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## Criminal Law in Missouri

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## CRIMINAL LAW IN MISSOURI\*

EDWARD H. HUNVALD, JR.\*\*

The bodies of a man and a boy are found in a field. The surrounding circumstances indicate that they were shot to death at the same time and by the same person. D is tried for the murder of the man and is acquitted. He is then brought to trial for the murder of the boy and is convicted. That D could be innocent of one crime and guilty of the other would appear to be impossible to one not acquainted with the intricacies of the law, especially of double jeopardy and related doctrines. To a lawyer the result should at least appear to be somewhat unusual. Yet it is not only possible, but under present Missouri procedure, this was a proper result in *State v. Varner*.<sup>1</sup>

After D's acquittal of the charge of murdering the man, under the doctrine of double jeopardy he cannot be tried again for that offense. Why does not this finding of not guilty also determine the criminal liability on the charge of murdering the boy? The answer usually given is that these are separate and distinct offenses, and each charge requires proof of facts not necessary to the other charge.<sup>2</sup> The proof of the death of the victim will differ in each case. It is logically possible for the acquittal in the first case to have been based on some factor relative only to the death of the man and this, of course, should have no bearing on D's guilt or innocence as to the charge of murdering the boy.<sup>3</sup>

However, it is also possible that the acquittal in the first case was based on a finding common to both offenses, such as, for example, that D

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\*This Article contains a discussion of selected 1959 and 1960 Missouri court decisions reported in volumes 324 through 334 of Southwestern Reporter, Second Series.

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1. 329 S.W.2d 623 (Mo. 1959).

2. *State v. Williams*, 263 S.W. 195 (Mo. 1924); see Annot., 20 A.L.R. 341 (1922). See also cases cited, Miller, *The Plea of Double Jeopardy in Missouri*, 22 Mo. L. REV. 245, 270 (1957). In applying the doctrine of double jeopardy Missouri follows the "separate and several offense" test and rejects the "same transaction" test in defining the "same offense." *State v. Williams*, *supra*; *State v. Brooks*, 298 S.W.2d 511 (St. L. Ct. App. 1957); *State v. Moore*, 326 Mo. 1199, 33 S.W.2d 905 (1930); Miller, *supra* at 269.

3. For example, that the death of the man was not caused by his being shot by D, but that he died from other causes.

was not present at the scene of the crimes. If this were so it would seem that the finding in favor of the accused at the first trial should be binding on the state and thus prevent the second trial.<sup>4</sup>

A third possibility is that the state did not receive a fair trial in the first instance and the acquittal was the result of an error of law committed by the trial court. The state cannot appeal from the acquittal<sup>5</sup> and so there is no way of determining by appellate review if there was such an error, and consequently there is no way of correcting it. In multiple offense situations the state, by bringing another charge after an acquittal, can, in effect, have a new trial. Yet this is a new trial "granted" upon the belief of the prosecution that the first trial was a miscarriage of justice without any judicial determination or review of that question.<sup>6</sup>

One other possibility is that, while no error of law was committed by the trial court, the jury acquitted because they were perverse or prejudiced and, ignoring the evidence or the instructions, decided the case on some basis that should have been irrelevant to the proceedings.<sup>7</sup>

In deciding what logical effect the prior acquittal should have on the second charge one is severely hampered by the difficulty of determining the

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4. The doctrine involved is usually called "collateral estoppel" although it is sometimes referred to as "res judicata" when applied to criminal cases.

"Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action . . ." RESTATEMENT, JUDGMENTS § 68 (1942). For an excellent discussion of the application of this doctrine to criminal cases, see Mager, *Double Jeopardy and Collateral Estoppel in Crimes Arising From the Same Transaction*, 24 MO. L. REV. 513 (1959).

5. Miller, *supra* note 2, at 295. MO. RULES 28.04, RSMo 1957 Supp. and §§ 547.200, .210, RSMo 1949, allow a very limited appeal on the part of the state. None of these provisions permit an appeal from a jury verdict of acquittal.

