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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 269 (1920).

Comments

DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL IN CRIMES ARISING FROM THE SAME TRANSACTION

Three armed men break in on four patrons of a tavern, line them against the wall at pistol point, and relieve each of his valuables one at a time. An individual is indicted for the robbery of *three* of the victims and these indictments are joined for trial. The prosecution proves that there was a robbery, but only one of the

victims (not named in the indictments) identifies the accused, while three of the victims testify that he is not the robber. The defense is the testimony of the accused that he was not present at the tavern on the afternoon of the robbery. The jury returns a verdict of not guilty. The state subsequently indicts the accused for the robbery of the *fourth victim,* who is the only person who identified him at the first trial. What effect does the prior acquittal have on the subsequent prosecution? Is the state collaterally estopped from re-litigating issues necessarily found in favor of the accused in the prior trial? These were the facts and issues in the recent case of *Hoag v. New Jersey*[1] in which the New Jersey court held that the doctrine of collateral estoppel did not apply because there was no way of knowing exactly what was the basis of the jury's verdict of acquittal reached in the first trial.[2] On appeal, the Supreme Court affirmed the conviction, finding no violation of due process, and expressing grave doubts whether the widely espoused doctrine of collateral estoppel has any application in constitutional law.[3]

It is submitted that the following questions are implicit in determining a sound approach to the problem of whether or not the prosecution should be permitted to retain and play an "ace in the hole" by way of a subsequent prosecution. How can adequate protection be secured to the interest of society in punishing crimes arising out of the same transaction without forcing the accused to defend numerous prosecutions and "run the gauntlet" at the state's pleasure?[4] What application should be assigned to the doctrine of collateral estoppel in this type of factual situation? What application should the doctrine of collateral estoppel have to the plea of former jeopardy? Finally, is there any place in constitutional law for the doctrine of collateral estoppel?

The doctrine prohibiting double jeopardy is ancient, being imbedded in the common law and incorporated in most constitutions[5] in this country.[6] The doctrine forbids a second trial as well as a second punishment for the same offense.[7] The purpose of this doctrine, as it should be construed by the courts, is to protect persons accused of crime from vexatious criminal prosecutions, and at the same time protect society's interest against crime going unpunished.[8] In order to accomplish this purpose, the test for former jeopardy must be a practical one, and not theoretical.[9]

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1. 356 U.S. 464 (1958); 8 DE PAUL L. REV. 102 (1958); 32 TEMP. L.Q. 113 (1958); 2 U. ILL. L.F. 472 (1958).
2. State v. Hoag, 21 N.J. 496, 500, 122 A.2d 628, 632 (1956).
3. 356 U.S. at 471.
4. Green v. United States, 355 U.S. 184, 190 (1957).
5. Mo. CONST. art. I, § 19 (1945) reads: ". . . [N]or shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury."
6. *Ex parte* Dixon, 330 Mo. 652, 52 S.W.2d 181 (1932) (en banc); State v. Toombs, 326 Mo. 981, 34 S.W.2d 61 (1930); and see Lugar, *Criminal Law, Double Jeopardy, and Res Judicata,* 39 IOWA L. REV. 317 (1954).
7. State v. Fredlund, 200 Minn. 44, 273 N.W. 353 (1937); Annot., 113 A.L.R. 222 (1938).
8. *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).
9. Murphy v. United States, 285 Fed. 801 (7th Cir. 1923), *cert. denied,* 261 U.S. 617 (1923).

Courts take a variety of approaches to determine whether an accused has been twice placed in jeopardy in cases where there are multiple crimes arising out of the same transaction.[10] Two tests are generally applied, the "same evidence" test, and the "same transaction" test. The "same evidence" test is applied in a majority of jurisdictions. Generally it is stated in terms of whether the same evidence would support a conviction in either case.[11] In the *Hoag* case, as an example, the same evidence under the first indictments would not have supported a conviction under the subsequent indictment and trial because different evidence concerning the person robbed and the property taken would have been necessary to convict in the second trial.[12] The "same transaction" test which is applied to some extent in a few jurisdictions is that there can only be one *prosecution* for the consequences of a single criminal transaction.[13] The "same transaction" test would bar the subsequent prosecution in the *Hoag* case because even though there may be many offenses which took place during the same transaction, only one prosecution can take place for the whole transaction.[14]

The prohibition against double jeopardy embodied in the fifth amendment[15] is directly applicable to criminal trials in the federal courts,[16] but is only applicable to the action of the state courts by virtue of the fourteenth amendment as a denial of due process.[17]

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10. Harris v. State, 193 Ga. 109, 17 S.E.2d 573 (1941); State v. Fredlund, *supra* note 7; Lugar, *supra* note 6; see Annot., 147 A.L.R. 991 (1943).

11. Hoag v. New Jersey, *supra* note 3, at 467, states the usual New Jersey rule "that double jeopardy does not apply unless the same evidence necessary to sustain a second indictment would have been sufficient to secure a conviction under the first, *But see* Gully v. State, 116 Ga. 527, 42 S.E. 790 (1902) which held that "To entitle the accused to plead successfully former acquittal, the offenses charged in the two prosecutions must have been the same in law and fact." See Lugar, *supra* note 6 showing a variety of wordings and interpretations of the same test. The rule, whatever it has now become in a given jurisdiction, was first laid down in Rex v. Vandercomb, 2 Leach. 708, 2 East P.C. 519 (1796).

12. *But see* United States v. Wexler, 79 F.2d 526 (2d Cir. 1935), *cert. denied*, 297 U.S. 703 (1936), and Johnson v. Commonwealth, 201 Ky. 314, 256 S.W. 388 (1923) where rather ludicrous results followed application of this rule to cutting open six mail sacks, and playing seventy five hands of poker during the same transaction, respectively. See also Note, 24 MINN. L. REV. 522 (1939) pointing out obvious inconsistencies in application of the rule.

13. Roberts v. State, 14 Ga. 8 (1853); Dowdy v. State, 158 Tenn. 364, 13 S.W.2d 794 (1929); State v. Coffman, 149 Tenn. 525, 261 S.W. 678 (1924). *But see* Note, 32 MICH. L. REV. 512 (1934), criticizing the strict application of the same transaction test.

14. This result is apparently reached under the theory that there was only one crime, so that the defendant could not be tried twice for the same offense. The "same evidence" test attempts to pin-point what offense in the transaction has been tried, while the "same transaction" test treats the whole transaction as one crime only.

15. U.S. CONST. amend. V provides "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

16. Green v. United States, 355 U.S. 184, 190 (1957).

17. Hoag v. New Jersey, *supra* note 1; Palko v. Conneticut, 302 U.S. 319 (1937).

Since most courts proceed under the "same evidence" rule, and each criminal act directed toward a different individual is generally held to be a separate offense, there is no violation of the interpreted meaning of double jeopardy even when these crimes arise out of the same transaction.

It has been well argued, however, that there is but one actual criminal transaction in this situation and since historically the plea of double jeopardy was first conceived to prevent vexatious criminal trials for crimes closely or actually related, the "same evidence" rule violates the purpose of the protection against double jeopardy.[18] Be this as it may, most courts are adamant in holding that prosecution for each separate offense during one transaction does not violate their interpretation of double jeopardy or due process. The result is that the prosecution is able, even though it knows of all the separate offenses committed during one course of criminal conduct immediately related in time, space, and nature of act, to hold back an indictment and have an "ace in the hole" if it is not successful during the first prosecution. In the *Hoag* case, the New Jersey court recognized this practice, but assumed that the state would exercise sound discretion to preserve the rights of the accused and not without reason subject him to multiplicity of trials.[19] The Supreme Court affirmed the conviction but stated that it was preferable to try all of them together.[20] Both courts decided the *Hoag* case by the narrowest majorities[21] and it is probably a valid assumption that both courts felt that this type of prosecution could violate the spirit, if not the letter, of the doctrine of former jeopardy.

Collateral estoppel in civil cases is defined in the following terms by the *Restatement of Judgments:*

> (1) 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.
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> (2) 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.

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18. Note, 24 MINN. L. REV. 522, 550 (1940) states: "However equally as obvious, it is submitted, is the violation of the spirit of double jeopardy principles which the result of such cases entail. To the minds of the criminal, the ordinary laymen, and very likely the framers of the constitutional provisions, the defendant is guilty of but one crime." People v. Grzesczak, 77 Misc. 202, 206, 137 N.Y. Supp. 538, 541 (Nassau County Ct. 1912). See the dissent of Mr. Chief Justice Warren, Hoag v. New Jersey, 356 U.S. at 475, and Ciucci v. Illinois, 356 U.S. 571 (1958). The Court in a per curiam opinion held that there was no violation of due process when the defendant was separately tried three times for burning the three members of his family. On the last indictment the defendant was finally sentenced to death. Mr. Justice Douglas, with the Chief Juistice and Mr. Justice Brennan, dissented on the basis of the proposition announced above. Mr. Justice Black dissented for the reason that the fourteenth amendment bars a state from placing a defendant twice in jeopardy for the same offense.

19. State v. Hoag, 35 N.J. Super. 555, 559, 114 A.2d 573, 577 (Super Ct. 1955); State v. Hoag, *supra* note 2.

20. 356 U.S. at 467-68.

21. 4-3 in the New Jersey supreme court; 5-3 in the Supreme Court of the United States (Mr. Justice Brennan not sitting).

> The doctrine of collateral estoppel is operative where the second action is between the same persons who were parties to the prior action. . . . A judgment for the defendant in the first action may have the effect of furnishing a complete defense to the second action.[22]

As an example, suppose *A* sues *B* for an installment of interest due on a note. *B* denies making the note. Verdict and judgment for *B*. In a subsequent action for a further installment, *A* is collaterally estopped from bringing the action because the first action necessarily determined that the note was not made, and is binding on the parties, and is a bar to *A* maintaining the subsequent action.

The criminal question would compare with the civil example as follows. *A* is indicted for robbing *B*. *A* denies being present during the robbery. *A* is acquitted. In a subsequent prosecution for robbing *C* at the same time *B* was robbed, is the state collaterally estopped from relitigating the question of *A's* presence so that the verdict for *A* in the first trial is a bar to the subsequent prosecution.

The doctrine of collateral estoppel prevents the relitigation of issues which necessarily must have been decided during the first trial in any subsequent action between the parties wherein the same issue is in question. The adverse decision of fact in the first trial is binding in the subsequent proceedings as though the matter were res judicata.[23]

In *United States v. Oppenheimer*[24] the defendant pleaded former adjudication to an indictment charging a conspiracy to conceal assets from a trustee in bankruptcy. The first trial, for substantially the same offense, had been decided for the defendant because the statute of limitations barred a conviction. His motion to quash the subsequent indictment on the grounds of former adjudication was granted. The government's contention, on appeal, was that the doctrine of res judicata[25] does not exist for criminal trials except in the modified form of the fifth amendment that a person shall not be placed twice in jeopardy of life or limb for the same offense. Mr. Justice Holmes, for the majority, holding to the contrary, adopted the language of Hawkins, J., in *Queen v. Miles:*

> Where a criminal charge has been adjudicated upon by a Court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of acquittal or conviction, is final as to the matter so adjudicated upon, and may be placed in bar to any subsequent prosecution for the same offense. . . . In this respect the criminal law is in unison with that which prevails in civil proceedings.[26]

Mr. Justice Holmes added:

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22. RESTATEMENT, JUDGMENTS § 68 (1942).

23. *Ibid.*

24. 242 U.S. 85 (1916).

25. Courts tend to use the terms res judicata and collateral estoppel interchangeably. In this case, what is really referred to is the doctrine of collateral estoppel.

26. 24 Q.B.D. 423, 431 (1890).

> The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice. . . in order, when a man has been acquitted on the merits, to enable the Government to prosecute him a second time.[27]

In *United States v. DeAngelo*,[28] the defendant was indicted for robbery of a bank messenger and for conspiracy to commit robbery. He was acquitted on the robbery indictment.[29] In the subsequent trial under the conspiracy indictment the government attempted to raise the issue of defendant's presence, an issue necessarily found in favor of the accused in the previous trial. Defendant attempted to introduce his previous acquittal as a defense. The trial court refused to admit the previous acquittal, and he was convicted. The circuit court of appeals granted defendant a new trial on the ground that the government was estopped from relitigating in a criminal trial facts theretofore materially in issue at the former trial between the same parties for a different criminal offense.[30]

A similar result was reached by the Supreme Court in *Sealfon v. United States*[31] where the defendant was first tried and acquitted of conspiracy to defraud the government by presenting false invoices and making false representations to the ration board. In a subsequent trial he was convicted for aiding and abetting the issuance of false invoices. In reversing the conviction, the Court said:

> But *res judicata* may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings . . . and operates to conclude those matters in issue which the verdict determined though the offenses be different.[32]

The Court stated further that the doctrine of collateral estoppel is generally accepted as applicable in criminal proceedings.[33]

Two questions may be raised to the application of collateral estoppel in criminal trials. (1) May a determination of the issues actually adjudicated in the first trial be made when the jury returns a general verdict? (2) Would the stated doctrine of collateral estoppel work in favor of the state as well as against it, so that the accused would be collaterally estopped in a subsequent proceeding from again contesting an issue of fact previously found in favor of the state?

