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JOINDER OF CRIMINAL CHARGES, ELECTION, DUPLICITY

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This is one of a series of memoranda on criminal law and procedure prepared under the direction of Bert M. Keating, District Attorney, Denver, Colorado, for use by his staff and for distribution to other Colorado district attorneys.

This memorandum, which applies alike to indictments, informations and criminal complaints, discusses (1) joinder and misjoinder of charges, (2) election between counts and (3) duplicitous and nonduplicitous statements of more than one offense in a single count. Counts are numbered as separate statements of criminal charges in a single instrument. For example, Count 1 may charge burglary, Count 2 larceny and Count 3 the receiving of stolen personal property knowing it to be stolen.

Two or more criminal offenses may properly be charged in one information if the joinder meets the tests hereafter discussed. If joined, they must be stated in separate counts. '35 C. S. A., c. 48, §450.

A statute, '35 C. S. A., c. 48, §449, provides that, for example, a charge of assault with intent to commit murder may be joined with a charge of assault with a deadly weapon, instrument or other thing with an intent to commit upon the person of another a bodily injury [both of which crimes are defined in section 67 of chapter 48, '35 C. S. A.], provided those offenses arose from the same transaction. And under either of those charged a defendant may be found guilty of an assault without there being any separate count charging that misdemeanor. The reason is that an "assault" is an essential element in either offense and is a lesser included offense, and the accused may be guilty of it even though he did not have the specific intent to kill or do bodily injury. See *People v. Hopper,* 69 Colo. 124, 126, 169 P. 152.

Assault and battery, however, is not an included offense in assault to murder or assault to injure, and would have to be set up in a separate count. *Lane v. People,* 102 Colo. 83, 77 P. 2d 121. But it would be futile to make the charge since the penalty for it and for simple assault are the same. '35 C. S. A., c. 48, §68, as amended. Moreover, under the view expressed in the recent case of *Eckhardt v. People,* 126, Colo. ......, 247 P. 2d 673, 677, a misdemeanor charge should not be joined with one for a felony, which means that assault with intent to murder, a felony, should not be joined with assault and battery, a misdemeanor.

A statute, '35 C. S. A., c. 48, §449, provides that charges of (1) larceny, (2) embezzlement and (3) receiving stolen goods may be joined. They must be stated in separate counts, '35 C. S. A., c. 48, §450, and, as will appear later, must arise from the same

transaction or series of transactions. Ordinarily, there may be a conviction on but one of the charges. *Hill v. Best,* 101 Colo. 243, 248, 248, 72 P. 2d 471; *Sanders v. People,* 109 Colo. 243, 244-245. In other words, a person may not be convicted of both embezzlement or larceny by bailee and larceny of the same property at one time. Nor may he be convicted of any of those offenses and also of criminally receiving the same property if it appears that he personally stole or wrongfully converted to his own use, or was personally present at such stealing or conversion. The exception to this rule would arise if he was an accessory before the fact to the crime by counseling and advising it, '35 C. S. A., c. 48, §13, and then knowingly received such property. In such case, he probably could be convicted both as a principal in the theft or conversion and as a receiver of the personal property. See *Spinuzza v. People,* 99 Colo. 303, 306, 62 P. 2d 471.

Counts for burglary and larceny may be joined, *Hill v. Best,* 101 Colo. 243, 72 P. 2d 471, as may be counts for burglary and for receiving stolen goods. *Parker v. People,* 13 Colo. 155, 160, 21 P. 1120. This decision discusses the notorious *"Boss" Tweed* case, 60 N. Y. 559, which, the Colorado court said, "has called for the severest criticism from our ablest criminal-law writers, and is contrary to the weight of authority both in England and in this country." There Tweed was charged in one indictment with 220 law violations, charged in separate counts, and was convicted of 204. The court sentenced him separately on twelve convictions, the sentence on the first being for the maximum allowable. After he had served the first sentence, the New York Court of Appeals freed him, holding that the sum of all of the punishments could not exceed the maximum fixed for a single conviction. But the court made the anomalous statement that had the 220 offenses been charged in separate indictments, he could have been convicted on each and have been given the maximum sentence on each.

It is the practice when there has been a burglary coupled with a larency, to charge in separate counts (1) burglary, (2) larceny and (3) receiving stolen goods. While a person could not be found guilty of all three of those crimes in a single transaction [unless he was both a receiver and an accessory before the fact by counseling and advising], nonetheless he may be convicted of both the burglary and the larceny and receive separate sentences to run one after the other. For example, if an accused entered a home with intent to steal, he was guilty of burglary; and if while so in the house he stole personal property, he committed the crime of larceny. While there was but one transaction, yet two separate crimes arose from it. *Hill v. Best,* 101 Colo. 243, 246, 74 P. 2d 471. Of course, if it was alleged in a single count that defendant entered and stole, but one crime would be stated, *Hill v. Best, supra,* which would be burglary. *Collins v. People,* 69 Colo. 343, 344, 193 P. 634.

