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JUDGMENTS - DOUBLE JEOPARDY - RES JUDICATA - EFFECT OF PRIOR CONVICTION OR ACQUITTAL ON SUBSEQUENT SUIT FOR STATUTORY PENALTY OR FORFEITURE

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JUDGMENTS — DOUBLE JEOPARDY — RES JUDICATA — EFFECT OF PRIOR CONVICTION OR ACQUITTAL ON SUBSEQUENT SUIT FOR STATUTORY PENALTY OR FORFEITURE—The case of *United States v. One De Soto Sedan*[1] has again focused attention on some of the perplexing problems raised by the statutory imposition of both criminal and civil sanctions for the same wrongful act. The court held that an acquittal in a criminal prosecution for possessing liquor on which no federal tax had been paid was a bar to a civil in rem proceeding to forfeit claimant's car as having been used in the removal, deposit and concealment of the same liquor with intent to defraud the United States of taxes. Since the two proceedings involved the same parties and substantially the same issues, the authority of *Coffey v. United States*[2] was controlling. The *Coffey* case had decided that even though the forfeiture suit is

[1] (D.C. N.C. 1949) 85 F. Supp. 245.
[2] 116 U.S. 436, 6 S.Ct. 437 (1886).

a proceeding in rem and civil in form, it is so far criminal in its essential nature that the government cannot sue to enforce a statutory forfeiture after defendant has been acquitted in a prior criminal proceeding to punish his acts as a crime, when the forfeiture is based upon those same acts.

If the prior acquittal is given the effect of a bar to the forfeiture suit, it must be because the doctrine of former jeopardy or the principles of res judicata can be relied on in the forfeiture suit. It is the purpose of this discussion to examine whether and how far res judicata or former jeopardy principles can properly be applied as between a criminal prosecution and a suit to enforce a statutory penalty or forfeiture for the same act or acts. There is a technical distinction between a statutory penalty and a statutory forfeiture, the former being the imposition of a duty to pay money as punishment (though not a fine), while the latter is the process by which, as punishment, one loses his right to property. The two terms will be used interchangeably in this comment except where otherwise indicated. This comment will deal, primarily, with federal law, since that is where the problem assumes its greatest importance and has been most fully treated.

I. *The Operation of Double Jeopardy*

The double jeopardy clause found in most state constitutions as well as in the Federal Constitution protects an accused from two punishments for the same offense. In the Federal Constitution (Fifth Amendment) the clause is worded: "nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb." By a liberal interpretation, the protection extends to all indictable offenses, including misdemeanors.[3] But, historically, except where a penalty is incidental to conviction for a crime, statutory penalties imposed as a result of a wrongful act are almost always enforced in a proceeding civil in form.[4] For example, the government, suing in its fiscal capacity in an action of debt or libel,[5] need not prove its allegations beyond a reasonable doubt,[6] and may have a verdict directed in its favor;[7] while

[3] 1 BISHOP, CRIMINAL LAW, 9th ed., §990 (1923); 24 MINN. L. REV. 522 (1940).

[4] The Palmyra, 12 Wheat. (25 U.S.) 1 (1827); 1 BISHOP, CRIMINAL LAW, 9th ed., §32 (1923); 51 HARV. L. REV. 1092 (1938); 40 YALE L. J. 1319 (1931); 25 C.J., Penalties, §§80, 81, 82 (1921); 37 C.J.S., Forfeitures, §2 (1943). See historical analysis in Stout v. State, 36 Okla. 744, 130 P. 553 (1913).

[5] Pettis v. Dixon, Kirby, (Conn.) 179 (1786); The Palmyra, 12 Wheat. (25 U.S.) 1 (1827).

[6] Two Ford Coupé Autos v. United States, (C.C.A. 5th, 1931) 53 F. (2d) 187.

