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DUPLICITOUS ALLEGATIONS IN INDICTMENTS

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THAT the West Virginia law as to duplicity in indictments is in confusion was recognized by the court in *State v. Howard*,[1] the most recent case in point.

> "As the situation stands, no one can know what is the law on the subject, or if he thinks he knows, cannot be certain how long it will remain the law, and this, I think, is to be deplored."[2]

These words of Judge Fox seem to describe aptly the current status of the West Virginia law as to duplicity in indictments, though they were used in reference to a different but somewhat related problem.[3]

"Duplicity" or "double pleading" consists of stating for one purpose two or more distinct grounds of complaint or defense when one of them would be as effectual in law as both or all of them.[4] This study will deal only with duplicity in indictments. More specifically, it will be an attempt to determine whether a count in an indictment charging the commission of two or more crimes is so faulty or defective that it will be held insufficient on a demurrer or motion to quash.[5] No attempt will be made to discuss

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[1] 137 W. Va. 519, 73 S.E.2d 18 (1952).

[2] Dissenting opinion in State v. Stollings, 128 W. Va. 483, 491, 37 S.E.2d 98, 101 (1946).

[3] The issue involved in the *Stollings* case was whether an indictment which charges in one count the commission of several distinct offenses in the disjunctive is bad on demurrer or motion to quash. If the commission of the several distinct offenses is charged in the conjunctive, the problem arises as to whether the count is bad on demurrer or motion to quash because of duplicity.

[4] State v. Vaughan, 93 W. Va. 419, 424, 117 S.E. 127, 129 (1923) (point 5 of the syllabus prepared by the court). See also Carlin, *Election of Causes or Grounds of Action in a Duplicitous Declaration*, 40 W. VA. L.Q. 241, 242 (1934). Mr. Carlin indicates that the term "duplicity" has been used to designate the situation where more causes of action than one or more defenses than one are alleged in a single pleading. As indicated in the text which follows, the term is here used in the more restrictive sense, namely, the situation where in a single count more than one ground for a conviction is alleged. This separates the problem here from that in misjoinder of offenses in separate counts in an indictment.

[5] In West Virginia, in criminal procedure, the common law general demurrer may be used to question the sufficiency of the allegations of the pleading. Without specification, every point of allegation is challenged. A defective allegation in an indictment may also be challenged by a general motion to quash. Without specification, such motion challenges every point of allegation. These two methods of attack may be employed interchangeably to reach all defects on the face of an indictment, whether of form or substance. In practice, they are often used in combination to reach such defects. For a more detailed treatment of the proper functions of a general demurrer or a general motion to quash, as contrasted with the use of a motion to quash with particularization of the points on which reliance is placed, see State v. DeBoard, 119 W. Va. 396, 194 S.E. 349 (1937).

the possibility of using a motion in arrest of judgment to reach such defect, nor will there be an analysis of the technique of requiring the state to elect a crime included in such count for which a conviction is sought. Whether the defendant may be convicted of more than one offense on such a count is also outside the scope of review. Joinder of offenses in separate counts of an indictment, for similar offenses or for the same offense committed in different ways,[6] will be mentioned only to the extent that it may have a bearing on the issue of joinder of offenses in the same count in an indictment.

In the *Howard* case, the court indicates that the following rules of law may be applied in deciding whether duplicity renders a count in an indictment bad on demurrer or motion to quash:

(1) The joining of two or more *misdemeanors* in a single count of an indictment will not make that count fatally defective, although such joinder of separate *felonies* will;

(2) If the form of the indictment is prescribed by statute, "the very statute itself bars an attack on the indictment on the ground of duplicity".[7]

Another principle was applied by the court in holding that the count was not duplicitous. This involved an examination to determine whether more than one crime was *effectually* charged. By definition a count will not be duplicitous if it charges the commission of only one crime, even though it may be defective for other reasons.[8] The court determined that the one-count indictment properly charged the "illegal sale of alcoholic liquor without a State license," and disregarded as surplusage the allegations of "aiding and abetting" in such sale since that part of the count did not properly charge the commission of such crime.[9]

These principles, expounded by the court in its latest decision in point, will serve as a starting point for an examination of the earlier decisions. Are these rules in accord with earlier decisions?

A. *Joinder of Misdemeanors and Felonies*

In the *Howard* case, the court indicates that two or more misdemeanors may, but that two or more felonies may not, be joined in the same count in an indictment. A third variation might have been enunciated, namely, that a felony and a misdemeanor cannot

[6] See Note, 57 W. VA L. REV. 196 (1955).

[7] 137 W. Va. at 541, 73 S.E.2d at 31.

[8] *E.g.*, it may not meet the requirement of W. VA. CONST. art. III, § 14, that the accused be fully and plainly informed of the character and cause of the accusation.