According to a recent Supreme Court decision, the general verdict poses little problem. *Emich Motors Corp. v. General Motors Corp.*[34] was an action to recover

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27. 242 U.S. at 88.
28. 138 F.2d 466 (3d Cir. 1943).
29. Defendant's only contention was that he was not present at the scene of the crime. It was alleged that he was driving the get-away car.
30. United States v. DeAngelo, 138 F.2d 466, 468-69 (3d Cir. 1943).
31. 332 U.S. 575 (1948).
32. *Id.* at 578.
33. *Ibid.;* see Annot., 147 A.L.R. 991 (1943).
34. 340 U.S. 558 (1951).

treble damages under the Clayton Act. General Motors offered to prove that they were not operating in restraint of trade in Chevrolet automobiles. In a previous prosecution by the government, they had been *convicted* of restraining trade in Chevrolets. The Court held that where the criminal judgment rests on a general verdict of the jury,

> . . . what was decided by the criminal judgment must be determined by the trial . . . upon examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the courts.[35]

The Supreme Court stated further that "what issues were decided by the former Government litigation is, of course, a question of law on which the court must instruct the jury."[36] In the *DeAngelo* case,[37] the court inquired into the facts which the jury must have found to *acquit* in the prior trial, viewed them in light of the evidence and instructions, and concluded that the essential element (the presence of the accused at the scene of the crime) must have been concluded in favor of the petitioner and upheld his plea.[38] The same analysis was used in the *Sealfon* case and a similar result reached.

It would appear then that the question of whether a determination of the issues litigated can be made in the general verdict situation has been answered by the federal courts in the affirmative. It is the duty of the trial judge in the subsequent proceedings to determine what issues must have necessarily been found in order to sustain the general verdict on the basis of the pleadings, evidence, instructions, and an examination of the whole record of the first trial.[39]

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35. *Id.* at 569. But where defendant was convicted during the first trial, that conviction establishes rather easily that defendant committed all the acts necessary to commit a crime. Where defendant is *acquitted* in the first trial, any number of things might have been responsible for the jury's verdict.

36. *Id.* at 571.

37. Note that this is a case of the first jury acquitting the accused.

38. 138 F.2d at 469.

39. Suppose the defendant is indicted for the murder of *X*, who was strangled. During the same transaction, it is also alleged that he murdered *Y* by stabbing him. During his trial for the murder of *X*, defendant relies on an alibi established by testimony that a former injury has severly limited his capacity to grip or squeeze with his hands. The jury acquits the defendant for the murder of *X*. In the subsequent trial for the alleged murder of *Y*, the trial judge is to decide what the first jury's general verdict was based on. It could be that they believed he had established an alibi, or that he did not have the physical capacity to commit murder by strangulation. In addition, the jury could have believed that the state failed in their burden of proof, that a state's witness lied, or any one of several other possibilities. There might also be present problems relating to the defendant's capacity to form the required intent in a given case. However, this problem is not insurmountable. The same transaction test could be applied altogether so that acts directed toward different individuals or things in the same transaction would be treated as one triable offense only. The doctrine of collateral estoppel could be applied to work in favor of the accused for *all* issues that he contested in the first trial, as a qualification "rule of evidence" for the same evidence test. See United States v. Carlisi, 32 F. Supp. 479 (E.D.N.Y. 1940). The same result could be accomplished by legislation requiring all crimes arising from the same transaction to be subject to a single

The second question is whether the doctrine of collateral estoppel applies to both parties in a criminal case. Undoubtedly, the doctrine of collateral estoppel does apply to both parties in civil proceedings. The objection to two-way application of the doctrine of collateral estoppel in a criminal trial is that it denies the accused the constitutional and common law right to present all defenses in his behalf.[40] It is submitted that the logic of the conclusion of mutuality in criminal trials is merely illusory, and that the doctrine of collateral estoppel does not apply against the accused in criminal trials. Herein lies the distinction between collateral estoppel in civil and criminal trials. As previously pointed out, the doctrine of former jeopardy in criminal trials should be applied to avoid vexatious criminal prosecutions.[41] Collateral estoppel in civil trials is related to *res judicata*, a doctrine which prevents re-litigation of issues in civil suits. Collateral estoppel in criminal trials is related to *double jeopardy* which prevents vexatious criminal prosecutions.[42] In the *DeAngelo* case the court held, in reversing the conviction, that the doctrine of collateral estoppel characterized as a rule of evidence, did apply in favor of the accused, and by *dictum* indicated that there was no requirement of mutuality in a criminal trial:

> But a 'rule of evidence' has been recognized 'which accords to the *accused* the right to claim finality with respect to a fact or group of facts previously determined *in his favor* upon a previous trial'[43] (Emphasis added.)

Among the facts previously litigated was the accused's presence and participation, and the jury's first verdict of acquittal determined these matters adversely to the government.[44]

Assuming the foregoing discussion is correct, what purpose should the doctrine of collateral estoppel serve in cases like the *Hoag* case where there is an alleged violation of the doctrine of double jeopardy, or a denial of due process under the fourteenth amendment? It has been held that an individual could be tried and convicted separately for each hand of stud poker played during the same four hour span.[45] Seventy-five hands were played. The court stated that each "pot" played for involved a separate offense under the statute, and since the evidence necessary

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prosecution only, unless good cause is shown why this is impractical in a given situation. See MODEL PENAL CODE § 1.08 and comment (Tent. Draft No. 5, 1956). The purpose of this statute as stated by the authors is to prohibit unfair multiplicity of convictions or prosecutions, and to prohibit the conviction for two offenses which require inconsistent findings of fact to establish their commisson.

40. This objection seems to be stated in terms of a truism. *Quaere* whether once having presented all his defense, defendant has a *right* to do so again. However, if the state has a right to split up its prosecutions, then perhaps it is not inconsistent to insist that the accused has the continued right to present his defenses.

41. *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

42. See United States v. Carlisi, *supra* note 40, for an example of the application of the doctrine of collateral estoppel and a discussion and history of the general problem which tends to support the thesis set out.

43. 138 F.2d at 468. *Accord,* United States v. Carlisi, *supra* note 40, at 482.

44. 138 F.2d at 469.

45. Johnson v. Commonwealth, 201 Ky. 314, 256 S.W. 388 (1932).

to convict the defendant for playing for one pot would not be the same as that necessary to convict for a subsequent pot, there was no reason why conviction for one could be a bar to conviction for another.[46] It is submitted that at some point during the prosecution of these seventy-five separate indictments, this type of prosecution will violate the due process clause of the fourteenth amendment. The second suit probably violates the stated purpose of the plea of double jeopardy as it should be applied by the courts, *i.e.*, protecting the accused from the burden of defending against vexatious criminal prosecutions at the state's pleasure.[47] The courts, in order to escape this conclusion, have adopted the "same evidence" rule. The question now arises as to why the appellate courts allow this practice, in view of the fact that these courts often state that they will "look to the substance rather than the form" of the matter before them to determine whether justice has been done. The answer is possibly found in the following rationalization. The state can only prosecute each offense once, and cannot appeal except under limited conditions. There exists a fear that for one reason or another the *state* may not receive a "fair" trial on the first prosecution. Therefore, the plea of former jeopardy may be disregarded by the test of whether the evidence would support a conviction in a technical sense under the various indictments.[48]

This reasoning results in inconsistent conclusions. On the one hand the protection against vexatious prosecutions is given, and on the other hand it is taken away because of the fear that the state will not receive a fair trial, and cannot appeal. Consequently, the state is allowed the benefit of restricting the accused's plea to such an extent that its historic purpose is thwarted. In order to reach at least a consistent result, the prosecution should be allowed to appeal as readily as the prosecuted. Without such a procedure, it would appear that the courts have provided the state with some protection against an "unfair" trial *where the defendant has been unfortunate enough to commit several crimes during the same transaction.* As a result the accused may be subject to even greater harrassment than if the state were allowed an unlimited right of appeal.[49]

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46. The statute prohibited the engaging in a game of hazard or of chance at which money, or other property was bet, won, or lost. In reading the opinion of the court, it would appear not only that the defendant could have been prosecuted for each "pot" played, but also for each bet he placed. The case involves separate convictions and not a prior inconsistent verdict. The court here allowed the prosecutor to seek the verdict he desired separately. See Ciucci v. Illinois, 356 U.S. 571 (1958).

47. An individual who gambles more than once can be, and should be, punished more than the defendant who only bets once. But where the acts of the accused violating the statute are done all at once, the state advisedly should bring only one prosecution.

48. Lugar, *Criminal Law, Double Jeopardy, and Res Judicata,* 39 IOWA L. REV. 317 (1954); Note, 24 MINN. L. REV. 522 (1939).

49. If the state were allowed to appeal more readily, there would be no motive on the part of the prosecutor to save back an indictment. The source of the inconsistency that the courts have arrived at would no longer exist. The state would no longer need the protection the courts have given where multiple crimes take place during the same transaction (which has not been given in the single-crime situation) because it would have adequate protection in both situations. This procedure would allow consistent results in the following situation also. If the defendant is

A partial remedy to this inconsistent situation would be the utilization of the doctrine of collateral estoppel. In extreme cases similar to the *Hoag* case, successive prosecutions might violate the due process clause. Collateral estoppel would preclude this possibility, preserve the legal significance of the first jury verdict determination that the accused was not present during the entire transaction, and secure to the defendant the common law protection against double jeopardy despite the application of the "same evidence" test. Using the *Hoag* case as an example, an illustration of the scope and application of collateral estoppel can be brought into sharper relief. Assume in the subsequent trial, Hoag introduces his prior acquittal and the first trial record, alleging that since there was but one *contested* issue in the first trial, whether he was present or not, that the first verdict of the jury necessarily determined that he was not.[50] All the crimes took place at the same time, and if he was not present, he could not be guilty of robbing any of the victims. The trial judge then determines whether or not this issue was determined in Hoag's favor at the first trial through examination of the pleadings, evidence, record, and instructions of that trial. Assuming that he does determine this issue was resolved in favor of the defendant in the first trial, that determination acts as a bar to a conviction under the second indictment and it should be quashed.[51] If Hoag had contested many issues in the first trial, the duty of the judge remains the same, but it is more difficult to perform. Suppose Hoag had shown during the first trial, that nothing had been taken from the first three victims, and was acquitted on presumably that basis. That finding would not preclude the present prosecution. If he had contested both the issue of his presence and that nothing was taken from the victims as charged in the first indictment, the trial judge's determination may or may not bar the present prosecution. The fact found in favor of the accused at the first trial must be a fact essential to a conviction in both cases before the subsequent prosecution is barred, as in the case of double jeopardy. But, as a qualification of the "same evidence" test, facts found in favor of the accused cannot be re-litigated in the second trial.

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accused of killing forty victims by secreting a bomb in an airplane, he has done only one criminal act. Although the defendant has killed forty people and is guilty of that many murders, it is generally agreed that he can be prosecuted only once for his criminal act. See 2 U. ILL. L.F. 472 (1958). Under present doctrines, however, if the defendant shoots all forty persons during the same transaction, he can be subject to numerous prosecutions, even though previously acquitted or convicted of any one of them. Note the similarities and distinctions between the two situations. Are these conclusions sound?

50. Where there is only one contested issue during the first trial it would clearly appear that a determination of what the jury found to acquit is reasonably apparent. In Hoag v. New Jersey, 356 U.S. 464, 476 (1958) Mr. Chief Justice Warren in his dissent emphasized the point of contested issues. See Justice Hehrer's dissent in the New Jersey supreme court, State v. Hoag, 21 N.J. 496, 122 A.2d 628 (1956), and People v. Grzesczak, 77 Misc. 202, 137 N.Y. Supp. 538 (Nassau County Ct. 1912).

51. It should be pointed out here that should the judge deny the defendant's plea, that decision would be a basis for appeal. This does not complicate trial and appeal procedure to any greater extent than ordinary cases where an appeal is made on the basis of an error at law. A practical aspect may present itself at this point also—administrative difficulty of obtaining the complete records of the first trial in which the defendant was acquitted.

