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County,[27] the state courts attempted to apply the original package test to factually similar situations in which there were, in fact, no "packages," while apparently ignoring the broader question of whether the importer had so acted upon the goods that they had been incorporated with the mass of property in the country. This narrow approach has resulted in conflicting decisions which fail to shed light on the basic question: when, for purposes of state taxation, do imported goods cease to be imports?

ACQUITTAL OF RECKLESS DRIVING DOES NOT BAR PROSECUTION FOR VEHICULAR HOMICIDE

After being involved in a fatal automobile collision, defendant was charged by information, in a court of limited jurisdiction, with the misdemeanor of reckless driving.[1] Trial by a three judge panel resulted in acquittal.[2] Subsequently, an indictment was returned by county grand jury charging defendant with vehicular homicide, a felony requiring proof of driving in a "reckless or culpably negligent manner, whereby a human being is killed."[3] Defendant contended that the prosecution for vehicular homicide would subject him to double jeopardy. The Appellate Division of the New York Supreme Court granted an order prohibiting the trial, agreeing that it would necessarily be a retrial of the charge of reckless driving.[4] On appeal, although no more than three members of the New York Court of Appeals could agree on a basis of decision, four of the seven judges voted for reversal. *Held:* Acquittal of the misdemeanor of reckless driving, in a court of limited jurisdiction, will not necessarily bar subsequent prosecution in a court of greater jurisdiction for the felony of vehicular homicide, even though the latter crime requires proof that defendant drove in a "reckless or culpably negligent manner." *Martinis v.*

[27] 78 Cal. App. 2d 181, 177 P.2d 804, *cert. denied*, 332 U.S. 766 (1947).

[1] N.Y. VEHICLE AND TRAFFIC LAW § 1190, provides: "Reckless driving shall mean driving or using any motor vehicle . . . in a manner which unreasonably interferes with the free and proper use of the public highway, or unreasonably endangers users of the public highway. . . ."

[2] The acquittal of reckless driving received both local and national publicity, in part because defendant's father was then a judge of the court in which the trial took place, though not a member of the panel that tried him. The trial also involved conflicts in testimony which resulted in investigations of possible perjury. See New York Times, July 2, 1963, p. 1, col. 3; New York Times, Aug. 3, 1963, p. 1, col. 3.

[3] N.Y. PEN. LAW § 1053-a provides: "A person who operates or drives any vehicle of any kind in a reckless or culpably negligent manner, whereby a human being is killed, is guilty of criminal negligence in the operation of a vehicle resulting in death."

[4] *In re* Martinis, 20 App. Div. 2d 79, 244 N.Y.S.2d 949 (1963).

Supreme Court, 15 N.Y.2d 240, 206 N.E.2d 165, 258 N.Y.S.2d 65 (1965).[5]

Both the New York and United States Constitutions prohibit successive prosecutions for the "same offense."[6] Since protection is not limited to successive prosecutions under a single statutory provision,[7] the problem is to determine when two separately stated offenses are the same for double jeopardy purposes. To meet this problem, most courts employ some variation of the "same evidence" test, permitting a second trial for the same act if each offense requires proof of an additional fact which the other does not.[8] An adjunct to this test is the "necessarily included offense" doctrine, which bars a second prosecution if there has been a prior acquittal of a lesser offense which constitutes an essential element of the greater crime.[9] In cases in which the "included offense" doctrine would seem to apply, the fact that the initial prosecution took place in a court of lesser jurisdiction will

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[5] 79 HARV. L. REV. 433 (1965).

[6] U.S. CONST. amend. 5; N.Y. CONST. art. 1, § 6.

[7] People v. Barrow, 42 Misc. 2d 888, 249 N.Y.S.2d 111 (1964), and cases cited therein; People v. Goldfarb, 152 App. Div. 870, 873, 138 N.Y.S. 62, 64-66, *aff'd*, 213 N.Y. 664, 107 N.E. 1083 (1926). For an explanation of the development of this concept, see Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 317, 319-29 (1954).

[8] There are numerous variations of this test. See Comment, 57 YALE L.J. 132 (1947). Most well-reasoned decisions require *each* offense to have an independent element. See, *e.g.*, Gavieres v. United States, 220 U.S. 338 (1911); Lugar, *supra* note 7. Under this test a defendant may be successfully tried for assault with a deadly weapon and assault with intent to kill. Although both crimes require proof of the element of assault, each also requires proof on an element independent of the other; to prove assault with a deadly weapon it is unnecessary to show intent to kill, and vice versa. But if the same evidence is necessary to prove both crimes, then the second prosecution will be barred. See Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591, 608 (1961).

