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The argument most commonly used in support of allowing interest was clearly set forth in *Fell v. Union Pacific R. Co.*,[14] which was a suit for property damage:

> Is there any reason why a person sustaining injury and damage to his property from the negligent act of another should not receive just what he has lost as nearly as may be accomplished in a court of justice? If a person's property is destroyed or damaged, why is he not entitled to be compensated to the full extent of its value in money so that he may replace the same with other property of a like nature? If on the day of its injury or destruction he restores or replaces it with his own money, why is he not entitled to interest on that money to the date of repayment? If he had loaned the money to someone, he certainly would be entitled to interest, and, if he borrowed it from someone, he would likely have to pay interest for its use. By being awarded legal interest, therefore, he is simply placed in *statu quo*, and nothing short of this is full compensation, and that is just what the law aims to accomplish.[15]

It may not be complimentary to a man to compare him with a chattel, but to a widow who has lost the source of her support it is similar to a man who has lost property essential to earning his livelihood.

The argument used in denying interest is, ". . . no interest could be recoverable because defendant knew not what, if anything, he should pay. That was a rule of convenience."[16]

What authority there is does not appear to favor the allowance of interest, even though it seems that the equities favor the allowance of interest. However, one fact remains: The statute, under which the action was brought, makes no provision for interest, and the statute generally controls. The *Stiles* case appears to be a clearcut departure from this general principle.

[14] 32 Utah 101, 88 Pac. 1003 (1907).

[15] Ibid., at 106, 1005.

[16] Funkhouser v. Preston Co., 290 U.S. 163 (1933).

CONSTITUTIONAL LAW–DISTRICT COURT MUST HAVE JURISDICTION OVER FIRST TRIAL TO CONSTITUTE JEOPARDY

The defendants were convicted and sentenced for violating Section 4705 of the 1954 Internal Revenue Code.[1] In recasting the provisions of the 1939 Internal Revenue Code, Congress inadvertently failed to provide a penalty for the violation of this section. This omission was promptly remedied by an amendment[2] but, prior to discovery of the error, the de-

[1] 26 U.S.C.A. §4705(a) (Supp., 1959) provides: "It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the secretary or his delegate."

[2] 26 U.S.C.A. §7237(a) (Supp., 1959).

fendants violated the statute. Thereafter, the defendants asserted that their sentences had been unlawfully imposed and sought their release by writs of habeas corpus. The district court vacated the sentences and, upon its own motion, vacated the convictions. The defendants were, a short time later, indicted for the same acts, but under 21 U.S.C., Section 174.[3] The defendant's pleas of double jeopardy were overruled, the finding of the trial court being that sentence is an additional element and, therefore, constitutes a new and different offense. It was further ruled that jeopardy did not attach because the defendants could not lawfully have been imprisoned in the initial proceeding.

In reversing the conviction, the court of appeals held that the 1954 Code did confer jurisdiction upon the court and, therefore, conviction of the defendants was valid. The court then declared that where there is a valid conviction, a subsequent trial for the same offense will constitute double jeopardy. This position was premised upon the propositions that the offense did not cease to be a crime during the interim and that a conviction results in certain serious consequences. *United States v. Sabella*, 272 F.2d 206 (C.A. 2d, 1959).

The doctrine of double jeopardy had its origin in the ancient pleas of *autrefoits acquit* and *autrefoits convict*, both of which were grounded upon the principle that the life of no man was to be placed in jeopardy twice for the same offense. *Autrefoits acquit* could be pleaded by a defendant in any of the following situations: (1) When the defendant's motion to quash the indictment was sustained; (2) when, upon trial, the defendant was adjudged not guilty; and (3) when, upon appeal, the trial court's ruling on the indictment was reversed, or the defendant's conviction was reversed. In order to prevent the defendant from entering a plea of *autrefoits acquit* in relation to indictments for homicide, the State would postpone the trial for a year and a day. Since all appeals had to be taken within a year and a day at common law, the defendant was barred from raising this matter after a conviction. In order to remedy this unhealthy situation, a statute was enacted which required the State to act immediately upon the indictment, but it also removed indictments from the plea of *autrefoits acquit*.[4] The plea of *autrefoits convict* applied where