[9] 137 W. Va. at 541, 73 S.E.2d at 31.

be joined in the same count unless the lesser offense is included in the greater.[10]

A chronological treatment of the earlier decisions to determine the correctness of these and other rules applied to the problem would make the most interesting treatment of the subject, but would perhaps require more space than would be justified. In lieu of that approach the cases will be grouped as to the rules discussed without special treatment as to the time at which the limitations were developed.

Initially there is a group of cases, not overruled, which indicates that duplicity is merely a formal defect, whether the joinder be of misdemeanors or felonies, and that as such the defect cannot be reached by a demurrer or motion to quash because of the provisions of what is now Chapter 62, Article 2, Section 10, of the *West Virginia Code*.[11]. This principle was first enunciated in 1915 in *State v. Jarrell*,[12] which involved the joinder of misdemeanors. The court there described the rule forbidding duplicity as a technical rule, one not designed for the protection of the accused, and stated that in an indictment it is innocuous on demurrer since the statute provides that no indictment shall be quashed or deemed invalid "for the omission or *insertion of any* other *words of mere form* or surplusage".[13]

In *State v. Hudson*,[14] the joinder of felonies in one count of the indictment was involved. The court decided that the count, alleging that the defendant did "embezzle, abstract and wilfully misplace money, funds, and credits," charged three separate offenses and three separate objects as to each offense. Nevertheless, the court concluded that the count was not bad on demurrer by reason of the joinder of these offenses, because no objection could be taken for mere form under the provisions of this statute. Referring to the *Jarrell* case, the court made this comment:

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[10] Although the statement is here limited to the joinder in a single count of a felony and a misdemeanor, the rule apparently applies to the joinder of several distinct felonies in the same count if the lesser is included in the greater. See text at notes 30 and 37 *infra*.

[11] This section was adopted from the Virginia Code of 1860 and the wording has not been changed since its adoption. It provides that no indictment or other accusation shall be quashed or deemed invalid for numerous specified formal defects and then adds "or for the omission or insertion of any other words of mere form or surplusage."

[12] 76 W. Va. 263, 85 S.E. 525 (1915).

[13] *Id.* at 266, 85 S.E. at 526. Italics supplied.

[14] 93 W. Va. 435, 117 S.E. 122 (1923).

". . . That case involved a joinder of misdemeanors in the same count; this case a joinder of felonies. But the statute . . . makes no distinction. It applies to all indictments."[15]

To determine the correctness of one of the instructions which had been given, the court analyzed the indictment count and determined that the instruction was not applicable to the case, since the count *properly* charged only embezzlement and that only as to one object. The court might have taken this approach of only one offense effectually charged to determine that the count was not duplicitous;[16] but the court placed its decision as to duplicity squarely on the statute.

On the same date that the *Hudson* case was decided, the court handed down its decision in *State v. Vaughan*,[17] both opinions having been written by Judge Meredith. Duplicity had been urged on the basis of joinder in the same count of a charge of felony with charges of separate and distinct misdemeanors. The court met this contention by finding that no felony had been charged. It is evident that avoidance of the applicability of the statute as to joinder of felonies in the same count was not desired in the *Hudson* case, for this same approach might have been used there.[18] In the *Vaughan* case, the statute was held to save the count from a demurrer or motion to quash though the charges of separate misdemeanors remained therein.

The contention that a count was fatally defective for having alleged two separate and distinct felonies therein was next made in *State v. Perry*.[19] In the count there were charged both forgery of an instrument and uttering of that instrument. The court agreed that the count charged two distinct felonies, agreed that it was thus improper to join them in the same count even though the offenses were of the same general nature; but *held* that, being merely duplicity, it was a fault in form only and that the count was not subject to demurrer or motion to quash on that ground. To support its position, the court cited the *Jarrell* and *Vaughan* cases. The *Hudson* case was cited in this connection to indicate that the state might be required to elect the offense on which it would stand for conviction, but was not cited as to duplicity being merely a formal defect. In *State v. Runnion*,[20] there were two counts in

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[15] *Id.* at 443, 117 S.E. at 125.
[16] For treatment of this approach, see part D of text.
[17] 93 W. Va. 419, 117 S.E. 127 (1923).
[18] See text at note 16 *supra*.
[19] 101 W. Va. 123, 132 S.E. 368 (1926).
[20] 122 W. Va. 134, 7 S.E.2d 648 (1940).

the indictment and each alleged both forgery and uttering. Again the court held that the separate felonies might be charged in each count of the indictment, citing the *Perry* case to support the holding.

