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What Constitutes Double Jeopardy

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quate defense to a complicated felony charge, a plea of guilty is not deemed a waiver anywhere.[37]

It is apparent that the principal distinction between the safeguards offered an accused under the Sixth Amendment and those established under the Fourteenth Amendment have reference to non-capital cases only.

The dissent in the principal case indicates that it would be advisable to have a uniform rule requiring that the accused in all criminal cases in state courts be advised of, and guaranteed a right to counsel, while the majority is inclined to follow a more flexible rule whereby each case is decided solely on the basis of whether the accused has had a "fair hearing." There is much worth in both positions but it is suggested that a more favorable rule would be that counsel be provided an accused in all felony cases, whether regarded as capital or non-capital crimes, when he is unable to procure counsel for himself because of financial or mental incompetency. This would represent a compromise between the two views expressed in the case, and yet offer a practical solution to a vexatious problem. The distinction between capital and non-capital cases should be disposed of, inasmuch as a long penitentiary sentence in a non-capital felony case can be as severe a punishment as a judgment of death.

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What Constitutes Double Jeopardy?

The principle that a person should not be punished more than once for the same act is familiar to all nations.[1] At common law one accused of a crime was protected from a second prosecution by pleas of former acquittal or conviction. However, these pleas were not available unless an actual verdict had been rendered at the first trial.[2] In America this principle has been characterized as a protection against double jeopardy and incorporated into the federal and forty-one state constitutions. Even in those states not having constitutional provisions the common law rule is applied as one of the elements of due process of law.[3] Under the constitutional provisions, however, the scope of protection has been broadened to prohibit putting the accused to a second

37 DeMeerleer v. Michigan, 329 U. S. 663 (1947). (A seventeen-year old boy was indicted for murder, arraigned, convicted on his plea of guilty without counsel, and sentenced to life imprisonment. Murder is a non-capital offense in Michigan. The accused was not instructed regarding the assistance of counsel, nor did the court apprise him of the consequences of his plea. Held to be a violation of due process.) Rice v. Olson, 324 U. S. 786 (1944).

1 "The maxim *non bis in idem* (not twice in the same) belongs to the universal law of nations". Grant, The Lanza Rule of Successive Prosecutions (1932) 32 Col. L. R. 1309, 1317.

2 See State v. Felch, 92 Vt. 477, 105 Atl. 23 (1918), for discussion of the common law rule.

3 *Ibid.* Connecticut, Maryland, Massachusetts and North Carolina are among those states not having a constitutional provision against double jeopardy. In all of these states the principle has been applied. Kneier, Prosecution Under State and Municipal Ordinance as Double Jeopardy (1931) 16 Corn. L. Q. 201, 202 note 4.

defense after jeopardy has once attached, whether or not a verdict was rendered at the first trial.[4]

Most of the constitutions provide that no person "shall be twice put in jeopardy for the same offense" or that no person "shall be subject for the same offense to be twice put in jeopardy of life and limb."[5] The greatest perplexities in the application of these provisions have been caused by the lack of certainty as to the definition of the seemingly simple term "same offense." In attempting to define this term, the courts have devised certain technical rules and tests, fair perhaps in one case, but often inadequate criteria when applied to different fact situations. The two double jeopardy problems which have caused the greatest conflict, and which have been most inadequately solved, have arisen where the same act violates the laws of more than one sovereignty and where more than one offense arises from the same act. In the first situation the majority of courts have held that a prosecution by one sovereignty will not bar prosecution by another, while in the second it is generally held that there may be a prosecution for more than one offense if certain requirements are met. The application of these two rules often seems harsh and unjust, but much of the seeming harshness may be accounted for by the fact that the state does not have a right to appeal, and by the consequent effort of the courts to compensate the state for this disadvantage. This comment will be limited in its scope to a consideration of these problems.

