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IMPEACHMENT AND
REHABILITATION OF WITNESS
BY CHARACTER EVIDENCE IN MISSOURI

ARTHUR N. BISHOP, JR.*

This is a virgin problem in Missouri, insofar as analytic commentary is concerned, but an ancient one in the courts. It has been examined in other jurisdictions on even a broader scale, but, exclusive of exhaustive investigations of reputation as regards the question of veracity under oath, and of the proposed Missouri Evidence Code, the entire field is an open one for review. Like an automobile which runs—but not without effort, headache, and expense, it needs a mechanic—to that end this venture is dedicated.

I. CHARACTER IN GENERAL

The rustic distinction that “character is what you are and reputation is what people think you are” has been glamorized, delineated, scholastically expanded, and artificially synthethized, but it still remains on the irrefutable subjective-objective standard: character is still what one really is, and reputation is what one’s fellow-citizens, his neighbors in the community in which he resides or does business, think he is, be it “bluenose”, “nice guy”, “rounder”, “scoundrel”, or worse. Probably as scholarly a definition as any of character is this:

The aggregate of the moral qualities which belong to and distinguish an individual person; the general result of the one’s distinguishing attributes.

The same source defines reputation as follows:

Estimation in which one is held, the character imputed to a person in the neighborhood where he lives.

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1. Kauffman, Impeachment and Rehabilitation of Witnesses in Maryland, 7 Md. L. Rev. 118 (1948); Note, Impeachment and Rehabilitation of Witnesses in Minnesota, 36 Minn. L. Rev. 724 (1952); Oppenheim, The Admissibility of Character Evidence for the Purpose of Impeaching Witnesses in Criminal Prosecutions, 12 Tul. L. Rev. 286 (1938).
5. Id., p. 1467.
Hence, the simple description remains unshaken. The courts, however, while admitting that character and reputation are not the same, have not yet been furnished with the projected “psycho-X-ray eye” which enables them to peer through the cranium into the cortex of the human brain to ascertain what a witness really is. Consequently, they must resort to a general form of accentuated hearsay called reputation to determine the veracity qualities of a witness offered them purportedly to tell all the truth he knows about a matter in question. After the sugar of the counsel pro, the salt of the counsel con, and the embalming oil of the court itself, the witness, in chaotic consternation, after introduction, examination, cross-examination, impeachment, redirect examination, rehabilitation, and penitence, is supposed to tell his collective father-confessor, the jury, what is, in law, called the truth: namely, that to which neither side objects, excepts, or raises an eyebrow. All this we call a part of character evidence.

For purposes of the law of evidence one must acquire character in the eyes of the general populace in which he resides, does business, or visits at frequent intervals over a prolonged period. That there are no arbitrary geographical or natural boundaries to this neighborhood was ably pointed out by Blair, J., in the leading case of Ulrich v. Chicago, Burlington Quincy R. Co., involving an action for personal injuries, wherein plaintiff was jarred loose from his footing by the impact of other cars switched into the one he was boarding. He had been a resident of

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6. 3 Wigmore, Evidence § 920 (3d ed. 1940).
7. Id., § 930; 3 Jones, Evidence in Civil Cases § 859 (4th ed. 1938); Note, Admissibility of Reputation of Witness at Former Residence to Impeach or Sustain His Testimony, 12 Ann. Cas. 395 (1909); State v. Fairlamb, 121 Mo. 137, 25 S.W. 895 (1894) (Murder: defendant and one W engaged in controversy over winnings in horse race; objection raised to favorable testimony as to good reputation of witness S in community; held, one acquainted with another's reputation for truth in neighborhood in which such other resides may testify as to other's character); State v. Sebastian, 215 Mo. 58, 114 S.W. 522 (1908) (Murder: shooting of neighbor by farmer after dispute over distribution of corn; exception to exclusion of prior commission of crime by state's witness, one S; held, impeaching witness must be confined to the general reputation of person impeached in the neighborhood where such person resides); State v. Lynes, 194 Mo. App. 184, 185 S.W. 536 (1916) (Prosecution for making false affidavit; defendant's grain elevator destroyed by fire, he making affidavit 2,000 bushels of wheat destroyed, but evidence contra showing only 400 bushels destroyed; exception to admission of character evidence; held, witness living within 1½ miles of residence of impeached witness may testify as to such person's reputation for truth and honesty).
8. 261 Mo. 697, 220 S.W. 682 (1920); semble: State v. McLaughlin, 149 Mo. 19, 50 S.W. 315 (1899) (Murder: defendant shot one M to death following drinking bout in tavern owned by D; held, one living within five miles from a town may testify as to a witness' general reputation for truth in such town, even though impeached witness had moved away 1½ years prior).
Iowa for about six years prior to the trial, but such residence was only a few miles from his former residence in Missouri, and he was still well known in the latter place because of frequent business he did there. His complaint that impeaching character evidence should be confined to the existing physical locus of residence was effaced by the holding that, while evidence of reputation to impeach a witness is restricted to reputation in the neighborhood ("i.e., the territory in which he resides, moves, circulates, does business, and has intercourse with his fellows"), that neighborhood is not arbitrarily limited by geographical lines. Similarly, one who has lived in a community twenty years acquires a reputation therein which may be offered to impeach him as a witness in a trial occurring three years after he moves elsewhere but does not establish a new permanent residence. Reputation cannot be acquired in a community where one is merely a visitor or transient except where he has no permanent residence. Hence, the only logical rule which can be deduced is that the wise discretion of the trial court is the omnipotent factor, as confined only by the "prudent man" doctrine, and considering all the circumstances as affected by the rule against hearsay. The place where character (as manifested by reputation) is acquired, therefore, is one's neighborhood of residence or business, be it urban blocks or rural acres, where he is known by the general populace of the area, during an appreciable period of time, regardless of the nature of the place.

9. Lindsay v. Bates, 223 Mo. 294, 122 S.W. 682 (1909) (Action for malicious prosecution following dismissed charge of arson, plaintiff excepting to the exclusion of the deposition of one B, a co-defendant in the arson charge, plaintiff contending the change of domiciles excluded impeaching evidence of reputation at the former address).

10. Waddingham v. Hulett, 92 Mo. 528, 5 S.W. 27 (1887) (Action for money loaned and for board of defendant and his two sons for fourteen years, plaintiff attempting to show bad general reputation of the sons in Detroit, where they had been on a three-month visit several years prior to the trial; held, the general reputation of a witness among his neighbors, i.e., those dwelling near him, is the only legitimate subject of inquiry for impeaching his credit, evidence of reputation acquired at a distant place on a short visit being inadmissible).

11. State v. Cushenberry, 157 Mo. 168, 56 S.W. 737 (1900) Murder: defendant shot a city marshal to death during attempted arrest following burglary, and excepted to impeaching testimony that his witness B was "housebreaker"; held, where witness is a nomad, gaining the reputation of being a "housebreaker" after only a few weeks' residence in the community, such evidence is not rendered inadmissible merely because of the short residence, for to refuse impeachment would allow him to testify from the same plane as a reputable citizen).

12. Clementine v. State, 14 Mo. 112 (1857) (Prosecution for keeping bawdy house; held, it is competent to prove the character of the women who live in such house, and the character and behavior while there, of the men who frequent the house, and also the effects of the establishment upon the peace, good order, and enjoyment of the neighborhood); see also annotation in 90 A.L.R. 877 (1934).
Nowhere is the rule against opinion more pronounced than in Missouri. That character evidence must be confined absolutely to one's general reputation in the community in which he resides has never been doubted, and it has been held that even reputation for truth and veracity acquired among a majority of his neighbors is inadmissible. What, then, is admissible? Only the general community opinion, whatever that is, as seen in the trial court's wise discretion, seems to fill the bill. No standards are set and no lines drawn, but practicality dictates that the trial court, which sees all the facts, hears all the stories, and determines the truth as shown by the weight of testimony, should set the rule, absent guiding standards. An excellent recent investigation of the subject recognizes the fact that few impeaching witnesses testify as to character from an inner urge to see justice done, giving their coagulations of community opinion, rather, from malice. As such, the rule against individual opinion should be altered to conform to the better jurisprudential theory that any impeaching witness gives, at best, a biased point of view of community opinion—without benefit of clergy, Gallup Poll, or accurate measurement media—and such opinion cannot be covered up by legalistic verbosity akin to an ostrich burying his head in the sand to prevent observation of the world about him. All juries hearing impeaching evidence against any witness, whether it be plaintiff in an action on the common counts or defendant in a prosecution for a grisly murder in the first degree, should be instructed carefully and cautioned as to the bias element in such testimony, for "community opinion" on the witness stand is only what the witness makes it, tempered, of course, by the acidity of cross-examination and the possibility of compounding impeachment upon impeachment, ad infinitum.

Time, the bejeweled emblem of the philosophical poet, is no less fleeting in the element of character of a witness in the courtroom than in the momentary capture of beauty that is forever preserved to mankind in the ageless replica of a Rembrandt masterpiece. What a person


14. Emory v. Phillips, 22 Mo. 499 (1856) (Action for conversion for carrying away a house, brought by church trustees to recover church building; evidence as to bad reputation of one of plaintiff's witnesses among majority of his neighbors held properly excluded).

15. Wilkins, op. cit., note 2, supra.

16. See the searching analyses in 24 Am. St. Rep. 752 (1890) and 82 Am. St. Rep. 25 (1898).
says, does, thinks, feels, and otherwise overtly manifests is etched for all time in the memory of an enemy who subsequently is asked to give his statement of "community opinion" of the actor to be impeached. Fortunately for the unfortunate, justice has tipped her scales to place a general stop-watch limit on how far back such "community opinion" can go. The Missouri courts, in a virtually unanimity of opinion, hold that the character of the witness impeached must relate to the time when the testimony is given, allowing prior character to be shown, provided it is not too distant in time as to negative honest probative value in showing present character.17 An examination of the cases reveals that char-

17. 3 Wigmore, op. cit., note 6, supra, §§ 927, 928 (adopting first rule cited in § 928); Wood v. Matthews, 73 Mo. 477 (1881) (Action on promissory note, the trial being in 1878, defendant attempting to show bad character in 1875 of two of plaintiff's witnesses; held, too remote); State v. McLaughlin, note 8, supra (Evidence that a witness' reputation for truth was bad in a town in which he had done business for eight months, ending 1½ years prior to the trial, is competent impeaching evidence, for the time required to establish character cannot be definitely fixed); State v. Shouse, 188 Mo. 473, 87 S.W. 480 (1905) (Rape: defendant, convicted of intercourse with stepdaughter, excepted to testimony of one B, who had known him in Tennessee seven or eight years before the charge; held, when a witness testifies that he had no knowledge of impeached person's reputation in the community where such person now resides, it was improper to permit him to testify as to the person's reputation in another state seven or eight years before); Lindsay v. Bates, note 9, supra (reputation three years prior to trial without permanent residence in the interim properly admitted); State v. Starr, 244 Mo. 161, 148 S.W. 862 (1912) (Prosecution for obtaining money by false pretenses, defendant stating to wealthy, elderly farmer that one S, the husband of a woman with whom the farmer had been intimate, contemplated action for alienation of affections and obtained money to "compromise" action; defendant contended impeaching state's evidence should have been confined to his reputation at the time of the trial; held, evidence of impeached person's reputation at time of trial was admissible, and such inquiry was not confined merely to the time before the commission of the offense); State v. Moreaux, 254 Mo. 398, 162 S.W. 158 (1913) (Prosecution for embezzlement; defendant excepting to admission of impeaching testimony of Chicago police officers as to his bad reputation for five years preceding the trial, although they had no personal knowledge of him for four years next preceding the trial; held, impeaching witnesses' statements of lack of knowledge of defendant during the four years affected merely the weight of the testimony, not the admissibility); Ulrich v. Chicago, Burlington & Quincy R.R., note 8, supra (six years prior to the trial not too remote if impeached party now lives only short distance from former residence, which he visits periodically); State v. Houston, 283 S.W. 219 (Mo. 1924) (statutory rape: defendant, convicted of carnal intercourse with his 15-year old daughter, sought to introduce niece's impeaching testimony of prosecutrix's reputation for truth and veracity more than four years before trial; held, too remote); Johnson v. Martindale, 288 S.W. 970 (Mo. App. 1926) (Action on promissory note, defendant pleading payment, and plaintiff excepting to impeaching evidence as to bad reputation of his witness M some fifteen years prior; held, fifteen years too remote for impeachment); State v. Richards, 11 S.W.2d 1035 (Mo. 1928) (Burglary: defendant, convicted of stealing groceries from neighbor's home, attempted to impeach prosecuting witness by inquiring into the latter's character prior to five years before, when witness had been convicted for illegally manufacturing whisky; held, too remote unless brought into case by party who offered witness); see also 3 Jones, op. cit. note 7, supra, § 859a.
acter evidence for periods of one and one-half, three, and six years prior to the trial has been admitted and upheld, while testimony relating to periods three, four, five, seven, and fifteen years beforehand was too remote to be of value in indicating present character. The more positive and better view, and undoubtedly the one in vogue today, is to leave the matter to the discretion of the trial court, which sees and considers the probative value of all circumstances. This rule was asserted in so many words for the first time by Cox, P. J., in the leading case of Baillie v. Hudson, an action on a promissory note begun in 1923, the defense being payment, and defendant complaining of impeaching testimony of his bad reputation for the ten years prior to the trial: held, the question as to how far back from the time of trial a party may be permitted to show general reputation of a witness is largely in the discretion of the trial court. This view was upheld in one of Ellison's classic opinions, State v. Scott, a prosecution for attempted robbery of the winner of a crap game by some of the losers. Defendant excepted to impeaching testimony against him as a witness. It was held that whether the impeaching testimony as to a witness' character should be confined only to character at the exact time of the trial is in the trial court's discretion. Thus, some leeway is allowed, but no exact standards have been set. Probably none should be, for an arbitrary statement that only character within x days, months, or years is to be admitted would evade all special circumstances which, like the bad penny, always continue to arise. Nor should prior character be excluded altogether, for one may have been of extremely poor character several years ago and reformed since. A prevaricating child more often than not becomes a truthful adult, and a truthful man of middle age may become a veritable Baron Munchausen in old age, particularly along certain lines. It is better to let sleeping dogs lie in this now-settled question of prior character, for Missouri's rule appears sound.

18. See cases in note 17, supra.
19. 278 S.W. 1056 (Mo. App. 1926).
20. 332 Mo. 255, 58 S.W. 2d 275, 90 A.L.R. 860 (1933); an example of this exercise of discretion is afforded by State v. Miller, 156 Mo. 76, 56 S.W. 907 (1900), involving a prosecution for murder, defendant being convicted of killing one C, an old man with whom he and his wife had formerly resided, who threatened to prosecute defendant for larceny because of $75 missing when they moved away; held, impeaching testimony of witness by sheriff who had known him for nine years down to the time of the trial was properly admissible, the witness' character remaining unchanged during the period.
It would seem almost trite to state that character evidence offered must be of the individual alone and not his family, but at least two cases have enunciated this doctrine, apparent even to an imprudent man. Excluding any and all academic theories of the psychology of individual differences, there is no doubt whatever that one can impeach a witness only by the witness' personal character, as manifested by reputation, and not by reference to his family's reputation.

