Collateral Estoppel—What Course Shall Ohio Follow in Criminal Cases

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has been a feeling that it is yet too visionary to be of any practical concern. This criticism may well have been justified a few years ago. But today, when one considers such decisions as *Henningsen v. Bloomfield Motors*, and *Middleton v. United Aircraft Corporation*, in which only a label of warranty obscures a *de facto* introduction of the "new tort," the utopian wraps of the proposal begin to fall away.

It has been predicted that "startling" new developments may soon occur in the field of products liability. Perhaps the declaration of a new tort will be one of these.

GEORGE DOWNING

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Laymen, as well as lawyers, are familiar with the doctrine of double jeopardy in criminal proceedings. In fact, the average person is aware that this right is embodied in the constitutions of the several states and the U.S. Constitution. On the other hand, few persons are cognizant of the fact that another principle, carried over from civil cases, can be almost as effective as double jeopardy in successive criminal proceedings involving the same defendant. This principle — "collateral estoppel" — and its applicability in criminal cases is the subject matter of this article. Primarily, the cases discussed herein will be limited to those situations where the defendant is acquitted of an offense in a former trial, finds that the rules applied under the doctrine of double jeopardy offer no bar to the prosecution of the second trial, and seeks assistance under the principle of collateral estoppel. The purpose of this article is to present Ohio's position in this area, explore the public policy factors involved, discuss the applications and limitations of this principle in criminal cases, and attempt to chart a course which the lawyers and courts of Ohio can follow in the future to achieve just results in criminal proceedings.

**Definition of Terms**

To understand the problem presented in the cases which are discussed herein, the terms "double" or "former jeopardy," "res judicata," and "collateral estoppel" must be clearly defined. This is especially true when

70. The new tort is commented on in 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.03(2) at 381-82 (1960).
72. 6 Av. Cas. 17,975 (S.D.N.Y. 1960).
considering the two latter terms, for they are often used interchangeably by the courts with resulting confusion to the reader. As will be seen, the failure to differentiate between these two terms probably explains the failure of some courts to recognize the principle of "collateral estoppel" in criminal cases.

**Former Jeopardy**

That no man shall be brought into jeopardy a second time for the same offense is an established maxim of the common law. And, it has been made an express provision of the Ohio Constitution. This doctrine consists of two essential elements: (1) there must be an identity of offenses. The words "same offense" mean just that, and not the same transactions, acts, circumstances, or situations; and (2) the parties at both trials must be the same. The effect of this doctrine is to nullify in toto a second prosecution.

**Res Judicata and Collateral Estoppel**

In the area of civil proceedings the broad doctrine of "res judicata" exists.

Briefly stated, this doctrine is that an existing final judgment or decree rendered upon the merits by a court of competent jurisdiction . . . is conclusive of the rights of the parties or their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction, on the points and matters in issue and adjudicated in the first suit . . .

As this broad doctrine was used and expanded, it actually became two different principles or doctrines, i.e., "res judicata" and "collateral estoppel." The former doctrine consists of the following essential elements: (1) The cause of action in each proceeding must be identical; and (2) the parties involved must be the same. The final judgment or decree rendered on the merits is dispositive of not only issues actually litigated, but also of those issues which could have been litigated. Further, this doctrine serves as a bar to future action. When "res judicata" is given this narrower meaning, it is in all respects essentially like the doctrine of "former jeopardy" which exists in criminal cases. "Collateral estoppel,

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1. U.S. CONST. amend. V. Only five states do not have a jeopardy clause in their constitutions. They are: Connecticut, Maryland, Massachusetts, North Carolina, and Vermont.
3. OHIO CONST. art. I, § 10.
4. State v. Corwin, 106 Ohio St. 638, 140 N.E. 369 (1922); State v. Rose, 89 Ohio St. 383, 106 N.E. 50 (1914). Ohio's "same offense" test is usually referred to as the "same evidence" test by the majority of courts.
5. 2 FREEMAN, JUDGMENTS 1322 (5th ed. 1925).
6. "Res judicata," as used in this note, will connote this narrower meaning. Other authorities, of course, define "res judicata" in its broader meaning; thus, "collateral estoppel" is merely a component of this doctrine and not a separate existing principle as used in this note.
on the other hand, is much broader than "res judicata" in that the causes of action need not be identical; but, it is also narrower in that only those issues actually litigated and determined in the prior proceeding are foreclosed so far as subsequent determination is concerned. Therefore, in most situations, the first proceeding is not a complete bar to the subsequent proceeding; however, in criminal cases the doctrine has served as a complete nullification of the subsequent prosecution on some occasions.

