



1964

Criminal Law - Double Punishment - Intent and Objective Test

James W. Cardwell

Follow this and additional works at: <https://scholar.smu.edu/smulr>

Recommended Citation

James W. Cardwell, *Criminal Law - Double Punishment - Intent and Objective Test*, 18 Sw L.J. 275 (1964)
<https://scholar.smu.edu/smulr/vol18/iss2/5>

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Notes

Criminal Law — Double Punishment — Intent and Objective Test

Defendant was accused of unlawfully entering a hospital under construction and stealing therefrom an air compressor. Defendant was convicted and punished for burglary (unlawful entry) and grand theft (unlawful taking), with the sentences to run consecutively.¹ Held: Section 654, California's double punishment statute,² prohibits Defendant from being punished for more than one of the offenses because burglary and grand theft constitute parts of a continuous course of criminal conduct motivated by one intent and objective. *People v. McFarland*, 58 Cal. 2d 748, 376 P.2d 449 (1962).

The rule against double punishment, in general terms, prohibits the imposition of a separate penalty for each of several offenses committed in one criminal transaction. The rule was nonexistent prior to the mid-1800s.³ It arose as a result of the numerous instances of

¹ The terms "consecutive sentences" and "concurrent sentences" are antithetical. A California court has given the following definition of consecutive sentences: "[A] sentence which runs consecutively is one which 'shall commence at the termination of the first term of imprisonment to which he has been sentenced, or at the termination of the second or subsequent term of imprisonment to which he has been sentenced, as the case may be.'" *People v. Hirshbein*, 16 Cal. App. 2d 458, 60 P.2d 532, 533 (Dist. Ct. App. 1936). Another court has said of concurrent sentences: "[T]he word 'concurrently' is generally used when terms of imprisonment are imposed separately for each of two or more offenses charged in the same indictment, and to indicate that while the convicted prisoner is serving one he is serving all." *Martinez v. Nagle*, 53 F.2d 195, 197 (9th Cir. 1931).

² See text accompanying note 10 *infra*.

³ Before this date, there was no need for the rule against double punishment. Punishment was strictly relative in the early days of criminal law, and the penalty meted out would be determined not only by the seriousness of the crime, but also by such factors as the accused's station in life, his reputation, and the number of times he had been in trouble. The judge or jury would take all of these factors into consideration and then determine one aggregate punishment. Punishment often took the forms of physical torture and confiscation of property rather than the incarceration of today; consequently, there was no problem whether the terms should be concurrent or consecutive. Such refinements arose only after codification of the penal laws. See Clark & Marshall, *Crimes* §§ 1.00-.10 (6th ed. 1958).

Unlike the rule against double punishment, double jeopardy has been known and in use since the earliest days of reported criminal law. First as an ancient common-law defense and later as a constitutional protection, the plea of double jeopardy has been invoked regularly to keep a defendant from being harassed by more than one prosecution for the same criminal offense. The double jeopardy doctrine gives meaning to trial by jury. If a person could be put on trial repeatedly for the same offense, the constitutional right to a jury trial would be emasculated. The jury's function would be voided. A United States Supreme Court case, *Ex parte Lange*, 85 U.S. 163 (1873), has held that the double jeopardy clause of the United States Constitution applies to double punishment as well as to double prosecutions. This was the basis for use of the double jeopardy plea in a one-trial, multicount indictment situation. For a California Supreme Court case which held that no plea of double jeopardy can be made when defendant is tried but once, see *People v. Tideman*, 57 Cal. 2d 574, 370 P.2d

partial overlap of offenses, a feature inherent in every penal code.⁴ It is commonplace for a defendant to violate more than one criminal statute as he perpetrates his criminal actions. The issue of the amount of punishment invariably becomes relevant if the accused is found guilty of violating more than one statute.⁵

The great majority of states solved the problem of double punishment through the courts on an *ad hoc* basis.⁶ The result was a strong conflict of authority between some of these jurisdictions as to certain combinations of offenses.⁷ A few states enacted statutes covering specific combinations of offenses⁸ and expressly defining the amount of punishment to be given when these combinations existed in one criminal transaction. Generally, these statutes were very narrow in scope and did not greatly alleviate the overall problem. Four states, including California, sensed the scope of the double

1007 (1962). Such diversities are indicative of the confusion in this area. For further treatments of the problem of double jeopardy, see Slovenko, *The Law on Double Jeopardy*, 30 Tul. L. Rev. 409 (1956); Note, 7 Buffalo L. Rev. 461 (1958).

