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CRIMINAL LAW*

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Many of the questions raised in the cases discussed herein have been passed upon several times before. This Article will serve as a discussion of the new and unique questions, which arose during the period covered and also as a review of existing law commented upon.

I. SPECIFIC OFFENSES

A. *Homicide*

State v. Goza[1] was a first degree murder case in which the defense was insanity. The court instructed on the defense of insanity and used the standard test of whether the defendant knew right from wrong. Defendant offered, and the court refused, an instruction which would have submitted the defense of insanity on the theory that if the homicide was the offspring or product of mental disease in the defendant, then he was not guilty by reason of insanity. This theory had been approved in New Hampshire[2] and by a federal court.[3] The court sustained a conviction indicating that they would still follow the right-wrong test as was originally set up in the *M'Naughten* case.[4] This opinion contains an excellent discussion of the various theories on insanity as a defense.

A second degree murder case[5] pointed out that demonstrative evidence submitted by the state in the form of a shirt and jacket worn by deceased at the time of his death was not improper as the testimony showed defendant was cutting at deceased and stabbed him on the left side of the chest, and the hole in the shirt and jacket would have tended to corroborate this evidence. There was no showing that the exhibits were gruesome or that they were improperly displayed, waved, flourished, or used for any purpose of inflaming the jury.

State v. Richardson[6] was a second degree murder prosecution in which the evidence showed that defendant fired a pistol and the bullet

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*This Article contains a discussion of selected 1958 and 1959 Missouri court decisions.

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1. 317 S.W.2d 609 (Mo. 1958).
2. State v. Pike, 49 N.H. 399 (1870).
3. Durham v. United States, 214 F.2d 862 (D.C. 1954).
4. 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).
5. State v. Vincent, 321 S.W.2d 439 (Mo. 1959).
6. 321 S.W.2d 423 (Mo. 1959).

hit another person than that intended by the defendant. The court pointed out that the accident which might be used as a defense on behalf of the defendant was the accidental firing of the gun, and not the accidental course the bullet took. Also, the fact that the defendant did not know and had no quarrel with, and did not shoot at the deceased was not a defense since the constitutive elements essential to convict of murder followed the bullet and were transferred to the actual victim when they existed with respect to the intended victim.

Three manslaughter cases recently reviewed[7] again point out that in manslaughter cases involving culpable negligence the particular negligent conduct must be of such reckless character as to indicate an utter indifference or disregard for human life. There must be more than ordinary common law negligence.

B. *Robbery*

State v. Hood[8] involved a first degree robbery charge in which the court set out an excellent discussion of the requirements for an information in such a charge. Also the court ruled that the state could properly cross-examine defense witnesses, who had admitted they were convicted felons, with regard to the exact nature of the crimes for which they had been convicted and the punishment assessed against them, inasmuch as the witnesses were then inmates of the state penitentiary and that such additional information with regard to their convictions and amount of punishment were matters affecting their credibility as witnesses.

In another first degree robbery prosecution[9] where defendant denied participation in the robbery and challenged indentification from photographs shown to witnesses at police station as well as personal indentification after being taken into custody, the photographs of defendant and another participant which had been identified by witnesses at police headquarters were held to be admissible as evidence.

C. *Burglary and Stealing*

The opinion in *State v. Pigques*[10] sets out in detail the elements of burglary, particularly the breaking and the entry that are necessary to

7. State v. Daugherty, 320 S.W.2d 586 (Mo. 1959); State v. Mayabb, 316 S.W.2d 609 (Mo. 1958); State v. Duncan, 316 S.W.2d 613 (Mo. 1958).
8. 313 S.W.2d 661 (Mo. 1958).
9. State v. Childers, 313 S.W.2d 728 (Mo. 1958).
10. 310 S.W.2d 942 (Mo. 1958), Faulkner, *Criminal Law—Burglary—Entry Defined*, 24 Mo. L. REV. 371 (1959).

constitute the offense. The evidence showed that the defendant broke open an outer wooden door with the intent to steal chickens in a building; that he then became alarmed and ran away before he breached an inner wire mesh door which barred his way to where the chickens were located. The evidence further showed that there would be some force or breaking necessary with regard to the wire mesh door before the defendant could have actually gained an entrance to the place where the chickens were located. The court held that the burglary had not been accomplished. Therefore, the trial court was correct in submitting the case on the basis of attempt to commit burglary.