Ohio's Position in Criminal Cases

Does Ohio recognize the principle of "collateral estoppel" in criminal proceedings? The Supreme Court of Ohio has been confronted with this question on two occasions, and both times the defendant failed to secure any benefits from the plea. In Patterson v. State, D was convicted of grand larceny of an automobile from A. The evidence showed that W was the actual thief, but D, as an aider and abetter in the theft, was tried as the principal. W testified for the state, and his testimony showed a conspiracy between W and D to steal the automobiles of A, B, and C. These automobiles were eventually delivered to D's place of business in pursuance of the conspiracy. However, most of the evidence was confined to the theft of C's automobile, and it developed at this trial that D had been acquitted of stealing C's automobile in a prior prosecution. Since the testimony was essentially the same as that produced in the prior trial, D objected, offering a record of the indictment, trial, and his acquittal in the former proceeding. In effect, D attempted to invoke the principle of "collateral estoppel." The court rejected D's plea, treating it as a guise for the plea of former jeopardy. And, since the offenses were not the same, there was no former jeopardy. It was observed that the State cannot be denied its right to prove every essential element of an offense, and the mere fact that the testimony tended to prove another offense did not render it incompetent to prove the offense charged at the second trial. Thus, the court became so obsessed with the doctrine of former jeopardy that it lost sight of D's favor.

See, RESTATEMENT, JUDGMENTS § 68 (1942), which speaks of the doctrine in terms of merger, bar, and collateral estoppel.

7. The Ohio courts in civil proceedings are careful to use both doctrines or principles in the same sense as used in this note. They are not used interchangeably. See, e.g., State ex rel. Ohio Water Serv. Co. v. Mahoning Valley Sanitary Dist., 169 Ohio St. 31, 157 N.E.2d 116 (1959).


9. 96 Ohio St. 90, 117 N.E. 169 (1917).
**Duval v. State**\(^\text{10}\) is the only other criminal case where the principle has been invoked by the defendant before the Ohio Supreme Court. At a prior trial, defendant was indicted and tried for murder while attempting to perpetrate a robbery. His sole defense was alibi, and he was acquitted. In the second case, defendant was tried for and convicted of the robbery arising from the same transaction in the former trial. He contended that his acquittal in the former trial estopped the State in this prosecution since the jury must have necessarily believed his alibi in the former trial; and his presence at the scene of the crime, an essential element here, was foreclosed by its verdict. As in the *Patterson* case, the court discussed the issues involved in terms of "former jeopardy," and defendant's plea was rejected. It is evident, however, that had the court invoked the principle of "collateral estoppel," its conclusion would necessarily have been the same. This is attributed to defendant's failure to furnish the court with evidence, (testimony, instructions, oral arguments, etc.) which could prove conclusively that the jury at the former trial did believe his alibi. Without such evidence, it follows that the jury may have acquitted defendant because the State failed to prove its case beyond a reasonable doubt. This line of reasoning was followed in a recent lower court decision rejecting defendant's plea of "collateral estoppel" under facts similar to the *Duval* case.\(^{11}\)

On the surface it appears that the Ohio courts have completely rejected the principle of "collateral estoppel" in criminal cases. A closer analysis, however, reveals that the Ohio Supreme Court has merely allowed the doctrine of "former jeopardy" to encompass the principle of "collateral estoppel." Ironically, this same court is quick to differentiate between the doctrine of "res judicata" and the principle of "collateral estoppel" in civil proceedings.\(^{12}\) This definite inconsistency seems to indicate that the application of "collateral estoppel" in criminal cases may still have a breath of life remaining. A very recent common pleas decision has recognized the principle where the defendant pleaded guilty in a prior proceeding.\(^{13}\) Does this decision indicate a trend towards acceptance of the principle in Ohio? Before this question can be answered, the effect of public policy on the application of "collateral estoppel" in criminal proceedings must be determined.

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10. 111 Ohio St. 657, 146 N.E. 90 (1924).
12. See note 7 supra.
13. *State v. Braskett*, 162 N.E.2d 922 (Ohio C.P. 1959). Here the defendant was indicted for failure to provide for his minor child. A plea of guilty in a former proceeding concerning support was held to be conclusive of the paternity of the child.
PUBLIC POLICY AND COLLATERAL ESTOPPEL

The provisions in the Fifth Amendment and most of our state constitutions against "former jeopardy" are designed to protect an individual from the hazard of possible conviction more than once for an alleged offense. Underlying these provisions is the idea that the state, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal; this would compel him to live in a state of continuing anxiety and insecurity, fearful of the possibility that even though innocent, he may be found guilty. The occasional miscarriages of justice which may result under our jury system are outweighed by the doctrine of "former jeopardy," for "such misadventures are the price of individual protection against arbitrary power."