In all of these cases mentioned and to be mentioned, if several persons participated in the offense, whether as principals or as accessories before the fact, it is within the discretion of the district attorney whether they shall be charged jointly in one information. Even when they are charged separately their cases may be consolidated for trial if the judge thinks it advisable. *Quinn v. People,* 32 Colo. 135, 75 P. 396. The same thing is true where several informations are filed charging one or more persons with offenses which lawfully may be joined in separate counts. '35 C. S. A., c. 48, §450.

Section 450, chapter 48, '35 C. S. A. [the subdivisions of which will be treated out of order for convenience and discussion] provides that where there are several charges against the same person or persons for (1) one or more acts or transactions of the same class of crimes or offenses which may be properly joined, or for (2) the same act or transaction, or (3) two or more acts or transactions connected together, such charges may be made in one information, or if several informations have been filed they may be consolidated for trial.

SAME CLASS OF CRIMES

Although the statute does not say so, it has been held that the offenses, to be joinable, must either (1) arise from the same transaction, or (2) be connected together. It is not enough that the crimes are of the same class, or even the same crime in name. *Cummins v. People,* 4 Colo. App. 71, 74, 34 P. 734; *White v. People,* 8 Colo. App. 289, 293, 45 P. 839.

For example, the crime of obtaining money by false pretenses from A on one day cannot be joined with the crime of obtaining money by false pretenses from B on another day, *Cummins v. People,* 4 Colo. App. 71, 45 P. 734, or even on the same day if the transactions are distinct. *Hummel v. People,* 98 Colo. 98, 52 P. 2d 669. It is only when the offenses arise from the same transaction, as where one robs two other persons at the same time, that crimes, even of the same class, may be joined. See *Wood v. People,* 60 Colo. 211, 212, 151 P. 941.

Again, for example, a number of larcenies from different persons at different time cannot be joined, even though they were committed on the same day. The reason is that the offenses arise from different acts or transactions. *Hummel v. People,* 98 Colo. 98, 52 P. 2d 669.

The two examples above are where the offenses were against different persons. But the principle applies equally where such offenses are against the same person, if they did not arise from the same transaction or are not connected together. Thus, where there was an illegal joinder of offenses in an indictment which charged defendant in Count 1 with the larceny of two head of neat cattle from one Tolle on March 1, in Count 2 with larceny of eight head of neat cattle from Tolle on May 20, and in Count 3 with larceny of eight head of neat cattle from Tolle on July 3,

and where defendant was convicted on Counts 2 and 3, such conviction was reversed because of the misjoinder of those separate transactions, although they were of the same class of crimes. *White v. People,* 8 Colo. App. 289, 293, 45 P. 539.

SAME ACT OR TRANSACTION

Whenever separate crimes arise from the same act or transaction they always may be joined, provided they are of the same class of crimes; for example, if both are felonies. Thus, in *Eckhardt v. People,* 126 Colo. ......, 247 P. 2d 673, 677, where a count for voluntary manslaughter, a felony, was joined with one for assault and battery, a misdemeanor, the supreme court expressed its disapproval, saying:

> In the instant case, the two counts, of course relate to the same transaction, but they do not relate to the same class of crime. The fact that the court finally charged on involuntary manslaughter, which is a misdemeanor, does not alter or change the question presented because the information as filed and as [it] remained throughout the case, contained a first count of felony and second count of misdemeanor. This does not present two degrees of the same crime, but initiates a crime of a different class. So far as this state is concerned, this situation may require legislative correction. The practice of joining a felony with a misdemeanor has, in some isolated cases, undoubtedly followed, and technically speaking, we cannot say that it is forbidden, or that such practice is precluded by our present statute. However, when we consider that under our statutes, in a case of homicide, assault and battery is not one of the offenses as of an inferior degree . . . we disapprove of the practice of joinder as herein found. . . .

As stated, separate crimes of the same class may be joined if they arise from the same act or transaction; and this is true whether the crimes be against the same person and different in nature, or whether the same kind of crime be committed against two or more persons.

Thus, as an example of the first situation, if in one transaction A unlawfully enters B's home with intent to commit the crime of larceny therein, and in fact does steal personalty in the home, he is guilty of both burglary and larceny, and the charges may be joined in the same information in two counts. *Hill v. Best,* 101 Colo. 243, 73 P. 2d 471.

And, as an example of the second situation, if A holds up B and C at one time and place and robs each of personal property, he is guilty of two separate robberies, which may be charged in one information in separate counts, *Wood v. People,* 60 Colo. 211, 151 P. 941, and where a defendant is charged in separate informations with killing two persons at the same time and place, the informations may be consolidated for trial. *Harris v. People,* 55 Colo.

