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is necessary for the corporate welfare. Our hardest problem, then, since our court is in substantial accord with the majority rule on all these points, is to discover exactly what that rule is, since it often appears that there are two equally strong rules on a point.²²

C. A. P., JR.

DISJUNCTIVE ALLEGATIONS IN INDICTMENTS
AND VARIANCE BETWEEN ALLEGATIONS
AND PROOF

The Constitution of West Virginia, following in substance the provision of the Constitution of the United States¹ and the constitutions of the several states, guarantees that in trials of crimes and misdemeanors “. . . the accused shall be fully and plainly informed of the character and cause of the accusation . . .”² The reasons generally given for this provision are that the accused is entitled to know with certainty what offense is charged so that he may prepare an adequate defense and not be taken by surprise by evidence offered at the trial, and that he is entitled to have the offense so charged that upon acquittal or conviction he may plead the same in bar of a subsequent proceeding for the same offense and establish his plea by production of the former record.³ This note will touch, in this connection, on disjunctive allegations in indictments and variance between allegations and proof.

Under such guaranty, most courts hold, and our court has held,⁴ that an indictment⁵ which charges an offense, using the

²² The recent United States Supreme Court case of *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 56 S. Ct. 466 (1936) raises a question as to whether the court will follow *Dodge v. Woolsey*, 59 U. S. 331, 15 L. ed. 401 (1866) (a stockholder's suit lies to force the corporation to resist payment of any illegal tax, however slight in its effect), or *Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 827 (1881) (the exercise of sound business policy by the directors may not be complained of in a stockholder's suit, whether they have failed to enforce all corporate rights or not). It is probable that the West Virginia court, pursuing a realistic policy, would follow *Hawes v. Oakland*, which states a sound rule for the general welfare of the corporation. It has been cited with approval in several West Virginia cases. [*Rathbone v. Gas Co.*, 31 W. Va. 798, 8 S. E. 570 (1888).]

¹ U. S. CONST. Amend. VI.

² W. VA. CONST. art. III, § 14.

³ *Berger v. United States*, 295 U. S. 78, 55 S. Ct. 629 (1935); *Clifford v. State*, 29 Wis. 327 (1871).

⁴ *State v. Charlton*, 11 W. Va. 332, 27 Am. Rep. 603 (1877); *State v. Miller*, 68 W. Va. 38, 69 S. E. 365 (1910); *State v. Dawson*, 184 S. E. 253 (W. Va. 1936), the latter case holding that the full information must be in the indictment, and that what the accused may draw from adventitious circumstances does not count.

alternative conjunction "or", thereby creating uncertainty, is fatally defective.⁶ This is true even though the statute enumerates the acts or intents constituting the offense disjunctively, so that if the indictment charges more than one act or intent it must charge them conjunctively,⁷ unless they are repugnant,⁸ and conviction may be had upon proof of so many of the averments as show a substantive offense.⁹

But there are several well-established exceptions to the general rule. (1) If the words stated in the alternative are synonymous, "or" being used in the sense of "*to-wit*", the indictment may be good.¹⁰ (2) "Or" may be used in enumerating negative averments required to exclude exceptions set forth in a statute.¹¹ (3) The use of "or" is sometimes specially provided for in statutory forms of indictment.¹² But since the objection to the disjunctive is constitutional, a statutory form should have no force to alter a decision on the point.¹³ West Virginia and Virginia recognize a fourth exception, that in liquor license cases the allegation of various kinds of liquor, but no other allegation,¹⁴ may be stated dis-

⁶ The word "indictment", as used in this note, will comprehend indictments, presentments, informations, warrants, and any other forms of criminal charge.

⁶ *Com. v. Grey*, 68 Mass. 501, 61 Am. Dec. 476 (1854); *Myslewitz v. Sullivan*, 102 N. J. L. 61, 131 Atl. 57 (1925). These cases are representative of a long line of decisions.

⁷ *State v. Merico*, 77 W. Va. 314, 87 S. E. 370 (1915). In *Wingard v. State*, 13 Ga. 396 (1853), it was held that as to misdemeanors, where only one offense was charged by reciting the entire statute, the state cannot be forced to elect.

⁸ *State v. Flint*, 62 Mo. 393 (1876).

⁹ *Angel v. Com.*, 4 Va. 212 (1819); *State v. Bresee*, 137 Iowa 673, 114 N. W. 45, 24 L. R. A. (N. S.) 103 (1907); *Sauer v. State*, 166 Miss. 507, 144 So. 225 (1932).