In a prosecution for burglary and stealing[11] the court held that it was not error to permit testimony concerning the burglary of another business establishment on the same night as the one involved in the charge inasmuch as the evidence showed that both burglaries were accomplished on the same criminal excursion, the elements of each were common to both, and the loot was co-mingled. Also the evidence showed that there was a common scheme embracing two or more crimes so related to each other that the proof of one tended to establish the other.

In *State v. Jacobs*,[12] a stealing prosecution, the jury brought in a verdict of stealing without designating whether the property was of the value of fifty dollars. The evidence was that the property involved was of the value of 3,350 dollars and the defendant's sole defense was that of an alibi. The court held that the jury could lawfully reach only one of two alternative decisions. The defendant was either guilty or not guilty of stealing property of the value of 3,350 dollars and construed in the light of the record the verdict is free of ambiguity and clearly reflects that the jury found the defendant guilty of stealing the precise property described in the information.

In another stealing case[13] wherein the defendant's evidence was to the effect that he was going to return or discontinue the use of the property, the court held that it was error for the trial court to fail to instruct on this defense under the statutory provisions[14] which provide that if the property stolen is a chattel and the person charged with stealing the chattel proves by a preponderance of the evidence no further

11. State v. Ronimous, 319 S.W.2d 565 (Mo. 1959).
12. 321 S.W.2d 450 (Mo. 1959).
13. State v. Gale, 322 S.W.2d 852 (Mo. 1959).
14. § 560.156, RSMo (Supp. 1957).

transfer was made and that at the time of the appropriation he intended merely to use the chattel and promptly to return or discontinue the use of it, he has a defense to the prosecution. The court further pointed out that it was neither desirable nor appropriate for them to embark upon a full scale inquiry as to the scope, meaning, and effect of the new stealing statutes,[15] as such an inquiry was not necessary in this case, since a necessary instruction was not given. Such an inquiry as to the scope, meaning, and effect of these new stealing statutes seems to be needed but to date there has not been a proper case before the court for it to consider such scope, meaning and effect.

D. *Arson*

In *State v. Paglino*,[16] defendant was convicted of homicide in perpetration of arson. There had been a reversal of an earlier conviction on the same charge[17] because the state had failed to show incendiary origin. In this case there was additional evidence presented by the state by experts who stated that the fire was such as would be a fire of incendiary origin, and also there was additional evidence in regard to the finding of a gasoline can in defendant's car when he was apprehended. The court pointed out that the prior ruling, that evidence was insufficient to sustain conviction, was not the law of the case on the second trial where there was new and material evidence introduced. Also, it was held that whether opinion evidence as to the cause of a fire is admissible depends upon whether facts and circumstances shown by the evidence are such that a person of special skill, by reason of training or experience, would be able to draw an inference from the facts established, where men of common experience would be left in doubt or without reason to form intelligently an opinion. Also, one expert testified that the fire was incendiary in origin. The court held that while this admittedly meant that it was set, such an opinion was not without factual support in the evidence. All expert testimony, to a certain extent, invades the province of the jury, because every opinion of an expert witness is an ultimate fact in the sense that it is a conclusion based upon facts supported by the evidence.

Another conviction for wilfully setting fire to and burning the house

15. §§ 560.156, .161, RSMo (Supp. 1957).
16. 319 S.W.2d 613 (Mo. 1958).
17. State v. Paglino, 291 S.W.2d 850 (Mo. 1956).

of another was reversed,[18] for the reason that there was not sufficient evidence to establish the corpus delicti. The corpus delicti in an arson case is not merely the burning of property but that it was burned by the wilful act of some person criminally responsibile for his acts and not by natural or accidental causes.

State v. Varsalona[19] was a prosecution for arson wherein defendant was charged with wilfully burning his own shop or warehouse. The court held that the information in this case was insufficient in that it did not charge that the life or property of another person was endangered, that the burning was done with intent to injure or defraud any person, and there was no charge of injury resulting to any person or thing as a result of this fire. The court pointed out that it was not the legislative intent to provide that every person who wilfully burns his shop or storehouse shall be guilty of a felony unless it is further shown that such an act endangered the life or property of others, defrauded or resulted in injury to others. The statute providing that every person who wilfully burns his shop or storehouse shall be guilty of a felony should be read and construed in connection with and in light of other statutes pertaining to arson.

