ROBERT J. WRIGHT, JOSEPH P. McDERMOTT AND VINCENT B. FEELEY ..... APPELLANTS;

1963
*Mar. 20, 21
Jun. 24

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Special pleas—Conspiracy—Interference with administration of justice—Six count indictment—Whether acquittal on conspiracy charge a bar to prosecution on second conspiracy charge—Autrefois acquit—Res judicata—Criminal Code, 1953-54 (Can.), c. 51, ss. 101(b), 518.

The three appellants, W, M and F, were indicted on six counts. Count 1 related to a conspiracy to commit an indictable offence by giving money to a peace officer with intent that the said officer should interfere with the administration of justice. This count was tried separately. All three were acquitted and the Crown's appeal was abandoned.

Count 2 related to a conspiracy to effect the unlawful purpose of obtaining from the same peace officer information which it was his duty not to divulge. Counts 3, 4 and 5 related only to W and charged him with paying money to the peace officer with intent that the latter should interfere with the administration of justice. Count 6 related to the keeping of a common gaming house by F and M, to which they pleaded guilty at a later trial.

At the second trial, the conspiracy under count 2 was tried as well as the substantive offences against W under counts 3, 4 and 5. The special plea of autrefois acquit and the defence of res judicata were raised not only against count 2 but also by W against the substantive offences. On the conspiracy charge, the trial judge held against the appellants on the plea of autrefois acquit, also that the defence of res judicata did not arise and declined to submit it to the jury. The jury convicted. However, on the three counts against W, the judge gave effect to the defence of res judicata and directed the jury to acquit. The appellants appealed against the conspiracy conviction and the Crown appealed against W's acquittal. The Court of Appeal affirmed the conviction on count 2 and ordered a new trial for W on counts 3, 4 and 5. The appellants were granted leave to appeal to this Court on count 2 and W appealed as of right from the order setting aside his acquittal.

Held (Cartwright and Hall JJ. dissenting): The appeal against the conviction on count 2 should be dismissed as well as the appeal of W against a new trial on counts 3, 4 and 5.

Per Taschereau, Fauteux and Judson JJ.: The Court of appeal was right in rejecting the plea of autrefois acquit and in finding that the trial judge was correct in his ruling under s. 518 of the *Criminal Code*. The conspiracies charged in count 1 and in count 2 were not substantially identical. Count 1 involved not only the payment of money but required proof of the intent that the officer should interfere with the

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administration of justice. On the other hand, count 2 did not involve as an element the payment of money with the intent mentioned in s. 101(*a*) but charged the appellants with having conspired for an object which did not necessarily involve an intent that the officer should interfere with the administration of justice.

The trial judge was right in ruling that there was nothing to submit to the jury on the defence of res judicata in respect of count 2. An acquittal on a charge of conspiracy does not pronounce against every part of it. There was no issue on which it could be said that the Crown was estopped in the second trial. The two counts charged two conspiracies with different component elements, and it was impossible to say that the substantial basic facts common to both counts had been determined in favour of the appellants in the first trial.

As to counts 3, 4 and 5 relating to W, the Court of Appeal was right in ordering a new trial. The verdict at the first trial acquitted W of nothing more than his participation in the conspiracy charged on count 1 and did not of necessity involve a finding that he did not commit the substantive offence against s. 101(*b*) charged in those counts.

Per Cartwright and Hall JJ., *dissenting*: The plea of autrefois acquit was not available to the appellants at the trial on count 2. On their trial on count 1 the appellants could not have been convicted on count 2.

It is for the judge to decide as a matter of law whether the defence of res judicata has been made out, and, therefore, the trial judge was right in refusing to admit as an exhibit to go to the jury the complete record of the first trial.

The trial judge should have held that the defence of res judicata had been established at the trial on count 2. The Crown was now estopped from questioning that which was (in fact and law) the ratio of and fundamental to the decision in the first trial. Although the two counts differed in language and in their essential elements, in reality they dealt wtih the same offence. There was only one conspiracy—if there was a conspiracy. The conspirators were not interested in just getting information or in just having the officer give information unlawfully, they wanted the information so as to be forewarned of the impending raids on their gambling clubs. Everything that could be considered unlawful under count 2 was part and parcel of the agreement under count 1. Only one agreement was in evidence and it could not be severed arbitrarily at some point by the Crown so as to create the illusion of two offences from what was in fact only one.

The Crown was not estopped by W's acquittal under count 1 from proceeding to try him for the substantive offences under counts 3, 4 and 5. *McDonald v. The Queen*, [1960] S.C.R. 186, referred to. However, his acquittal under count 1 negatived the essentially criminal element of these substantive offences—the intent that the officer should interfere with the administration of justice. It would not now be open to the jury to find that the money which W admitted having given was given with that intent. W's acquittal should be restored.

APPEALS by the three appellants from a judgment of the Court of Appeal for Ontario[1], affirming their conviction

[1] [1963] 1 O.R. 571, 38 C.R. 321, 1 C.C.C. 254, 38 D.L.R. (2d) 133.

on a conspiracy charge and setting aside a verdict of acquittal in the case of W on charges of corruption. Appeals dismissed, Cartwright and Hall JJ. dissenting.

J. J. Robinette, Q.C., for the appellant, McDermott.

J. Sedgwick, Q.C., for the appellant, Feeley.

P. Hartt, Q.C., for the appellant, Wright.

R. P. Milligan, Q.C., for the respondent.

The judgment of Taschereau, Fauteux and Judson JJ. was delivered by

JUDSON J.:—The three appellants were tried before Spence J. and a jury and acquitted in May 1961 on the first count in an indictment, which was:

1. *ROBERT J. WRIGHT, JOSEPH P. McDERMOTT* and *VINCENT B. FEELEY,* between the first day of January, 1960, and the first day of July, 1960, in the Province of Ontario, did unlawfully agree and conspire together to commit an indictable offence under Section 101(*b*) of the Criminal Code of Canada by corruptly giving money to George Scott, a Peace Officer of the Ontario Provincial Police, with intent that the said George Scott should interfere with the administration of justice, contrary to the Criminal Code of Canada, Section 408(1)(*d*).

The Crown abandoned an appeal against the acquittal and in March 1962, the three appellants were tried before Donnelly J. and a jury on the second count in the indictment, which was:

2. *AND FURTHER THAT* the said *ROBERT J. WRIGHT, JOSEPH P. McDERMOTT* and *VINCENT BERNARD FEELEY,* between the first day of January, 1960, and the first day of July, 1960, in the Province of Ontario, did unlawfully agree and conspire together to effect an unlawful purpose, to wit, to obtain from George Scott, a constable of the Ontario Provincial Police, information which it was his duty not to divulge, contrary to the Criminal Code of Canada, Section 408(2).

The judge held against the accused on a special plea of *autrefois acquit* and they then entered a plea of "Not Guilty" and offered the alternative defence of *res judicata.* The judge held that this defence did not arise and declined to submit it to the jury. The jury convicted and the conviction was sustained by a unanimous judgment in the Court of Appeal[1].

[1] [1963] 1 O.R. 571, 38 C.R. 321, 1 C.C.C. 254, 38 D.L.R. (2d) 133.

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I adopt in their entirety the reasons of the Court of Appeal in rejecting the defence of *autrefois acquit,* and their finding that the learned trial judge was correct in his ruling under s. 518 of the *Criminal Code.* The matter is summarized by Schroeder J.A. in the following paragraph:

> The conspiracy alleged in count 1 involved not only the payment of money to Constable Scott, but an essential ingredient of the offence was the intent of the alleged conspirators that George Scott should interfere with the administration of justice. Count 2, on the other hand, accuses the appellants of having entered into an entirely different kind of conspiracy. It does not involve as an element the payment of money corruptly to Scott or to any other person with the intent mentioned in s. 101(a)(iv) but its object or purpose was stated simply to be the obtainment from Constable Scott of information which it was his duty not to divulge. It was established at the trial that the provisions of the Police Act, now R.S.O. 1960, c. 298 and the Regulations passed pursuant thereto prohibited a police officer from disclosing such information to anyone, but the procurement of that breach of duty did not necessarily involve an intent on the part of the procurers that the police officer should interfere with the administration of justice. Count 2 simply charges the commission of the common law offence of "conspiracy to effect an unlawful purpose." The intent with which the parties are alleged to have entered into the conspiracy charged in count 1, namely, that he (Scott) should interfere with the administration of justice, is not an ingredient of the offence charged in count 2, and its absence is a significant point of distinction between the two offences. They are not substantially indentical or practically the same, and on that ground alone the defence based on the special plea of *autrefois acquit* cannot prevail.