New York, despite a statute which proscribes successive prosecution for the "same act or ommission" (N.Y. PEN. LAW § 1938) has applied the "same evidence" test. People v. Barrow, 42 Misc. 2d 888, 249 N.Y.S.2d 111 (1964), and cases cited therein. See People *ex rel* Maurer v. Jackson, 2 N.Y.2d 259, 140 N.E.2d 282, 159 N.Y.S.2d 203 (1957).

[9] This doctrine is set out in ALI ADMIN. CRIM. LAW: DOUBLE JEOPARDY § 17 (1935). The necessarily included offense rule was developed to protect the defendant in those cases where the commission of one offense necessarily requires the commission of another offense, and that lesser offense has once been tried. The rule applies to only a small number of cases, and categories covered by it remain uncertain. See Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 YALE L.J. 513, 529 (1949). The rule should bar a second trial if the state has failed, in the first trial, to prove one essential element of the greater crime. No legitimate purpose can be served by a subsequent prosecution where one essential element for conviction has already been resolved against the state. The doctrine springs in part from the need for judicial consistency. If a court of competent jurisdiction resolves against the state an issue of fact or law essential to another crime, conviction of the latter crime would render the former acquittal meaningless, and the decisions of the two courts would necessarily conflict.

The lesser included offense doctrine, though recognized by New York courts (People v. Barrow, *supra* note 8, 249 N.Y.S.2d at 116), apparently was not applied in that state prior to the principal case.

sometimes bar a double jeopardy plea.[10] The "same transaction" test disregards differences in statutory definitions and prohibits a second prosecution for the same conduct.[11] Regardless of the test used, it appears that the defense of double jeopardy has become increasingly unsuccessful,[12] and that the related defense of collateral estoppel will be only allowed in the most clear-cut cases.[13]

Three judges in the principal case, in an opinion by Judge Dye, reasoned that, since the two crimes were based on unrelated statutory schemes[14] and the first court had no jurisdiction over a prosecution for the greater offense, the second trial would not constitute double jeopardy. They concluded that although both charges arose out of the "same transaction," they were different because they required different elements of proof. Three other judges, in a dissenting opinion by Judge Fuld, took the view that reckless driving is an essential element of the crime of vehicular homicide, and therefore a second trial would constitute double jeopardy. Two of the judges who joined in this opinion argued further, in a separate dissent, that the doctrine of collateral estoppel should apply to bar a second trial.[15] The seventh judge was,

[10] People v. Herbert, 6 Cal. 2d 541, 58 P.2d 909 (1936); Commonwealth v. Jones, 288 Mass. 150, 192 N.E. 522 (1934); Commonwealth v. McCan, 277 Mass. 199, 178 N.E. 633 (1931); People v. Townsend, 214 Mich. 267, 183 N.W. 177 (1921); State v. Currie, 41 N.J. 531, 197 A.2d 678 (1964); Commonwealth v. Bergen, 134 Pa. Super. 62, 4 A.2d 164 (1939); State v. Empey, 65 Uath 609, 239 Pac. 25 (1925); *cf.* Diaz v. United States, 223 U.S. 442 (1912) (dictum); State v. Garner, 360 Mo. 50, 226 S.W.2d 604 (1950). *Contra,* State v. Heitter, 203 A.2d 69 (Del. 1964) (overruling State v. Simmons, 48 Del. 166, 99 A.2d 401 (1953)); *cf.* State v. Bacom, 159 Fla. 54, 30 So. 2d 744 (1947); People *ex rel* Kwiatkowski v. Trinkle, 169 Misc. 687 9 N.Y.S.2d 661 (City Ct. 1948). It has been suggested that one basis fo rdenial of the double jeopardy plea, when courts are of unequal jurisdiction, is the existence of collusion or "at least too great amount of defendant's initiative in bringing the case before the lower jurisdiction." Kircheimer, *supra* note 9, n. 78. In People *ex rel* Kwiatkowski v. Trenkle, *supra,* 9 N.Y.S.2d at 669, the state gave full-fledged consent to proceed before the Magistrate's Court. In the principal case, the defendant *"sought* and had" a prompt trial in the inferior court. 206 N.E.2d at 166, 258 N.Y.S.2d at 66 (Emphasis added).

