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Multiple Prosecutions, Collateral Estoppel And The Constitution

exclamation rule Wigmore makes the following observation which is extremely significant when read in light of the principal case: "To admit hearsay testimony simply because it was uttered at the time something else was going on is to introduce an arbitrary and unreasoned test, and to remove all limits of principle; and this has been the result."[34]

Although the spontaneous exclamation rule has in many instances provided a reliable basis for the introduction of hearsay evidence before the jury, the rule itself presupposes a spontaneous utterance prompted by and related to an exciting event which stills the powers of reflection and fabrication. When the courts use this rule as a conduit to introduce in evidence before the jury extrajudicial statements which are distinct, separate, and unrelated to the occurrence which provoked them, the reason for the rule disappears.

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MULTIPLE PROSECUTIONS, COLLATERAL ESTOPPEL AND THE CONSTITUTION

William Hoag has been a party *in forma pauperis* before the Appellate Division of the Superior Court of New Jersey, the Supreme Court of that state and the United States Supreme Court.[1] Although evoking the sympathy of six members of the enumerated courts in his quest for freedom, Hoag's conviction has not been reversed. The facts are as follows: Three men, including the defendant, allegedly robbed five persons at gun point in a Fairview, New Jersey, bar. After the apprehension of Hoag, three indictments were returned by the grand jury, each charging him with the robbery of a different victim. The remaining two victims were not named in the indictments. Alibi was the only defense interposed. Yager, one of the victims, who was not named in any of the three original indictments, was the only witness to give positive identification of the defendant. After a finding of not guilty on the first three indictments, the defendant

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company,' referring to premium-money alleged by the insurance company not to have been received. Such an utterance would by the present spurious limitation clearly be inadmissible. On principle, however, it would seem also inadmissible under the legitimate principles of the Exception . . . ." 6 Wigmore, Evidence § 1754 (3d ed. 1940).

[34]Id. § 1757(1).

[1]State v. Hoag, 35 N.J. Super. 555, 114 A.2d 573 (App. Div. 1955), aff'd, 21 N.J. 496, 122 A.2d 628 (1956), aff'd, Hoag v. New Jersey, 356 U.S. 464 (1958).

was then indicted for the robbery of Yager. Again the defense of alibi was offered. This time a verdict of guilty resulted.

The first issue presented in the New Jersey state courts by these facts was that of former or double jeopardy under the New Jersey Constitution.[2] To sustain a plea on this ground the successive offenses charged must be the same. In denying the defendant's plea of former jeopardy, the trial court, the intermediate appellate court, and a majority of the Supreme Court of New Jersey agreed that it was not former jeopardy to try the defendant for robbing Yager after being formerly acquitted of robbing three other persons, even though each robbery took place on the same occasion. The robbery of each person was held to be a separate offense, and a separate prosecution for each was held not to violate the double jeopardy clause of the New Jersey Constitution.[3]

The constitutional issue upon which certiorari was granted by the United States Supreme Court in *Hoag v. New Jersey*[4] was whether fundamental fairness implicit in due process was violated: (1) by the prosecution of defendant in two actions for multiple offenses when the offenses charged arose out of the same occurrence and could easily have been tried in one proceeding, and (2) by the relitigation of the fact issue of the defendant's identity as raised by his alibi defense.[5]

The first due process contention is whether the successive prosecutions deny the defendant the fundamental procedural fairness required by fourteenth amendment due process. "As in all cases involving what is or is not due process . . . no hard and fast rule can be laid

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[2]"No person shall, after acquittal, be tried for the same offense." N.J. Const. art. I, para. 11. The double jeopardy clause of the United States Constitution, contained in the fifth amendment, does not apply to the states. Brock v. North Carolina, 344 U.S. 424, 426 (1953); Palko v. Connecticut, 302 U.S. 319 (1937).

[3]For discussions of the Hoag case on the issue as to whether the accused was twice put in jeopardy by being tried in separate proceedings for robberies of different persons, committed at the same time and in the same place, see Note, 25 Fordham L. Rev. 531 (1956); Comment, 14 Wash. & Lee L. Rev. 80 (1957).