The policy considerations in support of the doctrine of "res judicata" rest on similar grounds. The peace and order of our society, the structure of our judicial system, and the principles of our government require that this doctrine be invoked. Without this doctrine, the very object of instituting courts of justice — that conflicts must be resolved, and resolved finally — would be defeated. Human life is not long enough to allow matters disposed of to be brought up for discussion again. These same policy factors can be attributed to the application of "collateral estoppel" in civil proceedings.

Should the policy factors supporting the application of "collateral estoppel" in civil litigation also apply to criminal proceedings? There are courts which deny such application. Their reasons are not without merit. First, it is difficult to apply this principle because of the generality of the plea which almost negatives the determination of those rights, questions, and facts put into issue and decided in the former adjudication. Again, this problem is accentuated by the multiple theories of acquittal generally offered in the instructions and the general verdict returned by the jury. Secondly, it is argued, when the state charges a citizen with a distinct crime, public policy demands that this charge shall be considered independently of any past prosecutions. And since each jury is a separate and distinct body, it shall render its decision independently on each material and relevant fact, regardless of the credence given this same evidence by another jury in another prosecution.

But, proponents of "collateral estoppel's" application in criminal cases

rest their contentions on firmer ground. The ever increasing number of statutory offenses reduces the protection offered by the plea of "former jeopardy," since it applies only where the offenses are the same. Thus, the prosecutor may re-indict the defendant for a different offense although it is based on the same anti-social conduct for which the defendant was tried previously. The courts have aided the prosecutor in his aims by the use of the "same evidence" and "same transaction" tests. The former test, which is followed by a majority of the courts, was established early in the English law and can be stated as follows:

... that unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second.

In the latter test, the plea of former jeopardy will be sustained only if both offenses were part of the same criminal transaction. On all occasions the "same evidence" test affords the prosecutor the means to re-litigate until a conviction is secured; and in many instances, the "same transaction" test offers similar opportunities. In civil proceedings, however, the defendant may look to the policy against splitting causes of action to avoid making repeated defenses to essentially the same claims. The considerations of judicial efficiency are allowed to outweigh the hardships of a litigant who loses a meritorious claim because he failed to present it in the previous action. Besides, multiple actions leave an individual with undesirable uncertainty in his economic affairs. Thus, it appears that in a civil action a party is offered more safeguards against repeated litigation than a defendant in a criminal prosecution. Can it be that "former jeopardy" is the only safeguard offered to the defendant under such conditions? This question was answered by Mr. Justice Holmes:

The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice ... in order, when a man once has been acquitted

22. At first blush, it appears that the "same transaction" test is actually an aid to the defendant, especially in the situations evidenced by the Patterson and Duval cases. However, the courts applying this test have impregnated it with numerous exceptions. In effect, then, it reaches the same results as the "same evidence" test on many occasions. For a good discussion of the "same transaction" test, see Note, 57 Yale L.J. 132, 134 (1947); and for the view that either test lacks a precise definition though arriving at precisely the same results, see Harris v. State, 193 Ga. 109, 17 S.E.2d 573 (1941).
on the merits, to enable the government to prosecute him a second time.\textsuperscript{24}

The above statement quelled most ideas that there is no place in the criminal law for the principle of "collateral estoppel."

**THE APPLICATION OF THE PRINCIPLE: GENERAL CONSIDERATIONS**

The principle of "collateral estoppel" in criminal cases has long been recognized in England.\textsuperscript{25} Where the question has risen in the United States, most states recognize the principle. However, there is some dicta to the contrary,\textsuperscript{26} and some courts have lost sight of the principle in the broader doctrine of "former jeopardy."\textsuperscript{27} The principle is applicable in a myriad of situations. For example, it has precluded subsequent prosecutions which have been barred by the statute of limitations;\textsuperscript{28} it has barred the defendant from raising three different but substantially identical motions;\textsuperscript{29} and it has been used to prevent the defendant from raising defenses which have been conclusively adjudicated against him in a prior and different prosecution.\textsuperscript{30} These situations will not be discussed here. Instead, this article is concerned primarily with those situations where the defendant has been acquitted in a former prosecution and is subsequently indicted for another offense.

There is one primary consideration which must be understood by defendant's counsel if he hopes to be successful: The courts are wary about speculating which issues or facts have been definitely decided in defendant's favor at the prior trial. Therefore, it is counsel's primary duty to present the court with evidence which can sustain his client's plea of "collateral estoppel." This does not insure success, but it is a step in the right direction.