6. This "ace in the hole" technique of holding back a charge paid off for the prosecution in *State v. Hoag*, 21 N.J. 496, 122 A.2d 628 (Sup. Ct. 1956), *aff'd*, 356 U.S. 464 (1958). The conviction was affirmed by the state supreme court, and the United States Supreme Court ruled that the failure to apply the doctrine of collateral estoppel did not violate due process. Both decisions were by divided courts. In earlier affirming the same conviction the Superior Court of New Jersey stated: "Assuredly our prosecutors are aware that the concept of double jeopardy is designed to prevent the government from unduly harassing an accused, and we are confident that they will not resort unfairly to multiple indictments and successive trials in order to accomplish indirectly that which the constitutional interdiction precludes." *State v. Hoag*, 35 N.J. Super. 555, 562, 114 A.2d 573, 577 (Super. Ct. 1955).

7. Phrased differently, this disregard of the law and evidence has been called a virtue of the jury system in that it provides flexibility by "popular justice." See, e.g., Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUD. Soc'y 166, 170 (1928).

basis of the acquittal, since, in nearly all criminal cases, the jury returns a general verdict.<sup>8</sup>

Allowing the second trial requires an assumption that the first acquittal was based on some factor peculiar to that charge, or that the state did not receive a fair trial, or that for some reason, the first affair was a travesty of justice. Are any of these assumptions so likely that the defendant should be forced to undergo another trial? As pointed out above, no matter what the reason for the acquittal, the defendant cannot be tried again for that offense. Should this same protection be granted as to a different offense arising out of the same transaction, an offense for which criminal liability may depend upon a fact already found in defendant's favor?

The choice of subjecting a possibly innocent person to two costly and wearing trials or of letting a person who may be a double murderer go free because of a mistake made in the first trial is not one capable of easy solution.<sup>9</sup> Certainly, the commission of several offenses should carry a greater penalty than that for a single offense. But to permit in all cases of multiple offenses a second trial after the first acquittal solely because the defendant might be guilty is arbitrarily denying protection against the harassment of continuous prosecutions.<sup>10</sup>

There is one obvious course of action that would reduce the likelihood that such problems will arise and that is, trying the defendant for all of the offenses at one proceeding. Why was this not done in *State v. Varner*?

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8. The major exception is the verdict, "Not guilty by reason of insanity." Such a verdict should be final as to all other offenses arising out of the same transaction. Even this verdict can raise problems as to its effect on offenses not a part of the same transaction but very close in time to the offense charged. For example, defendant was tried on a charge of rape allegedly committed on January 21, 1957. The jury found him not guilty of that offense by reason of insanity, and moreover found that he had not entirely and permanently recovered as of April 10, 1957. Later defendant is tried on a charge of robbery, (the evidence indicating the commission of a rape also), allegedly committed on January 22, 1957. What effect should the prior finding have in the second case? *Factual situation based on State v. Grapper*, 328 S.W.2d 633 (Mo. 1959).

9. For a proposed solution see Mager, *supra* note 4.

10. Similarly, allowing a series of trials, each resulting in a conviction, could be unfair to the defendant. In *Ciucci v. Illinois*, 356 U.S. 571 (1958), defendant had been charged in four separate indictments with murdering his wife and three children. In the first trial defendant was found guilty of murdering his wife and sentenced to 20 years; in the second trial for murdering one of the children, he was found guilty and sentenced to 45 years; and in the third trial for the murder of another child, he was convicted and sentenced to death. The Supreme Court affirmed the conviction against the claim of a violation of due process. The dissenting opinion stated: "This case presents an instance of the prosecution being allowed to harass the accused with repeated trials and convictions on the same evidence, until it achieves its desired result of a capital verdict." 356 U.S. at 573.

