

# Missouri Law Review

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Volume 27  
Issue 3 June 1962

Article 2

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1962

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### Recommended Citation

Frank P. Aschemeyer, *Survey of Some Aspects of Missouri Divorce Law, A*, 27 Mo. L. REV. (1962)  
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## A SURVEY OF SOME ASPECTS OF MISSOURI DIVORCE LAW

FRANK P. ASCHEMEYER\*

The purpose of this paper is to review the law of Missouri relating to the general nature of a suit for divorce; the various grounds for divorce; and the principal defensive matters which may be raised or which may be considered by the court. Although the subjects are important, no consideration has been given to alimony, separation or property settlement agreements, the custody of minor children or provisions for their support, and questions relating to jurisdiction.<sup>1</sup>

### I. NATURE OF SUIT FOR DIVORCE

There are several cases in which the Missouri Supreme Court has discussed briefly the historical background of divorce in Missouri and the nature of an action for divorce.<sup>2</sup>

A territorial statute adopted in 1807<sup>3</sup> allowed a jury trial in divorce cases. In 1825 the Missouri Legislature adopted an act regulating divorce which provided that the circuit court, sitting as a court of chancery, "should have jurisdiction in all causes of divorce and alimony, or maintenance, and the like process, and proceedings should be had and pursued in all cases as are usually had and pursued in other causes on the equity side of the court . . . ."<sup>4</sup> In the revision of 1855<sup>5</sup> the provision that the suit should be equitable in nature was omitted. The provision that divorce

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1. Mo. R. Civ. P. 88 applies to suits for divorce, alimony and separate maintenance. The venue of divorce cases is governed by § 452.040, RSMo 1959. Sections 452.050, .060, RSMo 1959, relate to jurisdiction. See also Prewitt, *Domicile Requirements for Divorce in Missouri*, 24 Mo. L. REV. 218 (1959).

2. *State ex rel. Couplin v. Hostetter*, 344 Mo. 770, 776, 129 S.W.2d 1, 4 (1939) (en banc); *Arnold v. Arnold*, 222 S.W. 996 (Mo. 1920); *Chapman v. Chapman*, 269 Mo. 663, 192 S.W. 448 (1917).

3. Ch. 31, § 2, at 90, 1 Terr. Comp. (1807).

4. § 3, at 330, RSMo 1825.

5. Ch. 55, § 4, at 663, RSMo 1855.

and maintenance cases "shall be tried by the Court" has been retained<sup>6</sup> and it is now embodied in Rule 88.01 of the Rules of Civil Procedure.

Strictly speaking, there is no common law of divorce and the action has its basis in statutory law. Certainly, the grounds for divorce are entirely statutory, although it has been said that some of the principles followed in the English ecclesiastical courts are applied by the courts of Missouri even where they are not embodied in the statutes regulating divorce.<sup>7</sup> Perhaps this is the basis of recognition of the defense of condonation, which has no specific statutory support, although a basis for its application may also lie in the equitable principles of estoppel and "clean hands."

At any rate, the principle has been firmly established by the Missouri decisions that a divorce suit "is a proceeding *sui generis* founded on statute not purely a common law or equitable proceeding, but having qualities of both."<sup>8</sup> While the rules that a divorce will only be granted to an "innocent and injured party" and that a divorce will not be granted where the parties are guilty of collusion have a statutory basis, they are also the result of the application of equitable principles.<sup>9</sup> Since the action is equitable in nature, the decisions are legion which hold that, on appeal, the scope of review is the same as it is in a suit in equity. Accordingly, the appellate court is not bound by the trial court's view of the weight of the evidence. It will consider the whole case *de novo*, weigh the evidence itself and reach its own conclusion on the facts after due deference to the factual conclusions of the trial court.

Another rule, firmly imbedded in Missouri law and unique to a suit for divorce, is that the state is, in effect, a party to such a suit.<sup>10</sup> Indeed, it has been said that the state is a third party to every marriage.<sup>11</sup> What is meant, of course, is that there is a vital public interest which has caused the state to regulate marriage and divorce. The public interest is involved in every divorce case. The court represents the state and the community

6. § 452.040, RSMo 1959.

7. *Arnold v. Arnold*, *supra* note 2.

8. *State ex rel. Couplin v. Hostetter*, *supra* note 2, at 776, 129 S.W.2d at 4.

9. *Franklin v. Franklin*, 365 Mo. 442, 283 S.W.2d 483 (1955) (en banc); *Crane v. Deacon*, 253 S.W. 1068 (Mo. 1923).

10. *Koslow v. Taylor*, 356 Mo. 755, 203 S.W.2d 433 (1947); *State ex rel. Couplin v. Hostetter*, *supra* note 2; *Gosmel v. Gosmel*, 329 S.W.2d 230 (Spr. Ct. App. 1959); *Schuler v. Schuler*, 290 S.W.2d 192, 199 (St. L. Ct. App. 1956); *Niedergerke v. Niedergerke*, 271 S.W.2d 204 (St. L. Ct. App. 1954).

11. *Trammell v. Vaughan*, 158 Mo. 214, 222, 59 S.W. 79, 81 (1900).

and it is incumbent upon the court, in the exercise of judicial conscience, to protect the public interest.

## II. GROUNDS FOR DIVORCE

The grounds for divorce are specified in Section 452.010 of the 1959 Revised Statutes of Missouri. The statute has been in its present form for many years. If a statutory ground is not alleged and proved, a divorce may not be granted. For example, non-support, although often an element of alleged indignities, is not, of itself, a ground for divorce.<sup>12</sup> Provision is made only for absolute divorce. The action for separate maintenance which is authorized by Section 452.130 of the 1959 Revised Statutes of Missouri is similar, in effect, to a limited divorce or a divorce from "bed and board."

A divorce may be granted either on a petition or upon an answer and cross-bill. Both the petition and cross-bill must be verified by an affidavit in prescribed form.<sup>13</sup> Execution of the prescribed affidavit is a jurisdictional requirement and if a petition is not properly verified, the court acquires no jurisdiction. The public interest requires that the statute (now rule 88.01) be strictly construed and that the affidavit be signed by the plaintiff.<sup>14</sup> It may not be executed by the guardian of an insane person in behalf of his ward. Accordingly, an insane spouse who is incompetent to execute the affidavit cannot obtain a divorce while his disability continues.<sup>15</sup> The decisions reaching this result have been based on the statutory provisions which are now incorporated in Rule 88 of the Rules of Civil Procedure. At this time caution would seem to dictate the assumption that the rule will continue to apply even though the requirement is now a matter of court rule rather than legislative fiat.