Another special item of character testimony is that the impeaching witness need not have a personal acquaintance of long standing with the person impeached. This is illustrated quite well by Rohling, C., in *Arnold v. Alton R.R.* an action for personal injuries by one of defendant's firemen, glass having embedded itself in his face and eye when a window in the locomotive cab shattered. One N., an attorney for a labor organization, had made several trips to plaintiff's home and the vicinity to develop an acquaintance with him during the course of litigation against the union by plaintiff, who excepted to impeaching testimony as to his reputation for truth and veracity given by the attorney in this action. The court held that while ordinarily the impeaching witness resides in the impeached witness' neighborhood, the testimonial qualification of such impeaching witness revolves around his knowledge of the party's general reputation, and that is dependent on the means and extent of his information rather than on his place of residence. Though no cases were discovered which directly involved special investigations for the purpose of gaining information with which to discredit a witness, this one obviously opened the door to that avenue. The absence of "hatchet man" cases is a wholesome sign, but it would be a wise move to greatly restrict the testimony offered by "impeaching special investigators" by means of careful instructions to the jury as to the doubtful value of second-hand

21. State v. Anderson, 19 Mo. 241 (1853) (Attempted rape: Negro slave convicted of attempted rape of white girl; held bad character of parents of prosecutrix inadmissible to impeach her); State v. Irvin, 324 Mo. 217, 22 S.W.2d 772 (1929) (Larceny of poultry, defendant complaining of testimony that reputation of his entire family for honesty and fair dealing was bad; held, in prosecution of five members of same family for stealing chickens the state could not prove defendant's reputation bad by proving the entire family's reputation was bad, for such bad reputation must be proved individually).

22. 343 Mo. 1049, 124 S.W.2d 1092 (1938); see also State v. Higgs, 259 S.W. 454 (Mo. 1924) (Robbery: defendant, convicted of hijacking bank messenger for $20,000, excepted to impeaching testimony against one of his witnesses, contending that impeaching witness was not acquainted with person impeached; held, mere lack of acquaintance of impeaching witness with party impeached does not preclude him from testifying as to such person's general reputation).
knowledge gained on short duration of time. This would forestall a rash of totally undesirable evidence, and it seems to be a common occurrence that more people hunt for dirt than for soap when dollar bills are involved.

What happens when a person’s character is never the subject of community discussion? This unusual aspect was decided early by Sherwood, C. J., in the trenchant English for which his opinions are famed: “A blameless life, oftentimes, though not always, gives origin to such a good reputation.” An imposing array of cases substantiates this thought, which is in keeping with the basic presumption that the character of any witness is good until attacked. It is also plain “horse sense” that a person whose reputation is absent of derogatory discussion enjoys a good reputation or has evolved a hitherto obscured method of clouding the community mind with an infantile Dorian Gray conception of his character. The latter has certainly not been revealed as yet to men of ordinary prudence, either in this jurisdiction or any other.

II. Cross-Examination to Question Character

The elementary concept that a witness may be cross-examined as to anything relevant was established early in Missouri, with little or no

23. State v. Grate, 68 Mo. 22 (1878) (Manslaughter: convicted defendant excepts to exclusion of testimony as to his good character by witnesses who had “never heard anything against him”; held, a witness who is well acquainted with a person whose character is in question, and lives in his neighborhood, will be allowed to testify as to his general reputation although he may never have heard it discussed or questioned); State v. Brandenburg, 118 Mo. 181, 23 S.W. 1080 (1893) (Seduction: defendant, convicted of gaining personal access to previously chaste female on promise of marriage, complains of testimony as to her good character; held, testimony, that witness has never heard anything bad against prosecutrix’s character is competent evidence of her character, and he need not base his knowledge on what is “generally said” about her, but may base it upon the absence of discussion of her character); State v. Day, 188 Mo. 359, 87 S.W. 465 (1905) (Debauching female between ages prohibited by statute: defendant convicted of having carnal knowledge of previously chaste female between 14 and 18 years of age; held, a witness who had heard but one person speak of another’s character was not competent to testify as character witness); State v. Reed, 250 Mo. 379, 157 S.W. 316 (1913) (Murder: Dying declaration of drinking partner whom defendant killed, thinking deceased was trying to rob him, admitted in evidence, defendant excepting to testimony as to deceased’s good character; held, mere negative evidence that the neighbors of a witness whose reputation is in issue, have not heard anything derogatory of his character is admissible in corroboration of his testimony); State v. Pool, 314 Mo. 673, 285 S.W. 726 (1926) (Assault with intent to kill: defendant, a deputy sheriff, convicted for having struck one S with an iron bar, excepted to negative evidence of prosecuting witness’ good character; held, permitting a witness to testify that he did not know the prosecuting witness’ general reputation because he had never heard it discussed or attacked, was not error).
question raised about it since, even when an impeaching witness cannot define the terms of the qualities he seeks to impeach. It is competent to inquire as to the state of the witness' feelings toward the parties, and it is proper for the jury to learn some of the witness' personal history to aid it in evaluating his testimony. The limits on this are, of course, a matter for the trial court's discretion.

Although the sounder rule of auxiliary policy would appear to prohibit irrelevant questions asked a witness on cross-examination for the purpose of impeaching him, when such questions involve answers disgraceful to the witness, the majority rule in the United States is contra. Missouri follows the majority rule, leaving the expunging of possible abuses to the trial court's discretion. The original rule was established in 1880 by Hough, J., in the oft-quoted case of Muller v. The St. Louis Hospital Association, a suit by the brothers and sisters of a testator to contest the validity of a will making defendant association residuary legatee. The court held that on cross-examination a witness may be compelled to answer any questions which tend to test his credibility or to shake his credit by injuring his character, however irrelevant to the facts in issue, or however disgraceful the answer may be to himself, except where the answer would expose him to a criminal charge. This

24. Page v. Kankey, 6 Mo. 433 (1840) (Assumpsit: held, if a witness is sworn and gives some evidence, however formal or unimportant, he may be cross-examined in relation to all matters involved in the issue). To the same effect are: Brown v. Burrus, 8 Mo. 26 (1843) (Trespass for taking away a slave girl); St. Louis & Iron Mountain R.R. v. Silver, 56 Mo. 265 (1874) (Action on account stated); State v. Brady, 87 Mo. 142 (1885) (Prosecution for murder); Siegel v. Illinois Central R.R., 186 Mo. App. 645, 172 S.W. 420 (1915) (Action for personal injuries; testimony of witness as to bad reputation of another witness for truth and veracity; weight of testimony properly left to jury).

25. State v. Miller, 71 Mo. 590 (1880) (Murder: convicted defendant complained of exclusion of testimony impeaching one Mrs. L., the only eye-witness to the stabbing; held, for purpose of impeaching a witness' testimony, it is competent to inquire as to the state of her feelings toward the parties); Wills v. Sullivan, 211 Mo. App. 318, 242 S.W. 180 (1922) (Action for damages for assault, orphan placed in home seeking recovery for foster-mother's brutality; held, ill-feeling of defendant and witnesses who testified against her is admissible to show bias and as bearing on the credibility of testimony, but details of trouble or unfriendliness cannot be shown).

26. Avery v. Fitzgerald, 94 Mo. 207, 7 S.W. 6 (1887) (Ejectment: parties claiming for same grantor, defendant further claiming through unsatisfied deed of trust, and excepting to permission granted plaintiff to state as an introduction to his testimony that he had been a slave in Mississippi before the Civil War; held, it is proper for the jury to know who the witness is, where from, and such personal matters as will enable it to appreciate his character and estimate the value of testimony he is about to give).

27. 3 Wigmore, op. cit., §§ 984 and 987, par. C.

28. 73 Mo. 242 (1880), affirming 5 Mo. App. 390 (1878).
has been repeated and repeated in case after case until there is no doubt that it is the rule in Missouri, despite the absence of common decency.\(^2\)

This bitter pill for the perspiring witness being cross-examined is sugar-coated, however, for, though he may be asked the irrelevant and disgraceful questions, the examiner is concluded by his answers. The qualification to the general rule was enunciated in two leading cases, *Miller v. Journal Company*,\(^3\) and *Wendling v. Bowden*.\(^4\) The *Miller* case was an action for a libel published in the Kansas City *Journal* that plaintiff was a "pal" of one "Toots" Rambo, a man of notoriously bad reputation. Plaintiff excepted to certain questions asked him on cross-examination as to his alleged improper conduct in his marital relations and a prior divorce granted his wife. It was held that where a plaintiff in a civil suit testifies in his own behalf he is subject to impeachment as any other witness and, therefore, may be questioned as to the particulars concerning the divorce obtained by his wife, subject to the qualifications that (1) the examiner is bound by his answers, and (2) he may not be asked as to what acts he has been charged with since, such questions tend to affect his character.

The *Wendling* case, entrenching the holding, was a suit to contest the validity of a will, the petition alleging undue influence. *Held*, a party

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\(^{29}\) State v. Davis, 284 Mo. 695, 225 S.W. 707 (1920) (Murder: draft-age defendant convicted of shooting to death draft board member at whom he was irked because of supposed malicious changing of defendant's draft classification to "immediately available" status; held, proper to show that deceased's daughter, who was principal state's witness, had a child born to her before marriage, such being offered to impeach her credibility); Brendel v. Union Electric Light & Power Company, 252 S.W. 635 (Mo. 1923) (Action for personal injuries by employee hurt by exploding water heater; held, proper to ask plaintiff on cross-examination as to whether he had charged fellow-employees 40% interest on personal loans made to them); State v. Blocker, 278 S.W. 1014 (Mo. 1925) (Unlawful sale of intoxicating liquor; held, witness may be asked on cross-examination if he is living with a woman not his lawful wife); Taylor v. Connecticut Fire Insurance Company, 285 S.W. 1012 (Mo. App. 1926), noted in 27 Col. L. Rev. 223 (1927) and 61 Am. L. Rev. 273 (1927) (Action on fire insurance policy: plaintiff's household goods were totally destroyed by fire, defense being that he had connived at or participated in the burning; held, proper to ask plaintiff's wife on cross-examination whether she had slept with certain other man during time she was married to plaintiff); McCarthy v. Metropolitan Life Insurance Company, 90 S.W.2d 159 (Mo. App. 1936) (Action on life insurance policy by mother of deceased, defendant having paid proceeds to decedent's estranged wife who was administratrix; held, proper to inquire of female witness with whom deceased had been keeping company and in whose apartment he died, as to presence in apartment of an ex-convict whose presence caused the scuffle resulting in the death); State v. Perkins, 342 Mo. 560, 116 S.W.2d 80 (1938) (Poultry larceny: held, proper to cross-examine poultry dealer who was state's witness and who made no claim of privilege, as to whether he had knowingly received or concealed stolen chickens).


\(^{31}\) 252 Mo. 647, 161 S.W. 774 (1913).
who testifies for himself, subjects himself to all the rules as to cross-
examination and impeachment of witnesses, and he may be cross-
examined on the details of his life affecting his character not exposing
him to a criminal prosecution, but unless the details are material to the
issues, the answers are conclusive. Subsequent cases have further
cemented the modifying doctrine, and a witness today, although knowing
he may be asked embarrassing questions, knows also that the details of
red-faced past experiences may remain forever locked in his memory
unless they are vitally material to the issues. Still a further limitation
is that the witness asked the question is the sole judge of whether the
answer would expose him to a criminal prosecution. This subject

32. Cantrell v. Davidson, 180 Mo. App. 410, 168 S.W. 271 (1914) (Action on
promissory note: plaintiff, a former bank cashier, was forced to pay defendant's note
which the bank deemed not good, defendant excepting to the exclusion of his attempt
to show that plaintiff had embezzled bank funds; held, a cross-examination to test
the credibility of a witness by injuring his character cannot be so extended as to
expose him to a criminal charge); State v. Blocker, note 29, supra (Examiner
bound by witness' answer); State ex rel. Horton v. Clark, 320 Mo. 1190, 9 S.W.2d
635 (1928) (Certiorari to compel defendant and other members of State Board of
Health to restore relator's license to practice medicine, which had been revoked
because of alleged fraudulent school records furnished the board in his original
application; held, though a witness may be compelled to testify as to whether he
committed some particular wrong or immoral act, subject to his personal privilege,
those asking the question are concluded by his answer except as to a conviction of
crime); State v. Perkins, note 29, supra (held, party asking question is bound by
witness' answer); Smith v. Thompson, 346 Mo. 502, 142 S.W.2d 70 (1940) (Action for
personal injuries, minor plaintiff who sues by next friend having been injured when
a stock truck in which he was riding was struck by a Missouri Pacific train, defend-
ant being trustee of the railroad; defendant complains of limitation of cross-examin-
ing plaintiff's witness F; held, on cross-examination, discrediting questions concern-
ning whether witness has been previously convicted of or charged with crime may
be asked to impeach him, but party is bound by witness' answer); State v. Hayes,
356 Mo. 1033, 204 S.W.2d 723 (1947) (Statutory rape: defendant, convicted of having
oral intercourse with nine-year old younger sister of girl he was dating, cited as
error question state asked his landlady, who appeared as his witness, as to whether
he had brought women to his room in the past, the question being answered affirm-
atively. The state contended this benefited defendant, since it showed his taste was
for grown women and not young girls; held, the state may ask a witness for defend-
ant discrediting questions or impeach him, even by proof of specific acts of mis-
conduct, if the proof reflects upon the witness, but it is bound by his answers regard-
ing purely collateral matters); State v. Wilson, 361 Mo. 78, 233 S.W.2d 686 (1950)
(Sodomy: defendant, a practicing physician, was convicted of having penetrated the
anus of an eleven-year old boy with his sexual organ, the act being forcible, although
the boy, who had occasionally cleaned up defendant's office, made no outcry.
Defendant excepted to questions asked his former wife, who testified as his witness,
as to whether unnatural sexual relations had been the cause of their divorce, she
answering negatively; held, the state was properly permitted to cross-examine her
on this subject, where she had testified their sexual relations had been proper, but
was concluded by her answer).

33. Ward v. State, 2 Mo. 120, 22 Am. Dec. 449 (1829) (Proceeding for superseads,
petitioner having been jailed for refusing to answer grand jury question as to whom
the bettors were at a faro table, without naming himself; held, the witness is not
borders largely on a witness' privilege, a topic sufficiently broad within itself to deserve individual treatment elsewhere, and is, consequently, without the scope of this investigation.