[7] Hepner v. United States, 213 U.S. 103, 29 S.Ct. 474 (1909).

the defendant has no right of confrontation.[8] Accordingly many courts have classified penalty suits as civil in form and remedial in nature, and since the double jeopardy provision applies only in case of two punitive actions instituted by indictment, the plea of former jeopardy is not available to the defendant in the penalty suit who has been acquitted in a prior criminal prosecution.[9]

On the other hand, courts desirous of according double jeopardy protection to the defendant have followed the test laid down in *Huntington v. Attrill*[10] and have inquired whether the penalty is "... in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person." Perceiving that the primary purpose of the penalty suit is punitive rather than remedial, these courts have labeled it "*quasi*-criminal"; and regardless of the fact that the suit is civil in form, it is held to be so far criminal that defendant may not be compelled to testify against himself,[11] is entitled to a day in court with a jury trial (where none would otherwise be required),[12] and may enter a plea of double jeopardy.[13]

It is apparent that, because of the fact that the penalty or forfeiture suit partakes of both traditionally civil and criminal characteristics,[14] the problem is one of classifying the proceeding as civil or criminal for double jeopardy purposes. It is equally apparent that courts can plausibly classify the proceeding as either civil or criminal, depending on whether the court favors a policy of promoting effective law enforcement or a policy of protecting the harassed defendant. If the

[8] United States v. Zucker, 161 U.S. 475, 16 S.Ct. 641 (1896).

[9] 1 BISHOP, CRIMINAL LAW, 9th ed., §§32 and 1067 (1923); 11 L.R.A. (n.s.) 667 (1908); State v. Roach, 83 Kan. 606, 112 P. 150 (1910); Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630 (1938) (penalty of 50% of income tax deficiency due to fraud with intent to evade taxes held remedial—to protect the revenue and reimburse the government for expenses of investigation and any loss due to taxpayer's fraud); United States ex rel. Marcus v. Hess, 317 U.S. 537, 63 S.Ct. 379 (1943) (purpose of a $2,000 penalty plus double damages for fraudulent and collusive bidding on government contracts held to be remedial, not punitive—simply to reimburse government for money lost through fraud); United States v. Physic, (2d Cir. 1949) 175 F. (2d) 338 (proceeding to forfeit claimant's auto for use in transporting heroin on which no tax had been paid held remedial—purpose being to reimburse government for lost taxes).

[10] 146 U.S. 657 at 683, 13 S.Ct. 224 (1892).

[11] Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524 (1886); Lees v. United States, 150 U.S. 476, 14 S.Ct. 163 (1893).

[12] Lipke v. Lederer, 259 U.S. 557, 42 S.Ct. 549 (1922).

[13] Chouteau v. United States, 102 U.S. 603, 26 L.Ed. 246 (1880) (suit for double tax on liquor unlawfully removed from a distillery held criminal in substance though civil in form); United States v. La Franca, 282 U.S. 568, 51 S.Ct. 278 (1931) (suit to recover double tax plus fixed sum for non-payment of retail liquor dealer's taxes held criminal in nature); McKee v. United States, (C.C. Mo. 1887) 4 Dill. 128 (suit to recover double the taxes lost through defendant's fraud held criminal in nature).

[14] See 51 HARV. L. REV. 1092 (1938).

objective guide to classification is, as is so often asserted, whether the purpose of the proceeding is remedial or punitive, it is submitted that penalty and forfeiture suits should be labeled criminal in their essential nature. As Justice Frankfurter pointed out in his concurring opinion in *United States ex rel. Marcus v. Hess*,[15] if the penalty were truly remedial the defendant should be allowed to show that the value of the property to be forfeited or sum to be paid will exceed any reasonable compensation figure.[16] Since this is not permitted, the proceeding must be punitive in nature and therefore criminal.

Even if the penalty suit is labeled criminal, there remains the further problem of whether the same offense is involved as was prosecuted in the antecedent criminal proceeding. This resolves itself into a question of how far the legislature may go in carving out two or more offenses from the same acts or transaction. It often happens that the criminal punishment and the penalty are imposed by two entirely different statutes which are in no logical way connected with each other. Perhaps the wording is different or different elements are prescribed. In many instances the statutory pattern resembles a patchwork quilt. At any rate, it is clear that the double jeopardy clause in some way limits the power of the legislature to split criminal causes of action. The test most often applied to determine whether two statutes in effect attempt to punish the same offense is the "same evidence" test. If the same evidence will sustain a conviction under either statute, the offenses are identical; if not, the mere fact that they arise out of the same trans-

[15] 317 U.S. 537, 63 S.Ct. 379 (1943).