⁴ Although penal codes brought important advantages to the criminal law, e.g., clarity and consolidation, many complications also arose. One complication was the overlap of offenses. However, there was no choice but to have such overlaps in the penal codes. The drafters were interested primarily in phrasing the statutes so that every conceivable instance of criminal behavior would be covered. The zealotry with which this was done may have increased the overlap problem, but it has never been suggested that an effective penal code could be written in any other way. Since this problem would continue to exist as long as the penal codes themselves existed, the rule against double punishment was created to counteract the unjust situations which would arise.

⁵ It is not difficult to discover the advantages which inured to the prosecutor when the multicount indictment gained acceptance. Such an indictment could be drawn to include every possible offense committed, with each of the offenses the subject of an individual count of the indictment. With such individual enumeration, it is unusual, and in fact it is the rule, that an accused will be found guilty on more than one count. This creates the problem of double punishment.

⁶ The courts acquired this responsibility by default in states in which the legislature failed to enact any applicable statutes. A court in these states seldom went as far as to say that with a certain decision it was attempting to solve the problem of double punishment. However, by determining whether an accused who had committed a combination of offenses, e.g., burglary and robbery, kidnapping and rape, or forgery and larceny, would be punished for each of the offenses or for only one, the courts were setting the state's policy in that respect. Illustrations of such devolution of the law are found in: Colorado: *Ex parte Hill*, 101 Colo. 243, 72 P.2d 471 (1937); Maryland: *Vandergrift v. State*, 226 Md. 38, 171 A.2d 713 (1961); New Jersey: *State v. Byra*, 128 N.J.L. 429, 26 A.2d 702 (Sup. Ct. 1942), *aff'd*, 129 N.J.L. 384, 30 A.2d 49 (Ct. Err. & App. 1943); North Carolina: *State v. Cody*, 224 N.C. 470, 31 S.E.2d 445 (1944); Virginia: *Robinson v. Commonwealth*, 190 Va. 134, 56 S.E.2d 367 (1949).

⁷ Compare *Branch v. Commonwealth*, 184 Va. 394, 35 S.E.2d 593 (1945), with *Commonwealth v. Ashe*, 343 Pa. 102, 21 A.2d 920 (1941). See also *State v. Bobbitt*, 228 Mo. 252, 128 S.W. 953 (1910); *State v. Carlson*, 5 Wis. 2d 595, 93 N.W.2d 354 (1958).

⁸ Tex. Pen. Code Ann. art. 1399 (1953) states: "If a house be entered in such a manner as to be burglary, and the one guilty of such burglary shall after entry commit any other offense, he shall be punished for burglary and also for whatever other offense is so committed."

Tex. Pen. Code Ann. art. 1324 (1953) states: "If any bodily injury less than death is suffered by any one by reason of the commission of any offense named in this and the preceding chapter [arson and related offenses], the punishment may be increased so as not to exceed double that which is prescribed in cases where no such injury is suffered."

See also N.Y. Pen. Law § 406; Wash. Rev. Code Ann. § 9.19.040 (1961).

punishment problem and enacted similar statutes⁹ that purported to cover all criminal combinations. California's double punishment statute, section 654, was based on Field's Draft of the New York Penal Code and was part of the original 1872 penal code. It has remained unaltered as follows:

An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one. . . .¹⁰

However, this statute does not prohibit double punishment in all cases. The effectiveness of these statutes, *i.e.*, the extent to which double punishment would be precluded, depended on the definition given to the word "act." Obviously, the more liberal and inclusive the definition was, the more thorough the preclusion of double punishment would be. Having no guidelines to follow in defining "act,"¹¹ the California courts were forced to grapple with the word on a case-by-case basis. Predictably, the result was a confusing set of dubious and parochial criteria, each adopted for a particular set of facts but none applicable to all situations. An early view restricted the statute's application to cases involving included offenses.¹² Later cases inquired into the reason for the use of physical force by the accused in perpetrating his crimes.¹³ If the physical actions connected

⁹ Arizona: Ariz. Rev. Stat. Ann. § 13-1641 (1956); California: Cal. Pen. Code § 654; New York: N.Y. Pen. Law § 1938; Utah: Utah Code Ann. § 76-1-23 (1953).

