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Article 8

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appeal the right is not assignable or descendible. An Appellate Court decision rendered in 1949 indicates that the Illinois courts still are not prone to free assignability unless clearly and concisely set out by statute, as the right to contest is not a vested one and no right existed in favor of an heir to contest independently of statute.[28]

As seen from the above discussion, while there still remains a diversity of opinion as to the assignability and descendibility of will contest rights, it must be concluded that both the courts and legislatures are turning towards a greater liberality in allowing assignability and descendibility of such rights.

DOUBLE JEOPARDY AND THE IDENTITY OF OFFENSES

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."[1]

This clause, which is embodied in our Federal Constitution, bestows upon us one of our most jealously guarded civil rights. It is well settled that this clause applies only to proceedings in federal courts;[2] however, most state constitutions have similar provisions.[3] This right to be free from multiple prosecutions for the same offense did not originate in the Constitution. It was well known in the ancient common law, being embodied in the Magna Charta.[4]

The protection which this right affords is invoked by what is commonly known as a plea of "double jeopardy" or "former jeopardy." The right is founded on the theory that repeated prosecutions for the same offense results in persecution; it is such resulting persecution which is sought to be eliminated.

All courts agree that two prosecutions for the same offense are prohibited by the constitutional clauses, but there is an enormous diversity of opinion as to the interpretation of the phrase, "same offense." The reason attributable to this enormous diversity of opinion is that the courts do not use the same criteria or tests in determining when offenses are the same.

The test which is most widely accepted by American courts is well illustrated in the recent Illinois decision of *People v. Harrison*.[5] The de-

[28] Kessler v. Martinson, 339 Ill. App. 207, 89 N.E. 2d. 735 (1949).

[1] U.S. Const. Amend. 5.

[2] United States v. Lanza, 260 U.S. 377 (1922); Phillips v. McCauley, 92 F. 2d 790 (C.A. 9th, 1937).

[3] Ill. Const. Art. II, § 10 (1870) reads as follows: ". . . or be twice put in jeopardy for the same offense."

[4] Ex Parte Lange, 18 Wall. 163 (U.S., 1873).

[5] 395 Ill. 463, 70 N. E. 2d 596 (1947). For other Illinois decisions applying this test see: People v. Flaherty, 396 Ill. 304, 71 N.E. 2d 779 (1947); People v. Allen, 368 Ill.

fendant was charged, tried, and acquitted of assault with intent to murder. Later, the victim died and the defendant was indicted for murder. When put on trial for murder he entered a plea of former jeopardy, which the court overruled, and the defendant was convicted. On appeal, the Illinois Supreme Court upheld the conviction, applying the general rule that the test is whether the facts charged in the later indictment, would if found to be true, have justified a conviction under the earlier indictment. If they do, then the judgment on the earlier indictment is a complete bar to a prosecution under the later indictment. Stated in a simpler fashion, when the facts necessary to convict on the second prosecution would have convicted on the first, a final judgment on the first prosecution is a bar to a second; but if the facts which will convict on the second would not necessarily have convicted on the first, then it is not a bar.

This test is followed by a majority of the states,[6] and is also the prevailing rule in the federal courts.[7]

Thus, it is readily apparent that the test of identity of offenses used by the majority of the courts bans the division of one crime into separate offenses and the imposing of a punishment for each.[8] It follows therefore, that a prosecution for any part of a single crime will bar another prosecution based on the whole or any part of the same crime.[9] If the facts constitute only one offense, as when one steals several articles of property at the same time, a prosecution for stealing some of the articles will bar a subsequent prosecution for stealing any of the other articles taken at the same time.[10]

But some courts have applied the majority rule illustrated in the *Harrison* case so strictly that they are in effect guilty of splitting of-

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368, 14 N.E. 2d 397 (1938); People v. Bain, 359 Ill. 455, 195 N.E. 42 (1935); People v. Greenspawn, 346 Ill. 484, 179 N.E. 98 (1931); People v. Mendelson, 264 Ill. 453, 106 N.E. 249 (1914). It is well to note the old English case upon which this rule is founded, Rex v. Vandercomb and Abbott, 2 Leach. C.C. 708 (1796).