[16] In many cases where the purpose of the government's suit was clearly remedial the courts have refused to classify the proceeding as criminal for double jeopardy purposes even though the acts sued for would in fact constitute a crime. See Stone v. United States, 167 U.S. 178, 17 S.Ct. 778 (1897) (suit to recover the reasonable value of timber cut on United States' land); United States v. Schneider, (C.C. Ore. 1888) 35 F. 107 (suit to recover wholesale liquor dealer's tax); Violette v. Walsh, (C.C.A. 9th, 1922) 282 F. 582 (suit to recover tax on manufacture of unlawfully transported liquor); Ferroni v. United States, (C.C.A. 7th, 1931) 53 F. (2d) 1013 (similar facts); United States v. Glidden Co., (C.C.A. 6th, 1941) 119 F. (2d) 235 (suit on bond given to insure proper use of denatured alcohol for industrial purposes); Murphy v. United States, 272 U.S. 630, 47 S.Ct. 218 (1926), noted in 13 VA. L. REV. 410 (1927) (suit to enjoin maintenance of a nuisance, viz., a place where liquor was manufactured); United States v. Donaldson-Schultz Co., (C.C.A. 4th, 1906) 148 F. 581 (suit to enjoin obstruction of a navigable stream); United States v. U.S. Gypsum Co., (D.C. D.C. 1943) 51 F. Supp. 613 (suit to enjoin monopolistic practices forbidden by the Sherman Anti-Trust Act). Cf. United States v. Salen, (D.C. N.Y. 1917) 244 F. 296 (suit to collect duties lost through defendant's alleged violation of the customs law held barred by defendant's prior acquittal in a criminal prosecution for violation of customs law based on the same acts); State v. Graffenreid, 226 Ala. 169, 146 S. 531 (1933) (impeachment of a state's attorney for moral turpitude held a criminal proceeding for double jeopardy purposes even though the usual theory is that a suit to disbar an attorney or revoke a physician's license is a civil suit to protect the public from practitioners of bad character. Cf. State v. Lewis, 164 Wis. 363, 159 N.W. 746 (1916).

action will not be controlling where Congress has prescribed two offenses.[17] Accordingly, in *Albrecht v. United States*[18] it was held that a prosecution for selling liquor was not barred by a previous conviction for possessing the same liquor, for one may possess without selling (and vice versa) and the offenses were made distinct by Congress.[19]

However, it should be noted that some courts have favored the "same transaction" test of whether the offenses are the same. For example, it has been held that if the possession now charged was only that possession at the time of sale which is necessarily incident thereto, there is but one offense. The state must elect to proceed either for "possession" or "sale" and conviction of sale bars a prosecution for possession.[20]

Having classified the penalty proceeding as criminal in nature, and having decided that the offense charged is the same as that of which there has been a prior conviction or acquittal, it must still be asked whether the penalty suit is a second attempt to punish that offense. It was early held that it was competent for the legislature to subject any particular offender both to a criminal prosecution (for fine and/or imprisonment) and to a civil suit (to recover a penalty or effect a forfeiture). The theory was that this is but one punishment enforceable in two proceedings—the criminal and civil sanctions being but part and parcel of the same punishment.[21]

The "comprehensive punishment" theory works out so long as the penalty suit is considered civil in nature; but when it is labeled criminal the double jeopardy clause may operate to limit the power of Congress to impose cumulative punishments. In effect there are two "prosecu-

[17] Morgan v. Devine, 237 U.S. 632, 35 S.Ct. 712 (1915); 2 FREEMAN, JUDGMENTS, 5th ed., 1370 (1925); 1 BISHOP, CRIMINAL LAW, 9th ed., 776 (1923); comment to §5, A.L.I., ADMINISTRATION OF THE CRIMINAL LAW (Proposed Final Draft, 1935) (containing citations of many cases to support a comprehensive analysis of the whole "same offense" problem); 31 COL. L. REV. 291 (1931); 32 MICH. L. REV. 512 (1934); 22 MINN. L. REV. 522, 546 ff. (1938).