On the defence of *res judicata* the trial judge treated the case as one in which there was no evidence to go to the jury that the first trial had determined in favour of the accused an issue or issues which would determine the second trial in their favour. But the defence says that the facts proved at both trials were the same or substantially the same, the conspirators were the same, the payments of money were the same and the person to whom the payments were made was the same person in each count. The defence argues from this that all the issues in count 2 have been litigated in favour of the accused by their acquittal on count 1, and that the case should have been submitted to the jury on this basis with an appropriate direction from the trial judge. The argument is supported by reference to the defence put forward at the first trial where everything was admitted in the presentation to the jury except the corrupt intent.

The weakness in this submission is in trying to read too much into the verdict of not guilty on count 1 where the

two counts charge conspiracy. At the first trial, the jury found that the proven facts did not amount to the conspiracy charged. At the second trial, the jury found that the same or substantially identical facts did amount to the conspiracy charged in count 2. An acquittal on a charge of conspiracy does not pronounce against every part of it. On what issue is there an estoppel against the Crown? Is it on the agreement or the corruptly giving or the intent in count 1? All that a judge or a jury, if it becomes fit matter for submission to a jury at the second trial, can determine is that the evidence fell short of warranting a conviction on the precise charge. There is no issue on which it can be said that the Crown is estopped in the second trial. This distinguishes the defence of *res judicata* in this case from the comparatively simple examples of its application in cases where there is an estoppel on issues such as identity of the accused (*The King v. Quinn*[1]); possession (*Sambasivam v. The Public Prosecutor*[2]), responsibility for the death of two persons as a result of the same catastrophe, where an acquittal on a charge of manslaughter of A must result in an acquittal on the same charge for the death of B, the whole matter having been litigated, adversely to the prosecution in the first trial (*R. v. Sweetman*[3]; *Gill v. The Queen*[4]).

These simplicities do not arise when the two counts charge two conspiracies with different component elements. It is impossible in the present case to say that the substantial basic facts common to both counts have been determined in favour of the accused in the first trial. The trial judge was right in his ruling that there was nothing to submit to the jury on this defence and I agree with the reasons of the Court of Appeal in affirming his ruling.

Counts 3, 4 and 5 in the indictment relate only to the appellant Wright. Count 3 reads:

> 3. AND FURTHER THAT the said ROBERT J. WRIGHT at the Municipality of Metropolitan Toronto in the County of York on or about the 29th day of February, 1960, did give corruptly to Constable George Scott, a peace officer of the Ontario Provincial Police Force, $400.00 in money with intent that the said George Scott should interfere with the administration of justice contrary to the Criminal Code of Canada, Section 101(*b*).

[1] (1905), 11 O.L.R. 242, 10 C.C.C. 412.
[2] [1950] A.C. 458.
[3] [1939] O.R. 131, 2 D.L.R. 70, 71 C.C.C. 171.
[4] [1962] Que. Q.B. 368, 38 C.R. 122.

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Counts 4 and 5 are in the same terms but refer to payments on subsequent dates.

On these counts, at the second trial, the learned trial judge did give effect to the defence of *res judicata* and directed an acquittal. The Crown appealed to the Court of Appeal against this acquittal and it was there held that there was error in law in giving this direction. The Court of Appeal set aside the order of acquittal on these counts and directed that there should be a new trial. I would affirm the order of the Court of Appeal on this aspect of the appeal for the reasons given by them, namely, that the verdict at the first trial acquitted Wright of nothing more than his participation in the conspiracy charged in count 1 and did not of necessity involve a finding that he did not commit the substantive offence against s. 101(b) charged in counts 3, 4 and 5.

The result is that the appeal of the three appellants against their conviction on count 2 is dismissed and the appeal of the appellant Wright against the order of the Court of Appeal directing a new trial on counts 3, 4 and 5 is also dismissed.

CARTWRIGHT J. (*dissenting*):—I agree with the reasons and conclusions of my brother Hall and wish to add only a few words.

In my respectful view the Court of Appeal[1] erred in considering and comparing the wording of the several counts in the indictment without making a sufficiently careful examination of the evidence adduced and the directions given by the presiding judge at each of the trials. The extracts from the transcripts of the proceedings in the two trials set out in the reasons of my brother Hall appear to me to make plain, what becomes, if possible, even more plain on an examination of the complete records, that in the trial on count 2 the jury were invited to pass upon the very same issue of fact as had already been decided in favour of the appellants by the jury at the trial of count 1.

The following words of Douglas J. delivering the unanimous judgment of the Supreme Court of the United States in *Sealfon v. U.S.*[2] appear to me to be in accordance with

[1] [1963] 1 O.R. 571, 38 C.R. 321, 1 C.C.C. 254, 38 D.L.R. (2d) 133.
[2] (1948), 332 U.S. 575 at 578.

our law and applicable to the circumstances of the case at bar:

It has long been recognized that the commission of the substantive offence and a conspiracy to commit it are separate and distinct offences. thus with some exceptions, one may be prosecuted for both crimes. But *res judicata* may be a defence in a second prosecution. That doctrine applies to criminal as well as civil proceedings and operates to conclude those matters in issue which the verdict determined though the offences be different.

Thus the only question in the case is whether the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offence. This depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial.

Respondent argues that the basis of the jury's verdict cannot be known with certainty.

* * *

The instructions under which the verdict was rendered, however, must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. We look to them only for such light as they shed on the issues determined by the verdict.

* * *

So interpreted the earlier verdict precludes a later conviction of the substantive offence. The basic facts in each trial were identical.

* * *

It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do.

With the greatest respect for those who hold a contrary view, after an anxious perusal of the records in the two trials I see no escape from the conclusion that the trial before Donnelly J. was a second attempt by the Crown to prove the agreement which was necessarily adjudicated in the trial before Spence J. to be non-existent. I am in complete agreement with the opinion of the Supreme Court of the United States from which I have quoted above that this the prosecution may not do.

In *The Queen v. King*[1], Hawkins J., with the concurrence of Cave, Grantham, Lawrance and Wright JJ., stated, not as a new rule but as one which was long established, that "it is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts". I am unable to see how the judgment appealed from can be upheld without a violation of those first principles.

[1] [1897] 1 Q.B. 214 at 218.

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I would dispose of the appeals as proposed by my brother Hall.

HALL J. (*dissenting*):—On May 29, 1961, the appellants came before Spence J. and a jury on an indictment as follows:

1. *ROBERT J. WRIGHT, JOSEPH P. McDERMOTT* and *VINCENT B. FEELEY,* between the first day of January, 1960, and the first day of July, 1960, in the Province of Ontario did unlawfully agree and conspire together to commit an indictable offence under Section 101(*b*) of the Criminal Code of Canada by corruptly giving money to George Scott a peace officer of the Ontario Provincial Police Force, with intent that the said George Scott should interfere with the administration of justice, contrary to the Criminal Code of Canada, Section 408(1)(*d*).
2. AND FURTHER THAT the said *ROBERT J. WRIGHT, JOSEPH P. McDERMOTT* and *VINCENT BERNARD FEELEY* between the first day of January, 1960 and the first day of July, 1960, in the Province of Ontario did unlawfully agree and conspire together to effect an unlawful purpose, to wit: to obtain from George Scott, a constable of the Ontario Provincial Police, information which it was his duty not to divulge, contrary to the Criminal Code of Canada, Section 408(2).
3. AND FURTHER THAT the said *ROBERT J. WRIGHT* at the Municipality of Metropolitan Toronto in the County of York on or about the 29th day of February, 1960, did give corruptly to Constable George Scott, a peace officer of the Ontario Provincial Police Force, $400.00 in money with intent that the said George Scott should interfere with the administration of justice contrary to the Criminal Code of Canada, Section 101(*b*).
4. AND FURTHER THAT the said *ROBERT J. WRIGHT* at the Municipality of Metropolitan Toronto in the County of York on or about the 29th day of March, 1960, did give corruptly to Constable George Scott, a peace officer of the Ontario Provincial Police Force, $200.00 in money with intent that the said George Scott should interfere with the administration of justice, contrary to the Criminal Code of Canada, Section 101(*b*).
5. AND FURTHER THAT the said *ROBERT J. WRIGHT* at the Municipality of Metropolitan Toronto in the County of York on or about the 27th day of April, 1960, did give corruptly to Constable George Scott a peace officer of the Ontario Provincial Police Force, $400.00 in money with intent that the said George Scott should interfere with the administration of justice, contrary to the Criminal Code of Canada, Section 101(*b*).
6. AND FURTHER THAT the said *JOSEPH P. McDERMOTT* and *VINCENT BERNARD FEELEY* at the Township of Toronto in the County of Peel during the month of May, 1960, and previously, did unlawfully keep a disorderly house, to wit: a common gaming house at the premises situate and known as 2165 Centre Road South in the Township of Toronto in the County of Peel, contrary to the Criminal Code of Canada, Section 176(1).