Prosecutions in More Than One Jurisdiction

Since the same act may constitute an offense against both federal and state laws, the question arises as to whether an acquittal or conviction in one jurisdiction will bar a subsequent prosecution in the other. In the earlier decisions the courts held the view that federal law superseded any state law relating to the same subject.[6] Under this view there was no question of a second prosecution for the same act since the federal government assumed sole jurisdiction over acts denounced as criminal by both state and federal law. However, in 1847 this ruling was abrogated by the decision in *Fox* v. *Ohio*,[7] in which the United States Supreme Court held that federal legislation against the passing of counterfeit coin did not deprive the state of its power to punish for the offense.[8] With the development of this theory it became apparent that successive prosecutions might become a reality. Although there were several holdings to this effect in the earlier cases, the *Lanza* case[9] decided in 1922, definitely established this "rule of successive prosecutions," that one

4 Jeopardy attaches when the jury is empaneled and sworn in, or, if the trial is by the court, when the court has begun to hear evidence. Exceptions: where there is error. Barber v. State, 151 Ala. 56, 48 So. 808 (1907) (Conviction under a void statute); State v. Scott, 99 Iowa 36, 68 N. W. 45 (1896). (Invalid or defective indictment) or where the jury were unable to reach a verdict. Dreyer v. People, 188 Ill. 40, 58 N. E. 620 (1900).

5 Ill. Const. Art. 2 § 10, Ill. Rev. Stat. (1945).

6 See Jett v. Commonwealth, 59 Va. 869, 877 (1867), for a discussion of the earlier cases.

7 46 U. S. 410 (1847).

8 See also United States v. Marigold, 50 U. S. 56 (1850); Moore v. People of Illinois, 55 U. S. 13 (1852).

9 United States v. Lanza, 260 U. S. 377 (1922).

act constituting a crime against both national and state sovereignties could be punished by both.[10] The reasoning behind this rule is that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of each and therefore may be punished by each; that, although the acts punished are identical, the offense is not the same. This "rule of successive prosecutions" reached maturity during the struggle with the problems arising under the prohibition laws. The courts, confronted with a multitude of cases concerning the transportation and sale of liquor, ignored the earlier decisions dealing with similar problems of concurrent jurisdiction.[11]

It has been a long established principle that the Bill of Rights was attached to the Constitution to secure to the people of this country the common law rights of Englishmen. Having had no previous experience with a federal system, those men who drew up the constitution clearly could not have anticipated the potential power of the state governments. Therefore, the Bill of Rights was directed solely at the central government as the source of power with which they were familiar. To prevent an abusive use of such power those rights were guaranteed. To determine what those rights were in relation to this doctrine it is necessary to consider the scope of the common law plea of a previous acquittal (*autrefois acquit*). In England as early as 1662 the plea of a previous acquittal upon a criminal charge in Wales was held a bar to a subsequent prosecution in England.[12] In fact, such extensive effect was given to this doctrine that in *R.* v. *Hutchinson,* England recognized a murder acquittal under Portuguese law.[13] The argument might be made that the situation of dual citizenship existing in the United States creates a problem different from that known at common law and to the law of nations, since under our federal system each resident is subject to both federal and state law. However, such reasoning is evasive when considered in the light of the real purpose of the double jeopardy doctrine. This principle, by whatever name it is called, has always been considered as a protection of human right as opposed to sovereignty. Under the older penal laws, including early common law, a common mode of punishment was dismemberment. Was an accused to give two arms in payment for a crime for which the punishment prescribed was the loss of one arm?, The principle was that the guilty person should lose one arm, not that each sovereignty offended should thus demand an arm in payment.[14] To prevent such violation of human right a second prosecution was forbidden. It is to be assumed that the framers of our constitution were informed as to the history of this principle,

10 United States v. Palan, 167 Fed. 991 (S. D. N. Y. 1909); United States v. Casey, 247 Fed. 362 (S. D. Ohio 1918); United States v. Holt, 270 Fed. 639 (W. D. N. D. 1921); McCarty v. Commonwealth, 200 Ky. 287, 254 S. W. 887 (1933).

11 Prior to the development of this rule the courts had held that where two sovereignties had concurrent jurisdiction either might prosecute, but the first prosecution was a bar to the subsequent prosecution by the other. Nielson v. Oregon, 212 U. S. 315 (1909) (treating concurrent criminal jurisdiction of Oregon and Washington on the Columbia River); Wedding v. Meyler, 192 U. S. 573 (1904); Houston v. Moore, 18 U. S. 1 (1820).