It is generally held that a plea of double jeopardy requires that the victim of the crime charged in each prosecution be the same person. People v. Lagomarsino, 97 Cal. App. 2d 92, 217 P.2d 124, 128 (1950); In re Allison, 13 Colo. 525, 22 Pac. 820, 822 (1889); Blitch v. Buchanan, 100 Fla. 1242, 132 So. 474, 475 (1931); State v. Taylor, 138 Kan. 407, 26 P.2d 598, 602 (1933); Keeton v. Commonwealth, 92 Ky. 522, 18 S.W. 359, 360 (1892); State v. Roberts, 170 La. 727, 129 So. 144, 145 (1930); Johns v. State, 130 Miss. 803, 95 So. 84, 85 (1923); People v. Rogers, 102 Misc. 437, 170 N.Y. Supp. 86, 89 (Sup. Ct. 1918), aff'd, 184 App. Div. 461, 171 N.Y. Supp. 451, 452, aff'd, 226 N.Y. 671, 123 N.E. 882 (1919); Orcutt v. State, 52 Okla. Crim. 217, 3 P.2d 912, 915 (1931); Alsup v. State, 120 Tex. Crim. 310, 49 S.W.2d 749, 751 (1932); 1 Anderson, Wharton's Criminal Law and Procedure § 143 (1957).

[4]356 U.S. 464 (1958).

[5]Id. at 470.

down. The pattern of due process is picked out in the facts and circumstances of each case."[6] Mr. Justice Harlan, writing the majority opinion in the principal case, arrived at the conclusion that fundamental fairness had not been abridged.[7] Merely because the robberies which the defendant is alleged to have committed could have been tried together but instead were tried in two separate proceedings does not "subject him to a... hardship so acute and shocking that our polity will not endure it."[8] Unless it can be said that it is unfair and oppressive to one who has committed several offenses for him to be tried for these separate offenses in separate trials, a finding that New Jersey has denied him due process of law would not be warranted.

The second issue reviewed by the Supreme Court is that of collateral estoppel: "Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action...."[9] Hoag contended that collateral estoppel should have been applied in the second trial as to the issue of alibi and because it was not applied, due process of law had been denied to him. The Supreme Court of New Jersey refused to invoke the doctrine of collateral estoppel, stating that the facts on which the defense of alibi was based were not necessarily resolved by the first jury's general verdict of not guilty. "There is nothing to show that the jury did not acquit the defendant on some other ground or because of a general insufficiency in the State's proof [citations omitted]. Obviously, the trial of the first three indictments involved several questions, not just the defendant's identity, and there is no way of knowing upon which question the jury's verdict turned."[10]

Mr. Justice Harlan, writing the majority opinion, expressed doubt

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[6]Brock v. North Carolina, 344 U.S. 424, 427 (1953).

[7]356 U.S. at 468.

[8]Palko v. Connecticut, 302 U.S. 319, 328 (1937).

[9]Restatement, Judgments § 68(1) (1942). Subsection (2) of this section states that "A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action."

"A victim of varying terminology, the concept has been applied under such aliases as 'estoppel by record,' [United States v. Accardo, 113 F. Supp. 783, 786 (D.N.J. 1953)] 'estoppel by findings,' [Turner v. Bragg, 117 Vt. 9, 82 A.2d 511 (1951)] 'estoppel by verdict,' [Goodman v. McLennan, 334 Ill. App. 405, 429, 80 N.E.2d 396, 406 (1948)] and 'estoppel by judgment,' [Gordon v. Gordon, 59 So. 2d 40, 43 (Fla. 1952)] among others." Polasky, Collateral Estoppel—Effects of Prior Litigation, 39 Iowa L. Rev. 217 (1954). Millar, The Historical Relation of Estoppel by Record to Res Judicata, 35 Ill. L. Rev. 41 (1940).

