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Recent Cases

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CRIMINAL LAW—DOUBLE JEOPARDY—SHOULD "OFFENSE" BE DEFINED IN TERMS OF SUBSTANTIVE LAW?

State v. Moton[1]

Defendant Moton and another held up a service station in St. Louis and obtained money from each of two attendants. The circuit attorney filed two separate informations against Moton. Each charged that defendant committed first degree robbery by means of a dangerous and deadly weapon.[2] The first information named attendant Rideout as the alleged victim; the second named the other attendant, Cook. Defendant was tried first for the robbery of Rideout and was convicted. Defendant then moved to dismiss the information that named Cook as the victim, claiming that a second trial would violate the double jeopardy clause of the fifth amendment to the United States Constitution.[3] The trial court overruled this motion. Moton was tried and found guilty of the robbery of Cook. Defendant appealed this second conviction to the Missouri Supreme Court, asserting that the second trial constituted double jeopardy.[4]

Defendant presented two arguments pertaining to double jeopardy. First, defendant claimed that he had committed only one punishable offense. He emphasized that the informations in the two cases alleged almost identical acts that were motivated by a single intent and that occurred almost simultaneously.[5] The defense cited a series of cases arguably holding that only one punishable offense can result from a single criminal episode, although the goods of two people are stolen.[6] In *State v. Toombs*,[7] the defendant issued three fraudulent stock certificates at the same time. *State v. Bockman*[8] involved the theft of two heifers, each belonging to a different person, from a single stock range at the same time. The defendant stole the goods of two men from a single hotel room at the same time in *Lorton v. State*.[9] In each of these cases, the court held that the particular defendant had committed only one punishable offense. Finally, the defense also relied on *State v. Citius*,[10] where the court stated that robbing two people in "one transaction at one time and place" constituted but one offense.[11]

1. 476 S.W.2d 785 (Mo. 1972).
2. *See* §§ 560.120, .135, RSMo 1969.
3. "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;" U.S. CONST. amend. V.
4. 476 S.W.2d at 786.
5. *Id.* at 788.
6. *Id.* at 789.
7. 326 Mo. 981, 34 S.W.2d 61 (1930).
8. 344 Mo. 80, 124 S.W.2d 1205 (1939).
9. 7 Mo. 55 (1841).
10. 331 Mo. 605, 56 S.W.2d 72 (1932).
11. *Id.* at 612, 56 S.W.2d at 74.

The *Moton* court rejected defendant's first argument. Robbery in the first degree with a dangerous and deadly weapon requires as an element that the defendant places a *person* in fear of immediate injury.[12] Because the service station holdup involved two victims, the court reasoned that the defendant had committed two crimes, one against each victim.[13] *Tombs, Bockman,* and *Lorton* were distinguished from the present case;[14] none of the crimes charged in those cases required the physical presence of the victim as an element.[15] Finally, the court found no robbery cases that followed *Citius* and concluded that the statement in that decision concerning double jeopardy was incorrect.[16]

Second, the defense advocated adoption of the "same transaction" test[17] proposed by the concurring opinion of Mr. Justice Brennan in *Ashe v. Swenson.*[18] This test requires prosecution of all offenses arising from or during the same transaction or episode in a single trial.[19] Application of this standard for double jeopardy would have barred the second trial in *Moton.* The Missouri Supreme Court summarily rejected the "same transaction" test,[20] noting that the majority opinion of the United States Supreme Court in *Ashe* was not based on this standard.[21]

The definition of "offense" constitutes the heart of the double jeopardy issue. Two tests have developed for defining this word. The "same evidence" test first appeared in the 18th century English case, *The King v. Vandercomb.*[22] In that case, the court stated that double jeopardy served as a bar only if the facts alleged in the second indictment could have convicted the defendant under the first indictment.[23] The formalistic rules of that time did not allow the prosecution to amend pleadings to fit a new theory when an unanticipated development occurred in the evidence at the first trial. The English courts developed the same evidence test with this problem in mind.[24] As a result, the test allowed reprosecution so long as the second indictment required an element different from the first. Modern rules of criminal procedure that allow amendment of pleadings to conform to proof have eliminated this need.[25]

The same evidence test defines "offense" in terms of the substantive elements of a crime. Under this standard, offenses are not the same if any of their elements differ. This approach analyzes whether offenses

12. § 560.120, RSMo 1969.
13. 476 S.W.2d at 790.
14. *Id.*
15. *Id.* at 789.
16. *Id.* at 790.
17. *Id.* at 788.
18. 397 U.S. 436 (1970) (concurring opinion).
19. 476 S.W.2d at 788.
20. *Id.* at 789.
21. 397 U.S. at 448 (concurring opinion); *but see* Commonwealth v. Campana, 304 A.2d 432, 441 (Pa. 1973) where the court found that the *Ashe* decision merely set a minimum standard that did not govern cases in which there was no collateral estoppel involved.
22. 169 Eng. Rep. 455 (K.B. 1796).
23. *Id.* at 461.
24. Caraway, *Pervasive Multiple Offense Problems—A Policy Analysis,* 1971 UTAH L. REV. 105, 110.
25. MO. R. CRIM. P. 26.05.

are the same by comparing indictments or informations rather than incidents. Thus, this test defines "offense" as "punishable offense" rather than as "criminal episode."[26]

At the time the courts formulated the same evidence test, it was effective in preventing successive prosecutions for a single criminal episode.[27] Criminal statutes were relatively few in number and drew only broad distinctions in classifying conduct into substantive crimes.[28] "Criminal episode" and "punishable offense" were virtually synonymous, so use of the latter as the definition did not impair protection from successive prosecutions.[29]

In modern times the same evidence test definition of offense as *substantive* offense has allowed change in the substantive law to erode the constitutional protection against double jeopardy. The number of substantive crimes has proliferated since the inception of the standard.[30] For example, such subtleties in behavior as "attempting to cast an illegal vote"[31] and "attempting to vote illegally by impersonating a voter"[32] are now separate offenses in the criminal statutes.[33] As a result, the number of substantive offenses that may arise from a single criminal episode has greatly increased.[34] Under the same evidence test, as the number of substantive offenses increases, the protection against multiple prosecutions decreases.

This erosion of protection permitted by the same evidence test has undermined the policies behind the constitutional protection against double jeopardy. Leading authorities generally turn to the following statement by Justice Black as a statement of these policies.[35]

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. . . .[36]

More recently, Mr. Chief Justice Burger noted the purpose of the Double Jeopardy Clause: "The prohibition is not against being twice punished, but against being twice *put* in jeopardy. . . ."[37]

The same evidence test leaves an individual with little protection from harassment by unnecessary multiple prosecutions.[38] The prosecutor

26. *See* Comment, *Double Jeopardy—Defining the Same Offense,* 32 LA. L. REV. 87, 89 (1971).
27. Commonwealth v. Campana, 304 A.2d 432, 435 (Pa. 1973).
28. *See* Comment, *Twice in Jeopardy,* 75 YALE L.J. 262, 279 (1965); Commonwealth v. Campana, 304 A.2d 432, 435 (Pa. 1973).
29. *See* Comment, *supra* note 26; Commonwealth v. Campana, 304 A.2d 432, 436 (Pa. 1973).
30. Commonwealth v. Campana, 304 A.2d 432, 436 (Pa. 1973).
31. § 129.480, RSMo 1969.
32. § 129.680, RSMo 1969.
33. *See* Comment, *supra* note 26.
34. Commonwealth v. Campana, 304 A.2d 432, 436 (Pa. 1973).
35. *Id.* at 435.
36. Green v. United States, 355 U.S. 184, 187 (1957).
37. Price v. Georgia, 398 U.S. 323, 326 (1970), *quoting from* United States v. Ball, 163 U.S. 662, 669 (1896).
38. Commonwealth v. Campana, 304 A.2d 432, 437 (Pa. 1973).

has a great deal of discretion under this standard.[39] The wide range of overlapping substantive offenses that may arise from most criminal incidents frees him to ignore the policies supporting the double jeopardy concept.[40] For example, in *State v. Ciucci*[41] the United States Supreme Court, following the same evidence test, allowed three separate trials of the defendant for murders that arose from a single incident. The prosecutor admittedly brought each successive prosecution in order to obtain a heavier sentence than previously imposed.[42] The result in *Ciucci* clearly violates the policies behind the double jeopardy clause. Further, the same evidence definition of offense provides a prosecutor with undue power over plea bargaining and other informal aspects of the criminal system.[43] As Mr. Justice Brennan stated, "[G]iven our tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution, the potentialities for abuse inherent in the 'same evidence' test are simply intolerable."[44]

