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Criminal Law - Conspiracy - Former Jeopardy

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CRIMINAL LAW—CONSPIRACY—FORMER JEOPARDY. Two indictments against D were presented, both alleging conspiracy to violate the same federal laws; times of the alleged violations overlapped. Of numerous named defendants, D was the only one charged in both indictments. In the first indictment tried, evidence involving D and defendants named in the second indictment was introduced. D contended that this evidence was inadmissible and might be used only to show the second offense. The evidence was barred, and D was acquitted because the remaining evidence was insufficient to connect him with the conspiracy. In this trial on the second indictment, D now pleads former jeopardy claiming that the prior trial was for the same offense. The court *held,* that not only had D failed to meet the burden of proof that he had been tried and acquitted of the same offense, but also he was estopped to so claim since the acquittal had been obtained on his contention that the conspiracies were separate offenses. *Reid v. United States,* 177 F.2d 743 (5th Cir. 1949).

The doctrine of former jeopardy[1] in American courts flows out of the provision of the Constitution stating " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb . . ."[2] and similar provisions found in state constitutions.[3] This constitutional immunity can, however, be waived.[4] After the defendant has proved that he has been placed in jeopardy on a prior occasion, the primary question is whether the defendant is being tried for the second time for the same offense.[5]

To determine identity of the offense a minority of state courts adopt the "same transaction" test whereby a person cannot be convicted of several offenses when they are a part of the same criminal transaction.[6] The broader test applied in the instant case is employed by the federal courts and a majority of the state courts including North Dakota.[7] By this "same evidence" test the second indictment is barred when the evidence necessary to support it would have been sufficient to ground a prior conviction had such evidence been admitted in the first proceeding.[8] The authorities are not, however, agreed in the

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[1] Former jeopardy is defined as that status which attaches to a person when he is put on trial, before a court of competent jurisdiction, on an indictment, presentment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance, O'Brian v. Commonwealth, 9 Bush 333 (Ky. 1872).

[2] U.S. Const. Amend. V.

[3] *E.g.* N.D. Const. Art. I, § 13.

[4] This waiver may be express or implied. For specific instances see 1 Bishop, Criminal Law § 988 (9th ed. 1923).

[5] 2 Wharton, Criminal Procedure § 1426 n.5 (10th ed. 1918).

[6] Note, 7 Brooklyn L. Rev. 79, 81 (1937).

[7] State v. Panchuk, 53 N.D. 669, 207 N.W. 991 (1926); State v. Virgo, 14 N.D. 293, 103 N.W. 610 (1910).

[8] Hall, Cases and Readings on Criminal Law and Procedure 902 (1949); Note, 7 Brooklyn L. Rev. 79, 81 (1937). The order of the test has at times been reversed to read ". . . whether the facts necessary to support the first indictment would warrant a conviction under the second . . ." Note, 20 Harv. L. Rev. 642 (1907).

method of application of this rule.[9] The well-reasoned case of *Short v. United States*[10] expresses the view that since the prosecution for conspiracy is for the criminal agreement, a continuing offense which becomes a crime upon the commission of a single overt act, one prosecution for conspiracy should be a bar to a subsequent conspiracy charge, although the second indictment may be distinguishable in part.[11] Another line of authorities exemplified by the case of *Ferracane v. United States*[12] requires a higher degree of proof by the defendant that the offenses charged are the same; these authorities refuse to find former jeopardy when there are any material discrepancies in the charges against the defendant.[13]

Elements considered in determining whether charges constitute one or more than one conspiracy are time, place, parties, overt acts, and statutes violated.[14] Where times of the alleged conspiracies are overlapping in part[15] or different[16] it has been held that prosecution on one of the charges is not a bar to prosecution on the other. A prosecution for a conspiracy in one location has been held not to be a bar to a prosecution for that conspiracy in another location.[17] Variance of parties has likewise resulted in divergent holdings. The *Ferracane* case, contra to the *Short* case, holds that where parties named in the indictments are for the greater part different, the two indictments are for separate offenses unless the defendant can show through other evidence that the offenses are the same in fact.[18] Courts likewise differ upon the effect of differing over acts, the *Short* case holding that if the different acts are part of one conspiracy, there can be only one conviction, while other courts hold that such different overt acts constitute two separate offenses.[19] Also there is substantial authority to

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[9] Note, 7 Brooklyn L. Rev. 79, 80 (1937).