407, 135 P. 785. On the matter of different robberies stemming from the same transaction, see *In re Allison,* 13 Colo. 525, 55 P. 820.

STATING TRANSACTION IN DIFFERENT WAYS

There are times when it is difficult to determine whether a particular theft is larceny, larceny by bailee or embezzlement because of the problem of proving whether "possession" of the property was obtained by defendant [1] wrongfully by trespass or fraud [larceny], or [2] rightfully [larceny by bailee or embezzlement], or, if rightfully, whether defendant's possession came to him [a] under an express or implied contract of bailment to deal with the property in a certain way [larceny by bailee—*Seebass v. People,* 116 Colo. 555, 564, 182 P. 2d 901; *Lewis v. People,* 114 Colo. 411, 415, 166 P. 2d 150], or [b] by reason of his office or employment [embezzlement—*Sparr v. People,* 122 Colo. 35, 38-39, 219 P. 2d 317]. Also, there is sometimes the possibility that the evidence may show that defendant actually was not guilty of the theft or the felonious conversion of the property, but received it after the crime, knowing it to be stolen or feloniously converted [receiving stolen goods].

In such situations it is permissible to charge the defendant in separate counts in the same information with (1) larceny, (2) larceny by bailee, (3) embezzlement and (4) receiving stolen goods. '35 C. S. A., c. 48, §449; *Smaldone v. People,* 102 Colo. 500, 505, 81 P. 2d 384. Then if, as suggested above, there is a dispute in the evidence as to the manner in which defendant came into possession of the property, all of the counts are submitted to the jury and they determine the disputed question, being instructed that they may find defendant guilty of but one offense. *Sanders v. People,* 109 Colo. 243, 244-245, 125 P. 2d 154; *Hill v. Best,* 101 Colo. 243, 248, 72 P. 2d 471, explaining *Blackett v. People,* 98 Colo. 7, 17, 52 P. 2d 389. The judge cannot compel the prosecution to elect at the end of its case-in-chief upon which of those charged offenses it will rely for conviction. If there is insufficient evidence as to one or more of the counts, the judge should direct a verdict of not guilty upon such count or counts; but as long as the various charges relate to the same transaction and a question of fact remains as to the offense which was committed, all counts must be submitted to the jury, and the prosecution cannot be compelled to elect. *Kelly v. People,* 17 Colo. 130, 133, 29 P. 805; *Johnson v. People,* 79 Colo. 439, 442, 246 P. 202; *Smaldone v. People,* 102 Colo. 500, 505-506, 81 P. 2d 385. There can, of course, be but one conviction arising from the theft or receipt of the same money in the same transaction. *Hill v. Best,* 101 Colo. 243, 248-249, 72 P. 2d 471.

Whenever separate crimes of the same class arise from transactions or acts that are "connected together," they may be joined in separate counts in the same information. For example, where a single statute made it a criminal offense (1) to manage or assist in managing a house of prostitution or (2) to live on or be

supported wholly or partially by the earnings of a prostitute, a defendant was properly charged, in separate counts, with violating both of those prohibitions of the statute. The court said:

> The crimes charged are both for the violation of the same section of the statute. They are for acts and transactions of the same class of crimes and in this case, as disclosed by the record, for acts and transactions connected, done and performed at the same time and place; the facts were intermingled; this brought them within the provisions of this act. *Trozzo v. People,* 51 Colo. 323, 329, 117 P. 150. See also *Harris v. People,* 55 Colo. 407, 135 P. 785.

In *Shaw v. People,* 72 Colo. 142, 144, 209 P. 812, defendant was charged in separate informations with (1) receiving stolen goods and (2) with conspiring with John Doe to steal them. The informations were consolidated for trial and defendant was convicted on both charges. The supreme court, in upholding the conviction, said:

> The consolidation was erroneous, it is said, because the two offenses were not connected and did not grow out of the same transaction and the proof of one would have no tendency to prove the other. The prejudice alleged is that under this consolidation the jurors had their attention directed to other similar offenses not otherwise admissible. We think the position untenable. The transactions were connected. Proof of one did tend to prove the other. No prejudice resulted, because evidence of other transactions to show scheme or intent would have been admissible under either charge if tried separately.
>
> In many of the cases thus far discussed, the charges were made in separate indictments or informations and were consolidated for trial, but they have been treated as though they were made in separate counts in the same information or indictment. The test of joinder is the same in either case, since section 450, chapter 48, '35 C. S. A., says that joinable offenses may be joined in one indictment in separate counts, and if two or more indictments are found in such cases the court may order them consolidated. *Cummins v. People,* 4 Colo. App. 71, 74, 34 P. 734.

