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SUSPENDED SENTENCE—"ACCRUAL" OF APPEAL ON REVOCATION [TEXAS]

In 1935 appellant was convicted of cattle theft, and the sentence was suspended in accordance with a Texas statute.[1] Two and a half years later he was convicted of driving while intoxicated, whereupon the trial judge in the first case revoked the suspension and pronounced sentence. The second conviction was affirmed on appeal,[2] and the two sentences were to be served consecutively. Meanwhile the court reporter's notes and transcript of testimony in the first trial had been destroyed, one of the attorneys had died, and the parties could not agree on a statement of facts from memory. On appeal as to the merits of the first conviction it was held that, since there was no adequate record for review, the judgment should be reversed and the case remanded for a new trial.[3]

The holding is based on two rules of criminal procedure which appear to be well-settled in the Texas decisions. The first of these is that there can be no appeal from a suspended sentence, since such does not constitute a "final judgment."[4] The second is that the right of appeal accrues if and when the suspension is revoked and final sentence and judgment pronounced.[5] There is a very general agreement with the first point.[6] However, a few jurisdictions have held to the contrary,[7] and some states have statutes expressly providing for appeal from suspended sentences.[8] In Pennsylvania several decisions, while recognizing the rule as prevailing in that state, have refused to follow it in certain situations, in order to prevent manifest injustice to the convicted appellants.[9] Under the Federal Probation Act[10] a distinction is drawn between suspending pronouncement of sentence and suspending execution thereof. Either order may be given, in the discretion of the trial judge, but only from the latter may the case be appealed

[1] Vernon's Texas Statutes, Code Crim. Proc. (1936) Art. 776, 776a, 778, 779.

[2] Lamkin v. State, 136 Tex. Crim. Rep. 99, 123 S.W. (2d) 662 (1939).

[3] Lamkin v. State, 136 S.W. (2d) 225 (Tex. Crim. Rep. 1940).

[4] Bierman v. State, 73 Tex. Crim. Rep. 284, 164 S.W. 840 (1914); Gallier v. State, 78 Tex. Crim. Rep. 534, 182 S.W. 306 (1916); Thomas v. State 87 Tex. Crim. Rep. 153, 219 S.W. 1100 (1920).

[5] Bierman v. State, 73 Tex. Crim. Rep. 284, 164 S.W. 840 (1914); Ex Parte Beland, 94 Tex. Crim. Rep. 614, 252 S.W. 529 (1923).

[6] 17 C. J. Criminal Law §3292; United States v. Lecato, 29 F. (2d) 694 (C.C.A. 2d, 1928); Birnbaum v. United States, 107 F. (2d) 885 (C.C.A. 4th, 1939); Barnes v. State, 20 Ariz. 183, 178 Pac. 780 (1919); People v. Von Eckartsberg, 133 Cal. App. 1, 23 P. (2d) 819 (1933); Symington v. State, 133 Md. 452, 105 Atl. 541 (1919); State v. Bongiorno, 96 N. J. Law 318, 115 Atl. 665 (1921).

[7] Law v. State, 238 Ala. 428, 191 So. 803 (1939); Sutton v. State, 194 Ind. 479, 143 N.E. 353 (1924) (overruling prior cases); State v. Liliopolous, 165 Wash. 197, 5 P. (2d) 319 (1931).

[8] Thompson's Laws of New York (1939), Code Crim. Proc. 517, 750.

[9] Commonwealth v. Trunk, 311 Pa. 555, 167 Atl. 333 (1933) (abuse of judicial discretion); Commonwealth v. Ragone, 317 Pa. 113, 176 Atl. 454 (1935) (defendant admittedly insane; convicted of murder); Commonwealth v. Haines, 130 Pa. Super. 193, 196 Atl. 621 (1938) (insufficient evidence). In the Trunk case, supra, severe sentences were imposed on two counts of the indictment, but sentence was suspended on the other counts. Flagrantly biased instructions as to the latter counts apparently influenced the trial and verdict as a whole. By the rule under discussion these instructions would not be open to review.

