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Joinder of Crimes in the Same Indictment

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April, 1920, and the evidence showed the offense to have been committed in January, 1920. In holding the indictment bad, the court said the question of fact is immaterial since it is necessary that it show an offense not barred by the statute of limitations. In the *Rector* case the indictment, found in April, 1946, alleged the commission of the offense in December, 1946, followed by a recital that it was committed "within one year *from* (italics supplied) the finding of this indictment." In holding that the lower court did not err in overruling a motion to quash the indictment, the court said that the policy is to sustain indictments for misdemeanors where it is directly alleged that the offense was committed within one year previous to the finding thereof", and this direct allegation will not be overcome by a mistaken date, where from all the circumstances, as here, such mistake appears to have been the result of a clerical error." There appears to be no logical reason why the same rule would not apply in the *Price* case. Of course, the *Price* case alleges a date which would be barred by statute and the *Rector* case states a date subsequent to the finding of the indictment, but it is submitted that this provides no solid ground for distinction. Especially is this true in light of the emphasis on the words used in the recitals, that the offenses were committed within the statutory period. The language in the *Price* case was "next preceding the finding," whereas in the *Rector* case the allegation was "from the finding". The word "from" could be given prospective as well as retrospective connotations. If "from" will cure a defective allegation of time, it seems that "next preceding" should.

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JOINDER OF CRIMES IN THE SAME INDICTMENT.—While the joining of crimes in the same indictment may be regulated by statute,[1] the practice was familiar at common law.[2] Crimes of the same general character, subject to like punishment and arising from the same transaction could be joined. Trial of like crimes was

[1] See, for example, W. VA. CODE c. 61, art. 3, § 12; c. 62, art. 2, §§ 5, 24, art. 3, § 19 and art. 9 § 9 (Michie, 1949). Statutes in other jurisdictions allowing a joinder of offenses have been sustained. Pointer v. United States, 151 U.S. 396 (1894); Williams v. United States, 168 U.S. 382, 390 (1897); People v. Kelly, 203 Cal. 128, 263 Pac.. 226 (1928); Commonwealth v. Slavski, 245 Mass. 405, 140 N.E. 465 (1923).

[2] Queen v. Castro, 5 Q.B.D. 490 (1880). No joinder was strictly illegal since the pendency of one accusation could not be pleaded in bar or abatement of another charge. Thus, the court had discretion in ruling on a motion to quash for a misjoinder of offenses. 1 BISHOP, NEW CRIMINAL PROCEDURE § 424 (2d ed. 1913).

thought not unduly involved, and the proof of one charge would probably be inseparable from the proof of the others.[3] A curious anomaly grew up around the practice of describing a single criminal act or transaction in the language of various crimes for the purpose of avoiding an acquittal by reason of any unexpected variance between allegation and evidence.[4] Each count of the charge was required to be so drafted that it would appear that a separate and distinct offense was being alleged. Thus, upon a motion to quash the indictment for a misjoinder of offenses, the court would not know whether in fact unrelated transactions were being alleged or a single or connected transaction variously described. Generally speaking, the court would overrule the motion to quash, and leave the defendant to his remedy of requiring the prosecution to elect at some later stage of the trial an offense upon which to seek conviction.[5]

In West Virginia, there is abundant authority under statutes for joining offenses, apparently distinct, to meet the evidence.[6] These statutes, permitting joinder in specialized situations wherein one criminal transaction constitutes two or more crimes, seem to be but declaratory of the common law. They are often referred to as statutes creating a "family of offenses".[7]