If however, the state is barred in the subsequent prosecution, its remedy does not depend upon whether or not the prosecution received a "fair" trial in the prior prosecution. Suppose for example, the state really does receive an unfair trial during the first prosecution because Hoag had established his alibi by what was later proved to be perjured testimony. Should the doctrine of collateral estoppel still be applied in a subsequent prosecution for a crime alleged to have taken place during the same transaction? It is submitted that perjury in connection with the doctrine of collateral estoppel does not demand any different treatment than in the single-crime, single-prosecution case.[52] The state's remedy for unfairness should not lie in its ability to hold back an indictment and reprosecute an accused where multiple crimes have occured during the same transaction, when the doctrine of double jeopardy precludes this procedure where only a single crime is committed. The prohibition against vexatious criminal prosecutions should be no more or no less in one situation than in the other. The defendant who commits more crimes than one during the same transaction should be more heavily punished, than the one who commits only one crime, but this does not afford a logical basis for more than one prosecution in the multiple-crime, same-transaction situation. The state's protection against unfairness should be the unlimited right of appeal, and not continued prosecution. In the multiple-crime, same-transaction situation as in the *Hoag* case, the state's protection against a future prosecution being barred should be in its right to a joinder, with an unlimited right of appeal to preclude unfairness.

Broadly stated, the advantages of applying the doctrine of collateral estoppel in the multiple-crime, same-transaction situation are that it preserves the protection against vexatious criminal prosecutions, and makes that protection consistent with the protection afforded in single-crime cases; it preserves the legal significance of the first jury verdict, and it provides a reasonable basis for solving the question of whether the accused has been convicted by prosecutions not consistent with the requirement of due process. The principal limitation on the use of collateral estoppel is the difficulty of determining what issues were determined by the jury's general verdict in the first trial.

Despite its limitations, collateral estoppel is a reasonable and justifiable doctrine within its scope of application. It is submitted that its zone of application lies in the following combination of circumstances: (1) the accused has committed multiple crimes at the same time, or during the same criminal transaction, and the prosecution splits these crimes into separate indictments; (2) in the first trial, the jury acquits the accused, and the issue or issues that necessarily must have been decided in favor of the accused must be reasonably apparent from the pleadings, evidence, instructions, and any other records; (3) the issue or issues so decided in the first trial must be material for conviction of all the crimes alleged to have taken place during the same transaction. When these requirements are present, if the state attempts to play its "ace in the hole" by a subsequent indictment and prosecution, the doctrine of collateral estoppel should be applied as a bar to the subsequent pros-

52. *Contra,* Annot., 147 A.L.R. 991 (1943).

ecution. The state can avoid this bar by joinder. By the application of collateral estoppel within this zone, a legally consistent, reasonable, and justifiable result is obtained which precludes separate prosecutions for multiple crimes arising out of the same criminal transaction.

TROY RICHARD MAGER

MORTGAGES—LEASING CLAUSE IN THE MISSOURI DEED OF TRUST

The Missouri realty mortgage or deed of trust frequently contains a clause providing that the trustee leases the mortgaged premises to the mortgagor. The precise terms incorporated in this clause may vary somewhat as to the amount and time of rental payments and as to surrender of possession. The usual provision, however, expresses that the trustee leases the mortgaged premises to the morgagor until the instrument be satisfied and released, or until default, at a rental of one cent per month, payable on demand, and that the morgagor will surrender peaceable possession to the trustee or purchaser thereof within a certain time (usually ten days) after the foreclosure sale, without notice or demand. The primary significance of this leasing clause in Missouri is to permit the trustee or purchaser at foreclosure sale to recover possession of the mortgaged premises utilizing the statutory action of unlawful detainer.[1]

The operation of this clause is best illustrated by a brief discussion of the Missouri mortgage theory, generally said to be the "intermediate" theory. In this state the mortgage or deed of trust operates as a lien against the realty, with title and all rights of ownership remaining in the mortgagor[2] so long as there is no default in the terms of the instrument.[3] Under this theory the right to possession of the mortgaged premises, in the absence of stipulation, remains in the mortgagor until default, at which time the trustee or mortgagee can demand possession and enforce his right thereto by ejectment.[4]

Owing to the fact that an ejectment suit takes considerable time and is rather expensive and because many persons seeking possession are landlords, the expedient and economical possessory action of unlawful detainer is provided by statute in Missouri. Unlawful detainer operates where a tenant lawfully in possession fails to pay rent or remains in possession after his term has expired or has been terminated by

1. § 534.030, RSMo 1949.

2. *In re* Thomasson's Estate, 355 Mo. 274, 171 S.W.2d 553 (1943); Reynolds v. Stepanek, 339 Mo. 804, 99 S.W.2d 65 (1937); Missouri Real Estate & Loan Co. v. Gibson, 282 Mo. 75, 220 S.W. 675 (1920); Kennett v. Plummer, 28 Mo. 142 (1859); Manser, *Real Estate Mortgage Theory In Missouri*, 6 Mo. L. REV. 200 (1941); Eckhardt, *Property*, 4 Mo. L. REV. 419, 423 (1939).

3. Wakefield v. Dinger, 234 Mo. App. 407, 135 S.W.2d 17 (Spr. Ct. App. 1939); JONES, MORTGAGES § 41 (8th ed. 1928).

4. Lustenberger v. Hutchinson, 343 Mo. 51, 119 S.W.2d 921 (1938).

notice. The relief sought is possession, damages and overdue rent.[5] In actions under this statute only right to possession may be inquired into;[6] the tenant cannot dispute his landlord's title in an unlawful detainer suit.[7] Under the first clause of this statute, which refers to hold-over tenants, unlawful detainer does not lie unless the relationship of landlord and tenant exists between the parties; whereas, under the second clause, which refers to an employee holding over after termination of employment, such relationship need not appear.[8] Discussion as to the leasing provision will be restricted to the first clause of the statute.

Consequently, before the trustee or purchaser at foreclosure sale can obtain the benefit of the action of unlawful detainer, a landlord and tenant relationship must exist between himself and the mortgagor in default. The effect of the aforementioned one cent leasing clause, according to Missouri cases, is to create such a landlord and tenant relationship between the parties.[9] Whether this relationship is substantial or nominal raises a serious problem which is not fully answered by the courts. One case held that the lease was a valid basis for unlawful detainer even though the trustee had not signed the deed of trust.[10] As a result thereof, the claimant has acquired the advantage of an expedient and economical remedy to recover possession without having to resort to the less desirable common law action of ejectment.

Since the primary purpose of the leasing clause is the prompt removal of the mortgagor in default, it should state the express terms upon which the mortgagor is to surrender peaceable possession. Confusion as to the requirement of demand or notice may be avoided if the lease is properly worded. In *Swaby v. Boyers*[11] the court held that a provision in the one cent leasing clause providing that the possessor remove within ten days after sale, without notice or demand for possession, was valid; no notice was required, nor was such demand necessary in case of a willful holding over by the tenant. The court rejected defendant's contention that notice to quit was required because the clause was indefinite and void rendering defendant a tenant at will, changed into a tenancy from month to month by a reservation of monthly rental. That provision may be constrasted to the situation where the clause expressly provides that in the case of sale under the deed of trust the grantor will remove from the premises any time thereafter upon one month's notice from the purchaser. In such a case the courts require notice as expressly provided.[12] Thus,

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5. 4 GILL, REAL PROPERTY LAW IN MISSOURI 1676-80 (1954).
6. Shull v. Hatfield, 240 Mo. App. 275, 278, 202 S.W.2d 916, 917 (K.C. Ct. App. 1947); Beery v. Hoelzel, 171 S.W.2d 741, 743 (K.C. Ct. App. 1943); Joseph v. Horan, 29 S.W.2d 234, 235 (St. L. Ct. App. 1930).
7. Hurley v. Stevens, 220 Mo. App. 1057, 1061, 279 S.W. 720, 722 (K.C. Ct. App. 1926).
8. Bruner v. Stevenson, 73 S.W.2d 413 (K.C. Ct. App. 1934).
9. Beery v. Hoelzel, *supra* note 6; Y.W.C.A. v. Lapresto, 169 S.W.2d 78 (St. L. Ct. App. 1943); Bruner v. Stevenson, *supra* note 8; Swaby v. Boyers, 221 S.W. 413 (St. L. Ct. App. 1920).
10. Y.M.C.A. v. Lapresto, *supra* note 9.
11. 221 S.W. 413 (St. L. Ct. App. 1920).
12. Parsons v. Palmer, 124 Mo. App. 50, 101 S.W. 609 (K.C. Ct. App. 1907), (leasing clause in deed of trust provided for an eight dollar instead of one cent monthly rental).

the intention of the parties to the lease may be assured protection by expressly providing in the clause the explicit terms as to surrender of possession. The trustee or purchaser at foreclosure sale may desire the most expedient remedy, whereas the mortgagor may prefer demand or notice. Whatever their agreed intention may be, the foregoing decisions indicate that, in the absence of ambiguity, the express terms of the leasing clause will be enforced.

The question now raised is whether the landlord and tenant relationship created by the one cent leasing clause entail certain disadvantages of an ordinary landlord and tenant situation. At least two problems may be anticipated in this connnection. The first relates to legislation dealing with landlord and tenant; the second refers to the tort liability of a landlord.

The problem of compliance with the provisions of the Federal Housing and Rent Act in relation to the leasing clause was encountered in the Missouri case of *Oldham v. Dupree.*[13] The court held that since the deed of trust provided that the defendant mortgagor became lessee of the property at a rental of one cent per month until foreclosure and delivery of the trustee's deed whereupon the mortgagor agreed to deliver possession to the new owner without notice, a landlord and tenant relationship was created. Furthermore, since the plaintiff bottomed her case on the theory that she was landlord and the defendant her tenant, she would have to recover on that theory, if at all. However, since she failed to prove compliance with the Federal Housing and Rent Act relating to evictions,[14] the plaintiff was denied recovery of possession in an unlawful detainer suit. The ramifications of this decision are somewhat doubtful and speculative. At the present time the case remains isolated without further judicial interpretation. The opinion indicates that the court recognized the created landlord and tenant relationship to be substantial in the sense of requiring compliance with provisions of the Federal Housing and Rent Act which are directed at an ordinary landlord and tenant situation. Thus, the decision gives rise to a disadvantage in using the leasing clause in the deed of trust by requiring compliance with the tenant eviction provision of the Federal Housing and Rent Act prior to bringing suit in unlawful detainer.[15]

A second issue may be raised as to price-ceiling and the rental value of the premises. If a price-ceiling were declared under authority of the Federal Housing and Rent Act,[16] as a wartime measure or otherwise, would the one cent monthly rental be declared as the basic rental value of the premises? Certainly, this is a

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13. 228 S.W.2d 14 (K.C. Ct. App. 1950); Annot., 10 A.L.R.2d 249 (1950).

14. 61 Stat. 200 (1947), as amended, 50 U.S.C. § 1899 (1953).

15. 61 Stat. 200 (1947), as amended, 50 U.S.C. § 1899 (1953). Since this statute has been frequently amended and may be enforced in local areas by executive order, it is not practical to set out the provisions and its applications in this Comment. Any person interested in the exact wording of the provisions should refer to the act itself.

16. 61 Stat. 197 (1947), as amended, 50 U.S.C. § 1894 (1953).

possible, though not a practical, result under the decision of the *Oldham* case. As to a short term mortgage, an alternative to avoid such circumstances might be to increase the one cent monthly rental to a reasonable rental value, declaring that such rent, payable on demand, would be applied against the principal and interest of the mortgage debt. Thus, if the price ceiling were applied by reason of the leasing clause in the deed of trust, it would seem that the landlord would not be precluded from receiving a fair rental from the tenant. However, as a long term mortgage, a change in economic conditions prior to expiration of the lease might result in a set rental value substantially less than the fair market rental of the premises. If a price ceiling were declared, by reason of the rental expressed in the lease the landlord's return, though substantial in amount, would be clearly inadequate as compared to the fair market value at that time. In such a case it might be better to use the one cent rental, chancing that this nominal value would be disregarded as a basis for any price ceiling which might be ordered.

Whether the relationship created by this clause is substantial or nominal presents a further problem relating to the tort liability of an ordinary landlord.[17] Extensive research has not disclosed an answer to this question.[18] Certainly such liability for actionable injuries to persons on or off the premises by reason of dangerous conditions or activities would place an undue burden on the trustee or purchaser at foreclosure sale. Since the usual clause enumerates only a nominal rental value and the lessor does not acquire or retain any right to control of the premises, there would seem to be no practical basis upon which to predicate such liability. In other words, it appears that the relationship created thereby is nominal and operative only for purposes of the unlawful detainer suit.

In conclusion, it may be safely asserted that the one cent leasing clause in the Missouri deed of trust is a valid basis for the statutory action of unlawful detainer. In order to prevent confusion as to the requirement of demand or notice the clause should include express terms as to the mortgagor's surrender of possession. When applicable, the trustee or purchaser at foreclosure sale must comply with the existing and appropriate provisions of the Federal Housing and Rent Act relating to eviction of tenants. Whether a rental price ceiling under authority of that act would apply to the mortgaged premises is unanswered; however, as to a short term mortgage, this difficulty might be avoided by providing for a fair rental value which is to be applied against the principal and interest of the mortgage debt. Futhermore, it appears that although the leasing clause creates a nominal relationship of landlord and tenant between the trustee and mortgagor for purposes of the unlawful detainer suit, there is no practical basis upon which to predicate landlord tort liability.