The right of divorce is predicated upon and presupposes the existence of a valid marriage.<sup>16</sup> An action for divorce, in contrast to a suit to annul a marriage, lies for causes which arise after the marriage rather than for causes existing at or before the time of marriage.<sup>17</sup> Nevertheless, some of

12. *Hess v. Hess*, 232 Mo. App. 825, 113 S.W.2d 139 (K.C. Ct. App. 1938); *Weller v. Weller*, 154 Mo. App. 6, 133 S.W. 128 (St. L. Ct. App. 1910).

13. Mo. R. Crv. P. 88.01, .02. See also §§ 452.020, .040, RSMo 1959.

14. *Robertson v. Robertson*, 270 Mo. 137, 192 S.W. 988 (1917); *Hinkle v. Lovelace*, 204 Mo. 208, 102 S.W. 1015 (1907).

15. *Higginbotham v. Higginbotham*, 146 S.W.2d 856 (St. L. Ct. App. 1940).

16. *Franklin v. Franklin*, *supra* note 9; *Wenzel v. Wenzel*, 283 S.W.2d 882, 887 (St. L. Ct. App. 1955).

17. *Henderson v. Ressor*, 265 Mo. 718, 729, 178 S.W. 175, 177 (1915).

the grounds for divorce relate to conditions existing at the time of marriage or events which occurred previously. One of these is the fact of a prior subsisting marriage. Of course, such a purported marriage is void. Even a decree of annulment may be unnecessary.<sup>18</sup> Another is the ground that the wife, at the time of marriage, was pregnant by another man, without the knowledge of her husband. This is generally regarded as a fraud which makes the marriage voidable and subject to annulment on the suit of the innocent husband.<sup>19</sup> To make situations of this kind grounds for divorce rather than annulment seems anomalous, but such anomalies are, by no means, restricted to the law of Missouri.

#### A. *Impotency*

The statutory ground is that "either party at the time of the contract of marriage was and still is impotent." In an early case, it was held that, while the statute does not define impotency, such a condition does not exist, as a matter of law, unless there is a permanent inability to copulate.<sup>20</sup> This position coincides with the concept recognized in English ecclesiastical law that incurable impotency rendered a marriage voidable and subject to annulment.<sup>21</sup> Apparently, it will also be recognized as a ground for annulment in Missouri.<sup>22</sup> Evidence that one spouse refused to have intercourse is not sufficient proof of impotency.<sup>23</sup> There is one decision which emphasizes the distinction between sterility and impotency<sup>24</sup>—a distinction which hardly requires elaboration.

18. See *Johnson v. Johnson*, 245 Ala. 145, 16 So. 2d 401 (1944).

19. For example, see *Reynolds v. Reynolds*, 85 Mass. 605 (1862).

20. *Kempf v. Kempf*, 34 Mo. 211 (1863).

21. 17 AM. JUR. *Divorce & Separation* § 159 (1957). See also *Tompkins v. Tompkins*, 92 N.J. Eq. 113, 111 Atl. 599 (Ch. 1920).

22. *Viermann v. Viermann*, 213 S.W.2d 259 (St. L. Ct. App. 1948). Here the suit to annul was based on fraud—that the defendant had falsely represented that she was physically capable of intercourse. The opinion of the court of appeals considered the case as if it were a suit to annul on the ground of incurable impotency. In affirming a judgment of dismissal, the court held that the evidence failed to show that defendant's impotency was permanent.

23. *Williams v. Williams*, 121 Mo. App. 349, 99 S.W. 42 (St. L. Ct. App. 1906). This is a dictum since a divorce was sought on the ground of desertion, but the conclusion seems to be sound.

24. *Smith v. Smith*, 206 Mo. App. 646, 229 S.W. 398 (K.C. Ct. App. 1921). The fact that intercourse was not satisfactory to one spouse was not proof of impotency.

B. *Conviction of Felony or Infamous Crime*

There are two separate grounds based upon this concept. One relates to such a conviction which occurred before the marriage and where the other party had no knowledge of the conviction at the time of the marriage. The other relates to a conviction during the marriage.

By statutory definition,<sup>25</sup> a felony is "any offense for which the offender, on conviction, shall be liable by law to be punished with death or imprisonment in the penitentiary." There is also a statutory definition of the term "infamous crime."<sup>26</sup> It includes every offense for which the person convicted is declared to be disqualified or incompetent to be a witness, or juror, or to vote at any election, or to hold any office of honor, profit or trust in Missouri.

In *Hartwig v. Hartwig*,<sup>27</sup> the husband sought a divorce on the ground, among others, that he had no knowledge at the time of his marriage that his wife had previously been convicted of an infamous crime. The evidence established that she had been convicted of petty larceny which, at that time, was an infamous crime. Rejecting an argument that the husband had constructive knowledge of the conviction, the court held that since the husband had no actual knowledge, he was entitled to a divorce.

In another case<sup>28</sup> where the husband had been convicted of a felony shortly after the marriage, he advanced the defense that since he was civilly dead under the provisions of Section 2382 of the 1899 Revised Statutes of Missouri, he was incapable of being sued for divorce. The appellate court pointed out that the disqualification applied only to suits brought by him. In addition, the court stated that since conviction of a felony or infamous crime is a statutory ground for divorce, it "presupposes the right of the innocent party to sue the convicted one for a divorce."<sup>29</sup>

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25. § 556.020, RSMo 1959. Since 1955 the crimes of grand larceny and petty larceny are encompassed in the crime of "stealing." § 560.156, RSMo 1959. Under the provisions of § 560.161, RSMo 1959, the penalty for stealing property valued at less than \$50.00 is a fine or imprisonment in jail, or both. The penalty for stealing property having a value of at least \$50.00 is imprisonment in the penitentiary or a jail term or a fine. Conviction of stealing property having at least the value of \$50.00 is, therefore, a felony, but, under other specified circumstances, stealing property, regardless of value, is a felony.

26. § 556.030, RSMo 1959.

27. 160 Mo. App. 284, 142 S.W. 797 (K.C. Ct. App. 1912).

28. *Gray v. Gray*, 104 Mo. App. 520, 79 S.W. 505 (St. L. Ct. App. 1904).

29. *Id.* at 522, 79 S.W. at 505.