12 R. v. Thomas, 1 Sid. 179, 1 Lev. 118 (1662). See Grant, cited *supra* note 1, for development of the common law rule.

13 Not recorded but discussed in R. v. Thomas, cited *supra* note 12.

14 See Freeland v. People, 16 Ill. 380 (1885) for a discussion of the historical development.

and were likewise interested in guaranteeing such protection to the individual. Indeed, from the terminology used it would appear that their intention was to extend the principle rather than restrict it as has been done by the *Lanza* case. Viewed in the light of history and the great care taken to restrict sovereignty by our Constitution it seems apparent that the *Lanza* rule violates the spirit of the provision if not the letter. The application of this rule has encouraged much abuse, being used principally as "an easy way for prosecutors to make a record for convictions with a minimum of effort,"[15] and a means of evading the constitutional provisions against compulsory self-incrimination and illegal searches and seizures.[16] An interpretation that effects so much injustice and is so conflicting with the spirit of the constitutional guarantee should be revised or abrogated. The position of the courts applying the rule of successive prosecutions is strengthened by the general acceptance of the construction that the Bill of Rights affects the Federal government only. In the recent Supreme Court case *Adamson* v. *People of California* this interpretation of the federal constitution was forcefully attacked by dissenting Justices Black, Murphy, Douglas, and Rutledge.[17] It is the theory of these Justices that the due process clause of the Fourteenth Amendment makes effective the specific guarantees of the Bill of Rights as a protection against state action.[18] Such a transformation of the double jeopardy provision into terms of due process would be added argument against a second prosecution for the same offense by any power whatever.

What little justification that can be made to support the "rule of successive prosecutions" on the basis of the double coverage of state and federal laws, is completely absent in the case of successive prosecutions by other political units. However, it has been extended to encompass successive prosecutions by state-state, state-city and state-county.

Although this problem was not before the court in *State* v. *Shimman*,[19] there is dictum to the effect that continuous transportation of liquor over the boundary of several states would be punishable in each state if the law of each state prohibited it. There is some division of opinion in reported cases when an act involves a violation of a state law and a municipal ordinance. The more just as well as more logical view held by a few courts is that because the municipality is but an agent of the state and acting under delegated authority, a prosecution under a municipal ordinance and a state statute would constitute a double prosecution within the meaning of the constitutional prohibition.[20] Under this view the violation is held to constitute but one offense as well as one act. However, the majority view is in line with the *Lanza* rule, and holds that an act forbidden by both city and state is an offense against

15 Pound, Co-operation in Enforcement of Law (1931) 17 A. B. A. J. 9, 14.

16 See also People v. Flaherty, 396 Ill. 304, 71 N. E. (2d) 779 (1947).

17 ... U. S. ..., 67 S. Ct. 1672 (1947).

18 In the *Adamson* case, *supra* note 17, Mr. Justice Black asserts that the history of the Fourteenth Amendment "conclusively demonstrates that the first section of the Fourteenth Amendment . . . was thought by those responsible for its submission to the people, and those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and immunities of the Bill of Rights."

19 122 Ohio St. 522, 172 N. E. 367 (1930).

20 See Kneier, cited *supra* note 3.

the peace and dignity of each and therefore constitutes two distinct offenses. Under this view a prosecution under one will not bar prosecution under the second.[21]

The most ridiculous lengths to which the theory of successive prosecutions have been extended are those cases of prosecution by two counties. In *Lunsford* v. *State*,[22] it was held that operating a lottery in several counties constituted a separate and complete offense in each county.[23] The more logical approach to this problem is that of the court in *State* v. *Shimman*,[24] where an illegal act of transporting liquor continued through several counties within one state was held to be a single offense and punishable in either county but not in both. This appears to be a sounder view since the county is but a unit of venue for prosecuting an offense against the state.[24]

