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Criminal Law -- Former Jeopardy -- Test for Identity of Offense

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Defendant was indicted for larceny of six bushels of corn. He pleaded *autrefois acquit*, contending that he had previously been indicted for the identical offense. *Held*, plea good; the two offenses grew out of the same transaction and only one indictment can be sustained therefor.¹

Three principal tests for the identity of offenses have been applied by the courts. (1) The "same evidence" rule inquires whether defendant could have been convicted on the first indictment upon proof of the facts alleged in the second.² (2) The "same transaction" test asks whether the crimes grew out of a single transaction.³ (3) The "essential element" test looks to whether the first prosecution was for any essential part or whole of the crime prosecuted in the second indictment.⁴ Some courts use these as interchangeable,⁵ some as mutually exclusive,⁶ and others as overlapping.⁷ An application of these rules to concrete fact situations reveals some interesting results.

¹ Harris v. State, 159 S. E. 603 (Ga. 1931).
² Winn v. State, 82 Wis. 571, 52 N. W. 775 (1892); Barker v. State, 188 Ind. 263, 120 N. E. 593 (1918); 16 Corpus Juris 264; Clark, Criminal Procedure (2nd ed. 1923), 457; 1 Bishop, Criminal Law (9th ed. 1923) §1052. The North Carolina rule is stated by Ruffin, J., in State v. Nash, 86 N. C. 650, 41 Am. Rep. 472 (1882): "the true test is, 'could the defendant have been convicted upon the first indictment upon proof of the facts, not as brought forward in evidence, but as alleged in the record of the second'."
³ "It is a fundamental rule of law that out of the same facts a series of charges shall not be preferred," Cockburn, J., in Regina v. Elrington, 1 B. & S. 688, 9 Cox C. C. 86 (1861); Jones v. State, 55 Ga. 625 (1876); Newton v. Commonwealth, 198 Ky. 707, 249 S. W. 1017 (1923); State v. Keep, 85 Ore. 265, 166 Pac. 936 (1917); 16 Corpus Juris 272; 1 Bishop, Criminal Law (9th ed. 1923) §1051.
⁴ "It is elementary to say that a prosecution for any part of a single crime bars any further prosecution based upon the whole or part of the crime," Hurt, C. J., in Rymon v. Morrow, 192 Ky. 785, 234 S. W. 304, 19 A. L. R. 632 (1921); U. S. v. Weiss, 293 Fed. 992 (N. D. Ill. 1923); Sanford v. State, 75 Fla. 393, 78 So. 340 (1918); State v. Cheeseman, 63 Utah 138, 223 Pac. 762 (1924); 16 Corpus Juris 270.
⁵ Mitchell v. State, 16 Ala. App. 635, 80 So. 730 (1918) (The first decision was based on a combination of the "essential element" and "same transaction" tests, while a rehearing rested its decision on the "same evidence" test.); State v. Elder, 65 Ind. 282 (1879); Commonwealth v. Vaughn, 101 Ky. 603, 42 S. W. 117 (1897); Arrington v. Commonwealth, 87 Va. 96, 12 S. E. 224 (1890).
⁷ "*Autrefois acquit* is only available in cases where the transaction is the same and the two indictments are susceptible of, and must be sustained by the same proof," White, F. J., in Simco. v. State, 9 Tex. App. at 348 (1880);
In a 1931 federal case defendant was indicted for illegally selling morphine. Three counts were based on a statute requiring sales to be from the original package, and others on a statute requiring a government order before any sale. The sales were on successive days to the government detective. An application of the "same evidence" test allowed conviction on all counts. The same facts would have given rise to an identical holding under the "essential element" test. The sale without order was in no way an integral part of the sale from an illegal package. In analogous situations under the "same transaction" rule the series of sales might be considered one offense or several.

In California, a defendant was indicted for attempting to murder his wife. By the shot intended for her, he killed another person. On the murder indictment he pleaded the attempt indictment as former jeopardy. The "same evidence" rule would not allow the plea. If a murder was proved to have been committed by defendant, it could not have convicted him on the first trial for an attempt on the life of another. Nor is an attempt on one person's life in any way an "essential element" of the murder of another. On the "same transaction" test a division of opinion exists, but some courts would hold but one offense indictable.