### C. *Pregnancy Existing at the Time of Marriage*

The statute reads: "Where the intended wife, at the time of contracting marriage, or at the time of solemnization thereof shall have been pregnant by any other man than her intended husband, and without his knowledge at the time of such solemnization. . . ."<sup>30</sup>

The fact that the husband has had sexual relations with his wife before marriage will not preclude his obtaining a divorce on this ground where the evidence showed clearly that the pregnancy resulted from intercourse with another man, that the husband was unaware of this fact, and that he mistakenly believed that he was the father of the expected child.<sup>31</sup> On the other hand, where the husband admits pre-marital sexual relations with his wife, he will be denied a divorce where the evidence does not show clearly that some other man was responsible for his wife's pregnancy.<sup>32</sup>

### D. *Habitual Drunkenness*

The statute reads: "shall have been addicted to habitual drunkenness for the space of one year." Excessive drinking is sometimes alleged as an indignity or it may be relevant to show occasions of drunkenness in explanation of the apparent cause for various indignities suffered by the spouse who claims to be innocent and injured.<sup>33</sup>

Habitual drunkenness, however, if alleged and proved, is a separate and distinct ground for divorce. It has been defined as "a fixed and irresistible habit of drunkenness, having by frequent indulgence lost the power or will to control [the] appetite for intoxicating liquors." It has also been said

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30. This is usually regarded as fraud going to the essentials of a marriage which will justify a court of equity in annulling the marriage. For example, see *Reynolds v. Reynolds*, 85 Mass. 605 (1862).

31. *Needham v. Needham*, 299 S.W. 832 (St. L. Ct. App. 1927); *Ritayik v. Ritayik*, 202 Mo. App. 74, 213 S.W. 883 (St. L. Ct. App. 1919).

32. *Tegethoff v. Tegethoff*, 198 Mo. App. 167, 199 S.W. 460 (St. L. Ct. App. 1917), where the court held that the husband's allegation that he was unaware of his wife's pregnancy was completely refuted by evidence that he had had pre-marital sexual relations with her and that she had not kept company with any other man for a considerable time prior to the marriage. Also, see *Kruse v. Kruse*, 231 Mo. App. 1171, 85 S.W.2d 214 (St. L. Ct. App. 1935), which was a suit to annul rather than for divorce. The plaintiff sought annulment on the ground, among others, that he married his wife because of her fraudulent misrepresentation that she was pregnant by him. The annulment was denied, the court holding that the evidence showed conclusively that the plaintiff had had pre-marital relations which resulted in her pregnancy, even though she had also had relations with another man.

33. *Robbins v. Robbins*, 257 S.W.2d 92 (Spr. Ct. App. 1953).

that it is not necessary to show that the person so accused was continually intoxicated or that he had a habit of getting drunk during usual business hours or that the drunkenness incapacitated him to perform the duties of his business or profession.<sup>34</sup> These general concepts have been followed in other cases in which the court considered the sufficiency of the evidence to sustain the statutory charge.<sup>35</sup> The proof to sustain this charge must be more than conclusions and vague statements concerning the drinking habits of the other spouse.<sup>36</sup>

### E. Adultery

Most of the cases in which adultery is charged deal with the sufficiency of the evidence. Only a few of them need be noticed. While this offense is usually only susceptible of proof by circumstantial evidence, the charge must be sustained by clear and convincing evidence. In *Ellebrecht v. Ellebrecht*,<sup>37</sup> the court said:

While it is true that the truth of the charge may be substantiated by circumstances, "the circumstances must be such as to lead to the fact of adulterous intercourse, not only by fair inference, but as a necessary conclusion, and must exclude every rational theory of innocence." 19 Corpus Juris, p. 138. The evidence of the plaintiff and his relatives is entirely too flimsy in character to brand the defendant as an adulteress or to establish the illegitimacy of the child born in lawful wedlock. . . .<sup>38</sup>

In one case the husband established his charge by clear proof that he had contracted a venereal disease from his wife.<sup>39</sup> In another, the husband proved by convincing evidence that he could not have fathered a child which was born to his wife.<sup>40</sup>

34. Tarrant v. Tarrant, 156 Mo. App. 725, 137 S.W. 56 (St. L. Ct. App. 1911).

35. McCoin v. McCoin, 218 S.W. 949 (K.C. Ct. App. 1920); Jackson County *ex rel.* Farley v. Schmid, 141 Mo. App. 229, 124 S.W. 1074 (K.C. Ct. App. 1910). See also Weber v. Weber, 195 Mo. App. 126, 189 S.W. 577 (Spr. Ct. App. 1916), in which the court said that the term "habitual" implies growth through various and increasing stages until drunkenness becomes a fixed and usual habit. Until this degree is reached, there is not a ground for divorce.

36. Llewellyn v. Llewellyn, 229 Mo. App. 1178, 88 S.W.2d 235 (K.C. Ct. App. 1935).

37. 243 S.W. 209 (St. L. Ct. App. 1922). For a similar statement regarding the degree of proof see Swoyer v. Swoyer, 157 Md. 18, 145 Atl. 190 (1929).

38. 243 S.W. at 211.

39. Kannenberg v. Kannenberg, 13 S.W.2d 664 (St. L. Ct. App. 1929).

40. Boudinier v. Boudinier, 240 Mo. App. 278, 203 S.W.2d 89 (K.C. Ct. App. 1947). The husband was in military service and had been sent overseas. On the wife's testimony, it appeared that the child had been born 316 days after she had last been with her husband. There was evidence of her association with other men



### F. Vagrancy

This ground reads: "when the husband shall be guilty of such conduct as to constitute him a vagrant within the meaning of the law respecting vagrants." The statute defining vagrancy has been in effect since 1879.<sup>41</sup> There are only three decisions in which this ground has been discussed.<sup>42</sup> It is not a ground of practical significance—probably because conduct which may come within the statutory definition of vagrancy would usually entitle a wife to a divorce on the grounds of indignities or desertion.

### G. Desertion

Fully stated, the ground is that either spouse "has absented himself or herself without a reasonable cause for the space of one year."

In defining desertion, the Missouri cases have held that three elements must be established by the evidence in order to sustain the charge: (1) a cessation from cohabitation without reasonable cause for one year; (2) the intention on the part of the deserter not to resume cohabitation (sometimes stated as an "intention to abandon"); and (3) the absence of consent to the separation on the part of the one who is deserted.<sup>43</sup>

during her husband's absence. A physician who attended the wife testified that the baby appeared to be a nine-months child but the trial court refused to permit him to testify as to the period of gestation and the probable date of conception. The rejected testimony was incorporated in an offer of proof. The court said, in part:

It is abundantly clear from the evidence, and of which the Court may take judicial notice, that the normal period of gestation is 280 days. The period claimed by the plaintiff was . . . a period of 316 days. Such a greatly extended period is not of such common knowledge as to warrant judicial notice. . . . The rejected testimony will be considered as evidence in the case.

240 Mo. App. at 294, 203 S.W. at 98. Some courts have held that the period of gestation is not so commonly understood that the courts may take judicial notice of it. See, for example, *Harward v. Harward*, 173 Md. 339, 196 Atl. 318 (1938).