[6] Commonwealth v. Ladusaw, 226 Ky. 386, 10 S.W. 2d 1089 (1928); Commonwealth v. Crowley, 257 Mass. 590, 154 N.E. 326 (1926); People v. Cook, 236 Mich. 333, 210 N.W. 296 (1926); People v. Snyder, 241 N.Y. 81, 148 N.E. 796 (1925); State v. McGaughey, 45 S.D. 379, 187 N.W. 717 (1922); State v. Rose, 89 Ohio St. 383, 106 N.E. 50 (1914); People v. Brannon, 70 Cal. App. 225, 233 Pac. 88 (1924); Holcomb v. State, 19 Ala. App. 24, 94 So. 917 (1922); Thompson v. State, 90 Tex. Crim. App. 222, 234 S.W. 400 (1921).

[7] Bartlett v. United States, 166 F. 2d 928 (C.A. 10th, 1948); Robinson v. United States, 143 F. 2d 276 (C.A. 10th, 1944).

[8] State v. Sampson, 157 Iowa 257, 138 N.W. 473 (1912); State v. Cotner, 87 Kan. 864, 127 Pac. 1 (1912); People v. Stephens, 79 Cal. 428, 21 Pac. 856 (1889).

[9] State v. Toombs, 326 Mo. 981, 34 S.W. 2d 61 (1930); Runyon v. Morrow, 192 Ky. 785, 234 S.W. 304 (1921).

[10] People v. Perrello, 350 Ill. 231, 182 N.E. 748 (1932); State v. Douglas, 26 Nev. 196, 65 Pac. 802 (1901).

fenses.[11] Thus, it has been held that on the basis of a single act of intercourse, a defendant can be convicted of both rape and incest,[12] rape and seduction,[13] and impairing the morals of a minor and rape.[14] Under these decisions it seems that by requiring slightly different elements, a defendant can be made to suffer repeated prosecutions for that which is in reality the same offense.

The second test of identity of offenses most generally followed is that of the "same transaction." In applying this test, the subject of inquiry on a plea of double jeopardy is whether the offenses were part of the same criminal transaction.[15] If they are, a subsequent trial for such an offense places the defendant in double jeopardy. The leading case applying this test is *State v. Cooper*.[16] Here, the defendant had burned a building and a person died in the conflagration. The court held, in a somewhat dubious decision, that a prosecution for arson barred a later prosecution for murder because both offenses arose out of the same act. A later decision[17] in the same jurisdiction reaches a somewhat similar dubious result. The defendant was engaged in committing a robbery, when his accomplices murdered the victim. The defendant was indicted for robbery and murder. He pleaded guilty to the robbery charge, and when tried for murder, pleaded double jeopardy. The court upheld the plea, expressly rejecting the majority rule and applied the "same transaction" test of the *Cooper* case. The court pointed out that usually, where more than one crime has been committed by the same act, the defendant is tried for the most serious one and if the state chooses to prosecute the smaller offense, it is better that the residue of the criminal act go unpunished than to subject the citizen to a second prosecution. Thus, by pleading guilty to robbery, the defendant escapes punishment for murder. The defects of this test become readily apparent when such a result is possible.

In spite of such results, the "same transaction" test is being applied in many other jurisdictions.[18] Some courts which usually apply the

[11] 40 Yale L. J. 462 (1931).

[12] Burdue v. Commonwealth, 144 Ky. 428, 138 S.W. 296 (1911).

[13] Hall v. State, 134 Ala. 90, 32 So. 750 (1902).

[14] State v. Rose, 89 Ohio St. 383, 106 N.E. 50 (1914).

[15] State v. Cosgrove, 103 N.J.L. 412, 135 Atl. 871 (1927).

[16] 13 N.J.L. 361 (1833).

[17] State v. Mowser, 92 N.J.L. 474, 106 Atl. 416 (1919).

[18] Crane v. State, 39 Okla. Cr. 40, 263 Pac. 174 (1928); Phillips v. State, 109 Tex. Crim. Rep. 523, 4 S.W. 2d 1056 (1928); State v. Houchins, 102 W. Va. 169, 134 S.E. 740 (1926); Coon v. State, 97 Tex. Crim. Rep. 645, 263 S.W. 914 (1924); State v. Covington, 142 Tenn. 659, 222 S.W. 1 (1920); Furnace v. State, 153 Ind. 93, 54 N.E. 441 (1899); State v. Shedrick, 69 Vt. 428, 38 Atl. 75 (1897); People v. Johnson, 81 Mich. 573, 45 N.W. 1119 (1890); Trawick v. City of Birmingham, 23 Ala. App. 308, 125 So. 211 (1929); Ruffin v. State, 29 Ga. App. 214, 114 S.E. 581 (1922).