The Crown elected to proceed with the trial of count 1 only.

After a trial which lasted nine days, the jury found the appellants not guilty. An appeal from that verdict was taken by the Crown but later abandoned, so the acquittal on count 1 stands.

Then on March 12, 1962, the appellants came before Donnelly J. and a jury to be tried on counts 2, 3, 4, 5 and 6.

When called upon to plead to count 2, Wright, by his counsel, Mr. O'Driscoll, entered a special plea pursuant to s. 516 of the Code as follows:

> I have a special plea for the accused Wright. Having heard the said indictment read here in Court, the said Robert J. Wright saith that our said Lady the Queen ought not further to prosecute the said Indictment against him, the said Robert J. Wright, because he saith that, heretofore, to wit, on the 9th day of June, 1961, in the Supreme Court of Ontario, in the City of Toronto, in the Province of Ontario, before the Honourable Mr. Justice Spence and a Jury, he, the said Robert J. Wright, was lawfully acquitted of the said offence charged in the said Indictment.
>
> Wherefore he, the said Robert J. Wright, prays Judgment and that he may be discharged from the said premises in the said Indictment specified.

being a plea of autrefois acquit.

McDermott by his counsel Mr. Brooke entered the same special plea.

Feeley followed the same course by his counsel Mr. Sedgwick.

Mr. Milligan for the Crown replied as follows:

> In reply thereto and hereupon I, R. P. Milligan, Crown Counsel who prosecutes for our said Lady the Queen in this behalf, says that by reason of anything in the said plea of the said all three accused above pleaded in bar alleged, our said The Lady, The Queen, ought not to be precluded from prosecuting the said indictment against the said three accused; because she says that the said three accused were not lawfully acquitted of the said offence charged in the said indictment, in manner and form as the said three accused hath above in their said plea alleged; and this he, the said R. P. Milligan prays may be inquired of by the country.

The issues of these special plea of autrefois acquit were fully argued by counsel for the accused and counsel for the Crown. Intertwined in the autrefois acquit argument were submissions that the plea of *res judicata* was also available and that it was being put forward on behalf of the three appellants.

Donnelly J. gave judgment on the special plea as follows:

> The three accused rely on a special plea of autrefois acquit. Section 517 of the Code requires that I decide this issue. The three accused were before

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this Court in May and June, 1961, on the first count in the indictment at which time the jury acquitted all three on the charge on which they were then before the Court.

It is now agreed that there will be no new evidence offered if the trial proceeds on the second count. If there was any change in the evidence it will simply be that the Crown will not offer all the evidence which was adduced before. Section 518 of the Code provides that where an issue on a plea of autrefois acquit to a count is tried and it appears that the matter on which the accused was given in charge of the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and that on the former trial, if all proper amendments had been made that might then have been made, he might have been convicted of all the offences of which he may be convicted on the count to which the plea of autrefois acquit is pleaded judgment shall be given discharging the accused in respect of that count.

In considering the matter I must keep in mind the statement of Crown counsel that no new evidence will be offered on the second count. The test is not the similarity of the evidence or the facts in the particular case. The question is whether the charges are identical, or substantially identical. It then remains to consider whether the charges under Count 1 and Count 2 are substantially identical. By Count 1 the accused were charged that they conspired together to commit an indictable offence under Section 101(*b*) of the Criminal Code of Canada by corruptly giving money to George Scott, a peace officer of the Ontario Provincial Police Force, with intent that the said George Scott should interfere with the administration of justice, contrary to Section 408(1)(*d*). The second count charges that the accused did unlawfully agree and conspire together to effect an unlawful purpose, to wit, to obtain from George Scott, a constable of the Ontario Provincial Police Force, information which it was his duty not to divulge contrary to the Criminal Code of Canada, Section 408(2).

On behalf of the accused it is urged that the jury having rendered a verdict of not guilty they found that the accused did not conspire together. People, when conspiring, may conspire to do one or more unlawful acts. It does not follow that because the jury found the accused not guilty on a charge of conspiring to do a specific unlawful act that the jury found the accused did not conspire to do any unlawful act.

On the first trial the jury was instructed that the essential elements of the offence were, firstly, the agreement to give money to Scott corruptly; secondly, the intent that Scott should interfere with the administration of justice. It is clear that these are the elements of the offence charged in the first count. In order to establish the offence charged in the second count it is not necessary for the Crown to prove any agreement to give or pay money to Scott corruptly. Section 101 makes it an essential part of the offence that the person committing the offence intend that the party offered or receiving the money interfere with the administration of justice. No such intent is required under Section 482. It was argued by counsel for Feeley that Count 1 could have been drawn in such a way that it would have included the second count. If this had been done it is my opinion that the count would be bad for duplicity. I find that the offence charged in the second count is not an offence included in the first count and that it would not have been possible on the former trial, no matter what amendment had been made, to have convicted the accused of the offence charged in the second count.

It is well established that a person must not be placed in peril of being convicted twice for the same offence. Here the offences are not the

same or substantially the same. The result is that the accused are not being asked to stand trial a second time for the same offence notwithstanding that the evidence will be the same as on the former trial.

The accused have failed to establish that the offence charged in the second count is substantially the same as that charged in the first count, or one on which they could have been convicted at the first trial and the plea of autrefois acquit fails.

Will you have the prisoners plead, please.

And as to *res judicata* the record is as follows:

HIS LORDSHIP: Before leaving the matter I should deal with the question of res judicata. I am of the opinion that this is a defence included in a plea of not guilty and should not be dealt with by me at this time.

Mr. SEDGWICK: So long as that is clear, that in pleading not guilty res judicata is pleaded as being an included plea.

HIS LORDSHIP: That is my view.

Mr. SEDGWICK: It is not provided for as an included plea. I intend to stress that as part of the defence.

HIS LORDSHIP: As far as I am concerned you are free to raise it as part of your plea of not guilty.

Following this counsel for the appellants applied to have count 2 tried separately from counts 3, 4, 5 and 6. Donnelly J. directed the Crown to proceed with count 2 only and the trial proceeded on that basis after pleas of Not Guilty had been directed to be entered by Donnelly J. following similar statements by all three appellants that "I enter no plea at this time."

Following the selection of a jury the record of the trial before Spence J. was tendered. Donnelly J. dealt with the matter as follows:

HIS LORDSHIP: I am not going to permit the filing of the evidence. If you wish to file it with the Court I am content that it be filed, but I do not propose to permit these books of evidence or any documents which you have asked to file—I do not propose to permit them to go to the jury. If you wish to file them with the Court for the use of counsel I am content that they be filed for that purpose, but for that purpose only.

But the record was not then filed.

Mr. Milligan opened for the Crown. In view of the arguments advanced on behalf of the appellants, it is desirable to quote rather fully from Mr. Milligan's opening statement. He said in part:

Mr. MILLIGAN: Gentlemen of the jury, simply put the offence is this, that the three accused agreed and conspired together to obtain information from a police officer which that constable was not at liberty to give them.

Now, gentlemen, the Crown alleges that the accused McDermott and Feeley were gamblers, that they are interested in two clubs—chartered

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clubs where gambling was allowed, that is legal gambling, and the Crown alleges it was suspected at times there was illegal gambling going on in the club. Now, you will appreciate, gentlemen, that the police would want to check these clubs to see if any illegal gambling was going on in these clubs, and to check these clubs there is only one way to do it, and that is not to tell the people they were coming to inspect them because they would certainly not find anything then, but to raid quickly and without notice, to swoop down on the club, walk in and then see if there is any illegal gambling, and if the police did find that there was illegal gambling, of course the club would be charged and probably put out of business. *The Crown alleges that naturally McDermott and Feeley would be very interested to know when these clubs would be raided and on what dates so that they would be ready.*

How would they get that information? I submit to you that the only way they can get the information is to get it from some person in authority who knew the raid was going to take place—was going to be conducted. The Crown alleges that for some time the accused Wright in the year 1953/1954 was in what is known as an anti-gambling squad of the Ontario Provincial Police. The anti-gaming squad is a branch of the Ontario Provincial Police which deals almost entirely with the suppression of illegal gambling. Wright was on that squad, and you can draw your inferences from the evidence of what connection Wright had with the accused McDermott and Feeley.

In any event, in the early part of 1960, in January 1960, the accused Wright was transferred out of the anti-gambling squad to duty in the Town of Belleville. *The Crown alleges now that the accused McDermott and Feeley had lost their contact. Wright was now out of the anti-gaming squad, he would not be able to tell them when and at what time the raids would be conducted. Another source of information had to be obtained. The Crown alleges that then the three accused conspired together to obtain that information from a member of the anti-gaming squad, namely Constable Scott.*

Scott was approached, and how he was approached will be tendered in evidence, and how information was obtained from him will be tendered in evidence, but the Crown alleges that they did conspire to obtain information from Scott, a member of the anti-gaming squad, that they did obtain information from Constable Scott, and that Constable Scott—and I should say the information they obtained from Constable Scott is unlawful for Constable Scott to give, or for any police officer, of the anti-gaming squad to give.