41. § 563.340, RSMo 1959. It should be noted, however, that the following statutes confer on municipalities of various classes the power to define and punish vagrancy: First class cities—§ 73.110; Second class cities—§ 75.110(63); Third class cities—§ 77.580; and Fourth class cities—§ 79.460, RSMo 1959. The question whether conduct constituting a violation of an ordinance defining vagrancy would come within this ground for divorce has never been decided.

42. *Marolf v. Marolf*, 191 Mo. App. 239, 177 S.W. 819 (K.C. Ct. App. 1915); *Gallemore v. Gallemore*, 115 Mo. App. 179, 91 S.W. 406 (St. L. Ct. App. 1905); *Dwyer v. Dwyer*, 26 Mo. App. 647 (St. L. Ct. App. 1887).

43. *Campbell v. Campbell*, 281 S.W.2d 314 (Spr. Ct. App. 1955); *Crum v. Crum*, 217 S.W.2d 715 (Spr. Ct. App. 1949); *Parsons v. Albertson*, 31 S.W.2d 211 (St. L. Ct. App. 1930); *Nicholson v. Nicholson*, 214 Mo. App. 570, 264 S.W. 82 (Spr. Ct. App. 1924).

Where the parties continue to live under the same roof, the refusal of one spouse to have sexual relations with the other does not amount to desertion. There must be an actual separation.<sup>44</sup> There must be a continuous separation for at least one year prior to the suit.<sup>45</sup> There is no abandonment if the spouse who claims desertion has consented to or acquiesced in the separation even though such consent or acquiescence is subsequent to the separation.<sup>46</sup>

The Missouri cases recognize the usual rule that it is the husband's right to select the family domicile and the wife's duty to accompany him. If the wife, without legal justification, refuses to accompany him or to accept the domicile of his selection, she is guilty of abandonment.<sup>47</sup> In *Brackmann v. Brackmann*,<sup>48</sup> however, the court emphasized that, while the wife is under a duty to live with her husband at such place as he is able to afford, the husband cannot act arbitrarily in choosing their domicile. He must be reasonable and not arbitrary, and must have due regard for the safety, comfort, welfare and peace of mind of his wife. On the facts presented, the court held that the wife's failure to live in the home selected by her husband did not warrant granting him a divorce.

A vital ingredient of desertion is that the separation must be without reasonable cause or legal justification. Under the Missouri cases it is clear that there is no legal justification for one spouse refusing to live with the other unless the conduct of the latter is such that it constitutes a basis for divorce. For example, in *Singleton v. Singleton*,<sup>49</sup> the husband sought a divorce on the ground of desertion while the wife filed a cross-bill seeking a divorce on the ground of indignities. It was held that, since the wife had failed to prove her charge of indignities, she had no legal justification for leaving her husband.

44. *Watson v. Watson*, 291 S.W.2d 198 (Spr. Ct. App. 1956); *Gruner v. Gruner*, 183 Mo. App. 157, 165 S.W. 865 (St. L. Ct. App. 1914).

45. *Plymate v. Plymate*, 180 S.W. 29 (Spr. Ct. App. 1915).

46. *Campbell v. Campbell*, *supra* note 43; *Hupp v. Hupp*, 238 Mo. App. 964, 194 S.W.2d 215 (Spr. Ct. App. 1946); *Parsons v. Albertson*, *supra* note 43; *Nicholson v. Nicholson*, *supra* note 43; *Creasey v. Creasey*, 168 Mo. App. 68, 151 S.W. 219 (St. L. Ct. App. 1912).

47. *Bailey v. Bailey*, 317 S.W.2d 630 (St. L. Ct. App. 1958); *Campbell v. Campbell*, *supra* note 43; *Parsons v. Albertson*, *supra* note 43.

48. 202 S.W.2d 561 (St. L. Ct. App. 1947). The court cited *Nicholson v. Nicholson*, *supra* note 43, and *Girdner v. Girdner*, 230 S.W. 382 (K.C. Ct. App. 1921), in support of its position.

49. 239 S.W.2d 773 (K.C. Ct. App. 1951); *Searcy v. Searcy*, 196 Mo. App. 311, 193 S.W. 871 (K.C. Ct. App. 1917); *Creasey v. Creasey*, *supra* note 46.

In a suit for separate maintenance, it is necessary for the wife to prove, among other things, that she has been abandoned, without good cause, by her husband. Where the wife has left her husband and relies upon constructive abandonment to support her claim, she must show that her husband was guilty of such conduct that she would be entitled to a divorce if she sought such relief.<sup>50</sup> This principle should be equally applicable to a suit for divorce on the ground of desertion. When the spouse who must establish legal justification for the separation does so, as he must, by showing that the other spouse is guilty of conduct constituting grounds for divorce, he has also proved constructive abandonment by his spouse.<sup>51</sup>

In *Creasey v. Creasey*,<sup>52</sup> a husband sought a divorce on the grounds of desertion and indignities. His wife, by cross-bill, sought a divorce on the same two grounds. The appellate court ruled that neither was entitled to a divorce. The husband had left his wife. The court found that his abandonment was without legal justification since the wife's conduct was not such as to constitute indignities. On the other hand, the conduct of the husband also did not give his wife the right to a divorce on the ground of indignities. Sometime after the separation, but before one year had elapsed, the husband made an attempt, in good faith, to effect a reconciliation. The wife refused his offer. The court said she had no reasonable basis for such rejection because her husband's prior conduct toward her was not such as to constitute indignities. It was held, then, that while the husband's leaving was wrong in the first instance, she was unwilling to take him back. In rejecting his bona fide offer of reconciliation, without legal justification, she acquiesced in the separation so that it no longer constituted desertion. The decision is sound in its conclusion that the wife's rejection, without justification, ended the husband's abandonment of her. As a matter of fact, under the circumstances presented, the wife's refusal to end the separation started a period of abandonment by her, which, if continued for the statutory period, would have entitled the husband to a divorce on the ground of desertion. This was said to be the effect of an unjustified refusal of a bona fide offer of

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50. *Grieshaber v. Grieshaber*, 313 S.W.2d 763 (St. L. Ct. App. 1958); *Price v. Price*, 281 S.W.2d 307 (Spr. Ct. App. 1955).

51. In *Searcy v. Searcy*, *supra* note 49, the court, by way of dictum, stated that the husband who had left his wife was not constructively abandoned or deserted since his evidence did not show that his wife was guilty of misconduct which drove him from the matrimonial domicile.