In another arson prosecution,[20] defendant was convicted for burning insured goods with intent to defraud the insurer. The evidence showed that the defendant had the opportunity to set the fire, that there was the presence of motive, and that the defendant disclaimed, at the time of the fire, having sufficient insurance to cover his loss suffered. This made a sufficient case for the jury to consider. For those that are particularly interested in the elements of a charge of arson, it is suggested that you distinguish this case from *State v. Ruckman.*[21]

E. *Obtaining Money by False Pretenses*

State v. Gilpin[22] was a prosecution for obtaining money by false pretenses. In the trial evidence was admitted of a similar transaction consummated a little more than a month before the offense here charged. The court held that this was properly admitted and pointed out, as it has

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18. State v. Paillou, 321 S.W.2d 445 (Mo. 1959).
19. 309 S.W.2d 636 (Mo. 1958), Wall, *Criminal Law—Missouri—Arson—Intent Given to Statutory Requirements,* 24 Mo. L. Rev. 374 (1959).
20. State v. Ferrara, 320 S.W.2d 540 (Mo. 1958).
21. 253 Mo. 487, 161 S.W. 705 (1913).
22. 320 S.W.2d 498 (Mo. 1959).

often held, that in prosecutions for obtaining money or property by false pretenses, evidence that defendant committed or attempted similar offenses is admissible, if not too remote, in order to prove the criminal intent of the accused. This is a well established exception to the general rule that evidence as to other offenses is not admissible.

F. *Buying and Receiving Stolen Property*

Two cases involving prosecution for buying and receiving stolen property[23] point out that an essential element of the state's case under section 560.270, Missouri Revised Statutes (1949) is that the defendant be charged and evidence show that defendant received stolen property with intent to defraud. These cases point out that an information which alleged that defendant feloniously and fraudulently did receive said goods was not sufficient. It was pointed out that the statute covering this offense, prior to amendment in 1955, was a departure from the common law in that under the old statute intent to defraud was not a constitutive element of the statutory offense. The court further pointed out that the words feloniously and fraudulently did not sufficiently set out the necessary allegation of intent. The intent alleged must be intent on the part of the receiver of the stolen property.

G. *Criminal Contempt*

State v. Topel[24] involved a prosecution for contempt for refusal to answer questions before the Workmen's Compensation Commission. In approving the dismissal of the information the court held that the fact that defendant declined to tell where she lived on the ground that if she did so she might incriminate herself, did not result in making her guilty of contempt. The immunity from self incrimination is available before any tribunal in any proceeding.

H. *Driving While Intoxicated*

In a driving while intoxicated case,[25] defendant claimed that the verdict was unsupported by any evidence of felonious intent on the part of the defendant. The court held that there was ample evidence that defendant was driving the automobile involved, that he was at the time intoxicated, and that under the statutory provisions proof of these two elements is sufficient to sustain a conviction.

23. State v. Bryant, 319 S.W.2d 635 (Mo. 1959); State v. Harris, 313 S.W.2d 664 (Mo. 1958).
24. 322 S.W.2d 160 (St. L. Ct. App. 1959).
25. State v. Spurlock, 312 S.W.2d 843 (Mo. 1958).

I. *Misdemeanors*

State v. Graham[26] was a prosecution for exceeding a speed limit wherein the principal evidence of the state was based upon the use of a radar device. The opinion contains an excellent discussion of the various cases that have been decided with regard to the reliability of a radar device. The court held that radar as a device for detecting speed is a scientific principle so soundly established as to be accepted by the court. It was pointed out, however, that even though the court recognizes the scientific principle as such, nevertheless there must be a showing that the machine was properly tested and functional at the time and place of the occurrence. In this case the evidence showed the radar was set up a short time before the arrest, was checked by a State Patrol car being driven through the radar beam at 50 miles per hour and 70 miles per hour, the radar being compared with the recording of the patrol car speedometer, and also was checked by the tuning fork test. The court held that this was a sufficient showing of the reliability of the machine at the time and place in question. It was also pointed out that the operator of a radar machine could not be required to be familiar with all the scientific principles involved in the working of the machine as long as the operator was instructed as to the proper functioning and testing of the machine for use.

