RES JUDICATA IN THE CRIMINAL LAW

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> Although this question has been constantly before the Courts, and has been the subject of frequent decision, yet it has been a matter for argument up to the present time.[1]

The High Court of Australia has recently made an important extension of the scope of *res judicata* in the criminal law by rediscovering[2] the doctrine of issue estoppel, according to which, 'if it appears by record of itself, or as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in issue on a second criminal trial of the same prisoner',[3] it is not open to the Crown to make any allegation of law or fact inconsistent with the previous determination.

In this article an account will be given of the development of issue estoppel in the criminal law and its relationship with pleas of *autrefois acquit* and *autrefois convict*. The conclusion will be reached that, contrary to the usual view, these two pleas rest on different principles and serve different functions, *autrefois acquit* being a form of issue estoppel, and *autrefois convict* being a limitation on the executive power of the Crown. It will further be submitted that the usual tests of the validity of a plea of *autrefois acquit* are unsatisfactory because they are too vague, and that this difficulty is overcome by treating *autrefois acquit* as one form of issue estoppel. Such an approach will be seen to have the additional advantage of clarifying the true nature of pleas both of *autrefois acquit* and of *autrefois convict*.

I. Issue Estoppel in Practice

The practical working of this doctrine is illustrated with varying degrees of complexity by seven recent Australian decisions and an appeal to the Privy Council from Malaya. The first in point of time was *The King v. Wilkes*,[4] from which the foregoing summary of issue estoppel was taken. The case is notable less as an instance of issue estoppel than for occasioning what is now accepted as the standard

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[1] *The King v. McNicol* [1916] V.L.R. 350, 352, *per* Madden C.J.

[2] There is a reference to the doctrine in *The King v. Cleary* [1914] V.L.R. 571, 577, *per* Hodges J., but its importance was not perceived. It is possible to discern traces of issue estoppel in *Regina v. Ollis* [1900] 2 Q.B. 758, and *Rex v. Norton* (1910) 5 Cr. App. R. 197. The doctrine is familiar in the U.S.A.: (1952) 65 *Harvard Law Review* 874 ff; Mayers and Yarbrough, *'Bis Vexari*: New Trials and Successive Prosecutions' (1961) 74 *Harvard Law Review* 1.

[3] *The King v. Wilkes* (1948) 77 C.L.R. 511, 518-519, *per* Dixon J.

[4] (1948) 77 C.L.R. 511.

statement, by the present Chief Justice of Australia,[5] of the conditions subject to which an issue estoppel can arise in a criminal case.

Wilkes was charged with the manslaughter of V, conspiracy with V and A to procure the unlawful miscarriage of V, and conspiracy with A to defeat the course of public justice. He was acquitted on the first two accounts but convicted on the third. The South Australian Court of Criminal Appeal quashed the conviction on the ground that the verdicts were 'inconsistent'. The conspiracy charged in the third count depended on the same evidence as the conspiracy charged in the second count. This evidence was given by A, who had been pardoned for any complicity in the crimes with which he might be charged. If the jury rejected his evidence on the second count, it followed that they must have rejected it on the third count also. The High Court by a majority[6] refused special leave to the Crown to appeal, agreeing with the view taken in the court below. However, Dixon J., dealt with issue estoppel in deference to an argument by the Crown that if the Court of Criminal Appeal had decided there was an issue estoppel here, they were wrong. The full quotation from his judgment of which the extract above is a part is as follows:

> Whilst there is not a great deal of authority upon the subject,[7] it appears to me that there is nothing wrong in the view that there is an issue estoppel, if it appears by record of itself or as explained by proper evidence[8] that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in issue on a second criminal trial of the same prisoner . . . Such a question must rarely arise because the conditions can seldom be fulfilled which are necessary before an issue estoppel in favour of a prisoner and against the Crown can occur. There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of affairs arises I see no reason why the ordinary rules of issue estoppel should not apply.[9]

The simplest example of issue estoppel which has so far come before the courts is the Tasmanian case of *The Queen v. Flood*.[10] The accused, who was serving a term of imprisonment, was charged with escaping from gaol and with committing certain offences whilst at large. He

[5] A hint of what was to come is to be seen in his earlier judgment in *Broome v. Chenoweth* (1946) 73 C.L.R. 583, 599.

[6] Rich, McTiernan and Dixon JJ., (Latham C.J. dissenting).

[7] His Honour relied to some extent on *Regina v. Ollis* [1900] 2 Q.B. 758. He would have done better to refer to *The King v. Cleary* [1914] V.L.R. 571, 577.

[8] Proper evidence of what happened at a previous trial is not furnished by the otherwise unsupported testimony of police constables as to their recollection of what happened: *Maynard v. Vercoe* (1942) 59 W.N. (N.S.W.) 186.

[9] (1948) 77 C.L.R. 511, 518-519.

[10] [1956] Tas. S.R. 95.

was tried first for the escape, and while the jury were considering their verdict a second trial for the other offences was started before another jury. The escape alleged by the prosecution was unusual, the Crown case being that the accused had left the gaol one night, committed depredations abroad, and returned in time to be found in his cell in the morning. The jury in the first trial declined to accept this story and returned a verdict of not guilty. This verdict arrived in the middle of the second trial and thereby posed the judge a problem, for if the prosecution failed to prove that Flood was outside the gaol, it could hardly be open to them to prove that he committed an offence while at large. Citing the authorities on issue estoppel, the learned judge directed a verdict of not guilty in the second trial also on the ground that the Crown was estopped by the verdict in the first trial from asserting the fact of escape in any subsequent proceedings. What course he would have taken if the verdict in the first trial had not arrived until after a verdict of guilty in the second trial, is uncertain.

At the opposite extreme from *The Queen v. Flood* lies the complicated decision in *Mraz (No. 2) v. The Queen,*[11] which is now the leading case on issue estoppel. Mraz was originally charged with murder under the Crimes Act 1901-1951 (N.S.W.), section 18, in that he caused the death of the deceased during or immediately after the commission of a crime punishable with penal servitude for life, namely, rape. He was acquitted of murder but convicted of manslaughter. This conviction was quashed on appeal to the High Court for misdirection.[12] A new trial for manslaughter was refused on the ground, in effect, that the evidence disclosed a case of murder or nothing, and Mraz had been acquitted of murder. The Crown then launched a prosecution for rape, relying on the same evidence as before. Mraz defended himself by filing 'a somewhat irregularly drawn plea to the indictment'[13] in which he asserted that by virtue of the previous proceedings 'he must be deemed to have been acquitted of the rape'.[14] He also pleaded not guilty. Verdicts on both these issues were found against him and his appeal to the New South Wales Court of Criminal Appeal was dismissed. The High Court, in a unanimous joint judgment, allowed his further appeal and quashed the conviction. Reduced to their simplest terms, the reasons for the decision were as follows.

The verdict of the jury at the first trial, acquitting Mraz of murder but convicting him of manslaughter, meant that although he killed the deceased, either he did not rape her, or, if he did rape her, that he did not kill her during or immediately after the rape; for otherwise they must have found Mraz guilty of murder. To protect himself

[11] (1956) 96 C.L.R. 62. [12] *Mraz (No. 1) v. The Queen* (1955) 93 C.L.R. 493.
[13] *Mraz (No. 2) v. The Queen* (1956) 96 C.L.R. 62, 65.
[14] The whole plea is reproduced at (1956) 96 C.L.R. 64.

from a further indictment for rape, Mraz had to demonstrate that the verdict of the jury rested on a finding, not that he killed some time after raping, but that he did not rape. He could not do this by pointing merely to the record, for that would not disclose the true ground of the verdict. He was entitled, however, to argue from the case actually presented by the prosecution at the first trial in order to get at the substance of the matter which lay behind the purely logical possibilities. The only case presented by the Crown, and the only case warranted by the evidence, was that Mraz killed during or immediately after raping the deceased. Since the jury found by their verdict of manslaughter that Mraz killed the deceased, and since there was no evidence that he killed her some appreciable time after the alleged rape, it followed necessarily that the jury also found that he did not rape her. Hence he must be deemed to have been acquitted of rape.

The High Court discarded as irrelevant the possibility that the jury would have found a verdict of murder, and therefore by implication a verdict of rape, if the trial judge had not misdirected them. However strong the possibility, it remained mere speculation. In deciding questions of issue estoppel, regard could be had only to established facts and necessary implications. For the same reason no account could be taken of the possibility that the manslaughter finding was a compromise verdict. The determination on appeal that even the conviction for manslaughter should be quashed was also irrelevant to the rape question because it related only to the fact of unlawful killing. Had it been relevant, an acquittal on appeal would have been just as determinative of any issue of law as an acquittal by a jury.

The scope of the inquiry put upon the court by the decision in *Mraz (No. 2) v. The Queen* was summarized by Hardie J., of the Supreme Court of New South Wales in the later case of *Brown v. Robinson*[15] as follows:

> The Court is entitled to look, not only at the findings of the tribunal whose decision is relied upon to support the plea of issue estoppel, but also to have regard to the whole course of the proceedings in that Court. The Court is entitled to analyse the findings and the whole record to see what the real issues were. Attention should, of course, be paid to various parts of the proceedings according to their merits.

In that case the accused was tried summarily for driving under the influence after having been acquitted on indictment for manslaughter arising out of the same facts. The deceased had been a passenger in a car driven by the accused which met with an accident. At the manslaughter trial the prosecution relied on proving that the car was driven recklessly or with a high degree of negligence, but there was also some evidence that the accused had been under the influence of

[15] [1960] S.R. (N.S.W.) 297, 306.

liquor when the accident occurred. Having been acquitted of manslaughter, the accused maintained that he had been impliedly acquitted of driving under the influence also, arguing that the jury must be taken to have considered this evidence and rejected it along with the rest of the Crown case. To this the prosecution in the second trial replied that their case on the manslaughter charge was that the accused drove culpably whether under the influence or not, and that therefore no inference could be drawn about the jury's view of the liquor evidence, whichever verdict they returned. The Supreme Court of New South Wales held that an issue estoppel had not been made out.[16]

One point which was mentioned in *Brown v. Robinson* remains open for decision. Technically the parties to a summary prosecution are not the same as the parties to a prosecution on indictment; the latter is a proceeding between Crown and subject, the former between two subjects of the Crown only.[17] It was therefore open to the prosecutor in *Brown v. Robinson* to argue that there could be no estoppel because the parties to the two prosecutions were not the same. However, doubtless feeling that this was not a meritorious point to take, he declined to argue it. The court therefore declined to decide it, but expressly left the question open for future consideration. In the earlier case of *Clout v. Hutchinson*[18] the distinction between summary trial and trial on indictment was more definitely relied on by the prosecution but not referred to in the judgment. One may hazard a guess, in view of the emphasis so far on bringing out the matters of substance, as opposed to form, raised by a plea of issue estoppel, that if the point is seriously taken in some future case the decision will be adverse to the Crown.

Clout v. Hutchinson applied issue estoppel in a straightforward manner to the degrees of criminal negligence. The defendant was prosecuted summarily for negligent driving after being acquitted on indictment of the distinct offence of causing grievous bodily harm by negligent driving. In the first trial it was admitted that grievous bodily harm had been caused, the only issue being negligence. This question having been decided in his favour, the defendant set up an issue estoppel at his second trial. The Supreme Court of New South Wales held that the degree of negligence required to be proved to establish the offence of causing grievous bodily harm by negligent driving was substantially higher than for negligent driving *simpliciter*; that therefore the verdict in the first trial did not necessarily imply

[16] *Cf. Brennan v. Williams* (1951) 53 W.A.L.R. 30; *The Queen v. Laycock* (1954) 71 W.N. (N.S.W.) 221; *The Queen v. Ashman* [1957] V.R. 364.

[17] *Munday v. Gill and Orr* (1930) 44 C.L.R. 38, 86, *per* Dixon J.

[18] (1950) 51 S.R. (N.S.W.) 32. The effect of the decision was reversed by amending legislation: *The King v. Stair* 70 W.N. (N.S.W.) 248.

that the defendant had not driven negligently; and that therefore there was no issue estoppel.