52. 168 Mo. App. 68, 151 S.W. 219 (St. L. Ct. App. 1912).

reconciliation in *Glenn v. Glenn*.<sup>53</sup> Where, however, the wife left her husband because of his habitual drunkenness, and she was entitled to a divorce on this ground, her refusal to see him and to consider a reconciliation did not amount to desertion of her husband.<sup>54</sup> This conclusion is sound because, otherwise, the wife would be forced to choose between condoning her husband's misconduct or incurring the onus of having deserted him.

#### H. Cruelty

The statutory provision is that either spouse "shall be guilty of such cruel or barbarous treatment as to endanger the life of the other." There are comparatively few cases involving the ground of cruelty as distinguished from the ground of indignities. In some of the cases both grounds are alleged and, while there is sometimes loose language referring to cruelty, it is apparent that the basis of decision was whether the evidence was sufficient to establish the ground of indignities.

In *Johnston v. Johnston*<sup>55</sup> the court emphasized that cruelty and indignities are separate and distinct grounds for divorce: In holding that a single, slight blow not threatening bodily harm is not sufficient to sustain the charge of cruelty, the court said: "It is not necessary that there be repeated acts of cruelty, but no single act of cruelty that falls short of endangering life is sufficient to justify a divorce under said first ground [cruelty]."<sup>56</sup>

In another case it was held that a charge of cruelty was not sustained by proof of one instance where the wife struck her husband on the arm with a candlestick which was so fragile that it broke upon contact. It was also pointed out that the wife was ill; that she was given provocation by her husband; and that it was an isolated incident.<sup>57</sup> Where the husband struck his wife on several occasions; once was restrained from hitting her with a chair; and, just before the separation, knocked her down and beat her, it was held, as might be expected, that he was guilty of cruel and barbarous treatment endangering her life.<sup>58</sup> It is also obvious that a wife who delib-

53. 192 S.W.2d 629, 631 (St. L. Ct. App. 1945). See also *Smith v. Smith*, 299 S.W.2d 32, 34 (Spr. Ct. App. 1957).

54. *Tarrant v. Tarrant*, *supra* note 34, previously cited under the ground of "habitual drunkenness."

55. 260 S.W. 770 (St. L. Ct. App. 1924).

56. *Id.* at 772.

57. *Weisheyer v. Weisheyer*, 6 S.W.2d 989 (St. L. Ct. App. 1928).

58. *Strahorn v. Strahorn*, 82 Mo. App. 580 (K.C. Ct. App. 1900).

erately shoots at her husband several times, hitting the mark once, is guilty of cruelty endangering his life.<sup>59</sup>

There are these distinctions between the grounds of cruelty and indignities: The act or acts of cruelty relied upon must be of such a character that the court may reasonably conclude that they will endanger the life of the other spouse. A charge of cruelty can be sustained by proof of one incident if it is of sufficient severity, while allegations of indignities must be supported by proof of a course of conduct by one spouse which renders intolerable the condition of the other. Proof of a single or occasional act will not be sufficient.

### I. *Indignities*

The statutory language is that one spouse "shall offer such indignities to the other as shall render his or her condition intolerable." This, of course, is the ground for divorce which is most frequently relied upon. It was said in *Richardson v. Richardson*:<sup>60</sup> "[E]ach case in which divorce is sought on the ground of indignities must be determined upon its own facts; 'no hard and fast rule is or can be prescribed as to what acts or conduct are sufficient.'"

It has been held in many cases that the acts relied upon must amount to a "species of mental cruelty" and must show a course of conduct by one spouse toward the other of such character and frequency as to be subversive of the marital relation.<sup>61</sup> As has been stated earlier, allegations of indignities are not supported by proof of a single or occasional act. The evidence must show a continuous course of conduct over a period of time—the cumulative effect of which is to render intolerable the condition of the spouse seeking divorce.<sup>62</sup>

59. *Torlotting v. Torlotting*, 97 Mo. App. 183, 70 S.W. 941 (St. L. Ct. App. 1902).

60. 270 S.W.2d 68, 71 (K.C. Ct. App. 1954), in which the court quoted from *Culp v. Culp*, 164 S.W.2d 623, 625 (St. L. Ct. App. 1942). See also *Thomas v. Thomas*, 288 S.W.2d 689 (K.C. Ct. App. 1956), and *Kinder v. Kinder*, 267 S.W.2d 356 (St. L. Ct. App. 1954).

61. *Oliver v. Oliver*, 325 S.W.2d 33 (St. L. Ct. App. 1959), in which the court pointed out the difficulty of attempting a precise definition of mental or physical cruelty; *Ames v. Ames*, 284 S.W.2d 888 (K.C. Ct. App. 1955); *Cadenhead v. Cadenhead*, 265 S.W.2d 426, 435 (K.C. Ct. App. 1954).

62. Cases cited in footnote 61. See also *Moore v. Moore*, 337 S.W.2d 781 (Spr. Ct. App. 1960); *Coleman v. Coleman*, 318 S.W.2d 378 (St. L. Ct. App. 1958); *Clark v. Clark*, 306 S.W.2d 641 (K.C. Ct. App. 1957); *Watson v. Watson*, 291 S.W.2d 198 (Spr. Ct. App. 1956).

These, then, are the salient principles which the decisions have applied in evaluating the sufficiency of the evidence to sustain allegations of indignities. The types of acts and conduct relied upon are so varied and numerous that it is not practicable to attempt a catalogue of them.

### III. DEFENSES

#### A. *Collusion*

The affidavit which must be annexed to a petition or cross-bill for divorce must recite that "the complaint is not made . . . by collusion . . . between the plaintiff and defendant, for the mere purpose of being separated from each other . . . ." <sup>63</sup> In addition, Section 452.030 of the 1959 Revised Statutes of Missouri, provides: "If it shall appear to the Court that the adultery, or other injury or offense complained of, shall have been occasioned by the collusion of the parties, . . . then no divorce shall be granted."

Collusion is, quite obviously, not a defense in the sense that it must be pleaded and proved. Where the parties to a divorce suit are guilty of collusion, it is to be expected that they will make every effort to conceal such fact from the court. It is the province of the court to ascertain whether collusion exists and to dismiss the case if it appears. This is one of the areas in which the court, representing the state and the public interest, seeks to carry out the public policy of the state that marriages shall be dissolved "only in the manner and for the causes specified by law."<sup>64</sup>

The type of collusion specified in section 452.030 relates to the fabrication of grounds for divorce. There are, apparently, no Missouri decisions dealing with this type of collusion. But it is also collusion for the parties to agree that one shall obtain a divorce and that the other will make no contest.<sup>65</sup> The failure to contest a suit is not collusive if there is no agreement between the parties that it shall not be contested. Agreements regarding alimony and support or contracts settling property rights between

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63. Mo. R. Civ. P. 88.01, based on § 452.040, RSMo 1959; Mo. R. Civ. P. 88.02, based on § 452.020, RSMo 1959.

