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## Constitutional Law - Former Jeopardy - Successive Litigation of Crimes Arising from a Single Transaction Does Not Violate the Fourteenth Amendment

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## RECENT CASES

CONSTITUTIONAL LAW — FORMER JEOPARDY — SUCCESSIVE LITIGATION OF CRIMES ARISING FROM A SINGLE TRANSACTION DOES NOT VIOLATE THE FOURTEENTH AMENDMENT. — Defendant was charged in four separate indictments with the murder of his wife and three children by shooting them on the same evening. At the first trial, for the murder of his wife, the jury affixed a sentence of 20 years. The second trial, for the murder of one of his children, resulted in a 45 year sentence. The jury imposed the death penalty at his third trial for the murder of another child. Evidence of all four killings was received at each of the trials.<sup>1</sup> The United States Supreme Court *held* four justices dissenting, that the trial of each offense separately was not a denial of due process. *Ciucci v. Illinois*, 356 U.S. 571 (1958).

The general rule is that conviction or acquittal of one charged with a criminal offense, is not a bar to his subsequent prosecution for another similar offense committed at the same time.<sup>2</sup> Some jurisdictions hold that where two persons are killed at the same time, the result may be attributed to a single wrongful act, and an acquittal or conviction of the murder is a bar to subsequent prosecution for the other murders.<sup>3</sup> Other jurisdictions decree that the "same transaction" test should be applied;<sup>4</sup> others rule that the offenses must be identical;<sup>5</sup> while still others hold that the offenses must be the same in fact and in law to sustain a plea in bar of former conviction or acquittal.<sup>6</sup>

When the problem of joining offenses arises it is imperative that the rules of criminal procedure be analyzed. A failure to do so may authorize a motion in arrest of judgment,<sup>7</sup> or a motion to quash,<sup>8</sup> which may be sustained,<sup>9</sup> for failure to try both offenses in the first trial. Rule 8 of the Federal Rules of Criminal Procedure provides for a permissive joinder of felonies or misdemeanors which are the same or of a similar character, or are based on

1. Petitioner contended this procedure violated the due process of law clause of the Fourteenth Amendment to the Constitution of the United States. It was undisputed under Illinois law that each murder constituted a separate crime and that the evidence of the entire occurrence was relevant in each of the three prosecutions.

2. *State v. Fredlund*, 200 Minn. 44, 273 N.W. 353 (1937) (The court stated that, ". . . neither the federal nor in our own Constitution is there any prohibition against successive prosecutions if the wrongful act is the cause of separate and distinct offenses.") *Jeppesen v. State*, 154 Neb. 765, 49 N.W.2d 611 (1951); *State v. Martin*, 154 Ohio St. 539, 96 N.E.2d 776 (1951).

3. *State v. Wheelock*, 216 Iowa 1428, 250 N.W. 617 (1933) (The court stated that there was no multiple intent); *Sadberry v. State*, 39 Tex. Crim. 466, 46 S.W. 639 (1898).

4. *E.g.*, *Few v. State*, 1 Ca. App. 1222, 58 S.E. 64 (1907).

5. *Nounes v. United States*, 4 F.2d 833 (1925); *State v. Corbett*, 117 S.C. 356, 109 S.E. 133 (1921).

6. *Bossio v. United States*, 16 F.2d 57 (1926); *State v. Barefoot*, 241 N.C. 650, 86 S.E.2d 424 (1955).

7. N.D. Rev. Code § 29 - 2502 (1943).

8. N.D. Rev. Code § 29 - 1404 1B (1943).

9. *State v. Roberts*, 170 La. 727, 129 So. 144 (1930) (Defendant while robbing a store killed a woman and then her child. On the second indictment defendant pleaded former jeopardy. The court held that this was one continuous unlawful transaction and that it came within the provision of the Criminal Code, which provided that where two or more crimes result from a single act, or from one continuous unlawful transaction, only one indictment will lie.)

10. Fed. R. Crim. P. 8.

the same transaction.<sup>10</sup> The North Dakota Rules provide that an indictment or information can charge only one offense.<sup>11</sup>

The dissenting justices argued that the prosecution had in effect tried the accused for four murders three successive times. They further stated that this harassment of the defendant is a violation of the Fourteenth Amendment. It might be noted that there are several aspects to this argument that merit careful investigation. When the problem is viewed in the light of "fairness" to the parties, the state's unlimited finances place a tremendous burden on the defendant. Funds are usually available to locate key witnesses no matter where they are, and the prosecutor may expect greater cooperation from the police in his jurisdiction.<sup>12</sup> When this is combined with the power of the prosecutor to use these unlimited finances to harass the defendant through repeated litigation it becomes a dangerous weapon in the hands of a zealous prosecutor. It might also be noted that it is an unwarranted expenditure of money and valuable court time to relitigate matters that could just as well be settled in one trial. It further stands to reason, as proven in the principal case, that as the number of trials is increased, the chances of the desired verdict are likewise increased.

Since the principle of due process is generally identified with the concept of fairness in the procedural aspect,<sup>13</sup> it might be well to note of what this fairness consists. In deciding this problem, two questions must be resolved: "Is that kind of double jeopardy . . . a hardship so acute and shocking that our polity will not endure it? Does it violate those fundamental principals of liberty and justice which lie at the base of all our civil and political institutions?"<sup>14</sup>

KEITHE E. NELSON.

FEDERAL CIVIL PROCEDURE — PARTIES — EFFECT OF FAILURE TO MAKE TIMELY APPLICATION FOR SUBSTITUTION FOR DECEASED PARTY DEFENDANT. Plaintiff brought an action against Sims and Navarra. Navarra then died. After two years had elapsed, a motion was made to dismiss the action as to Navarra on the basis of Fed.R.Civ.P. 25(a)(1), which provides that: "If a party dies and the claim is not thereby extinguished, the court within two years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party." The District Court, in denying the motion, *held* that Fed.R.Civ.P. 25(a)(1) was invalid insofar as it attempted to abridge plaintiff's substantive right to bring her action to trial by placing a fixed time limit upon her right to apply for a substitution for the deceased party defendant.<sup>1</sup> *Henebry v. Sims*, 22 F.R.D. 10 (E.D.N.Y. 1958).

The case presents a striking issue of procedural law. In *Anderson v. Yungkau*,<sup>2</sup>

11. N.D. Rev. Code § 29-1404 1B (1943); *but see* N.D. Rev. Code § 29-1149 (1943).

12. See Ludwig, *The Role of the Prosecutor in a Fair Trial*, 41 Minn. L. Rev. 602, 608, 609 (1956).

13. See *Powell v. Alabama*, 287 U.S. 45 (1932).

14. *Palko v. Connecticut*, 302 U.S. 319, 328 (1937).

1. 28 U.S.C. § 2072 (1952); *United States v. Sherwood*, 312 U.S. 584, 590 (1941).

2. 329 U.S. 482 (1947); *Hofheimer v. McIntee*, 179 F.2d 789 (7th Cir. 1950); *Winkleman v. General Motors Corp.*, 30 F. Supp. 112 (S.D.N.Y. 1939); *Anderson v. Brady*, 1 F.R.D. 589 (E.D. Ky. 1941).