In *State v. Digman*,[21] the indictment, with only one count, charged the defendant of rape, of being present aiding and abetting another to commit rape, and of unlawfully aiding, abetting, procuring, hiring and employing another to commit rape. Thus, in one count, the defendant was charged as both a principal in the first and second degrees and also as an accessory before the fact.[22] It is interesting to note that this single count also included accusations against the other joint defendant. Although the court did not approve this form of indictment, it held that it was not "open to the question that it does not give the accused adequate information concerning the charge against him." The indictment was held sufficient, the court citing the *Vaughan* case in support of this conclusion.

In these more recent cases permitting joinder of distinct felonies in the same count, citing the *Hudson* case therein for support would have strengthened the decisions.

Although the more recent of these decisions do not specifically refer to the statute as being the basis of the decision, they do rely directly upon decisions which held that duplicity, being merely a formal defect, cannot be reached by a demurrer or motion to quash under the provisions of *West Virginia Code*, Chapter 62, Article 2, Section 10. The statute was applied in effect whether joinder was of felonies or misdemeanors. Looking only at this series of cases, it would seem that the law in this jurisdiction was clear by 1940.[23] These cases never having been overruled to date, it would seem that duplicity alone would no longer render any count fatally defective.

However, both during the period covered by these decisions and since 1940, the issue has been raised so many times and discussed at such length by the court that this approach seems unsafe. The *Howard* case, the most recent decision in point, is

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[21] 121 W. Va. 499, 5 S.E.2d 113 (1939).

[22] Rape being a felony, a principal in the second degree or an accessory before the fact is "punishable as if he were the principal in the first degree." W. VA. CODE c. 61, art. 11, § 6 (Michie 1955).

[23] The *Jarrell* case was decided in 1915 and the *Runnion* case in 1940. In the interim the court had applied the statute or decisions based thereon to bar attack on the basis of duplicity in the *Hudson, Vaughan, Perry* and *Digman* cases. The *Hudson, Perry, Digman* and *Runnion* cases all involved joinder of felonies in the same count.

typical of the manner in which the problem occasionally has been treated by the court; the earlier decisions, holding that the statute bars an attack on a count for duplicity even though the joinder be of felonies, having been overlooked.[24] Except for the cases applying the statute, or citing cases based thereon, each case seems to have been treated on an *ad hoc* basis with various other principles being discussed. For example, in the *Howard* case, the second of the rules expounded was that the form of the indictment being statutory barred an attack thereon on the ground of duplicity.[25]

B. *Lesser Included Offense*

Before discussing the statutory-form-indictment rule, it seems appropriate here to discuss another principle which has often been applied and is more closely related to the felony-misdemeanor approach already discussed.

In the *Vaughan* case, the court said that the charge of duplicity was being urged, "but in an unusual way,—that is, that there is a joinder in the same count of a charge of *felony with* charges of various separate and distinct *misdemeanors*".[26] This type of duplicity had been noted in earlier West Virginia decisions, but in each case an exception had been suggested, namely, that a misdemeanor might be joined in the same count where the misdemeanor charged was necessarily included in the greater offense. In *State v. Tomlin*,[27] in a one-count indictment the defendant was charged with both operating and possessing a "moonshine still." The court took the position that, even though possession was a separate offense and a misdemeanor, it was also an incident to and included in the offense of operating a "moonshine still," the greater offense including the lesser. The court indicated that if such possession were not "incidental to or included in" the other offense charged, the indictment might have been quashed because a felony was joined with a misdemeanor. This decision was followed and applied to these

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[24] In State v. Wisman, 98 W. Va. 250, 252, 126 S.E. 701, 702 (1925), the court said that "it is a violation of the fundamental laws of pleading to charge two separate felonies in the same count of an indictment," and concluded that, in order to sustain the indictment, it was necessary to find that only one felony was properly charged in the count therein. This is the case which the court cited in State v. Howard, 137 W. Va. 519, 541, 73 S.E.2d 18, 31 (1952) for the proposition that separate felonies may not be properly charged in a single count of an indictment.

[25] 137 W. Va. at 542, 73 S.E.2d at 31.

[26] 93 W. Va. at 423, 117 S.E. at 129. Italics supplied.