Now unfortunately for the three accused Scott was approached and without letting the accused know he reported to his superior officers. The superior officer when Scott was first approached by the accused Wright, who was at that time, as I told you, still a member of the Ontario Provincial Police, stationed at Belleville—but Wright did not say whom he was working for, so the superior officers naturally wanted Scott to play along with Wright because they wanted to find out who Wright was working for. In other words, may I put it this way, they were not so much interested, or they were interested in seeing that Wright was arrested and booked, but they were certainly interested in who Wright was working for, and so Scott was instructed to play along and he did play along, and eventually contact was made, particularly with the accused McDermott, eventually directly by Scott to McDermott, and *you will hear evidence of McDermott's dealings with Scott to obtain information as to when and what times the raid would be made on these clubs.* You will hear evidence

of the implication of the accused Feeley with the accused McDermott in these clubs, that they were partners and had other dealings together and they were associated together, and the Crown is alleging that on that evidence, which will be submitted to you, there is only one inference you gentlemen can draw—that they were all associated together and that for a common purpose and for a common interest they conspired to obtain information from Constable Scott of the anti-gaming squad, and that for the unlawful purpose as set out in the indictment. (The italics are mine.)

The evidence for the Crown was led and received and was similar to the evidence that had been given in the trial before Spence J. except that some of the evidence at the first trial was omitted at the second trial.

The next matter of importance to note is what transpired at the conclusion of the Crown's case. Mr. Hartt on behalf of Wright renewed the application to file as an exhibit the record of the trial before Spence J. The discussion between Donnelly J. and Mr. Hartt is as follows:

Mr. HARTT: I understand at the beginning of this trial an application was made by Mr. Sedgwick, then counsel for Mr. Feeley, that the copy of the transcript of the evidence of the former trial of these three accused persons should be entered as an exhibit in this case. I understand that at that time you made a ruling that you would not allow it in at that stage as an exhibit, but you would allow it to be filed with the Court.

I subsequently was informed that the copy that had been furnished to you was a copy that had been marked by some other person and I received a copy to-day that was not in that condition from the Court of Appeal and I would ask your lordship to allow me to file that copy with the Court.

HIS LORDSHIP: As an exhibit?

Mr. HARTT: My application is as an exhibit.

HIS LORDSHIP: What have you to say as to whether it should be filed as an exhibit or not? I am giving you this opportunity of arguing this. It was argued on behalf of the other accused earlier. In view of the fact you were not present I consider you should have an opportunity of making a presentation at this time.

Mr. HARTT: I will be brief.

My submission is that the defence which arises from a plea of not guilty and res judicata is one which I will submit is open to us in this case. With regard to that defence it is my understanding that it is a question, first of all, for your lordship whether or not the evidence in this trial—whether or not the issue in this trial is identical to the issue previously and is judicially determined.

HIS LORDSHIP: No, that is the plea of autrefois acquit or autrefois convict, but not the basis of res judicata. You may have different issues but some essential fact which is common to the two issues on which a decision has been given; it is certainly not the basis of res judicata.

Mr. HARTT: I think res judicata is a wider matter than autrefois acquit.

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HIS LORDSHIP: In my view it covers the situation entirely. There is some relation but it is a different principle.

Mr. HARTT: If I may put it this way—it is a factual issue which was directly placed before a competent tribunal and it was determined and it is not open to one of the parties to the original inquiry to raise it again. It is my submission to your lordship by reference to the charge in the first trial, to the manner of procedure adopted in relation to that charge, and the issue that eventually went to the jury, the factual issue that went to the jury, realistically went to the jury, that is the same issue that this jury is being asked to determine. If I am right in that, it is my submission that the issue is originally for your lordship, and then if you do not think the jury should be directed in relation to it then it becomes an issue for the jury. On that basis it is my submission that this transcript should be marked as an exhibit in the trial because I see no other way how the jury can ascertain what the real issue was at the first trial, the real factual issue.

My application is an alternative one, that it be marked as an exhibit in the trial for all purposes, and if your lordship does not accede to that request that it be marked as an exhibit before the Court in order to allow me to argue the question of defence before your lordship.

HIS LORDSHIP: Mr. Hartt, I am of the same opinion I was earlier, that the transcript should not be filed as an exhibit. It should not be available to the jury in the jury room. *In my opinion that applies even though the evidence in the two trials is exactly the same.* It is quite apparent that in this trial there was not as much evidence called as there was in the other trial. Witnesses were called in the other trial who did not testify in this trial. If that evidence was filed as an exhibit the jury would have the evidence of those witnesses before them. In my opinion that would be most improper. If the transcript of the proceedings in the earlier trial went to the jury in their jury room, it is most likely that the jury would dispose of the matter, not on the evidence which they heard at this trial and on which they are sworn to examine the matter, but on the written transcript which they would have before them. Being human beings and having the written transcript of a previous trial, if their memory is at all vague as to what a witness said at this trial, they would consider the evidence which was given at a previous trial.

These accused must be tried on the evidence tendered during this trial and not on the evidence during the previous trial. I must refuse your application to have the transcript filed as an exhibit. I told counsel at the opening of the trial, when this matter was argued, I was quite content to have the transcript filed with the Court for use of counsel and the Court but that it would not go to the jury room and I am still content to have that done if you desire it.

Mr. HARTT: I have given to Mr. Bradley a fresh copy of the evidence, if your lordship would refer to that in the course of my argument.

My first submission to your lordship is that on the authorities, and on the Court of Appeal and the Supreme Court of Canada it is clear that res judicata is a defence.

HIS LORDSHIP: I made that clear at the opening. I consider res judicata was a defence included in a plea of not guilty, and a defence open to the accused in this case—open to them to argue in this case.

Mr. Hartt thereupon applied to have Donnelly J. hold that the defence of *res judicata* had been made out and that the jury be directed to return a verdict of not guilty.

Donnelly J., in the course of the argument, at p. 1102 of the record, said:

HIS LORDSHIP: I think in view of the addresses and the charge I must come to the conclusion that the jury in the first trial either found that there was not the intent to interfere with the administration of justice or were not satisfied beyond a reasonable doubt of that ingredient.

Mr. MILLIGAN: Then do I understand your lordship to say that the intent to pervert the course of justice is res judicata?

HIS LORDSHIP: I would, on the evidence, on the charges and on the addresses, I can come to no other conclusion but that the elements as pointed out by the learned trial Judge, that there must be an agreement to pay Scott money and an intent to interfere with the administration of justice—what other finding would you suggest is warranted by the addresses and the finding of the jury?

and he gave judgment on this application at p. 1111:

HIS LORDSHIP: The accused rely on the maxim of res judicata and point out that these three accused were earlier acquitted of an offence that—

> between the first day of January, 1960, and the first day of July, 1960, in the Province of Ontario they did unlawfully conspire together to commit an indictable offence under Section 101(b) of the Criminal Code of Canada by corruptly giving money to George Scott a peace officer of the Ontario Provincial Police Force, with intent that the said George Scott should interfere with the administration of justice, contrary to the Criminal Code of Canada, Section 408(1)(*d*).

It would appear that the evidence which was tendered by the Crown on the present charge was tendered together with other evidence on the earlier charge.

In his charge to the jury on the trial of the first count in the indictment, the learned trial judge pointed out to the jury that the essential elements of the offence with which the accused were charged were, firstly, the agreement to give money to Scott corruptly, secondly, the intent that Scott should interfere with the administration of justice. In his address to the jury, counsel for the accused Wright admitted that Wright had given to Scott sums of money totalling one thousand dollars, and based his defence solely on the contention that Wright did not have the intention to interfere with the administration of justice. Counsel for McDermott spoke to the jury of the necessity of the intent to interfere with the administration of justice and suggested that McDermott was caught between the two officers who were spying on each other. Counsel for the accused Feeley submitted to the jury that Wright did not have the intent to interfere with the administration of justice, and said that if Wright did not have that corrupt intent, which was an essential element of the charge against all three men, then that was the end of the case against Wright and the end of the case against McDermott and Feeley.

When charging the jury the learned trial judge discussed the payment of money to Scott by Wright, and pointed out that it was admitted by

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counsel for Wright that he did pay money to Scott and in return passed on information to at least McDermott. In dealing with the question of intention he pointed out to the jury that it was important that they consider whether Wright did this corruptly in order to interfere with the administration of justice, because that was the whole gravamen of the charge.