In a prosecution for disturbing the peace in violation of a city ordinance,[27] a judgment of conviction was reversed because the trial court erred in denying defendant's request for a jury trial even though defendant failed to appear at the trial. Also the court erred in trying the case without the presence of defendant in court.

State v. Smith[28] was a prosecution for operating a bawdy house in which the court held that it was not error to permit witnesses to testify that the house owned and occupied by the defendant had a bad reputation. This decision follows the general weight of authority that the reputation of a house is admissible upon the issue as to whether it is a disorderly house.

A judgment of conviction on the charge of wilfully and unlawfully supplying intoxicating liquor, to-wit: beer, to boys under the age of

26. 322 S.W.2d 188 (Spr. Ct. App. 1959). See also Hough, *Arrest in Missouri By the Use of Radar Speedmeters*, 24 Mo. L. REV. 196 (1959).
27. City of St. Louis v. Walker, 309 S.W.2d 671 (St. L. Ct. App. 1958).
28. 310 S.W.2d 21 (Spr. Ct. App. 1958).

twenty-one years[29] was reversed because there was not evidence to establish that the beer which the boys were furnished contained alcohol in excess of three and two-tenths percent and therefore there was no evidence that the beer supplied to the boys was an intoxicating liquor.

State v. *Pilkinton*[30] was a prosecution for a violation of the compulsory school attendance law, wherein the conviction was reversed on the ground that there was not a sufficient information charging defendant with this offense. The information set out the allegations with regard to failure to keep the child in regular daily attendance in the public school but contained no charge that defendant did not provide such child with regular daily instruction at home substantially equivalent to instruction given to children of like age at a day school. The court pointed out that under the statutes with regard to this offense[31] the exceptions must be pleaded in the indictment inasmuch as they are a part of the statutory definition of the offense.

In a prosecution for operating an improperly licensed motor vehicle,[32] the court held that where a vehicle was the property of a Delaware corporation, which had only a statutory agent in that place, and which had its principal place of business in Indiana where the vehicle was based, garaged, repaired, and licensed, the corporation was a resident of Indiana within the meaning of the reciprocity statute referring to registration of out of state vehicles. A corporation may have more than one residence and the term residence must be defined according to the situation in which it is used. In this case the determination of the definition of residence was based upon the reciprocity agreement involved and the background and legislative intent with regard to the reciprocity agreement. *State v. Brunow*[33] was a similar case.

J. *Habitual Criminal Act*

In a prosecution where a defendant was convicted under the Habitual Criminal Act,[34] it was held that subsequent repeal of statutes under which prior convictions of felonies were had was not material to issues involved in prosecution under Habitual Criminal Act at this time, and

29. State v. Patton, 308 S.W.2d 641 (Mo. 1958) (en banc).
30. 310 S.W.2d 304 (Spr. Ct. App. 1958).
31. §§ 164.010—.110, RSMo 1949.
32. State v. Tustin, 322 S.W.2d 179 (Spr. Ct. App. 1959).
33. 320 S.W.2d 80 (K.C. Ct. App. 1958).
34. § 556.280, RSMo 1949.

there is nothing within that act that requires that the statutes must still be in force and effect when the second or subsequent offense is committed, and a prosecution instituted.[35]

State v. Nolan[36] was a prosecution for murder under the Habitual Criminal Act wherein the defendant alleged error in permitting evidence of prior convictions. His basis for this allegation was that defendant served a sentence in the intermediate reformatory and not the penitentiary. The court pointed out that since the offense for which he served a term was punishable by imprisonment in the penitentiary, the fact that the defendant was sent to serve and did serve his term at the intermediate reformatory would not make the Habitual Criminal Act inapplicable. Also the defendant claimed that the prior conviction was too remote to be admitted in evidence, in that it occurred twenty-two years before the instant charge. The opinion stated that since the Habitual Criminal Act does not contain a maximum time limit, the remoteness of a prior conviction would not affect the admissibility of evidence of such prior convictions. The defendant further complained that such evidence of prior convictions violated the right of privacy and was unconstitutional. The Habitual Criminal Act has previously been found to be constitutional and the court still had that opinion. Such evidence did not violate the right of privacy inasmuch as the judicial disclosure that a person has been convicted is privileged and communication of even private matters does not violate privacy when the publication would be a privileged communication under principles governing libel and slander.