[18] 273 U.S. 1, 47 S.Ct. 250 (1927).

[19] *Accord:* Bynum v. State, 28 Ala. App. 439, 186 S. 588 (1939) (unlawful transportation and unlawful possession of liquor held distinct offenses).

[20] Newton v. Commonwealth, 198 Ky. 707, 249 S.W. 1017 (1923). *Accord:* Savage v. State, 18 Ala. App. 299, 92 S. 19 (1921); Phillips v. State, 109 Tex. Cr. 523, 4 S.W. (2d) 1056 (1928); Port Gardner Investment Co. v. United States, 272 U.S. 564, 47 S.Ct. 165 (1926); Commercial Credit Co. v. United States, 276 U.S. 226, 48 S.Ct. 232 (1928).

[21] People v. Stevens, 13 Wend. (N.Y.) 341 (1835); In re Leszynsky, (C.C. N.Y., 1879) 16 Blatcf. 9, 15 F. Cas. No. 8279; United States v. Mt. Clemens Beverage Co., (D.C. Mich. 1927) 23 F. (2d) 885. See criticism of this view in Stout v. State, 36 Okla. 774, 130 P. 553 (1913).

tions" to punish one offense.[22] Justice Frankfurter recognized this problem in his concurring opinion in *United States ex rel. Marcus v. Hess*.[23] He declared that this vague scheme of classifying penalty suits as civil or criminal would not adequately safeguard those human rights for the protection of which the double jeopardy clause was inserted. However, even though the defendant was being twice punished for the same offense, this peculiar situation should not be considered within the scope of the double jeopardy clause. The legislature had simply prescribed, in advance, two sanctions for the same conduct enforceable in two separate proceedings. Plausibility is given to this theory by the traditional practice of enforcing penalties in civil proceedings, so that it is not illogical for Congress to shape its punishments according to existing procedures.

The view that there can be no double jeopardy since two proceedings are required to enforce but one punishment has been somewhat modified by several cases in the federal courts. In *United States v. Chouteau* and its companion case, *United States v. Ulrici*,[24] it was held that a suit to recover double the normal tax on liquor unlawfully removed from a distillery was barred by a compromise of the indictment or a conviction for removing the same liquor from the distillery without paying taxes. This was so even though the statute specifically provided for fine, imprisonment and double tax for such acts.[25] Again, in *United States v. McKee*,[26] it was held that double jeopardy prohibited a civil suit to recover double the taxes lost through defendant's fraud because he had previously been convicted of conspiracy to defraud the government of taxes. Implicit in these holdings are the assumptions that the penalty suit is criminal in nature, the offenses are the same, and the penalty suit is an attempt to impose a second punishment for that offense. Although the validity of one or more of these assumptions may be seriously questioned, the result is not illogical for a court eager to protect an accused by a liberal interpretation of the double jeopardy provision.

It is unfortunate that later courts faced such precedents as the *McKee* and *Chouteau* cases without an adequate understanding of their

22 "But an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it take the form of a civil action; and the word 'prosecution' is not inapt to describe such an action." United States v. La Franca, 282 U.S. 568 at 575, 51 S.Ct. 278 (1931).

23 317 U.S. 537, 63 S.Ct. 379 (1943).

24 102 U.S. 603 and 612, 26 L. Ed. 246 (1880).

25 *Accord*: United States v. La Franca, 282 U.S. 568, 51 S.Ct. 278 (1931) (conviction for unlawful sale of liquor bars a suit to recover double the retail liquor dealer's taxes).