*Invoking "Collateral Estoppel" at the Commencement of the Second Trial*

Occasionally, the defendant has invoked the principle of "collateral estoppel" by a motion to quash the indictment before the second trial commences. To be successful he must convince the court that an essen-

\textsuperscript{24} United States v. Oppenheimer, 242 U.S. 85, 88 (1916).
\textsuperscript{25} Reg v. Miles, L.R. Q.B.D. 423 (1890); Rex v. Duchess of Kingston, 20 How. St. Tr. 355, 358 (1776).
\textsuperscript{26} Town of St. Martinville v. Dugas, 158 La. 262, 103 So. 761 (1925); Justice v. Commonwealth, 81 Va. 209 (1885), *writ of error denied*, 136 U.S. 639 (1890).
\textsuperscript{27} State v. Coblenz, 169 Md. 159, 180 A. 266 (1935); People v. Josic, 206 Misc. 704, 134 N.Y.S.2d 283 (Bronx County Court 1954).
\textsuperscript{28} United States v. Oppenheimer, 242 U.S. 85 (1916); State v. Latil, 231 La. 551, 92 So. 2d 63 (1956).
\textsuperscript{29} William v. United States, 166 F.2d 527 (8th Cir. 1948).
\textsuperscript{30} Commonwealth v. Evans, 101 Mass. 25 (1869).
tial element of the present offense set out in the indictment has been adjudicated in his favor at the prior trial. Only one instance has been found where the defendant prevailed by merely presenting the ultimate facts of his indictment, trial, and acquittal at the prior trial.\textsuperscript{31} Usually the court requires \textit{something more} before it can rule on defendant's contention. Thus, in \textit{United States v. Meyerson},\textsuperscript{32} defendant had been acquitted of a general conspiracy to defraud creditors in violation of the Federal Bankruptcy Act. At the second trial he was indicted for another conspiracy (a different offense) involving the same scheme to defraud. To sustain his motion to quash, defendant presented the court with the transcript of the prior trial and the \textit{instructions} by the court. These \textit{instructions} revealed that the jury was directed by the court to return a verdict of not guilty, because the prosecution had failed to prove that defendant had any knowledge of the scheme to defraud creditors. This same scheme was an essential element of the present offense, and to relitigate it was error. Thus, the motion to quash was granted. To the same effect it has been held that the \textit{transcript} of the prior trial may be sufficient to uphold the defendant's motion to quash.\textsuperscript{33} In most cases, however, the two offenses are not as closely related, and defendant's efforts to quash the indictment at the second trial will fail because the second offense is not dependent on any essentials adjudicated in his favor at the prior trial. For example, an acquittal of defendant for the \textit{sale} of tax-unpaid alcohol on one day is not conclusive as a bar to a prosecution predicated on the \textit{unlawful possession} of such alcohol on another day.\textsuperscript{34} Of course, the prosecution may attempt to introduce facts at the second trial which were litigated in defendant's favor at the prior trial. It will then be the trial court's duty to make rulings or give instructions involving the principle of "collateral estoppel" on particular questions or issues which may have been affected by the prior verdict of acquittal at the first trial.\textsuperscript{35}

\begin{itemize}
\item \textsuperscript{31} Oliver v. Superior Court, 267 Pac. 764 (Cal. Ct. App. 1928). Here, defendant was indicted for 33 substantive offenses and a conspiracy to commit these same offenses. He was acquitted of the 33 offenses. The prosecution for conspiracy was barred because the offense required at least proof of one overt act to conspire. Since defendant had been acquitted of all the overt acts at the prior trial, there was nothing to substantiate the crime of conspiracy.
\item \textsuperscript{32} 24 F.2d 855 (S.D.N.Y. 1928).
\item \textsuperscript{33} United States v. McConnell, 10 F.2d 977 (E.D. Pa. 1926), where defendant was charged with a conspiracy to transport, sell, and deliver liquor in violation of the National Prohibition Act. To support the conspiracy, five overt acts were charged. At a prior trial, defendant had been acquitted of these same acts, and the transcript of that trial revealed that he had had no knowledge of such acts. This same knowledge was an essential element here, and the indictment was quashed.
\item \textsuperscript{34} United States v. Dockery, 49 F. Supp. 907 (E.D.N.Y. 1943).
\item \textsuperscript{35} United States v. Perrone, 161 F. Supp. 252 (S.D.N.Y. 1958), where the instructions of the prior trial did not show that an essential element of conspiracy was determined by defendant's acquittal of the substantive offenses. Only the trial court can determine if the same evidence or facts litigated at the former trial are offered again at the second trial; \textit{accord}, United States v. Morse, 24 F.2d 1001 (S.D.N.Y. 1926).
\end{itemize}
Invoking the Principle at the Conclusion of the Second Trial

