UNITED STATES COURT OF APPEALS

FOR THE INDIAN TERRITORY.

No. 636.

J. C. WILCOX et al., Plaintiffs in Error,

versus

UNITED STATES, Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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For Defendant in Error.

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Plaintiffs in error have fairly stated the nature and result of the action.

FIRST ASSIGNMENT.

The appellants complain in their first assignment of error of the refusal of the court to allow each of the defendants three peremptory challenges, and because the total number of challenges to appellants was restricted to three.

Sec. 2240 M. D. provides:

"The defendant is entitled to twenty peremptory challenges in prosecutions for felony and to three in prosecutions

for misdemeanor."

Sec. 2247 M. D. enacts:

"When several defendants are tried together, the challenge of any *one* of the defendants, *shall be* the challenge of *all*."

Mr. Wharton, in his work on Criminal Pleadings and Practice, Sec. 614a, says:

"Whether each of several joint defendants is entitled to his full number of challenges is a point usually determined by local statute."

We do not think the contention of appellants well taken here, because after quoting:

"That in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for all the purposes of challenges under this cestion."

Sec. 819 R. S. U. S. they say:

"If this were the statute applicable, there could be no question of the government's contention, but as a totally different statute, framed to correct a different mischief, has been enacted the effect of this statute shall not be imported into the other."

Then analyze Sec. 2247, M. D., "The challenge of any one of the defendants, shall be the challenge of ALL." Not the challenge of each defendant, nor does the act authorize the exercise of three challenges each in prosecutions for misdemeanor.

In the case of Cochran et al. vs. United States, recently appealed from Oklahoma, 76 Pac. Rep., 672, in an opinion by Justice

Burwell, the court remarked:

"Where two or more persons are indicted under a statute of the United States for a misdemeanor, they are not entitled as a matter of right to separate trials. Separate trials may be granted or refused in the discretion of the trial court.

"The rule of procedure which gives to the government and the defendant each three peremptory challenges, does not mean that where two or more defendants are tried jointly for a misdemeanor, that each defendant may challenge three jurors, but that ALL of the defendants may jointly challenge that number."

The defendants were jointly tried for a misdemeanor and under the law they were entitled to three challenges, in which all of them should join."

Upon this subject Mr. Thompson in his work on trials, Vol. 1, page 40, says:

"Though formerly doubted, it is now generally settled that where several persons are jointly indicted, they MUST JOIN in their challenges, and cannot claim for each the number accorded by the common law or by statute, except in cases where the statute accords them this right, which it does in some jurisdictions, either in express terms or by reasonable interpretation. Many statutes, on the other hand, expressly require, that defendants jointly indicted, shall join in their challenges."

And the author in support of this latter statement cites Sec. 1920 Gantt's Digest, which was incorporated in Mansfield's Digest as Sec. 2247. Mr. Thompson's construction of this section is certainly entitled to great weight.

See also Glass vs. Commonwealth, 26 S. W., 811, decided by the Court of Appeals of Kentucky in 1894.

Under the Revised Statutes of Maine providing that each party shall be entitled to two peremptory challenges "party" does not mean "person." The several defendants must join in their peremptory challenges.

Appellants seem to rely very largely upon Sec. 1028 of Bishop's New Criminal Procedure, but they do not follow the author far enough, for Section 1032 is as follows:

> "Statutes with us, have to a considerable extent, made it imperative on joint defendants to unite in their challenges."

Under the uniform decisions of the English as well as our own courts, the effect of Sec. 2240 is exactly the same as Sec. 2247 as contended by appellants, that is, that when two defendants are jointly tried, the challenge of one defendant excuses a juror without the consent, or even over the protest, of the other lefendant. The right of challenge being the right to reject and not to select one defendant had no right to complain, because a juror was excused without his consent. Courts must, if possible, as correctly stated by appellants, construe a statute so that all parts will stand. Therefore, if Section 2247 means what appellants contend it does, it is simply a repetition of the law as it was before said section was adopted, and such construction renders it nugatory.

All authorities cited by plaintiffs in error are from cases decided approximately forty years ago, based upon statutes substantially the same as Sec. 2240 standing alone, and at variance with the later and better practice, which holds to and is governed by the local statute.