[27] 86 W. Va. 300, 103 S.E. 110 (1920).

same two offenses charged in one count of an indictment in *State v. Murdock*[28] and *State v. Henson*.[29]

A similar result seems to have been reached by the court in permitting the joinder of larceny and burglary, or larceny and breaking and entering (or entering without breaking), in the same count in an indictment. Here it will be noted that this may result in the permitted joinder of two felonies in the same count.[30] This rule seems to have had its origin in West Virginia in a dictum in *State v. McClung*.[31] In that case the larceny was not properly charged, so only one offense was effectually alleged; but the court said, "It is common and better practice to allege in one count both the burglary and the larceny."[32] This was termed an "anomaly in inserting two offences in one count, apparently violating the rule against duplicity, and the rule against joining different offences, especially in the same count."[33] This rule was stated again by way of dictum in point one of the syllabus to *State v. Flanagan*.[34]

Both of these decisions preceded the *Jarrell* case, which first applied the statute to bar an attack on duplicity,[35] but as recently as 1948 the court was twice confronted with this type of joinder.[36] In neither case did the court rely on the statute or decisions based thereon. In both cases the *Flanagan* case was cited as sole support for the joinder, except that the first of these two cases was quoted in the second. Although the point is not mentioned by the court, grand larceny was joined with another felony in each of the two counts in the first of these cases,[37] whereas only petit larceny was

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[28] 90 W. Va. 628, 111 S.E. 632 (1922).

[29] 91 W. Va. 701, 114 S.E. 273 (1922). Contrast State v. Kyer, 55 W. Va. 46, 46 S.E. 694 (1904). *Compare* State v. Wisman, 93 W. Va. 183, 116 S.E. 698 (1923) *with* State v. Wisman, 98 W. Va. 250, 126 S.E. 701 (1925).

[30] The larceny involved may be a felony. If the goods or chattels stolen are of a value of $20 or more, this is grand larceny and is punishable by confinement in the penitentiary. W. VA CODE c. 61, art. 3, § 13 (Michie 1955). Offenses which are punishable by confinement in the penitentiary are felonies. *Id.* c. 61, art. 11, § 1. See text at note 37 *infra*. Compare the statute permitting joinder of counts for breaking and entering, or for entering without breaking, with a count for burglary. See note 80 *infra*.

[31] 35 W. Va. 280, 13 S.E. 654 (1891).

[32] *Id.* at 282, 13 S.E. at 654.

[33] *Id.* at 284, 13 S.E. at 655. The Virginia court and others had permitted such joinder in one count on a mistaken application of the principle of permitting joinder of a lesser crime included within a greater one. CLARK, CRIMINAL PROCEDURE 327 (2d ed. 1918).

[34] 48 W. Va. 115, 35 S.E. 862 (1900).

[35] See text at note 12 *supra*.

[36] State v. Cutlip, 131 W. Va. 141, 46 S.E.2d 454 (1948); State v. Varner, 131 W. Va. 459, 48 S.E.2d 171 (1948).

[37] "Each count charges that defendants did commit larceny of three pork hams and a pork shoulder of the aggregate value of $51.82." 131 W. Va. at 142, 46 S.E.2d at 456. See note 30 *supra*.

joined in each of the two counts in the second case.[38] In the latter case counsel made the specific objection that each count joined a felony with a misdemeanor. Apparently counsel was relying upon the principle urged in the *Vaughan, Tomlin, Murdock,* and *Henson* cases.[39] The court did not mention that rule or its limitation, although it would seem here that the misdemeanor was "incidental to or included in" the other offense charged.

These two recent cases indicate that larceny, whether grand or petit, may be joined with burglary or any of the statutory offenses which have extended the scope of that common law crime.[40] If this applied to the joinder of larceny even when charged as a felony, it seems to follow that the joinder of any other felony with burglary or any of the related statutory offenses cannot be reached by a demurrer or motion to quash if the other felony reflects the intent with which the entering or breaking and entering is charged to have been done.[41] This would seem to be true even though the decisions applying the statute to duplicity, even as to felonies, are ignored.

C. *Statutory Form of Indictment*

> ". . . Moreover, this indictment is in the form prescribed by Section 7 of the statute, and the very statute itself bars any attack on the indictment on the ground of duplicity."[42]

Thus reads the opinion in the *Howard* case; another reason given for there being no valid objection to the indictment even if two distinct offenses had been set forth in the one count therein. The

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[38] See the second ground assigned for the demurrer and motion to quash wherein complaint was made as to the joinder of a felony with *petit larceny.* 131 W. Va. at 460, 48 S.E.2d at 172.

[39] See text at notes 26, 27, 28, and 29 *supra.*

[40] The decided cases have involved joinder with larceny of "breaking and entering an outhouse adjoining a dwelling house", "breaking and entering an outbuilding not adjoining a dwelling house" (both in the *Cutlip* case, *supra* note 36), "breaking and entering a storehouse", and "entering a storehouse without breaking" (the latter two in the *Varner* case, *supra* note 36). For other extensions of the common law crime of burglary, see W. VA. CODE c. 61, art. 3, §§ 11 and 12 (Michie, 1955).

