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Criminal Law -- Inconsistent Verdict -- Double Jeopardy (Goodwin et al v. Stati, Fla. 1946)

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RECENT CASES
CRIMINAL LAW — INCONSISTENT VERDICT — DOUBLE JEOPARDY

In a recent Florida case, defendants were charged on two counts in the same indictment with (1) breaking and entering with intent to commit larceny, and (2) larceny. They were acquitted of the former and convicted of the latter. On appeal, they contended that the verdict was inconsistent and should be set aside. The Supreme Court held that the offense of burglary does not necessarily include that of larceny and that the verdict was not inconsistent.

Cases relied on by appellants establish that in one type of case, inconsistency of verdict is ground for reversal. In this type, if the jury finds a defendant guilty on two counts both of which he cannot in law be guilty of because guilt of one necessarily proves innocence of the other, the verdict must be set aside. Thus, where one has been convicted of larceny, he cannot be adjudged guilty of criminally receiving the thing stolen. The statutory crime of receiving stolen goods is a separate offense, not intended to punish the thief by way of double penalty. Rather, it is aimed at those who encourage theft by making it easy or profitable.

Another type of inconsistency is not ground for setting the verdict aside. This occurs, where a defendant is acquitted on one offense and convicted on another closely related to it, proof of both offenses depending upon proof of the same facts. For example, when the defendant is acquitted of the charge of possession of intoxicating liquor, but convicted of maintaining a nuisance, the courts have maintained that consistency in the verdict is not necessary, if the resulting error has caused no substantial injury. It is permissible for a jury to convict on one count.

* Goodwin et al. v. State, 26 So. (2d) 898 (1946).
  * Bargesser v. State, 95 Fla. 404, 116 So. 12 (1928); Gordon et al. v. State, 97 Fla. 806, 122 So. 218 (1929).
  * See note 1, supra; Commonwealth v. Haskins, 128 Mass. 60 (1880); Tobin v. People, 104 Ill. 555 (1882); Rosenthal v. U. S., 276 F. 714 (1921).
  * 2 Bishop’s New Criminal Law, para. 1140; Wharton’s Criminal Law, 10th ed. para. 986; Regent v. Perkins, 5 Cox C. C. (Eng.) 554; In re Franklin, 72 Mich. 615, 43 N. W. 997 (1889); Owen v. State, 52 Ind. 379 (1876).
  * Adams v. State, 60 Fla. 1, 53 So. 451 (1910); Ann. Cas. 1912 B. 1209.
and acquit on another when they could have convicted for both on the same evidence.9

The court in the principal case held that the verdict was not inconsistent, relying on a prior Florida decision which dealt with double jeopardy.10 Double jeopardy occurs when a person, after acquittal or conviction of a crime, is subsequently charged with the same or any other crime, which includes or is included in the one of which he was acquitted or convicted. A Florida peculiarity in this respect has been since corrected. Formerly, Florida held that a conviction or acquittal in order to be a bar to another prosecution had to be for the same offense or for an offense of a higher degree and necessarily including the offense for which the accused stood indicted.11 This position has been abandoned and Florida now generally holds that if a minor offense is embraced within a higher crime as a constituent element or component part of it, and, on the trial of the higher offense, there could be a conviction of the minor offense, then a conviction of the minor offense will bar a prosecution for the higher crime.12

The inconsistent verdict problem is concerned with a single proceeding, whereas that of double jeopardy deals with consecutive proceedings.13 Verdicts on different counts, however, are not to be set aside as inconsistent unless the finding on one necessarily includes finding that the essential element in the other does not exist.14 If the two crimes are distinct, on the other hand, although growing from the same transaction, neither a plea of inconsistency nor of double jeopardy will avail.

It has been held in another jurisdiction that a former acquittal of larceny does not bar a subsequent indictment for procuring the same goods by false pretenses.15 This is in effect, the application of the Bargesser and Gordon cases to the cognate principle of double jeopardy. On the other hand, a person convicted of larceny might not thereafter be tried for robbery, if the larceny in the former charge was an essential element.16 By deciding in the principal case that the verdict was not inconsistent, the court properly eliminated the question whether inconsistency demands that a verdict be set aside. This fact notwithstanding, the court proceeded to rule that refusal to set aside an inconsistent

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* Brown v. State, 135 Fla. 90, 184 So. 777 (1938).

* Bowell v. State, 20 Fla. 869 (1884).

* Sanford v. State, 75 Fla. 393, 78 So. 340 (1918).

*16 Morgan v. Devine, 35 S. Ct. 712 (1914).


verdict is not reversible error. It relied in part on a statute which prohibits reversal in the absence of error injuriously affecting appellant’s substantial rights,"¹⁰ and in part on the Dunn case."¹¹ The Dunn case, however, was one where the defendant was acquitted of possessing intoxicating liquor but convicted of maintaining a nuisance by maintaining a place for the sale of intoxicating liquor. If defendant were to stand convicted of larceny and receiving the identical property as stolen goods, as in the Bargesser and Gordon cases,"¹² it is believed that the court would not hesitate to disregard as obiter the view expressed in the principal case, and reverse.

REAL PROPERTY — DOWER — EFFECT OF JUDGMENT AND EXECUTION*

In a recent decision, the Supreme Court of Florida has laid down the unequivocal doctrine that a judgment and execution sale of a married debtor’s real estate not only divests him of all title thereto but also completely extinguishes the wife’s right of dower in the property.¹³ This represents a fundamental change in the attitude of the Florida court toward this question and is completely contrary to the great weight of authority in other jurisdictions.

As stated in a standard authority, the majority rule—and erstwhile Florida rule—is: "A sale of lands under execution against the husband issued under a judgment rendered against him after the marriage will not cut off the wife’s dower.⁴ The law is settled in accordance with the above in those states where the common law rule prevails and if the husband by his own conveyance cannot divest the wife’s dower, this cannot be done by a sale in execution under judgment against him."¹⁵

There is no doubt that this rule represents the great weight of authority. The rule is so well settled that in recent years the courts have very seldom been called upon to determine the question; it is so well settled that it is thus stated without qualification even in encyclopedias of law.¹⁶ State after state has laid down this rule in the most unequivocal language.¹⁷

¹⁰ Criminal Procedure Act, Sec. 924.33, 1941 Statutes of Fla.
¹¹ Note 6, supra.
¹² Note 2, supra.
* In re Hester’s Estate, 28 So (2d) 164, (Fla. 1946).
† In re Hester’s Estate, supra.
* "It is clear that at the common law sale under a judgment rendered subsequent to marriage will not bar the widow of her dower." 21 Am. Jur. 153.
* "It hardly seems necessary to cite authorities to the proposition that at common law the wife could not be deprived of dower rights in the real estate of her husband through sale upon execution under a judgment obtained against him subsequently to marriage. * * * It has