Sections 2240 and 2247 M. D. prescribe in express terms the rights of defendants in misdemeanor cases relative to the number of challenges they shall exercise, and are entirely free from ambiguity, so much so indeed, that they have not been raised before the Supreme Court of Arkansas.

SECOND AND THIRD ASSIGNMENT.

The second and third specifications of error are that the court admitted evidence over the objections of the defendants, tending to show that a conspiracy existed between Wilcox and Ungles to assault Shepard, and refused to admit a verdict and judgment of acquittal on a former trial of Wilcox for conspiracy to commit the same assault.

Sec. 5518, R. S. U. S., under which the original indictment was drafted, was designed especially for the protection of United States officers in the performance of their official duty, and reads as follows:

> "If two or more persons in any State or Territory conspire to prevent, by force, intimidation or threats, any person from accepting or holding any office, trust or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place where his duties as an officer are required to be performed, or to injure him in his person or property ON ACCOUNT OF HIS LAWFUL DISCHARGE of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property, so as to molest, interrupt, hinder or IMPEDE HIM IN THE DISCHARGE OF HIS OFFICIAL DUTIES, each of such per-

sons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment."

It will be seen therefore, that the gist of the offense laid in that indictment was for "Conspiracy to injure an officer of the United States and impede him in and on account of his official acts," while the statute under which the second indictment is drafted is Section 1800 M. D., which reads as follows:

"If any person shall wilfully or maliciously, disturb, either by day or night, the peace and quiet of any town, village, neighborhood or family, by loud or unusual noise, or by abusive, violent, obscene or profane language,——— or by quarreling, challenging to fight or fighting———on conviction shall be fined in any sum not more than three hundred dollars or be imprisoned in the county jail not less than one month nor more than six months, or both, at the discretion of the court or jury trying the case."

It is observed therefore, that the first indictment charged a felony under a section of the Revised Statutes of the United States, and the second charged a misdemeanor under an entirely different statute, and not included in the first.

While conceding the correctness of the contention of appellants that an acquittal upon one charge operates as an estoppel against proving the existence of the same facts which were involved in and decided by the former trial, our contention is that this condition is not here presented. Wilcox and Ungles were indicted for conspiring to impede in the performance of his official duties, and for assaulting an officer of the United States because of his official acts.

Upon this charge Wilcox was tried and acquitted. Wilcox and Ungles were afterwards jointly tried upon the second indictment, and appellants contend that as evidence was introduced on the former trial tending to show that a conspiracy existed that the verdict of acquittal in that case estops the government from showing the existence of a conspiracy in this case. But the evidence on the former trial was for the purpose of showing that a conspiracy existed to IMPEDE and to ASSAULT an officer of the United States for his official acts, and not to show that a conspiracy existed to assault Charles O. Shepard, an individual.

Let us carry the appellants' contention further and we will see its fallacy. Suppose appellants had objected to evidence tending to show any assault at all upon Shepard. The indictment in the former case alleges the overt act, for which the conspiracy as alleged to have been formed. Wilcox was acquitted of this assault, FOR THIS REASON. Would any one contend that the government is estopped in this case from showing that Wilcox committed a simple assault upon Shepard, the individual? Certainly not, Neither can it be claimed that an acquittal upon a charge of conspiring to assault a person by reason of his official acts, be conclusive that no conspiracy existed to commit an assault upon a person by reason of some private grudge or ill will. The only issue necessary to be decided in the first case, in order to acquit the defendant was that there was no conspiracy to impede the officer in or assault him on account of his official acts. The jury may have believed that there was a conspiracy to assault the man because of some personal feeling; and that personal feeling may or may not have arisen because of his official acts.

The distinction above pointed out will more clearly be seen by supposing that there was a statute making it a substantive offense to assault an officer of the United States because of his official position. Then if one be indicted and tried for conspiring to assault an officer because of his official position and acquitted, on a subsequent trial for the assault because of his official position, although he could be convicted for the assault, testimony could not be introduced for the purpose of showing that a conspiracy existed to commit the assault, because the very question that a conspiracy did not exist to commit that very offense, had been decided in the former case.

A consideration of the doctrine which has been applied in csaes where a plea of autrefois acquit or convict has been interposed, will be of much assistance in arriving at a solution of this question. While it is true that in this case the plea of *autrefois acquit* was not and could not have been made, still the objection to the evidence as to the conspiracy is virtually a plea of *autrefois acquit* as to the existence of the conspiracy.