[10] State v. Hoag, 21 N.J. 496, 122 A.2d 628, 632 (1956).

whether collateral estoppel could be regarded as within the ambit of due process. However, he refused to discuss the matter on the ground that the Supreme Court's corrective power over state court decisions did not extend far enough to allow a different conclusion as to the basis for the jury's decision than that reached by the New Jersey courts.

It appears that Justice Harlan reached the correct result in the principal case. That is, the relitigation of the issue of alibi in New Jersey did not deny the defendant due process of law. It is submitted, however, that the reasoning employed in reaching this result is fallacious. Quoting with approval Justice Frankfurter's opinion in *Watts v. Indiana*,[11] Justice Harlan states: " 'On review here of State convictions, all those matters which are usually termed issues of fact are for the conclusive determination of the State Courts and are not open for reconsideration by this Court.' "[12] By this passage Justice Harlan implied that the Supreme Court of New Jersey determined as a question of fact that the basis of the jury's verdict was open to conjecture. This, it is submitted, is incorrect. In order for collateral estoppel to apply, "a question of fact essential to the judgment" must have been litigated and decided of necessity in a prior proceeding.[13]

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[11]338 U.S. 49 (1949).

[12]356 U.S. at 471.

[13]"The prior judgment is conclusive only as to facts which have such relation to the issue that their determination was necessary to the decision of the issue." Karameros v. Luther, 279 N.Y. 87, 91 (1938). Collens v. Loisel, 262 U.S. 426, 430 (1923); Cromwell v. County of Sac, 94 U.S. 351, 353 (1876); State v. Coblentz, 168 Md. 159, 180 Atl. 266, 268 (1935); Griffen v. Keese, 187 N.Y. 454, 464 (1907); State v. Barton, 5 Wash. 2d 234, 105 P.2d 63, 67 (1940).

There is considerable authority for this interpretation. United States v. Halbrook, 36 F. Supp. 345, 349 (E.D. Mo. 1941); People v. Cygan, 229 Mich. 172, 200 N.W. 967, 968 (1924); People v. Rogers, 102 Misc. 437, 170 N.Y. Supp. 86 (Sup. Ct.), aff'd, 184 App. Div. 461, 171 N.Y. Supp. 451, aff'd, 226 N.Y. 671, 123 N.E. 882 (1919); Commonwealth v. Greevy, 75 Pa. Super. 116, rev'd, 271 Pa. 95, 114 Atl. 511, 513, cert. denied, 257 U.S. 659 (1922); State v. Erwin, 101 Utah 365, 120 P.2d 285, 312 (1941); State v. Barton, 5 Wash. 2d 234, 105 P.2d 63, 67 (1940).

Cases holding contra to this view are Sealfon v. United States, 332 U.S. 575, 580 (1948); Coffey v. United States, 116 U.S. 436, 444 (1885); United States v. De Angelo, 138 F.2d 466, 469 (3d Cir. 1943); Harris v. State, 193 Ga. 109, 17 S.E.2d 573, 581 (1941); State v. Meek, 112 Iowa 338, 84 N.W. 3, 6 (1900); People v. Grezesczak, 77 Misc. 202, 137 N.Y. Supp. 538, 541 (Nassau County Ct. 1912).

"The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution." Brown v. New Jersey, 175 U.S. 172, 175 (1899).

"The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State. The general question, therefore, is,

When the issues presented to the jury are known and the verdict of that jury is known, the determination of what was necessarily decided by that verdict must be arrived at as a matter of law, in this case as a matter of New Jersey law. It was decided as a matter of New Jersey law that it was impossible to determine with certainty which issues of fact were decided by the former general verdict of acquittal.

A federal constitutional question was also presented to the United States Supreme Court, that is, whether the New Jersey law, as determined by the New Jersey court, violates due process guaranteed by the fourteenth amendment.[14] Justice Harlan concluded that the New Jersey Supreme Court had not exceeded constitutionally permissible bounds in determining "that the jury might have acquitted petitioner at the earlier trial because it did not believe that the victims of the robbery had been put in fear, or that property had been taken from them, or for other reasons unrelated to the issue of 'identity'."[15] This conclusion, though, should have been based on acceptance of a constitutionally valid New Jersey rule of law rather than on a constitutionally acceptable interpretation of facts.