An old rule allowed the jury to consider a witness' refusal to answer a degrading question when it asserted its verdict, but this has long since been superseded. The entire matter of allowing, disallowing, or limiting the line of questioning as to irrelevant and/or degrading questions is now within the discretion of the trial court, which, under the present law, is as it should be. This principle was first expounded in *Ring v. Jamison*, an action to recover moneys advanced to defendant's intestate, defendant administrator asking a witness whether he had been arrested for larceny; *held*: counsel may sometimes ask a witness a question, the answer to which may degrade him, but it is in the discretion of the [trial] court to require an answer; the court may also, under certain circumstances, forbid such questions to be asked. A long succession of cases has affirmed and solidified the rule, probably the most bound to answer when his answer may disclose a fact which forms a necessary and essential link in the chain of testimony, sufficient to convict him of crime—and of this he is to judge; *State v. Miller*, 22 S.W.2d 642 (Mo. 1929) (Larceny of automobile, victim being in church at time of theft, defendant citing as error the exclusion of a question he sought to ask a state's witness as to whether she and man to whose room she would slip at night to sleep with, had stolen a car prior; *held*, exclusion of question was proper, since the witness could have refused to answer on ground of incrimination, and defendant had no legal right to have the question answered).

34. *Clementine v. State*, note 12, *supra* (Witnesses who had frequented the house of ill repute had refused to answer questions as to the conduct of inmates and "customers" while there).

35. *66 Mo. 424 (1877), reversing 2 Mo. App. 534 (1876).*

36. *Brown v. Hannibal & St. Joseph R.R.*, 66 Mo. 588 (1877) (Action for personal injuries by revenue passenger on freight train, plaintiff excepting to evidence of his general reputation; *held*, when a witness has testified that the character of another witness for truth and veracity is bad, it is discretionary with the trial court to admit or reject further testimony from the same witness to prove his general moral character also to be bad); *Goins v. City of Moberly*, 127 Mo. 116, 29 S.W. 985 (1895) (Action for personal injuries by child who fell on defective sidewalk, defendant city being refused its attempted impeachment of plaintiff's witness by showing he had maintained his wife as "kept woman" prior to their marriage; *held*, the court may, in its discretion, refuse to compel a witness to answer questions concerning his relations with his wife prior to their marriage, for the purpose of discrediting his testimony); *DeArman v. Taggart*, 65 Mo. App. 82 (1896) (Action on promissory note purportedly executed to *U*, plaintiff's assignor, defendant inquiring of *Mrs. U* as to the date of her marriage, age of her first child, etc., to show that she had illicit intercourse with her husband prior to their marriage; *held*, while on cross-examination it may be right to fix the present character and moral principles of a witness, yet the interests of justice do not require that errors long since repented of and forgiven by the community should be recalled and perpetuated in judicial documents); *S. Hirsch & Co. v. Green*, 83 Mo. App. 486 (1900) (Action on promissory note, the court sustaining defendant's objection to a question asked his witness *H*, a former employee of plaintiff, as to whether he had been discharged for dishonesty; *held*,
recent being Gildehaus v. Jones, an action for personal injuries incurred when plaintiff's automobile was in collision with defendant's tractor-trailer truck. Plaintiff contended on appeal that it was error to allow cross-examination concerning her number of marriages. It was held that the right of cross-examination to a limited degree extends to collateral matters, including questions which, when answered, may tend to degrade the witness and affect his credibility, but the extent of such examination rests largely within the trial courts' discretion; and if the number of

the extent to which a cross-examination for the purpose of discrediting the witness may go rests entirely in the trial court and will not be interfered with save in case of manifest abuse, and refusal to allow a witness to answer the question as to his discharge for dishonesty is not reversible error, since the question is too indefinite); Edger v. Kupper, 110 Mo. App. 280, 85 S.W. 949 (1905) (Action for breach of contract of employment of female plaintiff as defendant's hotel manager; held, the trial court properly excluded evidence of plaintiff's being a "double grass widow"); Cantrell v. Davidson, note supra (Extent of cross-examination to test credibility is within the discretion of the trial court); State v. Kinkelkamp, 207 S.W. 770 (Mo. 1918) (Manslaughter: midwife, convicted for death of fetus, sought to impeach prosecuting witness through one S, the author of all the trouble, by showing that her mother knew of the proposed abortion; held, testimony to affect the credibility of a witness in a criminal case is admissible only as to matters material and relevant to the issue); State v. Cook, 318 Mo. 1233, 3 S.W.2d 365 (1928) (Prosecution for unlawful sale of corn whisky, defendant repeatedly obtaining negative answers to questions asked prosecuting witness as to latter's reputed acts of criminality or moral turpitude; held, the court did not abuse discretion by ruling against continuance of this type of examination); State v. Sherry, 64 S.W.2d 238 (Mo. 1933) (Felony assault; defendant, convicted of killing a man, cross-examined concerning specific acts to impeach witness' testimony, if not too remote in time, rests largely in the trial court's discretion); State v. McGee, 336 Mo. 1032, 93 S.W.2d 98 (1935) (Kidnapping: defendant, convicted of kidnapping for ransom, the daughter of Judge Mc, sought to impeach him by questions as to an article he had written concerning slot machine operations and to his interest in such; held, although a witness can be cross-examined on irrelevant matters to affect his credibility, when such matters do not expose him to a criminal charge, the trial court in its discretion may refuse to permit cross-examination on collateral matters which have no direct bearing upon or tend to prove or disprove a vital issue of the witness' attitude upon the merits of the case or toward the defendant); State v. Crow, 337 Mo. 397, 84 S.W.2d 926 (1935) (Larceny of cattle: convicted defendant's questioning of state's witness L as to whether L had once burned a schoolhouse, excluded; held, any witness may be impeached by his own evidence and, hence, may be cross-examined for that purpose, but the extent to which such cross-examination may go is within trial court's discretion); Hungate v. Hudson, 353 Mo. 944, 185 S.W.2d 646, 157 A.L.R. 598 (1945) (Action for personal injuries incurred by defendant's truck plowing into the rear of plaintiff's automobile as he was stopped at a railroad crossing; defendant was permitted to ask plaintiff why he had not brought the action in Illinois, where he was a well-known resident; held, although it is proper to identify a witness and to inquire into his residence, antecedents, social connection, and occupation, and may be asked questions, the answers to which tend to degrade him or reflect on his credibility, if cross-examination questions are wholly immaterial and can have no effect other than their general tendency to prejudice the jury against the witness or party, they are improper).
marriages of a party is foreign to any issue, cross-examination relating thereto for purpose of impeachment is properly denied.

One item of cross-examination as to character in which Missouri definitely differs from the majority rule is its refusal to permit the impeaching witness to be asked whether he would believe the impeached witness if the latter were under oath. One early case held that the question was improper, since the bad character of a witness need not be confined to the single fact of want of veracity under oath, but this was expanded later to admit the asking of the question without hesitation. The inflating case was that of State v. Rothschild, involving a grand larceny conviction of a defendant who pursued the esteemed occupation of bartender in a house of ill repute, the subject matter being a billfold dropped by a drunken patron of the establishment, who did not report the loss at first because he was uncertain as to which of several similar institutions was the locus in quo of the missing money-holder. Two of defendant's witnesses were positive in their statements that they would not believe state's witness S., a pimp, if he were under oath, but the court refused to allow a third witness to do so, holding that, though the question was proper, the witness had been fully impeached.

Although not directly saying so, Missouri forsook the majority rule, as accessioned by the Rothschild case and joined the minority in State v. Rush, an epic authority, which started with an indictment for selling liquor on Sunday, wherein defendant's impeaching witness was not permitted to answer whether he would believe the prosecuting witness under oath, for such would be "an opinion based on his personal knowledge" as well as upon knowledge of general character. This same point of view was taken by the federal court two generations later in Colbeck v. United States, where defendants were prosecuted for theft of mail pouches containing securities of great value. It was held that an inquiry into the reputation of an impeached witness for honesty and veracity was too broad a basis for inquiry as to whether the impeaching witness

38. 3 Jones, op. cit., note 7, supra, § 862.
39. Day v. State, 13 Mo. 423 (1850) (Grand larceny, state's impeaching witness stating that reputation of witness M was so bad he would not believe her under oath, but defendant was not allowed to ask as to how the impeaching witness' opinion was formed).
40. 68 Mo. 52 (1878), reversing 5 Mo. App. 411 (1878).
41. 77 Mo. 519 (1883).
42. See the scholarly analysis of this point by Wilkins, op. cit., note 2, supra.
43. 14 F.2d 801 (8th Cir. 1926).
would believe him under oath. The entire matter stands that way today: an impeaching witness still cannot be asked the verboten inquiry; albeit, the arguments, like the normal city streets, run in both directions.\textsuperscript{44} The majority rule appears to be the better rule, for, like college football, it is better to admit at least semiprofessionalism and condone it under a cultural vision than to act an ostrich. It cannot be reiterated too often that a witness' idea of community opinion is what he makes it, cross-examination or no. Elasticity of the rule against personal opinion should be tested if we are to admit finally that no law can change the nature of human nature. Neither cajolery nor force can accomplish any change in the human mind which the mind will not allow. Why, then, should a set of rules beat its collective head against a stone wall? Under proper instructions to the jury, would it hurt one any more to have another say that he would not believe him under oath than it would to have such other say that he is known in the community, as I interpret it, as being a chronic liar, cheat, and shady character? With the swing to the majority truth-veracity rule of confining impeaching character evidence, it would appear that Missouri can go one step farther along the road and join the majority by eliminating the "whisky case" rule against evidence as to veracity under oath.

A final aspect of cross-examination to question character should deal with the extent to which the testimony of an impeached witness is admissible. There is no doubt whatever that it should not be excluded, for any spark of a sense of justice acknowledges the fact that one can be the victim of a "ganging up", and all Missouri decisions in point discovered agreed that the testimony of an impeached witness should be weighed by the jury in connection with all the facts and circumstances involved.\textsuperscript{45} Fair play could dictate no other course.

\textsuperscript{44} Wilkins, op. cit., note 2, supra, favors admitting the question, in view of the modern trend toward elimination of the rule against opinion; Cf. Note, 22 Ill. L. Rev. 681 (1928), commenting on People v. Lehner, 157 N.E. 211 (Ill. 1927).

\textsuperscript{45} John Farwell & Co. v. Meyer & Wolff, 67 Mo. App. 566 (1896) (Suit to rescind mortgages in fraud of creditors; held, it was error to disregard the testimony of a witness impeached as to general reputation for veracity, for such evidence must be weighed in connection with surrounding circumstances, to determine to what extent the witness should be credited); State v. Bauerle, 145 Mo. 1, 46 S.W. 609 (1898) (Murder; held, the testimony of a material witness will not be rejected, though his general reputation for truth is impeached, when he occupies an independent, disinterested position between the parties and his evidence corresponds and is consistent with the controlling facts of the case); Whetsel v. Forgey, 823 Mo. 681, 20 S.W.2d 523, 67 A.L.R. 476 (1929) (Suit to reform deed of trust and foreclose reformed deed of trust; held, testimony of impeached witness is entitled to pro rata weight with
III. THE DEFENDANT AS WITNESS IN CRIMINAL PROSECUTION

No oriental hue is cast, but a defendant in a criminal prosecution immediately becomes a Siamese twin when he enters the witness stand, occupying the dual role of, properly enough, defendant and witness. As the first, he is unimpeachable for character unless he chooses to place it in issue; as the second, he is no different from any other witness, no different than if he were an impartial stranger to the entire proceeding. The reign of jurisprudential confusion is not only apparent from the outset, but has been all too actual throughout our legal history—and we are by no means individual in that confusion. The primary question is still where to draw the line, a question which, in 1955, still has no clear-cut tabs.

That a defendant in a criminal prosecution can be impeached as a witness, just as any other witness, was settled three-quarters of a century ago in State v. Clinton. A long line of cases since then have concreted the rule, with the nature of the offense charged having little or nothing to do with the permissibility of impeachment. Since 1935 the impeaching

other testimony and surrounding circumstances); State v. Miller, note 33, supra (Credibility of witnesses, one of whom was a confessed thief and one a woman who slipped up to his room at night to sleep with him, while rooming in the same house, was jury question) State v. Cohen, 100 S.W.2d 544 (Mo. 1946) (Receiving stolen goods: junk yard proprietor convicted on testimony of self-confessed thieves; held, the fact that the three state's witnesses were self-confessed thieves and were otherwise impeached, did not require Supreme Court, on appeal from conviction of knowingly purchasing stolen railroad equipment, to disregard their testimony in determining sufficiency of evidence to sustain conviction); State v. Thursby, 245 S.W.2d 859 (Mo. 1952) (Prosecution for receiving money without consideration from earnings of prostitute: defendant, a hotel bellboy, received $4 from the $10 earned by prostitute from "date" he arranged through the procurer, M, who pleaded guilty under the same statute; held, the fact that the state's witnesses were the prostitute and her pimp and that the latter had been convicted of felonies, was living in adultery with her, and had pleaded guilty to similar offense, did not affect the competency of the witnesses nor destroy the substantiality of their testimony, but only made the question of credibility one for the jury. 46. 67 Mo. 380, 29 Am. Rep. 506 (1878) (Forgery of promissory note to self purportedly executed by wealthy deceased).

47. State v. Cox, 67 Mo. 392 (1878) (Larceny of harness); State v. Rugan, 68 Mo. 214 (1878), affirming 5 Mo. App. 592 (Assault with intent to kill); State v. Palmer, 88 Mo. 568 (1886) (Murder); State v. Bulla, 89 Mo. 595, 1 S.W. 764 (1886) (Receiving stolen horse); State v. Rider, 90 Mo. 54, 1 S.W. 825 (1886), 95 Mo. 474, 8 S.W. 723 (1888) (Murder); State v. Beaty, 25 Mo. App. 214 (1887) (Petit larceny); State v. Beaucleigh, 92 Mo. 490, 4 S.W. 666 (1887) (Fraudulently obtaining funds by means of bogus check); State v. Day, 100 Mo. 242, 12 S.W. 365 (1889) (Perjury); State v. Weeden, 133 Mo. 70, 34 S.W. 473 (1896) (Assault with intent to kill); State v. Dyer, 139 Mo. 199, 40 S.W. 768 (1897) (Murder); State v. McLain, 92 Mo. App. 456 (1902) (Malicious destruction of personal property caused by placing pieces of iron in wheat field so as to sabotage neighbor's threshing machine); State v. Woodward, 191 Mo.