¹⁰ *State v. Matthews*, 134 S. E. 665 (W. Va. 1936); *People v. Jackson*, 181 Ill. App. 713 (1913); *State v. Bragg*, 220 S. W. 25 (Mo. App. 1920). It is interesting to note that in *State v. Newson*, 13 W. Va. 859 (1873), "pistol or revolver" was held good, while in *State v. Green*, 50 Tenn. 112 (1871), "belt, or pocket pistol, or revolver" was held bad.

In *State v. Dawson*, 184 S. E. 253 (W. Va. 1936), it was said that "or" cannot be used between things merely of the same generic nature, for, since all statutes must be about things of the same generic nature, then any disjunctive indictment would be good.

¹¹ *People v. Ellis*, 185 Ill. App. 417 (1914); *State v. Burns*, 20 N. H. 550 (1847).

¹² *McGuff v. State*, 88 Ala. 147, 7 So. 35, 16 Am. St. Rep. 25 (1889).

¹³ In *Scott v. Harshbarger*, 116 W. Va. 300, 180 S. E. 187 (1935), the fact that the indictment followed a statutory form did not keep it from being fatally defective for omission of a material element of the offense.

¹⁴ *State v. Charlton*, 11 W. Va. 332, 27 Am. Rep. 603 (1877), refused to extend the rule in *Morgan v. Com.*, 48 Va. 310 (1850), cited n. 15, *infra*, to a charge for liquor sold "in, upon, or about the building or premises", holding it bad.

jectively.¹⁵ In other jurisdictions, however, the general rule is applied here as in other cases.¹⁶

An examination of most of the cases in point shows that courts usually find that uncertainty is the result of a use of the disjunctive, save in the exceptions mentioned. But some decisions, which easily might have applied the simple rule and held the charge defective, have held that if the gravamen of the charge is certainly stated, the fact that "immaterial" or "explanatory" portions of the charge are in the alternative does not invalidate it.¹⁷ Such an opinion is that of a majority of the court in the recent case of *State v. Keller*.¹⁸ There a warrant, under our statute providing that "No person shall . . . operate any vehicle . . . while intoxicated, or under the influence of intoxicating liquor, drugs or narcotics",¹⁹ charged defendant with driving while "intoxicated and under the influence of liquor drugs or narcotics". Upon demurrer by defendant that he was not fully and plainly informed of the character and cause of the accusation against him, in that the warrant stated the casual agents of intoxication in the disjunctive, the warrant was held sufficient, on the ground that the gravamen of the charge was intoxication and that what caused the intoxication was immaterial and though stated alternatively was not prejudicial. The rule governing such cases is stated: "an indictment ought not to state the case disjunctively, when it is thereby left uncertain what is really intended to be relied on as the accusation." Two judges dissented, being of the opinion that such a rule as above stated entirely destroyed the value of the rule against disjunctive allegations as a means of discovering whether or not uncertainty exists. The minority has most other courts to support it when it says: "It is not the un-

¹⁵ *Cunningham v. State*, 5 W. Va. 508 (1872). This case blindly follows the Virginia cases of *Thomas v. Com.*, 90 Va. 92, 17 S. E. 788 (1893), and *Morgan v. Com.*, 48 Va. 310 (1850), the latter of which established the exception, giving no reason therefor. In *State v. Miller*, 68 W. Va. 38, 69 S. E. 365 (1910), the West Virginia court said *Morgan's* case, *supra*, ought not to be regarded as overthrowing the general rule and must govern only whenever a case like it arises.

¹⁶ *Grentham v. State*, 89 Ga. 121, 14 S. E. 892 (1892); *Clifford v. State*, 29 Wis. 327 (1871).

¹⁷ *State v. Jarrett*, 194 S. E. 1 (W. Va. 1937); *Dziatkiewicz v. Town of Maplewood*, 115 N. J. L. 37, 178 Atl. 205 (1935); see *State v. Dawson*, 184 S. E. 253, 256 (W. Va. 1936).

¹⁸ 191 S. E. 201 (W. Va. 1937). Two of the majority were dissenters from the decision in *State v. Dawson*, 184 S. E. 253 (W. Va. 1936), a case similar on its facts, in which the indictment was held defective.

¹⁹ W. VA. REV. CODE (1931) c. 17, art. 8, § 25.

certainty that gives rise to the rule; it is the rule that determines the uncertainty"; thus stating a rule that is certain and easy to follow.