The answer is that, until the recent case of *State v. Terry*,<sup>11</sup> the well established rule in Missouri was that there could not be one trial resulting in conviction of two distinct offenses.

As a general rule it is a misjoinder to include separate and distinct offenses in one information or indictment.<sup>12</sup> However, such joinder does not make the charge "bad as a matter of law,"<sup>13</sup> and thus the subsequent proceedings may not be invalid if the defendant fails to object to the joinder. Prior to *State v. Terry* Missouri courts had been strict in the application of the rule that, except where specifically authorized by statute,<sup>14</sup> a defendant could not be convicted of more than one offense in a single proceeding.<sup>15</sup> Moreover, the court had ruled that it was the "absolute duty" of the trial judge to require the prosecution to elect which single offense was to go to the jury, even without a request by the defense for such an election.<sup>16</sup>

In *State v. Terry* the defendant had been charged in one information with the crimes of burglary ("... with intent to commit rape") and rape. The defendant made no objection to the joinder of offenses and no motion to require the prosecution to elect which offense was to be submitted to the jury. Both counts went to the jury and the jury found the defendant guilty on both counts. The convictions were affirmed, the court stating that there was no express prohibition against joinder of distinct offenses, or against conviction of more than one offense at one time,<sup>17</sup> and that "there appears to be no reason for the established rule in Missouri which should prevent a waiver of that rule,"<sup>18</sup> and since the joinder is not bad as a matter of law, the defendant could waive the rule against multiple convictions. The court then stated that the defendant's failure to raise the question in his motion

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11. 325 S.W.2d 1 (Mo. 1959).

12. "... only such offenses may be joined as arise out of the same transaction, and which are so far cognate as that an acquittal, or conviction for one, would be a bar to a trial for the other." *State v. Christian*, 253 Mo. 382, 394, 161 S.W. 736, 739 (1913). See also Mo. RULES 24.01, RSMo 1957 Supp.

13. *State v. Gholson*, 292 S.W. 27, 28 (Mo. 1927).

14. See, e.g., § 560.110, RSMo 1957 Supp.

15. See cases cited *State v. Terry*, *supra* note 11, at 4. With this rule in effect, the only way to secure the greater penalty deserved by the commission of multiple offenses was by a series of separate trials for each offense.

16. *State v. Presslar*, 316 Mo. 144, 149, 290 S.W. 142, 144 (1926), *overruled on this point*, *State v. Terry*, *supra* note 11.

17. Neither, however, was there any express allowance of such a practice except as to specific crimes.

18. *State v. Terry*, *supra* note 11, at 5.

for a new trial constituted an "election" to be tried on both charges at one time.<sup>19</sup>

It is not possible to state what the effect of *State v. Terry* will be. Since there is statutory authority for the joinder of burglary and stealing in connection with the burglary,<sup>20</sup> it was not too great a step to allow joinder of burglary and rape in connection with that burglary. How will this decision affect multiple offenses such as the two murders in *State v. Varner*?

The reason for the reluctance to allow joinder of distinct offenses is to benefit the accused; to prevent the difficulty of defending more than one charge at a time,<sup>21</sup> and to prevent the jury from using evidence of one offense to convict of another.<sup>22</sup> If the defendant can waive the rule against two convictions in a case of burglary and rape, there does not seem to be any reason why it cannot also be waived in other cases of multiple offenses arising out of one transaction. In the fact situation of *State v. Varner* it is difficult to see how trying the defendant for both murders at one trial would have prejudiced the accused. It would not have increased the burden of defense counsel to defend two charges, since there does not seem to have been any matters of defense that would apply to one killing but not the other. The problem of having evidence of two crimes before the jury would not affect the defense since evidence of *both* crimes was allowed in each of the separate prosecutions.<sup>23</sup> In cases of multiple crimes, evidence of all the crimes is usually admissible in a prosecution for one, as the evidence of other crimes is needed to give a complete picture of the offense charged.<sup>24</sup>

The result of *State v. Terry*, then, should extend to other situations of multiple offenses, that is, waiver of the rule against joinder of the offenses and waiver of the rule against conviction of more than one offense should be allowed. It would seem that the second of these rules, that against more

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19. It is not clear from the opinion at exactly what point the waiver will occur. As a logical matter it seems clear that to avoid a waiver of the rule the defendant must make his motion *at least* prior to the submission of the case to the jury. As a practical matter the motion should, of course, be made at the earliest possible opportunity.

