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**Criminal Law—Double Jeopardy—Multiple Transgressions
from a Single Act**

D, a twenty-three-year-old male, pleaded guilty in the juvenile court to contributing to the delinquency of a thirteen-year-old girl, was convicted and sentenced. In a subsequent trial, *D* was convicted of statutory rape upon the same facts over his objection of former jeopardy. *Held*, affirmed. Conviction in a juvenile court of contributing to the delinquency of a minor does not bar prosecution in the circuit court for statutory rape, although the evidence necessary for conviction was substantially the same in both prosecutions. *Bennett v. State*, 182 A.2d 815 (Md. 1962).

The principal case does not involve any particularly new development in the law. The doctrine of former jeopardy arose in sixteenth century England when the death penalty was meted out for many minor offenses. It was a means by which the courts attempted to restrain excessive use of severe punishments. Horack, *The Multiple Consequences of a Single Criminal Act*, 21 MINN. L. REV. 805 (1937). This reason for the rule is now obsolete. A better reason for the rule today is to prevent the state from harassing an individual by prosecuting him again for the same offense. The doctrine might also be considered the criminal counterpart to the civil law's maxim of *res judicata*, where each person is entitled to one day in court and only one. In West Virginia the defense of double jeopardy is provided for in the State Constitution: ". . . nor shall any person, in any criminal case, . . . be twice put in jeopardy of life or liberty for the same offense." W. VA. CONST. art. III § 5. Generally speaking, the doctrine forbids a second trial as well as a second punishment for the same offense. *State v. Fredlund*, 200 Minn. 44, 273 N.W. 353 (1937). For a collection of cases on this principle, see Annot., 113 A.L.R. 222 (1938).

The principal case is an example of one of the three areas where the doctrine of double jeopardy fails to bar multiple prosecutions. These are, cases of multiple sovereignty of the defendant, cases of a single act producing the same wrong against more than one person, and cases of a single act producing more than one wrong against a single person. An example of the first area would be a violation of a city ordinance and a state statute in the same act, or a violation of a state and federal statute in the same act. *Hebert v. Louisiana*, 272 U.S. 312 (1926). The second area involves cases where in one criminal act, more than one person is

wronged. Such as, one gun shot killing two persons, or the robbery of more than one person at one time. *Hoag v. New Jersey*, 356 U.S. 464 (1958). The third area, in which the principal case falls, involves one criminal act producing several wrongs against one person. Examples of this would be aggravated assault and murder, rape and incest, or statutory rape and contributing to the delinquency of a minor. *State v. Watson*, 99 W. Va. 34, 127 S.E. 637 (1925).

The two tests commonly applied to determine whether one offense or more is committed are the "same evidence" test and the "same transaction" test. The "same evidence" test is applied in a majority of jurisdictions. Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 317 (1954). Under this test a conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. Note, 24 MINN. L. REV. 522 (1940). Generally, the "same evidence" test is construed in terms of whether the same evidence would support a conviction in either case. *Hoag v. New Jersey, supra*.

The "same transaction" test is that there can only be one prosecution for the consequences of a single criminal transaction. *Dowdy v. State*, 158 Tenn. 364, 13 S.W.2d 794 (1929). The *Dowdy* case in referring to a second punishment said that even if it were conceded that two convictions and two punishments may be had in any case upon separate counts, the practice was not approved and certainly it must be clear that the offenses were wholly separate and distinct. The "same transaction" test would bar a subsequent prosecution, because even though there may be many offenses which took place during the same transaction, only one prosecution may take place for the whole transaction. This result is apparently reached under the theory that there was only one crime, so that the defendant could not be tried twice for the same offense. The "same evidence" test attempts to pin point which offense in the transaction has been tried, while the "same transaction" test treats the whole transaction as one crime. The "same transaction" test would prevent a second prosecution when the proof shows that the second offense charged concerns the same transaction as the first, even though additional elements need to be proved. Kirshheimer, *The Act, The Offense and Double Jeopardy*,

58 YALE L. J. 513 (1949). If the "same transaction" test had been applied to the principal case the defendant would not have been tried the second time.