The constitutional provision quoted above has been construed to require also that the allegations in a criminal charge and the proof offered must correspond, for the reasons heretofore given, especially that of avoidance of surprise, which apply equally to variance between allegations and proof as to disjunctive allegations.²⁰ But for a variance to be fatal, it must be material²¹ and prejudicial,²² so as to affect the substantial rights of the accused, and such a variance arises when an acquittal of defendant under the indictment would be no bar to a further prosecution for the same offense²³ or when the proof is so different from the allegations that the defense prepared turns out to be inapt. Yet there is also the rule that surplus matter in an indictment need not be proved,²⁴ but an exception to the rule exists where facts unnecessarily alleged constitute a part of the description of the offense.²⁵ It is generally agreed that unnecessary words descriptive of concrete things or persons are not surplusage,²⁶ and must be proved as laid.²⁷ In the case of *State v. Myers*²⁸ it was charged that defendant made a felonious assault with a deadly weapon, *to-wit*, a knife, and conviction was had upon proof that the victim was struck with a blunt instrument.²⁹ Judgment was reversed by unanimous decision for the assigned error of variance. The State argued that it was not

²⁰ *Bennett v. United States*, 227 U. S. 333, 33 S. Ct. 288 (1913); *Worsham v. State*, 56 Tex. Cr. 253, 120 S. W. 439, 18 Ann. Cas. 134 (1909); also cases cited in n. 3, *supra*.

²¹ *State v. Poindexter*, 23 W. Va. 805 (1884); *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225 (1886); *State v. Fleshman*, 40 W. Va. 726, 22 S. E. 309 (1895); *State v. Hill*, 48 W. Va. 132, 35 S. E. 831 (1900); *Com. v. Butts*, 4 Va. 118 (1815); *Com. v. Butcher*, 45 Va. 212 (1847).

²² *State v. Johnson*, 111 W. Va. 653, 164 S. E. 31 (1932).

²³ *People v. Arras*, 89 Cal. 223, 26 Pac. 766 (1891).

²⁴ *Hall v. State*, 120 Ga. 142, 47 S. E. 519 (1904).

²⁵ *State v. Herrera*, 28 N. M. 155, 207 Pac. 1085 (1922).

²⁶ In *Mitchell v. Com.*, 141 Va. 541, 127 S. E. 368 (1925), the court expressed the opinion that descriptive allegations that must be proved as laid are not confined to concrete things or persons, but have a more extended application, that is, to words describing, limiting, or qualifying the words necessary to the indictment, and cites *People v. Myers*, 20 Cal. 76 (1862), and *State v. Flynn*, 76 N. J. L. 473, 72 Atl. 296 (1909), in support thereof.

²⁷ *State v. Newland*, 7 Iowa 242, 71 Am. Dec. 444 (1858); *Com. v. Magowan*, 58 Ky. 368, 71 Am. Dec. 480 (1858); *Mitchell v. Com.*, 141 Va. 541, 127 S. E. 368 (1925).

²⁸ 190 S. E. 678 (W. Va. 1937).

²⁹ Probably under W. VA. REV. CODE (1931) c. 61, art. 2, § 9.

necessary to allege the instrument used in the assault,³⁰ so that its averment might be treated as surplusage. While this is true as to immaterial averments,³¹ the court pointed out that there is a decided difference between an immaterial averment and an averment that need not be made, the latter of which, while not material in the sense that leaving it out would make the indictment defective, becomes material by alleging it,³² because the defendant is thereby notified and led to believe that he will be safe in accordingly preparing a defense against only what is charged.³³

Thus, West Virginia follows the general authorities as to the variance rule and a slightly altered rule as to disjunctive indictments, both of which rules are deeply embedded in the Anglo-American system of criminal procedure, and rightly so, to make for certainty and fairness which are necessary in this field of the law. These protective rules, of course, do not let the accused go scot free, because by statutory provision³⁴ a person acquitted of an offense on the ground of variance or upon an exception to the form or substance of an indictment, may be arraigned again on a new indictment and tried and convicted of the offense, notwithstanding such former acquittal. The interests of both the accused and society are thereby protected.

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³⁰ This is borne out by *State v. Gibson*, 67 W. Va. 548, 68 S. E. 295, 28 L. R. A. (N. S.) 965 (1910). But in *Com. v. White*, 33 Ky. L. 70, 109 S. W. 324 (1908), under a statute against pointing a deadly weapon, the indictment did not name the weapon, and conviction by proof of use of a .45 cal. pistol was reversed, the court saying that prosecution may not supplement a defective charge by sufficient proof, since proof and allegations must agree.

³¹ Under the rule and exceptions, immaterial averments or true surplusage seem to be confined to immaterial description of unnecessary allegations.

³² It might be said that the more minute and particular the unnecessary allegations, the more likely is defendant to be prejudiced by proof varying therefrom. See cases cited in n. 27, *supra*.

³³ In a similar situation, in *Arbetter v. State*, 79 Tex. Cr. 487, 186 S. W. 769 (1916), the rule was stated: "If the indictment . . . alleges the means by which the assault was committed, such allegation, whether necessary or unnecessary, being descriptive, must be substantially proved as alleged."

³⁴ W. VA. REV. CODE (1931) c. 61, art. 11, § 14.