26 (C.C. Mo. 1887) 4 Dill. 128.

underlying theory and policy. For instead of merely challenging the validity of the assumptions in those cases, too many courts desirous of promoting effective law enforcement sought to work out tenuous distinctions and thereby further confused the law on this subject. For example, in *United States v. Three Copper Stills*[27] the court held that a prior conviction for removal and concealment of non-tax-paid liquor was no bar to a suit to forfeit the same liquor for not having revenue stamps on the casks. The reasoning of the court was that the liquor itself is the offender in an in rem suit and so the owner is not placed in jeopardy at all.[28] By relying on this neat little technicality the court was able to distinguish the *McKee* case, when it would have been perfectly simple to hold that the forfeiture proceeding was merely a necessary mode of enforcing part of a single comprehensive punishment. There is ample authority to sustain the proposition that the owner is the real party interested in a forfeiture suit and is therefore placed in jeopardy as if there were an indictment against him personally.[29]

Another device used to avoid the application of double jeopardy to a forfeiture suit is to find that the parties are different. For example, where the husband was acquitted in the criminal proceeding, his wife, the record owner of the car, could not plead the acquittal in bar.[30]

It has been suggested that if the double jeopardy clause prohibits the imposition of comprehensive punishment for the same offense, a statute which attempts to do so is unconstitutional.[31] In the first place, it should be observed that most courts have accepted the two-suits—

[27] (D.C. Ky. 1890) 47 F. 495.

[28] *Accord*: United States v. One Machine for Corking Bottles, etc., (D.C. Wash. 1920) 267 F. 501; Various Items of Personal Property v. United States, 282 U.S. 577, 51 S.Ct. 282 (1931) (conviction for conspiracy to manufacture liquor unlawfully no bar to suit to forfeit still for use with intent to defraud government of taxes). Cf. United States v. La Franca, 282 U.S. 568, 51 S.Ct. 278 (1931) (double jeopardy bars a suit for penalty taxes after conviction for same acts. Opinion written by same justice who delivered opinion in Various Items etc. v. United States), noted in 40 YALE L.J. 1319 (1931), 29 MICH. L. REV. 930 (1931).

[29] Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524 (1886); Coffey v. United States, 116 U.S. 436, 6 S.Ct. 437 (1886); United States v. One Dodge Sedan, (C.C.A. 3rd, 1940) 113 F. (2d) 552 (expressly disapproving of Coffey v. United States in other respects); State v. Intoxicating Liquor, 72 Vt. 253, 47 A. 779 (1900). Cf. Stout v. State, 36 Okla. 744, 130 P. 553 (1913), apparently rejecting the two-suits-one-punishment theory in favor of the in rem-no jeopardy theory after a careful historical analysis of the double jeopardy protection.

[30] United States v. One Dodge Sedan, (C.C.A. 3rd, 1940) 113 F. (2d) 552. *Accord*: United States v. One Pontiac Sedan, (C.C.A. 6th, 1939) 105 F. (2d) 149. See also United States v. Manufacturing Apparatus, Oleo etc. Co., (D.C. Colo. 1916) 240 F. 235 (acquittal of officer-shareholder no bar to suit to forfeit corporate property). *Contra*: United States v. One Distillery, (D.C. Cal. 1890) 43 F. 846.

[31] Stout v. State, 36 Okla. 744 at 766, 130 P. 553 (1913); Murphy v. United States, 272 U.S. 630, 47 S.Ct. 218 (1926).

one-punishment theory, which means that double jeopardy should have no part to play and no question of constitutionality is raised. But even if the theory is rejected, the courts have apparently met the problem by either forcing the government to elect between inconsistent procedures or holding the second proceeding barred by the acquittal or conviction in the first, thereby avoiding the constitutional issue.[32]

It should be noted that there are cases apparently involving double jeopardy issues which will be treated below as res judicata cases. It is submitted that no discussion of double jeopardy is logical once the two-suits—one-punishment theory is accepted, but it is possible that the same results can be reached by applying the broader doctrine of res judicata.