Compared with *Mraz (No. 2) v. The Queen, Brown v. Robinson* and *Clout v. Hutchinson* were of little theoretical interest. The same cannot be said of *The Queen v. Clift*.[19] Here again the accused had been acquitted on indictment of larceny, and was subsequently tried summarily on a charge arising out of the same facts, this time of knowingly having in his possession sheep reasonably suspected of being stolen and failing to give to a magistrate a satisfactory account of how he came by the sheep. It was held by the Supreme Court of New South Wales that

> a suspicion that goods have been stolen cannot in law be a reasonable suspicion if it is based on the belief that the person charged stole them and that person has been acquitted of the theft. To put it in another way, where the only evidence tendered to establish the suspicion that the goods were stolen points to the accused as being the thief, to the exclusion of all other persons, it is not in law reasonable to entertain such a suspicion.[20]

The Crown was therefore estopped from proving a reasonable suspicion that the sheep had been stolen.

The offence of unlawful possession, it was held, is not complete until the accused has failed to give a satisfactory explanation to the court. But before being called upon to explain, he is entitled to proof by the prosecution of a reasonable suspicion. Since the explanation had to be given at the time of the hearing, the suspicion also had to be proved to be reasonable at the time of the hearing. It was not open to the prosecution to rely on a suspicion which was reasonable when the accused was charged but unreasonable when he came up for trial.[21]

If one compares the approach of the court to the question before them in this case with a parallel situation which might arise in another part of the law, it is seen to accord with principle. Thus, if D were charged with murder but before he came up for trial the police came by irresistible evidence that he could not have committed the crime, it would not be open to the Crown to argue that D should be tried on the state of the evidence as it was when he was charged. As Erskine would have said, the thing is absurd. It is submitted that there is nothing peculiar about unlawful possession which takes it outside the general rule.

However, there is a peculiarity about unlawful possession of a different kind which the court in *The Queen v. Clift* did not take into account. The verdict of not guilty at the trial for larceny meant no

[19] (1952) 69 W.N. (N.S.W.) 87. [20] *Ibid.* 89, *per* Owen and Herron JJ.

[21] Offences of unlawful possession are discussed in more detail under *autrefois acquit, infra. Cf. Ex parte Patmoy, re Jack and Anor* (1944) 44 S.R. (N.S.W.) 351.

more than that the jury were not satisfied beyond reasonable doubt that the accused had stolen the goods. It did not mean that they did not entertain a reasonable suspicion that he had stolen them, for if they had had only a suspicion, however reasonable, it would have been their duty to acquit. Indeed, one may go further and assert that the very fact that the case was left to the jury at all showed that a suspicion was reasonable on the evidence as a matter of law.[22] It is therefore submitted that the doctrine of issue estoppel was wrongly applied to the facts of the case in *The Queen v. Clift.*

Where the same standard of proof is required in all the relevant proceedings, the foregoing criticism of *The Queen v. Clift* does not apply. The question whether evidence which has been rejected on one charge is admissible in proof of another related charge is, however, capable of giving rise to complexities of its own. This is illustrated in striking manner by *Sambasivam v. Public Prosecutor of the Federation of Malaya,*[23] a decision of the Privy Council arising out of the Malayan rebellion. Sambasivam was originally tried under emergency regulations for two separate offences constituted by the same facts, the first of carrying a firearm, the second of carrying ammunition. Both offences carried the death penalty. After his arrest Sambasivam made a statement which tended to prove him guilty of both offences, and this statement was put in at the trial. He was found not guilty of carrying ammunition, but the court could not agree on the firearm charge. He was then tried a second time on the firearm charge and convicted, his statement being put in as before without comment.

The Privy Council allowed his appeal on the ground that the statement had been improperly admitted in the second trial. The court ought at least to have taken into account the fact that since the statement must be taken to have been rejected in the first trial in so far as it tended to prove that Sambasivam was carrying ammunition, it must be treated with reserve in so far as it tended to prove that he was carrying a gun. It is not clear that their Lordships would have refused to admit the statement in the second trial at all, but this does not seem to be of importance, for the answer clearly depends on the precise nature of the statement or other evidence in question. If the probative value of the evidence on one charge could be clearly separated from its probative value on another charge, there would be no need to exclude it altogether in the second trial. A warning to the jury would be sufficient acknowledgment of the issue estoppel against the Crown. If, however, the evidence were inextricably bound up with the two charges because it referred to one composite fact

[22] The writer is indebted to his colleague Dr Horst Lücke for drawing attention to this point.

[23] [1950] A.C. 458; *Regina v. Ollis* [1900] 2 Q.B. 758, must be regarded as of doubtful authority since this decision.

situation, as would normally be the case with a confession, it ought to be excluded altogether in the second trial.

Sambasivam v. Public Prosecutor of Malaya was accepted by the High Court of Australia in the following year as directly covering the case before them in *Kemp v. The King*.[24] Kemp had been previously tried for indecent assault upon a thirteen year old boy on three separate occasions. He had been acquitted on the first two counts but convicted on the third. For reasons immaterial here, the conviction had been quashed and a new trial ordered. At the second trial the Crown was allowed to put in evidence of the first two occasions of which Kemp had already been acquitted, not, so it was argued, to prove the fact of guilt which had been negatived by the earlier verdict of not guilty, but to prove a course of conduct tending to show guilt on the third occasion. The unanimous and brief judgment of the High Court on appeal from conviction was delivered by Dixon J.,[25] who said that *Sambasivam v. Public Prosecutor of Malaya* was

> decisive to show that the prisoner must be taken to have been innocent of the charges covered by the first two counts of the indictment for such a purpose as that for which the evidence was tendered. . . . Moreover, no direction was given to the jury enabling them to understand that they should discard any evidence covering the same matters as were the subject of the first two counts.[26]

These, then, are the credentials presented by the doctrine of issue estoppel for admission to the criminal law. They will now be examined further in relation to pleas of *autrefois acquit* and *autrefois convict*.

II. Issue Estoppel and Autrefois

Dixon J. ended his statement of the essentials of issue estoppel in *The King v. Wilkes*[27] by differentiating it from a plea of *autrefois acquit* or *autrefois convict*:

> Such rules are not to be confused with those of *res judicata*, which in criminal proceedings are expressed in the pleas of *autrefois acquit* and *autrefois convict*. They are pleas which are concerned with the judicial determination of an alleged criminal liability and in the case of conviction with the substitution of a new liability. Issue estoppel is concerned with the judicial establishment of a proposition of law or fact between parties.

With profound respect to so great an authority on the criminal law, the distinction drawn here wears a look of formality rather than substance.

[24] (1951) 83 C.L.R. 341.

[25] Who is the architect of issue estoppel, as of so many other valuable developments in the criminal law.

[26] (1951) 83 C.L.R. 341, 342-343.

[27] (1948) 77 C.L.R. 511, 518-519.

One obvious difference between the two *autrefois* pleas and issue estoppel is that the former are very old[28] and the latter, in criminal cases, very new. It is therefore possible, in view of the similarity between the pleas, that some cases in the past which were tested by the canons of *autrefois* would be seen today as instances of issue estoppel.[29] A development in the law of this kind tends to blur outlines and to render authority persuasive in inverse proportion to its age.[30] An example of the breakdown of clear distinctions is to be found in the sentence, 'Issue estoppel is concerned with the judicial establishment of a proposition of law or fact between parties.' A moment's reflection will show that exactly the same is true of an *autrefois* plea. If a distinction between *autrefois* and issue estoppel is to be maintained, a distinction must be drawn between the types of issues of law or fact judicially established in the two cases.[31] Again, it is as true of issue estoppel as of *autrefois* that it is 'concerned with the judicial determination of an alleged criminal liability.' There could hardly be a clearer instance of this than *Mraz (No. 2) v. The Queen.*[32] The point that *autrefois convict* is also concerned with liability to punishment distinguishes it as much from *autrefois acquit* as from issue estoppel.

Things are no more precise on the formal level. It was said in *The Queen v. Flood*[33] that issue estoppel is not a matter which can be raised by plea, but in *The Queen v. Clift*,[34] *Mraz (No. 2) v. The Queen*[35] and *Brown v. Robinson*[36] the accused did just that. Indeed, it is not clear how else issue estoppel can be raised in such cases as these, for the accused is saying in substance exactly what he says in a plea of *autefrois acquit*: that he has been previously acquitted of the offence with which he is now charged.[37] The fact that he is asserting acquittal only by implication is immaterial, for nearly every case of *autrefois acquit* also has turned on the question whether the accused had

[28] The earliest report appears to be *Anon.* (1367) Jenk. 45, but the doctrine was evidently a familiar one by that date.

[29] Similarly, questions of the admissibility of evidence which in the past were rather vaguely disposed of by an appeal to relevance, may come to be seen more often as turning on issue estoppel. Compare *Sambasivam v. Public Prosecutor of Malaya* [1950] A.C. 458, with *Maxwell v. Director of Public Prosecutions* [1935] A.C. 309.

[30] Thus many of the older cases turned on procedural and pleading technicalities irrelevant at the present day.

[31] It is, of course, possible to argue that issue estoppel goes to part only of an allegation of crime, whereas *autrefois acquit* and *convict* go to the whole, and this may be what His Honour had in mind. However, since the end result of barring further prosecution is the same in both cases, this distinction seems immaterial.

[32] (1956) 96 C.L.R. 62.

[33] [1956] Tas. S.R. 95, 98.

[34] (1952) 69 W.N. (N.S.W.) 87.

[35] (1956) 96 C.L.R. 62.

[36] [1960] S.R. (N.S.W.) 297.

[37] In *autrefois acquit* this is a jury issue: *The King v. Gamble* [1947] V.L.R. 491, disapproving on this point *The Queen v. Baker* (1896) 2 Argus L.R. 83. There is no authority expressly deciding the point for issue estoppel, but it is submitted that the rule must be the same. It is the practice to leave the question to the jury, even if only as a matter of form. See *e.g.*, *The Queen v. Flood* [1956] Tas. S.R. 95.

previously been impliedly acquitted of the charge. Nowadays the Crown would attempt to prosecute a person a second time for exactly the same offence only by mistake. Moreover, the formal status of a plea of *autrefois acquit* is of little or no importance at the present day, for it has been decided that it is the duty of the court to investigate any matters which may seem to justify such a plea, whether it is made or not, and at whatever stage of the proceedings the question arises.[38] Indeed, it has been the established practice for well over a century to allow the accused to put in an *autrefois* plea informally or by amendment if the facts seemed to warrant this course.[39]

There is therefore a *prima facie* case for doubting whether there is any distinction of substance between issue estoppel and *autrefois acquit*. It is at least possible that what was once a somewhat technical plea in bar is now being transmuted into a wider principle more capable of development to meet modern needs.

It will not have escaped notice that in his formulation of the doctrine of issue estoppel in *The King v. Wilkes*, Dixon J. referred always to the estoppel being set up against the Crown. The cases bear this out. There is no instance of issue estoppel working against the accused in favour of the Crown. This observation suggests that the traditional view that the pleas of *autrefois acquit* and *autrefois convict* rest on the same basis has outlived its usefulness. It is clear as a matter of theory that whereas *autrefois acquit* can always be regarded as resting on an estoppel against the Crown, the same is not true of *autrefois convict*, for if there were any estoppel here it would work against the accused. If, however, *autrefois acquit* is to be regarded as an instance of issue estoppel, two questions have to be answered: whether there is any advantage in so regarding it, and what principle can then be put forward as justifying the plea of *autrefois convict* which does not do equally well for *autrefois acquit*? These questions will be answered in the next two sections of this article.

III. Autrefois Acquit

It is submitted that one advantage of treating *autrefois acquit* as a form of issue estoppel is that the law gains in precision and capacity to

[38] *Flatman v. Light* [1946] K.B. 414, explaining *Rex v. Banks* (1911) 6 Cr. App. R. 276, on the ground that there the accused was met with a technical answer only because he set up an unmeritorious technical defence. In *The King v. De Kuyper* [1948] S.A.S.R. 108, the accused was allowed to raise *acquit* on appeal even though he refused an invitation by the court to do so at his trial. At no stage was he represented by counsel. Old decisions that a plea to the general issue (guilty or not guilty) cannot be made at the same time as an *autrefois* plea in bar, are no longer applicable. Many technicalities were swept away by the Criminal Procedure Act 1851, s. 28 (Eng.) which has been generally copied in Australia.