[41] For burglary at common law, the breaking and entering was required to be with the intent to commit a felony. An intent to commit larceny was not required; the intent to commit any felony was sufficient. This is also true with respect to the statutory extensions of the common law crime of burglary. *Ibid.* For example, breaking and entering with intent to commit rape within the building would be sufficient for burglary or the related statutory offenses. Therefore, if grand larceny may be joined in a count with burglary or the related statutory offenses when the intent to commit larceny is an element of the other crime, it seems that rape may be joined in a count with burglary or a related statutory offense when the intent to commit rape is alleged as an element of the other crime.

[42] State v. Howard, 137 W. Va. 519, 542, 73 S.E.2d 18, 31 (1952).

statement is broad enough to apply to felonies as well as misdemeanors, although the offenses actually involved were misdemeanors.

No authority was cited for the soundness of this proposition, and it has often been demonstrated that the mere fact that the legislature has prescribed the form of indictment for an offense does not protect the indictment from attack.[43] In fact, this same indictment was held deficient in the *Howard* case to the extent that it attempted to charge the crime of aiding and abetting in the unlawful sale of alcoholic liquor without a state license: this left only the offense of unlawfully selling alcoholic liquor without a state license. Accordingly, the proposition here discussed is merely obiter dictum because that part of the count which applied to aiding and abetting may be disregarded as surplusage, a principle often applied to save such counts and discussed in some detail later in this paper.

Although this dictum in the *Howard* case is the most explicit statement found to the effect that joinder of two or more distinct offenses in one count in a statutory form of indictment will bar an attack on the basis of duplicity, some emphasis had been given to this approach in earlier decisions not cited in the opinion.

In *State v. Miller*,[44] the defendant was indicted upon the charge that he did "unlawfully sell, give, offer, expose, keep and store for sale and gift, liquors." The court recognized that the indictment was in the form prescribed by the statute. The indictment was held not subject to attack by demurrer for "duplicity", even though separate and distinct offenses were charged, for two or more offenses of the same general nature may be joined in "an indictment". The court apparently failed to draw a distinction between duplicity and joinder of crimes in different counts.[45]

The *Miller* case was followed in *State v. Counts*,[46] where a warrant charged substantially the same combination of offenses as to intoxicating liquor. A motion to quash was made on the ground that the warrant did not specifically inform the defendant of the nature of the charge alleged against him so that he could prepare his defense. *Held*, that even though distinct offenses were

[43] In accord with the *Howard* case are State v. Garcia, 83 S.E.2d 528 (W. Va. 1954); State v. Ray, 122 W. Va. 39, 7 S.E.2d 654 (1940); State v. McGinnis, 116 W. Va. 473, 181 S.E. 820 (1935); and Scott v. Harshbarger, 116 W. Va. 300, 180 S.E. 187 (1935) (habeas corpus proceeding against the sheriff). The statutory forms held defective in the last three cases were amended by the legislature in 1953. The indictment form held defective in the *Howard* and *Garcia* cases has not been amended. See W. VA. CODE c. 60, art. 6, § 7 (Michie 1955). For the amended forms, see *id.* c. 62, art. 4, §§ 5, 7 and 15.

[44] 89 W. Va. 84, 108 S.E. 487 (1927).

[45] For further development of this point, see part E of text.

[46] 90 W. Va. 338, 110 S.E. 812 (1922).

charged, the warrant was not bad for "duplicity". The court concluded discussion of this point with the observation:

> ". . . The warrant is in the statutory form of an indictment for these offenses which has been held sufficient to satisfy the requirements as to time, place and circumstance and certainty as to the offense charged, and to serve as a protection against future prosecution for the same offense. . ."[47]

Again the *Miller* case was followed in *State v. Joseph*,[48] where the indictment contained two counts. The first count charged the defendant with owning, operating, maintaining, possessing and having an interest in a "moonshine still". The court held that the demurrer was properly overruled, with this remark being made:

> ". . . The indictment is in the prescribed statutory form and in the language of the statute. . . . It is sufficient. . . ."[49]

If these opinions are read in the light of the decisions which have held statutory forms of indictments bad for omitting matters of substance, the conclusion may be drawn that a statutory form bars attack as to duplicity because this defect is merely formal. If this be true, may not the same result be attained by a general statute forbidding an attack on any indictment on the ground of form rather than prescribing statutory forms for numerous offenses? This approach seems to have been approved by the cases which hold that *West Virginia Code,* Chapter 62, Article 2, Section 10, has accomplished this result as to duplicity, whether joinder of misdemeanors or felonies be involved. If those cases be wrong as a matter of interpretation, though never overruled, the need of such legislation seems apparent. No thought is here expressed that such legislation should save an indictment or any count therein which truly leaves the defendant in doubt as to the nature of the accusation.[50]

D. *Additional Offenses as Surplusage*

By joining several distinct offenses in one count, the indictment containing only this count is rendered duplicitous. If only one of the offenses which seem to be alleged in the count is held to have been *sufficiently* alleged, duplicity disappears. The same legerdemain results if the allegations as to one of two offenses alleged "would be sufficient except for the fact that the statute is not broad enough