In order for the defence to succeed on a plea of res judicata there must have been in the earlier proceeding a finding adverse to the Crown on some point which it is essential for the Crown to prove on the second charge. Counsel for the accused contend, while the intention to interfere with the administration of justice was an essential element in the first count, it was also an essential element on the second count on which the accused are presently before the Court, and that the finding of the jury acquitting the accused on the charge under the first count establishes a lack of intent on the part of Wright to interfere with the administration of justice. My reading of the addresses and the charge together with the verdict of the jury satisfies me that the finding of the jury turned on the essential element of intention to interfere with the administration of justice. Counsel for the accused contend the acquittal negatives such intent. If the verdict of the jury turned on this vital element, it cannot be said that the jury found that there was no such intent. It may very well have been that the verdict was the result of a reasonable doubt as to whether the Crown had proven such intent. While an intent to interfere with the administration of justice is an essential element in the first count of the indictment, in my opinion it is not an essential element in the second count and the Crown need not prove such intention. I must therefore hold that there is no finding which can be taken from the verdict of the jury which deals with any of the essential elements of the second charge. In my opinion a finding of not guilty which would appear to have been based on the failure to prove this essential element in the first charge is not sufficient ground for allowing the motion of the defence on the plea of res judicata, as this element is not essential in this second charge. I must find that the defence has failed to establish res judicata.

Mr. Hartt then submitted to Donnelly J. that he should charge the jury that the Crown was estopped from challenging any of the findings on the first trial and that counsel for the accused should be permitted in addressing the jury to point out to the jury what the issues were in the first trial and the results of the first trial.

Donnelly J. disposed of the submission as follows:

HIS LORDSHIP: I do not consider that the accused in their addresses to the jury are entitled to refer to the results of the first trial, or what inferences they consider can be drawn from the verdict of the jury in that trial. In my opinion, as I have indicated, the jury were influenced in arriving at their decision or the verdict at which they did arrive, by a consideration whether or not the Crown had proven the intent which was an essential element of the first charge. In view of my finding that this is not an essential element in the second charge, I find that no reference should be made on behalf of the accused to the jury finding.

Does that clear up your problem?

Mr. HARTT: I wanted to make perfectly clear we are not entitled to any of the issues in the first trial?

HIS LORDSHIP: No, this is a different trial, a different charge, a different offence.

Mr. HARTT: Your lordship is taking the defence of res judicata away from the jury?

HIS LORDSHIP: Yes, that is my judgment.

Mr. MILLIGAN: Your lordship is not saying I am estopped from saying they are related to these clubs?

HIS LORDSHIP: I make no finding on that. I say the only finding which could reasonably be drawn from the verdict in the first case is that the jury had some doubt whether the Crown had satisfied the onus in regard to proving this intent. Anything further than that would be speculation, as I see it.

and he dealt with the same matter at p. 1125:

Mr. HARTT: Could I refer to the part of the transcript to show the issues before the last jury and this one?

HIS LORDSHIP: These are entirely different issues, in my ruling. Possibly I did not make it clear yesterday, but what I intended was this, that neither you nor Mr. Nasso nor Mr. McDermott may mention to the jury the issues in the trial of the first charge or the results of that trial. In my understanding it is my duty to rule on the question of whether res judicata has been successfully established by the defence, and that it is not a matter for the jury. You understand that, Mr. McDermott?

After the judge's charge to the jury, Mr. Hartt asked the judge to charge the jury that in view of Wright's acquittal on count 1 it should be put to the jury that Wright did not have an unlawful purpose of conspiring for an unlawful end with McDermott and Feeley.

Mr. Hartt put his request as follows:

I suggest to your lordship if you accept my premise that I have a finding he was acting in accordance with the administration of justice then it is impossible for the jury to find that there is an illegal agreement in relation to the accused Wright.

* * *

Put it this way, that a previous jury has found Wright did not have this intent and it is not open to this jury to make a contrary finding. Therefore it must be put to the jury that it cannot be found that he had, or Wright had an unlawful intent in relation to what he was doing and that being an essential to the agreement to bring about an unlawful purpose that he cannot be found guilty on that indictment.

The Crown's position was stated by Mr. Milligan on p. 1174:

I want to comment on Mr. Hartt's objection; the main one is that he would like your lordship to put the issue of res judicata to the jury. He would like your lordship to put to the jury that a previous jury having

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found that there was no unlawful purpose, or that Wright did not intend to effect an unlawful purpose they should not consider that. I submit if your lordship put it to them in that way you might as well tell the jury to acquit.

The learned judge's ruling was:

> In regard to the objection that I must tell the jury that they cannot convict Wright unless they find that he obtained this information or agreed to obtain this information for an unlawful purpose it is not necessary for the Crown to show any unlawful purpose and it is wrong for me to so instruct the jury.

The jury found the three appellants guilty as charged on count 2. That left counts 3, 4 and 5 against Wright only and count 6 against McDermott and Feeley to be dealt with. Wright was tried on counts 3, 4 and 5 by Donnelly J. on March 23, 1962. When the counts were read to him, he entered a plea of not guilty. A jury was empanelled. Mr. Milligan for the Crown opened the case to the jury as follows:

> May it please your lordship. Gentlemen of the jury, you have heard the charges read to you by the Clerk of the Assize and in simple language they simply indicate that the Crown alleges that the accused Wright, in 1960, a member of the Ontario Provincial Police Force, had been a member of the Anti-Gaming Squad of that Police and he was transferred to Belleville. On the Anti-Gaming Squad at the same time with Constable Wright was Constable Scott who remained and still is a member of the Anti-Gaming Squad Branch. The Crown alleges that Wright, for the purpose of tipping off gaming houses as to raids on them by the Provincial Police, approached Scott to get the information of these raids.
>
> The Crown alleges that he offered Scott money and that Scott then reported to his superior officers and he was told to continue the investigation, in other words, as an underhand man, and Scott then continued his contact with Wright and subsequently Wright on three occasions, the 29th February, 1960, the 29th March, 1960, and the 27th April, 1960, the accused Wright gave Scott—gave him on the first occasion $200, $400, and $200, for payment for tip-offs of raids on gaming houses. Scott took that money to his superior officers after taking note of the money so that he would be able later to identify the money.
>
> The Crown alleges that Wright, having received information from Scott of the dates of the raids, passed that information on to the operators and the raids were made on the gaming houses and the gaming houses were ready for the police. The Crown alleges that the accused, in the terms of the charges laid, bribed corruptly Constable Scott for the purpose of perverting the course of justice.

Constable Scott was the only witness called by the Crown. His evidence was substantially the same as he had given before Spence J. at the first trial in respect of count 1 and

before Donnelly J. at the second trial in respect of count 2.

The record reads:

CROSS-EXAMINATION BY MR. HARTT:

Q. Mr. Scott, you gave evidence at the trial which commenced May 29th last before his lordship Mr. Justice Spence?

A. Yes.

Q. The accused Wright was one of those accused at that time?

A. Yes.

Q. There was also two other accused, a man by the name of McDermott, and Feeley?

A. Yes.

Q. I suggest the evidence you gave at the trial was the evidence you have given us to-day?

A. Yes.

Q. Did you also give evidence last week at a trial?

A. Yes.

Q. In which this man was accused?

A. Yes.

Mr. HARTT: That is all, my lord.

Then Mr. Hartt made the following admissions on behalf of his client:

My Lord, for the purpose of the record in this trial I am prepared to admit that Wright, the accused, contacted the officer Scott and obtained information from him. I am also prepared to make admissions on behalf of my client that we paid money—or money was paid to Scott, and a third admission that we are prepared to make for the purpose of this trial, my lord, that the information was passed on to other persons who had been interested in relation to obtaining this information. However, I do wish to make it perfectly clear that we deny the intent which is an essential ingredient of this charge.

Mr. MILLIGAN: In view of the admissions of my learned friend the Crown closes its case.

Mr. Hartt then applied to Donnelly J. to direct the jury to return a verdict of not guilty on the three counts 3, 4 and 5 on the grounds Wright, having been acquitted under count 1, the matter was *res judicata.*

Donnelly J. gave judgment on the application as follows:

Counsel for Wright in his address to the jury at the trial on the first count in the indictment admitted to the jury that Wright had paid the various sums of money to Scott, the same sums which were related by Scott in his evidence to-day. Counsel also admitted that information was received from Scott by Wright and the sole defence of Wright on that charge as I understand it on checking the address of his counsel was that he did not have the intention to interfere with the administration of justice. Counsel for McDermott in his address contended that McDermott was caught between two police officers who were spying on each other.