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evidence can no longer extend to general morality, but must be confined to
evidence as to his general reputation for truth and veracity. Due
to the fact that the defendant is being impeached as a witness and not
as a defendant he does not need to introduce evidence of his good char-

617, 90 S.W. 90 (1905) (Murder of pool hall proprietor); State v. Barnett, 203 Mo. 640, 102 S.W. 506 (1907) (Murder of town marshal during attempted arrest for peace disturbance); State v. Baker, 209 Mo. 444, 108 S.W. 6 (1908) (Murder of promoter at Negro picnic); State v. Priest, 215 Mo. 1, 114 S.W. 949 (1908) (Assault with intent to kill); State v. Hubbard, 223 Mo. 80, 122 S.W. 694 (1909) (Larceny by woman pick-pocket whose attentions had excited prosecuting witness); State v. Snider, 151 Mo. App. 699, 132 S.W. 299 (1910) (Illegal sale of liquor); State v. Wilson, 152 Mo. App. 61, 132 S.W. 303 (1910) (Same); State v. Barrett, 240 Mo. 161, 144 S.W. 485 (1912) (Murder following drinking bout); State v. Philpott, 242 Mo. 504, 146 S.W. 1160 (1912) (Murder following argument about bottle of whisky and price of a soupbone); State v. Chinn, 164 Mo. App. 124, 148 S.W. 146 (1912) (Illegal sale of liquor); State v. Starr, note 17, supra; State v. Wellman, 253 Mo. 302, 161 S.W. 795 (1913) (Sodomy, defendant indulging in cummulingus with prosecutrix after she had refused intercourse); State v. Fitch, 180 Mo. App. 482, 166 S.W. 639 (1914) (Violation of local option law); State v. Shuster, 263 Mo. 600, 173 S.W. 1049 (1915) (Muder); State v. Shepherd, 192 S.W. 427 (Mo. 1917) (Keeping crap table); State v. Edmundson, 218 S.W. 864 (Mo. 1920) (Statutory rape, defendant impeachable as witness by evidence of his bad sexual morality); State v. Wicker, 222 S.W. 1014 (Mo. 1920) (Assault with intent to kill neighbor following argument over opening of public road); State v. McBride, 231 S.W. 592 (Mo. 1921) (Larceny of automobile); State v. Barker, 296 Mo. 51, 246 S.W. 909 (1922) (Same); State v. Hulbert, 259 Mo. 572, 253 S.W. 764 (1923) (Murder during robbery); State v. Lemon, 263 S.W. 186 (Mo. 1924) (Assault with intent to kill neighbor because of latter standing on accused's land); State v. Ross, 306 Mo. 445, 267 S.W. 853 (1924) (Arson); State v. Shobe, 268 S.W. 81 (Mo. 1924) (Statutory rape: prosecutrix was married prostitute but under age of consent); State v. Cooper, 271 S.W. 471 (Mo. 1925) (Statutory rape); State v. Henderson, 284 S.W. 799 (Mo. 1926) (Larceny of outhouse rugs); State v. Hastings, 285 S.W. 69 (Mo. 1926) (Assault with intent to kill Mexican cook in Negro restaurant who refused to help defendant get his automobile out of mud where it was mired, defendant then slapping prosecuting witness and shooting him in the hip); State v. Bugg, 316 Mo. 581, 292 S.W. 49 (1927) (Bank robbery); State v. Hodges, 295 S.W. 786 (Mo. 1927) (Feloni-ous assault with deadly weapon resulting from alleged disparaging statements about defendant made by prosecuting witness); State v. Hedrick, 296 S.W. 152 (Mo. 1927) (Illegal sale of corn whisky); State v. Gentry, 320 Mo. 389, 8 S.W.2d 20 (1928) (Rape, sexual orgy occurring); State v. Taylor, 320 Mo. 417, 8 S.W.2d 29 (1928) (Same); State v. Irvin, note 21, supra; State v. Howard, 324 Mo. 86, 23 S.W.2d 16 (1929) (Violation of prohibition law); State v. Meeks, 327 Mo. 1209, 39 S.W.2d 765 (1931) (Burglary); State v. Bundy, 44 S.W.2d 121 (Mo. 1931) (Muder of husband); State v. Williams, 335 Mo. 234, 71 S.W.2d 732 (1934) (Robbery, defendant having extorted money from attempted rapist of daughter, sought more to use in his own defense in a federal prosecution); State v. Duvall, 76 S.W.2d 1097 (Mo. 1934) (Burglary: state allowed to impeach defendant—witness as to bad reputation for truth, veracity, and good character); State v. Carson, 239 S.W.2d 532 (Mo. App. 1951) (Indecent exposure by proprietor of a "health club" who solicited two young female job applicants to give him a "local"); see also 3 Wigmore, op. cit., note 6, supra, §§ 890,891.

48. See sections 5 and 6, infra.

49. State v. Quinn, 345 Mo. 855, 136 S.W.2d 985 (1940) (Burglary of filling station); State v. Willard, 346 Mo. 773, 142 S.W.2d 1046 (1940) (Larceny of cow); State v. Ferguson, 353 Mo. 46, 182 S.W.2d 38 (1944) (Murder of husband); State v. Graves, 352 Mo. 1102, 182 S.W.2d 46 (1944) (Murder); State v. Sheets, 229 S.W.2d 703 (Mo. App. 1950) (Common assault).
acter before the state can impeach him\textsuperscript{50} but it is a prerequisite that he must first testify.\textsuperscript{51} His reputation cannot be proved by that of his family,\textsuperscript{52} and the state may not inquire into special instances of crime imputed to him,\textsuperscript{53} although it may comment on his failure to explain incriminating circumstances testified to by other witnesses.\textsuperscript{54}

It was formerly the caballero rule that a defendant testifying could not be cross-examined on matters not referred to by him in his direct examination,\textsuperscript{55} but this was questioned\textsuperscript{56} and thereafter expressly overruled so as to permit a cross-examination today limited only by the overriding discretion of the trial court, privilege, the opinion rule, and the somewhat watered-down rule against impeachment by particular acts or facts.\textsuperscript{57}

\begin{footnotesize}
\begin{enumerate}
\item State v. Hulbert, note 47, supra; State v. Cooper, note 47, supra; State v. Henderson, note 47, supra.
\item State v. Wellman, note 47, supra.
\item State v. Irvin, notes 21 and 47, supra.
\item State v. Beatty, note 47, supra (admitting only evidence of general reputation); State v. Parker, 96 Mo. 382, 9 S.W. 728 (1888) (Murder of farmer by neighbor following controversy over fence; held, the state may introduce evidence of a defendant's general moral character to impeach him as a witness, but not alone as to the trait of character involved in the offense); State v. Archie, 301 Mo. 392, 256 S.W. 803 (1923) (Murder, state precluded from showing defendant's bad reputation for peace and quietude); State v. Stout, 257 S.W. 186 (Mo. App. 1924) (Violation of prohibition law, state could not show defendant had bad reputation as moonshiner and bootlegger); State v. Jones, 221 S.W.2d 137 (Mo. 1949) (Burglary: prosecutor not allowed to appeal to jury to convict merely because defendant had committed other unrelated crimes).
\item State v. Larkin and Harris, 250 Mo. 218, 157 S.W. 600, 46 L.R.A. (N.S.) 13 (1913) (Murder: defendant and wife of deceased were surprised by latter returning unexpectedly from work one night, fatal gun battle following; prosecutor was permitted to comment on defendant's failure to deny or explain away statements of other witnesses that he said he would take care of his paramour if anything happened to her husband).
\item State v. McGraw, 74 Mo. 573 (1881) (Burglary, defendant asked on cross-examination as to prior conviction and penitentiary sentence in Kansas under another name); State v. Porter, 75 Mo. 171 (1881) (Obtaining signature to note under false pretenses, representing it to be a sales agency contract); State v. McLaughlin, 76 Mo. 320 (1882); State v. Turner, 76 Mo. 350 (1882); State v. Palmer, note 47, supra; State v. Chamberlain, 89 Mo. 129, 1 S.W. 145 (1886) (Forgery: extension of cross-examination beyond matters referred to in direct examination will justify reversal); State v. Bulla, note 47, supra; State v. Rider, note 47, supra.
\item State v. Howe, 287 Mo. 1, 228 S.W. 477 (1920) (Receiving money without consideration from earnings of prostitute, defendant being "madam" of the house of ill repute where prosecutrix plied her trade; held, asking defendant whether she had ever been arrested and convicted of crime was not error merely because she was not questioned as to such on direct examination); State v. McBride, note 47, supra.
\item State v. Bagby, 338 Mo. 951, 93 S.W.2d 241 (1936) (Bank robbery; cross-examination as to prior convictions of crime allowed, though not testified to on direct examination); State v. Shipman, 854 Mo. 265, 189 S.W.2d 273 (1945) (Burglary); State v. Hacker, 214 S.W.2d 413 (Mo. 1948), noted in 14 Mo. L. Rsv. 172 (1949) (Assault with intent to kill).
\end{enumerate}
\end{footnotesize}
Probably the most exaggerated form of hearsay permissible in criminal prosecutions in Missouri or elsewhere is the subtle defendant-impeachment afforded by permitting the state to ask his character witnesses if they have ever heard rumors of his particular acts of misconduct, especially when such acts have involved criminal conduct, arrests, indictments or informations, and convictions. This is done ostensibly to test the sources of the witness' knowledge, for reliability, but as it works out in actual practice, it accomplishes both the direct impeachment of the witness himself and the indirect impeachment of the defendant as a defendant in the eyes of the jury. The jury lacks the discerning eye of an appellate justice and cannot differentiate between the mere discrediting of the character witness by disintegrating his reliability of sources of knowledge, and convicting the defendant on the charge at bar because of disparaging rumors which may be based on fancy as well as fact. This evil, unjustifiable, unconscionable rule is to be condemned by anyone possessing a jurisprudential sense of fair play (how can anyone be presumed to have prepared a defense against rumors?), but it is unquestionably the law in Missouri today. It has been axiomatic since ancient days that when the reason for the rule disappears, the rule itself

58. 3 Wigmore, op. cit., note 6, supra, § 988; State v. Crow, 107 Mo. 341, 17 S.W. 745 (1891) (Larceny of cow); State v. Evans, 158 Mo. 589, 59 S.W. 994 (1900) (Murder of husband resulting from defendant's familiarity with deceased's wife); State v. Parker, 172 Mo. 191, 72 S.W. 650 (1903) (Murder of son-in-law caused by argument as to when deceased was going to move away from defendant's home); State v. Brown, 131 Mo. 192, 79 S.W. 1111 (1904) (Murder of stepdaughter who had called defendant a "drunken son of a bitch"); State v. Harris, 209 Mo. 423, 108 S.W. 28 (1908) (Assault with intent to kill; asking of question as to rumors held within trial court's discretion); State v. Phillips, 223 Mo. 299, 135 S.W. 4 (1911) (Assault with intent to kill a drunk who threw rocks at defendant; rumors as to defendant's running a "dive" and illegally selling liquor, admitted); State v. Steele, 280 Mo. 63, 217 S.W. 30 (1919) (Abortion: rumors as to defendant's formerly being a drunkard who had taken the "whisky cure" held, properly admitted); State v. Seay, 282 Mo. 672, 222 S.W. 427 (1920) (Statutory rape: defendant convicted of having relations with 13-year old girl in presence of another girl, this extending over prolonged period; rumors as to defendant's being charged with similar crimes in the past held, properly admitted); State v. Affronti, 292 Mo. 53, 238 S.W. 106 (1922) (Robbery; rumors as to defendant's having been in police lineups and in reform school, admitted); State v. Glazebrook, 242 S.W. 928 (Mo. 1922) (Receiving stolen goods); State v. Cooper, notes 47 and 50, supra; State v. Gurnee, 309 Mo. 6, 274 S.W. 58 (1925) (Sodomy accomplished by insertion of defendant's sexual organ in anus of son; rumors of prior misconduct, admitted); State v. Johnson, 316 Mo. 86, 289 S.W. 847 (1926) (Rape of white woman by Negro; rumors of defendant's prior penitentiary term, admitted); State v. Miller, 12 S.W.2d 59 (1928) (Violation of prohibition law); State v. Hicks, 64 S.W.2d 287 (Mo. 1933) (Buying and receiving stolen goods; rumors of similar crime in the past, admitted); State v. Pope, 338 Mo. 919, 92 S.W.2d 904 (1938) (Robbery; rumors as to other offenses, admitted); State v. Bagby, note 57, supra (Proper to ask witness if he knew notorious criminals and maintained hideout for them).
crumbles away. Can there be any reason for this rule today when character evidence is confined to truth and veracity? When there is a rule against hearsay? And a rule against opinion? All the facilities of common sense discount rumors as statements to be taken with a grain of salt. The average bank teller, salesman, electrician, and steeplejack, regardless of his expert knowledge in his chosen field of endeavor, is not learned in the law. It is he, however, who collectively constitutes the jury which hears a witness testify as to a party's good character, then hears the witness admit he has heard rumors that party has done something wrong at one time in his life. He does not hear the testimony of the party who started the rumor, nor does he hear repeater 1, repeater 2, repeater 3, nor repeater x, so as to determine the truth of the rumor: all he hears is a witness' affirmative answer. Does the juryman then recall that he hears the affirmative answer purely to test the witness' source of knowledge, or does he instinctively believe the rumor himself and chalk up another black mark against the defendant on the strength of something, the truth of which there is no opportunity afforded to prove or disprove because of the unnecessary time consumed in collateral matters? Must Missouri wait until a virtual majority of other states refute this archaic rule and an image of Ellison's intellectual gianthood be born in the law to have like courage and wisdom to wipe out a rule founded on convenience rather than on justice? Must we wait legislative action as long in coming as the statute conforming Missouri to the simple media of uniform traffic hand-signals (effective August 29, 1953, after a two-decade wait)? Let us hope not! This inequitable, time worn rule, born probably at the time of the Spanish Inquisition, should no longer serve to pester erring citizens of a state located in the heart of an American democracy.

IV. THE MORALITY RULE

This section, opportunely, is totally historical, Missouri dividing its judicial history, as regards the law of character evidence, into two periods: (1) prehistoric (the Stone Age of the morality rule) and (2) common sense (the enlightened age of the truth-veracity rule). The light year, i.e., when Ellison flipped the switch, was 1935. This section, then, concerns the "grunt", "ug", and "duh" stage prior to 1935.

The morality rule was first established by Napton, J., in the Victorian
Era case of State v. Shields, a prosecution for assault and battery. It was held that, in discrediting a witness, a party is not restricted to inquiries into the character of that witness for veracity; a bad moral character generally, or a depravity not necessarily allied to a want of truth, may yet, to some extent, shake the credibility of a witness and, therefore, is a fair subject of investigation. This thought was echoed over and over again in Missouri's legal annals in the next four generations.

Although some of the cases do not so indicate, there were some limitations on the extent of coverage of the term "general morality". Thus, evidence as to reputation for peace and quietude or violence and turbulence was excluded, as was evidence as to good or bad citizenship.