A wholly different conclusion is reached by Mr. Chief Justice Warren as to the claim that defendant had been denied due process of law by requiring him to litigate a second time the issue of alibi. The Chief Justice states: "In my view the issue posed here is not a 'fact issue' at all. The facts are clear and undisputed. The problem is to judge their legal significance."[16] The Chief Justice's conclusion that the New Jersey rule is unconstitutional under the fourteenth amendment seems necessarily to be based on the premise that a large part of the double jeopardy clause of the fifth amendment is incorporated into the fourteenth amendment. He says:

> "Few would dispute that after the first jury had acquitted petitioner of robbing the first three victims, New Jersey could not have retried petitioner on the identical charge of robbing

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whether such a law violates the Fourteenth Amendment ... by depriving persons of their life, liberty or property without due process of law." Twining v. New Jersey, 211 U.S. 78, 90-91 (1908). See note 14 infra.

[14]"Whether the state court erred in its construction of the state constitution and statutes and the common law on the subject ... is not a Federal question. We are bound by the construction which the state court gives to its own constitution and statutes and to the law which may obtain in the State .... The only question, therefore, is, as we have stated, whether ... [that construction] under the circumstances amounted to a violation by the State of the Fourteenth Amendment ...." West v. Louisiana, 194 U.S. 258, 261-62 (1903).

[15]356 U.S. at 472.

[16]Id. at 475.

> these same three persons. After a jury of 12 had heard the conflicting testimony of the five victims on the issue of the robber's identity and concluded that at least a reasonable doubt existed as to whether petitioner was one of the robbers, the same evidence could not be presented to 12 new jurors in the hope that they would come to a different conclusion.
> ***The vice of this procedure lies in relitigating the same issue on the same evidence before two different juries with a man's innocence or guilt at stake."[17]

With double jeopardy brought under the fourteenth amendment, the reach is not so far to encompass aspects of collateral estoppel as well. The Chief Justice's view then is that since the only *contested* issue in the *Hoag* case was based on alibi, an acquittal in the case as a matter of constitutional law, must have been based on a failure of the state to prove the defendant was present at the scene of the crime. This issue cannot under the double jeopardy clause, incorported into the fourteenth amendment, be litigated in any other criminal proceeding.

It is doubtful whether former jeopardy is such a fundamental concept as to be "of the very essence of a scheme of ordered liberty"[18] and thus within the purview of fourteenth amendment due process.[19] Even if former jeopardy were such a fundamental concept, the basis for such a holding clearly could not be applied to hold collateral estoppel such a fundamental concept. While former jeopardy has its roots deep in our common law system, collateral estoppel has for its basis mere policy considerations.[20] When such matters as the right to trial by jury,[21] immunity from prosecution except as the result of an indictment,[22] and immunity from compulsory self-incrimination[23] have been determined not to be such fundamental principles

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[17]Ibid. Justice Douglas, writing a separate dissent in the principal case, contends that the defendant should not be triable a second time. He states: "Since the petitioner was placed in jeopardy once and found not to have been present or a participant; he should be protected from further prosecution for a crime growing out of the identical facts and occurring at the same time." Id. at 479.

[18]Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[19]Brock v. North Carolina, 344 U.S. 424 (1953); Palko v. Connecticut, 302 U.S. 319 (1937).

[20]See Polasky, supra note 9, at 219. " 'The right to assert the claim of former jeopardy is guaranteed by the constitution [New York]. . . . Res Judicata, however, does not rest upon any constitutional provision. It is a 'rule of evidence. . . .' " N.Y.L.J. Dec. 18, 19, and 20, 1939, quoted in United States v. Carlisi, 32 F. Supp. 479, 482 (E.D.N.Y. 1940).

[21]Maxwell v. Dow, 176 U.S. 581 (1900).

[22]Hurtado v. California, 110 U.S. 516 (1884).

[23]Twining v. New Jersey, 211 U.S. 78 (1908).