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Counsel for Feeley based his defence on the contention that there was no intention on the part of Scott to interfere with the administration of justice, and in fact told the jury that McDermott and Feeley were gamblers, at least one of them was associated with the club at Cooksville, that there had been telephone calls from Wright and Scott to McDermott. The defence of Wright was based on the contention by his counsel that the Crown had not proved the intent on the part of Wright to interfere with the administration of justice. The jury were instructed on the law by the learned trial judge. He outlined the essential elements of the offence as, firstly, the agreement to give money to Scott corruptly, and secondly, the intent that Scott should interfere with the administration of justice.

Considering the addresses by counsel to the jury and the admissions that were made by them in these addresses together with the instruction given by the learned trial judge I must infer that the jury at least came to the conclusion that the Crown had not proven beyond a reasonable doubt that Wright had the intention to interfere with the administration of justice. I fail to see how the verdict of not guilty on the first count in the indictment could have been reached by the jury on any other basis. I must find that the jury trying the first count did find that the Crown had not proven the intention which is an essential element in the three offences with which the accused is charged and on which he is presently on trial.

Will you bring in the jury, please. I consider that I am bound by *Rex v. Quinn,* 10 Canadian Criminal Cases, 412.

His lordship then charged the jury as follows:

Members of the jury, as I informed you very briefly before you retired to your jury room, you are the sole and only judges of the facts, but it is my duty to pass on questions of law. Counsel for the accused has made a motion raising what is known as a plea of res judicata and it is for me to pass on that motion. The three charges against the accused Wright, on which he is presently on trial, are the same except that various amounts of money were paid on different dates. The law in regard to each charge is the same and the essential elements of each charge are the same. The essential elements are, first, that Wright corruptly paid money to Scott. That is admitted. It is also admitted that Scott received money and gave information to Wright that Wright passed on to one or more persons who were interested in receiving that information; second, that Wright had the intention of interfering with the administration of justice, that is an essential element of each of these charges. Wright and others were tried in May and early June, 1961, on a charge that they conspired to commit an indictable offence by corruptly giving money to George Scott, a peace officer of the Ontario Provincial Police Force, the same man who is alleged to have received the money in this present trial, with intent that the said George Scott should interfere with the administration. You see that in that charge the same money was involved and that same intent which is an essential element.

Having read the addresses of counsel to the jury on that trial, the charge which was delivered to the jury by the learned trial judge when he instructed them on the law and reviewed the facts with them, and having considered the verdict of the jury at that trial, I consider that the only inference which I can draw is that at that trial the jury considered that the Crown had not proven beyond a reasonable doubt that Wright had this necessary intention of interfering with the administration of justice. It was a judicial decision on that point and it is not now open to

the Crown to ask you to come to a different verdict on that point. There is the verdict of the earlier jury and as I have said the only inference I can draw from the addresses and the charge to the jury and the verdict is that the Crown failed to prove the necessary intention. That is an essential element in this charge and before the accused may be found guilty the Crown must prove each element of the charge beyond a reasonable doubt. That burden is on the Crown; it is not on the defence. It is my duty to instruct you that it is my view that the jury on the earlier trial considered that the Crown had not proven this essential element. It is therefore my duty to instruct you that you cannot find the accused guilty on these present charges because it is not open to you to arrive at a different verdict than the other jury on this essential element. I would therefore ask that you, without leaving the jury box, select a foreman and if you agree with my instruction to you that you find the accused not guilty on each one of these charges on which he is presently before the Court. Will you select a foreman, please, from among yourselves.

Have you arrived at your verdict?

The FOREMAN: Yes.

The REGISTRAR: Members of the jury, have you agreed upon your verdict? On Counts 3, 4 and 5 as charged in this indictment how do you find the accused as directed by his lordship?

The FOREMAN: My own—the verdict of the jury—I don't know.

HIS LORDSHIP: I had suggested to you that you find the accused not guilty. I had gone further than that; I had instructed you that in my opinion it was impossible for you to arrive at any other verdict.

The FOREMAN: We agree he is not guilty.

HIS LORDSHIP: On each of the counts?

The FOREMAN: On each count.

The situation at this stage of the proceedings may be summarized as follows:

As to count 1: All three appellants had been acquitted.

As to count 2: All three appellants had been convicted.

As to counts 3, 4 and 5: The appellant Wright had been acquitted.

As to count 6: The appellants McDermott and Feeley had entered a plea of guilty and had been fined. This count does not appear further in the proceedings.

The three appellants then appealed to the Court of Appeal for Ontario[1] against their conviction on count 2. The appeal was taken upon the following grounds:

1. That the Learned Trial Judge erred in failing to find that the plea of autrefois acquit was properly pleaded in this case.
2. That the Learned Trial Judge erred in refusing to place the theory of the defence before the jury.
3. That the Learned Trial Judge erred in failing to allow to be placed before the jury the fact of the acquittal of the accused on a previous

[1] [1963] 1 O.R. 571, 38 C.R. 321, 1 C.C.C. 254, 38 D.L.R. (2d) 133.

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charge in so far as it was relevant to the issue to be determined by the jury in this case.

4. That the Learned Trial Judge having found that a previous jury had found that it was not proven beyond a reasonable doubt that the appellant had the intent that George Scott should interfere with the administration of justice erred in failing to direct the jury to return a verdict of not guilty of the conspiracy charge where the facts were admitted to be the same.
5. That the Learned Trial Judge having found that a previous jury had found that it was not proven beyond a reasonable doubt that the appellant had the intent that George Scott should interfere with the administration of justice erred in failing to place this fact before the jury as a relevant consideration in determining whether the appellant was guilty of the conspiracy charged.
6. That the verdict of the jury was inconsistent with a previous verdict on the same facts.
7. Such further and other grounds as Counsel may advise and the Court may deem sufficient grounds of appeal.

The Attorney General for Ontario appealed to the Court of Appeal for Ontario against the acquittal of the appellant Wright on counts 3, 4 and 5 on the ground that: "The learned trial judge erred in law in directing the jury to return a verdict of 'not guilty' on each charge on the ground of res judicata."

These appeals were argued together on September 7, 1962, and judgment was handed down on October 4, 1962. The Court of Appeal dismissed the appeals of the appellants in respect of count 2 and allowed the Crown's appeal in respect of counts 3, 4 and 5 directing that the order of acquittal of the appellant Wright upon those counts be set aside and that there should be a new trial with respect thereto. Schroeder J.A. wrote the judgment in which Laidlaw and Kelly JJ.A. concurred.

The three appellants applied to this Court and were given leave on October 22, 1962, to appeal from the judgment of the Court of Appeal on the following points:

1. Did the Court of Appeal for Ontario err in holding as a matter of law that the learned Trial Judge was correct in holding that the defence of res judicata was not available to the Appellants by reason of their previous acquittal upon count 1 of the indictment?
2. In the alternative, did the Court of Appeal for Ontario err as a matter of law in holding that the learned Trial Judge was correct in not leaving to the Jury for its determination the defence based upon res judicata?
3. Did the Court of Appeal for Ontario err as a matter of law in not holding that the learned Trial Judge has misdirected the Jury when he declined to point out to the Jury that by virtue of the acquittal

of the accused on the first count of the indictment the Jury was precluded from drawing any inferences by way of motive or otherwise on the matter presented to them at the trial on the second count from the supposition or view that the accused had conspired together to interfere corruptly with the administration of justice?

4. Did the Court of Appeal for Ontario err in holding that the plea of autrefois acquit was not properly pleaded in this case?

The appellant Wright appealed to this Court as of right from the order setting aside his acquittal on counts 3, 4 and 5 and directing a new trial.

Although they filed separate factums and were represented by different counsel, all three appellants made common cause in their appeal from conviction under count 2. Wright was alone in the appeal under counts 3, 4 and 5.

Ground of appeal no. 4 dealing with the plea of autrefois acquit may be disposed of under the provisions of ss. 517 and 518 of the *Criminal Code* which read:

517. EVIDENCE OF IDENTITY OF CHARGES. Where an issue, on a plea of autrefois acquit or autrefois convict is tried, the evidence and adjudication and the notes of the judge and official stenographer on the former trial and the record transmitted to the court pursuant to section 462 on the charge that is pending before that court, are admissible in evidence to prove or to disprove the identity of the charges.

518. (1) WHAT DETERMINES IDENTITY. Where an issue on a plea of autrefois acquit or autrefois convict to a count is tried and it appears

(*a*) that the matter on which the accused was given in charge on the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and

(*b*) that on the former trial, if all proper amendments had been made that might then have been made, he might have been convicted of all the offences of which he may be convicted on the count to which the plea of autrefois acquit or autrefois convict be pleaded,

the judge shall give judgment discharging the accused in respect of that count.

(2) ALLOWANCE OF SPECIAL PLEA IN PART. The following provisions apply where an issue on a plea of autrefois acquit or autrefois convict is tried, namely,

(*a*) where it appears that the accused might on the former trial have been convicted of an offence of which he may be convicted on the count in issue, the judge shall direct that the accused shall not be found guilty of any offence of which he might have been convicted on the former trial, and

(*b*) where it appears that the accused may be convicted on the count in issue of an offence of which he could not have been convicted on the former trial, the accused shall plead guilty or not guilty with respect to that offence.