20. § 560.110, RSMo 1957 Supp.

21. *State v. Collins*, 297 Mo. 257, 265, 248 S.W. 599, 602 (1923), *State v. Terry*, *supra* note 11, at 5.

22. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 258-261 (1947).

23. One of the major contentions by defendant in *State v. Varner* was the alleged error of allowing evidence of the prior killing of the man, of which the defendant had previously been acquitted, in the trial for the murder of the boy. The court rejected this contention.

24. *State v. Millard*, 242 S.W. 923 (Mo. 1922). McCORMICK, EVIDENCE 328 (1954).

than one conviction in the same trial, could be dispensed with<sup>25</sup> and the matter disposed of by objections to the joinder of offenses in the indictment or information.

It would be an improvement in Missouri procedure to adopt a rule specifically allowing joinder of separate offenses arising out of the same transaction. This would remedy the somewhat inconsistent and indefinite approach that such a charge is defective but not "bad as a matter of law."<sup>26</sup> Such a joinder is allowed under the Federal Rules of Criminal Procedure.<sup>27</sup> It is certainly true that the trial of a defendant for more than one crime may, in many cases, be prejudicial to the defendant. In such instances, the proper remedy is a motion to sever, and this motion could be granted upon a showing of possible prejudice rather than as an absolute right.<sup>28</sup>

The next question is: should there be any requirement on the state to bring multiple charges at one time rather than letting the state divide a transaction into its separate and distinct offenses and wearing down the accused with a number of trials?<sup>29</sup> In other words, since it may in fact be beneficial to the accused to have the entire matter settled at one proceeding, is there any way he can insist on a one-shot trial? Also, is it not beneficial to the administration of justice to dispose of multiple offenses at one proceeding?

In this connection, the Tentative Draft of the American Law Institute's Model Penal Code<sup>30</sup> provides:

Section 1.08 Method of Prosecution When Conduct Constitutes  
More Than One Offense.

25. Except, of course, in those cases where the joinder of several offenses is for the purpose of avoiding a variance and a conviction under one count negates the possibility of guilt under another count.

26. See note 12 *supra*.

27. Rule 8(a) provides: "Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." See also *FED. R. CRIM. P.* 13.

28. *Cf.* Rule 14 of the Federal Rules of Criminal Procedure, which provides: "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

29. Under the doctrine of double jeopardy the state cannot "split up a single crime and prosecute it in parts or piecemeal." *State v. Brooks*, *supra* note 2, at 513. *Miller*, *supra* note 2, at 267. Should not this protection against harassment by a series of prosecutions apply to multiple offense situations?

30. *MODEL PENAL CODE* § 1.08 (Tent. Draft No. 5, 1956).

(1) . . . .

(2) *Requirement of Single Prosecution.* Except as provided in Paragraph (3) of this Section, if a person is charged with two or more offenses and the charges are known to the proper officer of the police or prosecution and within the jurisdiction of a single court, they must be prosecuted in a single prosecution when:

(a) the offenses are based on the same conduct; or

(b) the offenses are based on a series of acts or omissions motivated by a purpose to accomplish a single criminal objective, and necessary or incidental to the accomplishment of that objective; or

(c) the offenses are based on a series of acts or omissions motivated by a common purpose or plan and which result in the repeated commission of the same offense or affect the same person or the same persons or property thereof.<sup>31</sup>

(3) *Relief from Required Joinder.* When a person is charged with two or more offenses, the Court may order any such charge to be tried separately, if it is satisfied that justice so requires.

