AUTREFOIS ACQUIT AND DECISION NOT "ON THE MERITS."

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The plea "autrefois acquit" may be regarded as an application to criminal law of the principles of estoppel by judgment. The field of criminal law, however, involves considerations of public policy which do not arise, or are not so important, in the field of civil law; for this reason it is safest to regard the pleas of autrefois acquit and convict as depending on peculiar principles. Further, the case of "autrefois convict" does not involve so many difficulties as "autrefois acquit," because if a man has been convicted and suffered the punishment adjudged by a Court, both individual justice and the interests of the state suggest that he should not be tried again whether the conviction was according to law or not. But in the case of acquittal, there is not the same consonance between the interests of the individual and the interests of the state. On the one hand, the individual contends that he has suffered the strain and expense of a trial, and having regard to the fallibility of judges and magistrates (as evidenced by the frequency of successful appeals from both) he has by standing to trial been in jeopardy of conviction, whatever the ground on which he was dismissed without day. On the other hand, the point of view of the state is that the purpose of the criminal law is to punish criminals, not simply to submit them to a kind of "ordeal by trial," so that an acquittal should be a bar to further proceedings only where it was "on the merits." These difficulties have given rise (chiefly in the last century) to divergent expressions of opinion by English and Australian judges. The older view was undoubtedly that an acquittal was pleadable only when it proceeded on the merits in a trial at which a conviction could lawfully have been recorded: see 4 *Coke, Cases of Appeal and Indictment*, esp. *Vaux v. Brooke* (No. 1) and *R. v. Vaux* (No. 10); *Russell*, 8th ed., p. 1818. Cockburn C.J. says in *Charlesworth*[1]: "It appears to me that when you talk of a man being twice tried you mean a trial which proceeds to its legitimate and lawful conclusion by verdict; that when you speak of a man being twice in jeopardy, you mean put in jeopardy by the verdict of a jury, and that he is not tried, that he is not put in jeopardy, until the verdict comes to pass." In relation to summary proceedings, Douglas J. says in *Ramm v. Gralow*[2]: "When a conviction upon a complaint before a Court of Petty Sessions is quashed upon a ground which does not go to the merits of the case it is not a bar to a subsequent prosecution for the same offence." On the other hand, Ridley J. says in *Haynes v. Davis*[3]: "In whatever way a person obtains an acquittal, whether it be by the verdict of a jury on the merits or by some ruling on a point of law without the case going to the jury, he is entitled to protection from further proceedings." And in *Curyer v. Foote*[4] Murray C.J. says "The authorities on the subject are difficult to reconcile, but it appears to me that some confusion has arisen from treating the rule now in question as a branch of the doctrine of

1. 9 Cox 44.
2. 26 Q.J P.R. 115.
3. [1915] 1 K.B. 332.
4. [1939] S.A.S.R. 203

res judicata. Lord Blackburn pointed out in *Lockyer v. Ferryman*[5] that "the object of the rule of res judicata is always put on two grounds—the one of public policy, that it is in the interest of the State that there should be an end of litigation, and the other, the hardship on the individual that he should be vexed twice for the same cause. It may well be that the former ground assumes that there has been a decision on the merits, but the other ground involves no such implication, for the hardship on the individual is just as great if he is charged for an offence of which he was in peril of being convicted on a previous prosecution, whether his acquittal was on the merits or on some other ground." The confusion seems to have arisen chiefly from cases relating to summary prosecutions. Perhaps in strictness the term "autrefois acquit" is properly used only in the case of proceedings in the superior courts, but by inveterate usage it is also applied to the cognate defence available in the case of summary prosecutions, and it is generally assumed that the same principles apply in both cases. In what follows, an attempt will be made to tabulate the chief ways in which a prosecution of any sort may terminate in favour of the accused and the consequences of such termination on subsequent proceedings for the same offence.

1. Nolle prosequi—does not bar a subsequent presentment, and the same presumably applies to a decision of the Crown not to present after committal for trial (*R. v. Tyrone Justices*[6]).