[39] *Rex v. Chamberlain and Hill* (1833) 6 Car. & P. 93, *per* Littledale J.; *Rex v. Bowman* (1834) 6 Car. & P. 337, 338; *Regina v. Drury* (1849) 3 Cox 544, 547, *per* Coleridge J.; *Regina v. Stanton* (1851) 5 Cox 324, 325, *per* Erle J.; *Regina v. Gilmore* (1882) 15 Cox 85, 86, *per* Huddleston B.; *Regina v. Miles* (1890) 24 Q.B.D. 423; *Rex v. Tonks* [1916] 1 K.B. 443.

develop with changing needs without abandoning the purposes it has hitherto served. The classic statement of the principle upon which *acquit* is supposed to depend was made by Hawkins:

> That a man shall not be brought into danger of his life for one and the same offence more than once. From whence it is generally taken, by all the books, as an undoubted consequence, that where a man is once found *not guilty* on an indictment or appeal free from error, and well commenced before any court which hath jurisdiction of the cause, he may by the common law in all cases whatsover *(sic)* plead such acquittal in bar of any subsequent indictment or appeal for the same crime.[40]

This statement of the law, which has occasionally been elaborated,[41] but never improved on, lays down five prerequisites for a plea of *autrefois acquit*; a previous indictment free from error; 'well commenced'; before a court of competent jurisdiction; leading to a verdict of not guilty; of the same crime with which the accused is now charged. A brief account will be given of the first four of these requirements, which at the present day may be taken together as matters of procedure, as a preliminary to the fifth, which is the question of law with which we are chiefly concerned. The procedural prerequisites apply in general equally to both *acquit* and *convict* pleas.

(i) *Procedure*

The requirement that the previous adjudication be made by a court of competent jurisdiction has led to the exclusion of domestic tribunals.[42] The status of acquittals by foreign courts is less clear. In *Rex v. Beech*[43] in 1775 an acquittal by a court in the Cape of Good Hope was held to be capable of sustaining a plea of *autrefois acquit*, and in *Rex v. Aughet*[44] in 1918 a Belgian court martial was held to be a court of competent jurisdiction for the same purpose, although in that case the Court of Criminal Appeal took care to guard against any general statement on the subject, expressly limiting its remarks to the facts of the case.[45] Without anticipating the discussion of 'the same crime' which follows, it may be observed that a crime charged under a foreign law can never be literally the same as a crime charged under domestic law. *Rex v. Aughet* shows, however, that such a strict view is unlikely to be taken, for in that case the corresponding offence under the Belgian Criminal Code was held on the strength of expert evidence to be the same crime for all practical purposes as unlawful wounding, even though the accused had actually been acquitted on a ground unknown to English law. The question whether acquittal on

[40] 2 *P.C.* ch. 36, s. 1.
[41] *E.g. Regina v. Miles* (1890) 24 Q.B.D. 423, 431, *per* Hawkins J.
[42] *Lewis v. Mogan* [1943] 1 K.B. 376; *Regina v. Hogan* [1960] 3 W.L.R. 426.
[43] (1775) 1 Leach 134.
[44] (1918) 13 Cr. App. R. 101.
[45] *Ibid.* 108-109.

a ground unknown to English law would always be irrelevant was left open in view of the finding that the two offences were the same for the immediate purpose.

At the present day the distinction between courts of summary jurisdiction and superior courts occasions no difficulty. Although it is pedantically true that an *autrefois* plea can be made only to an indictment, there never has been any real doubt that an equivalent objection can be set up in summary proceedings.[46] There have been a number of decisions on the distinction between justices sitting as examining magistrates and justices exercising summary jurisdiction. It periodically happens that these functions are either confused by the justices themselves or not adequately distinguished to the accused. The law is that an *autrefois* plea cannot be set up where the justices have acted without jurisdiction, although they may not have intended to do so, but, conversely, can be set up where they have adjudicated upon the issue, intentionally or not.[47]

These rules are really part of a wider distinction which has been drawn between errors in the conduct of a prosecution which render the purported trial a complete nullity, so that the accused cannot later plead *autrefois* because no one is put in jeopardy by proceedings which are a nullity, and errors which afford a ground of appeal against conviction but do not nullify the whole proceedings, so that after his appeal has succeeded the accused can plead *autrefois acquit*. The distinction is particularly important in such jurisdictions as England, where the Court of Criminal Appeal has no general power to order a new trial, for the only way in which the English courts can procure a new trial is to grant a *venire de novo,* and this can be done only where the previous proceedings were a nullity. The doctrine of nullity applies in practice only to cases where the irregular trial led to conviction. At the present day a new trial will not be ordered where the previous proceedings ended in acquittal.[48]

Most criminal appeals are taken on technical points of law rather than procedure. The only generally reported modern examples of an appeal being taken on an irregularity in the actual conduct of a trial

[46] A majority of the cases cited in this chapter started as summary trials. For an express statement see *Wemyss v. Hopkins* (1875) L.R. 10 Q.B. 378, 381, *per* Blackburn J.

[47] *Bannister v. Clarke* (1920) 26 Cox 641; *McLellan v. Allchurch* [1925] S.A.S.R. 256; *Mines v. Doddrell* [1938] S.A.S.R. 90; *Rex v. Norfolk Justices, ex parte Director of Public Prosecutions* (1950) 34 Cr. App. R. 120 *(sub.nom. Rex v. South Greenhoe Justices, ex parte Director of Public Prosecutions* [1950] 2 All E.R. 42); *Regina v. Campbell* [1953] 1 All E.R. 684. Confusion has also occurred over the power to try summarily but remit for sentence. *Rex v. Norfolk Justices, ex parte Director of Public Prosecutions;* and *Rex v. London Sessions, ex parte Rogers* [1951] 2 K.B. 74.

[48] *Rex v. Simpson* [1914] 1 K.B. 66; *Regina v. Middlesex Justices, ex parte Director of Public Prosecutions* [1952] 2 All E.R. 312. The High Court of Australia, which has a general power to order a new trial, in practice is very reluctant to do so after acquittal: *The King v. Wilkes* (1948) 77 C.L.R. 511.

which was held not to render the trial a nullity are *Rex v. Neal*[49] and *Thomas v. The King (No. 2)*.[50] In *Rex v. Neal* the jury were allowed out for lunch after having retired to consider their verdict. The Court of Criminal Appeal held that since the trial had been impeccable up to that time, it would be going too far to regard this slip as invalidating the whole proceeding. On the other hand, to allow the jury out had been clearly improper. The conviction was therefore quashed. In *Thomas v. The King (No. 2)* the accused claimed on appeal that he had been absent from the court when the jury were recalled from retirement to be re-directed on a certain matter. The Court of Criminal Appeal found as a fact that he had not been so absent, but expressly stated that they would not in any event have treated so slight an irregularity as invalidating the proceedings.

In *Gregory v. Murphy*[51] the insertion, by mistake, of the wrong return date in a summons was held not to nullify the trial, even though this meant sustaining a conviction of the accused made in his absence. However, that was an unusual case in which the accused was trying, in effect, both to have the previous conviction quashed and to rely on it for a plea of *autrefois convict*. Sustaining the conviction meant that the *convict* plea protected him from a reopening of the proceedings.[52]

Flaws which have been held to nullify the previous trial altogether are numerous: defective indictment or information;[53] reception of unsworn evidence;[54] failure to comply with a statutory procedure;[55] failure in summary proceedings to explain to the accused the existence and incidents of his right of election to go for trial;[56] improper constitution of the court owing to a mistake over the adjournment period;[57] unsworn juror;[58] juror who had a fit;[59] verdict returned by the jury which they had no power to return;[60] and joint trial of two

[49] (1948) 33 Cr. App. R. 189.

[50] [1960] W.A.R. 129. *Cf. Poole v. Reginam* [1960] 3 W.L.R. 770.

[51] [1906] V.L.R. 71.

[52] In *Rex v. Lester* (1938) 27 Cr. App. R. 8, omission to direct the jury constituted a good ground for quashing the conviction, but not for nullity. Omission to direct, however, is more like misdirection than irregularity in the conduct of the trial.

[53] *Anon.* (1484) Jenk. 162; *Regina v. Vaux* (1591) 4 Co. Rep. 44a; *Rex v. Segar and Potter* (1696) Comb. 401; *Regina v. Carter* (1704) 6 Mod. 167; *Rex v. Reading* (1793) 2 Leach 590; *Rex v. Gilchrist* (1795) 2 Leach 657. For the modern extension to defective informations see *Ex parte Curry* (1904) 21 W.N. (N.S.W.) 260; *Ramm v. Gralow* (1932) 26 Q.J.P.R. 115; *Broome v. Chenoweth* (1946) 73 C.L.R. 583, especially 599-600, *per* Dixon J.; *Hackwell v. Kay* [1960] V.R. 632. But *cf. Gregory v. Murphy* in the previous paragraph of the text.

[54] *Rex v. Bitton* (1833) 6 Car. & P. 90, and *Rex v. Chamberlain and Anor.* immediately following in the report; *Rex v. Marsham* (1912) 23 Cox 77.

[55] *The Queen v. McLellan* (1894) 15 L.R. (N.S.W.) 426; *Rex v. Breslauer* (1904) 68 J.P.Jo 341.

[56] *Stefani v. John* [1948] 1 K.B. 158; *Regina v. Kent Justices* [1952] 2 Q.B. 355.

[57] *Rex v. Bowman* (1834) 6 Car. & P. 337.

[58] *The King v. Dempster* [1924] S.A.S.R. 299.

[59] *Rex v. Goulo* (1763) 18 St. Tr. 415 n.

[60] *The Queen v. Tierney* (1885) 1 W.N. (N.S.W.) 114; *The Queen v. Lee* (1895) 16 L.R. (N.S.W.) 6; *Rex v. Kitching* (1929) 21 Cr. App. R. 144.

accused charged on separate indictments.[61] An interesting point is raised by *Regina v. Drury*.[62] Drury was convicted of inciting to destroy property and illegally sentenced to ten years transportation, the court having power to sentence to no more than seven years transportation. The whole proceedings were set aside by writ of error, and it was held that the accused might be indicted anew. The question which suggests itself is as to what would happen in comparable circumstances at the present day. The doctrine of nullity as we now have it seems to apply only to irregularities in the actual conduct of the trial. When sentence is imposed the trial is over and the verdict has been given. It is submitted that the accused could not be indicted again. On the other hand, he is clearly entitled to appeal against the illegal sentence. There is ground for thinking that an appeal against sentence as such would be inappropriate, for strictly speaking the court has not imposed a sentence according to law at all. The trial may not be a nullity, but the purported sentence is certainly null. The proper course, assuming that excessive imprisonment has been imposed, would seem to be by way of *habeas corpus*. If the sentence has been a fine, then the accused could merely ignore it and set up the illegality against any attempt to enforce the judgment. The problem is as to the position of the accused when he has been released on *habeas corpus*. By analogy with the course which has been taken where justices have erroneously remitted people for sentence after summary trial,[63] having no power to do so, it seems that on the application of the prosecution the accused may be ordered to attend before the trial court for lawful sentence.

