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THE DOCTRINE OF RES JUDICATA AS APPLIED TO THE TRIAL OF CRIMINAL CASES

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The principle of *res judicata* as applied to civil litigation is very familiar. Likewise well known in the field of criminal law is the doctrine of former jeopardy

It is apparent, however, from an examination of decisions in criminal cases, that aside from the very restricted field of former jeopardy, the application of the general doctrine of *res judicata* to criminal litigation is not generally appreciated and applied.

The doctrine of former jeopardy is of course applicable only where the two offenses are identical, and cannot be invoked if the offenses are distinct, even in cases where the same facts give rise to two or more criminal offenses. With the present tendency to multiply statutory regulations and penalties, there is a consequent increase of scope for the application of *res judicata* as distinguished from former jeopardy

The cases applying the doctrine of *res judicata* to criminal cases are not at all numerous. The cases where the doctrine was applied, as also the cases wnere the doctrine might have been applied, are of interest. The following are perhaps typical cases

In *Coffey v. U S.*,[1] decided in 1886, Coffey was defending a forfeiture proceeding brought by the United States against certain property said to belong to Coffey, the forfeiture being in the nature of penalty for an alleged violation of the Internal Revenue laws. Coffey set up as a special defense that the acts charged in the for feiture information were the same as were contained in a certain criminal information theretofore filed against him, upon which information, after a trial before a jury, he had been found not guilty The court said there was no question but that—

> "* * * the fraudulent acts and attempts and intents to defraud, alleged in the prior criminal information, and covered by the verdict and judgment of acquittal, embraced all of the acts, attempts and intents averred in the information in this suit."
>
> "The question, therefore, is distinctly presented, whether such judgment of acquittal is a bar to this suit. We are of opinion that it is."

After pointing out that one of the proceedings was civil and the other criminal, the court said

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* Of the Seattle bar.

[1] 116 U. S. 436, 29 L. Ed. 684, 6 Sup. Ct. 437.

> "Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem.*"

The court first denied the contention that the differences in the degree of proof required in the two proceedings—that is, "beyond reasonable doubt" and "preponderance of proof" could affect the question of *res judicata.* The court said.

> "The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, *did not exist.* This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis of *any* statutory punishment denounced as a consequence of the existence of the facts." (Italics ours).

Another interesting case is *Stone v. U S.*,[2] decided in 1897. That was a civil action in which Stone was being sued for conversion of certain timber which it was alleged he had cut and removed from the government lands. He set up in bar that he had previously been acquitted by a jury on an indictment charging him criminally with the removal of the same timber. The Supreme Court refused to sustain this former acquittal as a bar. In doing so it is of interest to note that the court, as a "makeweight," pointed out that his acquittal in the criminal case might have been due to the difference in the degree of proof required in a civil and a criminal case, in this respect contradicting the opinion in the *Coffey* case. The real reason for holding the plea bad, however, was that.

> "An essential fact had to be proved in the criminal case which was not necessary to be proved in the present suit,"

referring to the fact that knowledge of the government's ownership of the timber was an essential element in the criminal case, but was not an element of a civil liability for a conversion.

In *U S. v. Oppenheimer*,[3] decided in 1916, the opinion is by Justice Holmes. In that case the defendant had been indicted for a conspiracy to conceal assets from a trustee in bankruptcy He

[2] 167 U. S. 178, 42 L. Ed. 127, 17 Sup. Ct. 778.
[3] 242 U. S. 85, 61 L. Ed. 161, 37 Sup. Ct. 68.

set up as a bar the fact that the court had held a former indictment for the same offense barred by the one year statute of limitations, which the court said was "an adjudication, since held to be wrong in another case." The court said

> "Upon the merits the proposition of the government is that the doctrine of *res judicata* does not exist for criminal cases except in the modified form of the 5th Amendment, that a person shall not be subject for the same offense to be twice put in jeopardy of life or limb, and the conclusion is drawn that a decision upon a plea in bar cannot prevent a second trial when the defendant never has been in jeopardy in the sense of being before a jury upon the facts of the offense charged. It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightfully mentioned with solemn reverence, are less than those that protect from a liability in debt. It cannot be that a judgment of acquittal on the ground of the statute of limitations is less a protection against a second trial than a judgment upon the ground of innocence, or that such a judgment is any more effective when entered after a ver dict than if entered by the government's consent before a jury is impaneled."