In another prosecution involving the Habitual Criminal Act,[37] the state offered an exhibit in evidence which was a certified transcript of defendant's record in the state penitentiary. In this exhibit there was a list of the former imprisonments of the defendant, which included imprisonments that were not pleaded in the information. The court held that this was prejudicial error inasmuch as the mention of imprisonments that were not pleaded was inadmissible because not properly related to the cause on trial. The exhibit could properly have been admitted, but its use should have been limited by excluding from the jury the reference to the imprisonments that were not pleaded in the information.

35. State v. Richardson, 315 S.W.2d 139 (Mo. 1958). See also a later affirmance of the same case, 321 S.W.2d 423 (Mo. 1959).
36. 316 S.W.2d 630 (Mo. 1958).
37. State v. Dunn, 309 S.W.2d 643 (Mo. 1958) (en banc).

II. TRIAL

A. *Evidence*

In a prosecution for molesting a minor,[38] the court held that where evidence tends to show commission of impropriety with the prosecuting witness at or about the same time and place that defendant committed an indecent act with another boy, the act with other boy formed a part of the res gestae and the admission of evidence thereof was not improper. The two acts were so inseparably connected and interrelated that evidence of one necessarily tended to show the other. The two improprieties were not independent but were concomitant. Also the defendant testified that he had never committed the acts specifically charged with prosecuting witness or with anyone else. The court held that it was proper rebuttal evidence for the state to show that defendant had committed the same act with the other boy earlier in the same year.

State v. Scown[39] involved a charge of abortion. There were several questions raised with regard to cross-examination and the opinion contains an excellent discussion of the scope of cross-examination of a defendant. The state in cross-examining a defendant who has testified in his own behalf is not confined to a categorical review of matters covered or stated in the direct examination and may cover all matters within the fair purview of direct examination.[40] Generally evidence of a different crime is inadmissible but where proof of other offenses may tend to establish motive or intent, or absence of accident or mistake, or identity of defendant, or a common scheme or plan embracing commission of separate similiar offenses so interrelated that proof of one tends to establish the other, proof of such other offenses is usually held to be admissible.

State v. Greer[41] was a case in which defendant was convicted of statutory rape of defendant's daughter. Error was claimed in the court's permitting defendant's wife to testify on behalf of the state. The court restricted the evidence of the wife to what she found when she returned home and found defendant and the child together. The court upheld the conviction, pointing out that the law of necessity alters the general rule

38. State v. Wilson, 320 S.W.2d 525 (Mo. 1959).
39. 312 S.W.2d 782 (Mo. 1958).
40. See also State v. Brown, 312 S.W.2d 818 (Mo. 1958).
41. 313 S.W.2d 711 (Mo. 1958).

of competency under such circumstances, and the force and effect of the common law decisions is such as to permit the husband and wife to testify against each other on charges affecting their persons and liberties. The opinion did not mention that there might be any distinction between the husband and wife testifying against each other on charges affecting their persons and on charges affecting their children, rather than themselves.

In *State v. Hamilton*,[42] a prosecution on the charge of sodomy, the state on cross-examination of the defendant asked questions which would tend to impeach his credibility. After receiving unfavorable answers to these questions the state offered and was allowed to present rebuttal testimony to show defendant's answers to such questions were not true. This rebuttal testimony was held to have been erroneously admitted inasmuch as the state was bound by the defendant's answers on matters going to his credibility.

In the *Daugherty* case, the evidence showed that a blood test was taken from defendant when he was not conscious. However, at a later date defendant signed a waiver giving permission for the authorities to examine his blood for its alcoholic content. The trial court, out of the hearing of the jury, conducted an examination as to the voluntariness of the defendant's waiver, determined that the same was voluntary and ruled that the action of the defendant did constitute a waiver of any complaint that the blood used for the test had been extracted without his consent. The appellate court found that such action was not erroneous.