Joinable crimes may be different offenses against different persons, as long as they are connected together. For example, A and B find C and Miss D sitting in an automobile. While B intimidates C with a gun to prevent his interfering, A rapes Miss D; and then B in turn rapes her while A holds the gun on C. A, at gunpoint, forces C to remove his trousers and he and B then drive away in C's car with the trousers. A and B may be jointly charged in separate counts in the same informa-

tion with (1) rape of Miss D and (2) robbery of C. See *State v. Thompson,* 139 Kan. 59, 29 P. 2d 1101, where it was said:

> The reason for separate charges and separate trials fails when the acts constituting the crimes are connected together in a series in such a way that they amount to one comprehensive transaction, and this is true whether or not the offenses are of the same general nature. For example, A breaks and enters a house in the night time with intent to commit a crime, thus committing burglary. He steals a $100 ring and other property, thus committing grand larceny. He rapes the woman of the house, thus committing rape. On being discovered by the man of the house he kills him, thus committing murder. To conceal his crime he maliciously sets fire to the home, thus committing arson. All of these acts form such a chain in time, place and circumstances that they constitute one combination event. The various crimes are separate, not in relation to each other but only by definition in the statutes, and there is no reason why they should not be joined in separate counts in one information.

Granato v. People, 97 Colo. 303, 49 P. 2d 431, presents an analogous situation where the court undoubtedly would have permitted joinder of two charges against a defendant involving the rape of two girls in immediately connected transactions. There, A assisted B in removing one girl from an automobile so that B could rape her (thus becoming an accessory before the fact, and hence chargeable as a principal, in that crime) and then raped another girl he had detained in the automobile.

Moreover, different crimes against the same person may be joined in separate counts if they are connected together. Thus, A may be charged in one count with the rape of Miss B and in a second count with the crime of sodomy against her, if the two transactions were connected. *Sarno v. People,* 74 Colo. 528, 530, 223 P. 41.

Frequently, so that some count will meet the evidence at the trial, the district attorney will set up counts containing different statements of the transaction. This is permissible. *Bergdahl v. People,* 74 Colo. 528, 530, 223 P. 41. The question usually arising is whether the counts relate to the same transaction. If the answer does not appear on the face of the information, the district attorney's statement to the court that but one transaction is involved is sufficient, and the count may not require the district attorney to elect before trial as to which count he will rely upon for conviction. *People v. Fitzgerald,* 51 Colo. 175, 177, 117 P. 135. This is because the counts in an information are presumed to relate to the same transaction until the contrary appears. *Short v. People,* 27 Colo. 175, 185, 60 P. 350. This rule applies to informations consolidated for trial, even though each information contains more than one count, since if the informations could

properly be joined for trial, the charges in them could have been stated in different counts in the same information. *Bergdahl v. People,* 27 Colo. 302, 305, 61 P. 228.

Of course, if when the prosecution presents its evidence it appears that in fact the counts do not relate to the same transaction, then, on motion of the defendant, the court will require the prosecution to elect at that time the count upon which it will rely for conviction.

WAIVER OF MISJOINDER

The fact of misjoinder of counts must be taken advantage of by the defendant by motion at the earliest possible time or it is completely waived. It cannot be raised later, even upon review by the supreme court. If, for example, Count 1 charges A with larceny from B on a named day, and Count 2 charges him with larceny from B on another day, the fact of misjoinder is clear on the face of the information, since the two offenses could not possibly arise from the same transaction or connected transactions. In such case the misjoinder issue must be raised before trial or it is waived. *Critchfield v. People,* 91 Colo. 127, 131, 13 P. 2d 270.

And if the fact of misjoinder does not appear until the evidence comes in at the trial—as where it then appears that the counts do not, as the district attorney claimed, arise from the same transaction—the defendant must move to require the prosecution to elect before the case goes to the jury, or the misjoinder is waived. *Sarno v. People,* 74 Colo. 528, 223 P. 41; *Warren v. People,* 121 Colo. 118, 122, 223 P. 2d 381.

There is no duty on the trial judge to compel, on his own motion, an election. The defendant must make the motion, and if he fails to do so a misjoinder of counts is waived for all purposes. *Quinn v. People,* 32 Colo. 135, 138, 75 P. 396; *Sarno v. People,* 74 Colo. 528, 530, 223 P. 41; *Warren v. People,* 121 Colo. 118, 121-122, 213 P. 2d 381. In *Trask v. People,* 35 Colo. 83, 88, 83 P. 1010, the supreme court overruled a contrary holding in *White v. People,* 8 Colo. App. 289, 294, 300, 45 P. 539.

