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Criminal Law - Double Jeopardy - Single Act as Constituting an Offense Against Two or More Persons

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refused to hold the father in a case where his daughter used his car to get a watermelon from the village for her own consumption. In *Mulanix v. Reeves* (Kan. City Ct. of Appeals 1937) 112 S.W. (2d) 100, the court held that mere proof of ownership and permission to drive the car is insufficient to show agency. The court, in *Robinson v. Warren*, 129 Me. 172, 151 Atl. 10 (1930), said that the father's permission to use the car established merely a bailor-bailee relationship. In *Cherwin v. Geiteir*, 272 N.Y. 165, 5 N. E. (2d) 185 (1936), the court held that the "family-car" doctrine with respect to liability of an automobile owner for injuries sustained by a guest does not obtain in New York. In *Miller v. McHale*, 263 Ill. App. 471 (1931), the court said that even though the father gave his consent to the minor son to use the car, he was not liable when the son used the car for his own pleasure.

Statutes in some states impose absolute liability on car owners for injuries negligently inflicted by the driver of the car, whether the driver be the owner, a member of his family, or a mere bailee. CALIF. CIVIL CODE (1931) Sec. 1714 $\frac{3}{4}$; IOWA CODE (1935), Sec. 5026; MICH. COMP. LAWS (1929), Sec. 4648; MASON'S 1927 MINN. STAT. (1938 Sup.) Sec. 2720-104; N. Y. VEHICLE AND TRAFFIC LAW, Sec. 59.

GERARD A. DESMOND.

Criminal Law—Double Jeopardy—Single Act as Constituting an Offense Against Two or More Persons.—Three men walking abreast across an intersection were struck by an automobile operated by the defendant "hit and run" motorist. One of the pedestrians sustained serious injuries, and the other two died as a result of the accident. In a prosecution for the involuntary manslaughter of one of the pedestrians killed, the defendant-motorist was discharged under a special statute. Subsequently, the defendant was indicted for the involuntary manslaughter of the other pedestrian who was killed in the accident. Prior to the trial, the defendant filed a petition for a discharge under the second indictment alleging his previous discharge based on the same act or cause of injury as that charged in the present indictment, and that he was placed in double jeopardy. The petition for discharge on the ground of double jeopardy was denied, a jury found the defendant guilty, and he was sentenced to prison. The defendant prosecuted a writ of error to the Supreme Court of Illinois.

On appeal, *held*, conviction affirmed. In order for one prosecution to be a bar to another prosecution, it is not sufficient to show that the act is the same in both prosecutions, but it must be shown that the offense also is the same in law and in fact in both prosecutions. Here the same act was involved, but there were two separate and distinct offenses, and, therefore, the rule against double jeopardy did not apply. *People v. Allen*, 368 Ill. 368, 14 N.E. (2d) 397 (1938).

The term "jeopardy" is applied only to criminal prosecutions, and signifies the danger of conviction and punishment which the defendant in a criminal prosecution incurs when duly put on trial before a court of competent jurisdiction. *State v. Lewis*, 164 Wis. 363, 159 N.W. 746 (1916). It is a uniform rule that when a person has been arraigned and has pleaded and has been placed on trial before a court of competent jurisdiction on a valid indictment or information, and a jury has been impaneled and sworn, that jeopardy attaches. *State v. Gilmer*, 202 Wis. 526, 232 N.W. 876 (1930). As noted in the principal case, however, special statutes may allow jeopardy to attach under other conditions. Before a defendant may avail himself of the plea of former jeopardy, however, it is necessary for him to show that the present prosecution is for

the identical act, and that the offense both in law and in fact was determined by a previous prosecution. *Winn v. State*, 82 Wis. 571, 52 N.W. 775 (1892).

Since the common law rule and the constitutional guarantees against double jeopardy are directed to the offense and not to the act, a distinction must be made between an offense and the unlawful act out of which it arises, for a single act may constitute two or more distinct and separate offenses and a person may be convicted and punished for both. Under such circumstances, the guarantee against double jeopardy does not apply. *Spears v. People*, 220 Ill. 72, 77 N.E. 112, 4 L.R.A. (N.S.) 402 (1906); *Thomas v. Indianapolis*, 195 Ind. 440, 145 N.E. 550, 35 A.L.R. 1194 (1924). Thus, the jurisdictions agree that an acquittal for rape does not bar a prosecution for incest with the same party growing out of the same transaction. *Stewart v. State*, 35 Tex. Crim. 174, 32 S.W. 766, 60 Am. St. Rep. 35 (1895). In *State v. Brooks*, 215 Wis. 134, 254 N.W. 374, 94 A.L.R. 401 (1934), a district court conviction of a married man for lewd and lascivious conduct was held not a bar to a prosecution in municipal court for adultery. There was only one transaction, but two separate and distinct offenses. Similarly, a single act may be an offense against two separate statutes (as larceny of an automobile, and operating the same automobile on a public highway without the owner's consent), and an acquittal or conviction under either statute does not bar a prosecution and punishment under the other statute. *Schroeder v. State*, 222 Wis. 251, 267 N.W. 899 (1936).