[3] Pointer v. United States, 151 U.S. 396, 404 (1894). In accordance with a general policy of making distinctions between felonies and misdemeanors, the principle as to misdemeanors at common law was more liberal in that dissimilar crimes could be included together in the same charge. State v. Jarrell, 76 W. Va. 263, 265, 85 S.E. 525, 526 (1915). A felony could not be joined with a misdemeanor, however, because a felon was denied the right to counsel and a copy of the indictment, rights secured to a misdemeanant. Scott v. Com., 14 Gratt. 687 (Va. 1858). A dilemma would be faced were the accused charged both as a felon and a misdemeanant in the same indictment. The doctrine of merger was a device to repress this problem; the misdemeanor being considered lost in the felony. There was no merger when the felony and the misdemeanor were distinct and the one not a necessary constituent of the other. The doctrine of merger has been abolished in most states, and usually there is no objection to the joinder of felonies and misdemeanors. *Cf.* W. VA. CODE c. 62, art. 3, § 18 (Michie, 1949).

[4] Another purpose has been stated thusly: ". . . if there is a legal doubt what form of charge the court will approve . . . to shape the record that disaster will not come from unexpected rulings." 1 BISHOP, NEW CRIMINAL PROCEDURE § 422.

[5] Some West Virginia cases intimate that a motion to quash should be sustained if, on the face of the indictment, distinct transactions are charged. State v. Ringer, 84 W. Va. 546, 100 S.E. 413 (1919). But the separateness of the transactions must be clearly apparent. State v. Smith, 24 W. Va. 814 (1884). *Cf.* State v. Neff, 169 Kan. 116, 218 P.2d 248 (1950) (transactions may appear on face of indictment to be unrelated); Webb v. State, 177 Ga. 414, 170 S.E. 252 (1933) (allegation of connectedness unnecessary).

[6] State v. Cutlip, 131 W. Va. 141, 46 S.E.2d 454 (1948) (burglary and breaking and entering); State v. Larue, 98 W. Va. 677, 128 S.E. 116 (1925) (larceny and embezzlement); State v. Haskins, 92 W. Va. 632, 115 S.E. 720 (1923) (larceny and temporary taking).

[7] State v. Hudson, 93 W. Va. 435, 117 S.E. 122 (1923).

In addition, joinder of offenses has been sustained in this jurisdiction under statutes setting forth an aggregation of unlawful acts or omissions, all, several, or any one of which will constitute the punishable offense. *State v. Tabet*[8] involved an indictment containing six counts for related offenses under the "numbers" statute.[9]

West Virginia has no comprehensive statute such as is found in a number of jurisdictions allowing joinder of felonies[10] although certain of the traditional requisites are absent.[11] However, the fact that the offenses may be subject to different punishments seems not be to an obstacle to joinder even in this jurisdiction when the offenses are otherwise joinable. In *State v. Varner*,[12] the contention on this ground was not even answered by the court.

The Kansas cases indicate that dissimilarity in the nature of the offenses committed ought not to prevent joinder when their commission has been connected in time, place and circumstance.[13] It may be provided by statute that the court shall exercise its discretion in ruling on the question when similar, although unconnected, crimes are charged.[14] This liberal view of joinder states that the reason for separate charges and separate trials fails when the acts constituting the crimes are linked together in a series in such a manner that they become one comprehensive

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[8] 136 W. Va. 239, 67 S.E.2d 326 (1951).

[9] W. VA. CODE c. 61, art. 10, §§ 11, 11a, 11b (Michie, 1949). See, also, State v. Masters, 106 W. Va. 46, 144 S.E. 718 (1928), for a similar decision under the "hit and run" statute, W. VA. CODE c. 17, art. 8, § 23 (Michie, 1949), and State v. Hamilton, 133 W. Va. 394, 56 S.E.2d 544 (1949), a decision under the reckless driving statute. W. VA. CODE c. 17, art. 8, § 18 (Michie, 1949). The nearest approximation to the liberal view of joinder, discussed above, reached in West Virginia has occurred in the specialized statutory situations.

[10] See note 3 *supra,* for the principle with respect to misdemeanors.