[10] 43 Stat. 1259 (1925), 18 U.S.C.A. 724 (1927).

on the merits.[11] In at least one state it has been held that an order denying a motion for new trial will serve as the basis for an appeal, even though the sentence is suspended.[12]

In regard to the second point involved in the present case—the accrual of the right of appeal upon revocation of suspension—the weight of authority appears to be contrary to the Texas decision.[13] The result is that in many jurisdictions suspension of sentence removes all opportunity for appeal, unless before the time limit on appeals expires the defendant demands that sentence be pronounced. If he does not, he is deemed to have waived all rights to appeal.[14]

There are obvious disadvantages in allowing an appeal and a new trial years after conviction, as was done in the case under discussion.[15] While this procedure may well be preferable to a complete denial of appeal, it appears to violate the well-established policy underlying statutory time limits on appeals. But such a result would be unnecessary were it not for the first premise in the case, that an appeal will be denied from a suspended sentence. This rule seems more technical than logical and is difficult to justify. The cases supporting it generally state that the only final appealable judgment in a criminal case is the pronouncement of sentence. But an order adjudging the accused guilty and suspending sentence terminates the prosecution and the proceedings of the trial. For the purpose of appeal this should satisfy any sound criterion for final judgment.[16] In passing it may be added that a defendant's conviction is only too "final" if he cannot obtain review.

The cases denying an appeal sometimes state the rule in terms of estoppel.[17] It is considered unbecoming of a defendant to question the fairness of his trial when he has received the benefits of a suspension of sentence. This argument assumes that no injury is suffered so long as actual imprisonment is stayed.[18] But it should be remembered that in all these cases a person has been indicted, tried, and found guilty. Certain privileges may thus be lost. In *State* v. *Liliopolous*[19] the defendant at-

[11] Berman v. United States, 302 U.S. 211 (1937); Birnbaum v. United States, 107 F. (2d) 885 (C.C.A. 4th, 1939).

[12] People v. Hartman, 23 Cal. App. 72, 137 Pac. 611 (1914).

[13] Brooks v. State, 51 Ariz. 544, 78 P. (2d) 498 (1938); Sutton v. State, 194 Ind. 479, 143 N.E. 353 (1924); Renado v. Lummus, 205 Mass. 155, 91 N.E. 144 (1910).

[14] "The petitioner having waived his right of appeal, and having . . . accepted a different provision for his benefit, his claim of an appeal . . . came too late." Renado v. Lummus, 205 Mass. 155, 157, 91 N.E. 144, 145 (1910). In regard to revocation of a suspended sentence, it is generally provided by statute that this must be within the period for which the defendant might have been sentenced. Commonwealth ex rel. Wilhelm v. Morgan, 278 Pa. 395, 123 Atl. 337 (1924). It has been held in some cases, however, that revocation and the imposition of sentence may come at any time. State ex rel. Tingstad v. Starwich, 119 Wash. 561, 206 Pac. 29 (1922). Under this rule a defendant may have a life-long threat of incarceration hanging over his head.

[15] Witnesses may die or move away, records may be destroyed, and evidence lost. See Brooks v. State, 51 Ariz. 544, 78 P. (2d) 498 (1938). The present case well illustrates some of the difficulties.

[16] It should be noted that the term "final judgment" has no set meaning, and in fact varies widely in regard to different purposes. United States ex rel. Voorhees v. Hill, 6 F. Supp. 922 (M.D. Penn. 1934) (suspended sentence is final judgment as to liquor-law violators on probation at the time of Repeal); noted in 3 Geo. Wash. L.R. 247 (1935); see Words and Phrases, perm. edit. (1940) "Final judgment or order."

[17] "Accepting the benefits of probation, therefore, . . . estops him from bringing the errors committed at the trial to this court for review. . . . He cannot 'eat his cake and have it too'." Brooks v. State, 51 Ariz. 544, 551; 78 P. (2d) 498, 501 (1938).