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These sections appear to be a code of the law relating to the pleas of autrefois acquit and autrefois convict and I am in complete agreement with the views of Schroeder J.A. on this point and do not consider it necessary to review the law on the subject in the light of that judgment. Shortly put, on their trial on count 1 the appellants could not have been convicted on count 2.

In dealing with the defence of *res judicata* as raised in this instance, it is necessary to deal with a preliminary but important question which the appellants urged upon the trial judge, in the Court of Appeal and in this Court, namely, that it was for the jury to decide the issue and that Donnelly J. erred when he refused to admit as an exhibit to go to the jury the complete record of the trial before Spence J. At the beginning of the trial there was some confusion as to what function the jury performed in respect of a plea of *res judicata*. When the question was first raised, Crown counsel took the position that it was a matter for the jury to decide as stated on p. 47:

> If you accept the submission of my learned friend, I submit you yourself would be deciding res judicata, and I submit that is a defence which should be submitted to the jury to decide. I submit if your lordship were simply to impanel a jury and instruct them, you have decided it is res judicata and therefore they must not convict, you are really treating the res judicata as a special plea, but doing it indirectly and I submit your lordship should not do that on the issue of res judicata because that is something for the jury to decide.

Donnelly J. did not then decide the point but did hold that *res judicata* was not a special plea and that it is a defence included in a plea of not guilty. There the matter rested until at the conclusion of the Crown's case when Mr. Hartt again asked that the record of the first trial be received in evidence to go to the jury. Donnelly J. refused the application but ordered the record to be filed but not to be available to the jury. He further held that the question as to whether the defence of *res judicata* had been made out was one of law for him to decide and was not a question for the jury. He thereupon ruled that the defence of *res judicata* had not been established.

While there are findings of fact involved in determining whether or not the defence of *res judicata* has been made out in any given case, it is manifest that it would be unrealistic to hand over to a jury the record of a previous

trial or to have read to the jury that record which in any specific case might contain evidence inadmissible in the second trial and prejudicial to the accused. On balance, therefore, justice requires that a workable rule consistent with safeguarding the rights of accused persons be formulated and in that regard I think the procedure followed by Donnelly J. is the only reasonable course to follow and which should be followed in the future. It will be for the judge to decide as a matter of law whether the defence of *res judicata* has been made out. The case of *Cowan v. Affie*[1] was cited in support of the position taken by Mr. Hartt and agreed to initially by Crown counsel. For the reasons just stated I do not think that *Cowan v. Affie, supra,* ought to be followed.

The appellants urge that the defence of *res judicata* was available to them and that Donnelly J. and the Court of Appeal were in error in holding that it had not been established.

The defence of *res judicata* differs materially from autrefois acquit or autrefois convict. The principle of *res judicata* estops the Crown in a second or later legal proceeding from questioning that which was in substance the ratio of and fundamental to the decision in the earlier proceeding. *Res judicata* is applicable in criminal as well as civil proceedings. This was aptly stated by Holmes J. in *United States v. Oppenheimer*[2] when he said:

> It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.

and by Lord MacDermott in *Sambasivam v. Public Prosecutor*[3] in the following passage:

> The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim "Res judicata pro veritate accipitur" is no less applicable to criminal than to civil proceedings.

This principle was adopted by this Court in *McDonald v. The Queen*[4] in both the majority and minority opinions.

[1] (1893), 24 O.R. 358.
[2] (1916), 242 U.S. 85 at 87.
[3] [1950] A.C. 458 at 479.
[4] [1960] S.C.R. 186, 32 C.R. 101, 126 C.C.C. 1.

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In view of the reference by Schroeder J.A. to *Rex v. Bayn*[1], it must now be said that the statement by Haultain C.J.S. in *Bayn* at p. 90:

> . . . that there is no rule or principle of the common law, or of the statutory law, on which the principle of *res judicata* is applicable to criminal cases, which is not founded on the maxims *nemo debet bis vexari pro una et eadem causa* or *nemo debet bis puniri pro uno delicto.*

is not good law.

Accordingly, what was in substance the ratio of and fundamental to the verdict of acquittal on count 1 before Spence J.? Count 1 and count 2 read:

1. *ROBERT J. WRIGHT, JOSEPH P. McDERMOTT* and *VINCENT B. FEELEY,* between the first day of January, 1960, and the first day of July, 1960, in the Province of Ontario did unlawfully agree and conspire together to commit an indictable offence under Section 101(*b*) of the Criminal Code of Canada by corruptly giving money to George Scott a peace officer of the Ontario Provincial Police Force, with intent that the said George Scott should interfere with the administration of justice, contrary to the Criminal Code of Canada, Section 408(1)(*d*).
2. AND FURTHER THAT the said *ROBERT J. WRIGHT, JOSEPH P. McDERMOTT* and *VINCENT BERNARD FEELEY* between the first day of January, 1960 and the first day of July, 1960, in the Province of Ontario did unlawfully agree and conspire together to effect an unlawful purpose, to wit: to obtain from George Scott, a constable of the Ontario Provincial Police, information which it was his duty not to divulge, contrary to the Criminal Code of Canada, Section 408(2).

They are not identical in their essential elements and for that reason the defence of autrefois acquit was not made out but the appellants argue that though differing in language and in their essential elements they do in reality deal with the same offence and that the basic error made by Donnelly J. at the trial and by Schroeder J.A. was that they approached consideration of the case from the standpoint of a comparison of the wording of the two counts and not the realities of the proceedings before Spence J.

The question really boils down to whether there were in fact two conspiracies or only one. The appellants argue that what the Crown has done is to make two conspiracies out of the one agreement testified to by Constable Scott by splitting off from the agreement alleged in count 1 a segment and calling it count 2. Accordingly, were there one or two unlawful agreements or conspiracies? Constable Scott's evidence at the two trials was almost identical.

[1] [1932] 3 W.W.R. 113, [1933] 1 D.L.R. 497, 59 C.C.C. 89.

Before Spence J. he testified as to the agreement with Wright in a series of interviews and telephone conversations deposed to from p. 176 to p. 202 of the record culminating in Scott's statement on pp. 201-202:

A. Well, Wright said that starting February 15th, he would call me every evening from Belleville between 6.30 and 7.00 p.m.

Q. And did he give you the name of his alleged contact or the gambler at that time?

A. No, sir, he didn't.

Q. And what conversation, if any, was there about disclosing the names of the contacts to you?

A. Well, Wright told me that as we developed the trust between us, I would be given much information regarding gambling activities in the Province.

Q. Any further discussion at this time?

A. Yes, sir. He again emphasized that the gamblers were only interested in the policy of the Branch towards the Clubs and the time of any raids on the Clubs. He said the only way we could get caught was if one turned the other in. We talked of using a code for our telephone conversations and we decided that we would call the Vets Club north and the Ramsey Club south. Wright said he thought the gamblers should pay the cost of all the long distance telephone calls. He also told me that he thought we could get more money in time to come. It was on this date that I agreed to go along with Wright; that is, I should say accept his proposition as he put it to me.

The proposition which Scott has described is at pp. 177-179:

Q. Apart from any personal conversation, was there any conversation with Wright on this occasion about any proposition?

A. Yes, sir, there was.

Q. Yes; what was said?

A. Well, Wright told me that he had stopped a car for speeding in the Belleville area about two weeks ago. Wright said the driver of this car turned out to be one of the gamblers from Toronto. He said that the gambler was surprised to see him in uniform and put a proposition to him. This proposition was that myself, as an officer on the Anti-Gambling Branch, would find out, or knowing our policies for dates of raids respecting two Clubs operating in the Province, would forward the information regarding policies and raids and dates of raids, I should say, to Wright in Belleville, who in turn would forward the information to the gambler in Toronto. Now, for doing this—providing this information, Wright said that we could obtain—

Q. Who is "we"?

A. Wright and myself.

Q. Yes?

A. —$200 each per month. He said that the gambler was only interested in raids on two Clubs and the policies of the Provincial Police

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towards these two Clubs. Wright said he had been given a number to call in Toronto and he could certify the figure of $200 each per month. When Wright made this approach to me I showed some surprise and laughed at him, but I said, "Well, go ahead and make the phone call." And Wright went to a pay phone located in the beverage room in the Wallace Hotel and he appeared to dial a number and carry on a conversation. He completed the apparent phone call and returned to our table. And he told me, "That is right, we can make $200 each."