¹⁰ Cal. Pen. Code § 654. There are two other subjects covered in this statute. They are double jeopardy and substituted punishments. This Note will be concerned only with the part of the statute which concerns double punishment.

There are at least two well recognized exceptions to the application of the double punishment portion of the California statute. Section 654 does not apply to instances in which a single statute names different acts and different offenses and punishes each act separately. *People v. Coltrin*, 5 Cal. 2d 649, 55 P.2d 1161 (1936); *People v. Mehra*, 73 Cal. App. 162, 238 Pac. 802 (1925). Also, this section is not applicable to instances in which one act has two results, each of which is an act of violence against the person of separate individuals. *People v. Brannon*, 70 Cal. App. 225, 233 Pac. 88 (1924).

¹¹ The courts have not had available the important interpretative aid, legislative intent. Since § 654 and numerous other penal statutes were enacted into law as parts of the first California penal code, there were few, if any, comments by the enacting session of the legislature on the individual statutes. Further, § 654 has not been amended since its enactment; subsequent legislative sessions have not voiced opinions as to its merits and applicability.

¹² *People v. Trantham*, 24 Cal. App. 2d 177, 74 P.2d 851 (1937); *People v. Mazzola*, 99 Cal. App. 682, 279 Pac. 211 (1929).

¹³ Compare *People v. Logan*, 41 Cal. 2d 279, 260 P.2d 20 (1953), with *Ex parte Chapman*, 43 Cal. 2d 385, 273 P.2d 817 (1954). In *Logan* the defendants hit the victim with a baseball bat to incapacitate him while they robbed him. In *Chapman* the defendants had completed an armed robbery, and as their victim attempted to escape, the defendants hit him with a revolver. The court held in *Logan* that since incapacitating the victim was an integral part of the defendants' scheme, double punishment could not be allowed. However, in *Chapman* the robbery had been completed, so assaulting their victim was not a part of the robbery, and, therefore, double punishment was allowed.

with one of the crimes were deemed "an inseparable part of"¹⁴ or "merely incidental to"¹⁵ the other crime's perpetration, they were considered only one act, and the defendant was punished only once. In other cases the court looked to the "singleness of the act."¹⁶ As is evident, the various interpretations were seldom similar and in some instances resulted in express reversals of earlier cases.¹⁷

The intent and objective test was first referred to in *Neal v. State*.¹⁸ In this case the defendants caused a fire in the victims' bedroom and were convicted of arson and attempted murder. On appeal the California Supreme Court, in allowing only one punishment, stated:

Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor.¹⁹

From the facts it is clear that the defendants' only act was the throwing of a fire bomb through the victims' bedroom window. Since

¹⁴ *People v. Knowles*, 35 Cal. 2d 175, 217 P.2d 1 (1950). The court said:

Defendant's convictions for violation of Penal Code section 209 (kidnapping) and Penal Code section 211 (robbery) both rest upon the commission of a single act: the taking of personal property in the possession of Waisler and Leshner from their persons and in their immediate possession by force and fear, namely, by seizing and confining them under force of arms. The seizure and confinement were an *inseparable part of the robbery*. *Id.* at 7. (Emphasis added.)

¹⁵ *People v. Coltrin*, 5 Cal. 2d 649, 55 P.2d 1161 (1936). The court reasoned: "If the act involved in one charge is necessarily involved in the other and is *merely incidental to* that charge, but one offense is committed, and it cannot be carved into two offenses in order to inflict a double punishment." (Emphasis added.) *Id.* at 1166.

¹⁶ *People v. Knowles*, 35 Cal. 2d 175, 217 P.2d 1 (1950). The court stated: "If a course of criminal conduct causes the commission of more than one offense, each of which can be committed without committing any other, the applicability of 654 will depend upon . . . whether a single act has been so committed that more than one statute has been violated. . . . It is the *singleness of the act* and not of the offense that is determinative." (Emphasis added.) *Id.* at 8.