[11] In Massachusetts and Kansas liberalized joinder has been effected without express statutory provision. Carlton v. Commonwealth, 5 Metc. 532 (Mass. 1842) (joinder allowed although offenses distinct); State v. Thompson, 139 Kan. 59, 29 P.2d 1101 (1934). 9 MASS. ANN. LAWS c. 277, § 46 (1933) is not inconsistent in that it simply provides that a single crime may be variously described in the language of related crimes. See also, CAL. PENAL CODE § 954 (Deering, 1941), and N.Y. CODE CR. PROC. § 279 (1945). Under the New York statute, similar crimes may be joined, subject to discretion in the court to order separate trials if the offenses are found to be unrelated in commission, and dissimilar crimes may be joined, provided they are parts of one transaction. The court may impose concurrent or consecutive penalties in its discretion. *Cf.* W. VA. CODE c. 61, art 11, § 21 (Michie, 1949), and FED. R. CRIM. P., Rules 8, 13, 14. The Rules permit codefendants to be charged with dissimilar offenses, especially when the proof is inseparable. Scheve v. United States, 184 F.2d 695 (D.C. Cir. 1950). In contrast to Massachusetts and Kansas, Oklahoma by statute has provided that an indictment may charge only a single offense. 22 OKL. STAT. ANN. § 404 (1937).

[12] 131 W. Va. 141, 46 S.E.2d 454 (1948).

[13] State v. Martin, 175 Kan. 373, 265 P.2d 297 (1953).

[14] N.Y. CODE CRIM. P. § 279 (1945).

transaction. They may be considered as exhibitions of conduct concatenated in time, place, and circumstance, comprising one composite event.[15] Thus, if evidence of one offense tends to corroborate proof of another, the defendant is not being unlawfully prejudiced.[16] Evidence of only one state of facts is being given.

R. L. DeP.

STATUTORY RAPE—PREVIOUS CHASTE CHARACTER.—Modern statutes creating the offense commonly known as statutory rape present an interesting paradox. Although the statutes are designed to impose "a barrier across which the profligate proceeds at his peril,"[1] fundamental notions of justice where the male is concerned have resulted in the tempering of the statutes through inclusion of various provisos. Such a qualification was added to the West Virginia statute in 1931 when the requirement that the female must be of "previous chaste character" was included.[2]

The extent to which the unchaste character of the female of tender years can be relied upon as a defense has yet to be determined by the West Virginia court. For although it has been held that the state can not rely on a presumption of chastity, but must allege and prove that the female is of previous chaste character,[3] the question of what is meant by previous chaste character has been left unanswered.

In other jurisdictions utilizing the phrase in either statutory rape or seduction statutes, there is a difference of opinion as to the meaning of previous chaste character. Under the most widely accepted view, previous chaste character means more than reputation[4] or purity of conduct;[5] it defines a female who has never voluntarily had previous sexual intercourse.[6]

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[15] State v. Thompson, 139 Kan. 59, 29 P.2d 1101 (1934); *accord,* People v. Bundte, 87 Cal.App.2d 735, 197 P.2d 823 (1948).

[16] "Where the impulse is single, but one indictment lies, no matter how long the action continues. If successive impulses are separately given, even though all unite in a common stream of action, separate indictments lie." 1 WHARTON, CRIMINAL LAW § 34 (12th ed. 1932). It would seem that an indictment ought never to be quashed on the ground of misjoinder of offenses, and that the accused should be made to await the determination of the connectedness of the offenses . See note 5 *supra.*

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[1] State v. Adkins, 106 W. Va. 658, 663, 146 S.E. 732, 734 (1929).
[2] W. VA. CODE c. 61, art. 2, § 15 (Michie, 1949).
[3] State v. Ray, 122 W. Va. 39, 7 S.E.2d 654 (1940).
[4] State v. Foster, 225 S.W. 671 (Mo. 1920).
[5] State v. Sigler, 116 Wash. 581, 200 Pac. 323 (1921).
[6] Lowe v. State, 154 Fla. 730, 19 So.2d 106 (1944).