Q. Did you ask him who the gambler or contact was, at that time?

A. I did, sir.

Q. And did he tell you at that time?

A. He did not, sir.

Q. What else, if anything, was discussed with Wright at this time with reference to this proposition of his?

A. Well, Wright stated that this information was required only to protect the clientele frequenting the Clubs in that they get—they had big shots as customers in the Clubs. He told me that this would not interfere with my duties and mentioned to me how few raids there were in the past five years.

Q. You refer to Wright telling you of the information required about two gaming clubs. Did he at this time make—identify them by name?

A. Well, he identified the Vets Club which was located in Cooksville.

Q. Yes; and does that cover substantially the conversation you had with Wright at this time—what did you tell him about the proposition?

A. Well, I might say also that Wright said if I agreed to this proposition we would have a meeting with his contact.

Q. Yes; what did you tell him?

A. I told Wright that I would like some time to think it over.

Q. Yes; and then did you and he leave the hotel and you went home?

A. Yes, sir, we did.

Then at the second trial before Donnelly J., Scott testified as to the agreement as appears on pp. 276 to 278 in language almost identical to his testimony on pp. 176 to 179, culminating again in Scott's statement at pp. 312 and 313 that he "would be part of this scheme".

No matter how Scott's evidence at the two trials is scrutinized, there is no escaping that he and Wright entered into only one agreement or proposition and that was as Scott described it at the first trial as set out above and at the second trial as:

A. Wright explained that the gambler told him that if I did inform Wright of the dates of raids on these two social clubs and the policy of the Provincial Police with regard to the clubs, and Wright in turn forwarded it to the gambler we would each be reimbursed in what he figured would be two hundred dollars each per month. He explained that the situation would be handled in this way:—Upon

> my finding out that any of the two clubs would be raided I would telephone him, Wright, at Belleville and give him the information and he in turn would phone back to Toronto the information. He explained that—he mentioned how few raids had been made on the clubs in the past five years, saying that it wouldn't hinder my work at all and the big reason that this information was required was to protect people of reputable standing from being caught in the clubs on a police raid. He wouldn't name the person with whom he had dealt and he said he had been given a Toronto telephone number and he could phone this number and certify this amount for two hundred dollars each per month. Now, at this time I laughed a bit and said well, he might as well call the number. He went to a pay 'phone in the hotel and appeared to dial a number and appeared to carry on a conversation at the telephone. A couple of minutes later he came back to the table and said that that was correct, that we could make the amount of two hundred dollars a month each for this information. I told Wright I wasn't too keen; I would like some time to think about this matter at this time.

The conspirators (if there was a conspiracy) did not agree together just to obtain from Constable Scott information which it was his duty not to divulge—they were not interested in just getting information or just in having Scott give information unlawfully—they wanted the information so as to be forewarned of impending raids on their gambling clubs. That was the conspiracy, if any.

Therefore, everything that could be considered unlawful under count 2 was part and parcel of the agreement under count 1. There was only one agreement deposed to and it cannot be severed arbitrarily at some point by the Crown so as to create the illusion of two offences from what is in fact only one.

The verdict of not guilty under count 1, however unpalatable to the Crown, was a lawful verdict which has not been challenged upon appeal. That verdict dealt with the realities of the crime these appellants were charged with having committed. The Crown is now estopped from questioning that which was (in fact and law) the ratio of and fundamental to the decision in the first trial.

Crown counsel must have considered the two counts as covering the same offence. This is evident from the similarity of counsel's opening statement on count 1 before Spence J. as follows:

> In January, 1960, the Provincial Police transferred the accused Wright to other duties in the Force in Belleville, not associated with the anti-gambling unit. At that time Scott then became the second senior constable under Sergeant Anderson.

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In February 1960, something like a month following Wright's transfer, it is alleged that Wright came to see Scott and told him a story about stopping a Toronto gambler for speeding. He told Scott the gambler had offered to pay $400 a month to get information about the policy of the anti-gambling unit and the times of raids. Wright told Scott that here was a chance to make some easy money. Scott told Wright that he would have to think this over, arranged to meet him or talk to him later. He immediately reported the incident to his superiors and was instructed to go along with Wright.

Scott then agreed with Wright to tip him off on raids as requested and supply what information he could. Wright told him that the information that the gamblers or his (Wright's) contacts wanted was as to raids on what was popularly referred to as the Vets Club at Cooksville and a new Ramsey Club in Niagara Falls. Those were apparently the two main alleged gaming houses or clubs then known to be operating in Ontario.

when compared to Crown counsel's opening before Donnelly J. previously quoted.

The one conspiracy view is further strengthened by the similarity of the language used by Spence J. in his charge to the jury relating to count 1 and Donnelly J.'s charge as to count 2.

Spence J. said at pp. 1261-2 of the record of the first trial:

So what the Crown has here charged, put in short words, is that Wright, McDermott and Feeley did agree and conspire together corruptly to give money to Scott, with intent that Scott should interefere with the administration of justice.

The essential elements of the offence charged are these. Firstly, the agreement to give money to Scott corruptly; secondly, the intent that Scott should interfere with the administration of justice.

The offence is complete with the agreement, the arriving at the agreement or design. That design need not be carried out, as the agreement to do the unlawful act is the offence.

and at pp. 1280-1:

Much of the evidence dealt with the character of these so-called social clubs, the Centre Road Veterans Club and the Ramsey Club, and with those who were in control there. That evidence is relevant only to show, if it does show, that the accused McDermott and Feeley had an interest in the protection of those places from police interference, and therefore an interest in making the illegal conspiracy with Wright with which they are charged in this charge. It is relevant only for that purpose. Even if you are convinced that both of those clubs are illegal gaming houses, it is not sufficient. You must be convinced beyond reasonable doubt that, with the intent to protect them and thus interfere with the administration of justice, the two men agreed to pay Scott money corruptly.

Donnelly J. dealt with count 2 in his charge as follows at pp. 1144-5 of the record of the second trial:

This indictment covers a period between January 1st, 1960 and July 1st, 1960. It is not necessary to show that the accused conspired over this whole

period, as long as they conspired at any one time during that period. The conspiracy does not need to cover the whole period. The evidence is that Scott first contacted Wright about February 5th and that Wright was arrested on the 28th of May. You do not have to find that the parties conspired over that whole period; all the Crown has to show is that sometime in the period the three parties were active in the common design—associated in a common design for a common unlawful purpose.

Now I propose to review the evidence with you in regard to the parties individually. The accused Wright, as you have been told, was a member of the Ontario Provincial Police, and was a member of the Anti-gambling Squad for some years, Scott being a member of that squad or branch during a number of years also. The evidence indicates that Wright was on the Branch before Scott, and in January, 1960, Wright was transferred to Belleville. Scott's evidence was that on the 5th of February Wright came to his house and after some conversation they went to the Wallace Hotel or some hotel and Scott was told by Wright about some man who had been stopped on the highway by Wright and it turned out he was interested in gambling and that he was interested in obtaining information as to the policy of the Anti-gambling Branch and the times when raids would be made on one or more clubs. Wright told Scott, according to Scott, that if this information was given each of them would receive two hundred dollars a month. Wright and Scott parted after Scott had told Wright that he wanted to think it over. There were subsequent conversations, one or two, very shortly after, in one of which Scott told Wright that he would be a party to the proposition which Wright had made . . . .

I am, accordingly, of opinion that Donnelly J. should have held that *res judicata* had been established and he should have directed the jury to acquit the appellants under count 2. The convictions will, therefore, be set aside and the appellants acquitted.

That still leaves Wright's appeal from the judgment of the Court of Appeal setting aside his acquittal by Donnelly J. on counts 3, 4 and 5 and directing a new trial.

I agree with Schroeder J.A. that as to these counts charging as they do the commission of substantive offences the Crown was not estopped by Wright's acquittal under count 1 from proceeding to try Wright for the substantive offences: *McDonald v. The Queen*[1], *per* Martland J.

That does not, however, dispose of the matter because Wright contends and in my opinion correctly that his acquittal under count 1 negatives the essentially criminal element of the charges, namely, that the various sums of money were given corruptly to Constable Scott "with intent that the said George Scott should interfere with the administration of justice . . . ." and that if the charges

[1] [1960] S.C.R. 186 at 194-195, 32 C.R. 101, 126 C.C.C. 1.

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under counts 3, 4 and 5 are to be let go to the jury the trial judge will be obliged to charge the jury in the light of the admissions made on behalf of Wright before Spence J. that in view of Wright's acquittal on count 1 it would not be open to them to find that the money which Wright admitted having given Scott was given with intent to interfere with the administration of justice. Such being the case in lieu of upholding the direction for a new trial which must necessarily result in an acquittal, this Court should allow the appeal as to counts 3, 4 and 5 and acquit Wright on these charges.

Appeals dismissed, Cartwright *and* Hall JJ. *dissenting.*

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