LARRY D. DINGUS

17. PROSSER, TORTS § 80 (2d ed. 1955).

18. This Comment is confined to Missouri cases; extensive, not exhaustive research has failed to disclose the use of a one cent leasing clause in other jurisdictions in connection with the realty mortgage or deed of trust.

RESTRAINTS ON LABOR AND CORPORATE EXPENDITURES IN FEDERAL ELECTIONS

History of Section 610, Title 18 U.S.C.[1]

In recent times numerous political leaders and theorists have expressed concern regarding the amount of money expended by individuals and organizations for the purpose of influencing federal election results. Elihu Root expressed the desirability of restricting the use of aggregated wealth to elect congressmen.[2] In his 1906 annual message to Congress, Theodore Roosevelt recommended legislation to prohibit corporations from contributing money for political purposes.[3] Congress responded in 1907 with an act[4] which prohibited national banks and corporations from making a "money contribution in connection with" a federal election. This act was held constitutional in *United States v. United States Brewers' Ass'n*,[5] but in practice it was not effective to prevent the evils which prompted its passage. Subsequently legislation was enacted requiring publication of contributions[6] and in 1918 it was made unlawful to either offer or solicit anything of value to influence voting.[7]

In an attempt to increase the effectiveness of this policy the *Federal Corrupt Practices Act*[8] was enacted in 1925, which made substantial changes in the 1907 act.[9] Political contributions by federal civil service workers are now restricted by the same type of legislation.[10] To counteract the effect of strikes during World War II, the *War Labor Diputes Act*[11] was passed, bringing labor unions under control of the *Federal Corrupt Practices Act* for the duration of the war.

The last major change in this area was section 304 of the *Labor Management Relations Act* (Taft-Hartley Act)[12] which amended the *Federal Corrupt Practices Act*, to include labor unions and added the word "expenditure" to supplement "contribution." This is the position of section 610 today.

Judicial Treatment of Section 610

Problems in judicial interpretation of section 610 seem to center around two questions which cannot be answered by a mere reading of the statute: (1) What acts are encompassed within the meaning of the words "contribution" and "expen-

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1. The act prohibits any corporation or labor union from making a contribution or expenditure in connection with a federal election.
2. Root, Addresses of Government and Citizenship 143 (Bacon & Scott ed. 1916).
3. 41 Cong. Rec. 22 (1906).
4. 34 Stat. 864 (1907).
5. 239 Fed. 163 (W.D. Pa. 1916).
6. 36 Stat. 822 (1910); 37 Stat. 25 (1911).
7. 40 Stat. 1013 (1918).
8. 43 Stat. 1070 (1925), 2 U.S.C. §§ 241-56 (1925).
9. One of the most important changes was the elimination of the word "money", so that any "contribution in connection with" a federal election was prohibited.
10. Hatch Political Activity Act, 62 Stat. 720, 18 U.S.C. § 595 (1948).
11. 57 Stat. 163 (1943).
12. 61 Stat. 136 (1947), 29 U.S.C. § 141 (1952).

diture"? (2) What is the scope of the phrase "in connection with"? Although the cases do not afford a complete answer to these questions, some insight as to the problems of construction presented may be gained by their examination.

The statute in its initial form[13] first came to the attention of the courts in *United States v. United States Brewers' Ass'n.*[14] Defendants were indicted for conspiring[15] to make money contributions in connection with a congressional election.[16] Motions to quash the indictments were denied, and demurrers to the indictments were overruled. The court was of the opinion that Congress had kept within its constitutional powers in enacting the statute and that the indictments stated sufficient facts to constitute a statutory offense. The court stated that Congress had the vested constitutional power to provide laws to regulate federal elections; that the words "money contributions" were not vague and uncertain but, that their meaning was plain, and their purpose as used in the act unmistakable;[17] and that the statute neither prevented, nor purported to prohibit, the freedoms of speech or press.

It was not until 1948 that the courts were again confronted with a case under the statute, then section 313 of the *Federal Corrupt Practices Act* of 1925,[18] as amended by section 304 of the *Labor Management Relations Act* of 1947.[19] In *United States v. CIO,*[20] the CIO and its president, Philip Murray, were indicted for making expenditures in connection with a special election to elect a representative to Congress from the Third Congressional District for the State of Maryland. An editorial written by Murray, favoring one candidate and opposing another, was published in *The CIO News,* the union newspaper, and distributed throughout the Third Congressional District. The editorial stated that its publication was made, despite the statute, in the belief that the section was an unconstitutional restraint of rights guaranteed by the first amendment. The defendants moved to dismiss the indictment, relying on this same contention. The district court dismissed the indictment on the grounds that the statute was unconstitutional saying:

> The statute contains no exemption or exclusion eliminating from its prohibitions those activties which the Bill of Rights protects. . . . It is plain that Congress by this statutory provision denounced as unlawful acts which would otherwise be entirely innocent in nature. . . . Judged by its plain terms, the statute on its face fails to survive the constitutional test.[21]

The Supreme Court held in an opinion by Mr. Justice Reed that the indictment failed to allege an offense under the statute, stating:

> If § 313 were construed to prohibit the publication, by corporations and

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13. 34 Stat. 864 (1907).
14. 239 Fed. 163 (W.D. Pa. 1916).
15. 35 Stat. 1096 (1909).
16. 34 Stat. 864 (1907).
17. The prohibition was extended to expenditures by 61 Stat. 159 (1947).
18. 43 Stat. 1070 (1925).
19. 61 Stat. 159 (1947).
20. 335 U.S. 106 (1948).
21. United States v. CIO, 77 F. Supp. 355, 357 (D.D.C. 1948).

> unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality. . . . We are unwilling to say that Congress by its prohibition against corporations or labor organizations making an "expenditure in connection with any election" of candidates for federal office intended to outlaw such a publication. We do not think § 313 reaches such a use of corporate or labor organization funds.[22]

Thus, the Court did not reach the constitutional issues. Mr. Justice Frankfurter, concurring, emphasized his conviction that a proper case had not been presented for a consideration of the constitutionality of the act.[23] Mr. Justice Rutledge, joined by three other members of the Court, wrote a concurring opinion assailing the constitutional validity of the statute.[24] The statute was next considered in *United States v. Painters Local* 481.[25] The union and its president were convicted for expending union funds (totaling $143.64) for newspaper and radio publicity attacking Senator Robert A. Taft and six incumbent congressmen. On appeal defendants did not deny that the statute, if valid, had been violated, but contended that it was an unconstitutional violation of the first, fifth, sixth, ninth and tenth amendments. The court of appeals felt that case was similar to the *CIO* case and held the the statute did not cover publications effected by the appellants. In referring to the *CIO* case the court stated:

> While Mr. Justice Reed, who wrote the opinion in that case, laid some stress upon the fact that the publication was by the union itself and reached a somewhat limited class of readers, he nowhere said that a publication in an ordinary newspaper paid for out of the funds of a union would not also be outside of the coverage of the Act. . . . In a practical sense the situations are very similar, for in the case at bar this small union owned no newspaper and a publication in the daily press or by radio was as natural a way of communicating its views to its members as by a newspaper of its own. . . .[26]

Thus, the rationale of the *CIO* case, which created an exception to the broad scope of section 610, was extended to include the situation where a union had no effective communications media of its own.

The *CIO* case was again relied upon in *United States v. Construction Workers Local* 264.[27] The union, its president and secretary were indicted for violating section 610 in having expended funds of the union for contributions or expenditures in connection with a general election in which Irving, the union president, ran for the United States House of Representatives. The specific violations charged involved small expenditures for gasoline for and repairs to vehicles used in Irving's campaign, and

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22. 335 U.S. at 121, 123-24.
23. *Id.* at 124.
24. *Id.* at 129.
25. 172 F.2d 854 (2d Cir. 1949).
26. *Id.* at 856.
27. 101 F. Supp. 869 (W.D. Mo. 1951).

for the payment of three union employees for personal services.[28] Defendants contended that the evidence was not sufficient to sustain a verdict of guilty, and that the act was unconstitutional under the first, fifth, sixth, ninth, and tenth amendments. As to the allegedly unlawful expenditures for gasoline and repair of vehicles, the court found the evidence insufficient. It was noted that the employees paid for campaigning testified that part of their efforts had promoted Irving's political interests, but that some of their activities consisted of taking people to register and taking voters to the polls. The district court said:

> It seems difficult for me to believe that the Congress intended that its definition of "expenditure" should be construed by the court so narrowly as to apply in a case of this type. . . . I believe that the Congress did not intend its definition of "contributions" to apply under the circumstances as shown by the evidence, and thus it is not necessary to pass upon the constitutionality of the statute. . . . Conforming to the view expressed by the Supreme Court in the C.I.O. case, that the acts charged against these defendants . . . are not violative of the Act, the motion of defendants for a verdict of acquittal with respect to each of the counts will be and is hereby sustained.[29]

A great deal of emphasis was placed on the fact that at least part of the efforts of the employees were directed toward activities which were for the general benefit of all candidates. Another inroad was made, then, into the breadth of the general prohibition imposed by the statute. It appeared that the courts were well on their way to a construction of section 610, which would perhaps render unnecessary a decision as to the merits of the contentions of unconstitutionality.

The most recent case involving section 610 is *United States v. International Union* UAW.[30] The union was indicted for having violated section 610 by defraying the costs of certain commercial television broadcasts. It was charged that the broadcasts urged and endorsed the selection of certain persons as candidates for representatives and senator to the Congress, and included expressions of political advocacy intended by the defendant to influence the electorate and to affect the results of the election. The defendant moved to dismiss the indictment on the grounds that (1) it failed to state an offense under the statute, and (2) the provisions of the statute were unconstitutional. The district court dismissed the indictment on the ground that it did not allege a statutory offense. The court in so doing apparently felt that it was following the trend established in the latter three of the four above-mentioned cases. The Supreme Court of the United States held that the indictment did state an offense under the statute and remanded the case to the district court for trial.[31] Mr. Justice Frankfurter, speaking for five other members of the Court wrote the majority opinion emphasizing that:

> To deny that such activity, either on the part of a corporation or a

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28. One employee was paid $60.20, a second $59.00, and the third $200.00.

29. 101 F. Supp. at 875, 876, 877.

30. United States v. International Union, UAW, 352 U.S. 567 (1957).

31. Upon the subsequent trial of the case the jury returned a verdict of not guilty. N.Y. Times, No. 7, 1957, p. 1, col. 4.

> labor organization, constituted an "expenditure in connection with any [federal] election" is to deny the long series of congressional efforts calculated to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital.[32]

Although the factual situation was quite similar to that in *United States v. Painters Local 481* that case was ignored. Apparently the liberal construction of section 610, seemingly authorized by the *CIO* case, was not to be followed, and the Court's opinion in that case was to be confined to the facts therein. Mr. Justice Frankfurter distinguished the *CIO* case on the grounds that:

> *United States v. CIO* . . . presented a different situation. The decision in that case rested on the Court's reading of an indictment that charged defendants with having distributed only to union members or purchasers an issue . . . of "The CIO News" a weekly newspaper owned and published by the CIO. . . . The organization merely distributed its house organ to its own people.[33]

In remanding the case for trial Mr. Justice Frankfurter suggested several questions, at the same time denying that their purpose was to answer problems of statutory construction, and asserting that they were merely to indicate the covert issues which might be involved in the case:

> [W]as the broadcast paid for out of the general dues of the union membership or may the funds be fairly said to have been obtained on a voluntary basis? Did the broadcast reach the public at large or only those affiliated with the appellee? Did it constitute active electioneering or simply state the record of particular candidates on economic issues? Did the union sponsor the broadcast with the intent to affect the results of the election?[34]

Three members of the Court dissented in an opinion by Mr. Justice Douglas expressing the view that the statute was unconstitutional:

> The Act as construed and applied, is a broadside assault on the freedom of political expression guaranteed by the First Amendment.[35]

These, then, are the five cases in which the statute has been involved. Although efforts have been made to test the constitutionality of the act, they have not thus far proved to be successful. Many doubts, seemingly justified, remain as to the scope, meaning and applicability of section 610.