[18] "A defendant may at any time insist upon the imposition of sentence, if so minded, and if he prefers to remain under probation rather than to take his chances, no grave evil results." United States v. Lecato, 29 F. (2d) 694, 695 (C.C.A. 2d, 1928).

[19] 165 Wash. 197, 5 P. (2d) 319 (1931). Washington is one of the states allowing an appeal from a suspended sentence. In New York such an appeal may be taken from certain courts. See note 8, supra. Under the New York procedure innocent persons have been enabled to clear their names of conviction. People v. Magnus, 155 N.Y.S. 1013 (1915) (epileptic defendant; medical testimony ignored in the trial court); People v. Albo, 250 N.Y.S. 167 (1931) (conviction unsupported by evidence). See note 9, supra.

torney had been convicted of embezzlement, which meant that the loss, by disbarment, of his means of livelihood was imminent. There is an attendant stigma. Few persons are so situated socially that conviction of felony works no injury. And an innocent party faces a hard choice when he must either forego the opportunity for full vindication, or else demand imposition of sentence and take the risk of an unsuccessful appeal.

STEPHEN LADD.

CONTRACEPTIVES—PRESCRIPTION BY A PHYSICIAN AS A HEALTH MEASURE [CONNECTICUT]*

The defendant, a licensed physician, prescribed the use of contraceptives for a married woman for the preservation of her general health and was convicted under section 6246[1] of the Connecticut General Statutes which places an absolute prohibition upon the use of contraceptives. On appeal the defendant contended that the statute should be construed so as to permit an exception where a physician prescribes the use of contraceptives to preserve life or protect the general health and well being of a married woman, and that construed without such an implied exception the statute was unconstitutional. The Supreme Court of Errors, however, affirmed the conviction holding no exception could be implied, and that the statute without the exception was unconstitutional.

The legislative history of this subject begins with the passage of the Comstock Act[2] by Congress in 1873. This act was immediately copied by a number of state legislatures whose enactments,[3] of which the Connecticut statute involved is one, were absolute in scope admitting of no exceptions. Although there is considerable authority to support the constitutionality of these statutes when strictly construed as being within state police powers,[4] there is some ground upon which a finding of unconstitutionality could be based. In *Lambert* v. *Yellowley*[5] Mr. Justice Brandeis intimated that the provision in the National

* State v. Nelson, 11 A. (2d) 856 (Conn. 1940).

[1] Section 6246 (1930) "*Use of drugs or instruments to prevent conception.* Any person who shall use any drug, medical article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or both fined and imprisoned."

Section 6562 (1930) "*Accessories.* Any person who shall assist, abet, counsel, cause, hire or command another to commit any offense may be prosecuted and punished as if he were the offender."

[2] 19 Stat. 90 (1876), 18 USCA 334 (1927). This act places an unconditional prohibition upon mailing or importing of articles "designed, adapted or intended for the prevention of conception or the procurement of a miscarriage." See Broun and Leech, Anthony Comstock (1927) for the influence the author of the bill had upon its passage.

[3] States having absolute prohibitions similar to Connecticut are Kansas, Rev. Stat. c. 21 §1101 (1935); Mississippi, Miss. Code Anno. §1057 (1930); Missouri, Mo. Rev. Stat. §4275 (1929); Pennsylvania, 18 Pa. Anno. Stat. §§777, 778 (Purdon 1930); Washington, Wash. Comp. Stat. §2460 (1932). See Dennett, Birth Control Laws (1926). Subsequent Federal statutes are also absolute in form: Transportation in interstate commerce 29 Stat. 512 (1897), 18 USCA §396 (1927); Prohibition on importation of articles for the prevention of conception 46 Stat. 688 (1930), 19 USCA §1305a (1935).

[4] Decisions sustaining their constitutionality are Commonwealth v. Gardner, 15 N. E. (2d) 222 (Mass. 1938); Commonwealth v. Allison, 227 Mass. 57, 116 N.E. 265 (1917); People v. Byrne, 163 N.Y. Supp. 682 (1916); State v. Arnold, 217 Wis. 340, 258 N.W. 843 (1935). The statute in the latter case allowed sale by registered pharmacist or duly licensed physician.