The abuses possible under the same evidence test result in unnecessary expense and inconvenience to the public.[45] The time and resources of judges, prosecutors, and witnesses are wasted, and court dockets are further overloaded.[46] In some situations, of course, different substantive offenses arising from a single criminal episode should be prosecuted at different trials. This practice is only appropriate, however, where joinder would substantially prejudice the prosecution or the defense by unduly confusing the jury or complicating and impeding trial preparation.[47]

A recent Supreme Court decision, *Ashe v. Swenson*,[48] has corrected some of the abuses possible under the same evidence test. In that case, the Court held that the federal constitutional protection against double jeopardy embodies the doctrine of collateral estoppel; the prosecution, in theory, cannot retry a defendant on issues decided at a previous trial.[49] Notably, collateral estoppel analysis approaches the issue more in terms of the criminal episode rather than the criminal indictments.[50] In prac-

39. *Id.* at 436.
40. *See* Comment, *supra* note 26.
41. 356 U.S. 571 (1958). In *Ciucci*, four separate indictments charged petitioner with murdering his wife and three children. In three successive trials he was convicted of first degree murder. At each trial, the prosecution introduced evidence concerning the details of all four deaths. At the first two trials, the jury sentenced petitioner to imprisonment; at the third, the penalty was death. *Id.* at 572.
42. Brief for Petitioner, app. B, at 43, State v. Ciucci, 356 U.S. 571 (1958); *see* Comment, *supra* note 26, at 281.
43. *See* Caraway, *supra* note 24, at 127.
44. Ashe v. Swenson, 397 U.S. 436, 452 (1970) (concurring opinion).
45. Commonwealth v. Campana, 304 A.2d 432, 441 (Pa. 1973).
46. *Id.*
47. *See* Comment, *supra* note 26, at 292-93.
48. 397 U.S. 436 (1970).
49. *Id.* at 444-45; *see,* Mager, *Double Jeopardy and Collateral Estoppel in Crimes Arising From the Same Transaction,* 24 Mo. L. Rev. 513 (1959).
50. The Court in *Ashe* reasoned that because the jury at the first trial had found that defendant did not participate in the robbery, he could not be tried again for an offense arising from the same episode, although the second indictment named a different victim. 397 U.S. at 445-47; *see* Caraway, *supra* note 24, at 112-19.

tice, however, the prevalence of general verdicts in criminal trials will make it difficult for a court to determine what issues the jury meaningfully decided.[51] Such uncertainty will reduce predictability.[52] Further, *Ashe* fails to prevent multiple prosecutions where a guilty verdict resulted at an earlier trial.[53] Thus, *Ashe* was a step in the right direction, but alone is not enough.[54]

In contrast to the same evidence test, many commentators have argued that multiple prosecution and multiple punishment, although closely related, constitute separate problems that require different treatment.[55] Accordingly, several prestigious national organizations concerned with criminal law have urged adoption of the "same transaction" test.[56] This standard defines "offense" in terms of the actual criminal episode. "Offense" is not divided into the artificial categories of punishable offenses set out in the substantive law. Thus, the same transaction test does distinguish between double jeopardy offense and substantive offense. Consequently, changes in the substantive criminal law do not affect the constitutional protection against double jeopardy.[57] Further, this standard recognizes "that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy and convenience."[58]

In the past year both the Pennsylvania[59] and Oregon[60] Supreme Courts held that the Double Jeopardy Clause required the same transaction test. Compulsory joinder of all offenses arising from a criminal transaction is accomplished by legislative enactment in California, Illinois, New York, and Minnesota.[61] The Missouri Supreme Court expressly rejects the same transaction test in *Moton*. Applying the same evidence test, the court went on to determine that defendant was not placed

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51. Caraway, *supra* note 24, at 114; Mager, *supra* note 49, at 523.

52. Caraway, *supra* note 24, at 114; Mager, *supra* note 49, at 523.

53. *See* Caraway, *supra* note 24, at 113-15; Comment, *supra* note 26, at 283-86.

54. Commonwealth v. Campana, 304 A.2d 432, 438 (Pa. 1973).

55. *See, e.g.*, MODEL PENAL CODE § 66 (Tent. Draft No. 5, 1956); Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 YALE L.J. 513 (1949); Note, *The Protection From Multiple Trials*, 11 STAN. L. REV. 735 (1959).

56. These organizations include: The American Bar Association, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO JOINDER AND SEVERANCE § 1.3 (1968); the American Law Institute, MODEL PENAL CODE § 1.07(2) (Prop. Offic. Draft, 1962); and the National Commission on Reform of Federal Criminal Laws, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE § 703(2) (1970).

57. Caraway, *supra* note 24, at 126-28.

58. Ashe v. Swenson, 397 U.S. 436, 454 (1970) (concurring opinion).

59. "We hold, in light of the persuasive authority discussed above, that the Double Jeopardy Clause requires a prosecutor to bring, in a single proceeding, all known charges against a defendant arising from a 'single criminal episode'." Commonwealth v. Campana, 304 A.2d 432, 441 (Pa. 1973).

60. "[A] second prosecution is for the 'same offense' and is prohibited if (1) the charges arise out of the same act or transaction . . . ." State v. Brown, ___ Ore. ___, 497 P.2d 1191, 1198 (1972).

61. *See* CAL. PENAL CODE 654 (West 1970); ILL. REV. STAT. ch. 38, § 3-3 (1969); 40 MINN. STATS. ANN. 609.035 (1964); N.Y. CODE CRIM. PRO. § 40.20(2) (McKinney 1971); Commonwealth v. Campana, 304 A.2d 432, 439 (Pa. 1973).

in jeopardy twice for the same offense because a single element, the person put in fear, varied between the two substantive crimes charged.[62] This analysis only considers the multiple punishable offense question and thus fails to examine the true double jeopardy issue of multiple prosecutions. The same transaction test, had it been applied, would have allowed punishment for both substantive offenses but would have required that they be joined in one trial.

At the time *Moton* was decided the Missouri Rules of Criminal Procedure did not permit joinder of separate robbery indictments.[63] Thus, the court cannot be criticized for applying the same evidence test. Now, however, the rules allow *voluntary* joinder by the prosecutor of all offenses arising from the same transaction.[64]

Joinder of all offenses arising from the same transaction should be made compulsory in Missouri. The same transaction test should be adopted either by decision or court rule. Adoption of this standard would restore the protection against double jeopardy to the level intended in the Constitution and would insulate this protection from erosion by changes in the substantive law.

FRANK M. EVANS, III

WILLS—ELECTION BY A SURVIVING JOINT TENANT OR TENANT BY THE ENTIRETY

In re Estate of Waters[1]

Henry John Waters shared a joint tenancy with his wife in real property in San Diego, California. In 1961, he executed a self-drawn will in which he bequeathed $60,000 to his son and devised the San Diego property to his wife and daughter, one-half to each. He left the residue of his estate to his widow, whom he named executrix.[2] When Waters died in 1969, the San Diego property was still held in joint tenancy. The executrix petitioned for final distribution of the estate, proposing to distribute the legacy to the son and the residue of the estate to herself. The petition contained no provision for the distribution of the San Diego property. The daughter filed objections to the proposed distribution, contending that the will required the widow to elect between her testamentary right to the residue of the estate and her proprietary right as surviving joint tenant[3] to the whole of the San Diego property. In re-

62. 476 S.W.2d at 790.
63. Mo. R. CRIM. P. 24.04 (prior to amendment effective July 1, 1971).
64. Mo. R. CRIM. P. 24.04.