While even a casual reading of the above raises a good many questions of interpretation,<sup>32</sup> this section is worthy of careful study and consideration as a possible solution to some of the problems of multiple offenses. And, while *State v. Terry* is certainly a progressive step, the problem is still very much with us and, for the most part, unsolved.

#### SECRECY OF GRAND JURY RECORDS

In *State ex inf. Dalton v. Moody*,<sup>33</sup> a proceeding to oust from office a county prosecuting attorney for improperly nol-prossing indictments returned by a grand jury, the findings and conclusion of a special commissioner

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31. "The penalty for the failure to . . . [join all such offenses] . . . is that the state is thereafter barred from subsequently prosecuting for any such offense. . . . Of course no prosecuting attorney is required to prosecute for every offense of which the defendant may be guilty. His discretion remains. All that is required is that charges against the defendant, which are known to the proper officer of the police or prosecution and within the jurisdiction of a single court, be determined in a single rather than multiple trials." MODEL PENAL CODE § 1.08, comment (Tent. Draft No. 5, 1956).

32. The comments following the section deal with many of the questions, such as the meaning of "same conduct," "single criminal objective," and "common purpose or plan."

33. 325 S.W.2d 21 (Mo. 1959) (en banc).



were approved and the ouster denied. The court considered the use by the commissioner of the transcript of the proceedings before the grand jury, portions of which comprised the entire case of the state. The respondent objected to this as being an invasion of the secrecy of the grand jury. The court upheld the action of the commissioner on the grounds that, while this did not fall within any specific statutory exception to the rule of secrecy, exceptions to the rule are implied when "essential to the ends of justice," and this action did not violate any statutory provisions specifically prohibiting disclosure.<sup>34</sup>

In another county an assistant prosecuting attorney was suspected of wrongdoing and was indicted on a charge of soliciting a bribe. On the motion of the accused, a circuit judge issued an order allowing inspection and copying of the minutes of the grand jury insofar as they related to testimony of certain witnesses, those whose names were endorsed on the indictment of the defendant, and "all proceedings which transpired during the course of their presence . . . or in connection with their testimony . . . ." The prosecuting attorney brought prohibition to prevent the enforcement of these orders. In *State ex rel. Clagett v. James*<sup>35</sup> the court ruled that the circuit judge had the discretionary power to allow inspection of those portions of the minutes that contained testimony of the defendant and of those witnesses whose names were endorsed on the indictment,<sup>36</sup> but that the provision in the order allowing inspection as to any portions beyond this was in excess of the jurisdiction of the circuit court.<sup>37</sup>

#### CONFESSIONS, ADMISSIONS AND SELF-INCRIMINATION

On the question of the extent of the privilege against self-incrimination, the court repudiated the overly broad language of a prior decision<sup>38</sup>

34. *Id.* at 25, *relying on* *Mannon v. Frick*, 365 Mo. 1203, 295 S.W.2d 158 (1956).

35. 327 S.W.2d 278 (Mo. 1959) (en banc).

36. The court emphasized that they were not deciding the question of whether or not the order was a proper exercise of discretion, but only that the respondent had the discretion. 327 S.W.2d at 285. On rehearing the court approved the suggestion of the concurring judge that the respondent review the exercise of discretion so as to require disclosure "only of such parts of the transcript of the testimony as to which inspection may be deemed essential to meet the ends of justice." 327 S.W.2d at 291.

37. There were two dissenting judges to the main opinion. These two would have made the rule absolute. The opinion on rehearing was a per curiam opinion.