[47] *Id.* at 341, 110 S.E. at 813.
[48] 100 W. Va. 213, 130 S.E. 451 (1925).
[49] *Id.* at 216, 130 S.E. at 452.
[50] See note 8 *supra.* The indictment or any count therein might also be bad for other reasons; for example, there might be joined in *one count* distinct offenses which could not be properly joined in *an indictment.* See part E of text.

to include these facts as an offense."[51] With only one "offense" alleged any duplicity which seemed to have been present has disappeared. Such allegations as to the seeming offenses may be as confusing to the accused as two or more offenses effectually charged; but any basis for attack on the ground of duplicity is eliminated when the court finds that he was legally charged with the commission of only one crime.

The most recent case in point upholds a count "alleging" both selling and aiding and abetting the sale of alcoholic liquor without a state license, using these words:

> ". . . the instant *indictment does not charge* defendant with *two distinct offenses*: *it effectively charges* defendant with the illegal sale of alcoholic liquor without a State license, *and ineffectively charges* defendant with illegally aiding and abetting in the sale of alcoholic liquor without a State license. The allegations of the indictment bearing on the purported charge of aiding and abetting are not sufficient to charge the offense, so that, in our opinion, those allegations may be regarded as surplusage, . . . "[52]

The court therein relied upon *State v. Gould*,[53] where the indictment charged that the defendent did "cruelly beat, shoot, torture, and otherwise ill-treat" a mule. It was held that the words, "shoot, torture and otherwise ill-treat," were surplusage. The statute covered these offenses: "over-drive, torture, torment, deprive of necessary sustenance, or unnecessarily, or cruelly beat, or needlessly mutilate, or kill" any domestic animal. The court reasoned that "shoot and otherwise ill-treat" were not acts named in the statute, and "torture" joined with "beat" was unnecessary since both together charged but one offense, that is, torture by beating. This decision was thus based on both insufficient allegations as to more than one crime and the statute being too narrow to include more than one of the offenses alleged.

More precise application of the second technique of finding only one offense alleged may be found in *State v. Wolfe*.[54] The specific question framed by the trial court was whether the indictment was duplicitous due to the fact that its averments, "if regarded as sufficient to properly charge an offense" under a specific statute, also charged an offense under a provision of the state

[51] These two approaches, as to the effect of surplusage on duplicity, are taken from the cases which are cited in the text which follows. Compare also the *Hudson* case discussed in the text *supra*.

[52] State v. Howard, 137 W. Va. 519, 541, 73 S.E.2d 18, 31 (1952). Italics supplied.

[53] 26 W. Va. 258 (1885).

[54] 128 W. Va. 414, 36 S.E.2d 849 (1946).

constitution. The answer was negative since the court held that the constitution provision was not self-executing as to its criminal effect. *State v. Marks*[55] and *State v. Calhoun*[56] both involved charges of "selling, offering, and exposing for sale and soliciting and receiving orders for spirituous liquors, wines, porter, ale, beer and drinks of like nature", without a state license. The statute under which this indictment was drawn purported to make any of these acts unlawful. In the *Marks* case, the court found that the license required by another section of the statute was *only* for selling spirituous liquors, concluding, "We think the indictment good, therefore, and that two separate offenses are not charged."[57] The *Marks* case was followed in the *Calhoun* case.

Some of the decisions seem to have applied the principle as to surplusage in a rather unusual fashion; at times perhaps this has been true because of the basis of attack on the indictment. In *State v. McCoy*,[58] the allegations were that the defendants conspired for the purpose of inflicting bodily injury and, pursuant to the conspiracy, did murder. A demurrer was interposed on the ground that conspiracy was not sufficiently charged. The court felt that conspiracy had been sufficiently alleged, but disposed of the point by stating:

> ". . . But why discuss this conspiracy part of the indictment? There was no conviction of conspiracy, but of murder. Eliminate the conspiracy part, and we have left a good indictment for murder."[59]

In *State v. Grove*,[60] a similar indictment combined conspiracy to rape and rape. Objection on demurrer was that this charged a conspiracy under the Red Men's Act and also rape. The count was held sufficient, the court citing the *McCoy* case, also questioning whether conspiracy under the act was charged, and concluding with this observation:

> ". . . The charge of conspiracy may not have been necessary [as the means by which some of the parties might be convicted of the crime resulting from the conspiracy], but, if not, it may be treated as mere surplusage. After its elimination therefrom, what remains would sufficiently charge the crime of rape. . . ."[61]

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[55] 65 W. Va. 523, 64 S.E. 616 (1909).
[56] 67 W. Va. 666, 69 S.E. 1098 (1910).
[57] 65 W. Va. at 526, 64 S.E. at 617.
[58] 61 W. Va. 258, 57 S.E. 294 (1907).
[59] *Id.* at 259, 57 S.E. at 294.
[60] 61 W. Va. 697, 57 S.E. 296 (1907).
[61] *Id.* at 700, 57 S.E. at 297.