1. 24 Cal. App. 3d 81, 100 Cal. Rptr. 775 (1972).
2. *Id.* at 83, 100 Cal. Rptr. at 777.
3. *See* C. SMITH & R. BOYER, SURVEY OF THE LAW OF PROPERTY 18-19 (2d ed. 1971), for a general discussion of the right of survivorship incident to a joint tenancy which invests the surviving tenant with ownership of the whole.

sponse, the executrix filed an amended petition for distribution denying that any election was necessary, but alleging if she were required to elect, she would waive her rights under the will and take the San Diego property. In the latter event, the executrix contended that the residue of the estate would pass by intestacy, one-third to her as surviving spouse, one-third to the son, and one-third to the daughter,[4] and that she was also entitled to receive $22,554.22 as her half of a community property asset in the probate estate.[5] The Superior Court, San Diego County, held that the widow was entitled to the residue under the will, because the title to the joint tenancy property passed to her upon her husband's death, and no provision in the will, either express or implied, required an election.[6] Presented with a case of first impression in California, the Court of Appeal for the Fourth District reversed, holding that the widow was required to elect[7] and that the lower court should have accepted her waiver of the right to the residue of the estate.[8]

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4. 24 Cal. App. 3d at 84, 100 Cal. Rptr. at 777. Respondent's statement as to the law of intestate succession in California is accurate. *See* CAL. PROB. CODE § 221 (West 1956).

5. CAL. PROB. CODE § 201 (West 1956) states that "(u)pon the death of either husband or wife, one-half of the community property belongs to the surviving spouse" while "the other half is subject to the testamentary disposition of the decendent." In California, a wife acquires a one-half interest in all the property accumulated from the husband's earnings during marriage; and, if the husband's will attempts to dispose of the property thus accumulated while making some other provision for the wife, a case for election is presented. *See In re* Wolfe's Estate, 48 Cal. 2d 570, 311 P.2d 476 (1957); *In re* Resler's Estate, 43 Cal. 2d 726, 278 P.2d 1 (1954). Similar rules obtain in the other community property states: Arizona, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. *See, e.g.,* Commissioner v. Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958); Million, *Community Property: A Guide for Lawyers and Students of Forty States,* 19 Mo. L. REV. 201 (1954).

6. 24 Cal. App. 3d at 84, 100 Cal. Rptr. at 777.

7. *Id.* at 86, 100 Cal. Rptr. at 779; *accord;* Bird v. Stein, 204 F.2d 122 (5th Cir. 1953); Young v. Biehl, 166 Ind. 357, 77 N.E. 406 (1906); Kentucky Trust Co. v. Kessel, 464 S.W.2d 275 (Ky. Ct. App. 1971); Thurlow v. Thurlow, 317 Mass. 126, 56 N.E.2d 902 (1944); Sutorius v. Mayor, 350 Mo. 1235, 170 S.W.2d 387 (1943); Wachovia Bank & Trust Co. v. Burrus, 230 N.C. 592, 55 S.E.2d 183 (1949); Bennett v. Bennett, 70 Ohio App. 187, 24 Ohio Op. 510, 45 N.E.2d 614 (1942); *In re* Riley's Estate, 6 Wis. 2d 29, 94 N.W.2d 233 (1959); Coates v. Stevens, 1 Younge & C. Ex. 66, 160 Eng. Rep. 28 (1834); *see* Commissioner v. Kelly's Estate, 84 F.2d 958 (7th Cir. 1936); Pittman v. Pittman, 237 Ark. 684, 375 S.W.2d 361 (1964); Mondelli v. Pizzi, 97 N.J. Super. 12, 234 A.2d 102 (Ch. 1967); *cf.* Ragland v. Craig, 188 Tenn. 380, 219 S.W.2d 894 (1949); Johnson v. McCarty, 202 Va. 49, 115 S.E.2d 915 (1960). *Contra,* Colclazier v. Colclazier, 89 So. 2d 261 (Fla. 1956); Webber v. Webber, 217 Mich. 178, 185 N.W. 761 (1921); *In re* Estate of Grieco, 431 Pa. 108, 244 A.2d 27 (1968). With regard to some of these cases, the above evaluation differs from that appearing at Annots., 60 A.L.R.2d 736, 733-76 (1958), 60 A.L.R.2d 789, 799-800 (1958). *See* 5 W. PAGE, WILLS § 47.13, at 618-19 (Bowe-Parker revd. ed. 1962), where it is unequivocally stated:

> A tenant in common, joint tenant, or tenant by the entirety, who devises the whole of such real estate to someone other than the other tenant, and then gives to such other tenant other property by will, puts such other tenant to an election between retaining his original interest in such real esate or accepting the benefits of the will.

8. 24 Cal. App. 3d at 86, 100 Cal. Rptr. at 779. It is unclear whether the court's ruling includes a ratification of respondent's contention that the

It is an established rule of law that when one possesses alternative rights, he may choose which to take, but he cannot have both.[9] One situation in which such alternative rights arise is where, as in *Waters*, a testator purports to devise *A*'s property to *B* and by the same instrument gives other property to *A*. *A* has rights outside the will to the property that testator purported to devise to *B*; and, alternatively, he has rights under the will to the property that testator devised to him. In this situation, *A* cannot claim both his own property and the testamentary gift; he must elect either to keep his own property and relinquish the gift, or vice versa.[10]

The obligation to elect appears from the conditional nature of the devise. Thus, whenever the will discloses that the intention of the testator was that one right should substitute for the other, election is required.[11] Accordingly, the appellate court in *Waters* began its discussion by asserting that "directly contrary to the statement made by the trial judge, what the testator 'was thinking about' was very much before the court."[12]

In Roman law, election was required in the above situation only if the donor knew that property he purported to bequeath to *B* actually belonged to *A*.[13] As the doctrine developed at common law, however, courts

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residue of testator's estate should pass by intestate succession if the widow elects against the will. As a general rule, however, courts of equity deem it proper that a beneficiary whose rights under the will have been defeated by an election to take against the will should receive compensation from the legacy relinquished by the legatee making the election. The application of this principle most often results in the acceleration of remainders that were subject to a life estate relinquished by the electing beneficiary, but it should apply with equal effect to a residuary legacy. *See* Carper v. Crowl, 149 Ill. 465, 36 N.E. 1040 (1894); Ruh's Ex'rs v. Ruh, 270 Ky. 792, 110 S.W.2d 1097 (Ct. App. 1937); St. Louis Union Trust Co. v. Kern, 346 Mo. 643, 142 S.W.2d 493 (1940); Cotton v. Fletcher, 77 N.H. 216, 90 A. 510 (1914); Bebout v. Quick, 81 Ohio St. 196, 90 N.E. 162 (1909); *In re* Vance's Estate, 141 Pa. 201, 21 A. 643 (1914). *See also* RESTATEMENT OF PROPERTY §§ 234-35 (1936); Annot., 36 A.L.R.2d 291, 306 (1954); 5 W. PAGE, *supra* note 7, § 47.46; J. POMERY, EQUITY JURISPRUDENCE § 468 (5th ed. S. Symons 1941).

9. 5 PAGE, *supra* note 7, § 47.1.

10. Collins v. Fincher, 235 Ark. 587, 361 S.W.2d 86 (1962); Morrison v. Bowman, 29 Cal. 337, 347-48 (1865); Kentucky Trust Co. v. Kessel, 464 S.W.2d 275 (Ky. Ct. App. 1971); Woods v. Conqueror Trust Co., 265 Mo. 511, 525, 178 S.W.2d 201, 204 (1915); Wachovia Bank & Trust Co. v. Burrus, 230 N.C. 592, 593-94, 55 S.E.2d 183, 184 (1949). *See generally* 57 AM. JUR. *Wills* § 1526 (1948); 97 C.J.S. *Wills* § 1239 (1957).

11. Morrison v. Bowman, 29 Cal. 337, 347 (1865); Colclazier v. Colclazier, 89 So. 2d 261, 264 (Fla. 1956); Lansdale v. Dearing, 351 Mo. 356, 360-61, 173 S.W.2d 25, 28 (1943); *In re* Riley's Estate, 6 Wis. 2d 29, 33, 94 N.W.2d 233, 235 (1959). *Compare* 2 J. POMEROY, *supra* note 8, § 465, *with* J. STORY, EQUITY JURISPRUDENCE §§ 1451-54 (14th ed. W. Lyon 1918).

12. 24 Cal. App. 3d at 84, 100 Cal. Rptr. at 777.