64. *Koslow v. Taylor*, 356 Mo. 755, 203 S.W.2d 433 (1947); *State ex rel. Couplin v. Hostetter*, 344 Mo. 770, 129 S.W.2d 1 (1939); *Gosmel v. Gosmel*, 329 S.W.2d 230 (Spr. Ct. App. 1959); *Schuler v. Schuler*, 290 S.W.2d 192 (St. L. Ct. App. 1956); *Niedergerke v. Niedergerke*, 271 S.W.2d 204 (St. L. Ct. App. 1954).

65. *Bishop v. Bishop*, 151 S.W.2d 553, 556 (St. L. Ct. App. 1941); *Welsh v. Welsh*, 230 Mo. App. 1006, 1020, 93 S.W.2d 264, 270 (St. L. Ct. App. 1936); *Rapp v. Rapp*, 162 Mo. App. 673, 145 S.W. 114 (K.C. Ct. App. 1912); *Donohue v. Donohue*, 159 Mo. App. 610, 141 S.W. 465 (K.C. Ct. App. 1911).

the parties are not, of themselves, evidence of collusion. Such agreements are invalid if they are accompanied by an agreement that one party shall obtain a divorce without contest.<sup>66</sup>

In the *Bishop* case,<sup>67</sup> the court stated the accepted rule that a contract settling property rights is void if it is collusive and that a collusive agreement is a bar to a divorce. For this reason, the court said, it "is vitally concerned with the character of any contract entered into between the parties looking to the settlement of their property rights. *A concealment of any such contract from the Court tends to produce collusion, and might well be regarded as evidence of collusion.*"

### B. Connivance

This defense has a statutory basis in section 452.030, which provides that no divorce shall be granted if it appears to the court that the complainant was "consenting" to the adultery or other marital offense of which complaint is made. Although there is one Missouri case which considers this defense with respect to one indignity, among others which were alleged, connivance, by its very nature, is usually considered only in connection with the charge of adultery.

In *Rapp v. Rapp*,<sup>68</sup> the court, in a dictum, said: "The distinction between collusion and connivance is that, while collusion is a corrupt agreement, connivance is a corrupt consenting. Both bar the plaintiff. . . ."

In *Torlotting v. Torlotting*,<sup>69</sup> the court held that the husband was guilty of conniving at his wife's adultery and said that "consenting" as used in the statute "means something more than passive acquiescence in the act; it signifies to connive, to agree to, to be willing that it should be done. . . ." The court made clear, however, that a spouse who suspects the other of adultery may watch or employ someone to watch the suspected

66. *Ibid.*

67. *Bishop v. Bishop*, *supra* note 65, at 556-57. (Emphasis added.)

68. *Supra* note 65, at 676, 145 S.W. at 115. The quotation is from 1 NELSON, DIVORCE § 500 (1st ed. 1895).

69. 82 Mo. App. 192, 202 (St. L. Ct. App. 1899). In this case the husband employed a detective to watch his wife in the hope that evidence of adultery could be obtained. The detective informed him that the wife had arranged a rendezvous with a man at a certain time and place. Arrangements were made for the husband to occupy an adjoining room in order to witness the proceedings. At the appointed time the wife and the detective appeared and the husband witnessed the ensuing adultery. It was held that the husband had connived at or consented to his wife's adultery since the detective was his agent, hired to obtain evidence without restrictions as to methods to be employed.

spouse and need not try to prevent the act so long as nothing is done to contribute to it.<sup>70</sup>

In another case in which the court held that the wife had not connived at her husband's adultery, it was stated that passive acquiescence, negligence, indifference or dullness of apprehension will not convict the innocent spouse of connivance if nothing is done to encourage the other to commit adultery or to create opportunities for the offense.<sup>71</sup>

In *Viertel v. Viertel*,<sup>72</sup> the husband, after becoming aware of his wife's adultery, did not remonstrate with either his wife or a farm hand who was his wife's paramour, and permitted the paramour to continue living in their home. The court held that on these facts the irresistible inference to be drawn was that the husband had entered into a scheme or understanding with the paramour "by which the latter was to compass the defendant's ruin and then to testify to the fact and thus afford the plaintiff a substantial cause for divorce."

In addition to the statutory basis for the defense of connivance, the decisions also stress the fact that a party seeking a divorce on the ground of adultery, who has consented to or connived at the offense, does not come into court with clean hands.

### C. Insanity

A divorce may be obtained from an insane spouse if the conduct establishing grounds for divorce occurred while the spouse was mentally competent. It is a defense, however, if the evidence shows that, during the time the acts relied upon were committed, the accused spouse was insane.

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70. In *Wilson v. Wilson*, 154 Mass. 194, 28 N.E. 167, the court made this graphic statement:

Merely suffering, in a single case, a wife, whom he already suspects of having been guilty of adultery, to avail herself to the full extent of an opportunity to indulge her adulterous disposition, which she has arranged without his knowledge, does not constitute connivance on the part of the husband, even though he hopes he may obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason. He may properly watch his wife, whom he suspects of adultery, in order to obtain proof of that fact. He may do it with the hope and purpose of getting a divorce, if he obtains sufficient evidence. He must not, however, make opportunities for her, though he may leave her free to follow opportunities which she has herself made. He is not obliged to throw obstacles in her way, but he must not smooth her path to the adulterous bed.

71. *Ratcliff v. Ratcliff*, 221 Mo. App. 944, 288 S.W. 794 (K.C. Ct. App. 1926).

72. 86 Mo. App. 494 (K.C. Ct. App. 1901). See also *Donohue v. Donohue*, 159 Mo. App. 610, 141 S.W. 465 (K.C. Ct. App. 1911).



In such cases the conduct or acts relied upon will not afford a basis for divorce because they were not willfully or deliberately committed and the insane spouse is not to be charged with responsibility for them.<sup>73</sup>

In the *Hemphill* case,<sup>74</sup> the Supreme Court of Missouri said:

However, the burden was not upon Roy Hemphill as plaintiff in the divorce case to prove that his wife was sane at the time the alleged indignities were committed. Sanity is presumed prior to an adjudication or until evidence of insanity is introduced. The burden was upon the guardian ad litem for the defendant wife (plaintiff here) to plead and prove, as a defense in that action, that she was insane at the time the alleged indignities were committed.<sup>75</sup>

The *Schuler* case<sup>76</sup> clearly states the rule that, while there is a presumption of continuing mental incapacity after an adjudication, there is no presumption of mental incapacity prior to the adjudication. The burden of proving mental incapacity prior to adjudication is upon the party who raises that issue as a defense. It must be pleaded and have evidentiary support.