The last procedural requirement which remains for consideration is the need for the first trial to have gone to verdict. Although in one case[64] it was assumed by the court for the purpose of argument that the entry of a *nolle prosequi* was equivalent to acquittal for *autrefois* purposes, it has since been authoritatively stated that it is not.[65] Equally, a verdict on a minor offence obtained by collusion, in order to bar a later prosecution for a more serious offence constituted by the same facts, does not sustain an *autrefois plea*.[66] One of the commonest causes of a trial not going to verdict is the discharge of the jury before it has reached a verdict, often because the jurymen have declared themselves unable to agree, but sometimes for another reason. It is well settled that the discharge of the jury is a matter entirely within the discretion of the trial court which will not be inquired into on

[61] *Crane v. Director of Public Prosecutions* [1921] 2 A.C. 299.
[62] (1849) 3 Cox 544.
[63] *Rex v. Norfolk Justices, ex parte Director of Public Prosecutions* (1950) 34 Cr. App. R. 120.
[64] *Bunker v. Kelly* [1924] V.L.R. 349.
[65] *Broome v. Chenoweth* (1946) 73 C.L.R. 583, 599, *per* Dixon J.
[66] *The King v. Muirhead and Bracegirdle* [1942] S.A.S.R. 226.

appeal, and which will not sustain a plea of *autrefois acquit*.[67] Anything that the jury said before being discharged is irrelevant.[68] Another course which terminates a trial before verdict, and therefore prevents its being relied on for an *autrefois* plea later, is withdrawal of a charge by leave of the court.[69] If justices discharge the accused on the ground that they are unable to agree upon a verdict, the result is the same as if the jury had been discharged without reaching a verdict in a trial on indictment.[70] An *autrefois convict* plea cannot be founded on the mere taking of offences into consideration when sentence was imposed at a previous trial if the conviction at that trial is subsequently quashed on appeal.[71]

If a conviction is quashed on appeal, the effect on future proceedings is the same as if the accused had been acquitted.[72] For this reason the proper plea would seem to be *autrefois acquit* rather than *autrefois convict,* although the latter has sometimes been used.[73] It seems that at common law one verdict for a continuing offence bars further prosecution.[74] This rule is usually altered by legislation.[75] Provided the verdict relied on was reached by a court of competent jurisdiction duly seised of the cause, it does not have to be a verdict 'on the merits', whatever that may mean.[76] This rule is to be distinguished from the rule commonly found in statutes providing expressly that magistrates are to give a certificate of dismissal only if they have adjudicated upon the merits, *i.e.* have gone into the evidence and not

[67] *Regina v. Newton* (1849) 13 Q.B. 716; *Regina v. Davison* (1860) 8 Cox 360; *Regina v. Charlesworth* (1861) 9 Cox 44; *Regina v. Winsor* (1866) 10 Cox 327; *The King v. Grand and Jones* (1903) 3 S.R. (N.S.W.) 216; *Rex v. Lewis* (1909) 78 L.J.K.B. 722. *Cf. Rex v. Richardson* (1913) 8 Cr. App. R. 159. On the Tasmanian Criminal Code see *The King v. Kent-Newbold* (1939) 62 C.L.R. 398.

[68] *The Queen v. Burns* (1893) 10 W.N. (N.S.W.) 116.

[69] The English cases are collected in [1959] *Criminal Law Review* 833-836; for Australian decisions see (1940) 13 *Australian Law Journal* 444, and see also *Doherty v. Howe* (1948) 65 W.N. (N.S.W.) 261; *cf. Schofield v. Betts* [1936] Tas. S.R. 32.

[70] *The Queen v. Alley, ex parte Selby* (1886) 7 A.L.T. 103.

[71] *Rex v. Nicholson (No. 2)* (1947) 32 Cr. App. R. 127, overruling *Rex v. McMinn* (1945) 30 Cr. App. R. 138. *Cf. Regina v. Webb* [1953] 1 All E.R. 1156.

[72] *The Queen v. O'Keefe* (1894) 15 L.R. (N.S.W.) 1; *Rex v. Norton* (1910) 5 Cr. App. R. 197; *Rex v. Barron* (1914) 10 Cr. App. R. 81; *Ramm v. Gralow* (1932) 26 Q.J.P.R. 115. The same rule applies for issue estoppel: *Mraz (No. 2) v. The Queen* (1956) 96 C.L.R. 62.

[73] *E.g. The Queen v. O'Keefe* (1894) 15 L.R. (N.S.W.) 1. Perhaps it is unfortunate that *acquit* and *convict* cannot be pleaded in the alternative: *Regina v. Bond* (1850) 4 Cox 231, 235.

[74] *Pilcher v. Stafford* (1864) 4 B. & S. 775; *Paddington Guardians v. Sullivan* (1903) 68 J.P. 23. But where habitual acts of intercourse have taken place over a period of time, the consent of the woman being in every case obtained by threats, each such act constitutes a separate rape: *The King v. Horne* (1903) 6 W.A.L.R. 9.

[75] Thus the compulsory vaccination legislation was amended after the decision in *Pilcher v. Stafford* (1864) 4 B. & S. 775. See *Allen v. Worthy* (1870) L.R. 5 Q.B. 163; *Tebb v. Jones* (1877) 37 L.T. 576. For more recent examples see *Attorney-General v. Bastow* [1957] 1 Q.B. 514; *Attorney-General v. Smith* [1958] 2 Q.B. 173; *Attorney-General v. Harris* [1960] 1 Q.B. 31.

[76] *Haynes v. Davis* [1915] 1 K.B. 332; *Curyer v. Foote* [1939] S.A.S.R. 203. *Regina v. Middlesex Justices, ex parte Director of Public Prosecutions* [1952] 2 All E.R. 312. *Cf. Regina v. O'Brien* (1882) 15 Cox 29.

merely dismissed the information for some technical fault in the case presented for the prosecution.[77]

(ii) *Law*

The real difficulty in Hawkins's statement of the law, however, is to decide what is meant by the expressions 'the same offence' and 'the same crime'. There are a few cases on record where the Crown has indeed prosecuted a second time after acquittal for precisely the same offence, but these have arisen out of attempts to rectify technical blunders at the first trial by launching a second prosecution.[78] In such cases a plea of *autrefois acquit* has always succeeded, even where the Crown was in a position to argue that new, or different, evidence would be relied on at the second trial.[79] In the majority of reported cases, however, the question has been whether the previous express acquittal of one offence could be said to amount also to an implied acquittal of another. A rule that only an express acquittal of the precise offence charged in the second indictment sufficed would bear too harshly on the accused, for it would mean that the Crown could charge him with a series of crimes constituted by the same facts, whether more or less serious than the one originally relied on, until a conviction was obtained. Certainly the court has an inherent power to decline to allow an indictment to proceed,[80] but this power has never been advanced as a reason for restricting the scope of a plea of *autrefois acquit,* which depends on rules of law.[81] On the other hand, it would not always advance the cause of justice if an accused person were able to rely on acquittal of one offence as a bar to any other prosecution at all arising out of the same facts, for this could produce the undesirable situation where the accused is able to free himself by proving that he committed an offence, perhaps a serious offence, but not the one relied on by the Crown.[82]

The courts have therefore sought to tread a middle path. In so seeking they have no doubt achieved substantial justice, but they have

[77] *Reed v. Nutt* (1890) 17 Cox 86; *Regina v. Edmondes* (1895) 59 J.P. 776; *Curran v. Wong Joe* [1927] St. R. Qd. 112; *Baumgarten v. Vincent* (1930) 33 W.A.L.R. 50; *Ward v. Hodgkins* [1957] V.R. 715. *Cf. Lenthall v. Gazzard* (1895) 16 L.R. (N.S.W.) 22.

[78] *Rex v. Emden* (1808) 9 East. 437; *Rex v. Clark* (1820) 1 Brod. & B. 473.

[79] *Anon.* (1367) Jenk. 45; *Rex v. Sheen* (1827) 2 Car. & P. 634; *Rex v. Dann* (1835) 1 Moody 424. For a modern example see *Halsted v. Clark* [1944] K.B. 250, discussed *infra; cf. Rex v. Coogan* (1787) 1 Leach 448; *Rex v. Woolford and Lewis* (1834) 1 M. & Rob. 384.

[80] *Rex v. Miles* (1909) 3 Cr. App. R. 13, 15.

[81] The nearest approach was the untenable explanation of *Regina v. King* [1897] 1 Q.B. 214, in *Rex v. Barron* (1914) 10 Cr. App. R. 81, 88, as turning on the wrongful exercise by the trial judge of his discretionary power. This power relates not to *autrefois acquit* issues but to matters of practice, such as joinder of counts in one indictment or allowing a series of trials for different but related offences. *The King v. De Kuyper* [1948] S.A.S.R. 108, 112.

[82] Note (1961) 24 *Modern Law Review* 166, on *Rogers v. Arnott* (1960) 44 Cr. App. R. 195.

not added to the clarity of the law. Acknowledgment has invariably been made of the principle enunciated by Hawkins, usually by rendering it in the modified form that the offences must be substantially or practically the same, but the need for a more precise test of criminal responsibility has been acutely felt. Two refinements of the general principle have been put forward by the courts as practical tests.

According to the first of these the true question 'is whether the evidence necessary to support the second prosecution would have been sufficient to procure a legal conviction on the first'.[83] This test claims descent from an English case in 1820[84] but was first put into general circulation by the High Court of Australia in a trio of cases in 1905-1906.[85] It has not proved popular, chiefly owing to uncertainty about what it means. It has been suggested that 'evidence necessary to support the charge' means 'ultimate facts to be proved',[86] and also that the test might lead to different results according to the order in which offences were charged.[87] The modern view seems to be that the High Court was not intending to lay down a test different in effect from the 'power to convict' test which is discussed below, and that in any event both tests are really only formulations according to taste of the general principle that the offences must be substantially the same.[88] The sort of confusion to which the 'evidence' test is capable of leading is illustrated by the Western Australian case of *Cox v. Cordingly*.[89] The accused was first charged with unlawful possession, the charge being dismissed on the ground that the evidence disclosed a case of larceny. At the ensuing trial for larceny the accused put in a plea of *autrefois acquit*, which was set aside on appeal on the ground that the magistrate's first decision showed that in his view the evidence on the second (larceny) charge would not support the first (unlawful possession) charge. The decision against the *acquit* plea was no doubt right,[90] but not for the reason given. Far from deciding that the evidence would not support unlawful possession, the magistrate decided that it would support more than unlawful possession, and that action should be taken accordingly.

[83] *Chia Gee v. Martin* (1905) 3 C.L.R. 649, 653.

[84] *Rex v. Clark* (1820) 1 Brod. & B. 474, through *Regina v. Bird* (1851) 5 Cox 20; *The Queen v. Fogg* (1864) 3 S.C.R. (N.S.W.) 215; and *The Queen v. Bingham* (1881) 2 L.R. (N.S.W.) 90.

[85] *Sherwood v. Spencer* (1905) 2 C.L.R. 250; *Chia Gee v. Martin* (1905) 3 C.L.R. 649; *Li Wan Quai v. Christie* (1906) 3 C.L.R. 1125.

[86] *Tucker v. Noblet* [1924] S.A.S.R. 326, 340, *per* Napier J.; *The King v. Kent-Newbold* (1939) 62 C.L.R. 398, 411, *per* Latham C.J.

[87] *Burn v. Peachy* (1929) 46 W.N. (N.S.W.) 26, 27, *per* Davidson J.

[88] *The King v. De Kuyper* [1948] S.A.S.R. 108; *Kilcullen v. Sammut* [1946] St. R. Qd. 152, explaining the earlier decision in *Dray v. Mitchell* [1932] St. R. Qd. 18. As early as *The King v. Cleary* [1914] V.L.R. 571, it was being said that the new test was not exclusive.

[89] (1933) 36 W.A.L.R. 44.

[90] Unlawful possession is discussed *infra*.

Moreover, in *Connolly v. Meagher*[91] the High Court itself seems to have ignored the evidence test at the very time when it was being given currency. The defendant had been previously convicted of selling liquor to a boy under fourteen. The evidence to support this charge was that he sold a bottle of port to the boy on a Sunday. He was then charged with selling liquor on a Sunday, to which he pleaded that he could not be punished twice for the same offence.[92] The court decided that the plea failed because the two offences were distinct. Yet the evidence necessary to support the second charge was exactly the same as the evidence which procured a legal conviction on the first one.[93] It is therefore submitted that the 'insufficiency of evidence' test, whatever it may mean, has not proved viable in practice. The same is not true of the 'power to convict' test, to which we will now turn.

