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COMMENTS

AN ANALYSIS OF THE GENERAL VERDICT: RES JUDICATA APPLIED IN CRIMINAL PROCEEDINGS

By WILLIAM J. KNOWLES*

Introduction

You can't do this to me! But they did, nevertheless: the little man who wasn't there can be found serving time in one of the Ohio penitentiaries.

In *State v. Orth*,[1] Orth had been indicted, tried and acquitted of first degree murder. His only defense had been alibi. In the flush of his victory, he must have considered the matter closed. Far from it, for he was subsequently indicted, tried and convicted of robbery. Both the homicide and the robbery arose from the same transaction. Orth managed to obtain a retrial on the robbery charge. In his new trial he attempted to plead once in jeopardy, but the plea was denied. On an inspiration, then, he invoked *res judicata*; surely a man cannot commit a robbery if he is not present! The court refused to adopt this theory of the situation and ruled against such a plea. To this ruling Orth assigned error on appeal. Ohio law permitted only five pleas: guilty, not guilty, once in jeopardy, not guilty by reason of insanity, and a former judgment of conviction or acquittal of the *offense*.[2]

The majority opinion in the *Orth* case limited *res judicata* to the same scope as the plea of former judgment and denied its application in this case because the offense was different. They further reasoned that since the verdict of not guilty only indicated the jury had a reasonable doubt of Orth's guilt, the judgment on that verdict could not have any value as *res judicata* of the issue of his Presence. The view was taken that the matter of Orth's presence was only one of many issues presented at the murder trial, none of which were specifically settled. The point was well taken, having much support in the authorities,[3] *so far as it went.*

A vigorous dissent in the *Orth* case was based on the point that the defense of alibi denied nothing except the presence of the accused and that no other fact was put in issue. It was said that the jury had only to determine whether or not Orth participated in the commission of the offense. Thus the acquittal, deductively, must have determined Orth was not present. This view also finds substantial support in the authorities.[4]

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1 153 N.E. 394 (Ohio Ct. App. 1957).

2 OHIO REV. CODE § 2943.03; see also CAL. PEN. CODE § 1016.

3 State v. Rose, 89 Ohio St. 383, 106 N.E. 50 (1914); Duvall v. State, 111 Ohio St. 657, 146 N.E. 90 (1924); Patterson v. State, 96 Ohio St. 90, 117 N.E. 169 (1917).

4 Harris v. State, 193 Ga. 109, 17 S.E. 2d 573 (1941); see 147 A.L.R. 980.

The Problem

When a criminal act is of such severity as to amount to a felony, it is rare, under modern statutes, that only one felonious feature arises. Many of these features are essential to a given offense, being "lesser included offenses." Others are entirely independent in nature, although they may have one or more common elements.[5] As to the lesser included offenses, once an accused has been put on trial and been "in jeopardy of life and limb" he may be able to escape a future prosecution by pleas of former jeopardy, *autrefois acquit,* or *autrefois convict.*[6]

Such is not the case, however, when an accused faces a second indictment or information charging a joint or concurrent offense, arising out of the same transaction.[7] A robbery resulting in a homicide gives rise to a charge of first degree murder.[8] The accused could be tried for the murder or the robbery. Can he be subjected to a *complete review of the evidence, de novo,* at a later trial for one offense in the event of a prior acquittal as to the other? Is he permitted to defy a prior conviction and urge a defense previously adjudged destitute of merit? If *res judicata* is as completely available in a criminal proceeding as in a civil action, it would seem both questions should be answered negatively.

Conceding that *res judicata* is available in a criminal proceeding,[9] the problem remains to determine the *extent* to which it may be applied. The cases and authorities are not in harmony as to the proper place of this plea in a criminal action. Some cases apply it liberally; others restrict the doctrine narrower than the rules obtaining in former jeopardy. They are so rife with uncertainty and conflict that even the Restatement of the Law of Judgments expressly excepts criminal rules from its scope.[10]

Invoking Res Judicata

In a given fact situation, where the life or liberty of the accused hangs in the balance, a doctrine which has its roots in stability and its limbs in public policy should not be so difficult of application as cases such as *Orth* make it seem. If there is doubt as to the proper application of *res judicata,* it seems fundamental in our jurisprudence that such doubt should be resolved in favor of the accused.

