Criminal Law: Admissibility of evidence of prior offenses and of charges under different statutes. Election of count in information.

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Honorable Arthur U. Goodman, Jr.
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Dear Mr. Goodman:

This is an acknowledgement of your inquiry addressed to the General, relating to Criminal Law, which is as follows:

> "I have two criminal cases pending in which an appeal will likely be taken if defendants are convicted. Therefore, I am asking for an opinion on these points:
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> (1) In a prosecution for selling liquor without a license, where the information does not name the purchaser and alleges the offense to have occurred on the_____day of November, 1943, can the State prove on the trial different sales within three years prior to the filing of the information?
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> (2) In a prosecution for uttering, with intent to defraud, a forged check drawn on a bank, is evidence admissible tending to prove that defendant forged the check?
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> (3) In the uttering case mentioned under (2) could I not go to trial on both counts (forgery & uttering) without being required to elect or dismiss one count until all of the evidence for both sides was closed?

In the case of State v. Jones, 164 S.W. (2d) 85, 89 the Supreme Court held:

> "It is the general rule that evidence of other crimes independent of that for which defendant is on trial is inadmissible, but, 'the general

> rule does not apply where the evidence of another crime tends directly to prove guilt of the crime charged. Evidence which is relevant is not rendered inadmissible because it tends to prove him guilty of some other crime.' State v. Flores, 332 Mo. 74, 55 S.W. 2d. 953, 955; State v. Krebs, 341 Mo. 58, 106 S.W.2d 428; State v. Patterson, 347 Mo. 802, 149 S.W.2d 332. Therefore, it may be said as stated in Wharton's Criminal Evidence, 11th Edition, page 487, Section 345:
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> " '* * * If the other crime and the crime charged are so linked together in point of time or circumstances that one cannot be fully shown without proving the other, regardless of whether the crime incidentally shown is of the same or a different character from the one on trial, the general rule of exclusion does not apply. * * * if evidence is competent, material and relevant to the issue on trial it is not rendered inadmissible merely because it may show that the defendant is guilty of another crime!"

In passing upon exceptions to the rule, stated in the above case, the court, in State v. Hepperman, 162 SW (2d) 878, 884-5, held:

> "Space does not permit of an exhaustive analysis of the rules and reasons underlying them for the admissibility of evidence which shows or tends to show the commission of an offense other than the one for which the defendant is on trial, suffice it to say that there are certain instances and crimes in which such evidence is admissible even though it may be prejudicial to a defendant's acquittal as evidence pointing to his guilt often is. <u>But, if the proof of another offense logically proves knowledge, intent or design in the commission of the offense charged and for which the defendant is on trial such evidence</u>

> <u>may be admissible.</u> Or it may show motive, the identity of the defendant as the perpetrator of the crime charged or it may be an act inseparable from the act charged, in which event evidence tending to show the defendant guilty of another crime is admissible. Or, if the evidence tends to establish the charge for which the defendant is on trial it is admissible though it prove him guilty of another offense. State v. Gruber, Mo. Sup. 285 S.W. 426; State v. Wolff, 337 Mo. 1007, 87 S.W. 2d 436; State v. Krebs, 341 Mo. 58, 106 S.W. 2d 428; 2 Wigmore, Evidence, Secs. 300-365, particularly Sec. 363, relating to murder by poison."

The general rule, above stated, was applied in the case of State v. Whitener, 46 S.W. (2d) 579, 581 in the following language:

> "We agree with the contention that the trial court erred in admitting the testimony of the State's witness Mary J. Settle which tends to connect the defendant with the theft of cattle belonging to said witness and her husband, in July, 1928. This testimony was not competent for any purpose and was highly prejudicial to the defendant."

Such was the holding of the court in a liquor case in State v. Wilcox, 44 S. W. (2d) 85, 89, in the following language:

> "The Attorney General in his brief confesses prejudicial error of the trial court in admiting evidence of the sale of liquor and the operation of the still which witnesses testified occurred in 1927 and 1928 in the clump of willows near the Missouri river, about fifteen miles distant from the Barnhart farm. We are of opinion that these were separate offenses, and that the testimony concerning them was prejudicial. In violations of the prohibition law, criminal intent is not as a rule a necessary element. A defendant who