The principle of "collateral estoppel" has been invoked more extensively on appeal at the conclusion of the second trial. Here, a comparison of both trials is more feasible. Therefore, it is imperative that counsel present the appellate court with a complete transcript of the former trial and extrinsic evidence which can be compared with the present proceeding. Certainly the bare record of the former trial in itself is insufficient, for the court has no means of ascertaining upon what basis the jury reached its verdict at the first trial. Was the defendant acquitted because the prosecution failed to prove its case beyond a reasonable doubt? Or was the defendant acquitted because an essential element of the offense was determined conclusively in his favor? The verdict of not guilty will not provide the answers. And this uncertainty in itself is enough to preclude the defense of "collateral estoppel." Counsel can be hopeful of success only if he provides the court with some tangible evidence that the defendant was acquitted because the jury adjudicated an essential element at the former trial in his favor. With this evidence before it, the appellate court can then consider the effect of defendant's contentions.

"Collateral Estoppel" as a Complete Bar to the Second Trial

In Sealfon v. United States, defendant was tried for a conspiracy to defraud the United States of its function in conserving and rationing sugar. The only evidence introduced to involve defendant in the conspiracy was a letter sent to one concerning certain exempt agencies to which defendant sold his products. G was able to supply defendant with large quantities of sugar for his products by presenting false invoices and making false representations to the ration board concerning the number of exempt agencies involved. Defendant was acquitted of the conspiracy charge. At the second trial, defendant was charged with the substantive crime of uttering and publishing as true the above false invoices. The trial proceeded on the theory that defendant aided and abetted G in the commission of these substantive offenses and essentially the same evidence concerning the invoices and letter was introduced. Defendant was convicted. He entered the plea of "collateral estoppel" and supported the plea with the transcript and instructions from the prior trial. Although others were involved in the conspiracy, the transcript showed that the letter to G was the only evidence tending to incriminate the defendant.

36. See State v. Leibowitz, 22 N.J. 102, 123 A.2d 526 (1956); State v. Cheeseman, 63 Utah 138, 223 Pac. 762 (1924). In both of these cases, the defendant's failure to present the court with "something more" than the bare record proved fatal.
37. 332 U.S. 575 (1948).
This fact was also reflected in the instructions which ordered the jury to acquit the defendant if there was reasonable doubt that he conspired with G. Proof of the agreement with G was also an essential element of the offense alleged at the second trial, and since defendant was acquitted at the first trial, it necessarily followed that the jury did not believe that the letter to G proved the agreement to conspire. Therefore, it was error to relitigate the same issue at the second trial, and the second prosecution was completely barred.

The test used in the Sealfon case can be stated as follows: If an essential fact has been adjudicated in defendant's favor at the first trial, and this same fact is essential or material to the determination of the offense alleged at the second trial, then the second trial is completely barred. In determining whether a fact is essential, the court can look at matters which follow by necessary and inevitable inference from the prior adjudication. Prior to the Sealfon decision, it appears that many courts assumed that an essential element at both trials was necessarily adjudicated in defendant's favor. After the Sealfon decision, only concrete evidence presented by the defendant and a close identity of offenses at the two trials have encouraged the courts to draw the necessary inference which bars the second prosecution.

Instances Where the Principle Fails

Actually, the use of "collateral estoppel" as a complete bar to the second prosecution is a rarity. The mere fact that the transcript and extrinsic evidence of the first trial show that a certain matter was properly within the issues controverted at the first trial is not enough. The evidence must also prove that the verdict necessarily involved the consideration and determination of that matter which defendant seeks to use as a bar to the second prosecution. The following example illustrates the defendant's difficulties in this area: Defendant is acquitted of a crime

38. See United States v. Clavin, 272 Fed. 985 (E.D.N.Y. 1921); United States v. Rachmil, 270 Fed. 869 (S.D.N.Y. 1921). Both cases involved situations where the defendant was acquitted of conspiracy and convicted of the substantive offenses at the second trial. The second trial was held to be barred; but, the basis of the courts' decisions does not appear to rest on the proper application of "collateral estoppel."