This discussion will emphasize the application of the doctrine of *res judicata* on behalf of an accused. The basic rules are the same for either prosecution or defense,[11] tempered only by the basic presumption of inno-

[5] *E.g.,* robbery-homicide and robbery both have attempted robbery as a common element, but only in robbery is it a lesser included offense. See CAL. PEN. CODE §§ 211; 189.

[6] 10 HASTINGS L.J. 188 (1958).

[7] State v. Dills, 210 N.C. 178, 185 S.E. 677 (1936).

[8] CAL. PEN. CODE § 189.

[9] United States v. Oppenheimer, 242 U.S. 85 (1916); Sealfon v. United States, 332 U.S. 575 (1948).

[10] RESTATEMENT, JUDGMENTS (1942) (Scope Note).

[11] See Estate of Bell, 153 Cal. 332, 340, 95 Pac. 372, 376 (1908). This is the rule in civil cases; it is uncertain what would be the effect of the presumption of innocence in criminal law; no case in point has been found.

cence and the prosecution's burden of proof, both of which are subservient to *res judicata.*

Approaching Res Judicata In Criminal Cases

The Supreme Court of the United States has declared that in *criminal and civil* proceedings[12]

> . . . [A] question of fact or law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties.

In a criminal proceeding the state or government is one of the parties. Perhaps this self evident fact is sometimes disregarded when the representatives are changed or the indictment varies. Unless such disregard is imputed to many opinions, this writer fails to find a logical explanation for the summary disposals of *res judicata* in those opinions where it seems applicable.[13]

Res judicata applies to all matters existing at the time the judgment is rendered which the parties have had an opportunity to bring before the court.[14] The judgment is conclusive not only as to matters actually presented but as to every other matter which might have been presented[15]

> . . . as incident to, or essentially connected with, the subject matter coming within the legitimate purview of the original action. . . .

These may be specific issues or essential elements of an ultimate issue. It does not refer to irrelevant or collateral points which were not presented or could not have been presented to support or deny a right.[16] Merely because a verdict is general on the merits does not prevent an analysis of the substance of the case to determine just what were the essentials. Properly understood, the doctrine would *require* such an analysis. An analysis would reveal that *res judicata* could not apply to later arising rights separate from those involved in the judgment.[17] Cases which limit *res judicata* to the actual issues presented in criminal trials usually are distinguishable on their facts as situations where there was no foundation for the doctrine in the first place,[18] the limiting language thus amounting to dictum.

The doctrine is of such great moment that it may give the character of truth or finality to a matter which may in fact not deserve this quality. Unless directly attacked on appeal an erroneous judgment is as conclusive as a correct one.[19]

Res judicata is a double-pronged doctrine. On the one hand, where the

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[12] Frank v. Mangum, 237 U.S. 309, 334 (1915).

[13] See Commonwealth v. Crecorian, 264 Mass. 94, 162 N.E. 7 (1928).

[14] State v. Torinus, 9 N.W. 725, 728 (Minn. 1881); Quirk v. Rooney, 130 Cal. 505, 511, 62 Pac. 825, 827 (1900).

[15] Estate of Bell, 153 Cal. 331, 95 Pac. 372 (1908).

[16] Emerson v. Yosemite Gold Mining & Co., 149 Cal. 50, 57, 85 Pac. 122, 125 (1906).

[17] State v. Torinus, 9 N.W. 725, 728 (Minn. 1881); Quirk v. Rooney, 130 Cal. 505, 511, 62 Pac. 825, 827 (1900).

[18] See People v. Ashrawy, 130 Cal. App. 145, 149, 19 P.2d 536, 538 (1933).

[19] Panos v. Great Western Packing Co., 21 Cal. 2d 636, 134 P.2d 242 (1943).

cause of action or indictment and the parties are the same, a prior judgment is a complete *bar* to the subsequent action or indictment.[20] On the other hand, where the cause of action or indictment is different but the parties are the same, the doctrine of *res judicata* renders conclusive matters which were decided by the first judgment, operating as an *estoppel*.[21] Of course, in a criminal proceeding, if the matter were decisive of the case, it would seem *res judicata* could be pleaded in bar even though the indictment was different.

Can it be seriously contended that *res judicata* has no place, or even that it should be limited, in criminal proceedings? Consider this statement of the policy behind the doctrine:[22]

> . . . [R]*es judicata* is not a mere rule of procedure, but a rule of justice *unlimited* in operation, which must be enforced whenever its enforcement is necessary for the protection of rights and the preservation of the repose of society, based on the grounds that there should be an end to litigation, and that a person should not be twice vexed for the same cause. (Emphasis added.)

