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Is the Plea of *autrefois acquit* for Misdemeanors Justifiable in Kentucky?

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settlement of land titles. He is meeting with remarkable success, having won all cases interested in recently.

Mr. V. Y. Moore, one of the most brilliant men that ever graduated from law in this University, and now located at Madisonville, Ky., has recently been nominated by the Republicans for Congress in his district.

S. B. Dishman, '14, is now located at Barbourville, Ky., and doing well.

The staff for the Kentucky Law Journal has been selected for next year. Mr. J. V. Chamberlain, the present Associate Editor, will be Editor-in-Chief, and Mr. F. H. Ricketson, Jr., will be Business Manager. The remainder of the staff will be selected later.

IS THE PLEA OF AUTREFOIS ACQUIT FOR MISDEMEANORS JUSTIFIABLE IN KENTUCKY?

This article, written by J. T. Gooch, a Senior in the Law Department of University of Kentucky, was awarded first prize in the contest conducted by Baldwin Law Book Company of Louisville.

The plea of autrefois acquit involves many questions of mixed law and fact. The purpose of the plea is to prevent any person from being persecuted in the courts. That is, if "A" has been indicted for any offense and brought to trial in a court of proper jurisdiction and acquitted, he cannot be arraigned in court again for that particular offense. The principle of the law is, that is better fof ninety and nine persons to go unpunished than for one innocent person to be punished. The same principle is embodied in Sec. 13, of the Constitution of Kentucky, which reads as follows: "No person shall for the same offense be twice put in jeopardy of life or limb."

The question of, "the same offense or identical crime," has perplexed our courts and has afforded much ground for contention among lawyers. The disagreement as to what constitutes "the same

offense or identical crimes," has evolved certain tests by which the question may be decided or determined.

Therefore the question naturally follows, what is the test of "identical offenses"? Chitty's Blackstone 4th B. 336, says: "The general rule is somewhat vaguely stated to be that the plea of former conviction or acquittal must be upon the prosecution for the identical offense or crime." Also Cooley on Constitutional Limitations, p. 328, gives the rules to determine identities to be as follows: "Several rules have been laid down by the authorities for determining whether crimes are identical; one test is to ascertain whether the facts alleged in the second indictment, would, if given in evidence, have warranted a conviction in the first, and, if this is the case, when the crimes are assumed to be identical. Another test is to inquire whether the two crimes are not the same, whether they grow out of the same transaction. The safest rule is that the offenses must be precisely the same, or they must be of the same nature, or the same species, so that the evidence which proves the one would prove the other."

Complications may arise as to the interpretation and application of these rules, i. e. whether they apply only to a second indictment of which one has been acquitted, or to an offense identical and simultaneous with one of which a person has been acquitted. To illustrate: Suppose "A," in an altercation with "B" and "C," who were acting in concert and making an attack upon him, shot and killed "B" and "C," but with separate shots. Suppose also that "A" was charged with and indicted for killing them on separate indictments. Suppore he was tried and acquitted for the killing of "B." The question is, can "A" plead former jeopardy or outrefois acquit in the trial for the killing of "C"? The courts seem to hold the contrary. They look upon the killing of "B" and "C," even under such circumstances as being two offenses.

The test of identities seems to be held to apply only in cases where there has been a second indictment for the same offense, of which the accused has been convicted or acquitted, and not to apply to the same kind of indictments, charging a person with two separate offenses, although committed simultaneously, by two separate and distinct acts, being of the same species and prompted by the same cause as shown by the following citations. Chitty's Blackstone Vol. II., p. 271, when speaking of special pleas in bar said: "First, the

plea of autrefois acquit, or former acquittal is grounded on this universal maxim of the Common Law of England, that no man is to be brought into jeopardy of life more than once for the same offense. And hence it is allowed as a consequence, that when a man is once found not guilty upon any indictment, or other prosecution before any court having competent jurisdiction of the offense, he may plead such an acquittal in bar of any subsequent accusation for the same crime."

Further, the plea of autrefois acquit is held to apply to the second indictment in Rex. v. Taylor 5 Dit. R. 521, 3B, and C. 62, in which the court held, "A plea of autrefois acquit cannot be pleaded unless the facts charged in the second indictment, would, if true, have sustained the first." Also in Rex v. Sheen, 2C, p. 635, the court said, "And if the prisoner could have been legally acquitted on the first indictment upon any evidence that might have been introduced, his acquittal on that indictment may be successfully pleaded to the second indictment, and it is immaterial whether the proper evidence was introduced at the trial of the first indictment or not."

Now let us examine in what cases the special plea of autrefois acquit may be pleaded. Art. 5, of the Amendments of the Constitution of the United States which reads as follows, "Nor shall any person be subjected for the same offense to be twice put in jeopardy of life or limb," and Sec. 13, of the Constitution of Kentucky, supra, has been interpreted to properly apply to treason and felonies and not to misdemeanors. Yet, Bishop's New Crim. Law, Vol. I., p. 596, Paragraph 990, reads, "Practically and wisely, the courts by an equitable interpretation apply it (the rule of autrefois acquit or former former jeopardy) to indictable offenses, including misdemeanors; but not to actions for the recovery of penalties because these are not criminal proceedings, nor to applications for sureties of the peace. There is, however, an apparent tendency in some of the courts to hold the doctrine more strictly in higher crimes, especially those punishable with death, than in ordinary misdemeanors."

The national government and all the states, so far as the writer of this article has been able to ascertain, hold that the plea of autrefois acquit may be pleaded in all crimes of treason and felony. There may be exceptions as to misdemeanors. However, since the lawyers of Kentucky are interested in Kentucky decisions the

remainder of this article will be, in alarge measure, devoted to the plea of outrefois acquit as regards misdemeanors in Kentucky.