Commonwealth v. Gardner, supra, commented on in 37 Mich. Law Rev. 317 (1938) and 7 Geo. Wash. Law Rev. 255 (1938) interpreting a statute very similar to the Connecticut statute held that the wording was unequivocal and admitted of no implied exception in favor of physicians and that an absolute prohibition was constitutional under the police power of the legislature. Also see Comment (1939) 6 U. Chi. Law Rev. 260.

[5] 272 U.S. 581 (1926).

Prohibition Act limiting the prescription of alcoholic liquors for medicinal purposes would have been unconstitutional had physicians been in agreement as to the medicinal values of such liquors.[6] A similar indication was given in a somewhat earlier decision, *Jacobson* v. *Massachusetts*,[7] where it was said, in a very strong dicta, that a compulsory vaccination statute comprehending all adults in its scope could not be applied against a person who could show with reasonable certainty that he was not at the time a fit subject for vaccination. Consequently upon a demonstration of the general recognition of the medicinal value of contraceptives by the medical profession in addition to a showing that their denial would cause a specific and predictable physical injury, these cases would lend considerable weight to a decision that the statute was unconstitutional.

However, the statute could be saved by a construction which would admit of exceptions where a married woman's health, or life was threatened by a specific danger through pregnancy. In the absence of an express declaration by the legislature that no exceptions were to be implied this would be possible,[8] especially in view of the fact that there is a considerable body of precedent in support of such a construction. In the face of the absolute Federal statutes the Circuit Court of Appeals in many decisions has found implied exceptions to the operation of these laws. In *United States* v. *One Package*[9] Judge Augustus Hand holding that the statute[10] did not bar importation of contraceptives by physicians to protect a patient's health or for experimental purposes, said "the statute . . . . embraces only such articles as congress would have denounced as immoral if it had understood all the conditions under which they were to be used, and was not designed to prevent importation of things which might intelligently be employed to save life or promote the well being of patients."[11] Similarly in *Youngs Rubber Co.* v. *Lee*[12] the court indicated that an absolute prohibition on the use of the mails for transporting articles of contraception did not apply where such objects also had a legitimate use. In *Bours* v. *United States*[13] a prohibition on the mailing of information as to where operations producing abortions would be performed which applied to all abortions by its terms, was held nevertheless not to prevent a physician from using the mails to say that if an examination showed the necessity of an operation to save life he would operate. Corresponding positions have been taken in *United States* v. *Dennett*[14] and *United States* v. *One Book Called Ulysses*[15] concerning obscenity.

[6] Id. 294. The court speaking with approval of the decision in Everards Breweries v. Day, 265 U.S. 545 (1924), said "that Congress must be regarded as having concluded—as well it might do in the absence of any consensus of opinion among physicians and in the presence of the absolute prohibition in many of the states—that malt liquor has no substantial medicinal qualities making its prescription necessary; and that this made it impossible to say that the provision was an unreasonable and arbitrary exercise of power."

[7] 197 U.S. 11 (1905).

[8] From 1923 to 1935 the Connecticut legislature repeatedly rejected an amendment to the statute which would expressly permit physicians to prescribe the use of contraceptives when in their opinion pregnancy would be detrimental to the health of such patient or to the child of such patient. This is strongly persuasive of the intent of the legislature. The federal courts, however, inferred the exception in the Comstock Act although the words "except on a prescription of a physician in good standing, given in good faith" were struck out of the original bill before it was passed by Congress.

[9] 86 F. (2d) 737 (C.C.A. 2d. 1936). Judge Learned Hand, although concurring on other grounds, said, ". . . there seems to me substantial reason for saying that contraceptives were meant to be forbidden whether or not prescribed by physicians, and that no lawful use of them was contemplated."

[10] 46 Stat. 688 (1930), 19 USCA §1305a (1935).