Constitutionality of Section 610 Under the First Ammendment

In each of the five cases in which a consideration of section 610 or its forerunners has been concerned the contention has been made that the statute is unconstitutional on the ground, among others, that it is violative of the first amendment. This argument is based on the proposition that the effective exercises of

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32. 352 U.S. at 585.
33. *Id.* at 588-89.
34. *Id.* at 592.
35. *Id.* at 598 (dissenting opinion).

these freedoms and rights by corporations and labor unions in political activities necessarily involves the expenditure or contribution of sums of money. It is asserted that the utilization of modern day communications media, which of course involves expenditures or contributions, is essential to any real enjoyment of these freedoms and rights in this area.[36] Of course, the first amendment does not in express terms guarantee the freedom to expend or contribute; however, if such freedoms are necessary to the exercise of the freedoms that are guaranteed, it would seem to follow that they should be afforded the same protection. If so, then a prohibition of expenditures and contributions in connection with federal elections would seem to be a prohibition of freedoms and rights inferentially guaranteed by the first amendment and deserving of its protection. On its face the statute bars all expenditures and contributions by corporations and labor organizations in connection with federal elections, and if given a strict interpretation would seem to be an outright abolition of political expression as far as these groups are concerned. However, as noted in the examination of the cases, the statute has not always been so construed and applied, and its effect has been rendered something less than an absolute prohibition of political expression by the groups concerned.

It seems well recognized that first amendment freedoms and rights are not absolute, and that some restrictions or limitations may be placed on their exercise.[37] This question of permissible restriction has most often been answered by application of the clear and present danger test, formulated by Mr. Justice Holmes in *Schenck v. United States*.[38] "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. . . ."[39] The rule was applied in many subsequent cases, and its development is summarized in *Dennis v. United States*.[40] As noted in the *Dennis* case, the courts have in some cases involving the first amendment declined to use the test.[41] The trend in more recent times has been to apply the test, and to apply it without distinction between statutes making certain acts unlawful (the evidence to support the conviction being speech) and statutes making the speech itself a crime. While it is possible that the courts might not base a decision as to the constitutionality of section 610 on the clear and present danger test, in view of the trend toward its application observed in the *Dennis* case, this consideration of the constitutionality of the statute is for the most part concerned with the effect of applying the test. In the *Dennis* case a new expression of the rule was adopted:

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36. United States v. International Union, UAW, *supra* note 32, at 594 (dissenting opinion). See Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 252, 69 N.E.2d 115, 130, (1946).

37. Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925).

38. 249 U.S. 47 (1919).

39. *Id.* at 52.

40. 341 U.S. 494 (1951).

41. Foremost among these cases were Whitney v. California and Gitlow v. New York, *supra* note 37.

> Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 183 F.2d at 212. We adopt this statement of the rule. . . .[42]

Although it is recognized as a general rule that there is a presumption of constitutionality, there is authority for the proposition that such presumption does not apply in cases involving a statute which appears to infringe upon first amendment freedoms and rights.[43] Therefore, where the clear and present danger test is the measure of constitutionality, as opposed to the reasonableness test often used in cases involving statutes having no bearing upon the first amendment, it would appear that the preferred place occupied by the first amendment strikes a balance and puts the parties on equal footing insofar as any burden of showing constitutionality or unconstitutionality is concerned.

Restrictions or limitations imposed by a statute upon freedom of speech and press and the right to assemble and petition are not unconstitutional abridgements in violation of the first amendment if they are justified by a clear and present danger. The constitutionality of section 610 would depend, should the courts apply the test, upon whether a clear and present danger exists to justify the restrictions and limitations which it imposes. The test by its nature does not lend itself to abstract application, but is designed for use in reference to the facts of a particular case. If expenditures or contributions made by a given corporation or labor organization in connection with a federal election were of such a nature as to adversely affect our federal electoral process, there would be little room for doubt that the gravity of the evil would be sufficient to meet the test. However, the breadth of the statute makes possible a technical violation under facts where no grave and serious evil exists. The statute seems to have as its premise the supposition that the expenditure or contribution of money is inherently evil. In a fact situation where the expenditure or contribution is made in good faith and without evil design, although the statute would still apparently be violated, there would be no grave evil to justify its infringement upon first amendment freedoms and rights. Again, in the second part of the test, which requires a discounting of the weight given the gravity of the evil in proportion to the improbability of its occurrence, the test must be applied to the facts of the particular case. In the abstract it might be said that it is unlikely, in view of the historical background which prompted Congress to enact the statute, that the improbability of the occurrence or existence of the evil would prove a sufficient discount to cause the statute to fail to meet this part of the test. Here too, in the circumstances of a particular case, the broad scope of section 610 might well bring within its purview contributions or expenditures of such nature that they would render highly improbable the oc-

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42. 341 U.S. at 510.

43. United States v. CIO, 335 U.S. 106, 144 (1948) (concurring opinion); Thomas v. Collins, 323 U.S. 516, 529-30 (1945); Lovell v. Griffin, 303 U.S. 444, 452 (1938); Stromberg v. California, 283 U.S. 359, 369-70 (1931).

currence of the evils sought to be curbed, but which would be at least a technical violation of the act. Perhaps an application of the last part of the test gives rise to the most serious doubts as to whether section 610 would meet the clear and present danger test. Assuming that the evil sought to be prohibited is found to exist in the facts of a particular case, it remains to be determined whether the evil "justifies *such invasion* of free speech *as is necessary* to avoid the danger. . . ." (Emphasis added.) In this connection the statute's greatest weakness would seem to be that it goes beyond that which is necessary to avoid the danger, and instead of being confined to corrupt practices, encompasses activity which is not objectionable and should be protected by the first amendment. In dealing with the abuse or evil the statute must not at the same time unnecessarily curtail first amendment rights.[44] The statute must be narrowly drawn to prohibit the specific evil.[45] The view has been expressed that section 610 in dealing with the evil of corrupt practices unnecessarily curtails first amendment rights, that the statute is not narrowly drawn, but that its scope is unconstitutionally broad and sweeping.[46]

On the other hand those who would support the constitutionality of section 610 have emphasized that its effect has been to impose only a very narrow restriction upon the participation of corporations and labor organizations in the area of free political expression and association. In this connection it has been pointed out that the act is not applicable to individual members or stockholders, and that they may still engage in political activity on behalf of the group, subject to restriction only by other sections of the *Federal Corrupt Practices Act*.[47] This would seem to ignore or deny the existence of any rights on the part of corporations and labor organizations to protection under the first amendment in the area of free political expression and association.[48] It has been asserted that the exercise of individual rights and freedoms in this area is no substitute for the exercise of group rights and freedoms.[49]

Another argument urging the vailidity of section 610, which seems to be supported by dictum in the *CIO* and *International Union* cases is that the statute merely prohibits corporations and labor organizations from making unlimited expenditures or

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44. De Jonge v. Oregon, 299 U. S. 353, 364-65 (1937).

45. Cantwell v. Connecticut, 310 U.S. 296, 311 (1940).

46. United States v. International Union, UAW, 352 U.S. 567 (1957) (dissenting opinion), United States v. CIO, *supra* note 43, at 146 (concurring opinion).

47. One such restriction upon individuals is the $5,000 maximum imposed by 62 Stat. 723 (1948).

48. Organizations were said to be entitled to protection of the first amendment in United States v. Construction Local 264, 101 F. Supp. 869 (W.D. Mo. 1951). See also Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941); and Grosjean v. American Press Co., 297 U.S. 233 (1936), holding that freedom of press was guaranteed to corporation by the fourteenth amendment. The right of individuals to form organizations to engage in political activity is protected as a part of the freedom to assemble guaranteed by the first amendment. Hague v. CIO, 307 U.S. 496 (1939), De Jonge v. Oregon, *supra* note 44.

49. United States v. CIO, 335 U.S. 106, 143 (1948) (concurring opinion), Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 252, 69 N.E.2d 115, 130 (1946).

contributions from their general funds, and that these groups are not restricted or limited in so using funds which have been built up from the voluntary donations of members or stockholders. However there is no clear cut decision by the courts that section 610 is applicable only to situations where the source for expenditures and contributions is general funds, and that the statute is not applicable where the source is donations. It must be admitted that this construction is in keeping with the alleged purposes of the act. It has been observed that the statute is intended to reduce disproportionate influence upon federal elections, to preserve the purity of such elections, and to protect that minority of members of labor organizations and stockholders in corporations who must share the expense of expenditures and contributions, but who do not share the political views of the majority who direct such expenditures and contributions.[50] Weight is added to this argument by pointing to the fact that the Taft-Hartley Act sanctions the union shop,[51] thereby giving the unions greater control over the labor force, and making it necessary in many cases for one to become a union member in order to work. The conclusion suggested is that since the government, through the Taft-Hartley Act, has placed the individual in this situation, the government should afford him protection. This argument, of course, is inapplicable in the case of corporate stockholders, their status as such being a matter of their own choosing. The whole minority rights argument has less force in the case of corporations. The greatest weakness of the protection of minority rights argument would seem to be the failure to recognize that by and large corporations and labor organizations are governed by the basic democratic concept of majority rule. The argument that the rights of the many should be forfeited in order that the rights of the few might be proteced seems foreign to a democratic system of government. In the words of Mr. Justice Douglas in the *International Union* case, the protection of minority rights argument in support of section 610 would seem to be an argument for "burning down the house to roast the pig".

In support of the constitutionality of section 610 it has also been suggested that the statute imposes no prohibition or restriction upon the establishment of parallel organizations in which membership would be voluntary. The definition of "labor organizations" in section 610 puts such parallel organizations outside the scope of the act.[52] Since such organizations are not within the statute, its objectives may be thwarted by their establishment. It is quite possible that such organizations would spend as much or more money, in the same manner, and for the promotion of the same interests as would the corporation or labor organization in support of

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50. United States v. CIO, *supra* note 46.

51. The "closed shop" has been prohibited by the Taft-Hartley Act, 61 Stat. 140 (1947), but the "union shop" is permitted.

52. The term "parallel organizations" has reference to such groups as CIO-PAC and the Committee of Political Education (COPE, AFL-CIO). "Labor organization" is defined by section 610 as any organization which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Since these parallel organizations would not exist for that purpose, they would not come within the statute.

which they are organized. On its face the statute prohibits all expenditures or contributions in connection with federal elections regardless of the intent with which they are made, and without any determination necessary as to whether they are such that would in fact constitute corrupt practices. Legitimate, good faith expenditures or contributions are just as culpable according to the words of the act as are expenditures or contributions which are made for an ulterior or evil purpose. Unobjectionable expenditures or contributions by corporations and labor organizations apparently could be punished under section 610 while objectionable expenditures or contributions made by parallel organizations could be made with immunity.

As pointed out above the clear and present danger test, as set out in the *Dennis* case, is satisfied by answering the question of whether the gravity of the evil, as discounted, "justifies such invasion of free speech as is necessary to avoid the danger. . . ." It would appear that section 610 may be more of an invasion than is necessary, and that it not only curbs the evil, but also curtails first amendment rights and guarantees. The statute is not confined to eliminating the evil which may be found in expenditures and contributions for corrupt purposes, but extends to all expenditures whether they are in fact evil or not. To require that the statute be confined to correction of the abuse, and that it not curtail the constitutional rights concerned is not an unreasonable demand. Clearly Congress may act to reduce disproportionate influence upon federal elections, to preserve the purity of such elections, and to protect minority rights. However there are other methods of dealing with the abuse, which do not at the same time curtail the freedoms and rights guaranteed by the first amendment. Among these is the punishment of those who actually engage in corrupt practices and threaten the integrity of the electorial process by making expenditures and contributions in connection with fedral elections. Another method would be a provision for the prompt public disclosure of all expenditures and contributions in connection with federal elections. In order to protect minority rights without at the same time abolishing majority rights, it might be desirable to adopt the "contract in" or "contract out" system for raising funds for political activities, which has been used in England.[53] Since section 610 appears to unnecessarily include within its prohibitions freedoms and rights guaranteed by the first amendment, the contention that it is unconstitutionally broad and sweeping would seem to be of merit and demanding of serious consideration.

CONSTITUTIONALITY OF SECTION 610 UNDER THE FIFTH AND SIXTH AMMENDMENTS

The combination of the due process clause of the fifth amendment and the sixth amendment's provision that an accused shall be informed of the nature

53. Under the "contract in" system it is required that the member make a positive manifestation of his willingness to contribute. Under the "contract out" system it is assumed that the member is willing to contribute unless he manifests his reluctance. See Rothschild, Government Regulation of Trade Unions in Great Britain: II, 38 COL. L. REV. 1335, 1363 (1938).

of the offense charged, has come to be known as the "ascertainable standard of guilt" requirement.[54] The test for this doctrine was established in *Connally v. General Constr. Co.*[55] where the court stated:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. . . . And a statute which either forbids or requires the doing of an act in terms so vague that *men of common intelligence must necessarily guess at its meaning* and differ as to its application, violates the first essential of due process of law. (Emphasis added.)[56]

One of the requirements of a criminal statute under this doctrine is that it give guidance to the individual in planning his future conduct.[57] In view of this, one part of section 610 which could be reasonably questioned is "expenditure in connection with an election." This phrase could also create difficulty with the second requirement under this doctrine, which is that the statute must give guidance to those adjudicating the rights of the accused.[58]

In addition to these somewhat abstract requiremnts there are other factors that have been considered by the Court in determining whether a statute provides an "ascertainable standard of guilt." The following treatment of some of these is not meant to be exhaustive of all such considerations that have been or could be used by the Court.