In 1801, the General Assembly passed an act as follows, Littels Statutes of Kentucky, Vol. II., p. 478, "If any riot, rout or unlawful assembly of the people, or breach of the peace, be made or committed in any part of this commonwealth, a justice of the peace, together with the sheriff or under-sheriff of the county, or the constable where such riot, assembly or rout, or breach of the peace shall be made, shall come with the power of the county, if need be to arrest them, * * * and shall inquire of the said riot, or rout, or assembly of the people or breach of the peace, and award against those whom they find guilty thereof, due pains, by amercement and imprisonment."

Later it was found that the above section was substantially the same as an act of Virginia, passed in 1786, which was practically the same as an act which had been passed by the English Parliament, with the exception that the Virginia act went no further than riots, routs and unlawful assemblies, while the Kentucky act of 1801, unfortunately added breach of the peace. Unfortunate, it is held, because it afforded a ready means of escape from punishment. And why? Because a breach of the peace can hardly be considered as a definable, substantive, independent offense.

To avoid this predicament, an act was passed by the General Assembly, in 1802, Littel's Statutes, Vol. 3, p. 55, to repeal Section 32 of the act of 1801, but the General Assembly made a mistake and repealed Section 22 of the same act which dealt altogether with forgery. The mistake was discovered and corrected in 1804, Littel's Statutes, Vol. 3, p. 241.

The act of 1802, provided, "That if any riot, rout, etc., be made or committed in any part of this commonwealth, a justice of the peace, together with the sheriff or under-sheriff of the county or constable where such riot, etc. * * shall be made, * * * and it shall be the duty of the sheriff, or under-sheriff or constable to summons twelve jurors to attend at the time, and the place directed by the justice aforesaid, who after being sworn by the said justice, shall proceed to punish each offender by a fine not exceeding twenty dollars, and in default of the payment thereof, shall be imprisoned not exceeding twenty days."

The passage of the above act brought before the courts the

question whether or not a person could be tried on a charge of assault and battery, after being tried on the charge of a breach of the peace, as prescribed by the statute. That is, where the assault and battery constituted the breach of the peace. In the case of the Comm. V., Miller, V. Dana, p. 320, the court held, "And therefore, as it appears, in this case not only that Miller had been proceeded against fairly and without collusive purpose, under the act of 1802, for breach of the peace, committed in the assault and battery, for which he is now indicted, but that he had actually paid the fine adjudged against him, and thus has been once punished—he is not legally liable to punishment upon the indictment for the same assault and battery." The same rule was held to apply, III, Metcalfe, p. 1, in answer to the question, "Is a fine for the breach of the peace, assessed under the statute for suppressing riots, etc., * * a legal bar to a subsequent indictment against the same party, for an assault and battery?" Thus the plea of autrefois acquit as regards the statute of 1802, was settled by the courts.

But it is clear after the passage of the act of 1802, making the statutory mode of prosecution before justices by warrant, repealed the common law mode of prosecution by indictment. Also it abolished the punishment provided by the common law. In 73 Kentucky Reports, p. 558, the court said: "The effect of this was to give justices of the peace exclusive jurisdiction of prosecution for breaches of the peace, and to make that offense no longer indictable." To remedy this defect in the law, an act was passed in 1809, Littel's Statutes, Vol. 4, p. 80, Sec. 11, providing: "Be it further enacted that the common law in relation to riots, etc., * * shall be and the same hereby declared to be in full force, and that any person or persons guilty of any of the aforesaid offenses may be indicted and punished at common law as heretofore, any law to the contrary not withstanding: Provided that this act shall be so construed as not to subject any person or persons to be twice punished for the same offense." Therefore the plea of autrefois acquit may be pleaded on indictment for misdemeanor at common law.

Thus, since the plea of autrefois acquit is permitted to be applied to misdemeanors in Kentucky, the question arises, why is it permitted to apply? If the plea of autrefois acquit, properly belongs to felonies and treason, how may the courts justify themselves in con-

struing it to apply to misdemeanors? The answer to these questions may be finely drawn but it is based upon justice and reason.

Since the granting of Magna Charta, 1215, A. D., by King John, the English Law has embodied the principle, that the greatest precaution must be taken by the courts, in dealing with persons accused of crime. And why? Because the law presumes every man to be innocent until he is proved guilty.

To prove the innocence or guilt of any person accused of crime, he must be arraigned in a court of proper jurisdiction, an issue must be reached, and an acquittal or conviction must be rendered, either by the court or a properly selected jury.

The English Law has such high regard for justice and places such careful restrictions on the officers of the law, as regards the rights and privileges of persons, that the courts of Kentucky have found it proper and in keeping with the spirit and justice of the law, to permit the plea of autrefios acquit, in cases of misdemeanors. Thus after a fair and impartial trial has been held a court of proper jurisdiction, the spirit of the law forbids a second trial upon an indictment for that particular offense.

Therefore, since the law is based upon justice, from Alpha to Omega, and since it places such careful restrictions upon the officers of the law, as regards the rights and privileges of persons, the courts of Kentucky acted properly and in keeping with the spirit and justice of the law, to permit the plea of autrefois acquit, to apply in cases of misdemeanors.

TRIAL BY JURY

This article was awarded second prize in the contest conducted by Baldwin Law Company.

By W. J. Kallbreir, Junior Law Student.

The greatest bulwark in the administration of justice against the power and aggression of a single man is the "Trial by Jury." The exact origin of this institution is not known, however, writers have traced it back to various sources. It is a settled fact today that all the early countries had some form of jury trial. We find that it was