It has been stated, in *Roberts v. People,* 11 Colo. 213, 215-216, 17 P. 637, that it is within the sound discretion of the trial court whether the prosecution must elect the count, as between or among a number of counts, upon which it will rely for conviction. This is both true and untrue, depending upon the particular facts involved.

It is true where, despite the statement of the prosecutor to the contrary, the counts relate to different transactions. When the evidence develops that fact, the court will grant defendant's motion to require an election.

It is also true where, as in statutory rape cases, there have been several instances of the offense by defendant against the same female. The information will charge a single offense as occurring on a named day, but that date actually is immaterial. The prosecution is not bound by its date allegation, but may prove

any day within the statute of limitations, *Laycock v. People,* 66 Colo. 441, 444, 182 P. 880, and may prove that the offense was committed a number of times. Eventually, however, the prosecution, on defendant's motion, must elect as to the specific act upon which it will rely. The discretion of the trial judge in such cases is as to when the election is to be made—whether before taking of evidence begins, during the progress of the trial, or at the close of the prosecution's case in chief. In any event, it must be before the defendant proceeds with his defense. *Laycock v. People,* 66 Colo. 441, 444-445, 182 P. 880; *Schreiner v. People,* 95 Colo. 392, 395, 36 P. 2d 764; *Shier v. People,* 116 Colo. 353, 356-357, 181 P. 2d 366. See *Schuete v. People,* 33 Colo. 325, 80 P. 890. Where but one offense is charged, but under the allegation it is possible to prove others, a motion to elect before the evidence is in showing them is premature. *Warford v. People,* 43 Colo. 107, 109, 96 P. 556.

This rule as to election by the prosecution applies, however, only when there are two or more transactions. While it was stated in *Roberts v. People,* 11 Colo. 213, 215-216, 17 P. 637, that, "A motion to compel a prosecutor to elect upon which count in an indictment he will proceed, when such indictment contains more than one count, each charging a felony, is a matter addressed to the discretion of the trial court," nonetheless, as was said in *Kelly v. People,* 17 Colo. 130, 133-134, 29 P. 805, "The district attorney was at liberty to proceed to trial upon both counts of the indictment at the same time; and he could not properly be required to elect upon which count he would rely so long as it appears from the evidence that the two counts related to the same transaction. In considering what was said in *Roberts v. People,* 11 Colo. 215, about compelling the prosecution to elect, the distinctions between different counts and different transactions must be kept in mind."

Accordingly, the rule is that "where the counts are properly joined the people are not obliged to elect". *Smaldone v. People,* 102 Colo. 500, 505-506, 81 P. 2d 385. In some of these cases of joinder there could be but one conviction, and in others there could be a conviction on each count; but in neither event is an election required.

If, as an example of where but one conviction could be had, one count charges larceny and the second charges larceny by bailee, defendant could not be found guilty of committing both crimes in unlawfully converting the same property in a single transaction. If the evidence fails to support one of the charges, the court may direct a verdict of acquittal on that count. But if a question of fact exists as to whether possession was wrongfully obtained [larceny] or rightfully obtained [larceny by bailee], the jury must decide the fact issue. Therefore, both counts must be submitted, with instructions that they may find the defendant guilty of one or the other of the offenses, as they determine from the evidence, but not of both. See *Hill v. Best,* 101 Colo. 243, 248,

72 P. 2d 471, explaining *Blackett v. People,* 98 Colo. 7, 17, 52 P. 2d 389.

If, as an example of where there can be conviction on more than one count, the first count charges that A unlawfully entered the house of B with intent to commit larceny therein, and the second count alleges that A committed larceny in B's house, and the transaction is the same, B may be convicted of burglary on the first charge and larceny on the second. Obviously, there, the court could not compel an election, since while there was but one transaction, two distinct offenses were committed during it. *Hill v. Best,* 101 Colo. 243, 72 P. 2d 471.

DUPLICITY

Duplicity is the joinder of two or more criminal offenses in a single statement. It may occur in a single-count information or within one or more of several counts.

The offenses may be (1) such as could be joined in separate counts because arising from the same transaction or from connected transactions, or (2) such as may not be joined because relating to distinct, unconnected transactions.

For example, if the single statement is that A, intending to commit larceny, unlawfully entered B's house and did so steal personal property therein, the count is duplicitous because it co-mingles two crimes in one statement. If A moves to quash the information because of the duplicity, the district attorney may allege the burglary and the larceny in separate counts because they arose from the same transaction. *Hill v. Best,* 101 Colo. 243, 247-248, 72 P. 2d 471. [If, however, A goes to trial on the single allegation, there can be but one conviction—and that is for burglary, *Collins v. People,* 69 Colo. 343, 344, 193 P. 634—and he has been in jeopardy on both crimes. *Hill v. Best,* 101 Colo. 243, 246, 72 P. 2d 471.]