If a statute is an apparent restraint upon civil liberties, the usual presumption of constitutionality may not exist.[59] Therefore section 610, which on its face appears to restrict freedom of speech, probably would not be extended this presumption since this freedom is assured to corporations and labor unions in addition to their protection under the due process clause of the fifth amendment.[60]

Another consideration is whether a practical degree of exactitude has been obtained by the legislature in relation to the subject matter of the statute.[61] The following points have been considered by the Court with regard to this problem. The degree of vagueness may be weighed against the social desirability of the legislative

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54. This doctrine was first mentioned in Lloyd v. Dollison, 194 U.S. 445 (1904), and clearly recognized in Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909). It was first used to invalidate a statute in International Harvester Co. v. Kentucky, 234 U.S. 216 (1914).

55. 269 U.S. 385 (1926).

56. *Id.* at 391.

57. *Ibid.*

58. United States v. Evans, 333 U.S. 483 (1948). No judicial determination will be made of a vague statute if to do so would be a legislative function.

59. Thornhill v. Alabama, 310 U.S. 88 (1940). If such a restraint is constitutional it has been held that it must be confined to precise acts. Stromberg v. California, 283 U.S. 359 (1931).

60. Thomas v. Collins, 323 U.S. 516 (1945); United States v. Construction Local 264, 101 F. Supp. 869 (W.D. Mo. 1951).

61. Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578 (1896).

policy.[62] Whether there are other more specific means available to the legislature has been considered in at least one case,[63] and the fact that attempts to comply with the statute would necessarily curtail socially desirable activity may be given some consideration.[64] However, it has been held that if the statutory standard of conduct is uncertain but of such a nature that it does give warning to those approaching the area of prohibition, then a person continuing toward this area must take the risk of violating the statute.[65]

Whatever difficulties there may be in determining whether section 610 is unconstitutionally vague and indefinite may be partically resolved by judicial interpretation. At present an indictment under section 610 would presumably require allegations that the effects of the expenditure extended beyond members of the corporation or labor union,[66] that it was not a "natural way" of communicating to members,[67] and that it was made with an intent to influence election results.[68]

Thus interpreted, these additional required elements tend to provide a more definite standard for future conduct. The necessity for an intent to influence election results, and not merely to publish political information to members, indicates that the statute must be knowingly violated. If so, then it could not be said that section 610 fails to give a warning.[69] Therefore, constitutionality under the fifth and sixth amendments would not appear to be an issue which would justify invalidation.

A brief consideration should be given to the ninth and tenth amendments, neither of which is likely to be given much weight in determining whether or not section 610 is constitutional. In view of the express power given to Congress under article I, section 4 to make or alter existing state regulations as to the manner of holding federal elections, it is difficult to imagine section 610 violates these two amendments.[70]

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62. United States v. Petrillo, 332 U.S. 1 (1947) (statute provided that an employer could not be forced to hire more than the "number of employees needed"; *held,* no better language could have been used); Miller v. Strahl, 239 U.S. 426 (1915) (statute required hotel operator to do all "within his power" to save guests after a fire in hotel; *held,* rules of conduct in this area must be general); Baltimore & Ohio R.R. v. ICC, 221 U.S. 612 (1911) (statute restricting employment to nine hours "except in case of emergency" held valid).

63. Winters v. New York, 333 U.S. 507 (1948) (statute prohibited transfer of publication containing to large degree criminal news or lust).

64. Champlin Ref. Co. v. Corporation Comm'n., 286 U.S. 210 (1932) (statute prohibited oil production in manner constituting "waste"), United States v. Cohen Grocery Co., 255 U.S. 81 (1921); Weeds v. United States, 225 U.S. 109 (1921) (statute made it unlawful to charge unjust or unreasonable rate for necessaries).

65. Boyce Motor Lines v. United States, 342 U.S. 337 (1952); United States v. Wurzback, 280 U.S. 396 (1930).

66. United States v. CIO, 335 U.S. 106 (1948).

67. United States v. Painters Local 481, 172 F.2d 854 (2d Cir. 1940).

68. United States v. International Union, UAW, 352 U.S. 567 (1957); Screws v. United States, 325 U.S. 91 (1945).

69. American Communications Ass'n. v. Douds, 339 U.S. 382 (1950); Screws v. United States, *supra* note 69.

70. United Pub. Workers v. Mitchell, 330 U.S. 75 (1946) (Hatch Act prohibiting certain political activity by federal employees held valid); United States v. Classic, 313 U.S. 299 (1941).

This position is further strengthened by the seventeenth amendment which has been held to give the federal government power to protect the electoral processes in senatorial elections.[71]

Conclusion

The all inclusive prohibitory wording of section 610 leads one to the conclusion that the statute, on its face, is unconstitutional in that it abridges freedoms and rights guaranteed by the first amendment and fails to provide an ascertainable standard of guilt as required by the fifth and sixth amendments. As indicated above, the Supreme Court of the United States has not to date handed down a decision on these consitutional issues, but has construed and applied section 610 so as to render such a determination unnecessary. Thus, while the statute standing alone may be manifestly susceptible to constitutional objection, it may, nevertheless, be constitutional in view of its construction and application by the Court. Although a narrow construction of the act was indicated by the earlier decided cases, the Court has not chosen to follow that trend in its recent decision in the *International Union* case. A narrow construction of section 610 seems to remove many of the constitutional objections apparent from the face of the statute, while a liberal construction would seem to emphasize these objections. If the Court's future construction of section 610 is as liberal as that made in the *International Union* case, then a decision on the constitutionality of the act would probably be necessary and the Court might well decide that the section is unconstitutional. However, should the court revert to the narrow construction made in the *CIO* case, it might hold (1) that a decision as to constitutionality is unnecessary; or (2) that the act is constitutional as applied.

John E. Burruss, Jr.
Charles B. Erickson

SENTENCES FOR CONVICTIONS UNDER THE FEDERAL BANK ROBBERY ACT—A PROBLEM IN STATUTORY CONSTRUCTION[1]

The Federal Bank Robbery Act[2] defines several crimes against banks which are members of the Federal Reserve System, or organized or operating under the laws of the United States, or the deposits of which are insured by the Federal De-

71. United States v. Aczel, 219 Fed. 917 (D.C. Ind. 1915).

1. The final participants in the Law School annual moot case competition ("Junior Case Club") were presented with a problem of construction and interpretation of the Federal Bank Robbery Act, 18 U.S.C. § 2113 (1952). The case was presented on April 26, 1958, as a Law Day activity before a distinguished bench consisting of Cullen Coil, Commissioner, Missouri Supreme Court; Marshall Craig, Judge for the 28th Mo. judicial circuit; William Kimberlin, Judge for the 17th Mo. judicial circuit. This Comment is a result of the research done by the following student participants: David A. Eggers, Donald L. Dickerson, William W. Quigg and Larry L. McMullen.

2. 62 Stat. 796 (1950), as amended, 18 U.S.C. § 2113 (1952). Bank robbery and incidental crimes

posit Insurance Corporation. Subsection (a) defines in the first paragraph the offense of bank robbery, and in the second paragraph defines an entry offense in the nature of burglary. Departing from the common law requirements of breaking and entering in the night time, this entry offense is complete upon proof of an entry with intent to commit any felony or larceny. The third paragraph of subsection (a) provides that whoever shall be convicted of the previously defined robbery "or" entry shall be subject to a maximum sentence of twenty years imprisonment. Subsection (b) defines in the first paragraph the offense of larceny of over $100 in value, and provides a maximum sentence of ten years imprisonment. The second paragraph de-

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(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "savings and loan association" means any Federal savings and loan association and any savings and loan association the accounts of which are insured by the Federal Savings and Loan Insurance Corporation. June 25, 1948, c. 645, 62 Stat. 796, amended Aug. 3, 1950, c. 516, 64 Stat. 394.

fines the offense of larceny of under $100 in value, and provides a maximum sentence of one year imprisonment. Subsections (d) and (e) increase the maximum sentence for aggravated forms of the offenses defined in (a) and (b).

The problem presented by considering subsections (a) and (b) as a whole is whether the offenses of robbery, entry, and larceny are separate crimes and so subject to maximum consecutive sentences for each offense, even though the crimes result from one continuous transaction. An affirmative answer to this question would allow the court to impose a twenty year sentence for the entry with intent to commit an offense and if this intent were consummated in a robbery, the court could impose an additional consecutive twenty year sentence. Or if the intent were consummated in a larceny, the court could impose in addition to the twenty years for the entry, a consecutive sentence for the larceny of ten years or one year, depending on the value involved. It may be argued that this is the conclusion to be drawn from a literal interpretation of the statute, but as might be expected the act has not always been so interpreted. The purpose of this Comment is to indicate the several views which have been advanced in regard to maximum sentences under the act and to recognize the interpretations which have been accepted by the federal courts.

Of course, any correct interpretation of the sentences allowed under the Bank Robbery Act must be grounded on the intent of the enacting Congress. The legislative history of this act fails to indicate what the intent of Congress was in regard to maximum sentences for the several offenses defined, and so the courts have presumed this intent from the circumstances surrounding the enactment of the Bank Robbery Act and the subsequent amendments.

Prior to 1934, robbery, burglary, and larceny of banks were offenses only under the state laws. The widespread activity of interstate gangsters prompted legislation making these crimes federal offenses when committed against banks operating under the laws of the United States.[3] However, as finally passed, the legislation included only the offense of bank robbery, imposing a maximum sentence of twenty years imprisonment.[4] In 1937, the Attorney General of the United States pointed out that unless the offense was accompanied by force or intimidation, no federal offense had been committed, and he asked that Congress include burglary and larceny in the Bank Robbery Act.[5] Accordingly, the act was amended to include these offenses,[6] and was re-enacted in 1948 in its present form.[7]

Whatever disagreement there once may have been,[8] it is now well settled that the robbery, entry and larceny offenses under subsections (a) and (b), and the aggravated forms of these offenses defined in subsections (d) and (e) constitute

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3. 78 CONG. REC. 5738 (1934).
4. 48 Stat. 783 (1934).
5. S. REP. No. 1259, 75th Cong., 1st Sess. 1 (1937).
6. 50 Stat. 749 (1937).
7. Quoted *supra* note 2.
8. United States v. Harris, 26 F. Supp. 788 (S.D. Cal. 1939).

only one offense for which only one sentence may be imposed.[9] Thus, an accused cannot be sentenced to twenty years for simple robbery under (a), and to a consecutive sentence of twenty-five years for robbery by assault with a dangerous weapon as defined under (d) of the act.

The present problem is not so easy to solve. Is the entry offense defined in subsection (a) only a different stage of a subsequent robbery or larceny offense and so only a lesser included part of one of those offenses when consummated? If so, then the entry with intent offense is not subject to a separate consecutive sentence when the intent has been carried out, but only the consummated act of robbery or larceny is subject to sentence. By this interpretation the robbery, entry and larceny provisions of the act define only *one* offense and thus the felonious entry may be punished *only* when it is frustrated before consummation into a completed robbery or larceny. This view has been adopted by the federal courts in *Simunov v. United States,*[10] *Madigan v. Wells,*[11] and *Barkdoll v. United States.*[12] While these opinions do little to explain their acceptance of the "one offense" view, such a result may be argued on several grounds. To conclude that Congress intended to define only one offense, two of the cases relied heavily on the fact that the aggravations defined in the act have been held not to be separate offenses. It may be further argued that under the act, Congress intended for the entry offense to cover *only* the possibility of frustrated intent and was content to rely on the punishment prescribed for robbery and larceny when that intent was consummated.

The weight of authority in the federal courts has rejected this argument and holds that the entry offense is a separate crime, not affected by any other offense under the act that might arise out of the same transaction.[13] By this view the entry offense may be punished by a consecutive sentence in addition to that imposed for the completed robbery or larceny. The cases supporting this view have found the entry offense a separate crime, while agreeing with settled authority that the aggravated forms of robbery and larceny described by the act are not offenses separate from the simple robbery and larceny defined by the act.[14] The conclusion that the entry offense is a separate crime under the act may be supported by several arguments. It is recognized that a statute may create separate and distinct offenses arising from one continuous transaction, even if one criminal intent inspired the entire transaction. Whether a continuous transaction constitutes two separate offenses is determined by whether each offense requires proof or facts additional to

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9. Remine v. United States, 161 F.2d 1020 (6th Cir.) *cert. denied,* 331 U.S. 862 (1947); Hewitt v. United States, 110 F.2d 1 (8th Cir.) *cert. denied,* 310 U.S. 641 (1940).
10. 162 F.2d 314 (6th Cir. 1947).
11. 224 F.2d 577 (9th Cir. 1955) (dictum).
12. 147 F.2d 617 (9th Cir. 1945) (dictum).
13. McNealy v. United States, 164 F.2d 600 (5th Cir. 1947), *cert. denied,* 333 U.S. 848 (1948); Rawls v. United States, 162 F.2d 798 (10th Cir.), *cert. denied,* 332 U.S. 781 (1947); Wells v. United States, 124 F.2d 334 (5th Cir. 1941), *cert. denied,* 316 U.S. 661 (1944); Durrett v. United States, 107 F.2d 438 (5th Cir. 1939).
14. Durrett v. United States, *supra* note 13.

those involved in the other.[15] These principles were applied to interpret the Federal Bank Robbery Act in *Rawls v. United States*.[16] After finding that proof of larceny and proof of the entry offense under the act would require different evidence, the court concluded that the offenses were separate and affirmed the consecutive sentences.

