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Constitutional Law - Double Jeopardy - Court Interpretation When Defendent Is Charged for Two or More Offenses Arising from the Same Act

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in their private capacity when some technicality prevents finding their action to be "under color of" state law.

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CONSTITUTIONAL LAW — DOUBLE JEOPARDY — COURT INTERPRETATIONS WHEN DEPENDENT IS CHARGED FOR TWO OR MORE OFFENSES ARISING FROM THE SAME ACT. — Defendant threw gasoline into the bedroom of the victims and ignited it. He was tried and convicted on two counts of attempted murder and one count of arson. Defendant moved to vacate the sentences on the second count of attempted murder and on the count of arson alleging that he was punished three times for a single act in violation of Penal Code section 654.[1] The California Supreme Court *held,* two justices dissenting, that the conviction of both arson and attempted murder violated the statutory and constitutional protection relating to defendant as the arson was merely incidental to the primary objective of killing the victims. Consequently, defendant could only be punished for the more serious offense which was attempted murder. The dissent criticized the result on the ground that the crime of arson and that of attempted murder belonged to two separate and distinct classes, involving proof of factual elements not common to the other; therefore the arson conviction should have been affirmed. *Neal v. State,* 9 Cal. Rptr. 607 (1961).

It is an ancient principle of common law that one may not be twice put in jeopardy for the same offense.[2] The constitutional guaranties against double jeopardy are merely declaratory of the common law.[3] Some states through statutory enactment,[4] and others by judicial decision,[5] have extended this protection against double punishment for separate offenses arising from the same act. This extension is frequently called

1. Cal. Pen. Code § 654 (Deering 1949). "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other . . ."
2. State v. Labato, 7 N.J. 137, 80 A.2d 617 (1951).
3. Kepner v. United States, 195 U.S. 100 (1904); State v. Healy, 136 Minn. 264, 161 N.W. 590 (1917); Commonwealth v. Ramunno, 219 Pa. 204, 68 Atl. 184 (1907).
4. Cal. Pen. Code § 654; N.Y. Penal Law, Consol. Laws, c. 40 § 1938 (McKinney 1949).
5. Crumley v. City of Atlanta, 68 Ga. 69, 22 S.E.2d 181 (1942; State v. Labato, 7 N.J. 137, 80 A.2d 617 (1951); People v. Savorese, 1 Misc. 2d 305, 114 N.Y.S.2d 816 (1952).

the "same transaction" test in which the intent and objective of the actor determines whether the course of criminal conduct is single or divisible.[6] It is the singleness of the act and not the offense that is controlling.[7] This test is properly termed the "defendant's rule" as the defendant may be punished for any such offense but not for more than one.[8]

Although finding favor in earlier federal decisions,[9] the "same transaction" rule was ignored in the often cited decision of *Blockburger v. United States.*[10] There the Supreme Court interpreted the test to be: when the same act or transaction constitutes a violation of two distinct statutory provisions, the test to determine whether this constitutes one or two offenses, is whether each provision requires proof of a fact which the other does not.[11] The application of this rule, which is frequently called the "same evidence rule" is found in the recent Supreme Court decisions. This test, which has found accomodation in most state courts,[13] is accurately classified as the "prosecutor's rule" for it permits cumulation of punishment.[14]

After the *Blockburger* decision, the courts, apparently in an attempt to mitigate the effect of the "same evidence rule", have formulated the "necessarily included offense" doctrine.[15] This doctrine, which is only applicable to crimes that can be divided into degrees, is that the prosecution for a minor offense included in a greater offense will bar prosecution for the greater, and conversely, prosecution for the greater will preclude prosecution for the lesser.[16]

North Dakota, in construing its constitutional prohibition

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6. People v. Miller, 5 Misc. 2d 987, 166 N.Y.S. 2d 902 (1957).
7. State v. Parsons, 70 Ariz. 399, 222 P.2d 637 (1950); People v. Knowles, 35 Cal. 2d 175, 217 P.2d 1 (1950).
8. **In re** Horowitz, 33 Cal. 2d 534, 203 P.2d 513 (1949); People v. Newman, 360 Ill. 226, 195 N.E. 645 (1935).
9. Coin v. United States, 19 F.2d 472 (8th Cir. 1927); Lewis v. United States, 4 F.2d 520 (5th Cir. 1925).
10. 284 U.S. 299 (1932).
11. **Id.** at 304.
12. Gore v. United States, 357 U.S. 386 (1958); Prince v. United States, 352 U.S. 322 (1957); Pereira v. United States, 347 U.S. 1 (1954).
13. Hall v. State, 134 Ala. 70, 32 So. 750 (1920); Johnson v. Commonwealth, 201 Ky. 314, 256 S.W. 388 (1923); Tokarchik v. Claudy, 174 Pa. Super 509, 102 A.2d 207 (1954); Hamblen v. State, 183 Tenn. 221, 191 S.W.2d 537 (1945).
14. Johnson v. Commonwealth, **supra.** (Defendant was convicted of two counts of illegal gambling, each count based on a single hand in a poker game). See also 32 Tul. L. Rev. 588.
15. Green v. United States, 355 U.S. 184 (1957); Giles v. United States, 157 F.2d 588 (9th Cir. 1946), **cert. denied** 331 U.S. 813 (1947); Coy v. United States, 156 F.2d 293 (6th Cir. 1946), **cert. denied** 328 U.S. 841 (1946).
16. See note 15, **supra.**

against double jeopardy,[17] applies the "same evidence" test.[18] In a North Dakota statutory enactment, pertinent to the topic of this article, can be found a provision which is cognate to and apparently designed after the "necessarily included offense" doctrine.[19]

It is submitted that there can be no doubt as to the preemptiveness and high favor put on the prohibition of double jeopardy, but the courts in construing and applying this protection have not been uniform and have used subtle distinctions between jeopardy and offense in creating the perplexing inconsistencies. The court in the instant case adhered to the "same transaction" test. This test appears to be the most reasonable and fairest as it tends to insure that the punishment will be commensurate to the violation of the defendant.

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HOMESTEADS — ACQUISTION AND ESTABLISHMENT — CONSTITUTIONALITY OF DECLARATION STATUTE. —Plaintiff, a lumberman, furnished a contractor with lumber to be used for the construction of a home on land owned by the contractor but to be sold to the defendant by an executory contract entered into before plaintiff furnished the lumber. Defendant from and after the making of this contract intended to occupy the premises as a homestead. After title passed to the defendant, the plaintiff brought an action to enforce a material man's lien on the property. The Supreme Court held, one justice dissenting, that the property was impressed with homestead character from the time of the contract between the defendant and the contractor, and that a statute which provides "if the property is not marked off, platted, and recorded as hereinbefore provided, it shall not have the character or the exemption rights of a homestead unless it is actually occupied as

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17. N.D. Const. art. I, § 13, "No person shall be twice put in jeopardy for the same offense . . ."

18. State v. Panchuk, 35 N.D. 669, 207 N.W. 991 (1926), "The constitutional and statutory guaranty is against second jeopardy for the same offense. In order that one prosecution may be said for the same offense as another, within the language of the text as formulated by the weight of authority, it must appear that the offenses described in the information or indictments are the same **in law and in fact**".

19. N.D. Cent. Code § 29-22-35 (1961). "If the defendant has been convicted or acquitted upon an information or indictment for an offense consisting of different degrees, the conviction or acquittal is a bar to another information or indictment for the offense charged or for any lower degree of that offense or for an offense necessarily included therein."