According to this test, the true question is whether the accused on the second trial is being charged with an offence 'of which he could have been properly convicted on the trial of the first indictment'.[94] The argument is that if the accused could not have been convicted at his first trial of the offence with which he is now charged, he was not previously in peril.[95] The standard example of the operation of the test is an acquittal of murder barring a later prosecution for manslaughter on the same facts,[96] although in one case the learned judge preferred to illustrate the rule from the opposite point of view by observing that acquittal of murder was no bar to a prosecution under a Cemeteries Act for unlawfully destroying the body of the deceased by fire.[97] The 'power to convict' test, as it is called herein, is the ruling criterion of the efficacy of an *autrefois acquit* plea at the present day, and there is no doubt that nearly all the reported decisions can be explained in this way. Nevertheless, it is submitted that the test is unsatisfactory for a number of reasons.

In the first place, although the point is perhaps not of much importance, there is at least one case with which it is clearly inconsistent. In *Regina v. Elrington*[98] a previous summary acquittal of common

[91] (1906) 3 C.L.R. 682.

[92] Queensland Criminal Code s. 16. The fact that this case was in the nature of *autrefois convict* does not detract from its utility as an example in the present context for the evidence test was said to apply indifferently to both types of cases.

[93] *Gould v. Sin On Lee* (1911) 6 Q.J.P.R. 15.

[94] *Rex v. Barron* (1914) 10 Cr. App. R. 81, 87. This test claims ancestry going back to *Rex v. Vandercomb* (1796) 2 Leach 708.

[95] 2 Hale *P.C.* 246.

[96] Early cases on homicide are unreliable because they turned on the technicalities of benefit of clergy. See the reporter's note to *Regina v. Brettel* (1842) Car. & M. 609, explaining *Rex v. Jennings* (1819) Russ. & Ry. 388, on this ground—The same applies to *Regina v. Holmes* (1584) 1 Hale *P.C.* 491; *Regina v. Holcroft* (1578) 2 Hale *P.C.* 246; *Wrote v. Wigges* (1591) 4 Co. Rep. 45 b. *Cf. Regina v. Tancock* (1876) 13 Cox 217; *The Queen v. Nammy (otherwise Jacky)* (1886) 20 S.A.L.R. 65.

[97] *Bunker v. Kelly* [1924] V.L.R. 349, 354, *per* McArthur J.

[98] (1861) 9 Cox 86. This case actually turned on a statutory forerunner of s. 45 of

assault was held to bar an indictment on the same facts for occasioning bodily harm. Obviously the accused could not have been convicted of occasioning bodily harm in a summary trial for common assault. For what it is worth, *Regina v. Elrington* is supported by issue estoppel, the fact of the assault having been conclusively determined against the Crown, but not by a theory of previous liability to conviction.

A more serious objection to the 'power to convict' test is that it relies on form at the expense of principle. It concentrates attention on the narrow question whether the court in the first trial had power to record a verdict for an offence other than the one with which the accused was charged. This is a technical matter, capable of giving rise to subtle argument,[99] and often dependent on the accidents of legislation.[1] It is undesirable that a principle which goes to the heart of criminal responsibility should be applied according to a test which has no necessary connection with the realities of the situation.

The sort of decision to which the 'power to convict' inquiry leads is illustrated by *Regina v. Connell,*[2] where a previous acquittal of murder was held not to bar an indictment on the same facts for administering poison with intent to murder. The ground of the decision was that Connell could not at his first trial for murder have been found guilty of administering with intent. The defence pointed out that in the first trial he could have been found guilty of attempted murder,[3] which on the facts was the same thing as administering with intent. The court replied that the two offences were distinct in that attempted murder at that time was a misdemeanour,[4] whereas administering with intent was a felony. The reply hardly seems sufficient, and yet on the 'power to convict' test it was technically impeccable. If anything, the argument on the distinction between felony and misdemeanour

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the Offences Against The Person Act 1861 (Eng.) whereby anyone who has been prosecuted summarily for a common assault, or for an aggravated assault on a female or a boy under 14, and is either acquitted or convicted, and pays any sum adjudged to be paid or serves any term of imprisonment to which he is sentenced, shall be 'released from all further or other proceedings, civil or criminal, for the same cause'. The court held that the case came squarely within the statutory words. However, it is clear from the later cases of *Regina v. Morris* (1867) L.R. 1 C.C.R. 90, and *Regina v. Miles* (1890) 24 Q.B.D. 423, that so far as it relates to criminal proceedings, s. 45 adds nothing to the general law of *autrefois*, so that *Regina v. Elrington*, which does not purport to decide anything different, cannot be distinguished by confining it to the statute (as was done in *Wemyss v. Hopkins* (1875) L.R. 10 Q.B. 378). *Regina v. Elrington* is also sometimes lumped together with *Regina v. Walker* (1843) 2 M. & Rob. 212, and *Regina v. Stanton* (1851) 5 Cox 324, but these were *convict* cases, and therefore, as will be shown *infra*, rested on different principles.

[99] As in *Rex v. Leonard Thomas* (1949) 33 Cr. App. R. 200, 210-213.

[1] For instances of the piecemeal nature of such legislation see Prevention of Offences Act 1851, s. 5 (Eng.); Criminal Procedure Act 1851, ss. 9, 12 (Eng.); Criminal Law Consolidation Act 1935-1956, ss. 290, 291, (S.A.). *Cf.* The remarks of Stephen C.J. in *The Queen v. Douglass* (1865) 4 S.C.R. (N.S.W.) 157.

[2] (1853) 6 Cox 178.

[3] Criminal Procedure Act 1851, s. 9 (Eng.).

[4] Now felony by Offences Against The Person Act 1861, s. 15 (Eng.). Administering with intent (s. 11) is grouped with other such offences under the general heading 'Attempts to Murder'. *Cf. Dean v. Dean* (1896) 17 L.R. (N.S.W.) (Div.) 1.

ought to have operated *a fortiori* in favour of the accused, for if he had been acquitted of misdemeanour which was the same in all essentials as a felony, still less should he have been indicted for the more serious offence.[5]

At the present day the court could not advance the argument that attempted murder is a mere misdemeanour, but the point that administering poison with intent could not be returned on a trial for murder would still be technically correct.[6] On an issue estoppel approach, however, if the second prosecution were barred, it would be for the sensible reason that the verdict in the first trial must be taken to have established an essential fact against the Crown. It must be noticed, however, that it is as true of issue estoppel as of the 'power to convict' test that the existence of a statutory power to convict may affect the result of an *autrefois acquit* plea. Suppose that in *Regina v. Connell* there had been a statutory power to convict of administering poison with intent on the trial for murder. Acquittal of murder would then necessarily have barred further prosecution for administering with intent, just as it barred further prosecution for manslaughter. This result would have followed as much from 'power to convict' as from issue estoppel. The advantage of applying issue estoppel is that it answers the reasonable question, 'Why does the existence of a power to convict of an alternative crime bar further prosecution?', by answering, 'Because the refusal by the jury in the first trial to use that power establishes as a matter of law that the accused did not commit that crime.'

It is pertinent to observe that the felony-misdemeanour dichotomy, although misapplied in *Regina v. Connell,* is by no means obsolete in this part of the law. In *The King v. Crossley,*[7] the accused was charged with a statutory offence of being 'knowingly concerned' in the commission of a misdemeanour by someone else. During the trial it appeared that Crossley was in fact the principal in the misdemeanour said to have been committed, and no evidence was produced that anyone else was the principal. The prosecutor therefore applied for leave to withdraw the charge so that the accused could be proceeded against as principal. The magistrate refused leave and acquitted Crossley, but later tried him as principal, overruling a plea of *autrefois acquit.* The plea was sustained on appeal on the ground that since there are no degrees of complicity in misdemeanours, Crossley could have been convicted on the first charge, and had therefore already been in

[5] This argument is not affected by the fact that at common law a jury could not return a verdict of misdemeanour on a charge of felony and *vice versa. The Queen v. Taylor* (1952) 69 W.N. (N.S.W.) 81.

[6] Thus a verdict of wounding with intent to murder cannot be returned on a trial for murder: *Rex v. Thomas* (1949) 33 Cr. App. R. 200, 210.

[7] (1948) 48 S.R. (N.S.W.) 494.

peril.[8] The decision accords with issue estoppel, for that doctrine does not enable the court to go behind the verdict to find any fact inconsistent with it. The circumstance that Crossley was acquitted because of a mistake of law by both prosecutor and magistrate is nothing to the point.[9] Moreover, the magistrate might have exercised his discretion to grant leave to withdraw the first charge.[10]

A striking example of the irrelevant complexities which the 'power to convict' test can produce is *Regina v. Bird and Bird.*[11] The accused was convicted of assault after having been acquitted of murder, and the conviction was affirmed on appeal by a majority. The arguments of counsel and the judgments, which are reported at great length, reveal an excessive preoccupation with the precise effect of a statute[12] which in certain circumstances allowed a verdict of assault to be returned on an indictment for a more serious felony based on facts involving assault. The result of the discussion was gloomily summarized by Campbell C.J. at the end of his judgment: 'I am afraid, that without the interference of Parliament, notwithstanding our best efforts to be unanimous, we ourselves, as well as others, may again find it difficult to anticipate the result of our deliberations.'[13] In the trial for murder the prosecution had relied on proving that death resulted from one or more of several assaults which were proved. However, medical evidence established that death in fact resulted from a blow on the head of which there was no evidence at all. The accused was therefore acquitted, and the subsequent arguments about the indictment for assault revolved round the question whether he could have been convicted of the assaults which had been proved. It is submitted that the later conviction for assault was clearly right, regardless of the statute, because the verdict in the first trial established no relevant issue of law or fact against the Crown.

The importance of taking into account the actual course of the first trial in order to evaluate the verdict is shown by *dicta* such as that of Jervis C.J. in *Regina v. Reid*[14] that since a verdict of assault with intent to rob cannot be returned on a trial for robbery, acquittal of robbery does not bar prosecution for assault with intent. It is submitted that such a question should not be determined on this narrow

[8] For the converse case, where D was first acquitted of being principal to a misdemeanour and then charged with aiding and abetting, see *Ex parte Homer* (1933) 50 W.N. (N.S.W.) 158. Contrast *Rex v. Plant* (1836) 7 Car. & P. 575, where D was convicted as an accessory before the fact to murder after being acquitted as principal (*sub. nom Rex v. Birchenough* 1 Moody 477). *Cf. Rex v. Woolford and Lewis* (1834) 1 M. & Rob. 384. Previous acquittal of conspiracy does not bar prosecution for aiding and abetting: *The King v. Erson* [1914] V.L.R. 144; *Rex v. Bernard Kupferberg* (1918) 13 Cr. App. R. 166.

[9] *Ryley v. Brown* (1890) 17 Cox 79; *Wood v. Nairn* (1897) 61 J.P. 184; *O'Connell v. Lee* [1922] S.A.S.R. 320; 30 C.L.R. 607; *O'Sullivan v. Rout* [1950] S.A.S.R. 4.

[10] *Halsted v. Clark* [1944] K.B. 250, considered *infra.*

[11] (1851) 5 Cox 20. [12] 1 Vict. c. 85, s. 11. [13] (1851) 5 Cox 103.

[14] (1851) 5 Cox 104, 111-112.

technical ground. The real point is whether it appears from the actual conduct of the first trial that the Crown case depended on proving that the accused committed a robbery which certainly occurred, or on proving that the accused succeeded in accomplishing a robbery which he certainly attempted.[15] The same can be said of the leading case on *autrefois acquit, Rex v. Barron,*[16] in which the Court of Criminal Appeal, in a judgment notable more for emphasis than analysis, held that a previous acquittal of sodomy did not bar a prosecution on the same facts for gross indecency, which differed in not requiring proof of penetration, because a verdict of gross indecency could not be returned on a trial for sodomy. A more relevant approach was taken in *Regina v. Gould,*[17] where the accused was convicted of burglary after being acquitted of murder in the furtherance and commission of that burglary. The jury were directed that had the second indictment contained an allegation of violence with the burglary, the previous acquittal of murder would have furnished a complete answer to that part of the indictment.