Prosecutions for More Than One Offense Arising from the Same Act

The constitutional provisions against double jeopardy usually prohibit a second prosecution for the "same offense." In attempting to reach a standard definition that would be satisfactorily applicable to all fact situations the courts have evolved a series of tests. The test adopted by a majority of the courts and often most harsh in its application is the *same evidence test*.[25] The rule has been stated in various ways by the courts. In general, however, the theory is that if the defendant upon the first indictment could not have been convicted of the offense described in the second, then an acquittal or conviction upon the former is no bar to the latter. A test rarely applied, but extremely favorable to the accused is the *single intent test*. Courts following this rule hold that where there is but a single intent there is but a single offense regardless of the number or severity of the results of the defendants' acts.[26] The third test, the *same transaction test*, recognizes

21 Thomas v. Indianapolis, 195 Ind. 440, 145 N. E. 550 (1924) (the court held that one who, in violating an anti-picketing ordinance, at the same time violated a state law could be prosecuted under both); Hankins v. People, 106 Ill. 628 (1883) (A grant of power to the city to punish for misdemeanors committed within its limits is not a surrender of power of the state to punish for the same offense); Robbins v. People, 95 Ill. 175 (1880) (conviction under a city ordinance prohibiting the keeping of a gaming house no bar to a subsequent prosecution under state statute).

22 60 Ga. App. 537, 4 S. E. (2d) 112 (1938); Hall v. State, 73 Ga. App. 616, 37 S. E. (2d) 545 (1946) (conviction for speeding continuously through two counties held subject to conviction in both).

23 (Note) 59 Harv. L. Rev. 1161 (1946).

24 *Op. cit. supra* note 19.

25 Rex v. Vandercomb, 2 East. P. C. 519 (1796) (principle first stated); Blockburger v. United States, 284 U. S. 299 (1932) (Where the same act constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether either provision requires proof of fact which the other does not); Ebeling v. Morgan, 237 U. S. 299 (1938) (Where successive cuttings of different mailbags involved—*held* proof of cutting one would not have supported the counts as to the other sacks, therefore separate crimes). "The true test is whether evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first." Archibald, Criminal Pleadings (1846) 106. *Contra*, Robinson v. United States, 143 F. (2d) 276 (C. C. A. 10th, 1944). See also 3 Greenleaf, Evidence (1853) § 36 and 1 Bishop, Criminal Law (9th ed. 1923) § 1052 for statements of the rule.

26 Hurst v. State, 24 Ala. App. 47, 129 So. 714 (1930); Burnam v. State, 2 Ga. App. 395, 58 S. E. 683 (1907).

that when both offenses are part of the same criminal transaction, and no human act or agency separates the two offenses, they are the same.[27] The fallacy in this method of approach is that the protection against double jeopardy is a substantive right that cannot be confined within the narrow limits of purely technical rules. Such a test may reach a fair result in one situation but is often unjust when applied to a different fact situation.

In the recent case *People* v. *Harrison*[28] the Illinois Supreme Court relied upon the *same evidence test* with little attempt at justification. The defendant was first acquitted on an indictment for the offense of assault with a deadly weapon with intent to commit murder. Following an acquittal of accused, the victim died and defendant was thereafter tried and convicted of murder. The conviction was affirmed by the Illinois Supreme Court. Had the Illinois court in the *Harrison* case applied either of the other available tests the result would have been otherwise. For example, if the court had analyzed the case on the basis of the rule that when there is but a *single intent* there is but a single offense, the conviction could not have been upheld. Logically it is difficult to understand how one can be innocent of intent or implied intent to commit murder and at the same time, as a result of the same act, have the malice which is necessary to constitute the crime of murder. It is equally apparent that the court would have reached a different decision if it had applied the same transaction test. There was no new act on the part of the defendant and no intervening agent. Clearly the death of the victim resulted from the *same transaction* or act for which the accused was acquitted at the first trial. There was no new evidence pointing to the defendant's guilt. It would seem that the prosecutor and trial judge felt that the first trial was not a fair one, that the defendant was actually guilty of the first offense. This would indicate that the enormity of the offense constitutes one factor in determining which test is to be applied.