60. State v. Hamilton, 55 Mo. 520 (1874) (Murder); State v. Breeden, 58 Mo. 507 (1875) (Defiling female ward); State v. Cox, note 47, supra; State v. Grant, 76 Mo. 236 (1883); 79 Mo. 113 (1883) (Murder of policeman attempting to apprehend thief); State v. Raven, 115 Mo. 413, 22 S.W. 376 (1890) (Murder of paramour by Negroes who found him with another woman and hit him with a brick); State v. Ragsdale, 59 Mo. App. 390 (1894) (Prosecution of mayor of Moberly for willful and malicious oppression in office by having two complainants arrested and jailed, then cursing them); Sitton v. Grand Lodge A.O.U.W. of Missouri, 84 Mo. App. 208 (1900) (Action on life insurance policy; bad reputation for chastity of female witness held admissible); Wright v. Kansas City, 187 Mo. 673, 96 S.W. 452 (1905) (Action for personal injuries caused by loose sidewalk board; evidence of bad reputation of prosecution as to chastity held admissible); State v. Beckner, 194 Mo. 281, 91 S.W. 892, 3 L.R.A. (N.S.) 535 (1906) (Murder; held, general bad reputation for morality cannot be extended to reputation for peace and quiet or turbulence and violence); York v. City of Everton, 121 Mo. App. 640, 97 S.W. 604 (1906) (Action for personal injuries suffered on defective sidewalk; prosecution's bad reputation for chastity held, properly admissible); State v. Christopher, 134 Mo. App. 6, 114 S.W. 549 (1908) (Prosecution for illegal sale of liquor; held, proper to show defendant's general business reputation was that of a seller of liquor in violation of law); Winn v. Modern Woodmen of America, 138 Mo. App. 701, 119 S.W. 536 (1909) (Action on insurance policy, defendant's witness being impeached for getting drunk any time he could get liquor; held, in impeachment, inquiry may not only concern general moral character, but also extend to particular traits, such as sobriety); State v. Loesch, 180 S.W. 875 (Mo. 1915) (Prosecution for obtaining deed by false pretenses: defendant's trading with partner of associates who had had reputations for honesty and fair dealing, help properly admitted); State v. Huffman, 238 S.W. 430 (Mo. 1922) (Robbery: testimony that defendant was a bootlegger held, admissible); State v. Hubbert, notes 47 and 50, supra; State v. Harmon, 317 Mo. 354, 296 S.W. 397 (1927) (Robbery); State v. De Shon, 334 Mo. 862, 68 S.W.2d 895 (1934) (Robbery by use of deadly weapon, taking diamond ring from girl who refused defendant's solicitation to engage in sexual degeneracy, then successfully resisted forcible attempt to rape); see also 3 Wigmore, op. cit., note 6, supra, §§ 923, 924; and Notes, 86 Am. Dec. 688 (1864) and 14 L.R.A. (N.S.) 699 (1907).

61. See note 60, supra.
62. State v. Nelson, 101 Mo. 464, 14 S.W. 712 (1890) (Murder); State v. Beckner, note 60, supra; State v. Richardson, 194 Mo. 326, 92 S.W. 649 (1906) (Murder); State v. Baird, 271 Mo. 9, 195 S.W. 1010 (1917) (Assault with intent to kill).
63. State v. Ragsdale, note 60, supra; State v. Baird, note 63, supra; State v. Gant, 33 S.W.2d 970 (Mo. 1930) (Statutory rape of stepdaughter); State v. Shepard, 334 Mo. 423, 67 S.W. 2d 91 (1933).
Similarly, it was improper to show that a witness was impulsive and used profanity liberally. Nor was it proper to show that he was in the tavern business, for purposes of discrediting him.

The basic trouble with the morality rule was its evasion of the cardinal purpose of all evidence: to arrive at the truth. It is simple logic to presume that, in order to arrive at the truth, impeachment should be confined to those traits of personality and elements of character (as manifested by reputation) which have a direct bearing on truth-telling. To show the asininity of certain aspects of the morality rule, male chastity was once admitted to impeach, the theory being that an unchaste male was of bad general character and, hence, not likely to tell the truth, although the idea was originally rejected and later criticized. With the overthrow of the morality rule itself, this puritanic memento that defied both the experience and wisdom of Solomon was also atomized. A good riddance it was, too, for a rule of such prudish disregard of all the facts of world history accomplished only three things: (1) the inflation of the ego of the impeached witness, (2) the amusement of the court, and (3) the satisfaction of the curiosity of cross-examining counsel as to how the "other fellow had fared".

The opening gun fired against the morality rule was probably that of

64. Shaefer v. Missouri Pacific Ry., 98 Mo. App. 445, 72 S.W. 154 (1903) (Action for damages for assault: plaintiff, a passenger on one of defendant's trains, thought conductor was taking up more mileage from his ticket than was proper, and on his so stating, conductor shoved plaintiff back on seat, and porter began choking him); State v. Baird, note 62, supra.

65. Shaefer v. Missouri Pacific Ry., note 64, supra. This is also true under the present truth-veracity rule: Thompson v. St. Louis Union Trust Co., 253 S.W.2d 116 (Mo. 1952).

66. State v. Clawson, 30 Mo. App. 139 (1888) (Adultery: defendant openly living in notorious relationship with wife of male servant; held, male chastity inadmissible); State v. Coffey, 44 Mo. App. 455 (1891) (Adultery, married man cohabiting with single woman; male chastity held inadmissible); State v. Shroyer, 104 Mo. 441, 16 S.W. 286, 24 Am. St. Rep. 344 (1891) (Assault with intent to rape, defendant apprehended in act of taking off trousers in 14-year old girl's room where she was asleep; held, male chastity admissible as part of general character, defendant being unhurt if general character is unaffected by such reputation for unchastity); State v. Sibley, 131 Mo. 519, 31 S.W. 1033, 132 Mo. 102, 33 S.W. 167, 53 Am. St. Rep. 477 (1895) (Defiling stepdaughter, defendant engaging in 35 to 40 different acts of intercourse with her, resulting eventually in pregnancy and discovery by her mother of what was going on; held, male defendant cannot be discredited for lack of chastity); State v. Pollard, 174 Mo. 607, 74 S.W. 969 (1903) (Defiling female employee under age eighteen: male chastity held admissible, but morality rule itself strongly castigated); see also 3 Wigmore, op. cit., note 6, supra, § 923; also the excellent analysis of the problem in Note, Impeaching Witness by Proving Want of Chastity, 53 Am. St. Rep. 479 (1895); and the collection of cases in 65 A.L.R. 410.
Fox, J., in *State v. Pollard*, in which he approved admission of the male defendant's bad reputation in the community for chastity and morality, but stepped in with a body blow against the general rule by stating that impeachment should be confined to truth and veracity, such constituting the trait of character directly involved. His analysis further concluded that the reason for the rule was gone, since both a defendant and a person previously convicted of a crime were now able to testify.

The next salvo was exploded by Johnson, J., in *State v. Oliphant*, one of the group of "Kansas City whisky cases", defendant druggist having been convicted of illegal sale of intoxicants to a detective employed by the prosecuting attorney. Evidence was admitted that defendant had a reputation for selling liquor illegally, this showing his general reputation and thereby impeaching his credibility. The rule was adhered to, but thoroughly criticized. A similar objection was registered by the St. Louis Court of Appeals the same year, but the status quo remained until 1923, when the strongest slash hitherto made was wielded by Railey, C., in *State v. Archie*, wherein he asserted that character impeachment should be confined to truth and veracity, honesty and fair dealing rather than general morality.

The chief architect of destruction, Ellison, began to whittle away at the morality rule in *State v. Scott*, decided in 1923. Although he still clung to the rule, he opined that *State v. Archie* was right, but was out of line with the weight of Missouri authority. His thorough review of past major cases concluded in a broadside assault on the rule and the absence of good logic behind it.

The coup de grâce came with Ellison's masterpiece, *State v. Williams*, referred to as "a landmark in the law of evidence in Missouri". The facts are these: defendant, a Negress, was convicted of the murder of one "Dutch" Jones, a Negro man with whom she had been living for two

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67. Note 66, supra.
68. 128 Mo. App. 252, 107 S.W. 32 (1908).
70. Note 53, supra.
71. Note 20, supra, at 279-280.
72. 337 Mo. 884, 87 S.W.2d 175, 100 A.L.R. 1503 (1935); noted in 20 Minn. L. Rev. 695 (1936), 1 Mo. L. Rev. 181 (1936), and 21 St. Louis L. Rev. 265 (1936); see also 3 *Jones*, op. cit., note 7, supra § 860.
73. Wilkins, op. cit., note 2, supra.
years, the shooting climaxing deceased's going to a dance without defendant. She followed him, several arguments ensued, and the fatal shooting occurred. Among the errors alleged was that impeaching evidence as to her general bad moral character was allowed, she contending that only reputation for truth and veracity could be shown to impeach her as a witness. This contention was upheld, and Missouri had joined the majority, upending nearly a century of gross misadventures in the field of dispensing justice. It was as simple as that: a juridical Moses had led his flock out of the wilderness.

V. THE TRUTH-VERACITY RULE

This is not a new sign in the zodiac, merely a buffing and polishing of the more worthwhile part of an old one from which it was extracted. Evidence of one's bad character, insofar as it concerns truth and veracity, honesty, and fair dealing have always been admissible to impeach him,74 the only difference between the truth-veracity and morality rules being that the latter went much further in coverage than the former, including many traits beside truth and veracity. It might also be worthy of note that impeachment as to veracity does not mean the witness is incapable of speaking the truth.75

The true rule, now stated succinctly for the first time, rapidly became settled law,76 and the standards which it set left no room for argument; consequently, it is now followed without question.77

74. Kingman & Co. v. Shawley, 61 Mo. App. 54 (1895) (Action on guaranty contract; held, witness may be impeached by showing his bad reputation for fair dealing); State v. Loesch, note 60, supra; Williamson v. Mc Elvain, 199 S.W. 567 (Mo. App. 1917) (Action to recover unpaid rents; held, veracity of witness may be impeached by proving his bad reputation for honesty and fair dealing); Pioneer Stock Powder Co. v. Goodman, 201 S.W. 576 (Mo. App. 1918) (Action on promissory notes signed by defendant under assurances of plaintiff's agents that they were mere sales agency contracts and that he did not need to get his glasses to read them; held, bad reputation for fair dealing, admissible); Reynolds v. Davis, 303 Mo. 418, 260 S.W. 994 (1924) (Purchaser's action for vendor's fraud in sale of interest in land and mining lease; held, bad reputation for honesty and fair dealing admissible to impeach); Williams v. American Exchange Bank, 222 Mo. App. 483, 280 S.W. 720 (1926) (Suit to recover excess paid on promissory note, usury alleged; held, any witness can be impeached by testimony that his reputation for truth and veracity is bad).
76. State v. Nibarger, 339 Mo. 937, 98 S.W.2d 625 (1936) (Larceny of harness).
77. State v. Whipkey, 358 Mo. 563, 215 S.W.2d 492 (1948) (Murder: defendant formerly lived with deceased in California, threatening to kill her if he ever found her with another man, later carrying out his threat, and complaining of inability to prove unchastity of female state's witness; held, refusal to permit cross-examination
VI. PARTICULAR ACTS OR FACTS

In General

It has long been the rule in Missouri that a witness may be impeached by general evidence of reputation, but not by evidence of particular acts, this principle having been laid down in 1865 in *State v. White,* 78 a rape case where defendant was not permitted to prove particular acts of lewdness on the part of the prosecutrix. Although exceptions and deviations have gradually worked their way in, the general rule still stands virtually unscathed. It is the majority rule, 79 the reasons given by the modern Master being (1) confusion of issues and (2) unfair surprise. 80 It is stated another way by an earlier scholar whose words are oft-quoted. 81 "Then "The exposing every man who comes into our courts of justice, to have every action of his life publicly scrutinized, would keep most men out of them. To admit character evidence in every case, or to reject it in every case would be equally fatal to justice." The propriety of this logic has been recognized in the Missouri courts time after time, 82 until today of state's witness concerning conduct which, if admitted, would have tended to discredit her as to chastity, was not error; morality cannot be used to impeach reputation for truth). 78. 35 Mo. 500 (1865).
79. 3 WIGMORE, op. cit., note 6 supra, § 987.
80. Id., § 979.
81. 1 BEST, EVIDENCE § 256 (12th ed. 1922) as quoted in Note, *Evidence of Particular Facts or Particular Transactions, 17* Am. Dec. 77 (1827); see also 58 Am. Jur., Witnesses § 758, and authorities cited there; and 70 C.P., Witnesses, § 1044.
82. Seymour v. Farrell, 51 Mo. 95 (1872) (Action on promissory note by indorsee after maturity against joint makers, plaintiff seeking to prove specific charges of immorality against defendant; held, the character of a witness cannot be impeached by testimony as to specific acts, since the witness is not presumed to be prepared to repel such attacks); State v. Houx, 109 Mo. 654, 19 S.W. 35 (1891) (Statutory rape, defendant sought answers of prosecutrix's mother to inquiries as to specific acts of alleged immorality commencing at a period twenty years previous; held, a witness cannot be required to testify concerning the immorality of his previous life where such testimony does not tend directly to prove some issue); State v. Gesell, 124 Mo. 531, 27 S.W. 1101 (1894) (Manslaughter, defendant seeking to impeach female state's witness by delving into her past life for specific delinquencies; held, evidence of specific past delinquencies inadmissible to impeach veracity); Wright v. Kansas City, note 60, supra (Evidence of specific immoral acts of a female is inadmissible to affect her credibility in an action for personal injuries); State v. Sassaman, 214 Mo. 695, 114 S.W. 590 (1908) (Murder; defendant seeking to show that female witness had lived in adultery with one B; held, the inquiry in impeachment cannot extend to evidence of specific acts); State v. Teeter, 239 Mo. 475, 144 S.W. 445 (1912) (Seduction: female witness impeaching defendant was not permitted to show that he seduced and impregnated her); State v. Hyder, 258 Mo. 225, 167 S.W. 524 (1914) (Assault with intent to kill tenant of neighboring farm; refusal of trial court to permit defendant to prove that prosecuting witness had sworn falsely against him in another prosecution; held, not error); State v. Burgess, 259 Mo. 383, 168 S.W. 740 (1914) (Rape of mentally deficient girl living with defendant and wife, wife being.
even the exceptions do not seem to be expanding, which is the antithesis of most rules of both substantive and procedural law as time passes.

Not only are specific acts inadmissible to impeach a witness, but the courts have, on occasion, specified particular acts which cannot be shown. Thus, the fact that a person has been a bankrupt is not admissible,\textsuperscript{83} for taking advantage of a right which law gives is not discreditable. Nor may a holder in due course, in an action on a promissory note, show that the payee procured it by fraud and theft and that it was not transferred when alleged, when trying to impeach the payee's character.\textsuperscript{84} Questions pertaining to the domestic relations of a witness are largely excluded on grounds of both relevancy and policy,\textsuperscript{85} but there have been exceptions.\textsuperscript{86}
Probably the most direct case along this line is that of Hancock v. Blackwell, an action for slander brought by a female graduate student at the University of Missouri against a professor at the institution. A quantity of money was taken from the home of one P while plaintiff was a visitor in P’s household. P turned the matter over to the city marshal, whom defendant saw on the street one day and voluntarily told him that he had discussed the matter with P, that he had told P that plaintiff had taken the money, and that she was “an adventuress of the first water and destined to become a noted crook.” Over defendant’s objection plaintiff was permitted to show that defendant had threatened to commit his father-in-law to an asylum if a provision were not made in the father-in-law’s will for defendant’s wife. The admission of such cross-examination was held error.