A case in point is that of State vs. Elder, 65 Ind., 282, wherein the defendant was tried for an attempt to commit an abortion, having been previously acquitted upon the same proof of murder of an unborn child. The defendant had judgment on demurrer, the State appealing, in which the judgment was reversed and remanded. Biddle, J., in rendering the opinion, among other things, said:

"We believe the true rules, deducible from both principle and authority to be,

1. When the facts constitute but one offense, though it may be susceptible of division into parts, as in larceny for stealing several articles of property at the same time, belonging to the same person, a prosecution to final judgment for stealing a part of the articles, will be a bar to a subsequent prosecution for stealing any other part of the articles, stolen by the same act.

2. When the facts constitute two or more offenses, wherein the lesser offense is necessarily involved in the greater —as an assault is involved in an assault and battery with intent to commit a felony, and as a larceny is involved in a robbery —and when the facts necessary to convict on a second prosecution would necessarily have convicted in the first, then the first prosecution to a final judgment would be a bar to the second.

3. BUT WHEN THE SAME FACTS CONSTITUTE TWO OR MORE OFFENSES, WHEREIN THE LESSER OFFENSE IS NOT NECESSARILY INVOLVED IN THE GREATER, and when the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, then the FIRST PROSECUTION WILL NOT BE A BAR, although the offenses were both committed at the same time and by the same act.

The answer we are considering falls under the third rule above stated. The lesser offense, namely, the charge in the present indictment, was not involved in the greater, namely, that charged in the former indictment, upon which the appellant was acquitted as alleged in his answer. An indictment for the murder of the unborn child of Elizabeth Bradburn is by no means the same as an indictment charging the employment of

certain means with the intent to procure the miscarriage of Elizabeth Bradburn, although the same means were used to commit the offense in both cases. The lesser offense is not involved in the greater; the offenses are not committed against the same person, and bear no resemblance toward each other, either in fact or intent; the facts necessary to support a conviction on the present indictment, would not necessarily have convicted, nor would they have tended to acquit, upon the former indictment. We cannot adopt the rule held in some states, that the accused cannot in any case be convicted but once upon the same facts when they constitute different offenses, wherein the lesser offense is not involved in the greater, and when the facts charged in the second prosecution would not convict upon the former. We think the third rule announced above, in such cases, expresses the law."

In the case of Commonwealth vs. Tenney, 97 Mass., 50, the defendant was indicted, tried and acquitted for larceny of certain bonds, and at a subsequent term of the county court was indicted under a general statute for "fraudulent conversion" of the same bonds. The defendant filed a special plea in bar alleging that he had been lawfully acquitted of the same offense set forth in this indictment, and annexed to his plea copy of a record by which it appeared that at a previous term of the same court he was indicted, tried and acquitted for larceny of the same bonds. To this special plea in bar the attorney for the commonwealth filed a demurrer which the judge sustained, whereupon the defendant entered his plea of not guilty and was placed upon his trial, found guilty, and moved in arrest of judgment, but the trial judge overruled his

motion to which defendant excepted and appealed.

A very exhaustive opinion was rendered in the case bp Justice Fuller, who said among other things:

"It is impossible to sustain a plea of *autrefois acquit* where, by a comparison of the two records it appears that the two indictments are, in point of law, for distinct offenses..... In the present case the plea does not answer the indictment, BUT ONLY ONE ASPECT OF THE EVIDENCE, by which it may have been supported."

A comparison of the records in the cases under consideration discloses, not only two separate and distinct offenses growing out of the wrongful acts of the plaintiffs in error, but DIFFERENT GRADES OF OFFENSES, NOT INCLUDED IN EACH OTHER AND WHICH WILL NOT MERGE.

It occurs to us that this rule is clearly applicable in the case at bar, because the evidence which was admitted over the objection of appellants was offered for the purpose of shedding light upon the issue of disturbing the peace of the family of J. W. McCrary, and not for the purpose of showing that the acts done by Wilcox and Ungles was in pursuance of an understanding or agreement to assault and injure a United States officer on account of his official acts. Indeed, there as no proof offered by the government in this second trial upon this latter question, i. e., as tending to show that the conspiracy, if one existed, was formed and executed, ON ACCOUNT OF SHEPARD'S OFFICIAL ACTS.