38. *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 1256, 232 S.W.2d 897, 902 (1950) (en banc); see *Annot.*, 24 A.L.R.2d 340 (1950). This case upheld the constitutionality of the Missouri sexual psychopath law.

that the constitutional privilege "applies only to a criminal case." In *State ex rel. North v. Kirtley*<sup>39</sup> the court stated that the privilege was available to a debtor in an examination under oath by a judgment creditor as to the debtor's means of satisfying the judgment. Nor could the debtor be compelled to answer under the provisions of a statute providing for immunity from prosecution for fraudulent conveyance of property,<sup>40</sup> as the statute did not provide absolute immunity.

As might be expected there were a number of cases in which the defendant sought to upset a conviction on some ground relative to the admission of a confession or admission into evidence. In none of these cases was a defendant successful, nor did any of the decisions indicate a tendency on the part of the court to alter the existing rules concerning the admissibility of such statements.<sup>41</sup> The Supreme Court reaffirmed its position that a failure to warn the accused of his constitutional rights regarding the making of a statement does not, in and of itself, render the statement inadmissible.<sup>42</sup> Nor will the fact that the statement was made while accused is in custody for several days automatically make the statement inadmissible.<sup>43</sup> The corpus delicti is sufficiently established by corroborating circumstances independent of the confession; it is not required that there be "full proof of the body of the offense, independent of the confession."<sup>44</sup>

#### SEARCH AND SEIZURE

In *State v. Harris*<sup>45</sup> the St. Louis Court of Appeals, in affirming a conviction of possessing lottery tickets, held that property which was acquired by the police as a result of an illegal arrest, where there was no

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39. 327 S.W.2d 166 (Mo. 1959) (en banc).

40. § 491.080, RSMo 1949.

41. See Howard, *Admissibility of Confessions of Guilt in Missouri*, 23 Mo. L. Rev. 331 (1958).

42. *State v. Laspy*, 323 S.W.2d 713 (Mo. 1959). (State's evidence, denied by defendant, showed that a warning was in fact given. Moreover defendant took the stand and testified to the same facts contained in the statement.) *State v. McCulley*, 327 S.W.2d 127 (Mo. 1959). (Statements made in response to questions by arresting officers at the scene of the crime and immediately after arrest). *State v. Thost*, 328 S.W.2d 36 (Mo. 1959). (Statements made at time of arrest, and no objection made as to their admission into evidence).

43. *State v. Phillips*, 324 S.W.2d 693 (Mo. 1959). (Defendant confessed while being held by Illinois authorities.)

44. *State v. Haun*, 324 S.W.2d 679 (Mo. 1959).

45. 325 S.W.2d 352 (St. L. Ct. App. 1959). The case had been retransferred to the St. Louis Court of Appeals in *State v. Harris*, 321 S.W.2d 468 (Mo. 1959) (en banc).

illegal search and seizure, had been properly admitted into evidence. Having insufficient grounds for arrest, but intending to make an arrest nevertheless, a St. Louis police officer came up to defendant, who was carrying a brown paper bag, displayed his badge, and said, "police officer." The defendant turned and ran. As he passed a garage, the defendant threw the paper bag onto its roof. He then stopped and submitted to arrest.<sup>46</sup> The police recovered the bag from the garage roof and discovered in it items relating to the "policy" game. The court ruled that no error had been committed in admitting the contents of the bag, as this evidence was not obtained as a result of a search of defendant's person or property, nor as a result of any seizure from defendant's possession, the defendant having "abandoned" possession by throwing the bag away. Apparently if defendant had kept a tight hold on the bag, the contents could not have been used against him.