Any rule, no matter how steadfast, must have its exceptions, and the rule against impeachment by proof of particular acts or facts is not an exception to the fact of exceptions to rules. Hence, to impeach a witness’ character it may be shown that he tampered with witnesses at this and other trials, or kept a house of prostitution, or prepared fraudu-

against plaintiff by two wives were not competent evidence against plaintiff, because defendant was not a party to such cases); State v. Nasello, 325 Mo. 442, 30 S.W.2d 132 (1930) (Murder of police officer by bandits escaping from robbed bank, defendant attempting to impeach state’s witness on nature of grounds of latter’s divorce; held, exclusion of testimony of state’s witness on cross-examination as to his wife’s divorcing him because of his association with lewd women was not error, since defendant offered no records of divorce petition and decree and therefore lacked best evidence); Benfield v. Thompson, 139 S.W.2d 1009 (Mo. App. 1940) (Action for personal injuries by passenger in automobile which overturned when it struck a place where tracks had been recently removed by the Missouri Pacific Railroad, of which defendant was trustee, defendant seeking to impeach plaintiff’s witness who was driver of the vehicle; held, it was not error to exclude evidence on cross-examination that plaintiff had made no appearance in answer to divorce petitions charging him with immoral conduct as ground for the divorce).

86. Webster v. Boyle-Prior Construction Co., 144 S.W.2d 828 (1940) (Action under Workmen’s Compensation Act for wrongful death of husband, defendant showing plaintiff’s unchastity in leaving husband following argument several months prior to his death, thereafter living in adultery with childhood sweetheart; held, such evidence was properly admitted because of plaintiff’s interest in subject matter).

87. 139 Mo. 441, 44 S.W. 205 (1897).


89. State v. Hack, 118 Mo. 92, 23 S.W. 1089 (1893) (Burglary and grand larceny; held, witness may be asked whether she had not kept girls for the purpose of prostitution, since the state had the right to know her vocation, and what she had been and was then engaged in, as affecting her credibility); contra: State v. Hungate, 98 S.W.2d 537 (Mo. 1938) (Robbery, defendant seeking to show prosecuting witness was pro-
lent tax returns, or perjured himself at another trial, or engaged in disreputable transactions, or knew notorious criminals and maintained a hideout for them, had a kept woman, or got into "scrapes". Unless he exercises his privilege he may be cross-examined as to his commission of a detestable crime. So also may it be shown that lewd women visited his home when other men and his wife were present and he was absent, but knew about it. Certain other specific acts may be extracted on cross-examination. When a woman's chastity is slandered and she sues for damages, the defendant may show her specific acts of fornication, both to determine her credibility and the truth of the matter asserted.

Specific habits or traits of character are also properly admitted when they bear on the witness' credibility. Drug addiction is one of these. Though but one lone case was found dealing with the problem in Missouri, it has received fairly extensive attention elsewhere. In the

prior of house of ill repute; held, refusal to permit such showing over state's objection was not error, since the accused had previously elicited from witness that he was not connected with operation of the house in question).

90. Cogin v. Herman, 202 S.W. 552 (Mo. 1918) (Suit to set aside deeds in fraud of creditors by one R, defendant being sworn as plaintiff's witness and impeachment allowed as to prior preparation of false tax and credit statements, tending to show prevarication).

91. State v. Stogsdill, 324 Mo. 105, 23 S.W.2d 22 (1929) (Murder: held, that witness corroborating state's principal witness admitted he had perjured himself at coroner's inquest only affected credibility of his testimony).

92. State v. McLaughlin, notes 8 and 17, supra.

93. State v. Bagby, Notes 57 and 58, supra.

94. State v. Nasello, note 85, supra (Cross-examination of defendant's father as to whether he lived at a certain place under an assumed name and kept woman there as his wife was properly admitted to impeach or disparage his testimony).

95. Gray v. St. Louis-San Francisco Ry., 254 S.W.2d 577 (Mo. 1952) (Action for personal injuries by trespasser who was pushed off moving passenger train by brake-man, he admitting on direct examination that he had been in "scrapes"; held, proper to show that there were other "scrapes" in which plaintiff had been involved, of which he had not related on direct examination).

96. State v. Long, 201 Mo. 664, 100 S.W. 587 (1907) (Murder of neighbor who had stoned defendant's pigs, which were constantly entering his yard).

97. McCoy v. Hill, 296 Mo. 135, 246 S.W. 582 (1922) (Alienation of affections of plaintiff's wife, defendant being town constable; plaintiff testified that no persons of bad repute ever visited him and his wife; held, this testimony was properly admitted to affect his credibility).

98. Asadorian Rug Co. v. Chandeysson, 144 S.W.2d 199 (Mo. App. 1940) (Action on account); State v. Hayes, note 32, supra (State may impeach defendant-witness in statutory rape case even by proof of specific acts of misconduct, if the proof reflects upon the witness).

99. State v. Collins, 117 Mo. App. 658, 93 S.W. 325 (1906) (Defendant had circulated stories that prosecution had been caught using a pump or syringe to do away with an unborn child, he thereby charging her with fornication with parties unknown in violation of Mo. Rev. Stat. § 2258 (1899).

100. Markowitz v. Markowitz, 290 S.W. 119 (Mo. App. 1927) (Action for money advanced for expenses of deceased, objection being raised and error cited to the
solitary case it was declared that evidence of a witness who was under the influence of a narcotic at the time of the occurrence to which he testified, or was under such influence at the time he testified, cannot be received as reliable, and the jury should be warned as to the credence to be given it. There is a definite split of authority across the nation as to the admissibility of expert testimony to show the mental deterioration involved in drug addiction, but the better principle apparently favors admission. After all, the purpose of all evidence (which cannot be reiterated often enough in analysis and comparison of conflicting rules and cases) is truth, and the widespread publicity in periodicals in recent years should be sufficient to presume judicial notice. Missouri's rule appears to have a sound footing, particularly in view of the ever-strengthening trend toward wider acceptance of expert testimony. As an afterthought, if evidence as to the poor capability for truth of a drug addict is to be admitted, it would logically follow that testimony of an expert given as to statements of a patient under the influence of "truth serum" should be afforded more than "witch doctor" credence. This, however, is still an open question in Missouri.

Drunkenness is the other habit which is admissible to impeach a witness in Missouri, although, like drug addiction, the subject apparently has been touched but once directly, that being in Sanders v. Armour & Co. an action for the loss of the services of plaintiff's wife. She was employed at defendant's Springfield poultry plant, her job being to pick pinfeathers from chickens, then carry the chickens so cleaned to the next processing stage, this requiring a walk of about thirty feet across a customarily dry concrete floor. On the day of the accident the floor was still wet after being sprayed with disinfectant, and plaintiff's wife fell. The question with which we are concerned here involved the testimony of defendant's witness E.K., who it was proved, had been drinking intoxicating liquor on the morning of the accident. Such evidence was held admissible, not to impeach, but as affecting credibility of witness testifying as to what transpired on that particular morning. Basically, is there a differ-
ence between evidence tending to discredit (impeach) and the same evidence given to negative credibility?

The mental weakness of a witness should always be admitted to discredit his testimony, and it has been so held in Missouri in State v. Pierson, a prosecution for murder in connection with the death of a woman which occurred when a St. Louis hotel was set afire by defendant and three others to obtain the insurance proceeds. At defendant's former trial, state's witness B.K. testified, but she was placed in a mental institution shortly thereafter. Her testimony was preserved and placed in evidence at this trial, defendant excepting to exclusion of impeaching testimony to show that she had been mentally incompetent at the first trial. Held, a witness' mental defects, as well as moral defects, may be shown to impeach his testimony. The well-reasoned opinion of Cooley, C., examined carefully the cases from other jurisdictions and placed Missouri in the common sense category.

In passing, it might be observed that one can impeach himself, this being almost too elementary to deserve more than scant attention. Also, Missouri does not permit introduction of extrinsic evidence to impeach a witness' character. It has been held twice that letters are inadmissible to impeach, and once that a signed statement by a female that she spent the night with one man while married to another is, likewise inadmissible. The modern bible of evidence fully expounds the preceding averment, but a swift reference to the policy rule against impeachment on the basis of specific acts of misconduct should clarify the point: if such acts cannot be proved on cross-examination of the

105. 337 Mo. 475, 85 S.W.2d 48 (1935).
106. Van Graafeiland v. Wright, 286 Mo. 414, 228 S.W. 465 (1920) (Bill in equity to set aside sheriff's sale and deed, defendant impeaching himself by confessing that he had falsely stated in his deed to another party-defendant, for the purpose of deceiving a possible purchaser, that he had sold the land for a specific sum).
107. State v. Talbott, 73 Mo. 347 (1881) (Murder; letter in which defendant purportedly planned it; held, properly excluded unless there is proof it was written by him); Page v. Payne, notes 82 and 85, supra (Letters tending to show plaintiff was the father of an illegitimate child ten years before the trial was a matter, the admissibility of which, was within the trial court's discretion, it not abusing its discretion by the exclusion, since the Statute of Limitations barred prosecution).
108. Willgues v. Pennsylvania R.R., 318 Mo. 28, 298 S.W. 817 (1927) (Action for wrongful death of husband killed in railroad accident as he was switching cars, defendant attempting to introduce the plaintiff wife's signed statement admitting she made a trip to Texas with one H, living with him as his wife; held, properly excluded, since a witness cannot be impeached by showing commission of specific immoral acts).

109 3 Wigmore, op cit., note 6, supra, §§ 979 and 987.
witness, the next step down the ladder cannot be taken by proving the same thing by outside sources. The maxim that the courts cannot do indirectly what they cannot do directly, still has application.

Prior Conviction of Crime

Although it is now a settled rule of law in Missouri, a witness' prior conviction could not always be shown either by cross-examination or by the record. The early rule was that a prior conviction could be proved only by the record of judgment of conviction, parol proof being inadmissible if the witness or party offering him objected to such verbal proof. But the objection must have been made. So, also, a witness formerly could not be asked whether he had been convicted of a crime and imprisoned, although the propriety of this restriction was questioned. A similarly unenlightening squabble briefly endured involved the question whether a witness could be asked about a prior plea of guilty to a criminal charge. The entire conglomeration of decisions pro and con revealed only two discernible aspects: (1) the rule against parol

111. State v. Lewis, 80 Mo. 110 (1883) (Murder of wife; state's witness giving negative answer on cross-examination to question as to whether he had not been convicted of grand larceny and sent to the penitentiary, defendant then offering to prove by one W that he had seen witness in the penitentiary as a convict; held, when parol evidence is objected to, the record must be produced to prove the conviction of a witness, whether the testimony is offered to affect his competency or his credibility); State v. Douglass, 81 Mo. 231 (1883), reversing 15 Mo. App. 1 (Murder by Negress of man with whom she had been living, believing him guilty of intercourse with another woman, defendant objecting to question asked her witness M.F. if witness had been confined in the workhouse; held, conviction of defendant's witness cannot be proved by parol where defendant objects).
112. State v. Rockett, 87 Mo. 656 (1885), reversing 16 Mo. App. 554 (1884) (Robbery; objection not raised to question as to prior conviction; held, subsequent admission over objection of record showing such conviction was proper).
113. State v. McGraw, note 55, supra; State v. Brent, 100 Mo. 531, 13 S.W. 874 (1890) (Assault with intent to kill); State v. Hale, 156 Mo. 102, 56 S.W. 881 (1900) (Burglary; held, it was error to inquire as to whether defendant had previously pleaded guilty to larceny, since such offense had no connection whatever with the charge against him).
114. State v. Miller, 100 Mo. 606, 13 S.W. 832 (1890) (Murder committed during burglary, co-defendant being asked if he had not been in the penitentiary; held, admission of the question was not error, for when the purpose is only to discredit the witness, it is not necessary to produce the record to prove a previous conviction).
115. State v. Sasseen, 75 Mo. App. 197 (1893) (Minister of thirty years' standing prosecuted for petit larceny, he stating his years of standing in the church; held, proper to inquire on cross-examination as to prior pleas of guilty to larceny charges, since state had the right to meet defendant on his own ground and show acts inconsistent with religious principles); contra: State v. Hale, note 113, supra.
proof of prior convictions was crumbling\textsuperscript{116} and was soon to be over-thrown, and (2) the record of conviction was always admissible as im-peaching evidence. The former occurred in the form of express statute,\textsuperscript{117} the latter being graphically illustrated by a comfortably strong series of cases prior to the statute.

Probably the first case where a record of conviction of prior criminal offense was admitted to impeach a witness in Missouri was that of Deer \textit{v. State},\textsuperscript{118} an indictment for riot for wrecking a house of ill repute, defendants apparently being dissatisfied "patrons" rather than wild-eyed reformers. They offered the record of conviction of the "madam" for having kept a bawdy house; and it was held admissible as bearing on her credibility. A similar theory was initially applied to a defendant-witness for the first time a generation thereafter,\textsuperscript{119} and from then until the legis-la tive passage and judicial interpretation of the forerunner of the present statute, there was no question as to the admissibility of the record of conviction for witness-impeachment purposes.\textsuperscript{120}

The modern rule was fashioned by the legislature in 1895, and has been incorporated in the subsequent statutory revisions.\textsuperscript{121} The revision currently in vogue\textsuperscript{122} reads as follows:

\begin{quote}
"\textbf{491.050. Convicts competent witnesses—conviction may be proved to affect credibility, how:} Any person who has been convicted of a criminal offense is, notwithstanding, a competent witness; but the conviction may be proved to affect his credibility, how."
\end{quote}

\textsuperscript{116} State \textit{v. Miller}, note 114, \textit{supra}; State \textit{v. Martin}, 124 Mo. 514, 28 S.W. 12 (1894) (Murder of white man by Negro under inexcusable circumstances; held, it is proper in a criminal cause to discredit a witness by asking how often he has been in the county jail under criminal sentences, it being unnecessary to produce the record of convictions to impeach).

\textsuperscript{117} Mo. Laws, p. 284 (history traced in 28 V.A.M.S. § 491.050 (1949)).

\textsuperscript{118} 14 Mo. 348 (1851).

\textsuperscript{119} State \textit{v. Kelsoe}, 76 Mo. 505 (1882), \textit{reversing} 11 Mo. App. 91 (1881) (Burglary and larceny).

\textsuperscript{120} State \textit{v. Rockett}, note 112, \textit{supra}; State \textit{v. Loehr}, 93 Mo. 103, 5 S.W. 696 (1887) (Petit larceny of fifty pounds of iron; prior conviction of similar offense held, admissible to impeach defendant as witness); State \textit{v. Nelson}, 98 Mo. 414, 11 S.W. 997 (1889) (Assault with intent to rob; former conviction of felony held, properly admitted); State \textit{v. Minor}, 117 Mo. 302, 22 S.W. 1085 (1893) (Burglary: record of conviction may be admitted against defendant because he stands on same ground as any other witness); State \textit{v. Dyer}, note 47, \textit{supra}; State \textit{v. Carr}, 146 Mo. 1, 47 S.W. 790 (1898) (Attempted burglary; held, when one is indicted as an habitual criminal, evidence of his former conviction is admissible to discredit him as a witness and to enable the jury, on conviction, to fix the punishment).

\textsuperscript{121} \textit{Op. cit.}, note 117, \textit{supra}.

bility, either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer.”