Still more recently in the case of *Collins v. Loisel*,[4] the court held that the 5th Amendment providing against double jeopardy was not intended to supplant the fundamental principle of *res judicata* in criminal cases.

In *Frank v. Mangum*,[5] the court again recognized that—

> "* * * a question of *fact or of law* distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction."

Of course both in civil and in criminal cases the record of and the proceedings in the former trial must be examined in order to ascertain what particular issues were actually therein adjudicated. As the United States Supreme Court said in the civil case of *Oklahoma v. Texas*[6]

> "What was involved and determined in the former suit is to be tested by an examination of the record and proceedings therein, including the pleadings, the evidence submitted, the respective contentions of the parties, and the findings and opinion of the court, there being no sug-

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262 U. S. 426, 67 L. Ed. 1062, 43 Sup. Ct. 618 (1927).
[5] 237 U. S. 309, 59 L. Ed. 969, 35 Sup. Ct. 582 (1915).
[6] 256 U. S. 70, 65 L. Ed. 831, 41 Sup. Ct. 420 (1921).

gestion that this is a proper case for resorting to extrinsic evidence."

In *United States v. Rachmil,*[7] the District Court sustained a motion to quash an indictment for *attempting to evade* the income tax, on the ground that there had been a previous adjudication in favor of the defendant in a charge involving identical issues. In the previous charge the defendant had been acquitted of having conspired to defraud the United States *by attempting to defeat and evade the income tax.* The District Court held this plea good because the overt act charged in the conspiracy indictment upon which the defendant had been acquitted, was the same act as constituted the *alleged attempt* in the latter indictment. The court said

> "Upon a trial of the present indictment, the issue as to whether the return filed was false and fraudulent, would be a fundamental proposition. That issue was involved in the previous trial, and to permit it to be litigated again would come so close to an encroachment upon the constitutional rights of the defendants as to warrant me to quash the present indictment."

It will be noted that even here the court, while reaching with some misgivings the correct conclusion, seems to have been influenced solely by "constitutional" grounds, namely, the constitutional provision against former jeopardy, although the opinion by Justice Holmes in the *Oppenheimer* case, *supra,* had been handed down some five years earlier.

In *U S. v. McConnell,*[8] the District Court of Pennsylvania sustained a plea in bar based upon a previous acquittal, although the offenses involved were quite distinct in law The later indictment charged a conspiracy to permit certain violations of the National Prohibition Act by the issuance of fraudulent liquor withdrawal permits. The previous case, in which the defendant had prevailed, had charged him with conspiracy to *defraud* the United States by the issuance of the same liquor permits. As illustrating the fact that it is the *identity* of issues that controls the application of the doctrine, the court said.

> "It appears conclusively that guilty knowledge concerning each of the permits upon which the several counts in the indictment now before us are based was in issue in the former indictment, and that the prosecution failed to produce any evidence of guilty knowledge of the three defendants now under indictment concerning any of the permits mentioned in the present indictment."

[7] 270 Fed. 869 (1921).
[8] 10 F (2d) 977 (1926).

And on page 980, the court, in looking into the issues of fact which had been determined, pointed out that the foundation element in each case was the unlawful issuance of permits with knowledge.

In *United States v. Meyerson*,[9] the District Court of New York refused to grant certain motions to quash insofar as they were based upon a plea of former jeopardy, since the offenses in question were quite distinct. The court said

> "The prior judgment of acquitaal is, however, conclusive upon all questions of fact or of law distinctly put in issue and directly determined upon the trial of the former indictment." Citing cases.
> "If upon the former trial the innocence of Katz of any participation in the conspiracy now charged against him was adjudicated and determined, the pending indictment should be quashed as against him."

In closing, the court said

> "Katz's participation in the scheme, whether it be called a scheme to defraud or a conspiracy, is no longer open to inquiry in any proceeding between him and the United States. Nor can the effect of the former adjudication of the acquittal be avoided by adding new elements to the old scheme, and thus broadening the charge of conspiracy"

It is manifest, therefore, that the extent to which a plea of *res judicata* in a criminal charge may be a defense, depends upon what issues of facts or of law were actually determined in the former trial, and whether any of such determinations would have to be controverted by the prosecution in order to procure a conviction of the second offense. It might well happen that an acquittal had been obtained in the first case on account of some issue not essential in the second case.