In West Virginia, there probably exists a comparable overlap between the two offenses as in the principal case. Although there are no cases directly in point, the West Virginia Court has stated that an act or transaction may constitute two offenses which may be separately charged and punished. *State ex rel. Lovejoy v. Skeen*, 138 W. Va. 901, 78 S.E.2d 456 (1953). In the *Lovejoy* case, the defendant had been convicted, in a magistrate court, of the offense of having copper wire in his possession without a bill of sale. On a subsequent warrant issued by the same justice the defendant was charged with stealing copper wire. The defendant was convicted of grand larceny in the circuit court on this second charge. Both offenses are described in the same provision of the West Virginia Code, W. VA. CODE ch. 61, art. 3, § 49 (Michie 1961). The court held that they were separate offenses, and since the defendant was charged in the justice's court with the crime of having wire in his possession without a bill of sale, he was not tried for the crime of grand larceny of the wire. Following the theory of the court, it would seem that the defendant could have been tried again under the general provision for grand larceny in W. VA. CODE ch. 61, art. 3, § 13 (Michie 1961).

A situation that probably also parallels the instant case in West Virginia is the negligent homicide provision W. VA. CODE ch. 17C, art. 5, § 1 (Michie 1961) and common law manslaughter as provided in W. VA. CODE ch. 61, art. 2, § 5 (Michie 1961). Cases of this type have, in the past, been prosecuted under the common law manslaughter provision. *State v. Lough*, 143 W. Va. 838, 103 S.E.2d 538 (1958); *State v. Lawson*, 138 W. Va. 136, 36 S.E.2d 26 (1945). Although it is an open question in this state, there seems to be nothing to prevent a prosecutor from trying a defendant under the common law provision for manslaughter and, failing to convict him, proceed again on the same facts under the statutory provision of negligent homicide. It may be construed that there are two separate offenses, one a statutory offense and the other a common law offense. If this be the case, it would appear that a prosecutor could so phrase his indictment as to create two separate offenses out of the one act. An indictment which charges a statutory offense is sufficient if it substantially follows the

language of the statute and fully and completely informs the defendant of the character and causes of the particular offense charged. The provision of our constitution which forbids that any person shall be twice put in jeopardy, applies only to the same offense. It has no application to another or different offense. *State v. Taylor*, 130 W. Va. 74, 42 S.E.2d 549 (1947). Thus the question presents itself as to whether the statutory offense of negligent homicide is the same offense as common law manslaughter. The court followed *State v. Taylor supra*, in saying that the State Constitutional provision denying the State the right to twice place in jeopardy a defendant has no application where the offense for which a defendant is being tried is a different offense than the one involved in a former prosecution. *State v. Pietranton*, 140 W. Va. 444, 84 S.E.2d 774 (1954).

For the doctrine of double jeopardy to operate properly, there must be a balance drawn between the rights of an individual, in the number of times he may be brought to trial for one act, and the authority of the State to prosecute separate criminal offenses that are committed in one act. It would seem that there is little the courts can do to avoid these overlaps in the law. If they are to be corrected it is up to the legislature to do it.

Earl Moss Curry, Jr.

Domestic Relations—The Effect of a Bigamous Marriage in a Workmen's Compensation Proceeding

P married *M*, who at the time of their wedding was already legally married. Under Kentucky laws this ceremony, between *P* and *M*, was void. *P* was awarded benefits as a dependent widow in a workmen's compensation proceeding. *Held*, a marriage contracted in Kentucky, which is made void by the laws of that state, cannot form the basis of a claim for compensation by one claiming to be the widow of the deceased workman by reason of such marriage. *Meade v. State Compensation Comm'r*, 125 S.E.2d 771 (W. Va. 1962).

The instant case itself poses no particular difficulty, for it is well established that a marriage which is void under the laws of the state in which it is contracted or celebrated is considered void everywhere. *Spradlin v. State Compensation Comm'r*, 145 W. Va.