The view that the entry offense is a separate one, separately punishable, may be supported by reference to the law of burglary. The entry provision of the act defines the offense of burglary excepting the common law elements of breaking and entering in the night-time. The courts have recognized that the entry offense is one in the nature of burglary.[17] When a burglar carries out his felonious intent, it may be held that he has completed two crimes which are separately punishable,[18] or the court may take a more "humane" view[19] and punish the defendant for either the burglary or the following felony, at the prosecutor's choice, but not for both.[20] Either way, the burglary is held to be a separate offense, complete after entry with the requisite intent, and without regard to any felony following the entry. Finally, in support of the "separate offense" view, it may be argued that Congress intended for the entry provision to cover not only the situation of frustrated intent, but also the case where the defendent entered with felonious intent and was successful in carrying it out. Thus two offenses would be committed, the entry and the felony following the entry, just as in the case of common law burglary. By this analysis, it may be assumed that the motive of Congress in the entry provision was similar to that which underlies all burglary statutes, *viz.* to deter would-be robbers and thieves.

Such were the authorities and arguments at the time *Prince v. United States*[21] reached the Supreme Court. This case was taken by that court for the express purpose of resolving the conflict between the circuits. The defendant entered a bank through an open door during regular banking hours and consummated a robbery with a revolver. He was indicted and tried on two counts, the first charging robbery, and the second charging entry of the bank with intent to commit a felony. He was convicted on both counts and sentenced to twenty years on the first and fifteen years on the second count, the sentences to be served consecutively. Some years later he filed a "motion to Vacate or Correct Illegal Sentence." Mr. Chief Justice Warren's opinion states: "Whether the crime of entering a bank with intent to commit a robbery is *merged* with the crime of robbery when the latter is consummated has

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15. Blockburger v. United States, 284 U.S. 299 (1932); Morgan v. Devine, 237 U.S. 632 (1915); Carpenter v. Hudspeth, 112 F.2d 126 (10th Cir.), *cert. denied*, 311 U.S. 682 (1940); 22 C.J.S. *Criminal Law* § 9 (1940).

16. 162 F.2d 798 (10th Cir.), *cert. denied*, 332 U.S. 781 (1947).

17. Jerome v. United States, 318 U.S. 101, 106 (1943); Purdom v. United States, 249 F.2d 822, 825 (10th Cir. 1957), *cert. denied*, 355 U.S. 913 (1958); Rawls v. United States, *supra* note 16, at 799.

18. Williams v. State, 205 Md. 470, 109 A.2d 89 (1954); State v. Byra, 128 N.J.L. 429, 26 A.2d 702 (Sup. Ct. 1942); 1 BISHOP, CRIMINAL LAW § 1062 (9th ed. 1923).

19. 1 BISHOP, *op. cit. supra* note 18, at §§ 1063, 1064.

20. Commonwealth v. Smith, 123 Pa. Super. 113, 186 Atl. 810 (1936).

21. 352 U.S. 322 (1957).

puzzled the courts for several years. . . . We granted certiorari because of the recurrence of the question and to resolve the conflict."[22] (Emphasis added.) After a brief resumé of the history of the Bank Robbery Act, the Court stated that it is a fair inference from the language used by Congress:

> that the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of commiting a crime, but is frustrated for some reason before completing the crime. The gravamen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather the heart of the crime is the intent to steal. This mental element *merges* into the completed crime if the robbery is consummated.[23] (Emphasis added.)

Thus, the Court stated the question to be decided in terms of *merger,* and ruled that the gravamen of the entry offense is the *intent* which *merges* into the completed crime when a robbery is consummated. Hence the accused could be sentenced to no more than twenty years. From this it would be reasonable to conclude that a violation of the entry part of subsection (a) of the statute merges with a larceny violation of subsection (b) whenever both occur in one transaction, but such does not seem to be the law.

In *Purdom v. United States,*[24] the defendant was convicted under an information charging, in different counts, (1) the entry of an insured bank with the intent to commit larceny therein and (2) stealing $591.95 belonging to the bank. He was sentenced to twenty years imprisonment on count (1) and to ten years on count (2), the sentences to run consecutively. On May 8, 1957, after the *Prince* decision was rendered, he filed a motion to vacate and set aside the sentence imposed on count (1), on the ground that he was subject to imprisonment on both counts for not more than ten years. The trial court set aside the sentence on count (2), but retained the sentence of twenty years on count (1).

Purdom appealed, apparently placing his reliance on the *Prince* case, but the Tenth Circuit did not agree with the prisoner's interpretation. After first pointing out that the Supreme Court was not relying upon the common law doctrine of merger in reducing the sentence of Prince, the court stated that the Supreme Court was only seeking to ascertain the intent of Congress with respect to the punishment that might be imposed in case there was both an entry and a robbery offense, and that the instant problem was the same. The court then mentioned no more of merger but rested the decision on the supposed intent of Congress that *one who commits the entry offense along with another violation of the statute can be convicted and sentenced for both violations, but the total sentence may not exceed the maximum which could be imposed for one of the offenses standing alone.* In other words, the law,

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22. *Id.* at 324-25.
23. *Id.* at 328.
24. 249 F.2d 822 (10th Cir. 1957), *cert. denied,* 355 U.S. 913 (1958).

as laid down by the *Purdom* case, and subsequently followed in other decisions,[25] seems to be settled that the *Prince* case stands only for proposition that there can be no pyramiding of penalties, even though the entry provision of the statute establishes an offense separate from all the others and one which does not merge with the others. If this is true, the merger language of the Supreme Court in *Prince* meant nothing and is pure dictum, and the *Prince* case decided under a writ of certiorari "to resolve the conflict" resulted in something less than that.

The solution of the *Purdom* case is particularly interesting for its evasion of the merger language used by Mr. Chief Justice Warren in the *Prince* case. In *Purdom* the court is able to follow the majority federal court view that the offenses of robbery, entry, and larceny under the act are separate crimes and so subject to separate consecutive sentences. The *Purdom* case decides that all Mr. Chief Justice Warren meant to say in the *Prince* case was that the total sentence imposed for these separate crimes could not exceed the maximum allowed for any one of these crimes. This interpretation is obviously very different than one to the effect that the entry merges into the consummated act. The *Purdom* case and subsequent courts of appeal decisions following *Purdom*[26] have served to explain Mr. Chief Justice Warren's opinion in the *Prince* case. The *Purdom* case would appear to be the law.[27]

DAVID A. EGGERS
LARRY L. MCMULLEN

TESTIMONY BY HUSBAND AND WIFE IN MISSOURI

The United States Supreme Court in the recent case of *Hawkins v. United States*[1] had the occasion to reaffirm the doctrine allowing a defendant spouse to prevent the other from giving adverse testimony in a criminal action. The case involved testimony by defendant's wife who had been imprisoned as a material witness and released on $3,000 bond conditioned on her being a witness for the United States. The testimony did not appear to be either adverse in and of itself,[2] or to involve confidential communications. Yet these factors were held not to be enough, in the light of "reason and experience," to modify the exclusionary rule.

While this Comment discusses Missouri law, the *Hawkins* case serves to illustrate the reluctance of American courts, including those of Missouri, to permit one spouse

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25. United States v. Williamson, 255 F.2d 512 (5th Cir. 1958); La Duke v. United States, 253 F.2d 387 (8th Cir. 1958). *But cf.* United States v. White, 156 F. Supp. 37, 38 (E.D. Va. 1957); State v. Holloman, —N.C.—, 102 S.E.2d 873, 882 (1958).

26. *Ibid.*

27. Annot., 59 A.L.R.2d 946 (1958) for a thorough study of the *Prince* case and the Federal Bank Robbery Act and all of their ramifications.

1. 358 U.S. 74 (1958) (Mann Act violation).

2. The testimony of the wife was largely to the effect that she was a prostitute before and after marrying the defendant.

to testify against the other. The great bulk of departures from this position have resulted from statutory enactments rather than judicial relaxation.

At early common law a party in interest was not permitted to testify because of the fear of perjury.[3] As a husband and wife were, in the eyes of the law, one person, then ipso facto the spouse of an interested party was also disqualified, in both civil and criminal cases.

Another common law rule prevented one spouse from giving testimony adverse to the other. This is the rule discussed in the *Hawkins* case. Whereas the "one-party" theory operated absolutely to disqualify the testimony of the non-party spouse, it appears that the "adverse testimony" rule was and still remains a privilege.[4]

The third rule developed at common law prevented, with certain exceptions, the divulgence by one spouse of confidential communications arising out of the marriage relationship.[5] This also was just a privilege.

These last two rules of exclusion were and are grounded on the desirability of protecting the marriage relationship from the disruptive effects of permitting one spouse to testify against the other. It may have been that when formulated, these rules did in fact serve the purpose for which they were created. However, at the present time it is considerably more difficult to justify their *raison d'etre* in certain instances.

A review of the early Missouri civil and criminal cases gives evidence of the use of the three exclusionary rules above noted. There were, however, some exceptions. For example, a party was allowed to testify if he was not the person for whose immediate benefit the action was brought.[6] In 1849 an interested party was made competent to testify by statute.[7] This ended the disqualification as to a spouse of an interested party.

Competency in Civil Actions

By statutory action in 1865 and 1874 a spouse was rendered competent to testify for or against the other with regard to businesss transactions conducted by the witness-spouse as agent for the other.[8] If both spouses were parties, then under the 1849 act (removing the interest disqualification) both were competent witnesses regardless of agency.[9] The same was true where the testifying spouse was the real

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3. 8 Wigmore, Evidence § 2227 (3d ed. 1940).
4. 2 & 8 *id.* §§ 601, 2227.
5. 8 *id.* § 2333.
6. McCullough v. McCullough, 31 Mo. 226 (1860). This was allowed even though the party was to receive some ultimate benefit.
7. Mo. Laws 1849, at 99, §§ 1, 2, now § 491.010, RSMo 1949.
8. § 5, at 587, G.S. Mo. 1866 (wife); Mo. Laws 1874, at 60, § 1 (husband).
9. Edmondson v. City of Moberly, 98 Mo. 523, 11 S.W. 990 (1889) (damage to real property seized by husband and wife); Bell v. Hannibal & St. J. R.R., 86 Mo. 599 (1885) (action by husband and wife for death of child); Berlin v. Berlin, 52 Mo. 151 (1873) (divorce).

party in interest although not a party to the suit.[10] But to qualify under the "real party in interest" exception, such an interest or right had to be one in property and not merely a personal right.[11] And if the interest was only collateral the non-party spouse was not a competent witness,[12] in the absence of the agency relationship.

The agency exception in the 1865 and 1874 acts resulted in considerable confusion. Some of the specific problems that arose were: (1) when did the agency relationship have to arise?[13] (2) what constituted an agent for this purpose?[14] and (3) who could prove that the relationship existed?[15] These problems did not arise where the husband was being sued for necessaries purchased by the wife as the marriage itself established the agency and there was no separate question as to its existence.[16] The testimony of the agent-spouse had to be confined to a suit based upon or connected with the business conducted as an agent.[17]

If the marriage relationship had been terminated by way of divorce then the ex-spouse was a competent witness.[18] The same was true where one spouse was dead, if the information had not been acquired by virtue of the marriage relationship.[19] However, even though the testifying spouse was an agent of the other or the marriage relationship had been terminated by divorce or death, the privilege of

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10. Quade v. Fisher, 63 Mo. 325 (1876); Owen v. Brockschmidt, 54 Mo. 285 (1873).

11. Joice v. Branson, 73 Mo. 28 (1880) (action by husband and wife for injury to wife).

12. Layson v. Cooper, 174 Mo. 211, 73 S.W. 472 (1903). *Compare* Landy v. Kansas City, 58 Mo. App. 141 (K.C. Ct. App. 1894) (husband's interest in wife's real property is collateral because curtesy abolished by statute), *with* Pace v. St. Louis S.W. Ry., 174 Mo. App. 227, 156 S.W. 746 (St. L. Ct. App. 1913) (husband cultivating wife's land was sufficient interest after curtesy was abolished).

13. Teckenbrock v. McLaughlin, 25 Mo. App. 524 (St. L. Ct. App. 1887) (if wife had been agent for transaction before marriage, she could testify).