13. INSTITUTES, 2.20. § 4, *translated at* 2 J. POMEROY, *supra* note 8, § 463 at 334, states:

> A testator may not only give as a legacy his own property, or that of his heir, but also the property of others. The heir is then obliged either to purchase and deliver it; or if it cannot be bought, to give its value . . . . But when we say that a testator may give the goods of another as a legacy, we must be understood to mean that this can only be done if

of equity imputed to the testator the knowledge that his gift to *B* was inconsistent with rights of ownership possessed by *A* independent of the will.[14] This approach was taken in one of the earliest cases in which the issue arose:[15]

> A. was seised of two Acres, one in Fee, t'other in Tail; and having two Sons, he by his Will, devises the Fee-Simple Acre to his eldest Son, who was Issue in Tail; and he devised the Tail Acre to his youngest Son and died: The eldest Son entered upon the Tail Acre; whereupon the youngest Son brought his Bill in this Court against his Brother, that he might enjoy the Tail Acre devised to him, or else have an Equivalent out of the Fee Acre; because his Father plainly designed him something. *Lord Chancellor.* This Devise being design'd as a Provision for the younger Son, the Devise of the Fee Acre to the eldest Son must be understood to be with a *tacit* Condition that he shall suffer the younger Son to enjoy quietly, or else, that the younger Son shall have an Equivalent out of the Fee Acre, and decreed the same accordingly.[16]

In this manner, the court ascertained the donor's intention from the dispositive scheme of the will. Thus, the rationale of the doctrine of election appears to be that the court will give effect to the testator's intent by implying a condition of election where none is expressed in the will.

Whether a court will imply a condition that *A* give up property to which he is entitled outside the will in order to take under the will is a question of testamentary construction. The courts presume "that no man will attempt to dispose of another's property through the instrumentality

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the deceased knew that what he bequeathed belonged to another, and not if he were ignorant of it; since, if he had known it, he would not, perhaps, have left such a legacy.

14. The English courts were drawn to this interpretation by the fundamental principle of equity that a person may not both accept the benefits and repudiate the burdens of an instrument of donation. *See* Ker v. Wauchope, 1 Bli. 1, 22, 4 Eng. Rep. 1, 8 (H.L. 1819); *accord,* Commissioner v. Chase Manhattan Bank, 259 F.2d 231, 239-40 (5th Cir. 1958); *In re* Moore's Estate, 62 Cal. App. 265, 270-71, 216 P. 981, 983 (1923); Colvin v. Hutchison, 338 Mo. 576, 579, 92 S.W.2d 667, 668 (1936). An exception to this general rule developed at common law to allow a widow her dower interest in addition to specific gifts devised by the will. *See* 5 W. PAGE, *supra* note 7, § 47.5. Absent a clear manifestation on the part of the testator that the benefits in the will were to be in lieu of dower, the common law courts allowed the widow to retain both if her claim did not defeat he testamentary scheme of the will. See Annots., 171 A.L.R. 649 (1947), 22 A.L.R. 437 (1923) for lists of cases supporting this view. By statute, the common law rule was modified in many states to force an election unless the will expressly provided that the devise was in addition to dower. *See, e.g.,* Mead v. Phillips, 135 F.2d 819 (D.C. Cir. 1943); Colvin v. Hutchison, *supra.* Section 469.140, RSMo 1949 (repealed 1955), was typical of these election statutes. *See* Stevenson, *Does Dower Still Lurk in Elections to Take Under the Will?,* 30 U. CIN. L. REV. 172 (1961), for a discussion of lingering problems in a jurisdiction where dower has not been abolished by statute. *See also* UNIFORM PROBATE CODE §§ 2-201 to -207, for a suggested scheme of statutory enactments related to the problem of election and the rights of a surviving spouse.

15. Anonymous, Gilb. Rep. 15, 25 Eng. Rep. 11 (Ch. 1708).

16. *Id.* at ___, 25 Eng. Rep. at 11-12.

of a will."[17] In this respect, no election is required unless the gift to *B* is irreconcilable with a property right that *A* has outside the will.[18] The test is whether the property rights that the will purports to confer upon *B* are so inconsistent with property rights to which *A* is entitled outside the will that both sets of rights cannot stand together.[19] Its application depends upon the particular language of the will. Thus, the courts have frequently held that a devise of property identified in general terms to *B* is not so inconsistent with *A*'s rights in specific property as to require an election.[20] On the other hand, the courts generally hold that a purported disposition by specific description to *B* precipitates an election where *A* is entitled outside the will to the specifically described property.[21] An election cannot be predicated upon an ambiguous or uncertain clause of donation,[22] because if the gift to *B* appears, by any reasonable interpretation, to be consistent with *A*'s interest in the gift property, no election is necessary.[23] In *Waters,* the court examined the dispositive language of the will[24] and concluded that the testator intended to leave a one-half interest in the San Diego property to his daughter. Since this devise was irreconcilable with the widow's right of complete ownership as surviving joint tenant, the court endeavored to carry out the intent of the testator by requiring the widow to elect between her proprietary right and the testamentary gift.

In 1968, the Supreme Court of Pennsylvania in *In re Estate of Grieco*[25]

17. Whaley v. Quillin, 153 S.W.2d 969, 971-72 (Tex. Civ. App. 1941).

18. Pittman v. Pittman, 237 Ark. 684, 375 S.W.2d 361 (1964); Sutorius v. Mayor, 350 Mo. 1235, 170 S.W.2d 387 (1943); *In re* Parker's Will, 273 Wis. 29, 76 N.W.2d 712 (1956). *See generally* 2 J. POMEROY, *supra* note 8, §§ 461-64.

19. Rieves v. Smith, 184 Ga. 657, 667, 192 S.E. 372, 379 (1937); Sumerel v. Sumerel, 34 S.C. 85, 89, 12 S.E. 932, 933 (1891); *In re* Riley's Estate, 6 Wis. 2d 29, 34, 94 N.W.2d 233, 236 (1959); *cf.* Wright v. Wright, 154 Tex. 138, 147, 274 S.W.2d 670, 676 (1955).

20. 5 W. PAGE, *supra* note 7, § 47.2; *see* La Tourette v. La Tourette, 15 Ariz. 200, 137 P. 426 (1914) ("all of the property of which I may die possessed"); *In re* Prager's Estate, 166 Cal. 450, 137 P. 37 (1913) ("all the real property owned by me"); Shermer v. Dobbins, 176 N.C. 547, 97 S.E. 510 (1918) ("all of my real estate"); Johnson v. McCarty, 202 Va. 49, 115 S.E.2d 915 (1960) ("my net estate"). See Annot., 60 A.L.R.2d 736, 754 (1958) for an additional list of cases.

21. *In re* Moore's Estate, 62 Cal. App. 265, 216 P. 981 (1923); Job Haines Home v. Keene, 87 N.J. Eq. 509, 101 A. 512 (Ch. 1917); Wachovia Bank & Trust Co. v. Burrus, 230 N.C. 592, 55 S.E.2d 183 (1949). See Annot., 60 A.L.R.2d 736, 754 (1958) for an additional list of cases supporting this view.

22. Commissioner v. Chase Manhattan Bank, 259 F.2d 231, 240 (5th Cir. 1958); Gulf, C. &. S.F. Ry. v. Brandenburg, 167 S.W. 170, 172 (Tex. Civ. App. 1914); Herrick v. Miller, 69 Wash. 456, 467-69, 125 P. 974, 979 (1912).

23. Pittman v. Pittman, 237 Ark. 684, 686, 375 S.W.2d 361, 362 (1964); *In re* Moore's Estate, 62 Cal. App. 265, 271, 216 P. 981, 983 (1923); *In re* Riley's Estate, 6 Wis. 2d 29, 34, 94 N.W.2d 233, 236 (1959); *see* 5 W. PAGE, *supra* note 7, § 47.13; 2 J. POMEROY, *supra* note 8, § 472. *Compare* Wright v. Wright, 154 Tex. 138, 274 S.W.2d 670 (1955) *with* Commissioner v. Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958).

24. 24 Cal. App. 3d at 83, 100 Cal. Rptr. at 777:

> I will and bequeath to my daughter, Virginia Jennings one-half ownership in the property located at 1304—38th Street, San Diego, California, hereinafter described as Lots ONE to EIGHTEEN, Block THIRTY-SIX, MARILOU PARK . . . .