It would appear from the regularity with which the trial court's determination is affirmed, that the trial judge is left relatively free to apply the test which appears to him to bring about a just result. The tests are so intangible that it is sometimes difficult to discover which test the court is following. In *United States* v. *St. Clair*[29] the court held that where violation of the White-Slave Traffic Act involves the transportation of more than one woman on the same trip and in the same vehicle, the transportation of each woman constitutes a separate and distinct offense. The rationale of the case was that evidence of defendant's intention as to one woman was no proof of his intention as to another. Although the court spoke in terms of same evidence it is not clear that the *single intent* test was not relied upon. The application of the *same transaction* test would clearly have brought about a different result.

The chief advantage of the *same transaction* rule is that it demands a more efficient prosecution at the first trial. The careless and in-

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27 Gunter v. State, 111 Ala, 23, 20 So. 632 (1895); Spannell v. State, 83 Tex. Cr. App. 118, 203 S. W. 357 (1918).

28 395 Ill. 463, 70 N. E. (2d) 596 (1946). For a discussion of the *Harrison* case, see Note 47 Col. L. Rev. 679-681 (1936).

29 62 F. Supp. 795 (W. D. Va. 1945); See also Gillenwater v. Biddle, 18 F. (2d) 206 (C. C. A. 8th, 1927).

efficient prosecutor may not cover his mistakes by repeatedly compelling the defendant to stand charges until a conviction is finally obtained. The operation of this rule and its advantages may be strikingly observed by comparing two cases with similar fact situations. In both cases the charge was manslaughter resulting from the alleged negligent and reckless driving of the defendant. In *State* v. *Wheeloch*[30] three people were killed through the negligence of defendant and the Iowa court, applying the test, held that an acquittal of the defendant on a charge of manslaughter of one victim was a bar to subsequent prosecutions for the manslaughter of the others. In *People* v. *Allen*,[31] defendant simultaneously struck and killed two pedestrians. The accused was set at liberty following an indictment for the manslaughter of one victim under an Illinois statute providing for the discharge for failure to prosecute within four months. Accused was subsequently indicted and convicted of the manslaughter of victim number two. The Illinois Supreme Court affirmed the conviction on the basis that there were as many offenses as there were deaths. In cases like this the courts have difficulty circumventing the fact the same evidence may be used to prove both offenses. However, as may be seen from the *Allen* case, they avoid this by placing the emphasis upon the name of the person injured or killed. The dissenting opinion in the *Allen* case indicates how unjust such an approach can be. The gist of the case in situations like the above is, was or was not the defendant grossly negligent? If he was, under Illinois law,[32] he is guilty of manslaughter if death is occasioned thereby. Although no great injustice was done the defendant in this particular case, since a more or less technical oversight accounted for the dismissal on the first manslaughter charge, the practical result of the Illinois view as set out in the *Allen* case is that the defendant may be repeatedly compelled to stand trial on this one point though jury after jury might find that he had not been guilty of gross negligence. Clearly the double jeopardy provision was intended to protect the accused from being forced to such continuous defense as this.

Another series of troublesome cases are those involving more than one category of crime arising from the same transaction. In *People* v. *Bain*[33] the defendant was first prosecuted for burglary and was then tried and convicted of robbery resulting from the same transaction. The California Court, although committed to the *same transaction test,* held that the previous prosecution was no bar to the latter. The reasoning of the court was that the burglary was complete when felonious entry into the house was effected and the robbery was a second and later transaction. This case and others like it indicates how far the trial courts may stray from the rule they are purportedly following and be upheld on appeal.[34] The Illinois Supreme Court was faced

30 216 Iowa 1428, 250 N. W. 617 (1933).

31 368 Ill. 368, 14 N. E. (2d) 397, *cert. denied* 308 U. S. 511 (1938).

32 Ill. Rev. Stat. (1947) c. 38, § 363.

33 75 Cal. App. 109, 241 Pac. 913 (1925).

34 State v. Melia, 231 Iowa 332, 1 N. W. (2d) 230 (1941) (Defendant shot his brother and his brother's wife who rushed in front of her husband, *Held* acquittal of the murder of one on grounds of justifiable self defense did not bar prosecution for the second—two deaths from a series of acts).

with a similar problem in the recent case of *People* v. *Loftus*.[35] The defendant, who has been tried and convicted on indictments for two robberies, was subsequently tried and convicted on indictments for burglary and larceny arising out of the same two fact situation. In affirming the four convictions the court reaffirmed its adherance to the *same evidence test*, that if the defendant upon the first indictment could not have been convicted of the offense described in the second, then an acquittal or conviction upon the former would be no bar to the latter.[36] Whether the acts be called a single offense or not it is clear that to allow the state several chances at conviction in cases like the above is to violate the spirit of the constitutional provision against double jeopardy.