2. Withdrawal of summary prosecution by consent of the Court. In *Pickavance v. P.*,[7] it was held that the withdrawal of an information under the Maintenance Acts was a bar to any further proceedings in respect of the same matrimonial offence. In *Anderson v. Ah Nam*[8] the Full Court of the N.S.W. Supreme Court applied the same principle to an information for selling a lottery ticket. But this rule was criticised by Palles C.B. in *R. v. Tyrone Justices*[9] and by the Victorian Supreme Court in *R. v. Woodhouse*[10]. In *Davis v. Morton*,[11] a Divisional Court held that where an information under the Betting Act was withdrawn by leave after the discovery that the defendant had not been informed of his right to trial by jury (as required by the Summary Jurisdiction Act), a fresh information could be laid for the same offence. The Court suggested that a withdrawn information might support a plea of autrefois acquit if the withdrawal had been due to the informant's view that the merits were against him. Finally in *Bishop v. Cody*,[12] Lowe J. held that withdrawal of a summary prosecution by leave of the court is no bar to a subsequent prosecution, unless possibly where an undertaking not to prosecute further is made a condition of the Court's leave to withdraw. There seems no reason in principle why the position of a withdrawal should be any different from the position of a nolle prosequi; the fact that summary prosecutions are frequently in private hands increases the danger of vexatious successive proceedings, and of applications to withdraw merely because a gap in the evidence makes a fresh start advisable.

5. 2 A.C. 519, at p. 530.
6. 2 I.R. 44, at p. 48
7. 1901 P. 60.
8. 4 S.R. (N.S.W.) 492.
9. *supra*.
10. [1919] V.L.R. 736.
11. [1913] 2 K.B. 479.
12. [1939] V.L.R. 246.

but the necessity for leave of the Court, the power of the Courts in summary jurisdictions to award costs, and the suggestion of Lowe J. as to the exacting of terms for leave to withdraw provide ample safeguards against abuse. Hence it seems unnecessary to complicate the law by the rule suggested in *Davis v. Morton*[13] that withdrawal as a result of the informant's view of the merits should bar further proceedings, and it is suggested that *Pickavance v. P.*[14] should, after so much amputation, be given final and decent burial.

3. Defects in mesne process. In common law criminal proceedings, defects in mesne process were cured by pleading (*R. v. Vaux*[15]). Once accused was at the bar of the Court, there were various devices by which he could be compelled to plead or taken as having pleaded, so that dismissal without day in consequence of a defect in mesne process could not occur. This is still the case as far as indictment and its Australian offshoot, presentment, is concerned ; if accused is at the bar of the Court, it does not matter how he got there. In summary proceedings, however, the position is not so simple. A great many summary prosecutions can be initiated by information made in a Court of Petty Sessions at which an accused person appears, and in such cases, as at common law, the process by which accused was brought there is immaterial.[16] But in a great many other cases the jurisdiction of the Court is defined, *inter alia*, by reference to a particular mesne process as condition precedent ; for example, a summons (*Dray v. Mitchell*[17]). Where that is so, then the problem comes under the next heading.

4. Dismissal of prosecution for want of jurisdiction in the Court. This constitutes no bar to a further prosecution, whatever the character of the abortive proceeding : *Wrote v. Wiggs*[18] (indictment) ; *Dray v. Mitchell*[19] (summary prosecution). The only difficulty here arises from loose judicial use of the term " want of jurisdiction " ; there is a tendency to describe any error in the process of trial as " depriving the Court of jurisdiction."(See, e.g., *Ramm v. Gralow.*[20]) It would be more convenient for purposes of analysis if the question of jurisdiction were treated as confined to the factors such as the character of the charge defining the right of the Court to take initial cognisance of the matter in question, and if errors in trial, such as failure to swear a witness (*R. v. Marsham*[21]) were not described as jurisdictional matters. This criticism does not apply to such cases as *Davis v. Morton*. In cases of that type, the problem arises from the position of courts of summary jurisdiction which are prima facie given power to make a preliminary investigation into an alleged offence, but which may proceed to hear and determine the matter if certain conditions (such as consent of accused) are complied with after initiation of the preliminary investigation. In *Davis v. Morton*, the right of the Court at the prior prosecution to hear the offence depended on

13. *supra.*
14. *supra.*
15. *supra.*
16. Immaterial, that is, to the question now under consideration, though very material to an action for wrongful arrest or false imprisonment.
17. [1932] Q.S.R. 18.
18. 4 Co. 456.
19 *supra*
20. *supra.*
21. [1912] 2 K.B. 362.

accused being informed of his right to trial by jury; for the purpose of a plea of autrefois acquit, the previous proceeding was not the preliminary inquiry which was merely ministerial (*R. v. Woodhouse*[22]), but the proceeding at which the Court was presuming to have jurisdiction to hear and determine the matter. Hence the factors defining the power of a Court to turn itself from a ministerial into a judicial tribunal are properly described as matters going to the jurisdiction of the Court.