25. 431 Pa. 108, 244 A.2d 27 (1968).

reached a result contrary to *Waters* on substantially similar facts. Testator and widow owned property as tenants by the entirety. Decedent's will gave 30 percent of this property to his brothers, and then made other gifts to the widow. The court held that no interest passed to the brothers and that the widow was not required to elect between the gifts conferred by the will and her entirety interest outside the will. It supported this result with a quotation from Pomeroy's *Equity Jurisprudence*:[26]

> The doctrine of election is not applicable to cases where the testator, erroneously thinking certain property is his own, gives it to a donee to whom in fact it belongs, and also gives him other property which is really the testator's own; for in such cases the testator intends that the devisee shall have *both,* though he is mistaken as to his own title to one.[27]

The passage from Pomeroy expresses the rule in those cases where a testator purports to give *A*'s property to *A,* and not to *B.* In this situation *A* can claim both his own property and the testamentary gift.[28] In *Grieco,* however, the testator devised to his brothers a portion of the entireties property, which in fact belonged to his widow; and the estate given the widow under the will was less than that to which she was entitled by operation of law. The Pennsylvania court was clearly in error in relying on the excerpt from Pomeroy.

A review of the earlier Pennsylvania cases dealing with this subject[29] discloses that the result in *Grieco* rests essentially on dicta in earlier cases. The interpretation in Pennsylvania began to develop with a collateral issue in *Alles v. Lyon,*[30] where the court held that an estate by the entirety could not be severed by divorce. The *Alles* court analogized that "on the death of the husband or the wife the survivor takes no new title or estate; he or she is in possession of the whole from its inception."[31] This language was subsequently relied upon by another Pennsylvania court in *Irlbacher's Estate.*[32] In *Irlbacher,* the testator directed that "[m]y real estate . . . should be arranged and settled according to law . . . ."[33] Testator had owned two pieces of real property in joint tenancy with his wife. She

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26. 2 J. POMEROY, *supra* note 8, § 475 at 358.
27. 431 Pa. at 114, 244 A.2d at 29-30.
28. *See, e.g.,* La Tourette v. La Tourette, 15 Ariz. 200, 137 P. 426 (1914); Williams v. Williams, 170 Cal. 625, 151 P. 10 (1915); York v. Adams, 277 Ky. 577, 126 S.W.2d 1077 (Ct. App. 1939); Byrd v. Patterson, 229 N.C. 156, 48 S.E.2d 45 (1948).
29. *In re* Peden's Estate, 409 Pa. 194, 185 A.2d 794 (1962); *In re* Williams' Estate, 349 Pa. 568, 37 A.2d 584 (1944); Steinman v. Palm, 76 Pitt. Legal J. 798 (Pa. C.P. 1926); Irlbacher's Estate, 62 Pitt. Legal J. 57 (Pa. Orphans' Ct. 1913). The court in *Peden* followed the reasoning in *Williams* to its logical conclusion and held that an express conditional devise by testator of "real estate which I hold as tenant by the entireties with my wife . . . with the intent . . . of putting my said wife . . . *to her election*" was void as against the law of survivorship incident to a tenancy by the entireties. 409 Pa. at 196, 185 A.2d at 795.
30. 216 Pa. 604, 66 A. 81 (1906).
31. *Id.* at 606, 66 A. at 81.
32. 62 Pitt. Legal J. 57 (Pa. Orphans' Ct. 1913).
33. *Id.*

chose to take certain bequests under the will. Testator's minor children contended that the two pieces of realty should be brought into the estate and distributed for their benefit, on the ground that the widow's decision to take under the will constituted an election, which terminated the widow's rights as a surviving joint tenant. The court held that no election was required.[34] Although it recognized that such a general disposition was too indefinite to force an election, the court also reasoned, on the basis of the dicta in *Alles,* that the testator was devoid of "power to dispose of what did not belong to him."[35] In the context of the doctrine of election, this statement is misleading. As long as nothing in the will negates a testator's belief in his power to exercise dominion over property, the fact that he has no such power is immaterial as to his intent to require an election.[36] Nevertheless, the Pennsylvania court in *Grieco* followed the rationale of *Alles* and *Irlbacher* and adopted the blanket position that the doctrine of election does not apply to any devise of entireties property.[37]

In *Sutorius v. Mayor,*[38] the Supreme Court of Missouri reached a conclusion opposite to the one reached by the Pennsylvania court in *Grieco.* In *Sutorius,* the testator and his wife were tenants by the entirety in several parcels of land. In his will, the testator purported to devise this land to his children, while making other provisions for his widow. At the time the will was probated, neither the children nor the widow knew that the property had been held by the entireties. The court held that the will required the widow to elect, but before her conduct would constitute an election and act as an estoppel, it had to be demonstrated that she was aware of her right to the property at the time she accepted any benefits under the will.[39] Although the court found no estoppel, it concluded that "in equity the circumstances stated required an election."[40]

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34. *See* Herrick v. Miller, 69 Wash. 456, 125 P. 974 (1912).

35. 62 Pitt. Legal J. at 59. The doctrine of election is not conditioned upon the valid exercise of testamentary power. In fact, the principle applies only because a testator attempts to dispose of property that does not belong to him. *See, e.g.,* Kenucky Trust Co. v. Kessel, 464 S.W.2d 275 (Ky. Ct. App. 1971); *see* authorities cited note 36 *infra.*

36. 24 Cal. App. 3d at 85-86, 100 Cal. Rptr. at 778; *accord, e.g., In re* Cecala's Estate, 104 Cal. App. 2d 526, 232 P.2d 48 (1951); *In re* Riley's Estate, 6 Wis. 2d 29, 94 N.W.2d 233 (1959). *Contra, In re* Peden's Estate, 409 Pa. 194, 185 A.2d 794 (1962). *See* Annot., 60 A.L.R.2d 789, 802 (1958); 5 W. PAGE, *supra* note 7, § 47.2; 2 POMEROY, *supra* note 8, § 473. The intention of the testator, not the ground upon which that intention rests, generates the necessity of an election. *See In re* Moore's Estate, 62 Cal. App. 265, 274, 216 P. 981, 985 (1923).

37. The court in *In re* Peden's Estate, 409 Pa. 194, 185 A.2d 794 (1962), note 29, *supra,* first enunciated this position. It would seem to apply with equal force to a devise of joint tenancy property.

38. 350 Mo. 1235, 170 S.W.2d 387 (1943).

39. Whether acts are such as to constitute an election must be determined from the facts of each individual case, but knowledge, intent, and reliance are the essential factors. *See* Collins v. Fincher, 235 Ark. 587, 361 S.W.2d 86, (1962); Wahl v. Pate, 177 S.W.2d 461 (Mo. 1944); Mondelli v. Pizzi, 97 N.J. Super. 12, 234 A.2d 102 (Ch. 1967). *See generally* 2 W. PAGE, *supra* note 7, § 47.21.

40. 350 Mo. at 1251, 170 S.W.2d at 396.

By analogy, a Missouri court confronted with the joint tenancy situation would probably render an opinion consistent with that in *Waters*.[41]

The question whether to require election by a beneficiary claiming a right of survivorship in property devised by the testator to another has been resolved by the courts of a dozen states.[42] The decisions in Arkansas,[43] Indiana,[44] Kentucky,[45] Mississippi,[46] New Jersey,[47] North Carolina,[48] and Wisconsin[49] are consistent with the California and Missouri views; only Florida[50] and Michigan[51] have decisions similar to the Pennsylvania holding. The federal courts have also required election by the surviving tenant.[52] In this respect, the result in *Waters* conforms with that in the majority of jurisdictions that have resolved the issue. Moreover, as a

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41. Section 442.450, RSMo 1969, requires a grant or devise (other than to husband and wife, executors, or trustees) to declare expressly that a transfer is "in joint tenancy" in order to create that estate. See Powers v. Buckowitz, 347 S.W.2d 174 (Mo. En Banc 1961), for an interpretation of the sufficiency of words necessary to create a joint tenancy under the statute. *See also* Eckhardt, *Property Law in Missouri*, 27 Mo. L. REV. 65, 70-72 (1962); Graham, *Concurrent Estates in Missouri—Sufficiency of Words Used to Create a Joint Tenancy—Section 442.450, RSMo 1959*, 27 Mo. L. REV. 287 (1962).