Similar considerations apply to a group of cases in which the only difference between the first and the second charges was that the former required proof of a specific intent. For example, in *Regina (on prosecution of Great Western Railway Company) v. Gilmour*[18] the accused had been acquitted of the felony of unlawfully and maliciously throwing an obstacle on a railway line with intent to endanger passengers or to obstruct or injure an engine.[19] This acquittal was held not to bar a prosecution for the misdemeanour of throwing such obstacles without the intents mentioned.[20] Clearly, it would be relevant to the later charge to discover whether the defence which succeeded at the first trial was denial of the specific intent or alibi. It is not maintained that the decision in this case or others like it[21] was incorrect; it is maintained that to explain them by saying that a conviction for the second offence could not have been returned at the first trial explains nothing.

There is another group of cases which may fairly claim to have reached the very pinnacle of unreality. Perhaps the best example is *Bannister v. Clarke.*[22] The accused was charged before justices with

[15] On all fours with *Regina v. Reid* is *Regina v. Grisson* (1847) 2 Car. & K. 781: acquittal of rape does not bar indictment for assault with intent. *Cf. Regina v. Dagnes* (1839) 3 J.P. 293; *The Queen v. Simpson* [1958] Q.W.N. 39.

[16] (1914) 10 Cr. App. R. 81. [17] (1840) 9 Car. & P. 364.

[18] (1882) 15 Cox 85. [19] 24 & 25 Vict. c. 97, s. 35; 24 & 25 Vict c. 100, s. 32.

[20] *Ibid.* ss. 36 and 34 respectively.

[21] *Regina v. Goadby* (1847) 2 Car. & K. 782 n.: common assault after assault with intent to do grievous bodily harm; *Regina v. Dungey* (1864) 4 F. & F. 99: common assault after assault with intent to rape; *The Queen v. Douglass* (1865) 4 S.C.R. (N.S.W.) 157; common assault after wounding with intent to murder. *Cf. The Queen v. Tierney* (1885) 1 W.N. (N.S.W.) 114: verdict of common assault could not be returned on charge of wounding with intent to do grievous bodily harm, but accused could be tried again for common assault.

[22] (1920) 26 Cox 641. Two similar South Australian cases are *Allchurch v. Beresford* [1928] S.A.S.R. 450, and *O'Sullivan v. Friebe* [1956] S.A.S.R. 89.

two offences on the same facts, the first for keeping a house for the purpose of betting,[23] the second of being the holder of a licence and suffering licensed premises to be used for betting.[24] The only difference between these two offences was that in the first it was unnecessary to establish that the accused was himself the licensee of the premises in question. The inappropriateness of any test dependent on the idiosyncratic nature of imperfectly correlated legislation is shown at the outset by the oddity that it was open to the accused on the first charge to elect to go for trial, whereas the second was purely a summary offence. One might have thought that the fact that the accused was a licensee would have aggravated rather than mitigated, so that if anything the right to elect would have been the other way about. In error the justices sent him for trial on both charges. Both were ultimately dismissed, the first on the merits and the second on the ground that since the justices had had no power to send him for trial, the court had no power to try him. Subsequently he was brought once more before the justices on the second charge and convicted. He appealed from this conviction, *inter alia,* on the ground that the two offences were substantially the same, and therefore that having been acquitted of the one he could not be now tried for the other.

The appeal was dismissed as to this ground because the two offences were not substantially the same. In the one case the accused did not have to be a licensee, in the other he did. A moment's reflection will reveal the absurdity of this result. If the accused had already been acquitted of keeping a house for the purpose of betting, what possible difference could it make in the second case that it was also being alleged that he was the licensee of the premises? It still had to be proved that he allowed betting to take place; yet this fact had already been determined against the Crown by the verdict in the previous trial. It is submitted that the decision in *Bannister v. Clarke* turned on irrelevant details which merely obscured the issue. On an issue estoppel approach this would not have happened.

A similar perversion of reasoning occurred in the Australian case of *Tucker v. Noblet.*[25] The accused was charged under section 185 of the Licensing Act 1917 (S.A.), with supplying liquor after hours. Proof of the commission of the offence was facilitated by section 186, according to which the court was obliged to convict if it was proved that during forbidden hours (a) any door giving access to a bar-room was open or unlocked; or (b) any person other than the licensee or his servant was in the bar-room; or (c) any light was on in the bar-room. The case for the prosecution was that certain persons had entered and left the premises after hours through a door giving access to the

[23] Betting Act 1853, s. 3 (Eng.).
[24] Licensing (Consolidation) Act 1910, s. 79 (Eng.).
[25] [1924] S.A.S.R. 325.

bar-room, and that a light was on in the bar-room. The court was therefore invited to convict by applying the evidentiary rules in section 186. The accused was acquitted.

He was then charged on the same facts under section 187 with having left unlocked a certain door to the premises whereby access could be gained to the bar-room from outside after hours. A plea of *autrefois acquit* failed on the ground that the two offences were substantially different, section 185 forbidding the supply of liquor, and section 187 forbidding open doors. It is submitted that the decision is logically indefensible. The verdict in the first trial must have meant that the evidence of an open door and a light in the bar-room had been rejected, for if it had been accepted the court, by virtue of section 186, would have been bound to convict. It was said that what had to be looked to was the 'ultimate fact'[26] which the prosecution were seeking to establish, and that whereas under section 185 this was the supply of liquor, under section 187 it was an open door. This, with all respect, is an attempt to have it both ways. If the prosecution had succeeded on the first charge, they would have done so by being allowed to prove, not supply or anything like it, but an open door or a light or an unauthorized person in the bar-room. But since they failed, the court said in effect that their failure was to be taken as a failure to establish supply only. Section 186, in short, was to be taken into account if it helped the prosecution, but not if it helped the defence. This sort of result is avoided by the rigorous application of issue estoppel.

It will be recalled that earlier in this article an account was given of the recent case of *The Queen v. Clift*,[27] in which the impact of issue estoppel on prosecutions for unlawful possession was considered for the first time. It is instructive to compare *The Queen v. Clift* with *Flatman v. Light*,[28] where the opposite situation obtained.[29] The police had arrested the accused on suspicion of larceny and, apparently in accordance with the usual practice, had charged him with knowingly being in possession of property reasonably suspected of being stolen, while they investigated the case further. By the time the unlawful possession charge came up for trial the police had collected evidence justifying a prosecution for larceny and no longer wanted to press the lesser offence. The magistrate therefore dismissed the information. At his trial for larceny the accused pleaded *autrefois acquit*, a course distinctly lacking in merit in the circumstances. His plea was held bad on the ground that the two offences were not substantially the same. The same result would have followed from applying the 'power to convict' test, for there could have been no conviction for larceny on

[26] [1924] S.A.S.R. 325, 340, *per* Napier J.
[27] (1952) 69 W.N. (N.S.W.) 87. [28] [1946] K.B. 414.
[29] *I.e.* prosecution for larceny after acquittal of unlawful possession, not *vice versa*.

the unlawful possession charge. Nevertheless, it is clear that the question in issue was not really one of *autrefois acquit* at all but of issue estoppel.[30]

Suppose the trial for unlawful possession had been carried through with proper evidence and had resulted in acquittal. It is submitted that the accused could not then have been later prosecuted on the same facts for larceny,[31] although the 'power to convict' test does not lead to this result, and the 'substantially the same' test does not do so either unless the courts render it meaningless by flatly contradicting the express ground of the decision in *Flatman v. Light*. If, however, a verdict of not guilty of unlawful possession is examined in context to see if it must be taken to negate reasonable suspicion of larceny, and on the facts of the trial this is the correct conclusion, there is no difficulty. *Flatman v. Light* is seen on this approach as a satisfactory instance of the court's finding that in the particular circumstances of the case no issue estoppel had been established.

It may be objected that this is to go behind the verdict to find an issue of law or fact inconsistent with the verdict. It is submitted that the objection, although logically sound, fails to take account of the peculiar nature and purpose of unlawful possession charges. It is quite clear that where there is reasonable evidence of larceny or receiving, the Crown should prefer the graver charge and not seek to proceed on unlawful possession, even when, as will normally be the case, this course involves obtaining leave to discontinue the unlawful possession prosecution.[32] Frequently the court will prefer to dismiss the lesser charge out of hand in order that it should not hang over the accused. It is obviously improper that the court should be prevented from taking this sensible course by a misapplication of the doctrine of issue estoppel or *autrefois acquit*. Unlawful possession, in short, is an ancillary offence designed to assist, not hinder, the police in the execution of their duty. The only thing that has to be watchfully discouraged is any tendency to use it in such a way as to turn prosecu-

[30] Lord Goddard seems to have appreciated this point to some extent, for he distinguished *autrefois acquit* from the principle *nemo debet bis vexari pro uno delicto* (discussed later in this chapter). He concluded, however, that any difference was immaterial.

[31] *The King v. Cleary* [1914] V.L.R. 571, is authority that there can be prosecution for receiving after acquittal of unlawful possession on the same facts, but it is submitted that the status of this decision is rendered uncertain by the emergence of issue estoppel. The judgments in *The King v. Cleary* do not satisfactorily deal with the real problem, though the court was clearly aware of it.

[32] *Lenthall v. Newman* [1932] S.A.S.R. 126; *Lenthall v. Fimeri* [1933] S.A.S.R. 22; *Hewitt v. O'Sullivan* [1947] S.A.S.R. 384; *Flatman v. Light* [1946] K.B. 414. *Cf. Cox v. Cordingly* (1933) 36 W.A.L.R. 44. The case is different where it is sought to charge unlawful possession *twice*, no evidence having been offered on the first trial. Here previous dismissal clearly bars the second prosecution—*Mitchell v. Berry* (1922) 22 S.R. (N.S.W.) 363. The explanation of *Williams v. Hallam* (1943) 112 L.J.K.B. 353, is that since the accused had asked that the two charges of larceny and unlawful possession be tried as one, he could hardly complain of this course later.

tion into persecution.[33] The doctrine of issue estoppel is admirably adapted to this end.

An interesting extension of *autrefois acquit,* which can now be seen as a distinct step towards issue estoppel, is *Halsted v. Clark.*[34] The accused was charged with making a statement which was false in a material particular, contrary to a defence regulation. At the close of the case for the prosecution it was submitted that there was no case to answer because the summons disclosed no offence known to the law, having omitted to aver that the statement was made 'recklessly'. It was then further submitted that if the prosecutor should apply for leave to amend the summons, leave should be refused on the ground that the evidence led by the prosecution did not disclose recklessness in any event, so that the amendment would be useless. The prosecutor then applied for leave to amend. Leave was refused and the case dismissed. The prosecutor then charged the accused on a new summons which included an averment of recklessness. This was met with a plea of *autrefois acquit,* which was accepted and sustained on appeal, the Divisional Court holding that the accused had already been in peril because the magistrates might have exercised their discretion the other way on the first trial and given the prosecutor leave to amend.

This decision evidently goes far beyond the traditional limits of an inquiry into *autrefois acquit.* The court would have been entirely justified in arguing that the two summonses disclosed materially different offences.[35] Instead of this, the course was taken of looking into the actual events of the first trial for the purpose of discovering what was established against the Crown. This was an issue estoppel inquiry, and it led to a result which was both correct and different from the one which would have been reached on a more orthodox approach.[36]

This extended survey of the decided cases on *autrefois acquit* has been undertaken in order to show in detail the impact of issue estoppel on this part of the law. It is submitted that to inquire whether there is an issue estoppel is a more satisfactory way of evaluating a plea of *autrefois acquit* than to ask if the two offences are substantially the same, or if there could have been a conviction for

[33] It is possible that persecution might be treated as an abuse of the process of the court in an extreme case. *Lenthall v. Fimeri* [1933] S.A.S.R. 22.

[34] [1944] K.B. 250.

[35] *Cf. Anderson v. Ayscough* (1905) 23 W.N. (N.S.W.) 54.