While the jurisdictions are in accord with the principles stated above, they are in conflict as to whether a conviction or acquittal of an offense against one person is a bar to a subsequent prosecution for an offense upon another person where the offenses against both or more persons were committed by the same single act as in the principal case. Jurisdictions following the majority rule extend the doctrine of distinct and separate offenses to those cases where the results to different persons were brought about by a single act, as a single shot or blow, and hold that the conviction or acquittal of a defendant charged with an offense against one person is not a bar to his subsequent prosecution for an offense upon another or more persons at the same time by the same single act. The cases upholding the majority rule stress the point that it is the identity of the offense and not of the act which is referred to in the constitutional guarantees against putting a person twice in jeopardy, and insist that where two or more persons are offended against, though it be by a single act, since the consequences affect, separately, each person injured, there is a corresponding number of distinct offenses. Therefore, under the majority rule, it is possible for a defendant to be tried an indefinite number of times for the same criminal act—limited only by the number of persons affected by the single act.

Jurisdictions following the minority rule refuse to extend the doctrine of distinct and separate offenses to such cases where the results to different persons were brought about by the same single act, and hold that the conviction or acquittal of a defendant charged with an offense against one person is a bar to his subsequent prosecution for an offense upon another or more persons at the same time by the same act. Therefore, under the minority rule, based upon the viewpoint that only one offense is committed, a defendant may be tried for the same criminal act only once regardless of the number of persons affected by the single act.

A review of the conflicting authorities revealed six recent automobile cases similar or identical in operative facts with the principal case. Three of the cases are decided according to the majority rule, and three according to the

minority rule. Those following the majority rule are *State v. Taylor*, 185 Wash. 198, 52 P. (2d) 1252 (1936); *Fay v. State* (Okla. 1937) 71 P. (2d) 768, and *State v. Freudland*, 200 Minn. 44, 273 N.W. 353, 113 A.L.R. 215 (1937). In *State v. Freudland*, *ibid.*, two automobiles collided on a public highway resulting in the death of a mother and her minor child who were passengers in one of the automobiles. The defendant-driver of the other automobile was charged in two indictments with murder in the third degree. It was held that the acquittal on the prosecution for the death of the mother was not a bar to a prosecution for the death of the child on the ground of double jeopardy. Although there was but one single act, there were two distinct and separate offenses. Accord: *Hurst v. State*, 24 Ala. App. 47, 129 So. 714 (1930); *People v. Brannon*, 70 Cal. App. 225, 233 Pac. 88 (1924); *Slone v. Commonwealth*, 266 Ky. 366, 99 S.W. (2d) 207 (1936), and *State v. Dills*, 210 N.C. 178, 185 S.E. 677 (1936).

The three automobile cases following the minority rule are *State v. Cosgrove*, 103 N.J.L. 412, 135 Atl. 871 (1927); *Smith v. State*, 159 Tenn. 674, 21 S.W. (2d) 400 (1929), and *State v. Wheelock*, 216 Iowa 1428, 250 N.W. 617 (1933). In *State v. Wheelock*, *ibid.*, the defendant-driver operated an automobile which collided with another automobile resulting in the death of three persons. It was held that there was but one offense, and, therefore, the defendant's acquittal on a charge of manslaughter for the death of one occupant of the other car was a bar to his subsequent prosecution for the death of another occupant of the other car. Accord: *State v. Hawchins*, 102 W.Va. 169, 134 S.E. 740 (1926), and *People v. Barr*, 259 N.Y. 104, 181 N.E. 64 (1932).

With the exception of the case *Winn v. State*, 82 Wis. 571, 52 N.W. 775 (1892), which merely approaches the principal case, there appears to be no Wisconsin decision on the exact point of law in question. If a case arises, therefore, similar in operative facts to the principal case, Wisconsin is free to adopt either rule. It is probable, however, that Wisconsin would agree with Minnesota and Illinois and follow the majority rule.

WILLIAM EDWARD TAAY.

Criminal Law—Robbery—What Constitutes "From the Person"?—The defendant and one Rich, both being armed, assaulted Michael A. Mangini and did "then and there rob, steal and take from the said Mangini, thirty-two Dollars." They entered the store of the prosecuting witness and sat down at a table to have some ice cream sodas. Rich arose, walked up to Mangini, and asked for cigars. While Mangini was getting them, Rich stepped in behind him and told him to "stick them up." The defendant, at the same time, went to the cash register and took the thirty-two dollars. He and Rich fled but were later arrested.

At the trial, after the State had rested, the defendant moved for a directed verdict, whereupon, at the court's suggestion, the State was permitted to enter a *nolle prosequi*. The defendant excepted to the court's failure to rule on the motion for a direct verdict and permitting the *nolle prosequi* to be entered.

On appeal, *held*, exceptions overruled. The information charges an offense under P. L. 8400 which provides: "A person who assaults another and feloniously robs, steals and takes from his person money or other property, the subject of larceny, being armed with a dangerous weapon, with intent if resisted to kill or maim the person robbed" shall be punished. . . . The requirement of taking from the person as used in the statute is satisfied by a taking from the presence,