majority test sometimes use the "same transaction" test.[19] And, as might be expected, where there is as much confusion as exists in this field, some courts which normally apply the rule of the *Cooper* case, have at various spasmodic intervals, applied the majority rule.[20]

The Wisconsin court, in a slight variation of both of these rules stated that "the offenses are not the same when there are distinct elements in one which are not included in the other, though both relate to one transaction."[21] Thus, it held a conviction for lewd and lascivious conduct was not a bar to a later prosecution for adultery.

Other courts use what is called the "substantial identity" test. A Louisiana court has held "the identity of offenses which is an essential element of a plea of double jeopardy is not a formal, technical, or absolute identity, but only substantial identity."[22] Thus a conviction of unlawfully possessing and transporting liquor in one county was held a bar to a second prosecution for transporting it in a second county on the same day.

Other courts resolve the problem entirely on the basis of degrees of offenses. Hence, it has been held that a prosecution for a higher degree of an offense bars prosecution for a lower,[23] and a conviction for a greater crime bars a prosecution for a lesser necessarily included within the greater even though, on trial for the greater, the defendant could not have been convicted of the lesser.[24] But an acquittal of the greater would not bar a prosecution for the lesser.[25]

What is considered the better authority holds that a conviction of a lesser offense included in a greater, on a charge of the greater, will bar a subsequent trial for the greater.[26] Thus, a conviction of manslaughter on a charge of murder operates as an acquittal of the graver offense.

[19] Mullins v. Commonwealth, 216 Ky. 182, 286 S.W. 1042 (1926); People v. Heacox, 231 App. Div. 617, 247 N.Y. Supp. 464 (4th Dept., 1931).

[20] Hochderffer v. State, 34 Okla. Cr. 215, 245 Pac. 902 (1926), (The court acknowledges that the Cooper case is the law, but applied the majority rule.); Foran v. State, 195 Ind. 55, 144 N.E. 529 (1924); Estep v. State, 11 Okla. Cr. 103, 143 Pac. 64 (1914), (The court treats the majority and the Cooper case as synonymous.); Holcomb v. State, 19 Ala. App. 24, 94 So. 917 (1922).

[21] State v. Brooks, 215 Wis. 134, 137, 254 N.W. 374, 376 (1934).

[22] State v. Roberts, 152 La. 283, 284, 93 So. 95, 96 (1922).

[23] People v. Wells, 246 App. Div. 853, 284 N.Y. Supp. 953 (3rd Dept., 1936).

[24] Commonwealth v. Ladusaw, 226 Ky. 386, 10 S.W. 2d 1089 (1928); Barton v. State, 26 Okla. Cr. 150, 222 Pac. 1019 (1924); 1 Bishop, Criminal Law § 1054 (9th ed., 1923).

[25] Gray v. United States, 14 F. 2d 366 (C.A. 8th, 1926); Mullins v. Commonwealth, 216 Ky. 182, 286 S.W. 1042 (1926).

[26] Usary v. State, 172 Tenn. 305, 112 S.W. 2d 7 (1938); People v. Newman, 360 Ill. 226, 195 N.E. 645 (1935); State v. McLaughlin, 121 Kan. 693, 249 Pac. 612 (1926); People v. Krupa, 64 Calif. App. 2d 592, 149 P. 2d 416 (1944)..

But, if the first conviction was procured by the fraud, connivance, or collusion of the defendant, it is not a bar.[27] The theory of the exception is that if the defendant had his hand in the prior conviction he was never really in jeopardy. A diversity of opinion exists as to whether a prosecution for a higher crime is barred where the lower court does not have jurisdiction of the higher crime. Some courts hold it is a bar,[28] while others hold it is not a bar.[29] Such a problem will arise where a defendant is prosecuted in a justice of the peace court and then later in the county or circuit court.

Another test of identity of offenses which is applied reluctantly by some courts is that of res judicata.[30] Some courts use this test where a strict application of the majority rule would work an undue hardship on the defendant.[31] Apparently the majority of courts feel that res judicata is strictly a creature of the civil side of the law and should so remain. But whatever be the reason, the fact remains that this test is not gaining in popularity.