5. Defects in indictment, presentment or information. The general principle at common law was that if an indictment or presentment was quashed for defect in its form, whether on demurrer or on motion in arrest of judgment after verdict, such quashing was no bar to further proceedings. Thus in *Davis v. Morton*, Avory J. quotes with approval the following passage from Chitty's *Criminal Law*: "the point in discussion is always whether, in fact, the defendant could have taken a fatal exception to the former indictment, for if he could, no acquittal will avail him." And see *R. v. Vaux*[23]; *R. v. Richmond*[24]. The simplicity of modern indictments and presentments and the extensive powers of amendment given to modern Courts make the quashing of indictments a rarity, but the same principles appear to be good law where such quashing does occur. There seems no reason in principle why the same rule should not apply in the case of summary prosecutions dismissed for want of form in the information or summons, and the same rule has in fact been applied in this sphere: *Ex parte Curry*,[25] (variance between information and summons); *Anderson v. Ayscough*[26] (information disclosing no offence). The only cases conflicting with this view are *Haynes v. Davis* and *Curyer v. Foote*[27] which will be discussed later.

6. Errors in process of trial. At common law, such errors could be dealt with only by discharge of the jury before verdict or on writ of error, the effect of which will be considered later. The tendency to-day is to regard such errors as immediately depriving the court of jurisdiction, and accordingly to hold that, as in the case of want of jurisdiction, termination of proceedings from this cause is no bar to a further prosecution for the same offence: *R. v. Marsham*[28] (failure to swear a witness); *Ramm v. Gralow*[29] (failure to order proper particulars of offence).

7. Failure of jury or of justices to agree on verdict with consequent discharge of jury or accused is no bar to further proceedings. See *R. v. Burns*[30]; *R. v. Alley*[31].

8. Discharge of jury before giving verdict is no bar to further proceedings, even although such discharge is the result of connivance between Court and prosecution to avoid a verdict for accused (*Whitebread*,[32]; *Charlesworth*[33]). Of course, discharge for the reason mentioned would

22. *supra.*
23. *supra.*
24. 1 Car. and Kir. 240.
25. 21 W.N. (N.S.W.) 260.
26. 23 W.N. (N.S.W.) 54.
27. *supra.*
28. *supra*
29. *supra.*
30. 10 W.N. (N.S.W.) 116.
31. 7 A.L.T. 103.
32. 7 St Tr. 311.
33. *supra.*

not occur to-day, but may occur for other reasons such as sudden illness of a witness (*R. v. Grand*[34]).

9. Illegal verdict. This can arise only where accused is convicted of an offence other than that preferred against him, in circumstances where such alternative conviction is not permitted by the various common law and statutory provisions on the subject. If the error is seen at the trial, the judge will refuse to accept the verdict and the result will be either a correct conviction or a failure to agree on verdict. If the error is not perceived at trial, then an acquittal can result only on appeal, as to which see the next paragraph.

10. Quashing of conviction on appeal. At common law, the only method of appeal from conviction by a jury was by writ of error, which here as in civil cases had to show error of law arising on the record. If the plaintiff in error succeeded, the decision of the appeal Court did not amount to a verdict of acquittal, but merely to a declaration that the proceedings below were a nullity. Hence success on writ of error was not treated as any bar to further prosecution for the same offence (*R. v. Drury*[35]). In 1848, the system of appeal by Crown Case Reserved was introduced (11 & 12 Vict. c. 78), and was duly adopted in Victoria (Criminal Law and Practice Act, 1864, ss. 389 ff.) and New South Wales (46 Vict. No. 17, ss. 422 ff.). It is still in operation in England and Victoria (Crimes Act, 1928, ss. 477 ff.), but was repealed in New South Wales in 1912. Under these provisions, only questions of law can be dealt with on appeal, and the result of a successful appeal accordingly would appear to be similar to the effect of success on a writ of error, and to be no bar to a fresh prosecution. This conclusion is supported in the case of the English and the now repealed New South Wales provisions by the fact that the Court was there given no express power to order a new trial. However, in *R. v. O'Keefe*[36] the New South Wales Full Court held that where a conviction had been set aside on Crown Case Reserved on the ground of wrongful admission of evidence, the accused could not be charged again with the same offence. The judgment of Windeyer J. suggests an entirely new approach to the question; namely, that the Legislature intends the Court for Crown Cases Reserved to dispose finally of the issue between Crown and prisoner, and accordingly that the old principles governing autrefois acquit are irrelevant. The Court accordingly disapproved of dicta in its own previous decision, *R. v. Mowatt*,[37] in which *R. v. Drury*[38] had been considered applicable to decisions on Crown Cases Reserved. But in *R. v. Lee*[39] the Full Court held that where a conviction was quashed on Crown Case Reserved because the jury had returned an alternative verdict not permitted by law, the accused could be presented again, and there are dicta to the same effect in *R. v. Tierney*[40] and *R. v. Buzzard*[41]. Accordingly it would appear that *O'Keefe* is confined to cases where the conviction is quashed on a ground relating to evidence;