Another confusing set of cases are those involving two offenses which are degrees of the same crime. The first group of cases to be considered are those in which the court, having jurisdiction of both offenses, elects first to prosecute for the greater offense. May it later prosecute for the lesser offense? In the *Harrison*[37] case the court stated that an acquittal of a defendant on an indictment for an offense which includes lesser offenses operates also as an acquittal of all included lesser offenses of which he might have been convicted on the first indictment. To constitute a "lesser offense" within the meaning of this definition, the courts have universally held that the lesser must be an element or degree of the greater, and arising from the same criminal act. As an example of this the courts have held that an acquittal on an indictment charging murder is a bar to a subsequent indictment for assault with intent to commit murder.[38] The problems involved in the application of this rule arise from the necessity of determining exactly when an offense is actually an element of a greater offense. In attempting to resolve this difficulty the courts are faced with many of the same problems that are involved in determining whether there are actually two offenses.

The problems here are not so great, however, as they are in the reverse situation where the state elects first to prosecute for the lesser of two offenses arising from the same incident. The rule allegedly followed is that there may not be a second prosecution if the smaller offense is a degree of the greater, or if the state could have prosecuted for the greater offense in the first indictment.[39] That an acquittal or conviction of an offense included in a greater offense bars a subsequent prosecution for the greater was upheld in the California case, *People* v. *Krupa*.[40] The defendant was first prosecuted under the second count of an indictment for contributing to the delinquency of a minor by having a minor transport narcotics, an act constituting a misdemeanor.[41] The California court held that this prosecution was a

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35 395 Ill. 479, 70 N. E. (2d) 573 (1946).

36 See also People v. Flaherty, cited *supra* note 16.

37 395 Ill. 463, 70 N. E. (2d) 596 (1946).

38 People v. Dugas, 310 Ill. 291, 141 N. E. 169 (1923); Gilpin v. Maryland, 142 Md. 464, 121 Atl. 354 (1923). For discussion see Comment (1931) 40 Yale L. J. 462.

39 People v. Moore, 276 Ill. 392, 114 N. E. 906 (1917). (Where a verdict of guilty of an assault with intent to commit rape was regarded as an acquittal of the greater offense of rape).

40 64 Cal. App. (2d) 592, 149 P. (2d) 416 (1944).

41 Calif. Welfare Insts. Code (1937) § 702.

bar to a subsequent prosecution under another statute making it a felony for anyone to hire or employ a minor in transporting narcotics[42]. In cases of prosecutions for murder following acquittal or conviction of assault with intent to murder, the former has been held not to be a bar even though it may be considered a degree of the same crime. The rationale of this practice is that the additional element of death constitutes a separate and distinct crime for which defendant could not have been prosecuted under the first indictment.[43] The reason for the distinction in the case of murder is clearly drawn in the *Harrison* case, where the death of the victim did not occur until the accused had been acquitted on the charge of assault with intent to murder.[44] It would have been impossible for the state to have prosecuted for murder in the first indictment since at that time the crime of murder did not exist.

Although the *same evidence* test is considered the majority rule in dealing with the problem of two offenses arising from the same act, there is considerable diversity of definitions even in those courts purportedly following this rule.[45] New Jersey alone has consistently adhered to the *same transaction test.*[46] In view of the conflicting decisions and the uniformity of affirmance on appeal it appears that the real decision is left to the discretion of the trial judge. Since the majority of cases involving these problems are cases in which the accused was acquitted at the first trial[47] it would seem that the prosecutor and trial judge are in effect deciding whether a fair trial was had in the first prosecution.