The foregoing words should have conclusively settled all previous controversies as to just what was admissible to impeach any witness, be he defendant or other, on the ground of conviction of crime in the past. It almost did, but, like any general rule, there were loopholes needing closing by judicial interpretation. The cases upholding the statute by interpretation are legion, with exceedingly few exceptions involved.
of accomplice in same crime was admissible to impeach defendant); Day v. Lusk, 219 S.W. 557 (Mo. 1920) (Action for personal injuries by train passenger in derailed car; held, conviction in another state is admissible as impeaching evidence); State v. Wicker, note 47, supra; Stack v. General Baking Co., 283 Mo. 336, 223 S.W. 89 (1920) (Action for personal injuries resulting from collision of automobile and delivery wagon; held, when a witness admitted that he was convicted of a certain crime, the record of conviction became inadmissible); State v. McBride, notes 47 and 56, supra; State v. Stokes, 288 Mo. 539, 222 S.W. 106 (1921) (Seduction; record of defendant's conviction of stealing watermelons when he was fourteen years old held properly admitted to impeach him as witness); State v. Saunders, 288 Mo. 640, 232 S.W. 973 (1921) (Larceny of poultry; record of conviction of similar crime in another state, admitted); State v. Heimbaugh, 249 S.W. 445 (Mo. App. 1923) (Illegal manufacture of whisky; held conviction of similar offense, admissible); State v. Merrell, 263 S.W. 118 (Mo. 1924) (Murder of policeman during escape following robbery; held, prior convictions are admissible, without regard to whether they are felonies or misdemeanors); State v. Taylor, 266 S.W. 1017 (Mo. App. 1924) (Illegal possession of liquor); State v. Ross, note 47, supra; State v. Jones, 306 Mo. 437, 268 S.W. 83 (1924) (Driving while intoxicated; prior convictions cannot be proved unless defendant offers self as witness); State v. Frost, 289 S.W. 895 (Mo. 1926) (Larceny of "Greasy Spoon" restaurant; held, if defendant admits only one prior conviction, state may show he had been convicted more than once); State v. Miller, 292 S.W. 440 (Mo. 1927) (Forgery of promissory note; prior conviction of embezzlement, admitted); State v. Zoller, note 82, supra; State v. Dalton, 23 S.W.2d 1 (Mo. 1929) (Illegal transportation of liquor); State v. Harrison, 24 S.W.2d 985 (1930) (Driving while intoxicated; state can prove more convictions than defendant–witness admits); State v. Meeks, note 47, supra (Reformation since prior conviction impeached by records of subsequent convictions); Myles v. St. Louis Public Service Co., 52 S.W.2d 535 (Mo. App. 1932) (Action for personal injuries by alighting streetcar passenger; held, where a witness admits a prior conviction, the record of such conviction becomes inadmissible); State v. Lonon, 331 Mo. 591, 56 S.W.2d 378 (1932) (Robbery); State v. Hawes, 60 S.W.2d 694 (Mo. App. 1933) (Unlawful possession of moonshine whisky); Jackson v. City of Malden, 72 S.W.2d 850 (Mo. App. 1934) (Personal injuries due to street obstruction); State v. Jackson, 336 Mo. 1069, 83 S.W.2d 87, 103 A.L.R. 339 (1935) (Rape of white woman by Negro; held, where the state waived its right to prove prior convictions under the habitual criminal statute, it may, nevertheless, cross-examine defendant–witness as to such prior convictions to affect his credibility as a witness); State v. Mitchell, 86 S.W.2d 185 (Mo. 1935) (Statutory rape); State v. Bagby, notes 57, 58 and 93, supra; State v. Adams, 339 Mo. 926, 98 S.W.2d 632, 108 A.L.R. 838 (1936) (Murder); State v. Ransom, 340 Mo. 165, 100 S.W.2d 294 (1936) (Robbery; state may show not only that prior convictions existed, but also for what crimes); Collins v. Leahy, 102 S.W.2d 801 (Mo. App. 1937) (Personal injury); State v. Brown, 165 S.W.2d 420 (Mo. 1942) (Assault with intent to do great bodily harm); State v. Graves, note 49, supra (Statute permitting proof of prior conviction of crime either by cross-examination or by the record held not a bill of attainder in violation of constitutional provisions); State v. Holloway, 355 Mo. 217, 195 S.W.2d 662 (1946) (Murder: state may inquire into details of prior convictions and show particular crimes of which defendant–witness has been convicted, to impeach him); State v. Parrish, 214 S.W.2d 558 (Mo. 1948) (Assault with intent to kill); State v. Jones, note 53, supra; State v. Pierce, 236 S.W.2d 314 (1951) (Statutory rape).
the most oft-quoted decisions in our judicial annals, was the baptism of
the statute by the bench. Therein, defendant had been convicted of grand
larceny in the theft of certain money from one H while they were dis-
cussing grain sales in the Board of Trade at Kansas City. He cited as
error the admission of questions asked his witnesses on cross-examina-
tion as to whether they had not been convicted of certain misdemeanors,
consisting of fighting, frequenting bawdy houses, etc. It was held that the
term "criminal offense" means both felonies and misdemeanors, and
evidence of conviction of either is admissible to affect a witness' credi-
bility.

The tenet that all "criminal offenses" were admissible to impeach a
witness did not hold completely true at early common law, for then
only "infamous" crimes were so admissible. Missouri's courts formerly
applied this rule, but not without doubt on occasion. The enabling
statute had some influence, for it made no discrimination between
felonies and misdemeanors, and this has ultimately been the distillate of
thought of the bench. Felonies, of course, have always been admissible,
the courts at times holding that prior convictions must have involved
felonies in order to impeach. On other occasions the prior convictions

| 126. 171 Mo. 530, 71 S.W. 1027 (1903). |
| 128. State v. Warren, 57 Mo. App. 502 (1894) (Affray: prior conviction must be for infamous crime to impeach); State v. Donnelly, 130 Mo. 642, 32 S.W. 1124 (1895) (Murder; held, conviction of gambling not admissible to impeach, since gambling is not an infamous crime); State v. Dyer, notes 47 and 120, supra (Prior conviction of petit larceny, admissible, since it was infamous crime at common law); State v. Manning, 87 Mo. App. 78 (1901) (Prosecution for issuing unlawful prescription for intoxicating liquors; prior conviction must be of infamous crime to impeach); State v. Prendible, 165 Mo. 329, 65 S.W. 559 (1901) (Assault with intent to kill: held, prior conviction for assault and battery, inadmissible, since it is not an infamous crime); O'Connor v. St. Louis Transit Company, 106 Mo. App. 215, 80 S.W. 304 (1904) (Action for personal injuries by streetcar passenger suffering fall when alighting; held, prior arrest, conviction, and fine for assault improper to impeach witness, since the crime was not infamous); State v. Wright, 236 S.W. 395 (Mo. App. 1922) (Indictment for gambling: prior conviction of gambling admissible even though gambling was not an infamous crime). |
| 129. Note 117, supra. |
| 130. State v. Smith, 125 Mo. 2, 28 S.W. 181 (1894) (Assault with intent to kill: prior conviction of assault and battery held inadmissible, since the conviction must have been for a felony); Gardner v. St. Louis & San Francisco Ry., 135 Mo. 90, 36 S.W. 214 (1896) (Action for personal injuries by employee, defendant attempting
admitted have not specified as to felonies or misdemeanors. A long series of cases since passage of the statute has apparently admitted prior convictions of misdemeanors, despite the nature of the conviction or the ridiculous absence of correlation of such convictions with the witness' truth-telling qualities. This can be carried to the grossest extremes, however, as three cases graphically depict. Stack v. General Baking Co. was an action for personal injuries resulting from a collision of plaintiff's automobile with defendant's delivery wagon. Defendant was permitted to show, on cross-examination, that plaintiff's witness C had once been convicted of selling liquor on Sunday. In Daggs v. St. Louis-San Francisco R.R., defendant railroad was refused permission to impeach plaintiff as a witness on the ground of prior conviction merely because it did not distinguish on the cross-examination question between crimes and violations of ordinances. The classic case of them all, however, is State v. Stokes, a prosecution for seduction of a nineteen-year old girl. In that case it was incredulously admitted, to impeach the defendant as a witness, that he had been convicted of stealing watermelons when he was a boy fourteen years old! Are there no limits to the ridiculous level the courts may sink when they fall asleep as to relevancy? Will we continue to restrain general character inquiries to truth and veracity, yet continue to admit misdemeanors such as this which have no relevancy whatever to the issues directly in point, namely, the capacity of the witness for truth and veracity, and the nature of the charge at bar?

to impeach plaintiff's witness by proof of his prior conviction of misdemeanor; held, crime must be infamous to impeach); State v. Forsha, note 24, supra; State v. Brooks, note 124, supra.

131. State v. Payne, note 124, supra (Larceny); State v. Freeman, note 124, supra (Possession of counterfeit money); State v. Clement, note 124, supra (Misuse of mails); State v. Merrell, note 124, supra.

132. State v. Blitz, note 124, supra (Fighting and frequenting bawdy houses, admitted); Chouteau Land & Lumber Co. v. Chrisman, note 124, supra (Stealing timber, admitted); State v. Thornhill, note 124, supra (Prior gambling, admitted); State v. Heusack, note 124, supra; State v. Barrington, note 124, supra; State v. Arnold, note 124, supra (Carrying concealed pistol, admitted); State v. Kennedy, note 124, supra (Adultery, admitted); State v. Oliphant, notes 68 and 124, supra (Violation of liquor law in another state, admitted); Ridenour v. Wilcox Mines Co., note 124, supra (Drunkenness and consorting with prostitutes, admitted, where witness claimed no exemption); State v. Saunders, note 124, supra (Stealing chickens in another state, admitted on similar charge to impeach defendant-witness); State v. Zoller, notes 82 and 124, supra (Illegal sale of liquor, admitted); Myles v. St. Louis Public Service Co., note 124, supra (Petit larceny, admitted).

133. Note 124, supra.

134. Note 125, supra.

135. Note 124, supra.
As this observer sees it, the only correlation between women and watermelons is the letter “W”!  

The question of time sometimes arises in proving prior convictions: how long is a “reasonable time” between prior conviction and present action to preclude admission of a witness’ previous erring on the ground of remoteness? The only three cases in point which were discovered leave no clear-cut dividing line. Naturally, a recent conviction is proper to admit, for it bears on present character. Missouri has allowed convictions ten to twelve years beforehand to impeach a witness in a prosecution for violation of the prohibition law; nineteen years in an action for personal injuries where the witness has also admitted running gambling places more recently, thus negating the idea of reformation; and thirty-five years in a bewhiskered action for personal injuries. In the latter instance a man forty-three years of age was impeached by the showing that he had been in reform school when an eight-year old boy! This type of thing could not happen today because of the rule against judgments of juvenile delinquency being considered as “crimes” for impeachment purposes, and rehabilitating evidence might enter the picture, but it would be confined to truth and veracity. How juvenile can we become where relevancy is concerned?

Convictions in another jurisdiction have long been held to be admissible to impeach a witness in Missouri. Thus, if convictions of almost anything are permissible to impeach a witness, are we reaching the point of view that anything which is enjoyable is either illegal, immoral, or unhealthy? Hardly. There are certain definite exclusions in the law as to what may be shown as a conviction as well as the rigid requirement that nothing less than the conviction of the party sought to be impeached may be shown.

Mere violations of municipal ordinances are not “convictions of criminal offenses” within the true meaning of the law, so as to discredit

136. See thorough collection of cases in 28 V.A.M.S. § 491.050 (1949).
137. 3 Wigmore, supra, § 387.
139. Collins v. Leahy, supra.
140. Jackson v. City of Malden, supra.
141. See infra.
a witness because of them, although this was not always so; but it was so held as early as 1889 and is definitely the absolute rule today.\textsuperscript{143} The line of distinction is drawn capably in \textit{Meredith v. Whillock},\textsuperscript{144} an action for damages for assault and battery committed in a barber shop. The court held it error to permit the cross-examination of a witness as to his having pleaded guilty to violations of city ordinances, for an ordinance is a regulation adopted by a municipal corporation and not a law in the legal sense. Annotations collecting the cases reveal the reason for this distinction, agreeing that a violation of an ordinance results primarily in a debt due the municipal corporation rather than a penalty for violating the rights of society in general.\textsuperscript{145}

Just as a violation of an ordinance is construed by the courts not to be a crime against society, at least for purposes of impeaching a witness, so, also, is an adjudication of juvenile delinquency not considered a "crime" for impeachment purposes. The leading case which lays down this fundamental is that of \textit{State ex rel. Sharte v. Trimble},\textsuperscript{146} involving certiorari to quash the opinion of the Kansas City Court of Appeals on an information for rape which was dismissed, and for juvenile delinquency. The facts are these: one \textit{W}, a boy under seventeen years of age, was charged with rape and being a juvenile delinquent: the first count was dismissed, but a finding of delinquency was entered. The trial court

\textsuperscript{143.} State v. Taylor, 98 Mo. 240, 11 S.W. 570 (1889) (Assault with intent to kill; held, evidence of violation of ordinance by frequenting bawdy house was not admissible to impeach); State v. Sovern, note 124, supra (Prior fines for assault not admitted); State v. Carroll, note 124, supra (Witnesses may be asked whether he had been drunk, passed whisky into the jail, and been convicted of disturbing the peace); State v. Mills, 272 Mo. 526, 199 S.W. 131 (1917) (Murder: held, prior conviction of violating city vagrancy ordinance, inadmissible); Custer v. Shackelford, 225 S.W. 450 (Mo. 1920) (Bill in equity to rescind sale of land because of vendor's fraud; held, impeachment of plaintiff by showing that she had allowed poultry to run at large in violation of city ordinance was harmless error, since defendant's own testimony revealed he was guilty of misrepresentations); State v. Roberts, 311 Mo. 521, 278 S.W. 971 (1925) (Bank robbery; held, prior conviction of violation of vagrancy ordinance inadmissible); City of St. Louis v. Tanner, 143 S.W.2d 354 (Mo. App. 1940) (Disturbance of peace; held, prior violation of peace disturbance ordinance inadmissible); Hoffman v. Graber, 153 S.W.2d 817 (Mo. App. 1941) (Slander arising from controversy over division of Synagogue; held, prior conviction of peace disturbance ordinance violation, not admissible to impeach plaintiff); Stokes v. Wabash R.R., 355 Mo. 602, 197 S.W.2d 304 (1946) (Action for personal injuries resulting from pedestrian's being struck by train; held, it was proper to refuse to admit plaintiff's arrest and police court convictions of violations of city ordinances).

\textsuperscript{144.} 173 Mo. App. 542, 158 S.W. 1061 (1913).

\textsuperscript{145.} Note, \textit{Violation of Municipal Ordinance as a Public Offense or Crime}, 48 L.R.A. (N.S.) 156; see also Note, Ann. Cas. 1913A, 327.

\textsuperscript{146.} 33 Mo. 888, 63 S.W.2d 37 (1933).
granted an appeal to the Kansas City Court of Appeals, where the judgment was reversed because of supposedly erroneous admission of evidence of sexual intercourse between W and prosecutrix after the date of the act charged in the information. Relator, the Attorney-General, contended this was error, and counsel for W contended that W had been convicted of a felony, and the appeal, therefore, should have been transferred directly to the Supreme Court. The court held that a juvenile court's judgment can only declare a child a delinquent, though the conduct charged consists of violations of criminal statutes, and such judgments do not constitute a "conviction of criminal offense". A deviation occurred later, in that instance the court allowing the showing of witness' having served a term in the reformatory prior to the passage of the juvenile delinquency statute, but this will not likely happen again.