14. Fishback v. Harrison, 137 Mo. App. 664, 119 S.W. 465 (K.C. Ct. App. 1909) (signing name not sufficient to create agency); First Nat'l Bank v. Wright, 104 Mo. App. 242, 78 S.W. 686 (St. L. Ct. App. 1904) (directing wife to write letter did not create agency).

15. A spouse was held competent to testify that he or she had authority to act as agent for the other. Leete v. State Bank, 115 Mo. 184, 21 S.W. 788 (1893). Early cases required some other evidence before there was "complete competency." William's Adm'r v. Williams, 67 Mo. 661 (1878). If one spouse was the real party in interest, he or she could testify that the other had been appointed as agent. Scrutchfield v. Sauter, 119 Mo. 615, 24 S.W. 137 (1893). Later cases appear to have allowed the agency to be established solely by the agent-spouse. Ingerham v. Weatherman, 79 Mo. App. 480 (K.C. Ct. App. 1899).

16. Reed v. Crissey, 63 Mo. App. 184 (K.C. Ct. App. 1895) (medical attention); McAllister v. Barnes, 35 Mo. App. 668 (St. L. Ct. App. 1889).

17. Flannery v. St. Louis I. M. & S. Ry., 44 Mo. App. 396 (St. L. Ct. App. 1891) (wife could not testify to value of goods purchased by her as agent for husband).

18. McCloskey v. Pultizer Publishing Co., 163 Mo. 22, 63 S.W. 99 (1901); Long v. Martin, 152 Mo. 668, 54 S.W. 473 (1899).

19. Sells v. Tootle, 160 Mo. 593, 61 S.W. 579 (1901); Stillwell v. Patton, 108 Mo. 352, 18 S.W. 1075 (1891).

confidential communications remained to exclude that type of testimony if the privilege was properly exercised.

In 1921 the agency exception was replaced by the present Missouri statute, which permits a husband and wife to testify for or against the other in civil cases except as to confidential communications.[20]

Competency in Criminal Cases

Statutes enacted in 1877 and 1879 (now appearing as § 546.260, RSMo 1949) provided that a criminal defendant was competent to testify in his own behalf although he could not be required to testify, and that the spouse of a defendant was not incompetent but could testify on behalf of the accused at the "option" of the accused. The confidental communication privilege is also set forth in this statute, which represents in substance the common law "adverse testimony" rule. The cases decided under this statute show less confusion than those under the old Missouri statutes applicable to civil cases, probably because it is more restrictive.

Even at early common law a wife could, over her huband's objection, testify against him where he was charged with a crime *against her.* A similar result is reached in Missouri.[21] It is interesting to note that in *State v. Kollenborn,*[22] a 1957 decision, it was held that a wife could voluntarily testify as to the husband's mistreatment of their child when the husband was being prosecuted for that offense. This result apparently proceeds from the theory that a criminal injury to a child is analogous to the same type of injury to the mother. If this be so, then it is not unreasonable to say that the same result should be reached if the parties in the above case were reversed.

Most of the cases in Missouri permitting a spouse to give adverse testimony over the defendant-spouse's objection involve bodily injuries inflicted by the defendant-spouse against the witness-spouse. This exception has also been extended to prosecutions for abandonment,[23] though not for disturbance of plaintiff-spouse's peace.[24] It might be socially desirable to apply this exception in cases of bigamy, but to date the Missouri courts have refused to take this step with regard to the lawful wife, although the unlawful wife is permitted to testify.[25]

It is generally reversible error to *compel* one spouse to testify against the other,

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20. § 491.020, RSMo 1949. Hughes v. Renshaw, 314 Mo. 95, 282 S.W. 1014 (1926); Witte v. Smith, 237 Mo. App. 639, 152 S.W.2d 661 (Spr. Ct. App. 1941).

21. State v. Pennington, 124 Mo. 388, 27 S.W. 1106 (1894). *But see* State v. Evans, 138 Mo. 116, 39 S.W. 462 (1897) (wife could not testify against husband as to his raping her before their marriage).

22. 304 S.W.2d 855 (Mo. 1957) (en banc).

23. State v. Bean, 104 Mo. App. 255, 78 S.W. 640 (St. L. Ct. App. 1904).

24. State v. Vaughan, 136 Mo. App. 645, 118 S.W. 1186 (K.C. Ct. App. 1909).

25. State v. Pinson, 291 Mo. 328, 236 S.W. 354 (1922).

even though the defendant-spouse is being prosecuted for an assault on the witness-spouse.[26]

As could be excepted there have been difficulties concerning the existence or non-existence of the marriage relationship. An invalid marriage does not prevent purported spouse involved therein from giving adverse testimony.[27] A valid divorce will lift the "incompetency veil"[28] except as to that knowledge acquired by reason of the marriage relation.[29]

Many of the Missouri criminal cases speak of the "competency" or "incompetency" of a spouse as an adverse witness. It seems that for the sake of clarity this should not only be treated as, but also called, a *privilege,* as a privilege can be waived but properly speaking, incompentency cannot.

Two other problems closely related to the "adverse testimony" rule are whether a spouse can compel the other to testify,[30] and the extent of cross-examination in criminal cases where the spouse does testify at the "option" of the other.[31] A detailed discussion of these two points is beyond the scope of this Comment.

Confidential Communications

In general communications between a husband and wife are privileged and neither can testify concerning them if proper objection is made.[32] The present Missouri statutes covering testimony by a spouse have provisions retaining the common law confidential communication rule.[33] But this "incompetency" is not absolute and can be waived by agreement or by failure to object when testimony is offered.[34]

This privilege has been applied to testimony concerning a husband's domicile,[35] an intention to commit a fraud or a criminal offense against a third person,[36] amount of income,[37] and threats to kill the other spouse,[38] to mention but a few examples.

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26. §546.260, RSMo 1949. State v. Dunbar, 360 Mo. 788, 230 S.W.2d. 845 (1950).
27. State v. Shreve, 137 Mo. 1, 38 S.W. 548 (1897); State v. Moore, 61 Mo. 276 (1875).
28. Long v. Martin, 152 Mo. 668, 54 S.W. 473 (1899).
29. State v. Kodat, 158 Mo. 125, 59 S.W. 73 (1900).
30. See generally, McQuie, *Criminal Law—Assault With Intent to Kill or to Do Great Bodily Harm—Specific Intent—Power to Compel Defendant's Wife to testify Over His Objection,* 17 Mo. L. Rev. 90 (1952).
31. In general cross-examination in criminal cases is limited to the facts testified to on direct examination as though the defendant were the witness. State v. Howard, 352 Mo. 410, 177 S.W.2d 616 (1944).
32. Berlin v. Berlin, 52 Mo. 151 (1873).
33. § 546.260, RSMo 1949 (criminal); § 491.020, RSMo 1949 (civil).
34. Chamberlain v. Chamberlain, 230 S.W.2d 184 (St. L. Ct. App. 1950).
35. *In re* Ozias' Estate, 29 S.W.2d 240 (K.C. Ct. App. 1930).
36. Dickinson v. Abernathy Furniture Co., 231 Mo. App. 303, 96 S.W.2d 1086 (K.C. Ct. App. 1936).
37. McPheeters v. McPheeters, 207 Mo. App. 634, 227 S.W. 872 (Spr. Ct. App. 1921).
38. O'Neil v. O'Neil, 264 S.W. 61 (St. L. Ct. App. 1924) (divorce).

Whether or not a communication is privileged is a question for the court.[39] To be privileged, the communication must pass between the husband and wife while they are alone.[40] If made in front of a third person capable of comprehending such a communication, it is usually not privileged.[41] Apparently this is not because of the nature of the conversation, but because the presence of a third person clearly shows that the communicator could not have intended that it be confidential. If the same or a similar statement is later made to a third person this does not destroy the privilege, since it is the intent of confidence at the time of communication that controls regardless of subsequent acts.[42] It is presumed that *all* communications between a husband and wife are confidential and the party asserting the contrary must satisfy the court that the reasons for this exclusion do not exist.[43]

In view of the requirement that for a statement to be privileged the husband and wife must be alone, it is natural that a letter written by one spouse to the other spouse and their children is not privileged.[44] If written just to the spouse, it is privileged as to the receiving spouse even though that spouse subsequently allows a third person to read it.[45]

One of the more prevelant exercises of the confidential commuication privilege occurs in divorce actions. Some of the earlier divorce cases seemed to reach a rather questionable result by a very vigorous exclusion of this type of testimony, even when the divorce action was based in part on opprobrious epithets.[46] At the present time in divorce actions statements which constitute a verbal assault will be admitted even though no one else was present, if some physical act of assault accompanied the statement.[47] The reasoning in this type of holding is that such statments are outside the confidential communication privilege, rather than exceptions to it. They become merged in the assault and are received as the res gestae of the assault.

The confidential communication privilege will be required to yield where to permit its exercise would result in injustice as between the husband and wife. This rule which is said to be based on necessity, was applied in an action for an accounting in connection with an alleged joint adventure between a husband and wife.[48] This can only be used where the action is between the spouses. It is very similar in operation to the exception to the adverse testimony rule in criminal cases which permits

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39. Hull v. Lyon, 27 Mo. 570 (1858).
40. Forbis v. Forbis, 274 S.W.2d 800 (Spr. Ct. App. 1955).
41. Long v. Martin, 152 Mo. 668, 54 S.W. 473 (1899); Tucker v. Tucker, 224 Mo. App. 669, 31 S.W.2d 238 (Spr. Ct. App. 1930). *Cf.* Schierstein v. Schierstein, 68 Mo. App. 205 (St. L. Ct. App. 1896) (Privilege not disturbed by presence of nine-month-old baby).
42. Revercomb v. Revercomb, 222 S.W. 899 (K.C. Ct. App. 1920).
43. Allen v. Allen, 60 S.W.2d 709 (St. L. Ct. App. 1933).
44. State v. St. John, 94 Mo. App. 229, 68 S.W. 374 (St. L. Ct. App. 1902).
45. Knapp v. Knapp, 183 S.W. 576 (Mo. 1916).
46. Ayers v. Ayers, 28 Mo. App. 97 (St. L. Ct. App. 1887).
47. O'Neil v. O'Neil, 264 S.W. 61 (St. L. Ct. App. 1924).
48. Brooks v. Brooks, 357 Mo. 343, 208 S.W.2d 279 (1948).

testimony where the defendant-spouse is being prosecuted for a crime against the other spouse.

In the situation where the husband and wife are being sued jointly, if one gives adverse testimony of a confidential nature, that evidence can only be used against the testifying spouse and not against the other.[49]

If the confidential communications are overheard by a third person then the latter can testify as to them regardless of how they were overheard.[50] However, if the communication is intercepted by the connivance of the other spouse it is still privileged at least with regard to letters.[51] Presumbly the same would hold true as to oral statements.

Divorce does not destroy the privilege as to pre-divorce communications, at least in criminal actions.[52] The same general theory has been followed with regard to the death of one spouse.[53]

Waiver

It was held by the St. Louis Court of Appeals in 1950 that if the confidential communication privilege is waived it "opens the door" for proof of other such communications.[54] If we are going to have this privilege then it seems difficult to justify such a ruling which is much different from saying that the privilege is lost as to the specific testimony when it is not properly claimed. The latter appears to be the more rational view.

The "adverse testimony" rule is merely a privilege, and therefore is waived if not properly asserted.[55]

Conclusion

Regardless of the theory used to support the "adverse testimony" and confidential communication rules, there are instances where they should be modified if not completely abandoned. Missouri has progressed from the common law theory, which excluded almost entirely all testimony by a spouse, to the point where a spouse's testimony will be admitted unless it is adverse to a defendant-spouse in a criminal action or involves confidential communications. Yet there remain certain areas where a spouse's testimony could be admitted without seriously affecting the marital relation. Where, for example, the parties are divorced or have been separated for a long period of time it is difficult to justify exclusion of this kind of testimony.

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49. Strode v. Frommeyer, 115 Mo. App. 220, 91 S.W. 167 (St. L. Ct. App. 1905).
50. Long v. Martin, 152 Mo. 668, 54 S.W. 473 (1899); Tucker v. Tucker, 224 Mo. App. 669, 31 S.W.2d 238 (Spr. Ct. App. 1930).
51. Mahner v. Linck, 70 Mo. App. 380 (St. L. Ct. App. 1897).
52. State v. Kodat, 158 Mo. 125, 59 S.W. 73 (1900).
53. Spradling v. Conway, 51 Mo. 51 (1872).
54. Chamberlain v. Chamberlain, 230 S.W.2d 184 (St. L. Ct. App. 1950).
55. State v. Hill, 76 S.W.2d 1092 (Mo. 1934).

The Missouri courts and most other American courts, have been most reluctant to modify these rules. No doubt relief will have to come from the General Assembly. Considering the difficulty in drafting legislation which would permit a spouse to testify more freely and yet adequately protect the marital relation, it is unlikely that any change in the present law will be made for some time.

CHARLES B. ERICKSON