As a practical result the offender is rarely subjected to a second punishment. Even when a second trial is allowed the court often resorts to such considerations of public policy as the seriousness of the offense, the penalty involved, and the past record of the offender in setting the sentence.[48] However, it would seem that the purpose of the double jeopardy provision is not served by placing the accused at the mercy of the trial court no matter how fair minded the court may be. There are many reasons for the conflicting interpretations placed on the double jeopardy provisions. However, the most important and perhaps the one most easily corrected is the fact that the state has not been given the right of appeal in most jurisdictions. Since it is impossible for the state to correct errors that may have prevented a fair trial on the first indictment, it is a logical result that the courts have resorted to a loose construction of the double jeopardy safeguards. In this way it has been made possible for the state to do indirectly what it could not do directly. However, it has been done with the previously mentioned accompanying evils.

42 Calif. Health and Safety Code § 1174 (1939).

43 People v. Dugas, 310 Ill. 291, 141 N. E. 169 (1923).

44 Cited *supra* note 37. For discussion see Comment cited *supra* note 38.

45 Compare Medlock v. Commonwealth, 216 Ky. 718, 720, 288 S. W. 670, 671 (1926); State v. McGaughey, 45 S. D. 379, 383, 187 N. W. 717, 718 (1922); Commonwealth v. Crowley, 257 Mass. 590, 595, 154 N. E. 326, 328 (1926).

46 State v. Mowser, 92 N. J. L. 474, 106 Atl. 416 (1919); State v. Cosgrove, 103 N. J. L. 412, 135 Atl. 871 (1927). The same transaction test has been applied, though not consistently in Alabama, Oklahoma, and Texas. Comment (1931) 40 Yale L. J. 462.

47 See comment cited *supra* note 46.

48 See case cited note 37 *supra.*

Right of the State to Appeal

Since the state was allowed no appeal at common law, no such right will ever be implied in the absence of statute. In most jurisdictions the right of the state to unqualified appeal is considered repugnant to the double jeopardy provisions contained in the state constitutions,[49] the theory being that when judgment is rendered the first jeopardy ends, the accused is free and any further proceedings would in effect constitute a second prosecution. In a few states, although an absolute right of appeal by the state is regarded as being inconsistent with the double jeopardy provision, appeals have been allowed but review limited to determination of questions of law not affecting the verdict.[50] This is to provide a method whereby the law officers of the state may receive the opinion of an Appellate Court upon questions which they consider important to a correct administration of the criminal law, and a basis for future action.

There are a few states allowing appeal where the offense charged is a misdemeanor. In these states a new trial may be allowed upon reversal, notwithstanding a former judgment of acquittal.[51] Other jurisdictions limit the state's right to appeal by allowing an appeal only when jeopardy has not attached as for example, in appeals from a trial court order quashing an indictment.[52]

The more logical view seems to be that the same fundamental principle of justice which allows a re-trial because a juror has been legally disqualified, should allow a re-trial when an error has been committed at the trial, such as, the admission of illegal evidence or the exclusion of legal evidence.[53] There are a few states following this thesis in which statutes conferring an absolute right of appeal by the state have been upheld.[54] However, in no case has such a statute been held valid in states having constitutional provisions against double jeopardy. It seems possible to avoid the conflict of these principles by accepting the view that jeopardy is a continuing jeopardy from the beginning of the case until a fair trial on the merits has been obtained on both sides.[55]

In *Palko* v. *Connecticut*[56] the defendant was convicted of murder in the second degree and sentenced to life imprisonment. Pursuant to a

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49 People v. Miner, 144 Ill. 308, 33 N. E. 40 (1893) (An acquittal bars the prosecution of a writ of error by the state in a criminal case whether felony or misdemeanor.) People v. Webb, 38 Cal. 467 (1869) (Statute purporting to give right of appeal to People in criminal cases held to be limited to cases in which errors in proceedings occur before jeopardy attaches); Kepner v. United States, 195 U. S. 100 (1904) (appeal by United States held inconsistent with double jeopardy provision of Federal Constitution).