39. Williams v. United States, 179 F.2d 644 (5th Cir. 1950), aff'd, 341 U.S. 70 (1951), where the transcript and instructions of the prior trial were offered to show acquittal of the substantive crime under the Civil Rights Statute. Since the theory of the first trial was based on defendant's aiding and abetting in commission of the offense, the second trial, based on a conspiracy arising out of the same circumstances, was barred; accord, Cosgrove v. United States, 224 F.2d 146 (9th Cir. 1954); Vaughn v. State, 83 Ga. App. 124, 62 S.E.2d 573 (1950), where defendant was acquitted of forgery, but convicted of uttering the instrument knowing it to be forged. A transcript of the prior trial revealed that defendant's knowledge of the forgery had been conclusively determined in his favor; thus, the second trial was barred.

40. United States v. Halbrook, 36 F. Supp. 345 (E.D. Mo. 1941); accord, Fall v. United States, 49 F.2d 506 (D.C. Cir. 1931); Bell v. United States, 2 F.2d 543 (8th Cir. 1924); contra, note 38 supra.
composed of two essential elements, \( A \) and \( B \). At a subsequent trial, defendant is convicted of a different offense which arises from the same set of circumstances presented at the first trial. He offers the court a transcript of the former trial and other extrinsic evidence to invoke the principle of "collateral estoppel." If \( A \) and \( B \) are not essential elements of the offense at the second trial, it is evident that defendant's plea will be to no avail.\(^{41}\) Again, assuming that \( A \) is an essential element to the second prosecution, the evidence may show that only \( B \) was decided favorably to him with no consideration of \( A \).\(^{42}\) Or, the evidence may show that both \( A \) and \( B \) were considered by the jury, but it is impossible to ascertain with certainty which of the two was decided in defendant's favor.\(^{43}\) In this area, the defendant has done everything which can be expected of him under the circumstances. The court is the final arbiter in these cases, and its inability to isolate that essential matter supporting the defendant's plea is a risk which the defendant must bear.

**Collateral Estoppel as a Limiting Factor**

In *Yawn v. United States*,\(^{44}\) defendant was convicted of a conspiracy to violate the Internal Revenue Code. Ten overt acts were alleged relating to defendant's possession of certain distilling apparatus and distilled spirits without paying taxes as a distiller. One of the overt acts relied upon during the trial concerned the *possession* of a certain unregistered distillery by defendant. Defendant objected to the relitigation of this matter since he had been acquitted of such *possession* at a prior trial. The court reversed and remanded the case, stating that the prosecution was

\(^{41}\) United States v. Kenny, 236 F.2d 128 (3d Cir. 1956), where defendant and others were charged with making false statements as partners to a governmental agency employing defendant. All were acquitted. At a subsequent trial, defendant was convicted of *wilfully* concealing the material fact of his private interest in certain government contracts. The court stated that the two offenses were mutually exclusive, and no essential element was common to both.

\(^{42}\) United States v. Kaadt, 171 F.2d 600 (7th Cir. 1948) involved the offenses of using the mails to defraud and shipping misbranded drugs through the mails. Defendant was acquitted of the former offense, and he offered the verdict and opinion of the prior trial to bar his conviction of the second offense. The court held that the guilty knowledge essential in the first offense was not required for a prosecution of the second offense; *Williams v. United States*, 170 F.2d 319 (5th Cir. 1948), where the court held that an acquittal of one offense occurring during a certain period of time was not a bar to a similar offense occurring at a different time.

\(^{43}\) United States v. Curzio, 170 F.2d 354 (3d Cir. 1948), where defendant was acquitted of conspiracy, but convicted of the substantive offenses which were set out as overt acts at the trial for conspiracy. The evidence showed that the trial judge found only that there was no concert of action; *United States v. Cowart*, 118 F. Supp. 903 (D.D.C. 1954), where the opinion of the court at the prior trial revealed that defendant's allegations were unfounded.

\(^{44}\) People v. Beltram, 94 Cal. App.2d 197, 210 F.2d 238 (1949), where defendant was acquitted of the crime of kidnapping, but convicted of robbery. Both crimes arose from the same transaction, defendant was tried as an aider and abettor in both trials, and his knowledge of the crimes was an essential element. The instructions were general, and it was impossible to tell what conclusion the jury came to at the prior trial; *accord*, *State v. Erwin*, 101 Utah 365, 120 F.2d 285 (1941).

\(^{44}\) 244 F.2d 235 (5th Cir. 1957).
NOTES

43. It must be observed that the Government's case was not dependent upon the proof of this one overt act. The same result would probably have followed with evidence supporting the nine overt acts remaining. However, the courts agree that the public policy underlying the principle of "collateral estoppel" precludes the prosecution from relitigating issues adjudicated against it at a former trial. Some courts have extended this principle to prohibit the use of related evidence from the prior trial, where it appears that the ultimate fact of defendant's acquittal at the prior trial necessarily involved the determination of these related matters in defendant's favor. It is not reversible error, however, to introduce evidence from the prior trial if the evidence is presented solely for the purpose of showing knowledge, motive, or intent at the second trial. The mere fact that this evidence tends to prove the commission of another offense is immaterial, providing the evidence is offered only for this limited purpose, and the jury is apprised of this limitation by proper instructions from the court.