Res judicata is basically a simple doctrine which has undergone no mutations since its earliest application in a criminal case.[23] Misunderstanding, however, has prevented its universal application in American law. The usual limitation arises in the form of a proposition that *res judicata* does not exist for criminal cases except in the modified form of the fifth amendment of the federal Constitution, and that the plea in bar cannot prevent a second trial when defendant has never been in jeopardy.[24] In *Oppenheimer v. United States*,[25] Mr. Justice Holmes attacked this proposition by saying that the mere statement of the position should be its own answer. He observed:[26]

> Where a criminal charge has been adjudicated upon by a court having jurisdiction . . . it is final as to the matter adjudicated . . . and may be pleaded in bar. . . . In this respect the criminal law is *in unison* with that which prevails in civil proceedings. (Emphasis added.)

One might contend that such a view would have no force in a state court. Such a position had been anticipated by Holmes, at least by cogent inference. He stated that the fifth amendment was not intended to do away with what is a *fundamental principle of justice* to enable the government to prosecute a second time.[27] Fundamental principles of justice are universal; they are not restricted solely to federal courts. This writer is of the opinion

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[20] Sutphin v. Speik, 15 Cal. 2d 195, 201, 99 P.2d 652, 655 (1940); Todhunter v. Smith, 219 Cal. 690, 694, 28 P.2d 916, 918 (1934); 26 St. B.J. 366.

[21] *Ibid.*

[22] In Re Walsh's Estate, 80 N.J.E. 565, 570, 74 Atl. 563, 566 (1909).

[23] Rex. v. Duchess of Kingston, 20 Howell's State Trials 538, 2 Smith's Leading Cases, Part 2, 734, 784 (8th ed. 1776).

[24] Patterson v. State, 96 Ohio St. 90, 117 N.E. 169 (1917).

[25] 242 U.S. 85, 87 (1916).

[26] *Ibid.*

[27] *Ibid.*

that those words are an invitation to appeal a case under the due process clause of the fourteenth amendment whenever the doctrine of *res judicata* is disparaged and pre-emptorily disposed of in the court of last resort of the state.

The General Verdict

Courts are frequently reluctant to seek an issue beneath the surface of a judgment to which *res judicata* may properly be applied. It is astounding that the doctrine can be so grossly ignored on pretexts of one sort or another. For example, in *Commonwealth v. Crecorian* the court passed it off in the following way:[28]

> The acts charged in the first indictment would not have warranted a verdict of guilty on the facts charged in the (second) indictment. . . . The crimes charged were not *identical.* (Emphasis added.)

Even the plea of once in jeopardy is not this restrictive!

Contrast this to the California case of *Oliver v. Superior Court,* where *res judicata* was applied to a very unusual degree in barring prosecution for conspiracy.[29] The accused presented the record of the prior trial which disclosed that the overt act alleged in the conspiracy indictment (for purposes of satisfying the statutory requisite of that offense) was the very crime of which he had been generally acquitted in the former trial. Surely an acquittal of the substantive offense does not preclude the existence of a conspiracy, a different offense, or even an attempt, a lesser included offense. Yet in *Oliver* the second trial was barred by the plea because the indictment alleged a completed offense rather than merely some overt act falling short of the offense. Any overt act would have been adequate. On the *face* of the indictment, however, it could be demonstrated that an essential allegation had been resolved in favor of the accused at a prior trial.

Issues Within the Scope of a General Verdict

What are the matters in a prior record which cannot be re-argued? Four factors might be considered in approaching a record to determine what issues must have been settled by judgment: concessions, admissions, stipulations and "reasonable certainties." If a relevant fact in the case for the state is conceded to the state by the accused, it is a part of the judgment.[30] Likewise, an admission of a relevant fact is part of the judgment.[31] Along with relevant stipulations,[32] these are parts of the decision on the merits. Since they were not *put* in issue at the first trial, they cannot be put in issue in a later proceeding between the same parties.[33] The reasoning