[3] 21 U.S.C.A. §174 (Supp., 1958) provides: "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

[4] 3 Hen. VII, c.1 (1486).

the defendant had been convicted of an offense and the State subsequently attempted to indict him for the same offense.[5]

That these ancient doctrines will continue to be a safeguard against an individual being subjected to prosecution twice for the same offense is ensured by the Fifth Amendment to the Constitution of the United States in the following words: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." This concept is predicated upon the theory that the State, with all of its power and resources, should not be permitted to make repeated attempts to convict a man of the same crime. If allowed, the probability of an innocent man being convicted would be increased with each new trial. A man ought not to be required to live in a state of constant fear and anticipation which would be the result of such a procedure.[6] However, as absolute as the concept of double jeopardy appears, it is a personal defense and, therefore, can be waived by the defendant, either expressly or impliedly.[7]

In ascertaining whether a conviction violates the Fifth Amendment, it is first necessary to consider two basic rules: (1) Jeopardy attaches "when [the defendant] is put on trial in a court of competent jurisdiction upon an indictment or information sufficient in form and substance to sustain a conviction, and a jury has been empaneled and sworn"[8] and, (2) the elements of proof required for each offense must be the same or conviction of one does not bar a subsequent prosecution for the other.[9]

So strongly embedded in the conscience of justice is the maxim of double jeopardy, that even the guilty must go free before the doctrine will be compromised.[10] However, in determining whether or not *Sabella* was a proper case for the application of double jeopardy, it is necessary to determine whether the trial court had jurisdiction in the first instance.

On the federal level, a court, in order to take cognizance of a criminal offense, must have had jurisdiction conferred upon it by a Congressional statute.[11] In *United States v. Hudson*,[12] the Court, in denying that a cir-

[5] Cooley's Blackstone, Commentaries on the Laws of England, Bk. 4, *335, 336 (4th ed., Andrews, 1899).

[6] Green v. United States, 355 U.S. 184 (1957); United States v. Gramer, 191 F.2d 741 (C.A.9th, 1951).

[7] Callahan v. United States, 35 F.2d 633 (C.C.A.10th, 1929); Brady v. United States, 24 F.2d 399 (C.C.A.8th, 1928).

[8] Hunter v. Wade, 169 F.2d 973, 975 (C.A.10th, 1948).

[9] Kendrick v. United States, 238 F.2d 34 (App. D.C., 1956); United States v. Perrone, 161 F.Supp. 252 (S.D. N.Y., 1958); United States v. Cooper, 143 F.Supp. 76 (N.D. Cal., 1956).

[10] Green v. United States, 355 U.S. 184 (1957).

[11] United States v. Flores, 289 U.S. 137 (1933); United States v. Hall, 98 U.S. 343 (1878); United States v. Hudson, 11 U.S. 32 (1812).

[12] 11 U.S. 32 (1812).

cuit court of the United States had common law jurisdiction of libel, advanced the following test to determine whether or not that court has jurisdiction: Congress must define the offense, provide for punishment, and specify the court which shall have jurisdiction of the offense. If this principle is absolute, there was no jurisdiction in the present case since Congress failed to attach a penalty. Therefore, jeopardy did not attach and the defendants' plea of double jeopardy should have been overruled.

The above theory is substantiated by two cases which are quite similar to the instant case. In *Mossew v. United States*,[13] the defendant was convicted of violating a provision of the Food Conservation Act of 1917. Congress failed to provide a penalty for this particular provision, but the intent to create a crime was indicated by the use of the word *unlawful* in the definition of the prohibited act. The court, in reversing the defendant's conviction, held that a statute, although criminal in nature, which failed to provide a penalty was a nullity. In *United States v. Evans*,[14] although the factual situation was somewhat different, the court arrived at the same conclusion reached in the *Mossew* case.

In the *Sabella* case, the court relied heavily upon a case decided by the Georgia Court of Appeals.[15] There it was held that a statute which failed to provide a penalty did confer jurisdiction upon the court and, therefore, a valid conviction did result. However, that case is weak in that it is predicated upon a prior case which held an indictment valid and then stated that it would not consider whether or not the statute provided a penalty.[16] Further, the Georgia decision is in conflict with the decision of all other states which have decided the question, these states having held that a statute which fails to prescribe a punishment is a nullity.[17] These cases were all propounded upon the principle advanced by the *Hudson* case and various definitions of a crime.