42. Courts in a few other jurisdictions have rendered decisions in cases involving surviving joint tenants and tenants by the entirety. But it remains unclear from these opinions whether the court has made a determination that the doctrine of election applies as a general rule of law. *See, e.g.*, Ragland v. Craig, 188 Tenn. 380, 219 S.W.2d 894 (1949); Walker v. Bobbitt, 114 Tenn. 700, 88 S.W. 327 (1905). A number of decisions from other jurisdictions are also unclear as to the nature of ownership in question and cannot be relied upon as supporting the application of election. *See, e.g.*, Evans v. Heilman, 37 S.D. 499, 159 N.W. 55 (1916). Additionally, several courts have considered the doctrine in relation to a bequest of personal property held in joint tenancy, often jointly held stock, and more recently, joint bank account funds. Most of these decisions support the requirement of election. *See* Thurlow v. Thurlow, 317 Mass. 126, 56 N.E.2d 902 (1944); Bennett v. Bennett, 70 Ohio App. 187, 24 Ohio Op. 510, 45 N.E.2d 614 (1942); Grosvenor v. Durston, 25 Beav. 97, 53 Eng. Rep. 573 (R.C. 1858); Coates v. Stevens, 1 Younge & C. Ex. 66, 106 Eng. Rep. 28 (1834); *cf.* Johnson v. McCarty, 202 Va. 49, 115 S.E.2d 915 (1960).

43. *See* Pittman v. Pittman, 237 Ark. 684, 375 S.W.2d 361 (1964); Collins v. Fincher, 235 Ark. 587, 361 S.W.2d 86 (1962).

44. *See* Young v. Biehl, 166 Ind. 357, 77 N.E. 406 (1906); *cf.* Johnson v. Hicks, 231 Ind. 353, 108 N.E.2d 129 (1952); Ragsdale v. Robinson, 219 Ind. 335, 38 N.E.2d 570 (1942).

45. *See* Kentucky Trust Co. v. Kessel, 464 S.W.2d 275 (Ky. Ct. App. 1971); *cf.* York v. Adams, 277 Ky. 577, 126 S.W.2d 1077 (Ct. App. 1939).

46. *See* Bird v. Stein, 102 F. Supp. 399 (S.D. Miss. 1952), *rev'd* 204 F.2d 122 (5th Cir. 1953).

47. *See* Mondelli v. Pizzi, 97 N.J. Super. 12, 234 A.2d 102 (Ch. 1967); Job Haines Home v. Keene, 87 N.J. Eq. 509, 101 A. 512 (Ch. 1917).

48. *See* Wachovia Bank & Trust Co. v. Burrus, 230 N.C. 592, 55 S.E.2d 183 (1949). *But see* Breece v. Breece, 270 N.C. 605, 155 S.E.2d 65 (1967); Burch v. Sutton, 266 N.C. 333, 145 S.E.2d 849 (1966).

49. *See In re* Riley's Estate, 6 Wis. 2d 29, 94 N.W.2d 233 (1959); *In re* Parker's Will, 273 Wis. 29, 76 N.W.2d 712 (1956); *In re* Schaech's Will, 252 Wis. 299, 31 N.W.2d 614 (1948).

50. *See* Colclazier v. Colclazier, 89 So. 2d 261 (Fla. 1956).

51. *See* Webber v. Webber, 217 Mich. 178, 185 N.W. 761 (1921).

52. *See, e.g.*, Commissioner v. Kelly's Estate, 84 F.2d 958 (7th Cir. 1936), applying Illinois law.

product of equity, the doctrine of election was designed to achieve just results. In *Waters,* it enabled the court to effectuate a testamentary intent that would otherwise be defeated. To this extent, the principle of election remains both "good law and good morals."[53]

RICHARD M. WAUGH

WITNESSES—CROSS-EXAMINATION—RIGHT OF CODEFENDANTS TO SEPARATE CROSS-EXAMINATION

Thompson v. Curators of University of Missouri[1]

Decedent's will designated the University of Missouri and the Slater, Missouri, Methodist Church as residuary legatees. Three nephews of decedent, his nearest relatives, contested the will solely on the ground that decedent lacked testamentary capacity at execution. A jury sustained the contestants' position, and both legatees appealed.

On appeal, the University of Missouri asserted individually that the trial court had unduly restricted its right to cross-examine adverse witnesses. At the beginning of the trial, counsel for both appellants had requested separate cross-examination. The trial judge ruled:

> As indicated earlier in our conversations, I'm going to permit you both to ask questions on voir dire; but I still feel that in view of the fact there is just one ultimate issue and both defendants are interested in that same one issue that cross-examination should be confined to one lawyer or the other; of course the court will allow you plenty of time to confer, but as I also suggested earlier, if something arises that has some special significance to one defendant or the other, if you will request the court at that time I'll make a ruling whether or not I'll allow both of you to cross-examine the same witness.[2]

Appellant University of Missouri contended that section 491.070, RSMo 1969,[3] gives each defendant the absolute right to separately cross-examine adverse witnesses, and that the trial court's discretion is properly exercisable only with respect to the scope and extent of the cross-examination.[4] The Missouri Supreme Court rejected this contention, stating that the

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53. Smithsonian Institution v. Meech, 169 U.S. 398, 415 (1898).

1. 488 S.W.2d 617 (Mo. 1973).
2. *Id.* at 620.
3. § 491.070, RSMo 1969, provides:
A party to a cause, civil or criminal, against whom a witness has been called and given some evidence, shall be entitled to cross-examine said witness (except where a defendant in a criminal case is testifying in his own behalf) on the entire case. . . .
4. Brief for Appellant at 54.

issue did not lend itself to the establishment of a rigid rule and was within the broad discretion of the trial court.[5]

The *Thompson* court relied[6] on the general rule that:

> Where there are several codefendants, counsel of each may cross-examine plaintiff's witnesses, . . . but it is undesirable for more than one attorney to cross-examine the same witnesses, and the right may be denied where the interests of the codefendants are identical.[7]

Codefendants do not have an absolute right of separate cross-examination;[8] its availability depends on the trial court's view of the codefendants' interests. Trial courts allow separate cross-examination, with respect to any one witness, only where the codefendants' interests are adverse.[9] An adverse interest means that the testimony of plaintiff's witness will have a different legal effect on one defendant than on the other (s). Thus, where

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5. 488 S.W.2d at 620.

6. State v. Bryant, 55 Mo. 75 (1874) is the only previous Missouri case dealing with a codefendant's right to separate cross-examination. Counsel for one of two defendants charged with murder sought to conduct additional cross-examination on matters material to his client's defense but which were damaging to the defense of the other defendant. The trial court refused the separate cross-examination, noting a local circuit court rule that limited cross-examination to one counsel on each side. The trial court ruled that the questions could be asked through the other defendant's counsel, who, of course, refused because of the harm to his client. The Missouri Supreme Court reversed, saying that "it was not in the power of a court to adopt any rule, which would deprive a defendant in a criminal case of the right of cross-examination." *Id.* at 78. The *Thompson* court did not refer to *Bryant* in its opinion. *Bryant* is easily distinguished by the defendants' adverse interests, *i.e.,* they were interested in proving different facts. Notwithstanding this adverse interest, *Bryant* is authority for the proposition that a criminal defendant has an absolute right to separate cross-examination.

7. 98 C.J.S. *Witnesses* § 368, at 116 (1957).

8. Only three reported cases have dealt with this issue. In Madden v. United States, 20 F.2d 289 (9th Cir.), *cert. denied,* 275 U.S. 554 (1927), several defendants charged with violations of the Prohibition and Tariff Acts asserted as error on appeal the trial court's denial of separate cross-examination. The Ninth Circuit Court of Appeals affirmed, saying that the defendants were given a fair opportunity for reasonable cross-examination on the record as a whole. *Id.* at 292.

In Kiviniemi v. Hildenbrand, 201 Wis. 619, 231 N.W. 252 (1930), plaintiff sued a trucking company and its insurance carrier for personal injuries sustained in a collision between his automobile and defendant's truck. The appellate court held that the trial court had properly allowed separate cross-examination where the defendants interests were adverse (*i.e.,* whether there was insurance on the car). On all other issues the trial court had properly denied separate cross-examination because the defendants' interests were identical. *Id.* at 624, 231 N.W. at 254.

In Jensen v. Logan City, 96 Utah 53, 83 P.2d 311 (1938), plaintiff sued a private property owner and the city for personal injuries. The Utah Supreme Court held that cross-examination of the city's witness by its codefendant was proper, noting that either or both defendants could be liable on different facts and that each was interested in excluding itself from liability. *Id.* at 65-66, 83 P.2d at 316.