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[28] 264 Mass. 94, 95, 162 N.E. 7, 8 (1928).
[29] 92 Cal. App. 94, 267 Pac. 764 (1928).
[30] Sealfon v. United States, 332 U.S. 575, 580 (1948).
[31] Johnson v. Fontana County F.P. Dist., 15 Cal. 2d 380, 389, 101 P.2d 1092, 1097 (1940).
[32] McCreary v. Fuller, 63 Cal. 30 (1883), *Aff'd.* 119 U.S. 327 (1886).
[33] Donner v. Palmer, 51 Cal. 629, 637 (1877).

behind this is logical. In a *practical* sense, these matters are *basic* or *essential* to the judgment.[34] They cannot be altered for purposes of obtaining a contrary result on an issue to which they are fundamental and which has already been adjudged.[35]

The application of "reasonable certainties" is not as readily apparent. If the issue *had* to be determined by the jury in order to arrive at their verdict, the judgment is a final determination of the issue.[36] But is an issue within the "domain of the jury" if the conflict is only superficial or unrealistic? If not an issue which the jury *had* to determine, how is the "reasonable certainty" applicable in the determination of the essential issues passed upon by the jury? This writer is of the opinion that a misconceived regard for the function of the jury is at the root of the problem in analyzing a jury's "reasonable doubt" and offers the following rationale of that problem.

Domain of the Jury

The jury is probably the closest approximation the law has for the "reasonably prudent man" upon whom it relies to resolve questions of fact about which reasonable men could differ. The law is not concerned with the reasoning of the individual jurors; it is the result of their cumulative effort which is sought. The jury is analagous to a computing machine: facts and variables are fed into it; they are run through its circuits; an answer comes out in the terms desired. The "dials" of the "jury-machine" are preset by instructions from the court to indicate what the legal consequences of certain cumulative facts and variables must be, so that the "answer" given is in terms of law: "guilty" or "not guilty." Yet, in the final analysis, it is fact which is determined.[37] The key here is that this "jury-machine" is used only to decide facts or issues over which reasonable men could differ.[38] If reasonable men could not differ, it may be assumed that the "jury-machine," replacing the reasonably prudent man, also would not differ. Some facts are fed into it during the course of the trial for which its operation may, in fact, not be needed at all when viewed at the *close* of the evidence. Thus, in analyzing the verdict, these issues should be set aside as matters upon which the jury did not deliberate but used only as foundation material. It is well known that an appellate court may reverse a decision on findings which are clearly "not supported by the evidence." It would seem that such "reasonable certainties" should be added to the list of necessary fundamentals to the verdict, along with concessions, admissions and stipulations. They become part of the foundation for applying *res judicata*.

This rationale is especially significant when it is considered that jurors do in fact differ as to the reasons for their individual votes. While it may be

[34] Sealfon v. United States, 332 U.S. 575, 579 (1948).
[35] *Ibid.*
[36] Horton v. Goodenough, 184 Cal. 451, 460, 194 Pac. 34, 38 (1920).
[37] CAL. PEN. CODE § 1126.
[38] CAL. PEN. CODE § 1096.

true that some jurors might refuse to accept the legal consequences of certain acts and vote for conviction or acquittal without regard to their own belief as to the commission or non-commission of acts, such a possibility must be disregarded. The jury must be regarded as acting in perfect harmony with the "setting of its dials," consistent with the law. To view it otherwise is to question the very purpose of the jury, or at least the propriety of allowing the general verdict at all. So, the general verdict naturally should be viewed as if legal consequences were applied with absolute infallibility, and only to those facts about which reasonable men would differ, after founding them upon undisputed or indisputable allegations and offers of evidence.

The Analysis

The test of whether the fact or facts decided in a prior proceeding will bar a second proceeding is not whether it is a successive step in a transaction. It is rather whether the offense charged in the second indictment necessarily involves the fact or offense charged in the first indictment.[39] If a fact is a requisite of both offenses, or if the first offense is essential to the second, *res judicata* is invoked to bar the second proceeding, assuming the fact or offense went in favor of the accused in the first trial.[40] Thus the fact that a robbery was committed and then a kidnapping, in one transaction, does not necessarily give them a mutual connection just because successive. An attempted robbery, however, is *essential* to both robbery and robbery-homicide. Under the doctrine of *res judicata* the accused may be able to show that his former acquittal on the first charge was necessarily controlled by the determination of some particular issue of fact which would preclude his conviction of the second charge.[41]

In some cases it is not possible to invoke *res judicata* as a complete bar. Yet a prior judgment is conclusive so far as a later indictment involves any issue which was essentially decided in the prior action.[42] Relevancy of the issue is the important feature in the proceeding.[43] Of course, if the issue is not relevant or material to the second action, *res judicata* would there have a hollow ring. The accused had been suspected of being the driver of a get-away car in the robbery-kidnap transaction in *People v. Beltran*.[44] He was acquitted as a principal in the crime of kidnapping. Later, in his robbery trial, the court recognized *res judicata* in its evidentiary capacity but dismissed it as irrelevant. Under the *facts* presented in his prior record the intent or knowledge needed for the kidnapping conviction could be wholly lacking and still not affect guilt of the accused as a principal in the crime of robbery.