In some situations, the courts have applied no test whatsoever and the result is that in such situations the citizen can be made to suffer a double punishment for one, indivisible, criminal act. Thus, if a single act is an offense against two statutes, and a different element of proof is required by each, a conviction under one is not a bar to a later prosecution under the other.[32] Hence it has been held, that a conviction of driving while intoxicated is not a bar to a later prosecution for manslaughter.[33]

The same act may also constitute a crime against two governments. If this is so, the law is well settled that a prosecution by one government does not bar a prosecution by the other. Such a violation is regarded as two separate and distinct crimes.[34] The same rule applies where an act constitutes a violation of both federal and state laws; a prosecution in a federal court is no bar to a later prosecution in a state court.[35] Some

[27] Jonson v. State, 17 Okla. Cr. 558, 190 Pac. 897 (1920); People v. McDaniels, 137 Cal. 192, 69 Pac. 1006 (1902).

[28] State v. Sampson, 157 Iowa 257, 138 N.W. 473 (1912).

[29] State v. Humphrey, 357 Mo. 824, 210 S.W. 2d 1002 (1948); Commonwealth v. McCan, 277 Mass. 199, 178 N.E. 633 (1931).

[30] United States v. Oppenheimer, 242 U.S. 85 (1916); State v. Cheeseman, 63 Utah 138, 223 Pac. 762 (1924).

[31] People v. Grzeczak, 77 Misc. 202, 137 N.Y. Supp. 538 (N.Y. County Ct., 1912).

[32] People v. Koblitz, 401 Ill. 224, 81 N.E. 2d 881 (1948); People v. Nelson, 319 Ill. 386, 150 N.E. 249 (1926); State v. Garcia, 198 Iowa 744, 200 N.W. 201 (1924).

[33] People v. Townsend, 214 Mich. 267, 183 N.W. 177 (1921).

[34] Ex parte Siebold, 100 U.S. 371 (1879).

[35] Herbert v. Louisiana, 272 U.S. 312 (1926); United States v. Lanza, 260 U.S. 377 (1922).

states have statutes which obviate this unjust situation by forbidding prosecution of a defendant who has already been in jeopardy for the same offense in another jurisdiction.[36] A somewhat similar situation is presented where an act violates both a municipal ordinance and a state statute; a prosecution under one will not bar a prosecution under the other.[37] A single criminal act may constitute a violation of both the military and the civil law, and the defendant may be punished by both civil and military authorities. Hence, in such a situation a trial by a court-martial is not a bar to a later prosecution by civil authorities.[38]

Generally, only one prosecution may be had for a continuing crime, and where the offense consists of a series of acts extending over a period of time, a prosecution based on a portion of that period will bar a prosecution covering the whole period. The offense is single and indivisible, and regardless of the period of time, it is a bar to a conviction for other acts within the same time.[39] Thus, a conviction for desertion of one's child will bar another prosecution for this offense for any period up to the time of conviction. However, if a violation of law is not continuous in its nature, a repetition of a prohibited act even if committed on the same day, is a second offense and the plea of double jeopardy is of no avail.[40]

From a backward glance over the cases examined, it must be concluded that the courts are in hopeless conflict when it comes to a solution of the problem of what is an "identical offense." The reason for this enormous diversity of opinion is clearly apparent from the cases examined. It is because the courts are applying different, overlapping, and conflicting tests to determine what is an "identical offense." A common yardstick which would be universally acceptable has not been found.

It is submitted that when such a fundamental right is involved, a liberal interpretation is necessary to assure the full protection of the right. This seems to be the view taken by the Supreme Court of California, when it recently held that doubts as to the meaning of a statute are to be resolved against a construction which would result in double punishment for the same act.[41]

[36] People v. Spitzer, 148 Misc. 97, 266 N.Y. Supp. 522 (Sup. Ct., 1933).

[37] City of Chicago v. Clark, 359 Ill. 374, 194 N.E. 537 (1935).

[38] Welch v. State, 53 Ga. App. 255, 185 S.E. 390 (1936).

[39] Commonwealth v. Peretz, 212 Mass. 253, 98 N.E. 1054 (1912).

[40] Ebeling v. Morgan, 237 U.S. 625 (1914).

[41] People v. Greer, 30 Cal. 2d 589, 184 P. 2d 512 (1947).