On the other hand, if the single charge is that A burglarized B's house on May 1, and that on June 1 he stole B's automobile, the information or count is also duplicitous because it charges two crimes in a single statement; but in this instance the crimes could not be joined in separate counts in the same information, since they involve independent, unconnected offenses.

If an information charges in a single count that A, as bailee of B, feloniously converted to his own use the personal property in the bailment, namely, (1) certain household furniture, (2) certain clothing, (3) a certain diamond ring and (4) a certain sum of money, all the property of B, it is not, ON ITS FACE, duplicitous, since the presumption is that there was but one bailment of all the property and but a single conversion. In such case, if the evidence at the trial shows four separate bailments by B to A for different purposes, and shows the conversions were at different times, the information in fact was duplicitous. Advantage of that error may be taken by a motion to quash made at

the trial because then was the first time such fact appeared. *Trask v. People,* 35 Colo. 83, 83 P. 1010.

On the other hand, if it appeared from the evidence that while there were different bailments they nevertheless were for the same purpose—as, say, for safekeeping—and that all of the property was converted at one time, there was no duplicity. This is because the crime lay in the felonious conversion, and as there was but one, the offense was single. *Lewis v. People,* 114 Colo 411, 419, 166 P. 2d 150.

Similarly, where a count alleges that at one time and place defendant stole the personal property of a number of persons, the count is not duplicitous inasmuch as there was but one theft and but one crime. *Sweek v. People,* 85 Colo. 479, 483-485, 277 P. 1.

A count charging a conspiracy to commit a number of crimes is not duplicitous, since the gist of the offense is the unlawful agreement and combination. *Hamilton v. People,* 24 Colo. 301, 303, 51 P. 425.

It was held in *McLean v. People,* 66 Colo. 486, 493, 180 P. 876, that:

> If, as is common in legislation, a statute makes it punishable to do a particular thing specified, "or" another thing, "or" another, one commits the offense who commits any one of the things, or any two or more, or all of them. And the indictment may charge him with any one, or with any larger number, at the election of the pleader; employing, if the allegation is of more than one, the conjunction "and" where "or" occurs in the statute.

For example, the forgery statute, '35 C. S. A., c. 48, §130, declares it a crime (1) to forge an instrument or (2) to pass a forged instrument knowingly. The prosecutor [if he wishes but one conviction and penalty, or if he is unsure what the evidence will develop] may always allege in a single count that defendant "forged and passed" the instrument. The count is not duplicitous and there can be put one penalty. Again, the forgery statute makes it an offense either to "falsely make" or to "alter" an instrument with intent to defraud. While "altering" refers to a previously genuine instrument and the charge is repugnant to that of "falsely making" the same instrument, both may be charged conjunctively in a single count.

No matter in which way the act is violated, the crime committed is forgery. Consequently, there can be no prejudice resulting to the defendant in reciting in the information several ways the crime may be committed. If defendant violated the statute in only one way, the fact that the other ways were alleged is mere surplusage and not prejudicial to his rights in any manner. *Wright v. People,* 116 Colo. 306, 310, 181 P. 2d 447.

Accordingly, so long as the count states the various violations

of the statute in the conjunctive there is no duplicity. Another illustration is found in *Johnson v. People,* 79 Colo. 439, 441, 246 P. 202, where it was said:

> The information was in a single count. It charged that defendant did "own, operate and have in his possession a still used, designed and intended for the manufacture of intoxicating liquor." Defendant moved to require the people to elect, because "he does not know of which of these offenses he is charged." He must have known. He was told by the information that he was charged with all three. The charges were based on a single transaction and he was found guilty of possessing and operating. Had he owned one still, possessed another and operated another, or owned at one time, possessed at another, and operated at another, he would have been guilty of three separate offenses. If at a single time and place he owned, possessed and operated, or possessed and operated, or owned and possessed, he was guilty of but one. A motion to elect is addressed to the sound discretion of the trial court. Roberts v. People, 11 Colo. 213, 215, 17 P. 637. Even where the charges are contained in separate counts the motion will not be sustained if the counts relate to the same transaction. Kelly v. People, 17 Colo. 130, 133, 29 P. 805. This motion was properly overruled.