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[39] Commonwealth v. Moon, 151 Pa. Super. 555, 30 A.2d 704 (1943); Commonwealth v. Bonmiller, 186 Pa. Super. 99, 140 A.2d 860 (1958).

[40] United States v. Waldin, 253 F.2d 551, 555 (3d Cir. 1948) (dissenting opinion).

[41] Harris v. State, 193 Ga. 109, 17 S.E. 2d 573 (1941).

[42] Todhunter v. Smith, 219 Cal. 690, 694, 28 P.2d 916, 918 (1934).

[43] Guardianship of Leach, 30 Cal. 2d 297, 182 P.2d 529 (1947).

[44] 94 Cal. App. 2d 197, 210 P.2d 239 (1949).

The jury is going to say "guilty" or "not guilty." The facts will have been considered, specifically or generally in unknown degree. There is no general rule which can be invoked to say just which of particular facts must have been determined in any trial for a given offense. Only by a close scrutiny of the record of the trial and by a careful, thoughtful analysis can the attorney hope to find in the record of the prior trial the settled issues which might be of some assistance to his client in a later trial. It cannot be said without looking into the specific case whether or not *res judicata* will be available at all. It will not appear with the regularity and precision as may be expected in applying the plea of former jeopardy. But the attorney may take heart in the knowledge that he is not necessarily defeated just because the plea of former jeopardy is not available.

The Multi-Offense Transaction

Merely establishing that *res judicata* applies in a criminal case to the same extent as in a civil action does no more than *allow* the doctrine in a *proper* case. It still remains to determine if a given case can be proper in view of the type of situation the facts present. If it can, is it in fact a proper one?

It would seem unlikely that *res judicata* would have any application to an event or transaction disconnected from the one giving rise to an indictment. This narrows its application to two possible situations. The first is illustrated by the *Orth* case, the robbery-homicide: statutory first degree murder, having attempted robbery as a pre-requisite. These might be designated as "joint" offenses. The second is represented by the *Beltran* case, where successive crimes were committed in the same transaction. This might be designated as a "collateral" or "concurrent" offensive transaction. In both cases mentioned *res judicata* was not allowed. *Orth* excluded the doctrine as not being applicable no matter what the facts might have been. *Beltran* excluded it on the basis of the particular fact situation. Without questioning the result in either case, it may be asked, which, if either, of the cases reasoned correctly. The answer requires an offer of hypothetical facts.

The Joint Offense

Four eye-witnesses might testify that they were present at a robbery; that they were in the bank where it occurred; that they saw the robber shoot the teller as he resisted; that the deceased was the man shot. If none of them were impeached this evidence would be very convincing that a homicide resulted from a robbery. A fifth witness might corroborate this testimony, he being a disinterested passer-by. It might be said that in such a case the evidence did not admit of any other conclusion but that a homicide did result from the robbery. As to that, reasonable men could not differ. It would be immaterial to this point that no witness could describe the alleged felons.

In order to convict D of felony murder in the above situation where his plea is "not guilty," it is necessary to prove that he attempted robbery *and*

that a homicide resulted therefrom.[45] The determination of the latter issue need not be submitted to the jury because of its reasonable certainty. The jury need only decide whether or not D committed acts sufficient to constitute attempted robbery as alleged. If the jury returned a verdict of "not guilty" in such a case it would be *res judicata* that D had not attempted the robbery, since it was the only issue about which reasonable men might differ upon the presentation of the record of the trial. In that case, then, *res judicata* would be a proper plea in bar to a subsequent robbery trial, since the necessary element, attempt, had already been adjudged. It would be immaterial which particular element of the attempt was the source of the "reasonable doubt" in the murder trial. Each juror might have had a different doubt. It is not essential that it be shown why the jury acquitted D. It need only be demonstrated from the prior record that the attempt was the essential issue decided. A denial that D committed acts sufficient to constitute an attempted robbery precludes commission of successful robbery. D must be acquitted at the second trial.