In impeaching a witness by proof of participation in a crime, whether by extrinsic evidence or his own admission, it is an absolute requisite that *conviction* be shown. An arrest alone is not enough, although a witness can be asked on cross-examination if he has not been arrested and sent to prison. The recent unusual case of *State v. Green* is illustrative. Therein, defendant was arrested in 1934 for robbery of a streetcar

147. Jackson v. City of Malden, notes 124 and 140, supra.
148. State v. Coffman, 360 Mo. 782, 230 S.W.2d 761 (1950) (Statutory rape: record of convictions of witnesses in juvenile court for petit larceny held inadmissible, since no "crime" occurred); see further, 147 A.L.R. 446.
149. State v. Howard, 102 Mo. 142, 14 S.W. 937 (1890) (Murder; held, the mere fact that a witness had been arrested is inadmissible to discredit him); State v. Taylor, 118 Mo. 153, 24 S.W. 449 (1893) (Rape of white girl by Negro; enraging facts: held, a witness may be asked whether he has been arrested and sent to jail for stealing billiard balls); State v. Pratt, 121 Mo. 566, 26 S.W. 556 (1894) (Forgery of deed: held, witness may be asked if he has not been in jail for stealing a pitchfork, and, also, if he had not been put in jail for assaulting and beating a poor woman on a streetcar); State v. Martin, note 116, supra (Witness may be asked how often he has been in jail on sentence for crime); State v. Grant, 144 Mo. 56, 45 S.W. 1102 (1898) (Assault with intent to kill arising from argument over religious meeting, defendant calling prosecuting witness a "damned liar" and altercation following; held, it is incompetent to show that defendant-witness had been arrested for illegally selling liquor); State v. Tracy, 284 Mo. 619, 225 S.W. 1009 (1920) (Burglary of bank); State v. White, 299 Mo. 599, 253 S.W. 724 (1923) (Exhibiting dangerous weapon, defendant showing that he had supported sheriff on prior election, to show the improbability of truth of charge; held, on special facts, a prior arrest may be shown); State v. Bounds, 216 Mo. App. 236, 262 S.W. 411 (1924) (Violation of prohibition law; held, witness cannot be asked whether he illegally manufactured whisky in Arkansas); State v. Ross, notes 47 and 124, supra (Previous convictions, but not mere arrests, may be shown); State v. Perkins, notes 29 and 82, supra; Smith v. Fine, 351 Mo. 1179, 175 S.W.2d 761 (1943) (Action for personal injuries brought by pedestrian struck by automobile; evidence that driver was arrested because of the accident held not admissible to impeach him).
150. 236 S.W.2d 298 (Mo. 1951).
operator. He escaped from jail and went west, nothing further happening to him legally detrimental until 1947, when he was convicted in federal court for draft evasion during World War II. Upon release he was returned to Missouri for this trial, where he complained of the admission of a purported confession in 1934, admitting six separate robberies. It has held that evidence of prior crimes, where there was no charge or conviction, is inadmissible to impeach a defendant as a witness or to test his credibility. That prior arrests are not admissible as evidence to impeach a witness is not only the Missouri rule, but also is the general rule, and is backed by the best authority.\textsuperscript{161}

If arrests are inadmissible, it follows that mere trouble with the police,\textsuperscript{162} resisting attempting arrest by an armed but unauthorized officer who has no warrant,\textsuperscript{153} and mere surveillance by the police\textsuperscript{154} are likewise inadmissible. A further conclusion is that, since convictions only can be shown, evidence of a charge of crime, information, or indictment cannot be shown unless a conviction followed, but this rule has not been unanimous in the decisions announced.\textsuperscript{155} The overwhelming weight of

\begin{itemize}
\item 151. 3 Wigmore, op. cit., note 6, supra § 980a; the cases are collected in 13 Ann. Cas. 643; Ann. Cas. 1914 C, 257; and in 6 A.L.R. 1608, as supplemented by 25 A.L.R. 340, 103 A.L.R. 364, and 161 A.L.R. 233.
\item 152. Daggs v. St. Louis-San Francisco Ry., notes 125, 134, and 152, supra (Trouble with officers in past does not affect witness' credibility); but held, incredibly, in Gray v. St. Louis-San Francisco Ry., note 95, supra, that prior "scrapes" other than those plaintiff had admitted on direct examination were admissible to impeach him.
\item 153. State v. May, 142 Mo. 135, 43 S.W. 637 (1897) (Murder: held, evidence of defendant's previously resisting arrest by an armed justice of the peace who had neither warrant nor authority, was inadmissible).
\item 154. State v. Barker, 249 S.W. 75 (Mo. 1923) (Burglary and larceny of automobile: held, error to show defendant-witness had been under police surveillance as car thief).
\item 155. Peck v. Chouteau, 91 Mo. 138, 3 S.W. 577, 60 Am. Rep. 236 (1887) (Action for malicious prosecution: held, prior indictment for feloniously removing liquors on which tax had been paid, when prosecution as to defendant was dismissed though he had pleaded guilty, when he testified, as government witness, held, admissible); State v. Weisman, 238 Mo. 547, 141 S.W. 1108 (1911) (Prosecution for fraudulent voting registration; held, evidence that a witness has been indicted is not competent to impeach him); State v. Potts, 239 Mo. 403, 144 S.W. 495 (1912) (Prosecution for establishing and maintaining crap table; held, where a prosecution for the same offense was pending against state's principal witness, it was proper to ask him whether he had arranged with the prosecuting attorney to dismiss the charges against him in consideration of his turning state's evidence); State v. Banks, note 124, supra (Commission of other crimes without convictions following held inadmissible); State v. Baker, 282 Mo. 699, 174 S.W. 359 (1914) (Embezzlement: prior investigation of witness by federal grand jury held inadmissible to impeach); State v. Barri, 199 S.W. 136 (Mo. 1917) (Robbery: held, mere indictment or charge of criminal offense not admissible); State v. Cole, 213 S.W. 110 (Mo. 1919) (Murder: held, alleged fact of guilt of statutory rape or seduction not admissible unless conviction shown); State v. Edmundson, note 47, supra (Evidence that felony charge
\end{itemize}
authority in Missouri upholds it, and there seems to be no doubt that constriction rather than expansion will follow in the future. The leading case in the field is *State v. Wigger*,\(^{156}\) a prosecution for arson in connection with the burning of a saloon, where it was held that questions as to prior charges, informations, or indictments for crime are improper. The reason for the rule was given in *Kribs v. United Order of Foresters*,\(^{157}\) an action on a life insurance policy, wherein defendant asked plaintiff if he were not "the same Kribs" under indictment for arson. The court held it cannot be shown that a witness has merely been charged with an offense by indictment, information, or otherwise, for, until conviction, he is presumptively innocent and of prima facie good repute. Another case often quoted, *State v. Pine*,\(^{158}\) was a prosecution for robbing the winner of a crap game, defendant complaining of two of his witnesses, being questioned on cross-examination as to their prior crimes; one being asked if he had not been arrested for assaulting an officer; and the other if he were not at the time under a charge of grand larceny for stealing cattle. These questions were held to be reversible error, since one is presumed innocent until convicted. Later in the same year (1933)

\(^{156}\) 196 Mo. 90, 93 S.W. 390 (1906).

\(^{157}\) 191 Mo. App. 524, 177 S.W. 766 (1915).

\(^{158}\) 332 Mo. 314, 57 S.W.2d 1087 (1933).
the same court held in *State v. Sherry*\(^{159}\) that a question asked a witness as to whether he had illegally sold liquor was proper, since credibility was affected, and admissibility of specific acts tending to impeach a witness' testimony, if not too remote in time, rests largely in the trial court's discretion. There is a favorite military phrase for an asinine decision such as this, which should be called by its name: "passing the buck". The propriety of the rule has only been questioned once since N.R.A. days, that being in *Smith v. Thompson*,\(^ {160}\) an opinion which definitely detracted from Ellison's luster. In that action for personal injuries it was determined that, on cross-examination, a witness could properly be asked a discrediting question as to whether he had been previously convicted or charged with a crime, the examiner being bound by his answer. Was this a step forward into the light or a leap backward into darkness? Whatever the answer, the doctrine of this case is not Missouri law.\(^ {161}\)

It is pseudo-elementary that any conviction shown to impeach must be proved to be that of the impeached witness.\(^ {162}\) It has been decided also that when an appeal of a conviction in the trial court is pending, such record is not admissible to impeach, due to the suspension of status pending appeal, but this procedure did not escape criticism.\(^ {163}\) To impeach, it would appear that the convicted party must actually begin sentence, whether it be imprisonment or suspension, since an appeal *may* bring reversal, and a new trial *may* bring acquittal. That has happened more than once, as any newspaper account of a reasonably famous or infamous case reveals. It is submitted that a conviction must be definitely *final* before it can be offered to impeach.

159. Note 36, supra.
160. Note 32, supra.
161. Notes 155 and 156, supra, and Holden v. Berberich, 351 Mo. 995, 174 S.W.2d 791, 149 A.L.R. 929 (1943) (Action for wrongful death by widow of passenger in automobile accident where driver was under indictment for driving while intoxicated, in same accident; held, mere arrests or indictments cannot be inquired about to discredit a witness: reviews prior cases thoroughly to cite Missouri rule); see also Note, *Impeachment of Witness by Showing That He Has Been Indicted*, 16 Ann. Cas. 872.
162. Myles v. St. Louis Public Service Co., notes 124 and 132, supra (Where plaintiff sues as "Hazel Myles", conviction of "Hazel Miles" is not admissible to impeach her without establishing that she was the person named in the conviction).
163. State v. Shelton, note 125, supra, adversely noted in 21 I.L.L. Rev. 746 (1927). In the commentary it was admitted that the entire matter hinged on the interpretation of the word "conviction", which was taken to mean a judgment and sentence. State v. Meyers, 198 Mo. 252, 94 S.W. 242 (1906) was cited, wherein conviction with new trial pending was allowable to impeach convicted party in a different suit, distinction being afforded to a limited degree in the case reviewed.
A conviction based on a plea of nolo contendere amounts to practically the same thing as a plea of guilty or a conviction on the facts by the jury, and as such it should be treated. No Missouri cases were found which directly touched this point, but there is more than cursory commentary across the nation. The prevailing rule is that such evidence is admissible, this being predicated on the idea that a plea of nolo contendere is, for all practical purposes, a plea of guilty. Since a prior conviction can be proved "either by cross-examination or by the record" in Missouri, it appears probable that this jurisdiction will accept the majority policy of admissibility when the question arises.

The final aspect of prior conviction of crime is that of mitigating such prior conviction (a form of rehabilitation) by explaining extenuating circumstances surrounding it or by showing an executive pardon following the conviction and sentencing. In Missouri this is not permitted, but there is not too strong a collection of authoritative cases to back up such a rule. In State v. Jones, defendant was convicted of murder in a stabbing which was the outgrowth of a railway labor dispute. The state was allowed to impeach him as a witness by proving his former conviction of horse theft. He excepted to the exclusion of facts sought to explain the conviction. It was held that where a former conviction is admitted in a criminal case to discredit the accused as a witness, he cannot show any facts impeaching the judgment of conviction. The only exception to this rule is that when a record of prior conviction is admittedly void on its face, such absence of validity may be shown, for the record should not be admitted in the first place. A somewhat different type of thing was involved in Maurizi v. Western Coal & Mining Co., an action by an employee for personal injuries incurred when he was struck by a rock which fell from the mine roof as he and a fellow-employee were attempting to get a derailed car back on the track. On cross-examination plaintiff admitted he had pleaded guilty twice to possession of "white mule", but was permitted to deny that he had been guilty of bootlegging. It was held that this was not erroneous as an attempt to explain the conviction of

165. 249 Mo. 30, 155 S.W. 33 (1913).
166. State v. Wagner, note 125, supra.
167. 321 Mo. 378, 11 S.W.2d 268 (1928), which distinguished State v. Jones, note 165, supra.
crime. Thus, the entire rule in Missouri rests on one case which, though pregnant with profundity of logic and wisdom, does not conform to the modern policy of liberality followed in other jurisdictions and favored by text-writers, annotators, and commentators, though it is the majority rule. The rationale is that an explanation of a conviction would allow the witness’ uncorroborated oral testimony to refute and contradict the verity of a court of record.

A definite break in this tightly welded chain in other jurisdictions occurred in United States v. Boyer, a prosecution for obtaining money under false pretenses, the prosecution seeking to impeach defendant’s testimony by inquiring as to his previous convictions for passing bogus checks and for embezzlement. He was allowed to explain that the bogus check charges were due to his secretary’s mistake, but he was not allowed to explain the embezzlement conviction. The appellate court did not reverse because of the exclusion of explanation of the embezzlement conviction, holding that the allowance of any explanation of a prior conviction is a matter for exercise of the trial court’s discretion. This is a wise course and has received favorable comment. One excellent analysis points out that the prior conviction offered against a defendant in a criminal case, purportedly to impeach him as a witness, may inferentially convict him of the present crime in the eyes of the jury. It is submitted here, therefore, that the liberal rule of the Boyer case is the fairer rule and merits careful consideration by the Missouri courts when such situations arise in this state.

An executive pardon is a parallel situation, but one with which the Missouri courts have not been squarely confronted, so far as could be determined by an exhaustive examination of the cases. However, it would apparently be governed by the rigid rule of the Jones case, just as was true of explaining the circumstances of a conviction. Probably the leading recent case in this field was that of Richards v. United States, a prosecution for grand larceny. Defendant was cross-examina-

168. 4 WIGMORE, EVIDENCE §§ 116, 117 (3d ed. 1940); Note, Pardon or Commutation as Affecting Proof of Conviction to Impeach Credibility of Witness, 47 L.R.A. (N.S.) 215; the cases are collected in a thorough annotation in 166 A.L.R. 211.


ed as regarding his prior conviction of unauthorized use of a government vehicle. He had served honorably in the armed forces during World War II for more than a year, thus bringing him within the class of persons which received a Presidential pardon. The prior conviction was still allowed to be shown, notwithstanding the pardon, but the dissent believed that the pardon completely cleansed the conviction. The commentaries\textsuperscript{172} are divided equally as to the propriety of allowing the conviction in spite of the pardon, but are in agreement that such is the general doctrine across the nation.\textsuperscript{173} Whether a pardon actually effaces the fact of the crime is a matter too academic and philosophical to be concerned with in a treatment of a procedural topic, but it is submitted in passing that a pardon, being granted by one elected to a political office, may not always be an amnesty granted from the goodness and purity of the heart for exemplary behavior. It is further submitted that a pardon should be admitted in mitigation, but that the conviction should also be admitted, for the jury then would have all the facts needed to guide it in the weight to give the testimony of the person so impeached. After all, both parties are entitled to equal justice, and this holds true as fully for the state in a criminal prosecution as for the parties litigant in a civil cause.

\textit{(To be continued)}

\textsuperscript{172} See note \textsuperscript{171}, \textit{supra}.