In *People v. Fitzgerald,* 51 Colo. 175, 176, 117 P. 135, it was said:

> The question for consideration is the ruling of the trial court sustaining a motion to quash the information. That pleading was drawn under, and based upon, Sec. 1685 Revised Statutes 1908, which, so far as pertinent here, reads: "Any person who shall steal, take, embezzle, carry or ride away any bicycle, or any person who shall purchase or receive from any person, or conceal or secrete, knowing the same to be stolen, taken, embezzled, carried or ridden away, any bicycle, shall be deemed guilty of larceny." The information, following closely the language of the statute, in the charging part states that "Simon Fitzgerald, . . . did feloniously steal, take, embezzle, carry and ride away, and did feloniously then and there purchase and receive from some person to the district attorney aforesaid unknown, and did feloniously conceal and secrete the said bicycle, then and there knowing the same to be stolen, taken, embezzled, carried and ridden away."
>
> The motion to quash was based upon the proposition that the information is "ambiguous, uncertain and du-

plicitous" in that it fails to inform the defendant for what particular crime he is being prosecuted and that three distinct and inconsistent crimes against defendant are charged in one and the same count of the information. The court was clearly wrong in sustaining the motion to quash. The statute is in the disjunctive. The stealing of a bicycle by a defendent, or the purchase or receiving from any person, or the concealing or secreting of a bicycle, knowing that the same has been stolen, all are, and each is, under the statute deemed larceny. An information conjunctively charging the same defendant with doing all of these acts at the same time and as a part of the same transaction is not duplicitous. Such is the rule already established in this jurisdiction, and it should have been heeded and applied by the district court in this cause. We shall not repeat the argument to support it. We refer to, and again approve, McClure v. People, 27 Colo. 358 [61 P. 12]. After reviewing and discussing a number of cases bearing upon the point now under consideration, this court, at page 367, thus summarized its conclusion: "Where two or more acts, stated in the statute disjunctively, either of which is an offense by itself if done by different persons or at different times, when done by the same person and at the same time and relate to the same transaction and are followed by the same penalty, they may be united in one count of an indictment or information, as constituting but one offense. Though the fact does not appear upon the face of the information, under the doctrine announced in Short et al. v. People, 27 Colo. 175 [60 P. 350], the mere statement of the district attorney that the different acts relate to and constitute one and the same transaction is sufficient as against a motion to quash. This information, in form, is like the one before the court in McClure v. People, supra. Under the bicycle statute precisely the same penalty is imposed whether the defendant stole the bicycle, or purchased it with the knowledge that it had been stolen, or concealed or secreted it with such knowledge. The ruling of the court is wrong. Trial courts must be governed by the rule of pleading again approved in this opinion. It follows that judgment on motion to quash the information was wrong, and is therefore disapproved and reversed."

Other cases with the same ruling are *Pettit v. People,* 24 Colo. 517, 218, 52 P. 756; *Rowe v. People,* 26 Colo. 542, 544, 59 P. 57; *Howard v. People,* 27 Colo. 296, 399, 61 P. 595; *Kingsbury v. People,* 44 Colo. 403, 404, 99 P. 601; *Walt v. People,* 46 Colo. 136, 141, 104 P. 89; *Moffitt v. People,* 59 Colo. 406, 412, 149 P. 104.

TIME WHEN DUPLICITY MUST BE RAISED

A duplicitous count or information is not void but is merely voidable; that is, it is valid unless and until the defendant, who has that option, takes advantage of the defect by motion to quash. Under Colorado practice, a motion to elect probably would not be good until the defect appeared during the trial. *Laycock v. People,* 66 Colo. 441, 182 P. 880. Where the fact of duplicity appears on the face of the information or count, a motion to quash, or a demurrer, must be filed before the defendant finally pleads to the charge. The rule against duplicity is for the defendant's benefit, and he waives its advantage where it appears on the face of the charge if he does not move in time. It is too late to object after the trial has begun. *Critchfield v. People,* 91 Colo. 127, 131, 13 P. 2d 270.

However, duplicity may actually exist, yet that fact not be apparent on the face of the pleading; that is, it may not appear until the prosecution's evidence is in. The objection must be made before the accused begins his defense, or it is waived. *Sweek v. People,* 85 Colo. 479, 485, 277 P. 1.

A case where duplicity was not apparent on the face of the information, but where it was held that a motion to quash should have been sustained when the evidence disclosed the defect, is *Trask v. People,* 35 Colo. 83, 83 P. 1010. There, the single count charged Trask with larceny as bailee of certain household articles, clothes, including a white dress and black hat, a diamond ring and a named sum of money on a certain date. On its fact obviously, this charged a single conversion under a single bailment. The evidence showed, however, that in fact there had been four bailments, made at different times for different purposes. The household articles and some of the clothing were entrusted to Trask for safekeeping; the hat and dress were given to him to be delivered to a third person; the diamond ring was turned over to him to raise money for the use of the bailor, and the money was given for safekeeping and to pay the expense of a trip planned by the bailor. At the close of the prosecutions case-in-chief the defendant moved to quash the information and for a directed verdict of not guilty, but the trial judge refused. The supreme court held that he should have done so and reversed the conviction.