Reading from the syllabus in the case of Prince vs. State, 19 Ohio, 423, we find:

"On the plea of *autrefois acquit*, the true test to determine whether the accused has been put in jeopardy, is whether

the things alleged in the second indictment, if proven to be true, would have warranted a conviction on the first indictment."

In this case the record set forth in the plea shows a trial and acquittal of a charge of burglary in the mill of Horace E. Westerhaven. The plea avers that the said Price indicted and acquitted is the same party charged in the indictment to which the plea is interposed; that said Charles B. Westerhaven in whose house the burglary in the last indictment is alleged to have been committed is the same person, who in the other and first indictment, was named Horace E. Westerhaven, and that the burglary charged in the first indictment is the same charged in the second. To this plea the state demurred; demurrer was sustained and the defendant required to plead over and on trial was convicted and sentenced; it was claimed that the court erred in sustaining the demurrer to the plea but the judgment was affirmed, and in so doing Justice Caldwell reiterated the rule laid down in Archbold's Criminal Pleading, page 87:

"When a man is indicted for an offense and acquitted, he cannot afterwards be convicted for the SAME OFFENSE, provided the first indictment were such that he could have been lawfully convicted upon it, and if he be thus indicted the second time, he may, plead *autrefois acquit*, and it will be a good bar to the indictment."

Otherwise, we take it, where the same criminal acts include several different offenses, as in the case before us.

Quoting further Justice Caldwell says:

"The true test by which the question whether such a plea

is a sufficient bar in any particular case, may be tried, is, whether the evidence necessary to support the second indictment would have been sufficient to prove a legal conviction in the first."

In the case under consideration the facts *were not* sufficient to prove a conviction in the first trial.

The authorities cited and the doctrine invoked by appellants are entirely inapplicable to the case at bar, as they seem to go in nearly every instance to civil actions, and are directed especially at estoppels by judgment, and do not support the distinctions attempted to be drawn between estoppel by judgment and estoppel by verdict.

Appellants quote from Van Fleet's Former Adjudication, Vol. 2, page 1242, section 628, which reads:

"If there is a contest between the state and the defendant in a criminal case over an issue I know of no reason why it is not res adjudicata in another criminal case."

Certainly, this is true, because it is a well established rule of law that a man cannot be put twice in jeopardy for the same offense, but the words "res adjudicata" as used by appellants in this quotation are misleading, for the reason that there can be no res adjudicata pleaded, unless the issues upon which the defendant is tried are identical.

FOURTH ASSIGNMENT.

The fourth and last specification of error is that the court erred in excluding testiomny of the witness McFarland. The appellants sought to show that the assaulted party was in the habit of speaking

rudely and violently.

This was not an attempt to prove reputation. The court informed defendants' counsel that they had the right to prove reputation, but they stated that they desired to show his custom of speaking rudely and violently.

The testimony was not offered in mitigation but for the purpose of corroborating the plea of justification, and it is a rule too well settled to require the citation of authorities, that words, however opprobrious, will not justify even a simple assault.

But even conceding that the assaulted party's reputation for talking in a rude and violent manner would have been competent, on the question of mitigation, it was not sought to prove this reputation, but they undertook to prove by one witness that he himself knew it.

None of the exceptions to the fundemental rule laid down in Greenleaf on Evidence, Sec. 55, that:

> ".....that the character of the party, in regard to any particular trait, is not in issue, unless it be the trait which is involved in the matter charged against him; and of this it is only evidence of general *reputation* which is to be admitted, and not positive evidence of general bad *conduct*" even intimate that the specific acts of general conduct or the knowledge or belief of an individual, are competent in any case.

That there was no error in excluding this testimony, we respectfully refer the court to a consideration of the following authorities:

Greenleaf on Evidence, Sec. 55;

McLain's Criminal Law, Sec. 307, 423;

Holmes vs. State, 88 Ala., 26;

Woods vs. State, 36 S. W., 96;

Gillett on Indirect and Collateral Evidence, p. 100.

Plaintiffs in error waive the fifth and sixth assignments of error.

The verdict should be sustained.

Respectfully submitted,

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