In the same situation a different result would follow if D had offered evidence to show that the four occupants of the bank and the passer-by were all known to be enemies of the deceased, or if he indicated that any of them had threatened the deceased, or if he impeached the witnesses by showing collusion. In that event reasonable men might well wonder whether or not there had been a robbery at all; or whether the death resulted from the robbery. The witnesses themselves might have used the robbery as a shield to premeditated murder by themselves after the robbery was over! Certainly a verdict of "not guilty" would not then be a proper starting point for analysis with a *res judicata* objective in mind.[46] The case simply would not be a proper one.

The compelling conclusion, then, from this example would be that the reasoning in the *Orth* case was faulty in regard to the general application of *res judicata*. Yet, one would have to examine that record to decide whether or not the *result* was wrong.

The Concurrent Offense

This is a more difficult type of case in which to apply *res judicata*. Still, a case can be conceived in which it would be proper. Four men might drive an armed vehicle with a loudspeaker into Yankee Stadium and announce that the players were being held up and that hostages would be taken for ransom as well. If this announced intention were put into effect and thereafter D, suspected as a participant, was brought to trial and acquitted under an indictment for kidnapping, *res judicata* might well rear its head. The testimony of several thousand witnesses that both offenses were committed by the same four men in a single transaction would be hard to impeach.

[45] CAL. PEN. CODE § 1102; CAL. CODE CIV. PROC. § 1869.
[46] Duvall v. State, 11 Ohio St. 657, 146 N.E. 90 (1924).

If D faced a subsequent trial for robbery, what might be the outcome? In the face of such overwhelming evidence that the robbers were also the kidnappers, it is hard to imagine that a reasonable man could have acquitted D of kidnapping without acquitting him of the act of participation in the transaction. The consideration given by the jury would not have dealt with legal essentials or definitions of the individual offenses, they being admittedly different in every legal aspect. It would have dealt with a transaction—a fact situation—which was continuing and in which the acts making up the various elements were themselves in issue. The tremendous amount of evidence removes virtually everything from the domain of the jury except the identity of the persons participating in the transaction. It is the only issue about which reasonable men might differ. This same issue was resolved in favor of the accused in the prior trial. Only blind legal conceptualism would fly in the face of such a record and look to "legal distinction" between the offenses of robbery and kidnapping.

Yet such a result might not follow in that case if it could be shown or suggested to any degree of possible belief that the persons abducted were in fact only accomplices in the robbery transaction, placed in the audience in reserve in case of difficulty, but not to participate unless needed. Such a contention must appear in the first trial record to be admissible to defeat the presumption of the judgment discussed above, since it was an issue which was "within the legitimate purview"[47] of the prior action. That element appearing, a jury could well believe D committed acts sufficient to constitute a robbery while having plausible doubts that there was a nonconsensual abduction.

Despite the dramatic unlikelihood of the hypotheticals posed here, perhaps they demonstrate that *res judicata* can have its place in the concurrent offense trial. It seems to favor the reasoning in the *Beltran* case which did look into the record of the prior trial before denying the doctrine.

Premeditation

In the joint offense where two grounds are offered for conviction of murder—robbery-homicide and premeditated murder—*res judicata* would still have full value for the accused if he were acquitted. The only distinction is that he would have been adjudged free of guilt on both grounds. The same analysis discussed herein would apply, if the case was a "proper" one. However, this would not be so in case of conviction. If D were convicted, only by demonstrating that the robbery-homicide was the basis for conviction could the judgment have weight for urging *res judicata* in a subsequent trial for robbery. Such demonstrations might not be possible. So the state might find it wiser to urge only one ground in the first trial, depending on which ground seemed stronger, with due consideration for the possible consequential use of *res judicata* in the event of acquittal or conviction.

[47] Estate of Bell, 153 Cal. 331, 95 Pac. 372 (1908).