In Commonwealth v. Bailey, 450 Pa. 201, 299 A.2d 298 (1973) a single defendant was denied the right to have both of his attorneys cross-examine the same witness.

9. *See* note 8 *supra.*

the codefendants are trying to prove different facts[10] or different sides of an issue,[11] they have an adverse interest.

The extent to which appellate courts defer to the trial court's determination whether the codefendants have an adverse interest is unclear. This determination is a question of law, and hence a denial of separate cross-examination where the interests are adverse could be reversible error. No case has held, however, that separate cross-examination is a matter of right even where the codefendants' interests are adverse. Possibly, to the extent that the record as a whole discloses a "fair opportunity for reasonable cross-examination,"[12] the availability of separate cross-examination is completely within the trial court's discretion.[13] In any case, it is likely that, on appeal, the codefendant (s) will have to show some prejudice from the denial of an opportunity to cross-examine.[14]

The question of separate cross-examination of adverse witnesses also arises in cases involving third-party defendants and interveners and in consolidated actions. In these multiple party actions, courts have used an approach quite different from that used in codefendant cases.

The federal courts of appeals have decided three similar cases dealing with the right of separate cross-examination in the third-party defendant context.[15] In each, a longshoreman was injured while working aboard a vessel; the longshoreman sued the vessel's owner, and the owner impleaded the plaintiff's employer, a construction or stevedoring company. The plaintiff did not charge the third-party defendant, nor did the third-party defendant raise any issue adverse to the plaintiff in his answer to the third-party claim. As to the issues raised by the testimony of plaintiff's witnesses, the third-party plaintiff and the third-party defendant had largely identical interests.[16] The courts held that the third-party defendant had

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10. Jensen v. Logan City, 96 Utah 53, 83 P.2d 311 (1938).

11. Kiviniemi v. Hildenbrand, 201 Wis. 619, 231 N.W. 252 (1930).

12. The language is that used by the Ninth Circuit Court of Appeals in Madden v. United States, 20 F.2d 289 (9th Cir.), *cert denied,* 275 U.S. 554 (1927) in denying separate cross-examination.

13. The trial court's decision is a two-step process: determining whether the defendants have adverse interests, and, if so, whether those interests justify separate cross-examination. The appellate courts in *Thompson, Jensen* and *Kiviniemi* considered the trial courts' rulings discretionary (presumably with respect to both steps) and spoke in terms of whether separate cross-examination was "proper." None referred to separate cross-examination by codefendants as a matter of right. Because the trial court was affirmed in each case, the extent of the trial court's discretion is difficult to define.

14. The *Thompson* court noted that the appellants had not shown injury or prejudice. 488 S.W.2d at 620-21.

15. Dibello v. Rederi A/B Svenska Lloyd, 371 F.2d 559 (2d Cir. 1967); Hagans v. Ellerman & Bucknall S.S. Co., 318 F.2d 563 (3rd Cir. 1963); Delpit v. Nocuba Shipping Co., 302 F.2d 835 (5th Cir.), *cert. denied,* 371 U.S. 915 (1962). The issue in *Dibello* was the third-party defendant's right to conduct summation. Relying in part on the third-party defendant's right to cross-examine, established in *Hagans,* the court held that the summation was proper.

16. Hagans v. Ellerman & Bucknall S.S. Co., 318 F.2d 563, 586-87 (3rd Cir. 1963); Delpit v. Nocuba Shipping Co., 302 F.2d 835, 838-39 (5th Cir.), *cert. denied,* 371 U.S. 915 (1962). A codefendant is allowed separate cross-examination only if the codefendants have adverse interests *inter se* in the issues that plaintiff raises. The third-party plaintiff and the third-party defendant are always adverse parties

the right to separately cross-examine plaintiff's witnesses.[17] The possibility of individual liability was a sufficient adverse interest, as between the two third parties, to justify the cross-examination. In one case, a contrary ruling was reversible error.[18] Other cases are in accord.[19]

A similar approach was taken in *Lamborn v. Czarnikow-Rionda Co.*,[20] a consolidated action. Plaintiff sued to recover for breach of warranty with respect to the quality of sugar purchased from defendant seller. The seller sued the refining company, and the actions were joined. The court said that justice is best served by allowing all parties to participate

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with respect to the third-party claim. With respect to the third-party defendant's right to cross-examine *plaintiff's* witnesses, however, the question is (following the rationale of the codefendant cases) whether they have an adverse interest in the plaintiff's claim. To the extent that both are interested in defeating the plaintiff's claim, they have an identical interest in the issues raised by these witnesses. The factual evidence presented by plaintiff's witnesses may, however, also be relevant to *whose* negligence caused the accident. The two parties are, therefore, interested in establishing different facts from the testimony. Clearly, both should have the right to cross-examine plaintiff's witnesses. In *Hagans*, the court noted that there appeared to be some issue adversity between the third parties regarding plaintiff's witnesses' testimony, but did not rely on this adverse interest as the justification for the third-party defendant's right to cross-examine. Instead, the court emphasized the third-party defendant's potential individual liability as an independent and sufficient justification. 318 F.2d at 586. In Dibello v. Rederi A/B Svenska Lloyd, 371 F.2d 559, 561 (2d Cir. 1967), the court cited *Hagans* for the proposition that a third-party defendant has a right to cross-examine plaintiff's witnesses. In *Delpit*, the court held that the third-party defendant has such a right based *solely* on his potential individual liability.

In many cases there is strict issue identity between the third parties with respect to the testimony of plaintiff's witnesses. *Hagans* and *Delpit* are strong precedent for the principle that the third-party defendant, nonetheless, has an absolute right to separate cross-examination.

17. Hagans v. Ellerman & Bucknall S.S. Co., 318 F.2d 563, 586-87 (3rd Cir. 1963); Delpit v. Nocuba Shipping Co., 302 F.2d 835, 838-39 (5th Cir.), *cert. denied*, 371 U.S. 915 (1962). Under the Federal Rules of Civil Procedure, many procedural rights of third-party defendants, including cross-examination, have traditionally been dependent on a finding that the plaintiff and the third-party defendant are adverse parties; the relationship of the third parties *inter se* is largely ignored. The use of similar reasoning in the codefendant context would focus on the relationship of the codefendant and the plaintiff, instead of the codefendants *inter se*, and would result in finding a right of separate cross-examination in every case.

18. Hagans v. Ellerman & Bucknall S.S. Co., 318 F.2d 563 (3rd Cir. 1963). The third-party defendant obtained a new trial on the third-party claim.

19. Commissioners of State Ins. Fund v. City Chem. Corp., 290 N.Y. 64, 48 N.E.2d 262 (1943) recognized the right of an impleaded thirty-party defendant to cross-examine plaintiff's witnesses in an action for breach of warranty. In Airline Motor Coaches, Inc. v. Fields, 180 S.W.2d 216 (Tex. Civ. App. 1944), the third-party defendants' cross-examination of plaintiff's witnesses was proper because the plaintiff amended his complaint to charge the third-party defendants. But in Grunenthal v. Long Island R.R., 292 F. Supp. 813 (S.D.N.Y. 1967), *aff'd*, 388 F.2d 480 (2d Cir. 1968) the trial court properly denied the third-party defendant the right to cross-examine one of plaintiff's witnesses as to the contents of a statement the witness had signed, saying that with respect to such contents the interests of the third-party plaintiff and the third-party defendant were identical. The court also said, however, that the third-party defendant's liability was a question of law.

20. 227 App. Div. 72, 237 N.Y.S. 69 (1929).

in the cross-examination of any witness.[21] To hold otherwise would be to deny the refining company the right it would have had if the actions were separate. The court held that separate cross-examination was proper even though the sole issue was the quality of the sugar and the seller and the refining company had identical interests with respect to that issue.[22] The decision impliedly recognizes that liability is a sufficient adverse interest to justify cross-examination.

The right of interveners to conduct separate cross-examination is unclear. One case held that when it is in the intervener's interest for the plaintiff to recover on his petition, and the intervener joins in the plaintiff's prayer for damages, the intervener has no separate right of cross-examination.[23] Two other cases allowed the intervener to participate fully and separately in cross-examination.[24] In both, however, the intervener was interested in proving facts distinctly adverse to the interest of the other two parties.[25]

There is no absolute right to separate cross-examination in these multiple party actions.[26] Courts have, however, exhibited a strong tendency to allow it.[27] The reason for this is that a party's potential liability alone is usually a sufficient adverse interest to justify separate cross-examination.[28]

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21. *Id.* at 73-74, 237 N.Y.S. at 70-71.