[11] See Comment, 11 STAN. L. REV. 735, 743 (1959). The "same transaction" test has been followed in Georgia, Kentucky, Oklahoma, and Tennessee. ALI, ADMIN. CRIM. LAW: DOUBLE JEOPARDY 29-30 (1935). Lugar, *supra* note 7, n. 26, cites New Jersey as consistently applying this test. It appears that this is no longer the case. State v. Currie, 41 N.J. 531, 197 A.2d 678 (1964).

[12] See, *e.g.,* Hoag v. New Jersey, 356 U.S. 464 (1958). See Mayers & Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions,* 74 HARV. L. REV. 1 (1960); Comment, 65 YALE L.J. 339 (1956).

[13] *E.g.,* Hoag v. New Jersey, 356 U.S. 464 (1958).

[14] For a first offense, reckless driving, a misdemeanor, is punishable under N.Y. VEHICLE AND TRAFFIC LAW § 1801 by a fine up to $100 and thirty days imprisonment. "Criminal Negligence in the operation of an automobile resulting in death," a felony, is punishable under N.Y. PEN. LAW § 1053-b by imprisonment up to five years and fine up to $1000.

[15] The separate dissenters reasoned that since the fact of driving in a reckless or culpably negligent manner was determined in favor of the accused, and since this fact was essential to a finding of guilty as charged in the second indictment, the second prosecution should be barred by collateral estoppel.

on the record before him, unable to decide whether the second trial would constitute double jeopardy. Judge Burke, concurring in denial of the writ of prohibition, said that it was possible to convict of vehicular homicide without proving the crime defined in the traffic law, and concluded that it would only be clear that double jeopardy had attached if, at the second trial, the prosecution relied on proof of the "same inseparable acts."

The first of two arguments utilized by Judge Dye in rejecting defendant's claim of double jeopardy was that it would be a "travesty of justice" to allow a prior prosecution for a minor traffic offense to preclude subsequent prosecution for a felony. The essence of this argument is that prosecution in a court of inferior jurisdiction does not present the element of harrassment which is traditionally prohibited by the doctrine of double jeopardy.[16] Traffic violations are tried quickly and informally, and punishment is minor compared to that fixed by the homicide statute. In expressing these views, Judge Dye said, "A defendant charged with a traffic offense in an inferior . . . court . . . rests secure in the fact that he can only be prosecuted for a misdemeanor."[17]

This argument appears unsound in view of the explicit requirement that reckless driving be proved for each crime. By statute, in New York, "a conviction . . . [of the lesser charge in the principal case] shall not be a bar to a prosecution . . . for a homicide. . . ."[18] Therefore, if a defendant was *convicted* of the misdemeanor, and a death had resulted from his conduct, a felony prosecution could follow. In the second prosecution, the prior verdict of guilt would at least be admissible[19] as evidence of the reckless driving element of the homicide, and might be the conclusive proof of that essential element.[20] A defendant, therefore, could find no "security" if the first prosecution was for a minor offense, for—if he failed to put forth his full effort in that defense and was con-

[16] This argument was successful in the following cases: People v. Herbert, 6 Cal. 2d 541, 58 P.2d 909 (1936); State v. Currie, 41 N.J. 531, 197 A.2d 678 (1964); State v. Shoopman, 11 N.J. 33, 94 A.2d 493 (1953). *Contra,* State v. Heitter, 203 A.2d 69 (Del. 1964) (overruling State v. Simmons, 48 Del. 166, 99 A.2d 401 (1953)). The other cases cited in note 10, *supra,* though dealing with the question of prior *prosecution* in a court of lesser jurisdiction, cannot validly be cited as supporting the view of Judge Dye in the principal case, as they lack the element of *acquittal,* present in the principal case, and the statutory requirement that "recklessness" be proved for both crimes.

[17] 206 N.E.2d at 167, 258 N.Y.S.2d at 68.

[18] N.Y. VEHICLE AND TRAFFIC LAW § 1800.

[19] People v. Formato, 286 App. Div. 357, 143 N.Y.S.2d 205, 211 (1955) (dictum), *aff'd mem.* 309 N.Y. 979, 132 N.E.2d 894 (1956).

[20] United States v. Rangel-Perez, 179 F. Supp. 619, 622-625 (S.D.Cal. 1959); People v. Mojado, 22 Cal. App. 2d 323, 70 P.2d 1015 (1937). There is little authority on this point. See Gershensen, *Res Judicata in Successive Criminal Prosecutions,* 24 BROOKLYN L. REV. 12, 26 (1958).

victed—one essential element of the homicide could be established against him.