50 State v. Gray, 71 Okl. Cr. 309, 111 P. (2d) 514 (1941); State v. Dulany, 87 Ark. 17, 112 S. W. 158 (1908).

51 Commonwealth v. Abell, 275 Ky. 802, 122 S. W. (2d) 757 (1938).

52 Where a demurrer to an indictment has been sustained, appeal has been allowed. Commonwealth v. Church, 1 P. St. 105, 44 Am. Dec. 112 (1845); United States v. Keitel, 211 U. S. 370 (1908) (Appeal allowed under the Criminal Appeal Act of 1907 when a discharge had been had on a motion to quash).

53 State v. Lee, 65 Conn. 265, 30 Atl. 1110 (1895).

54 State v. Felch, 92 Vt. 477, 105 Atl. 23 (1918).

55 This view was ably expressed by Justice Holmes in the minority opinion in Kepner v. United States, 195 U. S. 100, 134 (1904).

56 302 U. S. 319 (1937). This statute had been previously upheld in State v. Lee, see note 53 *supra*. A similar statute was held valid in State v. Felch, cited *supra* note 54.

statutory appeal taken by the state a new trial was granted. On the second trial, under the same indictment the defendant was convicted of murder in the first degree and sentenced to death. This conviction was sustained by the United States Supreme Court on the ground that appeal by the state was not a violation of due process of law. The kind of jeopardy to which the accused was subjected by the statute was not a hardship so acute and shocking as to "violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Since the double jeopardy provision of the Fifth Amendment to the Federal Constitution is not incorporated into the Fourteenth Amendment so as to apply to state action, it is thus limited in its operation to federal criminal procedure.[57]

Summary

There are several possible suggestions for clearing up the confusion concerning the application of the double jeopardy provision. However, before justice can be fully effected by any of these changes the state must be guaranteed one complete trial on the merits, free from error. The only way to insure this is to allow the state the right to appeal in criminal cases. A law granting such right would not violate the guarantee against double jeopardy if the duration of jeopardy is properly conceived. That the first jeopardy continues through appeal in cases where there is error at the first trial is not a new concept,[58] nor is it lacking in authoritative support today.[59] The accused is protected against illegal search and seizure, compulsory self-incrimination, double jeopardy, and has the right of appeal. In view of these and other safeguards it does not seem unreasonable that the state should be allowed one fair trial. If, as a corollary to such a law, the scope of protection offered by the double jeopardy provision is extended, the accused would also be more sure of obtaining his constitutional rights. If the reluctance of the courts to give a broad coverage to the double jeopardy provision is partially due to feeling that the state may not otherwise get a fair trial, granting the state the right of appeal would remove the basis for this attitude.

To remove the oppression of the rule of successive prosecutions there are several possibilities open. The courts could return to the earlier view that federal legislation supersedes state law relating to the same subject.[60] Another possibility would be to allow either to prosecute but hold the first prosecution a bar to a second. This view is also supported by earlier cases, especially in regard to the concurrent jurisdiction of the states.[61] The possibility that the offender might submit himself to state process to avoid the heavier penalty sometimes imposed by the federal law might be avoided by allowing an exception in such cases. Where the penalty is heavier under federal law and the state convicts first a trial might be allowed under federal law also, with

57 The United States may now take an appeal in criminal cases when defendant has not been put in jeopardy, 34 Stat. 1246 (1907) 18 U. S. C. A. § 682 (1927).

58 See dissenting opinion, Kepner v. United States, 195 U. S. 100, 134 (1904).

59 The American Law Institute has adopted a position allowing appeal by state whenever material error has occurred at trial, American Law Institute, Administration of the Criminal Law, Official Draft (August 15, 1935) p. 13, § 13-14.

60 See note 6 *supra*.

61 See note 11 *supra*.

sentences to run concurrently. The rationale of such an exception would be that the accused was not actually in jeopardy to the extent provided by the federal law at the first trial.

If the state had the right of appeal it would no longer be necessary for the court to define the "same offense" in such a way as to give the state another chance to prosecute because of error favoring the accused at the first trial. The state should then find it necessary to include in one indictment all offenses arising from one transaction which could be joined. The fact that such a rule will force the state to "throw the book" at the accused at the first trial will be offset by the assurance that having once proved his innocence he cannot again be forced to defend. Such a rule is directed at protecting the innocent rather than the guilty. The failure of the state to get a conviction would no longer be due to its inability to get a fair trial.

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