34. 3 S.R. (N.S.W.) 216.
35. 3 C. & K. 193.
36. 15 N.S.W.R. 1.
37. 6 N.S.W.R. 289.
38. *supra*.
39. 16 N.S.W.R. 6.
40. 1 N.S.W.R. W.N. 114.
41. 5 N.S.W.R. 419.

otherwise reversal of conviction on Crown Case Reserved, like reversal on writ of error, is no bar to further prosecution. However, the Victorian Crown Cases Reserved provisions specifically authorize the Court to order a new trial if it thinks fit. It is submitted that the reasoning of the New South Wales Full Court in *O'Keefe* is directly applicable to this situation. If the Victorian Full Court on Crown Case Reserved decides not to order a new trial, that should settle the matter as between Crown and accused, and no further prosecution should be permitted. If that is so on Crown Case Reserved, then the argument to the same effect is even stronger when applied to the other modern appeal provision contained in Victorian Crimes Act, 1928, Part V. S. 594 (2) requires the Court either to direct judgment and verdict of acquittal or to order new trial, so that the Court must be considered as compelled to a considered opinion, where acquittal is ordered, that no new trial should be had. There is no reported decision on the point. The corresponding English Act (7 Edw. VII. c. 23) does not give the Court of Criminal Appeal power to order a new trial. But in *Crane v. Public Prosecutor*[42] the House of Lords held that the Court of Criminal Appeal could under the Crown Cases Act, 1848 and under the Criminal Appeal Act, 1907 direct a new trial if it considered that the first trial was a mere nullity, and it would appear from the opinion of Lord Sumner in that case that in such circumstances fresh proceedings could be taken even although the Court of Criminal Appeal did not direct them to be taken. It is possible that if the point arises, the Victorian Supreme Court will similarly hold that under the Crimes Act, Part V., a judgment of acquittal will not support a plea of autrefois acquit where it proceeds on a point of law which under the old system would have been good ground for a writ of error. Analagous problems arise in relation to appeal from summary convictions.

11. Acquittal on the merits. This appears to be the only remaining method by which a prosecution can terminate in favour of the accused, and it is of course the case in which without any dispute a further prosecution is barred. It has to be noted, however, that in our law " acquittal on the merits " does not require, as common sense might suggest, a positive verdict that the jury or bench is satisfied affirmatively of the defendant's innocence. There is equally an acquittal on the merits if the evidence for the prosecution is not believed, or is legally insufficient (as where corroboration is required), or does not establish the elements of the offence in question, or even if the prosecution does not call any evidence at all.[43]

The above survey suggests that, apart from special problems arising from statutes relating to criminal appeals, a plea of autrefois acquit must be based on an acquittal on the merits. The only important case conflicting with this rule is *Haynes v. Davis*.[44] There a Divisional Court held that the dismissal of a summons under the Sale of Food and Drugs Act on the ground that the analyst's certificate had not been served with the summons constituted a bar to further prosecution for the same offence. It is submitted with respect that the decision is wrong, and that the

42. [1921] 2 A.C. 299.
43. *R. v. Sheen*, 2 C. & P. 634; *R. v. Austin*, 2 Cox 59: *Mitchell v. Berry*, 22 S.R. (N.S.W.) 363.
44. *supra*.

dissenting judgment of Lush J. correctly states the law on the point. The majority proceeded on the view that since, as had been decided in previous cases, the defendant could have waived the statutory requirements of service of the analyst's certificate, he stood in peril of being convicted although in fact he pleaded the non-service in bar of the prosecution. This argument shows a confusion of thought, and also illustrates the danger of relying on the conception that the defendant was "in jeopardy." In a sense, a defendant who answers to a charge is always in jeopardy. In this case the jurisdiction of the Court depended on two things—either service of the analyst's certificate or waiver of the certificate by the defendant; since neither condition precedent to jurisdiction existed, the Court had in effect dismissed the case for want of jurisdiction, and the principles in par. 4 above applied. In so far as the dicta of Murray C.J. in *Curyer v. Foote*[45] depend on the decision in *Haynes v. Davis*, it is submitted that they are similarly not a true expression of the law.