Only if one kind of reckless driving were in some way different from the other could a defendant "rest secure" in the lesser prosecution. There is no meaningful showing of how the two kinds of driving might, in fact, differ. Judge Dye suggests that the two statutory definitions of reckless driving can be distinguished on the basis of result; one "interferes" or "endangers" the users of the highway, and the other refers to conduct "whereby a human being is killed." But this seems to be a distinction without a difference. "Endangers," as used in the traffic code, could only reasonably be construed as referring to conduct which might result in injury or death. The class to be protected is the same under both codes, and no factual difference in conduct is suggested.[21]

Further, it would not seem unfair to the state to prohibit a second prosecution. In the principal case it would have been possible at the time of the first prosecution to indict for vehicular homicide, as all the facts were known. The state might have delayed the midsdemeanor trial pending prosecution for the greater offense.[22] When the misdemeanor trial is not delayed the state—rather than the accused—should suffer the consequences. Otherwise, the state is allowed, in effect, to "test its case" at the expense of the defendant, knowing that it may try again even if it fails to convict the first time.[23]

The second line of reasoning advanced by Judge Dye was that the "same evidence" test, when applied, indicated that defendant was not in double jeopardy. The opinion stated that, if "each case had an independent element... the state was entitled to its day in court on each charge."[24] However, the conclusion as to the application of this test is unsound. Although the opinion pointed out that proof of vehicular homicide requires an independent element, *i.e.*, the killing of a person, it failed to show the independent element needed for the reckless driving charge.

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[21] See the discussion in State v. Heitter, 203 A.2d 69 (Del. 1964).

[22] N.Y.C. CRIM. CT. ACT. § 32 (Removal of misdemeanor cases). The problem is more difficult if the state is powerless to prevent the misdemeanor trial. In such a situation, a second prosecution would be more acceptable. This argument was made to explain the result in State v. Shoopman, 11 N.J. 333, 94 A.2d 493 (1953). Bigelow, *Former Conviction and Former Acquittal*, 11 RUTGERS L. REV. 487, 505 (1957).

[23] It could be argued that to permit acquittal in a cour tof lesser jurisdiction to be the final determination of the issue of reckless driving would have the effect of granting jurisdiction over the felony to the inferior court. The argument should not be persuasive, as the choice as to which court may first try the defendant rests with the prosecution.

[24] 206 N.E.2d at 169, 258 N.Y.S.2d at 70-71.

Judge Fuld's dissent stated, in agreement with the position of the Appellate Division, that "reckless driving is an essential element of the homicide."[25] In view of the explicit wording of the statutes, and in the absence of a showing that reckless driving as a misdemeanor is different from reckless driving as used in the homicide statute, it is suggested that this is the result which should have been reached.

Judge Burke apparently applied the "same transaction" test. His concurring opinion questioned whether the defendant had committed inseparable acts made punishable by more than one statute. He argued that if the state twice sought to prove the same act, defendant would be twice in jeopardy. Judge Burke, however, was of the opinion that New York law did not necessitate proof of the act of reckless driving in order to gain a vehicular homicide conviction. His theory, apparently, was that there is a distinction between acts which constitute "culpable negligence"—as used in the homicide statute—and those which constitute reckless driving. It is questionable whether the New York cases support Judge Burke's theory,[26] though support may be found in other jurisdictions.[27] The problem in the principal case illustrates the difficulty of defining "same transaction." Six members of the court considered defendant's conduct to be a single incident. Judge Burke, however, was willing—for double jeopardy purposes—to carve the conduct into separate and distinct acts and allow the state at the second trial to attempt development of a fine distinction between recklessness and culpable negligence. Thus the "same transaction" test, normally considered to favor the defendant, here operated to the state's advantage by permitting a second prosecution.[28]

The approach urged by Judge Burke will not necessarily protect the defendant. As has been pointed out, the defendant's plea is based on the policies that an accused should not be repeatedly harassed for the same offense, and that a matter once judicially determined should not be inquired into a second time. Yet Judge Burke permitted the second trial on the theory that the state might prove a separate transaction.

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[25] *Id.* at 170, 258 N.Y.S.2d at 72.

[26] Judge Burke relied on People v. Decina, 2 N.Y.2d 133, 138 N.E.2d 799, 157 N.Y.S.2d 558 (1956), and People v. Eckert, 2 N.Y.2d 126, 138 N.E.2d 794, 157 N.Y.S. 2d 551 (1956). Neither of these decisions really distinguishes between recklessness and culpable negligence.