When an issue as to the sanity of a spouse sued for divorce is involved, the matter is a concern of the state as a third party to the divorce action. The court is seriously concerned as to the manner in which the guardian representing the insane spouse performs his duties. The guardian is required to take all steps reasonably necessary to protect and promote the interests of his ward.<sup>77</sup>

#### D. Condonation

As used in divorce law, condonation means that the marital offenses alleged as grounds for divorce have been forgiven, pardoned and excused. Hence, they no longer have vitality as a basis for divorce. This defense has no express recognition in the Missouri statutes. It has, of course, been long recognized by the Missouri decisions. It probably had its origin

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73. *Hemphill v. Hemphill*, 316 S.W.2d 582 (Mo. 1958); *Koslow v. Taylor*, 356 Mo. 755, 203 S.W.2d 433 (1947); *Schuler v. Schuler*, *supra* note 64; *Niedergerke v. Niedergerke*, *supra* note 64; *Dunn v. Dunn*, 240 Mo. App. 87, 216 S.W.2d 141 (St. L. Ct. App. 1949).

74. *Supra* note 73.

75. *Hemphill v. Hemphill*, *supra* note 73, at 586.

76. *Supra* note 73.

77. *Hemphill v. Hemphill*, *supra* note 73; *Schuler v. Schuler and Niedergerke v. Niedergerke*, *supra* note 64. See also *Bethel v. Bethel*, 181 Mo. App. 601, 164 S.W. 682 (St. L. Ct. App. 1914).

in ecclesiastical law but it also may be justified upon the doctrines of equitable estoppel and "clean hands." It can be argued that a spouse who has forgiven marital offenses is estopped to assert them later as a basis for divorce or that, under such circumstances, he has not come into court with clean hands.

In some of the cases it is clear that condonation has been pleaded as an affirmative defense.<sup>78</sup> In many others the opinions do not indicate whether the issue was raised affirmatively or whether it was deemed to be encompassed in a general denial. No decision has been found which discusses this question of pleading. It would seem to be the safer practice to plead the defense affirmatively although it should be recognized that if pleaded marital offenses have been condoned, they are no longer basis for a divorce, so that a general denial may raise the issue.

In *Weber v. Weber*,<sup>79</sup> the following explanation of the meaning and effect of condonation is given:

It means a forgiveness and pardon after full knowledge of past wrong, fault, or deficiency on condition, express or implied, that same will not be repeated.

In divorce proceedings, cohabitation offers strong evidence of such pardon and forgiveness of past conjugal offenses, increasing in probative force with the fullness of knowledge of the offense committed and the length of time continued. In most cases where the cohabitation is long continued, it will be taken as conclusive evidence. Much must depend, however, on the circumstances of the particular case. It is said that the doctrine of condonation is not applied with such strictness to the rights of the wife as it is to the husband, and is rarely held to bar her redress. . . .

The nature of the conjugal offense has much to do with this question. In cases of adultery condonation from cohabitation is more nearly conclusive than in cases of cruelty or indignities. . . .<sup>80</sup>

In *Tootle v. Tootle*,<sup>81</sup> the court explained that condonation is a conditional and not an absolute forgiveness of past offenses. It excuses known offenses upon the condition, express or implied, of future good conduct. If the condition is broken, the past offenses are revived as grounds for divorce. It is not necessary, the court said, that the subsequent conduct or offenses be of the same kind as those conditionally forgiven, or that they be proved

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78. For example: *Reynolds v. Reynolds*, 297 Mo. 447, 249 S.W. 407 (1923); and *Tootle v. Tootle*, 329 S.W.2d 218 (K.C. Ct. App. 1959).

79. 189 S.W. 577 (Spr. Ct. App. 1916).

80. *Id.* at 578.

81. *Supra* note 78.

with the same clarity or that they be sufficient, standing alone, to be ground for divorce. A course of unkind and cruel treatment will revive condoned adultery.

In the *Tootle* case it was held that the husband had condoned his wife's adultery, both expressly and by a resumption of marital relations. But her subsequent conduct in conducting correspondence with her former paramour, telephoning him on various occasions, wearing a ring he had given her and treating her husband with coolness and indifference, vitiated the prior condonation.

Usually the fact of condonation will be implied or inferred if the injured spouse resumes or continues cohabitation with full knowledge of the marital offenses. In *Forbis v. Forbis*,<sup>82</sup> however, the court stated that whether there has been condonation must be determined from the facts and circumstances of each case. Accordingly, when an insane wife indulges her husband sexually, she is incapable of an intention to condone his offenses and will not be deemed to have done so.

In *Pobst v. Pobst*,<sup>83</sup> the husband continued to live in the same house with his wife for one month after he filed suit for divorce. The court concluded that condonation could not be inferred even though they slept in the same bed since the evidence showed they had no marital relations, did not speak to each other and would not eat at the same table. The court said: "While it is true that, under the law, there is a strong presumption of condonation where the parties occupy the same room and bed, this presumption may be rebutted."<sup>84</sup>

In *Geary v. Geary*,<sup>85</sup> it was held that one act of intercourse did not condone the husband's offenses where it appeared that the wife objected to her husband's advances and only yielded to his importunities because she had no other choice. In *Randall v. Randall*,<sup>86</sup> where the wife was granted a divorce on her cross-bill, the husband urged condonation because they had intercourse one night after he had filed his suit. The evidence showed, however, that the wife understood he would dismiss his suit. The next morning the husband left and never returned to her. Under these circum-

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82. 274 S.W.2d 800 (Spr. Ct. App. 1955).

83. 317 S.W.2d 655 (St. L. Ct. App. 1958).

84. *Id.* at 661.

85. 277 S.W.2d 327 (K.C. Ct. App. 1955).

86. 284 S.W.2d 64 (K.C. Ct. App. 1955).

stances, the court said, there was no condonation. In the *Weber* case,<sup>87</sup> the wife was granted a divorce on her cross-bill. The chief issue on the husband's appeal was condonation. The wife admitted that after the separation and after she had moved to St. Louis, her husband came to see her to try to effect a reconciliation. They slept together two nights but she did not go back to him. Shortly thereafter, the husband filed suit. The court, in holding that there was no condonation, commented: "Plaintiff evidently not considering that there had been any condonation, for condonation is *mutual*, . . . filed his suit for divorce. . . ."<sup>88</sup>

There are a number of statements in the decisions, as in the *Weber* case, that if cohabitation is long continued, it may be taken as conclusive evidence that marital offenses have been condoned. This has not been the result in some cases where indignities have continued over a long period of time and down to the time of separation.<sup>89</sup> These cases appear to be sound. If there is a continuation of indignities to the time of separation, the continuation of offenses will have violated the implied condition of future good conduct and, thus, there is no effective forgiveness.