> manufactures or sells moonshine liquor violates the law, regardless of intent. State v. Seidler (Mo. Sup.) 267 S. W. 424; State v. Fenley, 309 Mo. 545, 275 S. W. 41; State v. Presslar, 316 Mo. 144, 290 S. W. 142. As was said by this court, Judge Walker speaking, in State v. Fenley, supra, 309 Mo. 545, 275 S. W. loc. cit. 44: 'Where, however, the facts are such that the defendant was bound to know the nature and character of his act, as he was in this case, proof of other offenses is not admissible to show intent.'
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> "Since it thus appears that evidence of other offenses is not admissible in liquor cases to show intent, such evidence is prejudicial error in this case. State v. Young, 119 Mo. 495, 24 S. W. 1038; State v. Vandiver, 149 Mo. 502, 50 S. W. 892; State v. Hale, 156 Mo. 102, 56 S. W. 881; State v. Hyde, 234 Mo.200, 136 S. W. 316, Ann. Cas. 1912D, 191; State v. Duff, 253 Mo. 415, 161 S. W. 683; State v. Banks, 258 Mo. 479, 167 S. W. 505."

Therefore, it is the opinion of this department that evidence which shows, or tends to show, the commission of an offense other than the one for which the defendant is on trial is not, as a rule, admissible. However, such evidence may be admissible, as exceptions to such rule, when offered for the purposes stated in the above decisions.

II and III

Forgery of checks or orders on any bank, and uttering forged checks, are two distinct, separate offenses, provided in different sections of the statutes. Both are felonies. However, in your case, both charges relate to the same check.

Therefore, the above rule would apply in the admission of evidence to prove such charges. However, such evidence may be admissible in such cases when offered for the purposes recited in the above decisions as exceptions to the rule.

The case of State v. Collins, 297 Mo. 257, was instituted by information in two counts: first, charging forgery of a note and secondly, charging the writing and selling of such note. The court on page 261 said:

> "***The defendant at the beginning of the case, before evidence was introduced, filed a motion to require the State to elect on which count it would proceed to trial. This motion was overruled.
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> "At the close of the evidence offered by the State the defendant again filed a motion asking the court to require the State to elect upon which count it would stand, and the State elected to stand on the second count.
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> "There was no error in overruling the motion filed before evidence was introduced. The election between the two counts was entirely sufficient after the evidence was introduced.***"

In the case of State v. Gant, 335 S. W. (2d) 970, 971, the Supreme Court held:

> "Generally, when an indictment or information contains two or more counts charging separate and distinct felonies, the state will be required to elect on which count it will proceed. State v. Guye, 299 Mo. 348, 252 S. W. 955; State v. Link, 315 Mo. 192, 286 S. W. 12, and cases cited; State v. Presslar, 316 Mo. 144, 290 S. W. 142. But, where the different counts relate to the same transaction and involve the same facts and are so far cognate that a conviction under one count will bar a prosecution for the offense charged in the other, it appears that two or more counts may be joined in one indictment or information even though the acts charged may be violations of different sections of the statute and may constitute different offenses, in which case the court may in its discretion submit both or all of the counts to the jury under appropriate

> instructions, but the jury must be instructed that there can be a conviction only under one count. Doubtless if the circumstances were such that failure to require an election would operate prejudicially to a defendant's rights, it would be error for the court to refuse to require it. The rule frequently quoted with approval by this court was thus stated in State v. Christian, 253 Mo. 382, 394, 161 S. W. 736, 739, that, except where otherwise provided by statute, 'only such offenses may be joined as arise out of the same transaction and which are so far cognate as that an acquittal or conviction for one would be a bar to a trial for the other.' In view of other statements in that opinion and of other decisions of this court, it would seem that the rule as above quoted, while in general correct, is in one respect inaccurately stated, if it is meant that the offenses must be such that an acquittal of the offense charged in one count would be a bar to prosecution for the offense charged in the other count had they been separately charged. In the same opinion (Christian Case) the court says: 'We have held, however, that a count for forgery may be joined with a count for uttering the instrument forged (State v. Carragin, 210 Mo. 351, 109 S. W. 553, 16 L. R. A. (N.S.)561,***"

Therefore, it is the opinion of this department that the trial court may in its discretion submit both of the mentioned counts to the jury under appropriate instructions, providing that he instruct such jury that there can be a conviction only under one count.

However, if the circumstances of such case"were such that failure to require an election would operate prejudicially to defendant's rights, it would be error for the Court to refuse to require it."

Respectfully submitted,

APPROVED:

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