Summary of Approach

If the interpretation be strained in "proper" cases so that the jury can be said to have acquitted because it was too squeamish to convict of first degree murder or some other substantive offense although they did in fact believe the accused committed the acts legally sufficient to warrant conviction, such reason is inconsistent with the theory that the jury is an impartial and reasonable fact finder. The result would not be "legally correct" if this were urged as the possible basis for acquittal. To allow that juries can disregard legal consequences in this way is to allow that juries are legislators as well as fact finders. Even if the contention be actually correct, it cannot be admitted when the admission would undermine a judgment, however wrong the judgment may have been.[48] The "compromise verdict," recognized as such in some jurisdictions, is a different species of result than an outright acquittal. A compromise verdict might be just what it says: a compromise to avoid a "hung jury," where individual jurors dispute the truth of certain facts alleged but admit others sufficient to allow conviction for some lesser included offense. A discussion of such a verdict is not within the scope of this comment.

The doctrine of *res judicata* applies to determinations of fact or law in a given case.[49] An acquittal for the robbery-homicide or other joint or collateral offense arising from the same transaction may render guilt for some other offense incompatible when the fact is established that both offenses arose from the same transaction. As was stated in *Harris v. State*:[50]

> Where the transactions are the same as a matter of fact, even though the offenses be not identical . . . (the accused) may nevertheless, under the principal of *res judicata* show his acquittal on the first charge was necessarily controlled by the determination of some particular issue . . . of fact which would preclude his conviction of the second charge.

It becomes a matter of reasonableness and logic. The *Harris* rule is the "major premise." The record of the prior trial must supply the "minor premise." If it is a "proper" case the conclusion follows that the accused cannot be convicted as he has already been adjudged "not guilty."

A Living Example: The Orth Case and Alibi

It has been held that a plea of "not guilty" puts every material allegation of the information or indictment in issue without particular regard to the nature of the defense interposed.[51] Certainly the state has the burden of proving every element of the offense,[52] and the sole defense of alibi does not appear on its face to ease that burden at all.

In the *Orth* case, had Orth been *convicted* over his defense of alibi in his

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[48] Panos v. Great Western Packing Co., 21 Cal. 2d 636, 134 P.2d 242 (1943).
[49] Frank v. Mangum, 237 U.S. 309, 334 (1915).
[50] 193 Ga. 109, 17 S.E. 2d 573 (1941).
[51] State v. Barton, 5 Wash. 2d 234, 105 P.2d 63 (1940); see also CAL. PEN. CODE § 1019.
[52] CAL. PEN. CODE §1102; CAL. CODE CIV. PROC. § 1869.

first trial for murder, and if the state had indicted him for robbery at a later date, he could not have been heard to say that the conviction was not *res judicata* of his guilt of attempted robbery. It would be immaterial that he had not offered specific evidence to deny the elements essential to establish that the attempt was made by someone. The murder conviction would not have stood the light of reason if Orth could contest his guilt for attempted robbery, or even that he had been present and participating. It might be otherwise if there had been any offer of evidence of premeditation and deliberation. But lacking that, and looking at the case from a logical and practical standpoint, the state should be relieved of the burden of proof except as to the issue of successful robbery.[53] All lesser included offenses would already have been determined.

Orth was *acquitted* of murder under his plea of alibi. The question arises, could the facts have been such that the jury did pass on the alibi as the only fact in issue? Upon the basis of the hypotheticals above, carried to a possible extreme, it would seem the answer to this question would be in the affirmative. But the dissent in *Orth* did not use such reasoning. It was maintained that the alibi removed all other matters from issue as a matter of course and required the jury to consider only one issue: presence. Has this contention any merit?

This liberal view of the alibi plea requires a more searching examination of some of the rules of *res judicata*. It already has been presented that concessions, admissions, stipulations and reasonable certainties are not within the domain of the jury. These are part of the judgment and amount to an imposition on the court which cannot thereafter be altered by either party as a means of escaping from the consequences of the decision.[54] If an alibi can be properly construed as an admission of all allegations in the indictment except the participation of the accused, then the view of the *Orth* dissent might gain ground.

The state's indictment says, in essence, that the accused committed a robbery or attempted robbery which resulted in a homicide. The accused answers that he could not be guilty of the acts alleged because he was not present. He does not admit or deny the acts were committed by someone. He only denies that the someone, if anyone, could be himself. Can it be said that, if the state overcame the denial of presence, it would have completed its task, and that, with nothing more being offered except the bare allegations of the indictment, the accused could be convicted? Logically not. It follows from this, then, that an acquittal may not have been based solely on the failure of the state to overcome the denial of presence. It may be that the state failed to convince the jury that the accused had committed any one of the acts essential to make out an attempted robbery, or that the death did in fact arise out of that transaction. The jury might have fully believed the accused was guilty of robbery, but was unable to convict

[53] The writer has found no case law in point.
[54] Donner v. Palmer, 51 Cal. 629, 637 (1877).

him of that offense because it was not a lesser included offense in the indictment.