A more extreme application of the surplusage principle was used in the two *Wisman cases.*[62] James and George Wisman were tried under the same indictment, which charged both conspiracy to inflict bodily harm and, in pursuance thereof, felonious and malicious assault. In the first case, contention was made that "the indictment is bad because it contains in one count two distinct offenses", one being a misdemeanor and the other a felony. The indictment was held good; partly on the basis that the conspiracy charge was included within the greater charge or the one-offense basis,[63] but also on the basis that the allegations as to conspiracy "could be left out as surplusage". To complete the reasoning on the second point, the court added, ". . . indeed, they are not necessary to complete an indictment for malicious maiming, and without them the offense is charged."[64]

The point was more directly placed before the court in the second case concerning this indictment, since the trial court tried the case on the theory that two felonies were charged in the one count, one under the maiming statute and the other under the Red Men's Act. At this point the appellate court placed the holding in the earlier case and in this case on the basis that the charge of conspiracy must be disregarded as surplusage. The result:

> ". . . By so doing, we violate no rule of pleading [two separate felonies in one count], we sustain the indictment, and conform to the prior holdings of this court in . . . State v. McCoy, 61 W. Va. 258. In the latter case, it was held:
>
> > " 'An indictment charging conspiracy to inflict punishment and bodily injury on the person, and charging also for murder, held good as an indictment for murder.' "[65]

Starting with the *McCoy* case which held that an objection to an indictment on the basis of insufficiency of allegations as to conspiracy was not well founded, the circle was completed to hold that a count alleging two felonies was not duplicitous since adequate allegations therein as to one felony could be disregarded as surplusage.

In a rather recent case a demurrer was interposed on the ground that in one count it was alleged that the defendant did unlawfully

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[62] State v. Wisman, 93 W. Va. 183, 116 S.E. 698 (1923); State v. Wisman, 98 W. Va. 250, 126 S.E. 701 (1925).

[63] See part B of text.

[64] 93 W. Va. at 187, 116 S.E. at 699.

[65] 98 W. Va. at 253, 126 S.E. at 702.

transmit and permit to be transmitted certain information.[66] In part this was the court's answer:

> " . . . The state might be required . . . to strike out what would otherwise be treated as surplusage. . . . State v. Calhoun, 67 W. Va. 666, 69 S.E. 1098."[67]

But, the *Calhoun* case merely disregarded as surplusage allegations which alleged no crime under the statute.

If duplicity be more than a merely formal defect, even the orthodox surplusage approaches seem to be prejudicial to the defendant. These artificial extensions of the surplusage principle can only be viewed as "affirmance at any cost." As a group these cases indicate that duplicity is a highly technical defect and that indictments ought not be held bad if this be the only defect therein.

E. *Duplicity and Joinder in Separate Counts*

> "An indictment in a single count is not fatally defective because it charges more than one offense, provided the offenses charged are such that they could be embraced in the same indictment containing a count for each offense."[68]

Although this approach was not used in the opinion in the *Digman* case, reliance therein being placed on a decision which applied the statute to bar attack on the ground of duplicity, this point in the syllabus is the most specific reference to this test found in any of the West Virginia cases. This approach to duplicity seems a very sound one; namely, that in view of the statute the combination of two or more offenses in one count in an indictment does not in itself render the count fatally defective, but that the count may be deficient for other reasons. In this case the suggestion is that the count may be bad for having offenses joined therein which cannot be joined in an indictment even though separate counts be used.[69]

In the *Jarrell* case, the first to apply the statute preventing attacks for matter of form,[70] the court permitted joinder in one count of charges of carrying numerous types of deadly weapons without a state license therefor. After referring to the rule permitting the joinder of both misdemeanors and felonies in an indict-

[66] State v. C. & P. Telephone Co. of W. Va., 121 W. Va. 420, 4 S.E.2d 257 (1939).

[67] *Id.* at 424, 4 S.E.2d at 259.

[68] State v. Digman, 121 W. Va. 499, 5 S.E.2d 113 (1939).

[69] The same approach may be used in a civil case, namely, "there may be united in a single count of a declaration causes of action which could not be joined in separate counts." See Carlin, *supra* note 4, at 242. Thus, although the count in the declaration would not be bad on demurrer for duplicity, it might be bad for misjoinder of causes of action.