[11] 86 F. (2d) 737, 739 (C.C.A. 2d. 1936).

[12] 45 F. (2d) 103 (C.C.A. 2d. 1930).

[13] 229 Fed. 960 (C.C.A. 7th. 1915).

[14] 39 F. (2d) 564 (C.C.A. 2d. 1930).

[15] 72 F. (2d) 705 (C.C.A. 2d. 1934). In this decision Judge Augustus Hand held that the Tariff Act of 1930, 46 Stat. 688 (1930), 19 USCA §1305a (1935), containing a prohibition on importation of obscene books except classics or books of recognized and established literary or scientific merit which may be admitted at the discretion of the Secretary of the Treasury but only when imported for non-commercial purposes did not exclude a publication which was sincere and in which the erotic matter was not introduced to promote lust and does not furnish the dominant note of the publication. Similarly United States v. One Book Entitled Married Love, 48 F. (2d) 821 (S.D. N.Y. 1931); United States v. One Book Contraception, 51 F. (2d) 525 (S.D. N.Y. 1931).

However, because exceptions may be implied to statutes that are absolute in form does not give the courts license to imply any exception they desire; the statutes must be interpreted in a manner not inconsistent with the reasonable legislative intent. Nevertheless it is difficult to see how the court could validly object to an exception permitting a physician to prescribe contraceptives where pregnancy would acutely jeopardize life, for to do so would result in the absurd situation where a married woman in ill health could not legally resort to the use of contraceptives but upon becoming pregnant could legally submit to an abortion if it were necessary to save her life.[16] It is difficult to believe that the legislature intended such an anomalous situation. The court in the instant case seemingly sensed this inconsistency for it confined the issue to situations where in the opinion of the physician the *"general health"* of a woman required that she not bear children and it refused to determine whether an implied exception might be recognized when pregnancy would *jeopardize life.*[17] But even on the assumption that in the above case the court would logically be impelled to find an implied exception, we still have the inequitable situation that a woman threatened with life long invalidism were she to bear a child, could not legally use contraceptives. Generally, in the past, courts have refused to find an exception to the abortion statutes unless the operation was necessary to save life.[18] The position of the court in the instant case would be conditioned by the precedents of the abortion cases. But harm suffered as a consequence of pregnancy may range from permanent physical invaldism to the disturbance of the psychological equilibrium and to create exceptions only in cases where life itself is endangered seems inequitable. This has been recognized in a recent English case, *Rex* v. *Bourne*,[19] where it was held that the necessity to prevent a woman from becoming a "physical and mental wreck" was a good defense to a prosecution under the abortion statute. Therefore it would seem that to imply an exception in a fact situation where it was necessary to avoid a specific danger to health,[20] although the danger might not necessarily jeopardize life, would be a judicial interpretation entirely consonant with legislative intent, past decisions and the equities of the situation. Further than this the court could scarcely go without clear legilative consent.[21]

DANIEL HANSCOM.

INDICTMENTS—DUPLICITY—CHARGING IN THE ALTERNATIVE IN THE WORDS OF THE STATUTE [DELAWARE]

In State v. Morrow[1] the defendant was indicted for the unlawful practice of medicine without a license. The Delaware statute[2] defines the practice of medicine as "to investigate or diagnosticate, or to offer to investigate any physical or mental ailment, or disease of any person, or to give surgical assistance to, or suggest, recommend, prescribe or direct for the use of any person, any drug, medicine, appliance or other agency," or the doing of other similar acts. The second count of the indictment[3]

[16] Section 6056 Conn. Gen. Stat. (1930) expressly provided an exception to the blanket prohibition against abortions where such abortions are necessary to save life.

[17] 11 A. (2d) 856, 859 (1940).

[18] See Note (1938) U. Chi. Law Rev. 109, 110.

[19] [1938] 3 All E.R. 615, [1939] 1 K.B. 87, 108 L. J. K. B. 471.

[20] Davis, Gynecology and Obstetrics, C. 5 p. 36, C. 9 p. 12, 20 (1935).