It appears that alibi is not an admission of the acts alleged any more than it is a denial. The *Orth* dissent seems to be too broad. However, a failure of the accused to contest any offers of evidence which tend to prove that there was a robbery attempted in which a homicide occurred might have the result, as viewed at the *close* of the evidence, of rendering the proofs of such allegations too strong for reasonable men to dispute. This would remove *all* of them from the domain of the jury! It would be conceivable, then, to have a case in which the matter of presence would be the only real issue remaining at the close of the evidence.[55] Then, *res judicata* might be a very proper plea, based on this lesser issue. If it were a proper case, a subsequent conviction of the robbery might have a result found in another similar situation and described as:[56]

> . . . two *incompatible* verdicts, which would amount to a finding on the one hand that the defendant was not present, and on the other hand that he was present. (Emphasis added.)

This would call for a reversal of the second conviction.

Procedural Difficulties

The court in *Orth* had difficulty in finding the area in which a plea of *res judicata* could be allowed, but circumvented it by the simple process of negating its existence in a criminal proceeding of that nature. Yet the statutory plea of former judgment of the offense seems suggestive of *res judicata*. Taken literally, it would seem the plea of former judgment of the offense is redundant to that of once in jeopardy, since the latter includes the former. This, however, was the precise construction given in *Orth*. Is this necessary or logical? Applying the rules of *res judicata* as herein discussed, it is clear that a former judgment of one offense can be a final determination of some element so essential to the second indictment that it would bar the second trial. In a practical sense, then, the second offense actually would have been decided. This view gives substantial character to the plea of former judgment, as being declaratory of the common law. This construction is highly inferential, but, in view of the importance of finding a proper means to raise the plea of *res judicata* and the alternative view which amounts to a nullity, such construction is plainly logical.

No special method is set out for pleading *res judicata* in California. The California pleas[57] are identical with those in Ohio,[58] applied in the *Orth* case. A few California cases have allowed that it may be pleaded "in defense," providing it is raised at the beginning of the trial "if there is a chance."[59] If there is no chance, the doctrine is somewhat emasculated by

[55] Harris v. State, 193 Ga. 109, 17 S.E. 2d 573 (1941).
[56] People v. Grzecyak, 77 Misc. Reps. 202, 137 N.Y.S. 538, 541 (1912).
[57] CAL. PEN. CODE § 1016.
[58] OHIO REV. CODE § 2943.03.
[59] Brown v. Campbell, 110 Cal. 644, 649, 43 Pac. 12, 13 (1896).

being permitted as evidence and by "timely objection."[60] A failure to plead *res judicata* is treated as a waiver.[61] Of course, if it is pleaded the party relying on it must produce evidence to demonstrate that it applies.[62] It seems somewhat anomalous that a state such as California, which clearly recognizes the doctrine in criminal cases, has failed to permit the statutory pleas to invoke the doctrine. The difficulty could result in an inadvertant waiver. Might this waiver rule be conflicting with the fourteenth amendment? Certainly the *Oppenheimer* case has opened the door to such a possibility. The possibility is left for others to examine.

Conclusion

The points which have been raised in this discussion suggest that the doctrine of *res judicata* has latent features for the benefit of the criminal law advocate. While there is substantial support in the authorities for the limitation of the doctrine, this writer believes that such authorities can and should be overcome by insistence on close analysis of the decisions. Acquiescence in superficial disposals of the doctrine should be avoided. Actually, they are in need of re-examination. Cases such as *State v. Orth* might be cited for their inherent weaknesses, and exposed to the filtering logic of liberal realism, adequately provided for in the *Oppenheimer* case. The issue has been joined. Future resolution should favor the accused, in harmony with the fundamental presumption that a person is innocent until proven guilty; a prior acquittal should be given full weight in favor of the accused at a later trial.

[60] People v. Beltran, 94 Cal. App. 2d 197, 210 P.2d 238 (1949).
[61] Domestic & Foreign Pet. Co., Ltd. v. Long, 4 Cal. 2d 547, 562, 51 P.2d 73, 80 (1935).
[62] *Ibid.*