The decision of the *Sabella* case is contra to the weight of authority, both on the state and federal level. Its only point of distinction from the aforementioned cases rests in the fact that a similar provision of the 1939 Internal Revenue Code did provide punishment and, therefore, was a crime. However, when a statute is repealed, it is as if it had never existed in relation to future acts which, under its provisions, would have consti-

[13] 266 Fed. 18 (C.C.A. 2d, 1920).

[14] 333 U.S. 483 (1948).

[15] Jenkins v. State, 14 Ga. App. 276, 80 S.E. 688 (1914).

[16] Kimbrough v. State, 101 Ga. 583, 29 S.E. 39 (1897).

[17] People v. Freres, 171 N.Y.S.2d 274 (1958); Redding v. State, 165 Neb. 307, 85 N.W.2d 647 (1957); Osborn v. Borchetta, 20 Conn. Sup. 163, 129 A.2d 238 (1956); Ex parte Ellsworth, 165 Cal. 677, 133 Pac. 272 (1913). Accord: Rosenbaum v. State, 4 Porter 599 (Ind., 1853). See Smallman v. Gladden, 206 Ore. 262, 291 P.2d 749 (1955); New Orleans v. Stein, 137 La. 652, 69 So. 43 (1915); Cribb v. State, 9 Fla. 409 (1861).

tuted punishable crimes.[18] Consequently, the principle established by this case, if accepted by other courts, will create an unmerited extension of the doctrine of double jeopardy and allow the guilty to go unpunished because of a technicality.

[18] United States v. Tynen, 78 U.S. 88 (1870).

CONSTITUTIONAL LAW–INDIANA HABITUAL CRIMINAL STATUTE NOT PUNISHMENT FOR STATUS

Petitioner was found guilty of the offense of vehicle taking and sentenced to a term of from one to ten years. In compliance with the Indiana Habitual Criminal Act,[1] petitioner, having twice previously been convicted and imprisoned for felonies, was sentenced to life imprisonment. At a hearing on the petition for habeas corpus, completion of the one to ten year term was averred and petitioner contended that the life sentence was punishment for a status of criminality rather than for a crime. It was insisted that since all Indiana convicts were subject to hard labor,[2] continued imprisonment under the life term would constitute involuntary servitude in violation of the Thirteenth Amendment.[3] The district court dismissed the petition for habeas corpus. The Court of Appeals, for the Seventh Circuit, affirmed the dismissal of the petition. *United States v. Dowd*, 271 F.2d 292 (C.A.7th, 1959).

Historically, the habitual criminal statutes in the various states have often been attacked on constitutional grounds,[4] but have almost invariably been sustained by the courts.[5] Among the more forceful assertions against constitutionality have been arguments that these statutes evoke cruel and unusual punishment, denial of due process and/or double jeopardy. In answering the cruel and unusual punishment argument, the courts have pointed out that this phrase as used in the Constitution refers to physical torture and not to duration of time that a convicted criminal is to spend imprisoned.[6] In refuting the denial of due process argument, the Supreme Court has held that the imposition of a heavier penalty under these Acts is not per se violative of due process.[7] In rebutting the double jeopardy argument, the Supreme Court has maintained that the heavier

[1] Ind. Rev. Stat. (1956) §§ 9-2207, 9-2208.

[2] Ind. Rev. Stat. (1956) § 13-238.

[3] U.S. Const. Amend. XIII.

[4] E.g., State v. Mead, 130 Conn. 106, 32 A.2d 273 (1943); State v. Zywicki, 175 Minn. 508, 221 N.W. 900 (1928); State v. Le Pitre, 54 Wash. 166, 103 Pac. 27 (1909).

[5] But cf. Goeller v. State, 119 Md. 61, 85 Atl. 954 (1912).

[6] E.g., Gibson v. Commonwealth, 204 Ky. 748, 265 S.W. 339 (1924).

[7] Graham v. West Virginia, 224 U.S. 616 (1912).