[27] Commonwealth v. Welansky, 316 Mass. 383, 55 N.E.2d 902 (1944); Andrews v. D.P.P., [1937] A.C. 576, 581-583. See MODEL PENAL CODE § 2.02, comment (Tent. Draft No. 4, 1955).

[28] It is apparent that a rigid interpretation of either the "same evidence" or "same transaction" tests may lead to restriction of double jeopardy protection. See Comment, 65 YALE L.J. 339, 348 (1956).

If, at the second trial, the state failed to prove a second transaction, the defendant would then have had to stand trial twice for the same conduct, and basic policy objective would not have been met. Nevertheless, Judge Burke's approach could make it possible to, at least partially, avoid such harassment. This could be accomplished by immediately halting the second trial when it becomes apparent that the state seeks to prove the same inseparable acts.[29]

The defense of collateral estoppel,[30] urged by two dissenters, avoids the limitations of double jeopardy treatment while achieving the policy objectives which give rise to double jeopardy protection. Most courts have held that collateral estoppel is available in criminal cases,[31] but the defense is sometimes ignored or avoided when it conflicts with the jeopardy determination.[32] In the principal case, Judge Dye dismissed the defense with little explanation or authority,[33] even though it seems clear that the doctrine has a place in the criminal law of New York.[34]

Two reasons might be advanced why the state should twice be allowed to attempt to prove the fact of reckless driving. First, it could be argued that, since the defendant in a second trial could probably contest the fact of reckless driving despite a prior conviction,[35] the state should be able to challenge a prior acquittal. This is the doctrine

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[29] This was not done in the principal case. At the second trial, it was not until after the case had gone to the jury, and the jury had failed to reach a verdict, that the trial court judge ruled—on the basis of Judge Burke's opinion—that Martinis was twice in jeopardy. People v. Martinis, 46 Misc. 2d 1066, 261 N.Y.S.2d 642 (Sup. Ct. 1965). The state will appeal. N.Y. Times, July 22, 1965, p. 1, col. 3.

[30] Collateral estoppel is essentially a procedural concept. "A party to a lawsuit is estopped to assert or deny a given issue of law or fact because that question has been determined in a previous lawsuit in which the party or someone in privity with him has participated." Note, *Collateral Estoppel In New York*, 36 N.Y.U.L. REV. 1158 (1961). See Sealfon v. United States, 332 U.S. 575 (1948).

[31] See cases cited in Lugar, *supra* note 7, at 330.

[32] In State v. Shoopman, 11 N.J. 333, 94 A.2d 493 (1953), the court ignored the issue of collateral estoppel in making its determination. State v. Currie, 41 N.J. 531, 197 A.2d 678 (1964), avoided application of the doctrine, but recognized that the defense had merit in *Martinis*.

[33] Judge Dye's only reference to collateral estoppel was as follows: "Absent any statutory or decisional law supporting petitioner's claim of double jeopardy, he may not find a substitute by invoking principles of collateral estoppel. Nor may any analogy to principles of *'res judicata'* in a civil suit be applied here. The situation of this defendant is not at all like that of a party to a civil suit." 206 N.E.2d at 168, 258 N.Y.S.2d at 70. Judge Dye relied on Hoag v. New Jersey, 356 U.S. 464 (1958). That case is not analogous, as the defense in *Hoag* was thwarted because there was no way of knowing the grounds upon which the jury had based its decision.

[34] The dissenters relied on People v. LoCicero, 14 N.Y.2d 374, 200 N.E.2d 622, 251 N.Y.S.2d 953 (1964), which suggests that the doctrine is applicable but refused to apply it. See People v. Grzesczak, 77 Misc. 202, 137 N.Y.S. 538 (Nassau County Ct. 1912); Note, *Collateral Estoppel in New York, supra* note 30, at 1180.

[35] People v. Formato, 286 App. Div. 357, 143 N.Y.S.2d 205 (1955) (dictum), *aff'd mem.*, 309 N.Y. 979, 132 N.E.2d 894 (1956).

of mutuality, applied in civil cases.[36] It is suggested that the doctrine should not apply in criminal law. The basic policy consideration of preventing harassment by the state, which commands superior resources, overrides the need for mutuality of estoppel.[37] The second factor hindering application of the defense of collateral estoppel is that, without a special verdict in the first case, a dispute may arise as to whether allegations at the second trial actually were in issue at the first.[38] This consideration is relevant in the principal case only if Judge Burke's distinction between recklessness and culpable negligence is accepted. Relying on this distinction, it would be possible to argue that the ultimate fact of reckless driving was not being relitigated in the second case. However, the New York courts have allowed introduction of the record of the first trial for the purpose of showing the scope of the issues there determined.[39] If this was possible in the principal case, the absence of a special verdict would be no problem. Further, Judge Burke's distinction was not adopted by a majority in the principal case and, since the absence of recklessness had been finally determined, the state should have been estopped from attempting to prove it again.