[36] The earlier cases of *Curyer v. Foote* [1939] S.A.S.R. 203, and *Ryley v. Brown* (1890) 17 Cox 79, which at first sight seem to be to the same effect as *Halsted v. Clark,* are not on all fours, because the point in them was that the accused could have been convicted on the first trial *without* amendment. For an old case reaching the same result, in effect, as *Halsted v. Clark* by a different route, see *Regina v. Austin* (1846) 2 Cox 59. *Regina v. Green* (1856) 7 Cox 186, must be taken now to be wrong on the possibility of amendment point.

one on a charge of the other, because the search for an issue estoppel promotes an investigation which is at once more rigorous and more realistic than the traditional approach. It is not contended that issue estoppel makes everything easy. *Mraz (No. 2) v. The Queen*[37] is enough to prove the contrary.[38] Neither is it contended that issue estoppel can be applied with remorseless logic to the solution of every problem in this part of the law. Odd offences such as unlawful possession[39] always create situations *sui generis* to which common sense must be applied as much as logic. But it is contended that issue estoppel furnishes a far more rational rule whereby to evaluate pleas of *autrefois acquit* than any test previously advanced by the courts.

IV. Autrefois Convict

The first of the two questions posed above, whether there is any advantage in regarding *autrefois acquit* as an instance of issue estoppel having been answered, there remains the second: what principle can be put forward as justifying a plea of *autrefois convict* which, contrary to the usual view, distinguishes it from *autrefois acquit*? It is submitted that the answer to this second question also is to be found by utilizing the concept of issue estoppel, this time for the analysis of the difference in law between the situations before the court when the accused pleads *autrefois acquit*, and when he pleads *autrefois convict*.

It has been seen that the true reason why the Crown is prevented from prosecuting by a justified *acquit* plea is that the previous acquittal necessarily involved the determination against the Crown, as a matter of law, of some issue essential to the second prosecution. As it is expressed in some of the cases,[40] *transit in rem judicatam*, the matter has been conclusively decided. This rule is one manifestation of the general doctrine of *res judicata* which, for reasons which need not be gone into here, has been found essential to the effective administration of the law. An accused person who sets up *res judicata* in the form of *autrefois acquit* is not arguing that the Crown ought not to be allowed to prosecute him twice for the same offence. He is making the much more precise point that as a matter of law there is

[37] (1956) 96 C.L.R. 62.

[38] Another example might be a repetition of the facts in *The Queen v. McDermott* (1899) 24 V.L.R. 636; D was acquitted on a housebreaking charge, the defence being alibi; he was then charged with perjury as to the alibi; he argued that he could not now be tried for perjury as the jury must be taken to have believed him at his first trial; this argument failed, the court holding that only an *acquit* plea would be in point and that, as the law then stood, such a plea was not available. The fallacy from an issue estoppel point of view seems to be that the question whether D was lying is not the same as the question whether his lies were believed. *Sed quaere*: in effect the prosecution on the perjury charge was asserting a fact negatived by the previous trial, namely, that D might have been on the scene of the housebreaking at the relevant time.

[39] And perjury: *supra* n. 38.

[40] *E.g. Wemyss v. Hopkins* (1875) L.R. 10 Q.B. 378, 381, *per* Blackburn J.

no issue to bring before the court, for the Crown is attempting to allege facts which in law do not exist.

It will be seen at once that the same is not true of *autrefois convict,* for here the idea of issue estoppel works in favour of the Crown. There is no doubt that a plea of *autrefois convict* may be made in a proper case as a matter of law, and that if justified it protects the accused from further prosecution for the same cause. This result, however, cannot possibly follow from issue estoppel. Indeed, a strict application of issue estoppel would annihilate *autrefois convict,* for by pointing to the previous determination of the present issue the accused would be effectively preventing himself from denying that determination in his own defence.[41] It is submitted that the true nature of a plea of *autrefois convict* is that it constitutes a necessary limitation on the executive power of the Crown.

For all that the doctrine of issue estoppel says, and the same applies to any other rule of law except *autrefois convict,* the Crown is at liberty to prosecute, and thereby to punish an individual an indefinite number of times for the same offence, once it is established that he committed that offence. In practice, no civilized society can permit such a state of affairs. Whether one regards this sentiment as an expression of the moral sense of justice or as a necessary administrative convenience is immaterial for the present purpose. What is important is to recognize the existence in the law of a principle protecting the individual from an undue exercise by the Crown of its powers to prosecute and punish. This principle receives expression in the plea of *autrefois convict.*

Such a plea is, of course, in one sense as much a manifestation of *res judicata* as is *autrefois acquit,* for *res judicata* as a general principle concerns itself only with the question whether an issue has been decided, not with the question in whose favour the decision went. This does not affect the point that the principles governing the application of *res judicata* to prosecution after acquittal necessarily differ from those governing its application to prosecution after conviction, for in the former case the Crown is estopped from proving its allegations, whereas in the latter it is not.

If the argument so far is right, it is reasonable to expect that the courts should make a more flexible approach to *convict* than to *acquit* cases. It has been seen that for *acquit* purposes it was found necessary to sharpen the inquiry whether the offences were substantially or practically the same into the question whether the court in the first trial had power to convict for the offence charged in the second trial. It has been submitted that this was in effect an acknowledgment of the

[41] It has been said, however, that a plea of guilty is not an admission of facts: *Regina v. Riley* [1896] 1 Q.B. 309, 318, *per* Hawkins J.

existence of an estoppel problem requiring rigorous analysis. This argument is not invalidated by the further submission that only recently have the courts developed a concept sufficiently refined to serve the purpose properly.

However, where a *convict* plea is made, the true nature of the decision before the court is whether the case is a proper one for the curtailment of the executive power of the state to punish, or at least to put the accused for the second time in danger of being punished.[42] In this situation it is desirable for the courts to retain a reasonable measure of discretion. If the doctrine of *res judicata* were applied with the same strictness in *convict* as issue estoppel in *acquit* cases, wrongdoers might go free in the most improper circumstances. It is here, out of the need for flexibility, that the vague 'substantially or practically the same' test comes into its own, for it is in the *convict* cases, under the guise of deciding whether any two or more offences were substantially or practically the same, that the courts have exercised a wide discretion in deciding whether the cases before them were properly made the subject of further prosecution. In appropriate circumstances the 'power to convict' test has also been applied, but never so as to restrict the choice of alternatives before the court.

Perhaps the best illustration is a well-established rule of the law of *autrefois convict* that a conviction for assault, whether common or aggravated, and whether summary or on indictment, does not bar a later prosecution for murder or manslaughter on the same facts if the victim dies after the first conviction.[43] No one would wish to dissent from this rule, which is based on sound considerations of public policy. If the victim of a savage attack hovers between life and death for some time, it is undesirable that the police should be obliged to refrain from arresting the aggressor for fear that conviction for the assault would prevent prosecution for the more serious offence if the victim ultimately died. On the other hand, the police have no power merely to hold him indefinitely without preferring a charge in order to see which offence he will in the event be shown to have committed.

The very different considerations which apply, however, where the first prosecution results in acquittal, are shown by *Regina v. Antonio*

[42] It might be said as a matter of logic that it would always be open to the court to allow the second trial to proceed and to decline to impose more than a nominal punishment in the event of a second conviction. There are two objections to this: firstly, the argument fails where the court has no discretion about punishment, as in murder; second, an individual can be oppressively harassed merely by being incessantly prosecuted, even if he is not convicted. For these reasons the courts do not nowadays draw any distinction with practical consequences between *autrefois convict* and the related principle *nemo bis vexari debet pro uno delicto* (or *pro eadem causa*): *Connolly v. Meagher* (1906) 3 C.L.R. 682; *The King v. McNicol* [1916] V.L.R. 350; *Flatman v. Light* [1946] K.B. 414; *Rex v. Thomas* (1949) 33 Cr. App. R. 200.

[43] *Regina v. Morris* (1867) L.R. 1 C.C.R. 90; *Regina v. Friel* (1890) 17 Cox 325; *Rex v. Tonks* [1916] 1 K.B. 443; *Rex v. Thomas* (1949) 33 Cr. App. R. 200.

De Salvi,[44] which, although reported only as a note in Cox's Criminal Cases, continues to attract judicial comment.[45] Interest is kept alive by a *dictum* of Pollock C. J. to the effect that 'acquittal of the whole offence is not an acquittal of every part of it, it is only an acquittal of the whole'. The purport of this pronouncement is elucidated by the circumstances of the case. De Salvi was indicted for murder after having been acquitted of wounding with intent to murder on the same facts except for the supervening death of the victim of the attack. It was held that the indictment for murder was not barred. It is submitted that the decision was wrong on any view of the law, and illustrates well the confusion which follows from applying *convict* principles to *acquit* cases.

De Salvi's argument was in effect that it was not open to the Crown, as part of their case of murder, to attempt to prove against him the assault of which he had already been acquitted, for the jury at the first trial had had power to convict him of unlawful wounding[46] if they were satisfied that he wounded but were not satisfied that he did so with intent to kill. This argument was rejected on the ground that the record showed only that De Salvi had been previously acquitted of wounding with intent and was now charged with murder. Since it was possible to prove murder without proving an intent to kill, and since the earlier verdict might have proceeded only on the absence of such an intent, it was logical to argue that the accused had not necessarily been in peril before.

This was what Pollock C.J. meant when he uttered the cryptic *dictum* quoted above. His observation, be it noted, was accurate enough, and is indeed merely another way of expressing the principle of issue estoppel. But in *Regina v. Antonio De Salvi* it was inaccurately applied to the facts of the case. By both the 'power to convict' and the issue estoppel tests De Salvi was entitled to set up *autrefois acquit*. He was prevented from doing so by a misapplication of the assault-homicide rule,[47] which is entirely proper in relation to *autrefois convict* but hopelessly inconsistent with *autrefois acquit*. The correct approach to the assault-homicide situation is illustrated by *Regina v. Hilton*,[48] where the accused was charged with manslaughter after a previous acquittal of assault. His plea of *autrefois acquit* succeeded.

Also to the point is *Regina v. Tancock*.[49] The grand jury, being presented with a bill for murder, returned a true bill for manslaughter only. Tancock was thereupon tried and convicted of manslaughter.

[44] (1857) 10 Cox 481 n.

[45] Approved in *Rex v. Barron* (1914) 10 Cr. App. R. 81; Doubted in *Rex v. Thomas* (1949) 33 Cr. App. R. 200. *Cf. The King v. De Kuyper* [1948] S.A.S.R. 108, 111.

[46] Prevention of Offences Act 1851, s. 5 (Eng.).

[47] It is significant that *Regina v. De Salvi* is reported as a note to *Regina v. Morris* (1867) 10 Cox 480, one of the authorities on the *convict* assault-homicide rule.

[48] (1895) 59 J.P. Jo. 778.

[49] (1876) 13 Cox 217.

Subsequently a coroner's jury returned an inquisition for murder, upon which Tancock was arraigned anew. He pleaded *autrefois convict*. Now, clearly the 'power to convict' test was nothing to the point, for there cannot be a conviction for murder on an indictment for manslaughter. Issue estoppel would have been equally irrelevant, as in all *convict* cases, because the only relevant issues had been determined in favour of the Crown. In this situation Denman J., quite openly exercised a discretion whether to try Tancock for murder, and decided not to because on the facts a verdict of murder would not be justified.

The learned judge pointed to the distinction between indictments for murder and indictments for manslaughter from a 'power to convict' point of view, observing that trial for murder could not take place after a verdict of manslaughter on an indictment for murder because the previous verdict meant that the accused had already been acquitted of murder, and continued:

> If I thought, on the depositions, that this was a case in which there had been an act committed which was probably murder, and which the jury would probably so think, I should reserve the point for the Court for Crown Cases Reserved and try the prisoner for murder; but, after carefully reading the depositions, and consulting with the Lord Chief Baron, my opinion is very strong indeed that to expect a verdict of murder would be idle; and if there were one, I should have to report against the conviction. That being so, the prisoner clearly would then practically be tried again on the same facts for the same offence, which is abhorrent to the law of England.[50]

Such an approach, which would be deplorably imprecise where the accused's innocence has been previously established, is entirely to be welcomed when the court is dealing with a man whose guilt has already been settled, the only question being whether he should be put in danger of an even more severe punishment than the one he has already received.