[21] For further discussion see Note (1940) 19 Neb. Law Rev. 35; Note (1932) 45 Harv. Law Rev. 723.

[1] 10 A. (2d) 530 (Delaware, decided Nov. 14, 1939).

[2] Del. Rev. Code (1935) c. 27 §926.

[3] The first count of the indictment charging only that the defendant "did unlawfully engage in the practice of medicine without proper license" was dismissed because not enough facts were stated to sufficiently inform the defendant of the charges he would have to meet at the trial.

charged the defendant with the doing of several of these acts set out in the statute, connecting them with the word *and* in place of the word *or* used in the statute. The defendant claimed the count was bad because it was duplicitous in alleging several distinct offenses in one count, and because it was misleading in that it did not specifically inform the defendant of the violation of the law against which he must defend. The court, however, held this count was not duplicitious since the several acts charged were connected with the same general offense and subject to the same measure and kind of punishment; and that the wording of the indictment was sufficiently clear to inform the accused of the crime with which he was charged.

The holding in the instant case on the point of duplicity follows the generally accepted rule that where a statute creates one offense but specifies several ways or means by which it may be committed, the indictment may charge conjunctively in a single count the doing of any or all of these acts, *i.e.* a single offense may be described by alleging several of these acts in one count although each one alleged separately would have been sufficient to describe it. The courts hold further that when several of the acts are charged only one need be proved to establish the crime.[4] They however seem to differ on when the acts alleged describe a single offense and when they go to make up separate offenses. While they seem to agree that all the acts must arise out of a single transaction they differ as to just exactly what a *single transaction* is; some give it a comparatively narrow meaning[5] while others allow a wider scope than the word would seem to imply.[6] However, these decision lines have never been clearly drawn so it is usually left to the discretion of the judge to determine whether the different acts alleged go to make up the gist of one offense or several separate and distinct offenses. By the use of this discretion the judges have been able to limit the formal rule of duplicity. In some states the legislatures have gone further and have by statute practically done away with duplicity by specifically providing that what previously required several counts might be accomplished in a single count unless the defendant was prejudiced thereby.[7]

While the general rule is that the several acts specified in a statute may be charged conjunctively in the same count it seems to be equally well settled that a count charging a series of acts disjunctively in the exact words of the statute would be held bad for uncertainty—that by the use of the word *or* instead of the word *and* the defendant would not know with which of the acts or offenses he was charged and would not be able to prepare his defense accordingly.[8] "Thus in Angels Case, 2 Va. Cases 231, it was held that where the statute said 'whoever shall unlawfully shoot or stab another with intention to maim, disfigure, disable *or* kill shall

[4] 1 Bishop, New Criminal Procedure (4th ed., 1895) §§434, 436; 1 Wharton, Criminal Procedure (9th ed., 1918) §300; 27 Am. Jur., Indictments and Informations §§124, 104.

[5] Cruel v. United States, 21 F. (2d) 690 (C.C.A. 8th, 1927), discussed in 37 Yale Law J. 522 (1927); Leach v. State, 86 P. (2d) 1013 (Okla., 1939) (the information charged that the defendant did "sell, barter, give and otherwise furnish whiskey" to a minor—held bad as duplicitous); State v. Haven, 57 Vt. 399. 9 Atl. 841 (1887) (false certificate "issued and used"—held to be bad for duplicity); State v. McCormack, 56 Iowa 585, 9 N.W. 916 (1881) ("forging and uttering forged paper" held separate offenses).

[6] Supra note 4. For more recent cases see State v. Carr, 151 Kan. 36, 98 P. (2d) 36 (1940); Jackson v. State, 5 A (2d) 282 (Md. 1939); State v. Rooney, 97 P. (2d) 156 (Wash. 1939).