#### MANSLAUGHTER—HEAT OF PASSION

In four cases the Supreme Court passed on the question of when, in a prosecution for murder, the evidence calls for an instruction on manslaughter. In *State v. Haynes*,<sup>47</sup> defendant claimed that the deceased had drawn a pistol, pointed it and "clicked" it twice without result. Defendant then knocked the gun out of deceased's hands, picked it up, and, seeing the deceased coming at her, fired the fatal shots.<sup>48</sup> On appeal defendant claimed the trial court erred in not giving an instruction on manslaughter. In affirming, the court followed the rule that lawful provocation to reduce murder to manslaughter requires personal violence, that is, physical violence to the person, and that a demonstration threatening imminent danger to life can not by itself amount to lawful provocation.<sup>49</sup> The court admitted that this was an arbitrary rule, but, quoting from an earlier decision, said: ". . . the law cannot have a rule exactly accommodating itself to the varied dispositions of people and altogether putting a premium on turbulent

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46. Although there were insufficient grounds for arrest, the police evidently had some reason to suspect defendant and had been observing him prior to this encounter.

47. 329 S.W.2d 640 (Mo. 1959).

48. The state's evidence showed a transaction somewhat at variance with the defendant's account.

49. Such a threat could provide defendant with the privilege of self-defense.

tendencies. A killing even in the heat of passion is not justifiable. For the proper administration of justice some absolute standard of conduct is required."<sup>50</sup>

A refusal to instruct on manslaughter was upheld in *State v. Williams*,<sup>51</sup> where, although there was physical violence and a struggle between defendant and deceased, the court ruled that since the struggle arose out of defendant's improper conduct toward the deceased's wife, it could not be considered lawful provocation.

However, in *State v. Smart*,<sup>52</sup> a conviction of second degree murder was reversed for failure to give a manslaughter instruction. After a high school basketball game a group of young people engaged in a rather riotous night on the town, or at least on the highway. The culmination of the evening's activities was the fatal shooting of one of the group. The evidence showed an assault and battery committed by deceased on defendant immediately prior to the shooting and the court ruled that this required an instruction on manslaughter even though the defense was self-defense.<sup>53</sup>

In *State v. Davis*,<sup>54</sup> a case similar in law, though quite different in fact, defendant overheard a telephone conversation between his wife and deceased that deceased was "coming over." Defendant left the house and

50. 329 S.W.2d 640, 646 (Mo. 1959), quoting from *State v. Bongard*, 330 Mo. 805, 816, 51 S.W.2d 84, 89 (1932). But see MORELAND, THE LAW OF HOMICIDE 75 (1952).

51. 323 S.W.2d 811 (Mo. 1959).

52. 328 S.W.2d 569 (Mo. 1959).

53. Cf. MORELAND, *op. cit. supra* note 50, at 77.

"The law of self-defense is based upon fear . . . . The law of voluntary manslaughter . . . is based upon heat of passion—heat of passion aroused by one of the acts which the law deems sufficient provocation to stir it up. The definitions are clear but it might be difficult to apply them in a case which falls close to the line between the two categories, because one of the definitions is framed in terms of 'fear' and the other in terms of 'heat of passion.' Is it possible to obtain a common denominator for the two definitions? Can they both be phrased in terms of 'fear,' for example? Suppose the jury concludes that the defendant feared 'substantial' bodily harm but had no heat of passion. He is not entitled to self-defense—he must fear 'grievous' bodily harm, as a minimum, to be entitled to self-defense.

"Would he be entitled to a verdict of voluntary manslaughter, nevertheless, by letting 'fear' substitute for 'heat of passion'? It is believed that he should and there are cases which support this conclusion. While fear does not raise heat of passion, it is an emotion equally as strong and may well substitute for it." If Moreland is correct, then the arbitrary rule of *State v. Hayes*, *supra* note 45, that a threat to life cannot be lawful provocation without a physical touching, is or can be wrong in a number of specific situations. Such, of course, is the major drawback to arbitrary rules.

54. 328 S.W.2d 706 (Mo. 1959).

later returned to discover his wife and deceased on a bed apparently "struggling." Defendant then went to his car, secured a .45 automatic, returned to the house and, seeing deceased rise up "as if to go to his hip pocket," shot him twice. Defendant also testified that if the deceased had not "raised up and made an attempt," he would not have shot him. The conviction of second degree murder was reversed on the grounds that failure to instruct on manslaughter, even without a request, was error. The discovery of the wife in the act of adultery provided the legal provocation. The state argued that there was no showing of an act of adultery and that the defendant's testimony did not show "heat of passion." The court rejected this by saying that the circumstances were sufficient to show the "probable existence" of heat of passion and spoke "more loudly" than the testimony of the defendant given "after long deliberation."