[70] See text at n. 12 *supra.*

ment by the use of different counts, the court made these observations as to the joinder in one count:

> ". . . In view of this rule, the argument *ab inconvenienti* wholly fails. As the accused may be charged with two or more offenses in one indictment, by the use of several counts, he must prepare to meet all of them, when he is so charged."[71]

A similar count charging these offenses was approved on the basis of this decision in *State v. Merico.*[72]

In several other cases the court has answered the contention that a count was "duplicitous" by applying the rule as to joinder of offenses in an *indictment.* In *State v. Miller,*[73] it was charged that the defendant "did unlawfully sell, give, offer, expose, keep and store for sale and gift, liquors." The court made this response:

> "The suggestion that the indictment is bad for duplicity is without merit. It is true that if the defendant did sell, give, offer, . . . liquors, he may be guilty of separate and distinct offenses, but it is well established in this jurisdiction that the joinder of two or more offenses of the same general nature in an indictment is not ground of demurrer. . . . State v. Jarrell, 76 W. Va. 263."[74]

Note that the *Jarrell* case was cited in support of this position. The *Miller* case holding as to "duplicity" was approved by dictum in *State v. Cook.*[75] A similar approach was used by Judge Lively in his concurring opinion in *State v. Wisman.*[76] He there questioned the correctness of a statement he had written in an earlier opinion for the court concerning the same indictment.[77] He no longer felt that the jury could convict on the one count for conspiracy alleged therein if they acquitted the defendant of malicious wounding as there alleged. He took the position that this would be improper since on the facts of the case these two offenses could not properly be combined in *an indictment.*

The same approach was sought in this manner in *State v. Tomlin*:[78]

> "Here the offense of possession is not only charged in the same indictment but in the same count thereof, which is certainly not permissible unless the charges of the several of-

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[71] State v. Jarrell, 76 W. Va. 263, 265, 85 S.E. 525, 526 (1915).
[72] 77 W. Va. 314, 87 S.E. 370 (1915).
[73] 89 W. Va. 84, 108 S.E. 487 (1921).
[74] *Id.* at 86, 108 S.E. at 488.
[75] 90 W. Va. 600, 606, 111 S.E. 595, 597 (1922).
[76] 98 W. Va. 250, 786 S.E. 701 (1925).
[77] State v. Wisman, 93 W. Va. 183, 116 S.E. 698 (1923). For discussion of the application of the surplusage principle in the two *Wisman* cases, see text at notes 62 to 65 *supra.*
[78] 86 W. Va. 300, 103 S.E. 110 (1920).

fenses made in the conjunctive can be treated as separate and distinct *counts.* For the purpose of this case we need not decide the latter question. . . ."[79]

If the allegations in a count violate only the rule against duplicity, the fault seems merely formal. As such, *West Virginia Code,* Chapter 62, Article 2, Section 10, *may* bar an attack by demurrer or motion to quash. However, if the allegations therein charge offenses which cannot be joined in the same indictment, even when stated in separate counts, there is nothing in this section of the Code to bar the attack. Other statutes or common law rules permitting joinder of different offenses in the same indictment would determine the issue.[80]

Summary

If a count in an indictment charges the commission of two or more crimes, it *may* be so defective as duplicitous that it will be held insufficient on demurrer or motion to quash. However, six West Virginia decisions have held that this defect is merely formal and cannot be reached by either of these techniques in view of the provisions of *West Virginia Code,* Chapter 62, Article 2, Section 10. Four of these cases have involved the joinder of felonies. In later decisions the court has continued to talk as if such joinder of felonies would make the count fatally defective since it would violate a "fundamental law of pleading".[81] In these decisions various other techniques have been used to sustain indictments in which two or more crimes, felonies or misdemeanors, have been joined in a single count, ignoring the cases which relied on the statute, or on decisions based thereon, to bar attack on the basis of duplicity.

In this setting, "no one can know what is the law on the subject".[82] However, aside from occasional statements that duplicity may be a basis for quashing an indictment if joinder of felonies be involved, the court seems now to view duplicity as in fact a technical defect because no recent case has been found in which the court actually held an indictment bad on the basis of duplicity. One technique or another has been used to avoid this result.

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[79] *Id.* at 303, 103 S.E. at 111. Italics supplied.

[80] *E.g.,* W. VA. CODE c. 62, art. 2, § 24 (Michie 1955) (permitting a count for receiving stolen goods or for embezzlement to be joined with a count for larceny; and permitting a count for false swearing to be joined with a count for perjury); *id.* c. 61, art 3, § 12 (permitting joinder of counts for breaking and entering, or for entering without breaking, the house or building mentioned in the count for burglary); see generally Note 57 W. VA. L. REV. 196 (1955).

[81] See note 24 *supra.*

[82] See text at note 2 *supra.*