In a prosecution for second degree murder,[43] the evidence showed that defendant threw the pistol used into the river after the shooting. The court held that the use of a similar gun by an expert witness to explain its operating mechanism as tending to meet defendant's testimony that he accidentally fired the shots was not improper on the ground that it was not the gun used by the defendant. It was pointed out that the objections were not timely and further stated that such evidence was competent under the record. It tended to meet the defendant's testimony.

B. *Instructions*

In *State v. Butler*,[44] defendant was prosecuted for stealing. The

42. 310 S.W.2d 906 (Mo. 1958).
43. State v. Richardson, 321 S.W.2d 423 (Mo. 1959).
44. 309 S.W.2d 155 (Spr. Ct. App. 1958).

question was raised as to the instruction given on the credibility of witnesses, and the court held in view of the conflict in evidence the trial court did not abuse its discretion in giving a credibility instruction with a "falsus in uno, falsus in omnibus" clause attached. Even though such instructions are often used, the court pointed out that they are received more often with tolerance than with favor, and the giving of same is largely within the discretion of the trial court. However, such an instruction should not be given where there is no conflict or basis for conflict in the evidence. Two other cases[45] discussed in some detail instructions as described above and pointed out that the same were subject to criticism and were looked upon with disfavor, although as yet this alone had not resulted in a reversal of any particular case.

In a prosecution for forcible rape,[46] defendant objected to the fact that some of the instructions given were on printed forms and others were typewritten, which he alleged would tend to give undue emphasis to the typewritten forms and to those instructions. The court held that there was nothing wrong with presenting instructions in a printed form and presenting other instructions in typewritten form.

State v. Andrews,[47] a prosecution for robbery, was a case where the trial court gave two forms of verdict. One form was the standard verdict form, the other informed the jury that if they agreed upon a verdict of guilt but were unable to agree upon the punishment to be inflicted, the court could assess the punishment. In answer to the complaint that these were conflicting instructions, the court held that these two verdicts were not conflicting and pointed out that the same were not even instructions, but verdicts, contrary to the allegation of error alleging conflicting instructions.

In the *Daugherty* case, the evidence showed that the defendant had been drinking at the time that the automobile accident occurred. Defendant complained that the trial court did not instruct the jury that defendant could not be convicted merely because he had been drinking. The court held that the failure to so instruct was not error inasmuch as the defendant did not make a request for such an instruc-

45. State v. Butler, 310 S.W.2d 952 (Mo. 1958); (same defendant as Butler case, *supra* note 44, but a different charge); State v. Rack, 318 S.W.2d 211 (Mo. 1958).
46. State v. Stehlin, 312 S.W.2d 838 (Mo. 1958).
47. 309 S.W.2d 626 (Mo. 1958).

tion, and since this was a collateral matter, it was necessary for the defendant to make such a request if he desired such an instruction.

C. *Trial Procedure*

In *State v. Spurlock*,[48] a felony case, the defendant complained that he was not afforded a preliminary hearing before a qualified magistrate. This question was raised for the first time in the unverified motion for new trial, and no proof was offered to support the assignment of error. The court held that if the defendant desired to raise the question he should have filed a plea in abatement, and offered proof. By his action of pleading to the information and going to trial he waived that question and he cannot on appeal complain that he was not afford a preliminary hearing.

In a prosecution for forcible rape,[49] after conviction it was found that one of the jurors was distantly related to the defendant. The trial court refused to grant a new trial on this basis and the appellate court held that such action was not error inasmuch as such relationship could not be claimed to be prejudicial in view of the fact that the record did not show that either the defendant or juror was aware of such relationship until after the trial had concluded and, also, the defendant was presumptively helped by the relationship since it was his relative.