[7] Minnesota, Mason's Minn. Stat. (1927) §10648; Montana, Rev. Code of Mont. (1935) §11853; Nevada, Nev. Comp. Laws (1929) §10858; Oklahome, Okla. Stat. (1931) §2892; Texas, Vernon's Tex. Stat. (1936) Code of Crim. Proc. art. 412; Florida, Comp. Gen. Laws of Fla., Supp. (1940) §866 (131); Hawaii, Rev. Laws of Hawaii (1935) §5506; Louisiana, La. Code of Crim. Proc. (1932) §252; Michigan, Mich. Stat. Ann. (1938) §28.1015; New Hampshire, Pub. Laws of N. H. (1926) c. 368 §12.

[8] 1 Bishop, New Criminal Procedure (4th ed. 1895) §§586, 436; 27 Am. Jur., Indictments and Informations §§104, 124; Annotation 51 L.R.A. (ns.) 134. See also Note (1935), 8 Australian Law J. 430, 432. 433. For Nebraska law see Note (1933), 11 Neb. L. Bul. 458.

be,' etc., the indictment was properly drawn which charged the act done 'with intention to maim, disfigure, disable *and* kill' and that the party on such an indictment should be found guilty if his intention was only to maim and disfigure and not to kill. If this indictment had followed the words of the statute, it would have been bad for it would have violated the well established rule that an indictment must not state the offense disjunctively when it is thereby left uncertain what is really intended to be relied on as the accusation."[9] The folly of such a rule seems to be obvious on the face of it. In one breath the Courts say it is good pleading to use *and* instead of *or* but still give *and* the meaning of *or* by allowing any one of the acts to prove the offense, and in another breath they say the use of the disjunctive makes the count bad. How can it be said that the use of the conjunctive better and more certainly informs the accused of the charges against him when it is in reality given the exact meaning of the disjunctive. For example, using the statute in the instant case, how would the defendant to be less informed of the charges which he must defend if the indictment read that the defendant "did investigate *or* did diagnosticate, *or* did prescribe certain drugs" than if it read "did investigate *and* did diagnosticate *and* did prescribe"? In the first case it would be claimed that the defendant would not know which of the three acts he was accused of and therefore the count would be uncertain, but why could he not prepare a defense for the three acts the same as in the case when the conjunctive is used? There would be some sense to the rule, other than common law of formality,[10] if the *and* were used in its strict sense and every act in the series had to be proved in order to constitute the offense; but such is not the case and any one of the acts by itself may constitute the entire offense, thus giving exactly the same result as if the disjunctive were used. The few cases in which the disjunctive is allowed are generally those in which the words or phrases so connected are practically synonymous as "spiritous *or* intoxicating" liquor.[11] Occassionally also the court may hold the alternative part as surplusage.[12]

Then, since the defendant would be fully informed of the crime with which he was charged under either the disjunctive or the conjunctive and since the rule is now illogical and impractical and only a remnant of common law formality it should be done away with.[13] Some states by statute have done this by providing that offenses of the same character and subject to the same punishment may be charged alternatively in the same count.[14]

RICHARD J. FINK.

[9] State v. Charlton, 11 W. Va. 333, 334 (1877).

[10] 1 Chitty, Criminal Law (1819) §336.

[11] State v. George, 134 La. 177, 63 So. 866 (1913). See Bishop, New Criminal Procedure §590; 51 L.R.A. (ns) 133.

[12] Bishop, New Criminal Procedure §592.

[13] Millar, The Reform of Criminal Pleading in Illinois (1917) 8 J. Crim. L. 337; Millar, The Function of Criminal Pleading (1921) 12 J. Crim. L. 500.

[14] Alabama, Ala. Code Ann. (1928) §4546; Arizona, Ariz. Code (1928) §4980; Kentucky, Carroll's Ky. Code of Prac. in Crim. Cases (1938) §126; New Mexico, N. M. Stat. Ann. (1929) §4409; Oklahoma, Okla. Stat. (1931) §2886; Oregon, Ore. Code Ann. (1930) §13-708; Tennessee, William's Tenn. Code Ann. (1934) §11628; Utah, Rev. Stat. of Utah (1933) §105-21-7.