[10] 91 F.2d 614 (1937); *Accord*, United States v. Weiss, 293 Fed. 992 (N.D. Ill. 1923).

[11] *See* Ferracane v. United States, 29 F.2d 691, 693 (7th Cir. 1928) (dissenting opinion); see Note, 112 A.L.R. 983 (1938).

[12] 29 F.2d 691 (7th Cir. 1928).

[13] See also Henry v. United States, 15 F.2d 365 (1st Cir. 1926).

[14] See Note, 112 A. L. R. 983, 989 (1938).

[15] Francis v. United States, 152 Fed. 155 (3d Cir. 1907); *cf.* Henry v. United States, 15 F.2d 365 (1st Cir. 1926); Gallagher v. People, 211 Ill. 158, 71 N.E. 842, 1904), *writ of error dismissed*, 203, U.S. 600 (1906), holding that the matter of time was considered by the jury in determining whether the offenses were the same.

[16] Johnson v. United States, 124 F.2d 101 (5th Cir. 1941); Wainer v. United States, 82 F.2d 305 (7th Cir. 1936); United States v. Swift, 186 Fed. 1002 (N.D. Ill. 1911).

[17] Davidson v. United States, 63 F.2d 90 (1st Cir. 1933); *Contra*: Short v. United States, 91 F.2d 614 (1937).

[18] Henry v. United States, 15 F.2d 365 (1st Cir. 1926); Gallagher v. People, 211 Ill. 158, 71 N.E. 842 (1904), *writ of error dismissed*, 203 U.S. 600 (1906).

[19] Piquit v. United States, 81 F.2d 75 (1936); Henry v. United States, 15 F.2d 365 (1st Cir. 1926); Francis v. United States, 152 Fed. 155 (3d Cir. 1907).

the effect that, where there has been a conspiracy to violate more than one statute, a trial for conspiracy to violate one does not bar a prosecution for a conspiracy to violate the others.[20] Respectable authority may, however, be found to support a view to the contrary.[21]

In the foregoing cases the courts have been unable to formulate a hard and fast rule which will guarantee justice in all situations. Although the "same evidence" test is probably the better rule for deciding identity of offenses in most criminal cases, it is possible that an application of the "same transaction" test would produce better results in conspiracy cases. As pointed out in the *Short* case, the prosecution is for the criminal agreement or transaction and not for the specific overt acts. Since the prosecution is for the agreement, a slight divergence in the evidence or the time, place, parties, overt acts, or statutes violated should not give rise to numerous prosecutions for the same conspiracy.

The question of identity of offenses involving divergent factual situations does not lend itself to determination by strict rules of law. It is probable that more just results would be obtained by freeing the courts from such rules and allowing them discretion in deciding the question on the basis of broad principles of public policy.[22] However, the court in the principal case is correct in placing on the defendant the burden of proving that the former prosecution was for the same offense[23] and in holding that the defendant will not be heard to criticize a judgment which he insisted should be granted.[24]

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TORTS—ATTRACTIVE NUISANCE—ARTIFICIAL POOLS OF WATER AS ATTRACTIVE NUISANCES. Defendant, a land owner in an area frequented by children, dug an uneven excavation near a public street. He allowed water to collect, thus creating a pond varying in depth from a few inches to more than eight feet. P's son, an eleven-year-old boy, was drowned while wading in the pool when he stepped into a depression. P sued for damages on the theory the pond was an attractive nuisance. In dismissing the suit, the Supreme Court of Indiana *held,* with two judges dissenting,[1] that such artificial pools

[20] Lewis v. United States, 4 F.2d 520 (5th Cir. 1925); United States v. Owen, 21 F.2d 868 (N.D. Ill. 1927).

[21] Manning v. United States, 275 Fed. 29 (8th Cir. 1921); United States v. Weiss, 293 Fed. 992 (N.D. Ill. 1923).

[22] Hall, *op. cit. supra* note 9, at 908.

[23] Johnson v. United States, 124 F.2d 101 (5th Cir. 1941); Kastel v. United States, 23 F.2d 156 (2d Cir. 1927).

[24] Haugen v. United States, 153 F.2d 850, 851 (9th Cir. 1946); United States v. Jones, 31 Fed. 725 (S.D. Ga. 1887).

[1] The dissenting judges stated that when there is an affirmative act done by man which creates a body of water, that man must use due care under the circumstances to avoid injury to others. The excavation attracted the infant and there was a duty on the part of the defendant to act affirmatively to avoid injury. The condition was likened to a trap.