"The rule is that where one offense is a necessary element in, and constitutes part of another and both are in fact one transaction, an acquittal or conviction of one should bar prosecution for the other," Snow, J., in People v. Cook, 236 Mich. 333, 210 N. W. 296 (1926); State v. Foster, 156 La. 891, 101 So. 255 (1924); State v. Shaver, 197 Iowa 1028, 198 N. W. 329 (1924). Blockburger v. U. S., 50 F. (2d) 795 (C. C. A. 7th, 1931)." It cannot be said that the evidence necessary to establish the truth of either of the two counts in controversy would establish the other, for indeed the opposite is true," Sparks, J., in Blockburger v. U. S., supra note 8.

"I do not think the penalty section of the statute contemplates such double punishment for the same transaction. . . . I believe that this 'one and continuous performance,' initiated and enacted under the 'personal direction' of the government agent, and financed by the government, represents but a single infraction of the law," Alschuyler, J., dissenting in Blockburger v. U. S., supra note 8; State v. Needham, 194 Mo. App. 201, 186 S. W. 585 (1916); State v. Covington, 147 Tenn. 659, 222 S. W. 1 (1920); State v. Linton, 283 Mo. 1, 217 S. W. 874 (1920).


Note (1922) 20 A. L. R. 341; Note (1883) 41 Am. Rep. 475.

The same transaction test adopted in this state may make a trial for the murder of one person a bar to the prosecution for assault with intent to murder a different person. For instance, if the defendant shot at A, intending to
Suppose a defendant has killed three persons by rapidly successive shots, and pleads acquittal for A's murder in defense of that of C.\textsuperscript{16} Proof of the missiles striking each of the three would be entirely different, thus three indictments would lie on the "same evidence" rule.\textsuperscript{18} The act in relation to one of the three was no "essential" part of the act in relation to another, hence three indictments lie on the "essential element" rule. Conceding three transactions to have taken place, each shot constituting one, the question arises as to what would be the situation where one shot kills three persons. Some courts have carried the "same transaction" test to its logical conclusion and would, on a basis of previous decisions, sustain but one indictment.\textsuperscript{17}

The "same transaction" test then is flexible, leaving to the court the definition of a single transaction. But the other tests are also flexible, changing with application. From a practical standpoint the courts in effect reach the same conclusions on any of the tests, with the possible exception, as noted, of the "same transaction" test, where several offenses grow out of the same act.

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Criminal Law—Quashing Indictment for Incompetent Evidence Before Grand July.

The defendant moved to quash his indictment on the ground that all the evidence (testimony of two witnesses) heard by the grand jury was hearsay and incompetent. Motion denied, and, in affirming, the Supreme Court held: There is a distinction to be made between in-


\textsuperscript{36}The court's decision rested on an application of the "same evidence" test, it being held that a different proof was necessary in the case of each murder.

\textsuperscript{37}The following cases represent the development of the rule in Georgia: Roberts v. State, 14 Ga. 8 (1853); Holt v. State, 38 Ga. 187 (1868); Knight v. State, 73 Ga. 804 (1884); Lock v. State, 122 Ga. 730, 50 S. E. 932 (1905); Burnam v. State, supra note 14; see 1 BISHOP, CRIMINAL LAW (9th ed. 1923) \S 1064. It appears in Lillie v. State, 79 Tex. Crim. Rep. 615 at 616, 187 S. W. 482 at 483 (1916), that in the opinion of the court, if two persons are killed or injured by the same shot, a conviction of the murder or assault of one of them would be a bar to a subsequent prosecution for the murder or assault of the other. The cases of Sadberry v. State, 39 Tex. Crim. Rep. 466 46 S. W. 639 (1898); and Wright v. State, 17 Tex. App. 152 (1894), would sustain but one conviction on a plea of autrefois convict.