Two further points need attention. Where a Court quashes a prosecution for informality in the presentment or information which it could have cured by amendment, it can be argued that the defendant by reason of the power of amendment stood in jeopardy of conviction and accordingly should not be prosecuted again. This argument was expressly rejected in *R. v. Green*[46] and *Dray v. Mitchell*[47]. But in *O'Connell v. Lee*, the South Australian Full Court (Poole J. dissenting) upheld a plea of autrefois acquit based on the dismissal of an information for want of form—failure to state the place of the offence—which could have been cured by amendment; the decision of Murray C.J. in *Curyer v. Foote* is to the same effect, the previous information having been dismissed for variance between evidence and information as to date of offence, a defect which could also have been cured by amendment. In *Dray v. Mitchell* the amendment asked for at the previous hearing was of a more substantial character—the substitution of one offence (coercion by intimidation) for another (coercion by violence) arising out of the same facts. But the defect in the former proceeding relied on in *R. v. Green*[48] related to variance between indictment and evidence as to ownership of property stolen, and so was more akin to the position in the South Australian cases. A further distinction on the facts is that in *Green* no amendment had actually been asked for, and in *Dray v. Mitchell* the application does not seem to have been pressed. However, the real distinction between these cases appears to lie in the character of the amendment provisions. The relevant statutes in *Green* and *Dray v. Mitchell* conferred a discretionary power to amend, but in the South Australian cases the relevant statutory provision (identical with Victorian Justices Act, 1928, s. 196) imposed a duty on the justices to amend immaterial errors and variances; hence in the South Australian cases the refusal to amend was wrong and the accused had been in jeopardy of lawful conviction. Even so, it is suggested with respect that the South Australian cases are unsatisfactory. It is difficult to see why the position of an accused rightly discharged on a ground not going to the merits should be any worse than the position of an accused improperly so discharged; in

45. *supra.*
46. 7 Cox 186.
47. *supra.*
48. *supra.*

neither cases has the chief end of criminal procedure—consideration of the merits—been achieved. The other statutory provision which needs consideration is that relating to certificate of dismissal by justices ; Victoria Justices Act, 1928, s. 88 (17). In England, New South Wales and Victoria such provisions are not regarded as excluding common law principles of res judicata, so that an acquittal in summary proceedings will support a plea of autrefois acquit even although no certificate of dismissal has been obtained[49] ; *aliter* in Queensland.[50] What if the certificate of dismissal is given after dismissal which does not proceed on the merits ? The problem cannot now arise in England, because 24 & 25 Vict. c. 100 s. 44 expressly requires the certificate to be on the merits before it bars further proceedings. No such words appear in the Victorian section. Nevertheless, in *Loft v. Wade*[51] Holroyd J. said *obiter* that his opinion inclined to the view that a certificate of dismissal would bar further action only if given on the merits. It is submitted with respect that the history of the Victorian section as well as the literal meaning of the words used lead to an opposite conclusion. Our present provision first appeared in the Justices of the Peace Act, 1887, s. 79 (17), but that section was adapted from Justices of the Peace Act, 1865, s. 107 (under which the certificate was conclusive only as to summary proceedings), which in turn came from 11 & 12 Vict. c. 43, s. 14, which in turn was adapted from 9 Geo. 4, c. 31 s. 27. In *Tunnicliffe v. Tedd*,[52] and *Vaughan v. Bradshaw*,[53] it was held that a certificate under the last named section was a bar to further proceedings even although the decision was not on the merits. See the history of the English provisions in *Reed v. Nutt.*[54] For this reason, it is submitted that a certificate under our present Justices Act, s. 88 (17) is also a bar to further proceedings although the decision is not on the merits ; whether this exception to the general principles governing " autrefois acquit " is desirable might well be considered by the Legislature when it has more time for law reform.[55]

49. *R. v. Miles*, 24 Q.B.D. 423 ; *Lenthall v. Gazzard*, 16 N.S.W.R. 22 : *Foreman v. McNamara*, 23 V.L.R. 501
50. *Curran v. Wong Joe*, [1927] Q.S.R. 112.
51. 24 V.L.R. 214.
52. 5 C.B. 553.
53. 9 C.B.N.S. 103.
54. 24 Q.B.D. 669.
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