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Criminal Procedure - Distinct Offenses Enumerated in the Same Law - When and How Chargeable in the Same Count

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the mental attitude necessary to the recognition of this tenet. There have, however, been many expressions to the effect that the answer lies in quick, decisive judicial action. The desirability of one approach over the other is a question susceptible of too many sociological and political implications to be the subject of a legal treatise. It is believed that the Supreme Court will in the future adhere to its established policy and allow the states and the individual members of both races to iron out their difficulties in the spirit of cooperation and realization of mutual benefit.

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CRIMINAL PROCEDURE—DISTINCT OFFENSES ENUMERATED IN THE SAME LAW—WHEN AND HOW CHARGEABLE IN THE SAME COUNT—Defendant was prosecuted and convicted of the crime of reckless driving under an ordinance[1] defining reckless driving as embracing, inter alia, driving a vehicle "while under the influence of intoxicating liquor *or* narcotic drugs." The affidavit charged that the defendant "did operate said vehicle while under the influence of intoxicating liquor *or* drugs." *Held,* remanded to allow the affidavit to be amended. The defendant is entitled to know whether the charge is driving while under the influence of intoxicating liquor *or* under the influence of drugs or both. Where the offenses or methods of committing the offense are charged disjunctively and alternatively, the precise accusation against the defendant is left uncertain. *City of Shreveport v. Bryson,* 33 So. (2d) 60 (La. 1947).

The right of an accused in a criminal prosecution to be informed of the nature and cause of the accusation is one of the corner stones of Anglo-American justice.[2] Thus, in the instant case, it was held that this right may be denied by the use of the word "or" in place of the word "and."

Article 222 of the Louisiana Code of Criminal Procedure states a long-recognized rule:

> "Several distinct offenses, or the intent necessary to constitute such offenses, disjunctively enumerated in the same law or in the same section of a criminal statute, may be cumulated in the same count, when it appears that they are connected with

1. Ordinance 207 of 1923 of the City of Shreveport, § 35.

2. This right is guaranteed both by the Constitution of the United States (Amendment VI) and by the Constitution of Louisiana (La. Const. of 1921, Art. 1, § 10).

the same transaction and constitute but one act, but in that event they must be charged conjunctively."

The first hurdle to clear is whether the terms enumerated disjunctively in a criminal statute are actually several distinct offenses or methods or committing the offense, or whether they are only synonymous words. Where the term following the disjunctive "or" in the statute is synonymous, explanatory, or merely provides an alternative meaning of the preceding word, the use of the word "or" in the indictment is good. Thus, an indictment may validly charge that the defendant "did forge a certain *cheque* or *bill of exchange;*"[3] or "did sell spirituous or intoxicating liquors."[4]

In some instances a fine line is drawn between words which are synonymous or explanatory and those which constitute distinct offenses or methods of committing an offense. In *State v. Sullivan*[5] the pertinent statute imposed a sentence upon anyone attempting to prevent any witness from appearing and testifying "by force, *or* threat, *or* intimidation of any kind, *or* by persuasion." The indictment charged that the defendant by threats *or* intimidation attempted to prevent a witness from appearing and testifying. Quashing the indictment, the court stated that while it was true that a threat could be regarded as a form of intimidation, it was not the only form; and that the defendant had a right to know whether he was charged with the offense of preventing a witness from testifying by threats or with preventing the witness from testifying by intimidation in some other form.

The overwhelming weight of authority supports the holding in the present case.[6] An analogous situation had been presented in connection with charging the operation of a "blind tiger" under a statute which disjunctively enumerated the methods of committing the offense. An affidavit charging that the defendant "did unlawfully operate a blind tiger . . ., keeping intoxicating liquors for

3. State v. Maas, 37 La. Ann. 292 (1885).

4. State v. George, 134 La. 177, 63 So. 866 (1913).

5. 125 La. 560, 51 So. 588 (1910); immediately affirmed by State v. Hood, 125 La. 563, 51 So. 589 (1910).

6. State v. Fant, 2 La. Ann. 837 (1847); State v. Bogan, 2 La. Ann. 838 (1847); State v. Banton, 4 La. Ann. 31 (1849); State v. Markham, 15 La. Ann. 498 (1860); State v. Palmer, 32 La. Ann. 565 (1880); State v. Foster, 32 La. Ann. 84 (1880); State v. Flint, 33 La. Ann. 1288 (1881); State v. Richards, 33 La. Ann. 1294 (1881); State v. Samuels, 38 La. Ann. 457 (1886); State v. Romus, 48 La. Ann. 581, 19 So. 669 (1896); State v. Edmunds, 49 La. Ann. 271, 21 So. 266 (1897); State v. Behan, 113 La. 754, 37 So. 714 (1904); State v. Jackson, 163 La. 34, 111 So. 486 (1927); State v. Newton, 166 La. 297, 117 So. 231 (1928).

sale, barter, exchange, or habitual giving away" was pronounced defective on the ground that the defendant was entitled to be informed whether he was to be prosecuted for keeping intoxicating liquors for sale *or* barter *or* exchange *or* the habitual giving away of such liquors.[7]

In such cases, as in the principal case, the indictment or affidavit must charge in which manner the offense was committed. When the offense has been committed in more than one way—when more than one of the disjunctively-enumerated statutory conditions were met—these offenses or methods of committing the offense should be stated conjunctively. However, in such cases, it is not necessary that both be proved.[8]

An interesting collateral problem arises when the indictment uses the expression "and/or." Generally the courts have disapproved of the use of this device,[9] and labeled it on one occasion[10] a "certainty-destroying expression." The use of such language is highly dangerous, but in some instances the situation has been saved by the fact that the phrases thus joined were virtually synonymous, and no uncertainty as to the charge resulted.[11]

In earlier cases where uncertainty or duplicity were found, the indictment was quashed.[12] Following the modern trend away from technicality, the court, in the present decision, took the better view in remanding the case to allow amendment under Article 252 of the Louisiana Code of Criminal Procedure.

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7. State v. Nejin, 140 La. 37, 72 So. 801 (1916). See also State v. Barnette, 138 La. 693, 70 So. 614 (1916).

8. State v. Bryan, 175 La. 422, 143 So. 362 (1932); State v. Burns, 131 La. 396, 59 So. 823 (1912); State v. Selsor, 140 La. 468, 73 So. 270 (1916).

See also State v. St. Philip, 169 La. 468, 125 So. 451 (1929), where the information in one count charged that the defendant and two others "did . . . set fire to and burn, and cause to be burned, and did . . . , willfully . . . aid, counsel, and procure the burning of a dwelling house. . . ." The two alleged confederates were acquitted. Held, when the two others were acquitted, all that the defendant could be guilty of was burning the dwelling house.

9. Compton v. State, 129 Tex. Crim. Rep. 648, 91 S. W. (2d) 732 (1936); State v. Herndon, 339 Mo. 283, 96 S. W. (2d) 376, 118 A. L. R. 1375 (1936).

10. State v. Beacon Publishing Co., 141 Kan. 734, 42 P. (2d) 960 (1935).

11. In re Owen, 207 N. C. 445, 177 S. E. 403 (1934), involved an application filed before a proceeding of a state board of dental examiners for the revocation of the license of a dentist, alleging the dentist solicited business by "running paid advertisements and/or solicitation for professional business" in a newspaper.

12. See note 5, supra.