Underlying the opinions in this case are conflicting views as to primary policy considerations. The question was whether prosecution for a traffic offense presents the element of harrassment that the law traditionally prohibits. Prompting this argument is concern that, too often, defendants escape just prosecution through technicalities, and that, since the state is denied appeal when there has been an acquittal,[40] courts should be more willing to permit second prosecutions in order to prevent avoidance of well-merited punishment.[41]

Serious doubt exists as to whether the above considerations should lead to restriction of double jeopardy protection, even when the equities seem to demand such restriction. A defendant should not be subjected

[36] See Iselin v. C. W. Hunter Co., 173 F.2d 388 (5th Cir. 1949); Ericson v. Slomer, 94 F.2d 437 (7th Cir. 1938); Schafer v. Robillard, 370 Ill. 92, 17 N.E.2d 963 (1938).

[37] See discussion in Comment, *Collateral Estoppel in Criminal Cases,* 28 U. CHI. L. REV. 142, 149-51 (1960).

[38] See Hoag v. New Jersey, 356 U.S. 464 (1958); People v. Pearson, 120 Misc. 377, 199 N.Y.Supp. 488 (Nassau County Ct. 1923); Kirchheimer, *supra* note 9. *But see* Sealfon v. United States, 332 U.S. 575 (1948); United States v. DeAngelo, 138 F.2d 466 (3d Cir. 1943).

[39] People v. Rogers, 184 App. Div. 461. 171 N.Y.Supp. 451 (1918).

[40] N.Y. CODE CRIM. PROC. § 518. Denial of the right to appeal an acquittal is based on the double jeopardy doctrine. People v. Tallman, 193 Misc. 563, 84 N.Y.S.2d 359 (Herkimer County Ct. 1948).

[41] For argument favoring restriction of double jeopardy protection, see Horack, *The Multiple Consequences of a Single Criminal Act,* 21 MINN. L. REV. 805 (1937).

to the expense, effort and anxiety of a criminal defense[42] when he has been acquitted, in a court of competent jurisdiction, of an essential element of the crime. The prosecution should not be tempted to proceed with an incompletely prepared case, knowing it will have the opportunity to try again. To allow this approach is to defeat certainty in criminal law and foster disrespect for the judicial system. Most of the problems in this and similar cases of successive prosecutions could be avoided by requiring the state to charge, in a single indictment, all offenses growing out of the same transaction.[43]

LOSS CARRYOVERS UNDER THE 1954 CODE: REJECTION OF THE *LIBSON SHOPS* DOCTRINE

Taxpayer corporation, which had sustained losses in the hardware business, entered into an agreement with two partners engaged in real estate development whereby a department of real estate development was established within the corporation. Funds needed for the department's operations were furnished by the partners through the purchase of non-voting preferred stock valued at approximately two-fifths of the total value of the corporate stock. By the terms of the agreement, ninety percent of the profits of the department were to be distributed to the preferred stockholders. Voting control of the common stock was placed in a voting trust. Thereafter, the hardware business was discontinued and the real estate department operated at a profit. In filing income tax returns, the corporation offset the past losses of the hardware business against profits of the real estate department. The Commissioner's disallowance of the loss carryover[1] was upheld by the Tax Court on the basis that there was not the continuity of business enterprise between the hardware business and the real estate development required by the so-called *Libson Shops* doctrine.[2] On appeal, the Ninth Circuit Court of Appeals reversed.

[42] See Green v. United States, 355 U.S. 184 (1957).

[43] This is the solution adopted in MODEL PENAL CODE § 1.08(2) (Tent. Draft No. 5, 1956).

[1] Net operating loss carryovers permit a form of income "averaging" by allowing a corporation to reduce taxable income in a profitable year by offsetting losses of prior years. Section 172 of the INT. REV. CODE OF 1954 provides that a net operating loss can be carried back as far as the third year preceding the loss, and offset against taxable income of those years. If this carryback does not absorb the loss the remainder may be carried forward for as many as five years. See generally Brody, *Net Operating Loss Deduction*, 34 TAXES 325, 326-38 (1956).

[2] See text accompanying note 14 *infra*.