#### E. Recrimination

This defense means, literally, a counter-accusation brought by one who is accused against his accuser. Rule 88.02 of the Missouri Rules of Civil Procedure and Section 452.020 of the 1959 Revised Statutes of Missouri upon which it is based stipulate that "it shall be lawful for the defendant, in his or her defense thereto, to set forth and charge, in his or her answer to the plaintiff's petition, any facts, which, if proved, would entitle such defendant under the law to a divorce . . ." Both the rule and the statute also provide, of course, that the defendant *may* pray for a divorce against the plaintiff for the causes stated in the answer. But the defendant may plead defensively, without seeking the affirmative relief of divorce, that the plaintiff is guilty of conduct constituting grounds for divorce.

In *Langshaw v. Langshaw*,<sup>90</sup> the court, in quoting from the early case of *Hoffman v. Hoffman*,<sup>91</sup> said: "If both parties have a right to divorce,

87. *Supra* note 79.

88. *Supra* note 79, at 577.

89. *Arnold v. Arnold*, 222 S.W. 996 (Mo. 1920); *Noll v. Noll*, 277 S.W.2d 853 (K.C. Ct. App. 1955); *Dunlap v. Dunlap*, 255 S.W.2d 441 (K.C. Ct. App. 1953).

90. 331 S.W.2d 15, 18 (K.C. Ct. App. 1960).

91. 43 Mo. 547, 549 (1869).

neither party has.'” This is a succinct statement of the principle of recrimination.

Both rule 88.02 and section 452.020 indicate that the defense of recrimination should be pleaded in the answer. In *Brackmann v Brackmann*,<sup>92</sup> the court stated that affirmative recriminatory matter, to be available, must be specially pleaded and the facts establishing the defense must be set out in the answer. It was held, however, that, in the interest of the public and in the exercise of a sound discretion, the court may receive and consider such evidence even though the defense is not pleaded. In *Straley v. Straley*,<sup>93</sup> where the answer was a general denial, the court stated: “[T]he case was tried as though recrimination were pleaded and it is unnecessary for us to pass upon the question as to whether recrimination should ordinarily be pleaded.”

The rule has been firmly established that a divorce may be granted only to an “innocent and injured” party. Rule 88.04,<sup>94</sup> relating to *ex parte* proceedings, expressly provides that the court shall “require proof of the good conduct of the petitioner, and be satisfied that he or she is an innocent and injured party.” This rule, and the underlying statute, do not apply to proceedings which are contested.

Section 452.010 of the 1959 Revised Statutes of Missouri states that the “injured” party may obtain a divorce on any of the grounds stated in the statute. It does not expressly provide that the party must also be “innocent.” In *Hoffman v Hoffman*,<sup>95</sup> it was pointed out that prior to 1849 the statute stipulated that a party must be both innocent and injured in order to obtain a divorce. In 1849 the statute was amended and the word “innocent” was omitted. But, the court said: “The statute should receive the same construction in this respect as before the change . . . .”<sup>96</sup> The courts have followed this construction of the statute—now section 452.010. For example, in *Simon v. Simon*<sup>97</sup> the court said: “One seeking a divorce must prove himself to be an innocent *and* injured party.”

92. 202 S.W.2d 561, 566 (St. L. Ct. App. 1947).

93. 221 Mo. App. 1136, 1150, 298 S.W. 110, 117 (K.C. Ct. App. 1927).

94. Mo. R. Civ. P. 88.04. This rule is based on § 452.090, RSMo 1959.

95. *Supra* note 91.

96. *Supra* note 91, at 549.

97. 248 S.W.2d 560, 562 (Mo. 1952). The court cited *Cody v. Cody*, 233 S.W.2d 777, 781 (St. L. Ct. App. 1950), and *Chapman v. Chapman*, 230 S.W.2d 149, 151 (St. L. Ct. App. 1950), in support of its statement. Other decisions could have been cited.

In the *Langshaw* case,<sup>98</sup> the court dismissed the action because the plaintiff was not an innocent and injured party. On appeal, it was argued that the trial court had erroneously decided the case under section 452.090, relating to *ex parte* proceedings, rather than under section 452.010. In disposing of the contention, the court said:

The first section relates to *ex parte* divorce cases, and does require that the court be satisfied that the plaintiff is "an innocent and injured party." The second section does not incorporate that specific language, but it has been held many times that the burden is on the applicant for divorce to show that he or she is an innocent and injured party, whether it be a contested or an *ex parte* case.<sup>99</sup>

What is an "innocent" party? The concept is defined in the *Simon* case<sup>100</sup> as follows:

An "innocent" party is not required to conclusively prove freedom from all fault, or such exemplary conduct as excludes any misconduct or all unwise or uncalled-for acts. He or she need show only that, under all the circumstances of a particular case, he or she has not been guilty of conduct constituting a ground or grounds for divorce under RSMo 452.010. . . . Plaintiff sustained her burden of proof in the instant case.

To summarize: The defense of recrimination, briefly stated, means that if both parties are entitled to a divorce, neither may obtain a divorce. The doctrine that only an innocent and injured party is entitled to a divorce means the same thing—or, at least, it has the same legal effect since, to be "innocent," means that the party seeking this relief must not be guilty of conduct which would entitle the other party to a divorce. Whether the defendant in a divorce suit has or has not pleaded recriminatory matters affirmatively does not seem to be significant since the plaintiff must show, at least *prima facie*, that he has not given the defendant grounds for divorce. Thus, the issue, from the defendant's position, can be raised by a general denial.

Neither the defense of recrimination nor the doctrine of innocent party involves the court in any weighing or comparison of the conduct of the parties or the grounds for divorce established by them. This is made clear by such cases as *Schumacher v. Schumacher*,<sup>101</sup> where the husband

98. *Supra* note 90.

99. *Supra* note 90, at 18.

100. *Supra* note 97, at 563. A similar definition of "innocent" party is contained in *Langshaw v. Langshaw*, *supra* note 90, at 18.

101. 14 S.W.2d 519 (St. L. Ct. App. 1929).

had shown his wife's adultery but was denied a divorce because the evidence also showed that he was guilty of cruelty and had rendered indignities to his wife.

While the doctrines of recrimination or innocent and injured party have been strongly criticized, it seems clear that they will continue as a part of Missouri law until such time as the legislature may see fit to amend the statutes. The fact that they have a statutory basis seems to make this conclusion inevitable.