The Defense of Alibi

The alibi cases emphasize the point that a defendant's plea of "collateral estoppel" must be accompanied by sufficient evidence, or his plea will fail. In *Harris v. State*, defendant had been acquitted of murder arising from a robbery. He was subsequently charged with the robbery and convicted. His sole defense at both trials was alibi, and, on appeal

46. United States v. Simon, 225 F.2d 260 (3d Cir. 1955), where the government was estopped from relitigating the receiving of stolen goods by defendant (an offense of which he was acquitted) at a trial for the guilty possession of the same goods; accord, United States v. Carlisi, 32 F. Supp. 479 (E.D.N.Y. 1940); Commonwealth v. Perry, 248 Mass. 19, 142 NE. 840 (1924).

47. United States v. De Angelo, 138 F.2d 466 (3d Cir. 1943), where the prosecution was precluded from offering testimony as to defendant's presence at a robbery for which he had been acquitted at a prior trial; State v. Hopkins, 68 Mont. 504, 219 Pac. 1106 (1923). Here, defendant had been acquitted of grand larceny at a prior trial. At the present trial, defendant was convicted of robbery. W testified as to defendant's felonious intent at both trials. The court held that the only possible explanation for defendant's acquittal at the prior trial was W's not being a credible witness against defendant. The State could not offer W's testimony again at the second trial.

48. United States v. Adams, 281 U.S. 202 (1930), where defendant had been acquitted of making a false entry on a certain day and then convicted of making false reports as to his employer's condition at a later period of time. It was not error to produce evidence as to the false entry since it was offered to show defendant's state of mind during the entire period; accord, State v. Thompson, 241 Iowa 16, 39 N.W.2d 637 (1949).

49. Woodman v. United States, 30 F.2d 482 (5th Cir. 1929); State v. Dewey, 206 Ore. 496, 292 P.2d 799 (1956).

50. 193 Ga. 169, 17 S.E.2d 573 (1941).
from the conviction of the robbery, he offered a plea of "collateral estoppel" presenting the court with a complete transcript of all the testimony from the first trial. The court held that the jury's acquittal of defendant necessarily determined that he did not participate in the whole transaction since the transcript revealed that the sole issue at the first trial was defendant's presence at the scene of the crime. In People v. Grzesczak, defendant was acquitted of arson, but, at a subsequent trial, he was convicted of attempted robbery arising out of the same transaction. Defendant's defense at both trials was alibi. It had been stipulated by both parties that the witnesses at the first trial would testify to the same facts at the second trial, and that defendant's defense would be alibi. This was revealed by the transcript presented to the court by defendant, and the second prosecution was barred since the only litigated question of fact at both trials was the presence of the accused. In both of these cases it was the transcript of the first trial which enabled the court to draw the necessary inference that the jury believed defendant's alibi. Unfortunately, these two cases represent the only instances where defendant has prevailed in this area.

Other courts have taken the position that the defendant's plea of not guilty places in issue every material allegation of the indictment, and the State has the burden of proving these allegations beyond a reasonable doubt. Thus, the verdict at the first trial merely estops the State from relitigating the ultimate fact that defendant was not guilty of the offense charged at the first trial. However, the defendants failed to present the court with evidence supporting their contentions in these cases, and the decisions merely reflect the difficulty of ascertaining the reason for the jury's acquittal of the defendants. One court has stated that, had defendant offered the judgment roll and minutes of the first trial, it might determine the scope of the issues decided at that trial. It is in this area that counsel must show some initiative if he hopes to be successful. With proper evidence, he can probably achieve a greater percentage of success than he could in any other area of the criminal law.