State v. Hampton[50] was a prosecution for stealing and burglary. The record showed that the trial court had interrupted the jury after about one hour's deliberation and at that time the jury informed the court that they had agreed upon guilt of accused but were unable to agree upon punishment. The trial court then instructed the jury that if they returned a verdict which agreed upon guilt but were unable to agree upon punishment the court could assess punishment, and thereafter the jury did return such a verdict and was polled in open court. Such action was not error in receiving an incomplete verdict notwithstanding the fact that the jury was not returned to the jury room for completion of its verdict. The court is charged with the duty of assessing punishment when a jury returns a verdict that is defective as to the punishment assessed and the trial court was not obligated to instruct the jury after they had said that they could not agree on punishment; however, it was indicated that

48. 312 S.W.2d 843 (Mo. 1958).
49. State v. Chandler, 314 S.W.2d 897 (Mo. 1958).
50. 317 S.W.2d 348 (Mo. 1958).

this is the best procedure. Also, the trial court was not obligated to have the jury return to the jury room inasmuch as the statutes provide that the jury can make its determination in the courtroom or retire to the jury room.

State v. James[51] was a prosecution for robbery in first degree. During the course of the trial the trial judge directed 165 questions to the witnesses with 163 of such questions occurring during examination of state's witnesses. The court pointed out that the judge was within his power in interrogating the witnesses, but that in this case he exceeded such powers in the manner in which he used them. The judge's discretionary power to interrogate witnesses is subject to certain limitations. Such extended interrogation by the trial judge as occurred in this case injected the judge himself too much into the trial of the case, and therefore his actions might have indicated to the jury a purpose to discredit the defendant and his witnesses or the defendant's case. The court felt that the trial judge was exhibiting a prosecutor's zeal inconsistent with the aloofness which courts have again and again demanded of the trial judge. He must not take the role of a partisan.

State v. Edwards[52] involved a prosecution for unlawful possession of heroin. Defendant complained that the trial court erred in refusing to require a police officer to divulge the name of his informant whose tip led to the arrest of defendant and discovery of narcotics hidden in defendant's car. The trial court did not require that the name be divulged although it did require that other information with regard to informant be provided. In making this ruling the trial court expressly stated that it was following the ruling in *State v. Bailey*,[53] which held that a police officer was not required to divulge the identity of an informant. The opinion in the present case overruled the *Bailey* case by saying that they did not believe any fixed rule with respect to disclosure is justifiable. The question of whether there would be a disclosure of the identity of a non-participating informant is to be determined essentially on whether it is necessary for the fair determination of the issue in any given criminal case, and that is up to the discretion of the trial court. This privilege of communication is a genuine privilege and must be based on the fun-

51. 321 S.W.2d 698 (Mo. 1959).
52. 317 S.W.2d 441 (Mo. 1958) (en banc).
53. 320 Mo. 271, 8 S.W.2d 57 (1928).

damental principles of privilege. The privilege is well established and its soundness cannot be questioned according to the court's opinion, but it is subject to certain limitations and disclosure must be made when it is relevant and helpful to the defense of the accused or is essential to a fair determination of the cause. Therefore the case was reversed and remanded because the trial court should exercise its discretion to determine whether such a disclosure as requested should be made in this case, and such discretion on the part of the trial court obviously was not available prior to this decision because of the ruling in the *Bailey* case. There was a strong dissent in this case in which the dissenting judge indicated that the rule in the *Bailey* case evidences a sound public policy vital to the protection of the public, and that the rule in the *Bailey* case should be followed.

D. *Motion to Vacate Judgment*

In several cases[54] the appellate courts set out the scope of Missouri Supreme Court Rule 27.26, which provides for motions to vacate judgments. These cases indicate that a hearing on such a motion is not required if the files and records of the original proceeding disclose that the prisoner is not entitled to such relief. Such a rule affords a prisoner a convenient means for an attack upon a judgment that is void or otherwise subject to collateral attack, but the rule does not broaden the right of attack or scope of review beyond that permitted in habeas corpus proceedings. Such a motion may not be used as a substitute for a motion for new trial or function as an appeal.

State v. Warren,[55] involving a motion to vacate judgment and sentence, presented the unique objection that the defendant was denied due process of law by reason of counsel being provided for defendant over his protest, notwithstanding defendant's right to defend himself. The charge involved was robbery, and the state waived the death penalty. The defendant refused the service of the office of public defender and dismissed two court appointed attorneys, one of whom he had requested by name. He stated he wanted to represent himself, and the trial court after observing defendant came to the conclusion that defendant needed the assistance of counsel, and provided defendant with counsel over defendant's objection. The court pointed out that this was not a capital case

54. State v. Moody, 312 S.W.2d 816 (Mo. 1958); State v. Rutledge, 317 S.W.2d 365 (Mo. 1958); State v. Jarrett, 317 S.W.2d 368 (Mo. 1958).