#### SEXUAL PSYCHOPATH LAW

One case dealt with the sexual psychopath law.<sup>55</sup> A prosecuting attorney brought an action under the statute to have a person declared to be a "criminal sexual psychopath." The trial court dismissed the petition and the state appealed. In affirming the trial court's action, the Kansas City Court of Appeals ruled, in *State ex rel. Wright v. MacDonald*,<sup>56</sup> that the state could appeal from the dismissal because an action under the statute is a civil, not a criminal proceeding. The court also stated that the case was not moot merely because the criminal charge, the filing of which was a prerequisite to bringing the action,<sup>57</sup> had been disposed of and the sentence served. Finally the court indicated the broad powers of the trial judge in disposing of this action. After ruling that medical testimony (in answer to hypothetical questions), that defendant "could" or "might" have the propensities to commit sexual crimes did not make out a prima facie case, the court stated that even had the testimony been that defendant "would" have such tendencies, the court as the trier of fact would not have to believe or follow this.

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55. §§ 202.700-770, RSMo 1949.

56. 330 S.W.2d 175 (K.C. Ct. App. 1959). For those familiar with the Columbia, Missouri, area the case is interesting also for its picturesque description of the "lyric" Hinkson Creek area.

57. § 202.710, RSMo 1949.

## CONCLUSION

While there were many other cases with interesting facets decided in the past year,<sup>58</sup> it is felt that the ones selected are those touching on areas of the criminal law which are, or ought to be, the subject of reconsideration.

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58. For example, on the constantly recurring problems of instructions, see *State v. Robinson*, 328 S.W.2d 667 (Mo. 1959), *State v. Winn*, 324 S.W.2d 637 (Mo. 1959), *State v. McWilliams*, 331 S.W.2d 610 (Mo. 1960), *State v. Lunsford*, 331 S.W.2d 538 (Mo. 1960), and *State v. Swinburne*, 324 S.W.2d 746 (Mo. 1959) (en banc). (This case shows the difficulties that can arise in instructing on the defense of insanity.) On manslaughter by culpable negligence, see *State v. Beach*, 329 S.W.2d 712 (Mo. 1959). (Conviction reversed because evidence that deceased, an infant of six weeks, was suffering from malnutrition and severe diaper rash was insufficient to show that death resulted from the culpable negligence of the defendants, the parents of the child). On use of radar in traffic cases, see *City of Webster Groves v. Quick*, 323 S.W.2d 386 (St. L. Ct. App. 1959). On attempted false pretenses, see *State v. Smith*, 324 S.W.2d 702 (Mo. 1959). On waiver of privilege against wife testifying, see *State v. Bledsoe*, 325 S.W.2d 762 (Mo. 1959). On receiving stolen property, see *State v. Brown*, 332 S.W.2d 904 (Mo. 1960). On issuing a check with intent to defraud, see *State v. Brookshire*, 329 S.W.2d 252 (St. L. Ct. App. 1959). (Conviction reversed; evidence of giving a post dated check in payment of taxes insufficient to make prima facie case where presentation and dishonor occurred prior to date check was payable). On administering poison with intent to kill or injure, see *State v. Fulkerson*, 331 S.W.2d 565 (Mo. 1960). On post conviction remedies, see *State v. Thompson*, 324 S.W.2d 133 (Mo. 1959) (en banc), *State v. Smith*, 324 S.W.2d 707 (Mo. 1959), *State v. Childers*, 328 S.W.2d 43 (Mo. 1959), and *State v. Hecke*, 328 S.W.2d 41 (Mo. 1959).