The same flexibility of approach is seen if the objection is raised to the course taken in *Regina v. Tancock* that if the accused had been tried for murder, he would in effect have been tried for the same offence twice, for the jury in the second trial, would have been able to return a second verdict of manslaughter. The answer to this point was given in *Rex v. Tonks*[51] where it was said that in such a case the judge should direct the jury that it is not open to them to bring in a verdict of guilty of the lesser offence of which the accused has already been convicted, but only of guilty of the greater offence, or not guilty. Presumably the refusal of the jury to obey this direction would constitute a ground for quashing the conviction.

[50] (1876) 13 Cox 217, 219-220.
[51] [1916] 1 K.B. 443.

Another indication of the broad approach taken by the courts to *convict* pleas is seen in the rule that if the accused has been convicted of one form of assault, he cannot be subsequently prosecuted for a more serious assault on the same facts.[52] The orthodox explanation of the difference between this rule and the opposite one, that conviction for assault does not bar prosecution for murder or manslaughter after a supervening death, is that in the latter case a new fact has entered into the situation which materially alters it. This is true, but it has to be noticed that there was nothing to stop the courts from taking the reasonable stand that wounding with intent to murder, for example, is not substantially or practically the same offence as common assault.[53] It is submitted that one sees here a clear instance of a value judgment by the judiciary. It is reasonable to protect the right of the individual not to be harassed with successive prosecutions to the point of forbidding more than one arraignment for physical assault,[54] even if this occasionally means that an offender by good fortune gets off too lightly.[55] It is going too far, however, to allow murderers to shelter behind conviction for common assault.

It is common for Interpretation Acts to include a section to the same effect as section 33 of the English Interpretation Act 1889, which says that where 'an act or omission' constitutes an offence under each of two or more statutes, or both at common law and under statute, the offender may be proceeded against under any of the relevant laws, 'but shall not be liable to be punished twice for the same offence'. In *convict* cases the courts have firmly refused to allow their discretion to be circumscribed by reading these sections as laying down any rule less wide than the common law rules of *autrefois convict*.[56] It has been held that the words 'the same offence' in the statute mean the same thing as at common law, namely, substantially or practically the same offence, and that there is no rule, and never was a rule, that a man may not be punished twice for the same act or omission.[57] Clearly, if there is no law that a man may not be punished twice for the same misdeed, to use a neutral term, there is all the more need for the

[52] *Regina v. Walker* (1843) 2 M. & Rob. 446; *Regina v. Stanton* (1851) 5 Cox 324; *Regina v. Miles* (1890) 24 Q.B.D. 423. *Cf. Wemyss v. Hopkins* (1875) L.R. 10 Q.B. 378.

[53] It will be recalled that it is not possible to argue that the assault cases proceeded on s. 45 of the Offences Against the Person Act 1861, because *Regina v. Morris* (1867) L.R. 1 C.C.R. 90, and *Regina v. Miles* (1890) 24 Q.B.D. 423, decided that s. 45 added nothing to the common law of *autrefois*.

[54] Disapproval was expressed in *The King v. De Kuyper* [1948] S.A.S.R. 108, 112, of the practice of holding a charge in reserve in case a conviction is not obtained on a similar one. *Cf. The King v. Donnelly* (1920) 14 Q.J.P.R. 62; *The King v. Sammon* [1920] Q.W.N. 25.

[55] See the comment of Hawkins J. in *Regina v. Miles* (1890) 24 Q.B.D. 423, 432.

[56] *The King v. Dunham* (1911) 13 W.A.L.R. 87; *The King v. McNicol* [1916] V.L.R. 350; *Rex v. Thomas* (1949) 33 Cr. App. R. 200. This is consistent with the interpretation put upon the Offences Against the Person Act 1861, s. 45 (Eng.), *supra*.

[57] *Rex v. Thomas* (1949) 33 Cr. App. R. 200.

courts to be vigilant to see that at least he is not punished twice without good reason.

If the courts exercise a wide discretion, one would not often expect to find a successful *convict* defence, for nowadays the plea rarely has much merit. This expectation is borne out by the reported cases. Thus a prosecution for larceny has been held not to be barred by previous convictions for uttering counterfeit coin[58] or interfering with goods under the control of the Customs;[59] demanding money with menaces by letter has been held, surprisingly on the face of it, to be substantially different from threatening to publish photographs with intent to extort, even though both charges arose out of the same facts;[60] using licensed premises for betting has been held to be substantially different from doing the same thing as a licensee;[61] conviction for being unlawfully on premises has not barred prosecution for breaking and entering those same premises;[62] conviction for selling whisky without a licence has not barred prosecution for selling it at a price exceeding the lawful maximum;[63] and obtaining by false pretences, the false pretence being contained in a forged telegram, has been held to be a substantially different offence from procuring the forgery of the telegram.[64] In none of these cases was there any kind of logical or legal compulsion to arrive at the decision reached. In each case it would have been just as easy to regard the two offences as overlapping to a substantial degree, as not to so regard them.

A rare instance of the court's discretion being exercised in favour of the defendant occurred in *Welton v. Taneborne*.[65] The accused had been charged on two informations based on the same facts, one for dangerous driving, the other for exceeding the speed limit. The magistrate convicted on the first information but sustained a *convict* plea on the second, on the ground that he had taken the evidence of excessive speed into account in arriving at his verdict of guilty of dangerous driving. This ruling was upheld by the Divisional Court by a majority. The dissentient, Jelf J., declined to regard the two offences as substantially the same, a perfectly tenable opinion. The majority ostensibly took the opposite view. It is submitted that the true difference of opinion was as to whether the accused deserved to get away with one conviction instead of two. It is impossible by logic alone satisfactorily to reconcile *Welton v. Taneborne,* which has not been overruled, with the cases cited in the previous paragraph.

[58] *Regina v. Webb* (1850) 5 Cox 154.
[59] *The King v. McNicol* [1916] V.L.R. 350.
[60] *Rex v. Kendrick* (1931) 23 Cr. App. R. 1.
[61] *Burn v. Peachy* (1929) 46 W.N. (N.S.W.) 26. This case makes a useful contrast with the similar cases on *acquit* pleas considered above.
[62] *The Queen v. Ulyett* [1953] V.L.R. 301.
[63] *Kilcullen v. Sammut* [1946] St. R. Qd. 152.
[64] *The Queen v. Hull (No. 2)* [1902] St. R. Qd. 53.
[65] (1908) 21 Cox 702.

Pickford v. Corsi[66] shows that it is not always the conduct of the accused which influences the court in passing upon a *convict* plea. In that case there had been a conviction for larceny arising out of the unlawful pawning by the accused of someone else's property. The question arose whether there could be a second prosecution for unlawful pawning under section 33 of the Pawnbrokers Act 1872 (Eng.), whereby, subject to certain conditions, the offender might be sentenced to 'forfeit' up to £5, which could be used to compensate victims of the deception for loss. The interested party here was the pawnbroker, who had no claim against the owner of the stolen property and had therefore lost the money he advanced to the accused. It was held that since refusal to allow the second prosecution would mean depriving the pawnbroker of the remedy Parliament evidently intended he should have, the prosecution was not barred.

One last case remains for consideration. *Regina v. King*[67] may at first sight appear to contradict one of the arguments put forward herein, namely, that issue estoppel cannot be determinative of a *convict* case. The accused had been convicted on an indictment charging him with obtaining by false pretences. The question arose whether he could later be properly convicted of larceny on the same facts.[68] It was held that he could not be, ostensibly on the ground that larceny and obtaining were practically the same. Now, 'practically the same' will cover a good deal of judicial vagueness, but it is quite unacceptable here. Ever since *Pear's Case*[69] the distinction between the two offences has been of major importance. This learning cannot be brushed aside by casually remarking that for the immediate purpose the two offences are to be regarded as practically the same. No more acceptable is the further explanation in *Rex v. Barron*[70] that in *Regina v. King* the court was deciding only that the trial judge had wrongly exercised his discretion to allow the indictment for larceny to stand, although that explanation is incidentally an interesting judicial avowal of the exercise of discretion in *convict* cases. It is submitted that the true reason why King could not be convicted of larceny after obtaining was that, by virtue of the difference in law between the two offences, a conviction for obtaining necessarily involved an implied acquittal of larceny. *Regina v. King* is therefore no more than an *acquit* case decided on familiar principles.

V. Summary

The scope of *res judicata* in the criminal law has recently been

[66] [1901] 2 K.B. 212.
[67] [1897] 1 Q.B. 214. *Cf. The King v. Burns* (1920) 20 S.R. (N.S.W.) 351.
[68] The trial was conducted in a manner which drew the strongest criticism from the Court for Crown Cases Reserved. It is difficult to believe that this question could have arisen in the normal course of events.
[69] *Rex v. Pear* (1779) 2 East *P.C.* 685; 1 Leach 212.
[70] (1914) 10 Cr. App. R. 81, 88; *Rex v. Kendrick* (1931) 23 Cr. App. R. 1, 4.

extended by the development of the doctrine of issue estoppel, whereby if it appears by record of itself, or as explained by proper evidence, that the same point was determined in favour of the accused in a previous criminal trial which is brought in issue on a second criminal trial of the same person, it is not open to the Crown to make any allegation of law or fact inconsistent with the previous determination.

Perhaps the most significant aspect of issue estoppel is the light which it casts on the law relating to pleas of *autrefois acquit* and *autrefois convict*. Hitherto these pleas have been universally assumed to rest on the same principle, but the supposed principle has never been satisfactorily defined. This underlying vagueness has led to the development of superficial, formalistic tests of the validity of pleas of *autrefois acquit* and *convict*. These tests have done little more than gloss over the confusion of practice to which uncertainty of principle invariably leads.

The only test which has been consistently applied by the courts asks the question whether the offence of which the accused has already been acquitted or convicted is substantially or practically the same as the one with which he is now charged. If so, his plea of *autrefois acquit* or *convict* succeeds. This test is often put in the more precise form of asking whether at his first trial the accused could have been convicted of the offence with which he is now charged. If so, his plea in bar succeeds; if not, it fails.

The application of issue estoppel to pleas of *autrefois acquit* and *convict* leads immediately to the drawing of a distinction between them, for whereas issue estoppel works in favour of the accused on an *acquit* plea, it works against him on a *convict* plea. It follows that although it is possible to treat the law of *autrefois acquit* as one type of issue estoppel, the same is not true of *autrefois convict,* for issue estoppel never works in favour of the Crown. This consideration imposes a need to choose between alternatives: either the traditional view that pleas of *autrefois acquit* and *convict* rest on the same principle is right, in which case issue estoppel cannot be that principle; or the traditional view is wrong, or at least obsolete, in which case issue estoppel will explain *autrefois acquit* but not *autrefois convict,* for which some other basis must be found.

The submission made herein is that the traditional view is wrong, or at least obsolete, for the following reasons. Firstly, the decided cases reveal a marked difference in the approach of the courts to the two pleas under discussion. Whereas *autrefois acquit* is usually decided by a firm application of the 'power to convict' test, *autrefois convict* is usually decided under the more vague 'substantially or practically the same' test. Detailed examination of the cases shows that the courts use a discretion in relation to *autrefois convict* which they do not

apply to *autrefois acquit*. The significance of this difference is revealed when it is recalled that after a conviction the subject has no such protection against the power of the Crown to prosecute and punish as is provided by issue estoppel after acquittal. Therefore the courts assume a discretion to limit the use of this power by way of allowing a plea of *autrefois convict* in a proper case.

Secondly, the law of *autrefois acquit* is much improved by the substitution of issue estoppel for the 'power to convict' test. The point here is not merely that in many cases issue estoppel arrives at a different and more just result than the 'power to convict' test, although this is often true, but rather that issue estoppel strengthens and develops the law by promoting an inquiry at once more rigorous and more realistic than has been usual hitherto.