On the other hand, in *Lewis v. People,* 114 Colo. 411, 415, 418, 166 P. 2d 150, the information charged that defendant became the bailee of personal property for safekeeping and return to the bailor. The evidence showed two distinct bailments, but also showed they were both for safekeeping and that there was but a single conversion. It as held that defendant's motion to quash, made at the close of the prosecution's evidence, was properly overruled because the offense lay in the criminal conversion and this was single.

It is not the duty of the trial judge himself to protect the

defendant against a duplicitous information; that duty is on the defendant. *Trask v. People,* 35 Colo. 83, 88, 83 P. 1010, held overruling a contrary holding in *White v. People,* 8 Colo. App. 289, 294, 300, 45 P. 539, that it was the duty of the trial judge to correct a misjoinder of counts. The rule is applicable alike to duplicity and misjoinder. *Trask v. People,* 35 Colo. 83, 88, 83 P. 1010; *Aarno v. People,* 74 Colo. 528, 520, 223 P. 41; *Warren v. People,* 121 Colo. 118, 121-122, 213 P. 2d 381.

This rule as to statement in a single count has no application to situations where the sentence for a crime may be increased if the defendant has been convicted previously of the same or other offenses. Such former convictions must be set up in a count or counts separate from that charging the present offense. They come into play only if and when the accused is convicted of the substantive offense for which he is to be tried. Examples of such situations are: (1) The habitual criminal statute, '35 C. S. A. Supp., c. 48, §555(1) [L. '45, p. 310, §1], see *People v. Wolff,* 111 Colo. 46, 49-50, 137 P. 2d 693; (2) the joyriding statute, '35 C. S. A., c. 16, §21, making a second conviction thereunder within five years a felony, although the first offense is a misdemeanor; and (3) section 187, chapter 16, '35 C. S. A. Supp. [L. '39, p. 229, §4], increasing the penalty for one convicted a second time of the offense of the driving of an automobile by an habitual user of narcotic drugs or by one under the influence of intoxicating liquor. See *Heinze v. People,* Colorado Bar Ass'n Advance Opinions, February 21, 1953, page 167.

SUPREME COURT AMENDS RULE 115 (i)

(i) NUMBER OF COPIES TO BE FILED AND SERVED. Ten copies of each motion, petition, brief, or other paper which is typewritten, mimeographed or reproduced by some method other other than printing, and fifteen copies of each thereof when printed shall be filed; provided, however, that on motions for extension of time or requesting oral argument, the original and one copy only need be filed; and any instrument intended for the exclusive use of the clerk, the original alone shall be deemed sufficient. Two copies of each motion, petition, brief, or other paper shall be served upon all parties except that in the case of typewritten motions, briefs, or other papers one copy only need be served. Proof of service shall be filed with the clerk. No such service shall be required upon a defendant in error who has not entered his appearance in the supreme court as stated in the summons to hear errors, but in lieu of such service one additional copy of each such paper shall be filed. (From Supreme Court Rules 38 and 46.)

This amendment shall become effective forthwith. Adopted March 26, 1953.

THOUGHT FOR THE MONTH

The following was expressed by Ray Murphy, General Counsel for the Association of Casualty and Surety Companies in an address delivered at the Institute on Personal Injury Litigation presented by the Southwestern Legal Foundation, Dallas, Texas, on November 14, 1952.

> To summarize, I have attempted to indicate in this discussion that there is a clearly apparent trend toward extension of liability in tort cases. I have pointed to the fact that the existence of actual fault on the part of the defendant is, as a practical matter, no longer an indispensable prerequisite to recovery, but rather its absence is a mere impediment that can readily be met by flimsy evidence of purely technical deviations from due care. More and more, fault on the part of the plaintiff is being disregarded. More and more, courts sanction judgments based on doubtful and remote consequences of occurrences—occurrences which are not accidents in the usual sense since there has been no contact; and more and more courts are permitting recovery by or on behalf of infants for injuries sustained before birth. Suits between members of the same family are becoming more and more common. I have noted that contemporaneously there is a strong trend towards larger and larger jury awards, with the rate of increase therein accelerating even more rapidly than inflation and the cost of living.
>
> All this may seem to paint a Utopian picture for the plaintiff's lawyer. It may be only a mirage. One realistic element is lacking in the phantasy—an inexhaustible and ever present source of funds.. Since insurance companies are not and cannot be such a source, and since no such source exists, the trend towards higher and higher payments to more and more persons, in my opinion, can but bring about the disintegration of our present system of jurisprudence.
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> In the event of such disintegration, and if, as I believe, the then likely successor to the present system of tort law would be a system based on compensation without regard to fault—a system of purely administrative law—we will find in such a substitute small comfort, slight compensation and lean pickings for the negligence lawyer. To the extent that he himself has contributed to that result he will have contributed to his own professional demise.

"Every man owes some of his time to the upbuilding of the profession to which he belongs."—Theodore Roosevelt.