The case of *State v. Danhof*,[10] we believe furnishes an instance where the doctrine of *res judicata* was applicable and if applied would have procured an acquittal of the defendant. It appears from the opinion that Danhof was charged and convicted of having fished on December 19, 1929, at a certain place with an appliance other than hook and line, contrary to a certain section of the code. At the trial he relied upon *former jeopardy* and to sustain that plea introduced the record of his prosecution and acquittal in a previous case, in which it was charged that on the same date he had fished with an appliance other than a hook and line *without*

[9] 24 F (2d) 855 (1928).
[10] 161 Wash. 441, 297 Pac. 195 (1931).

having a license so to do. The trial court held that this was a bar and discharged the defendant. The state appealed. It is of interest to note that both the trial and appellate court as well as counsel, considered the situation as merely involving former jeopardy The Supreme Court reversed the lower court, saying·

> "It is apparent there are *two distinct offenses.*"[11]

It is possible, of course, that Danhof may have procured his acquittal in the first case by showing that he had a license. Such an acquittal would not have involved a determination of the issue of fact whether or not he had committed the acts of fishing charged. This possibility is not, however, referred to by the court, and in the later decision of *State v. Phillips,*[12] the same court, in referring to the *Danhof* case, said at page 612

> "* * * the two prosecutions were based on the same evidence."

If this be true, then the state should not have been allowed to relitigate against Danhof the issues of fact regarding his having fished at the time and place in question. This issue had been adjudicated once and for all against the state.

In the *Phillips* case,[13] the charge upon which the defendant was convicted was that on June 25, 1933, he had unlawfully bought, received and concealed a certain automobile knowing it to have been stolen. He pleaded in defense a former acquittal in which the charge was that he had on April 21, 1933, unlawfully taken and driven away a certain automobile. Apparently this plea did not receive attention during the trial in the second case, and Phillips was convicted. Thereafter a motion was made to vacate the judgment on the ground of this inadvertence in not urging this plea. The lower court's order contains the following recital.

> "* * * it appearing to the court that even conceding although not deciding that said charges were tried on the same evidence and were identical as a matter of fact, that even if such were the case that an inquiry in that regard is not necessary, *in that such charges are not identical as a matter of law.*"

Here again, the situation is treated as presenting nothing more than a plea of former jeopardy The possible application of the

[11] One for fishing without a license, and the other for fishing at the prohibited place, whether with or without a license.

[12] 179 Wash. 607, 38 P. (2d) 372 (1934).

[13] Ibid.

broader principle of *res judicata* was apparently not given any consideration. The Supreme Court, in passing upon this situation, took the same viewpoint as shown by the following quotation from its opinion.

> "That the plea of former acquittal shall relate to the *same offense* and is governed by that test *rather than to the facts or acts upon which the same is based,* is also settled by the authorities in this and other states, " (Italics supplied)

The court then discusses four of its own decisions, including the *Danhof* case.[14] The cited cases of *State v. Peck,*[15] and *State v. Kingsbury,*[16] do not aid the present discussion because in each of those cases the defendants had been convicted of offenses which were distinct. The fourth case referred to by the Supreme Court is that of *State v. Reiff* [17] In that case it appears that the Supreme Court also treated the situation as presenting merely the plea of former jeopardy, citing the State Constitution with reference thereto.

In the *Phillips* case the Supreme Court, throughout its opinion, confines the matter to the question of former jeopardy, saying·

> "The test fixed by the statute is that the former acquittal shall be of the same offense."

It is difficult, if not impossible, to ascertain from the record in the *Phillips* case whether the issues which were adjudicated in Phillips' favor in the first case did include any of the issues which were essential to his conviction in the second case. The possibilities in that direction were not considered by either the trial or the appellate court in the consideration of the case.

In view of the vigor with which the Supreme Court of the United States, speaking through Justice Holmes in one instance and through Justice Brandeis in another, has applied the full force of the doctrine of *res judicata* to criminal cases, it would seem that those charged with crime have not in all cases received the full measure of protection to which they were entitled by reason of former acquittals on charges involving issues of fact or of law common to both charges, even though the nature of the offenses may be entirely distinct.

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[14] 161 Wash. 441, 297 Pac. 195 (1931) cited note 10, *supra.*
[15] 146 Wash. 101, 261 Pac. 779 (1927).
[16] 147 Wash. 426, 266 Pac. 174 (1928).
[17] 14 Wash. 664, 45 Pac. 318 (1896).