55. 321 S.W.2d 705 (Mo. 1959).

since the death penalty was waived; however, they stated that it would seem to be the duty of the trial court to appoint counsel for defendant in such a case, and therefore that defendant was not denied due process of law. The court cited the case of *Powell v. Alabama*,[56] which held that in a capital case counsel should be appointed, even though the same is not requested by defendant if defendant is unable to employ counsel and is incapable adequately of making his own defense. The court could see no readily apparent reason why the minimum standard of due process of law should depend upon the permissible punishment and they pointed out that the basic requirement for due process of law is applicable to a non-capital case. Therefore counsel should be appointed even though it is not a capital case if it is shown that defendant is unable to employ counsel and is incapable of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like. This would seem to be some extension of the rule first established in the *Powell* case.

III. Appeal

It was very noticeable in the cases reviewed that many of the assignments of error relied upon by the appellants before the appellate courts were not considered because they were not sufficient to comply with the rules[57] pertaining to motions for new trial, and preserved nothing for review. Also many assignments were overruled because they were so general and vague as to fail completely to preserve anything for review. Also there were many allegations in the motions for new trial for which there was no proof. Unverified allegations in criminal cases do not prove themselves and cannot be considered unless substantiated by the record.[58]

State v. Harris[59] involved a prosecution for possession of lottery tickets, which was a misdemeanor. The St. Louis Court of Appeals transferred the case to the supreme court[60] for the reason that defendant had properly raised and preserved a question involving construction of the

56. 287 U.S. 45 (1932).
57. Mo. Sup. Ct. R. 27.20.
58. State v. Whitaker, 312 S.W.2d 34 (Mo. 1958); State v. Ulrich, 316 S.W.2d 537 (Mo. 1958); State v. Tompkins, 312 S.W.2d 91 (Mo. 1958); State v. Stehlin, *supra* note 47.
59. 321 S.W.2d 468 (Mo. 1959) (en banc).
60. 313 S.W.2d 219 (St. L. Ct. App. 1958).

constitution. The supreme court transferred the case back to the St. Louis Court of Appeals on the ruling that the supreme court will not assume jurisdiction on a constitutional question when the identical question has been finally settled by prior decisions of the supreme court. The question here was whether there was a lawful search and seizure and the basic question to determine was whether there was a lawful arrest. If there was a lawful arrest the search and seizure was lawful. The court pointed out that the only question with regard to lawful or unlawful search and seizure was whether or not there was a lawful arrest and this question was not a constitutional question and therefore should be determined by the court of appeals. It further pointed out that the supreme court had ruled many times that if an arrest was unlawful then the search and seizure was unlawful and that if there is a lawful arrest then the search and seizure is lawful. Therefore, since this constitutional question had been determined many times they should not assume jurisdiction on an identical question. This opinion would seem to be a restricted view as to the jurisdiction of the supreme court on constitutional questions, as compared with earlier cases. The court pointed out that insofar as the earlier cases and others hold or may be construed to hold that this court has jurisdiction of any case in which an appellant has properly raised and preserved a question of violation of constitutional provisions relating to unreasonable search and seizures, irrespective of and without reference to the further decisive matter of whether the exact question involving the construction of the constitution has been priorly adjudicated, should no longer be followed. There was a dissent in this case indicating that the prior cases should be followed and that the question was not only the *interpretation* of constitutional provisions but also the *application* of constitutional provisions.

State v. Morrow[61] was a prosecution for robbery. The defendant did not file a notice of appeal until approximately two and one-half months after judgment and sentence, there was no application for a special order extending time for the filing of such a notice, and the period for making application for such special order had expired. The court held that they had no jurisdiction over the appeal and dismissed it for failure to file a timely notice of appeal. The steps required after the filing of a notice of appeal are not inherently jurisdictional but the filing of a timely notice is a positive requirement of the validity of an appeal.

61. 316 S.W.2d 527 (Mo. 1958).