The Perjury Cases

The modern trend and better view appears to be that an acquittal of one charged with a crime does not preclude prosecution for perjury based

51. 77 Misc. 202, 137 N.Y.S. 538 (Nassau County Ct. 1912).
52. State v. Hoag, 21 N.J. 496, 122 A.2d 628 (1956); accord, State v. Barton, 5 Wash.2d 234, 105 P.2d 63 (1940); But see State v. Orth, 106 Ohio App. 35, 45, 153 N.E.2d 394, 401 (1957) (dissenting opinion), which takes the position that a defendant who raises the defense of alibi admits every element of the offense except that pertaining to his presence at the scene of the crime.
upon testimony given at that trial, although a conviction of perjury would necessarily import a contradiction of the verdict in the former trial. One court has based its conclusion on the ground that a verdict of acquittal is not a finding by the jury that the defendant's testimony is true; rather, it is merely a declaration that the jury is not satisfied beyond a reasonable doubt of defendant's guilt. Another court has reasoned that if the defendant's acquittal is a bar to the perjury action, then a defendant's conviction at the former trial would necessarily be evidence of perjury. The policy denying the application of "collateral estoppel" in this area, however, is based on firmer grounds. Justice cannot be administered through a system of courts unless there can be some assurance that the findings of the courts are based upon testimony truthfully given. To encourage false testimony would threaten the peaceable settlement of controversies by the courts which are free from fraud. In effect, there would be a premium on perjury if a defendant, acquitted of an offense, could subsequently invoke the principle of "collateral estoppel" as a bar to the second prosecution. To permit the defendant to shield himself from perjury under such an artificial refinement of "collateral estoppel" would certainly be a flagrant abuse of that principle. Public policy frowns upon such immunity under these circumstances.

CONCLUSION

Although the principle of "collateral estoppel" has been recognized in criminal prosecutions in many states and the federal courts, it has seldom assisted the defendant. The generality of the defendant's plea, and the general verdict returned by the jury have hindered him to some degree; also, the many statutory offenses open to the prosecutor have made the defendant's plight even greater. Further, Ohio and a few other states have lost sight of this principle in the broader doctrine of "former jeopardy." It is doubtful that Ohio will continue its present stand if counsel for the defendant presents his case properly. This involves, as has been stated previously, producing proper evidence before the court so that the court can consider his contentions. More than the record of acquittal is needed. The testimony and evidence at the first trial are the court's most useful tools. But, the courts have also considered the instructions given at the former trial, statements and opinions of the trial judge, stipulations by counsel, concessions by the prosecutor, and the oral arguments.

54. 70 C.J.S. Perjury § 26 (1951).
of counsel. With this start, the defendant's chances for success will be greatly accelerated.\footnote{58}

The next step, of course, is that taken by the court in considering the defendant's plea. The Ohio courts need not be tied down by the legal technicalities which prevailed in common-law pleadings. Other courts have permitted the pleas of "not guilty,"\footnote{58} or "former acquittal"\footnote{60} to raise the principle of "collateral estoppel." There does not appear to be any reason why the Ohio courts cannot adopt the same attitude.

The future of "collateral estoppel" in Ohio, then, is dependent on counsel's attributes in the first instance, and the courts' attitude in the second instance. Both must give that "little extra push." Both must forget the past and start anew. Only then will the principle of "collateral estoppel" find its place in criminal proceedings in Ohio.

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\footnote{58. No cases have been found in which defendant has requested a special verdict or finding concerning an essential element of the offense alleged at the first trial. Assuming that a special verdict is permissible, defendant will have a useful tool which can be employed in lieu of a plea of "collateral estoppel." However, many problems are presented. Consider the alibi cases in which defendant has presented the court with a transcript and other extrinsic evidence of the first trial by his plea of "collateral estoppel." If the evidence shows that the prosecution has presented a strong case at the first trial, will the court draw the necessary inference that defendant was acquitted because the jury must have believed his alibi in light of the prosecution's strong case? Or will the court reject defendant's plea since it appears that the verdict of acquittal is contrary to the weight of the evidence? Again, suppose the prosecution's case is weak. Will the court reject defendant's plea because the jury necessarily considered the evidence insufficient, thus precluding its consideration of the alibi? Or will the court bar the second prosecution on the ground that fairness precludes the prosecution from litigating a second offense on such weak or meager evidence? By employing a special verdict at the first trial, it appears that defendant will solve the perplexing problems he faces in the above situation. But, instead, he will create a new problem, i.e., the possibility of the jury rendering a verdict which is inconsistent with the evidence before it. Faced with this dilemma, which course shall defense counsel follow when defendant's life is the price of failure? Whether a special verdict is the "answer" in this area is a problem which only the future can solve.

\footnote{59. United States v. De Angelo, 138 F.2d 466 (3d Cir. 1943); Commonwealth v. Spivey, 243 Ky. 483, 48 S.W.2d 1076 (1932).

\footnote{60. Harris v. State, 193 Ga. 169, 17 S.E.2d 573 (1941); People v. Beltran, 94 Cal. App.2d 197, 210 P.2d 238 (1949); Rouse v. State, 202 Md. 481, 97 A.2d 285 (1953).}