II. *The Operation of Res Judicata*

Even when the penalty or forfeiture proceeding is classified as criminal in nature and the offense held to be the same as that involved in a prior criminal proceeding, if the court recognizes the two-suits-one-comprehensive-punishment theory, a plea of bar on double jeopardy grounds is of no avail. It remains to be seen whether res judicata can apply, particularly to aid the defendant who has been acquitted in the criminal prosecution.

Res judicata is mentioned in these penalty suits much less often than double jeopardy. Perhaps the main reason is that they are, for historical reasons, considered civil proceedings and therefore the quantum of proof necessary to sustain the government's burden will be less than in the criminal prosecution. Although the parties are the same and the issues substantially identical, an acquittal may be the result of a failure to convince the jury beyond a reasonable doubt. Such an acquittal cannot bar a civil suit where the government need display only a fair preponderance of the evidence.[33]

[32] United States v. One Distillery, (D.C. Cal. 1890) 43 F. 846; United States v. Torres, (D.C. Md. 1923) 291 F. 138; Port Gardner Investment Co. v. United States, 272 U.S. 564, 47 S.Ct. 165 (1926); National Surety Co. v. United States, (C.C.A. 9th, 1927) 17 F. (2d) 369; Commercial Credit Co. v. United States, 276 U.S. 226, 48 S.Ct. 232 (1928); State v. Graffenreid, 226 Ala. 169, 146 S. 531 (1933).

[33] 2 FREEMAN, JUDGMENTS, 5th ed., §656 (1925); 17 CORN. L.Q. 493 (1932); Stone v. United States, 167 U.S. 178 at 188, 17 S.Ct. 778 (1897); Murphy v. United States, 272 U.S. 630, 47 S.Ct. 218 (1926), noted in 13 VA. L. REV. 410 (1927); Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630 (1938), noted in 22 MINN. L. REV. 1054 (1938), 37 MICH. L. REV. 647 (1939), 25 VA. L. REV. 839 (1939); United States v. Schneider, (C.C. Ore. 1888) 35 F. 107; United States v. Donaldson-Schultz Co., (C.C.A. 4th, 1906) 148 F. 581; United States v. U.S. Gypsum Co., (D.C. D.C. 1943) 51 F. Supp. 613; State v. Roach, 83 Kan. 606 at 611, 112 P. 150 (1910).

Since the opinion of Justice Holmes in *Oppenheimer v. United States*[34] it is not to be doubted that res judicata applies with full force and effect between criminal prosecutions as well as civil proceedings. So long as the penalty suit is held to be civil in essence as well as form, the difference in burdens of proof appears to raise an insurmountable barrier to the application of res judicata between the criminal and penalty proceedings. However, once the penalty suit is denominated criminal in nature, there is a real possibility of res judicata coming into play.[35] At least a prior conviction should be conclusive on the defendant in the penalty or forfeiture suit, since the government has already proved its case beyond a reasonable doubt.[36]

Perhaps the key to the role of res judicata as between a criminal proceeding and a penalty suit involving the same parties and the same offense is the case of *Coffey v. United States*.[37] The defendant had been acquitted of attempting to defraud the government of liquor taxes. The statutory punishment for such an offense was fine, imprisonment and forfeiture of any distilling equipment used in the defrauding; and forfeiture could have been decreed as an incident of conviction. Defendant's prior acquittal was held a bar to a subsequent civil suit to forfeit his still. The court did not ignore the fact that the forfeiture suit was in rem and civil in form so that the burden of proof was different from that required in the criminal proceeding. "Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing. . . ."[38] Thus the court apparently conceived of the civil suit as punitive in nature, to complete the punishment imposed by the statute. But the prior acquittal had involved a finding that the facts which were the basis of both the criminal and civil suits did not exist. "The facts cannot be again litigated between them [the same parties], as the basis of any

[34] 242 U.S. 85, 37 S.Ct. 68 (1916).

[35] See United States v. Seattle Brewing and Malting Co., (D.C. Wash. 1905) 135 F. 597, holding that the government, having been defeated in the criminal suit cannot sue to enforce the provisions of a penal statute by forfeiture. However, the government could sue to recover any revenue lost by defendant's acts since that suit would be purely remedial and not punitive.

