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# Indictment and Information - Videlicet - Will Use of Vidleicet Dispense with Necessity of Strictly Proving Averment Made Thereunder

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the witness. Evidence showed she had sufficient qualifications to be deemed an expert, and she did give an express opinion. It is submitted that a similar result in North Dakota would be unlikely. To disallow the testimony in the principal case would seem to be an overstep of proper judicial review. The true question involved was the degree of expertness of the witness, and as such it was a valid issue to be submitted to the jury. The appellate court should not have so impaired the proper exercise of discretion exercised in the lower court.

R. JON FITZNER

INDICTMENT AND INFORMATION — VIDELICET — WILL USE OF VIDLEICET DISPENSE WITH NECESSITY OF STRICTLY PROVING AVERMENT MADE THEREUNDER? — The defendant was a licensed package dealer in intoxicating liquors. A statute provided that: "No licensee shall sell any intoxicating liquor: (a) To any person under the age of twenty-one years . . . ."[1] The information on which defendant was prosecuted alleged that he "unlawfully sold intoxicating liquor, to wit: one quart of Stillbrook whiskey." The trial court instructed the jury that the only question for them to decide was whether or not defendant sold intoxicating liquor to the minor and thus, in effect, it was not necessary to find that he, in fact, sold *Stillbrook whiskey.* Defendant was convicted and appealed. In reversing the decision the Supreme Court of South Dakota *held,* one justice dissenting, that the state need not have alleged that the liquor was Stillbrook whiskey; but having done so, it became a matter of essential description and must be proved. *State v. Sudrala,* 116 N.W.2d 243 (S.D. 1962).

In the quoted portion of the information above the alleged fact preceded by the words "to wit" is said to be "laid under a videlicet."[2] That technical name is also given to "that is to say"[3] and "namely."[4]

At common law the allegation of a fact under a videlicet

1. S.D.C. § 5.0226(2) (1939).
2. People v. Shaver, 367 Ill. 339, 11 N.E.2d 400 (1937); Luka v. Behn, 225 Ill. App. 105 (1922).
3. Garrison v. City of Shreveport, 179 La. 605, 154 So. 622 (1934).
4. Taney County v. Empire Dist. Elec. Co., 361 Mo. 572, 235 S.W.2d 271 (1951). (The frequently used "viz." is an abbreviation of videlicet).

necessitated strict proof of the averment.[5] Apparently, one of the reasons for requiring strict proof of the fact was to make certain the accusation against a defendant so that he might prepare his defense and plead the judgment as a bar to a subsequent prosecution for the same offense.[6] It is said that: "If a necessary allegation is made unnecessarily minute in description, the proof must satisfy the descriptive as well as the main part, since the one is essential to the identity of the other."[7]

Some jurisdictions have weakened the effect of the exacting common law rule.[8] An early Illinois case stated that the office of a videlicet is "to indicate that the party does not undertake to prove the precise circumstances as alleged."[9] It should be noted, however, that in a later case the Illinois Supreme Court declared that proof is required if the matter laid under the videlicet is *material to the charge.*[10] A requirement of proof when the allegation under a videlicet is material appears to be a clearly establish rule.[11] When the fact alleged is not material, it is generally treated as surplusage.[12]

The court in the instant case relied on a Dakota Territory case which suggested that an allegation of "kind" is material if "descriptive of the identity of the subject of the action."[13] Admittedly, the allegation of Stillbrook whiskey was descriptive and made specific that which before was general. However, it is submitted that the allegation is not material to the *offense charged,* the statutory offense of selling "any intoxicating liquor" to a minor.

MAURICE R. HUNKE

INTERNAL REVENUE — INCOME TAX — BUSINESS OR NONBUSINESS BAD DEBTS — SCOPE OF "TRADE OR BUSINESS" —

5. State v. Scovill, 15 S.W.2d 931, 935 (Mo. 1929).
6. See, **e.g.,** McLendon v. State, 121 Ga. 158, 48 S.E. 902 (1904); State v. Sinnott, 72 S.D. 100, 30 N.W.2d 455 (1947).
7. 2 BISHOP'S NEW CRIMINAL PROCEDURE § 485(2) (2d ed. 1913).
8. See, **e.g.,** Columbian Three Color Co. v. Aneta Life Ins. Co., 183 Ill. App. 384 (1913); State v. Heck, 23 Minn. 549 (1877); Culp v. Virginian Ry. 80 W. Va. 98, 92 S.E. 236 (1917).
9. Chicago Terminal Transfer R.R. v. Young, 118 Ill. App. 226, 229 (1905).
10. People v. McCanney, 205 Ill. App. 91, 98 (1917).
11. See, **e.g.,** cases cited in note 8, **supra.**
12. See, **e.g.,** Tullis v. Shaw, 169 Ind. 662, 83 N.E. 376 (1908).
13. Brugier v. United States, 1 Dak. 5, 46 N.W. 502 (1867).