22. *Id.*

23. Price v. King, 255 Iowa 314, 122 N.W.2d 318 (1963). An employee sued a third party for injuries and the employer's workmen's compensation carrier intervened. The court said that the intervener was a co-party with the plaintiff and, therefore, had no separate rights on voir dire, examination, or cross-examination.

24. Succession of Townsend, 40 La. 66, 3 So. 488 (1887); Salvini v. Salvini, 2 S.W.2d 963 (Tex. Civ. App. 1928). In *Salvini,* petitioner sought to be declared the common law wife of the deceased. The state, seeking escheat, intervened. Intervener was permitted to cross-examine petitioner's witnesses even though the intervention petition had been dismissed. In *Townsend,* the state sought to set aside the will of a woman whose husband-legatee had murdered her. The interveners sought to be declared relatives of deceased and to prevent escheat. The husband-legatee and the state both were interested in proving that interveners were not relatives; yet, the court allowed the state to ask leading questions of the husband's witnesses. The state and the interveners were similarly interested in proving that the husband could not inherit. Faced with a situation in which the three parties had a different combination of interests on different issues, the court allowed all to examine and cross-examine.

25. In Price v. King, 255 Iowa 314, 122 N.W.2d 318 (1963), the intervener was not asserting a claim adverse to both plaintiff and defendant, but rather had joined in the plaintiff's petition.

26. There probably is a right of separate cross-examination of plaintiff's witnesses where there is pleading adversity. In Hagans v. Ellerman & Bucknall S.S. Co., 318 F.2d 563 (3rd Cir. 1963), the court may have said that the right is absolute even where the plaintiff and the third-party defendant are not adverse on the pleadings. It is arguable, however, that in this situation *Hagans* requires a finding of some issue of adversity between the third parties. *See, e.g.,* Grunenthal v. Long Island R.R., 292 F. Supp. 813 (S.D.N.Y. 1967), *aff'd,* 388 F.2d 480 (2d Cir. 1968).

27. Trial courts seemingly assume there are adverse interests simply because there are multiple pleadings and parties in the lawsuit.

28. *See* notes 15-25 and accompanying text *supra.* Third-party defendants probably have to show less prejudice on appeal from the denial of separate cross-examination than codefendants to obtain reversal. *E.g.,* in Hagans v. Eller-

In the codefendant context, courts have focused solely on the relationship of the codefendants *inter se* and required that there be some issue adversity before allowing separate cross-examination.[29] Yet, codefendants interests in the outcome of the litigation, *e.g.,* individual liability, often are different and independent. If potential liability is a sufficient interest to justify separate cross-examination in the multiple party cases, it should also be in codefendant cases.

In *Thompson,* the University of Missouri and the Slater Methodist Church had identical interests with respect to the issues and the outcome of the litigation. As the court stated, the residuary legatees had a "mutuality of purpose with the one goal of proving that decedent had a testamentary capacity," and they "would either profit or not together."[30] This conclusion is supported by both parties failure to request separate or additional cross-examination of any witness or to show on appeal that the trial court's ruling prejudiced either. The court's statement that the defendants' financial interests in the outcome were identical may indicate that in a case where the defendants' liability is potentially independent, separate cross-examination would be proper.

There are several fact situations where *Thompson* should be inapplicable. Separate cross-examination should be a matter of right in respondeat superior cases,[31] in cases where the codefendants' liability is potentially independent,[32] and in criminal cases.[33] In the latter, in addition to involving a more significant liability, there is a serious danger of denying the criminal defendant his constitutional right of confrontation if he is not permitted to cross-examine all of the state's witnesses. It has been held, however, that the right of confrontation extends only to "areas"

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man & Bucknall S.S. Co., 318 F.2d 563 (3rd Cir. 1963) the trial judge carefully screened the testimony during the trial to insure that denial of separate cross-examination did not result in prejudice to the third-party defendant. The appellate court said that judicial supervision is no substitute for the "sharp instrument of cross-examination intelligently wielded by the hands of the advocate of the party affected by testimony involving it." *Id.* at 587.

29. *See* notes 8-13 and accompanying text *supra.*

30. 488 S.W.2d at 620.

31. There are a great number of respondeat superior cases. The desirability of applying *Thompson* in that context is therefore an important question. In such cases, the employer's liability is independent of the employee's, making their interests in the outcome of the litigation very different. This situation is analagous to cases involving third-party defendants and the same principles should apply. *Thompson* should not be authority for denying separate cross-examination in these cases.

32. This category includes many cases besides respondeat superior. It includes all cases where one defendant may be liable and not the other(s).

33. Arguably, State v. Bryant, 55 Mo. 75 (1874) establishes the right of a criminal codefendant in Missouri to separate cross-examination. The issue is unclear because: (1) The holding in *Bryant* can be read as requiring issue adversity between the codefendants; (2) the *Thompson* court did not mention *Bryant* in its opinion, although the case was cited in appellants' brief; (3) the case is old and no other reported cases have dealt with the issue; and (4) there is authority elsewhere that criminal cases are governed by the same considerations as civil cases. *See, e.g.,* Madden v. United States, 20 F.2d 289 (9th Cir.), *cert. denied,* 275 U.S. 554 (1927).

of cross-examination, not to particular defendants, and that once an area is exhausted, no further cross-examination need be permitted.[34]

Beyond being inappropriate in the above stiuations, the *Thompson* rationale may be inappropriate in any case. Each defendant is, in effect, denied his right to be represented by counsel of his choice and must instead rely on the cross-examination of his codefendant's counsel. This result fails to recognize the many intangibles involved in cross-examination (*e.g.*, the particular lawyer's skill, style, and effect on the jury). Indeed, cross-examination of a witness by two lawyers, where not repetitious, may increase the effectiveness of cross-examination as a truthfinding procedure. Thus, in a case where the credibility of the witness will largely determine the result, as in *Thompson*,[35] the codefendants should be allowed maximum opportunity to attack the testimony.

The *Thompson* rationale fails to recognize the difference between allowing separate cross-examination and the trial court's broad discretion to control the scope and extent of cross-examination. The trial court can easily prevent repetition and delay. Full protection of the defendants' interests is more important than what little time may be lost.[36] As suggested herein, strong rationale exists for separate cross-examination as a matter of right in three codefendant situations (respondent superior, where liability is potentially independent, and in criminal cases). In

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34. United States v. Jorgenson, 451 F.2d 516 (10th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972). In *Jorgenson*, several defendants were charged with conspiracy to defraud the Federal Housing Administration. On appeal, one maintained that his due process right of confrontation had been denied because the court refused to permit his counsel to ask the prosecution's witnesses some of the questions that other defendant's counsel had already asked. The trial court had previously ruled that separate cross-examination was appropriate, but that counsel were not to repeat what other defense counsel had examined on. The appellate court said that the right of confrontation extends only to areas of cross-examination, and that denial of the right means completely denying access to an area that is properly the subject of cross-examination. Once an area of cross-examination is exhausted, the right of confrontation does not require additional cross-examination by other defense counsel. The holding of the case is that the right of confrontation does not require repetitive questions where the questions are relevant to a precise point already covered. The difficulty lies in determining what is repetitive, *i.e.*, how similar must the questions be? How much indulgence, if any, must be given counsel so that he may establish the groundwork, where somewhat repetitive, for his examination? How can the court determine, in advance, whether the examination will be directed to a precise point already covered? A danger in the holding is that any definition of repetitive, other than a narrow one, will effectively foreclose separate cross-examination because separate cross-examination will often involve a degree of repetition. An issue the court did not deal with was whether the right of confrontation requires separate cross-examination where, though unrepetitive, the codefendants have identical interests.

35. The sole issue in *Thompson* was decedent's testamentary capacity. The lack thereof was established at trial by the testimony of several witnesses who spoke to or observed the decedent. Probably, no one witness's testimony was determinative.

36. The court in Hagans v. Ellerman & Bucknall S.S. Co., 318 F.2d 563, 587 (3rd Cir. 1963) strongly emphasized this point.

other codefendant cases, the benefits of separate cross-examination would seem to outweigh the minimal difficulties involved. The most satisfactory approach may be to allow separate cross-examination in all cases.

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