[36] 2 FREEMAN, JUDGMENTS, 5th ed., §657 (1925); State v. Intoxicating Liquor, 72 Vt. 253, 47 A. 779 (1900).

[37] 116 U.S. 436, 6 S.Ct. 437 (1886).

[38] Id. at 443.

statutory punishment denounced as a consequence of the existence of the facts."[39]

The language used by the Court in the *Coffey* case clearly indicates that it was thinking in terms of res judicata; and reliance was placed on *Gelston v. Hoyt*,[40] a leading case on the subject of res judicata. However, the Court also mentions *McKee v. United States*, discussed supra, which, we have seen, refused to recognize that the penalty suit was merely to enforce part of a comprehensive punishment. It therefore becomes obvious that the decision is either a product of confused thinking or of a subtle blending of double jeopardy and res judicata theories. It is submitted that the latter is the true interpretation and that the case was correctly decided, although later courts and writers have attempted to classify the case as either a res judicata[41] or a double jeopardy decision.[42] The Court which decided the *Coffey* case was unusually sensitive to the policies underlying res judicata and double jeopardy, viz., to end litigation and to protect an accused from the danger of repeated punishment.[43] And it is believed that the *Coffey* case was merely an attempt to solve the problems raised by the peculiar nature of statutory penalties and forfeitures in the light of those policies.

It is possible, as some courts have done, to limit the *Coffey* case to its peculiar facts. Since the forfeiture could have been decreed as a result of a conviction the second suit to enforce forfeiture is clearly barred by acquittal on double jeopardy grounds.[44] But it would seem that the case has much broader implications, and it has been recog-

[39] Id. at 444.

[40] 3 Wheat. (16 U.S.) 246 (1818).

[41] See United States v. Three Copper Stills, (D.C. Ky. 1890) 47 F. 495; dissent of Stephens, J. in United States v. U.S. Gypsum Co., (D.C. D.C. 1943) 51 F. Supp. 613 at 617; Von Moschzisker, "Res Judicata," 38 YALE L.J. 299 at 325, note 89 (1929); McLaren, "The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases," 10 WASH. L. REV. 198 (1935); 31 COL. L. REV. 291 (1931).

[42] See Stone v. United States, 167 U.S. 178, 17 S.Ct. 778 (1897); Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630 (1938); State v. Roach, 83 Kan. 606, 112 P. 150 (1910); 2 FREEMAN, JUDGMENTS, 5th ed., p. 1386 (1925); 47 HARV. L. REV. 1438 (1934); 25 VA. L. REV. 839 (1939).

[43] See opinion of the same court in Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524 (1886), an unusually liberal interpretation of the operation of the Bill of Rights in penalty suits.

[44] See United States v. Donaldson-Schultz Co., (C.C.A. 4th, 1906) 148 F. 581; Various Items of Personal Property v. United States, 282 U.S. 577, 51 S.Ct. 282 (1931); State v. Roach, 83 Kan. 606, 112 P. 150 (1910); State v. Meek, 112 Iowa 338, 84 N.W. 3 (1900).

nized as controlling even where forfeiture was not made an incident of conviction by the statute.[45]

Courts have been astute in devising ways to circumvent what they conceived to be the holding in the *Coffey* case. For example, it has been held that there could be no bar where a different intent was necessary to support the criminal indictment than need be proved to sustain the civil charge;[46] where the defendant in the criminal case and the claimant in the forfeiture suit are different parties;[47] or where there was a prior conviction rather than an acquittal, as was involved in the *Coffey* case.[48]

Despite this whittling-away, the *Coffey* case is still respectable authority in the federal courts.[49] An interesting application of the doctrine of the case is seen in *Chantangco v. Abaroa*.[50] A Philippine statute provided in one section that a person is liable in a civil suit for any damages caused by his own negligence not punishable by law, and in another section that a person who is criminally liable for an act should also be liable in a civil suit for damages. It was held that defendant's acquittal in a criminal prosecution by the state for maliciously and unlawfully burning plaintiff's warehouse barred plaintiff's suit for damages on the authority of the *Coffey* case. The court conceived that the right of action for damages was conferred only in case of criminal liability where the acts were denominated criminal. The compensation sought in the civil suit was, by statute, made part of the punishment attached to the offense of which defendant had been acquitted. It is submitted that the same interpretation should be given our penal statutes, so that the fine, imprisonment and penalty are considered as integral parts of a comprehensive scheme of punishment, though enforced in two suits of different character. There should be no right to enforce part of that punishment without a prior

[45] United States v. One De Soto Sedan, (D.C. N.C. 1949) 85 F. Supp. 245; Sierra v. United States, (C.C.A. 1st, 1916) 233 F. 37; United States v. Salen, (D.C. N.Y. 1917) 244 F. 296.

[46] Stone v. United States, 167 U.S. 178, 17 S.Ct. 778 (1897).

[47] See note 30, supra.

[48] United States v. Three Copper Stills, (D.C. Ky. 1890) 47 F. 495.

[49] State courts have been reluctant to accept what they conceived to be the rule of the case. See State v. Roach, 83 Kan. 606, 112 P. 150 (1910); cases in 11 L.R.A. (n.s.) 667 (1908). However, see State v. Intoxicating Liquor, 72 Vt. 253, 47 A. 779 (1900) holding that an acquittal of keeping liquor with unlawful intent bars a suit to forfeit the liquor. The mere fact that one suit is criminal, the other civil does not prevent the application of res judicata.

[50] 218 U.S. 476, 31 S.Ct. 34 (1910).

conviction (in which case the judgment would operate as an estoppel in the civil penalty or forfeiture suit). This, of course, assumes that the penalty suit is criminal in nature and that the same offense is involved in each proceeding.

Another interesting case applying the rule of the *Coffey* case is *Chin Kee v. United States*.[51] When the government sought to deport him, the defendant produced the record of a prior habeas corpus hearing in which the court found him to be a native of the United States. Pending defendant's appeal from an adverse ruling in the deportation case, the government prosecuted defendant for forging the record, but he was acquitted. The court held this acquittal a bar to the deportation proceedings on the authority of the *Coffey* case. This decision highlights the res judicata nature of the *Coffey* case and indicates its possible broad application.

Conclusion

Cases involving penalties and forfeitures provide an excellent battleground for two conflicting policies. One declares that we must have effective law enforcement machinery; the other attempts to protect the accused from continued harassment and to settle once and for all those fact issues which have once been decided between the parties. The second policy has been split into two formalized doctrines, double jeopardy and res judicata, and the mechanics of neither have been sufficiently developed to meet the forces behind the first policy in this peculiar field of statutory penalties and forfeitures.

Recognizing the hybrid nature of penalties and forfeitures, consisting of both civil and criminal elements, the ideal would be to develop a hybrid mechanism to protect defendants, which itself would contain double jeopardy and res judicata elements. In fact, it would seem that the cases on this subject can be reconciled only if we view them as products of the two conflicting policies and as attempts by the courts to work out a satisfactory compromise without satisfactory tools.

The conflict of policies can be resolved early in a case by classifying the penalty as civil in nature, as well as in form, which is just what many courts have done, choosing the course of least resistance. But if the penalty is labeled criminal in nature because of its punitive purpose, double jeopardy applies to prevent a second punishment for the same offense, i.e., where the same evidence would sustain either the "criminal" or the "civil" charge. But even though the offense is

[51] (D.C. Tex. 1912) 196 F. 74.

the same, if the fine and/or imprisonment and the penalty or forfeiture are viewed as merely two parts of a single punishment, necessarily enforced in different proceedings, then double jeopardy cannot apply. Principles of res judicata must then be invoked to bar a penalty suit after a prior acquittal and bind defendant after a prior conviction. It is submitted that res judicata, because of its broad nature, is capable of being stretched to meet the situation despite the technical barrier of the difference between the burden of proof in the criminal and the penalty suit (civil in form, but criminal in nature). In this way a compromise between the two fundamentally conflicting policies can be worked out.

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