¹⁷ Compare *People v. Brown*, 49 Cal. 2d 577, 320 P.2d 5 (1958), with *People v. Coltrin*, 5 Cal. 2d 649, 55 P.2d 1161 (1936). These are both abortion-death cases with very similar facts. In the earlier *Coltrin* case, the court reasoned that performing an abortion which results in death is something more than a single act, and at some point an act of the defendant caused the death of the victim, but was not connected with the abortion. Therefore, that court allowed the defendant to be punished for both offenses, abortion and murder. Later, in *Brown* the court reconsidered its reasoning in *Coltrin* and said: "It is manifest from the evidence that defendant committed against Lucy only one criminal act, that is, the insertion of a blunt instrument in combination with the injection of a solution. . . . It is artificial to say that the act which caused death in the *Coltrin* case, and the act which caused death in the present case, was another act than that which constituted the abortion." *People v. Brown*, 320 P.2d 13, 15. Therefore, in *Brown* the court allowed defendant to be punished for only one of his two offenses.

Other courts have adhered to a simple, if not completely satisfactory, test to determine a double punishment statute's applicability. This test is an analysis of each case to determine whether an individual act can be established as the basis for each offense charged. A case in which this test has been applied is *People v. Battle*, 32 Misc. 2d 196, 228 N.Y.S.2d 455 (Albany County Ct. 1961).

¹⁸ 55 Cal. 2d 11, 357 P.2d 839 (1960).

¹⁹ *Id.* at 843.

it has never been questioned that only one punishment may be given when two or more offenses are committed by a single act of the defendant,²⁰ there was no doubt that the defendants in this case could be punished for only one of the crimes.²¹ Hence, resort by the court in *Neal* to the intent and objective test was not needed to reach the correct result of single punishment. The court's espousal of this test, therefore, cannot be said to be binding precedent and perhaps can be characterized as nothing more than judicial dictum.²²

The situation was different in *People v. McFarland*.²³ The defendant clearly committed more than one physical act by breaking into the hospital and carrying away the air compressor.²⁴ With these facts before it, the court examined the *Neal* statement concerning the intent and objective test and adopted it as the test to determine in what situations the double punishment statute will be applied. The court stated:

[T]he prohibition of the statute against double punishment applies not only where "one 'act' in the ordinary sense" is involved but also where there is a 'course of conduct' which violates more than one statute and comprises an indivisible transaction punishable under more than one statute within the meaning of section 654. . . . The divisibility of a course of conduct depends upon the intent and objective of the defendant; and . . . if all the offenses are incident to one objective, the defendant may be punished for any one of them but not for more than one.²⁵

From this it is clear that the California test is that multiple offenses must be examined in the light of the defendant's intent and objective to see whether he can be punished more than once. Furthermore,

²⁰ The only exception to this statement occurs if this single act has an injurious effect on more than one person. See note 10 *supra*.

²¹ Since the bomb had injured two persons, defendants could be given consecutive sentences for two attempted murder convictions, but no punishment could be given for the arson conviction, or if conviction on one count of arson carried a heavier penalty than conviction on two counts of attempted murder, then defendants could be punished for the arson conviction, but not for the attempted murder convictions.

²² *Childers v. Childers*, 74 Cal. App. 2d 56, 168 P.2d 218 (1946). The court stated: "Whatever may be said in an opinion that is not necessary to a determination of the question involved is to be regarded as mere dictum." *Id.* at 221.

Compare *Payne v. City of Covington*, 276 Ky. 380, 123 S.W.2d 1045 (1938), in which under the facts of the case construction of constitutional sections was unnecessary; language of the opinion construing such sections was said to be mere "dictum."

²³ 58 Cal. 2d 748, 376 P.2d 449 (1962).

²⁴ The dissent offers this fact as its main argument in claiming that § 654 is inapplicable. After stating that there is clearly more than one act present in this case, the dissent says: "Section 654 unmistakably speaks in the singular of 'An act or omission which is made punishable in different ways by different provisions' of the Penal Code. It does not speak in the plural of acts or omissions which independently constitute different crimes and which as such are made punishable in different ways by different provisions of the code." 376 P.2d at 466.

²⁵ 376 P.2d at 456.

even though the test had a doubtful beginning, the court in *McFarland* raised it to full legal stature by incorporating it as the main (and perhaps sole) basis for the decision.

California is the only state to adopt the intent and objective test. Of the other three states with double punishment statutes, only New York has delved very deeply into its statute.²⁶ New York's test is a case-by-case analysis to determine whether an individual act can be established as the basis for each offense charged. Adherence to this approach is illustrated by the court of appeals in *People v. Jackson*,²⁷ in which the court stated:

We recognize that section 1938²⁸ is not by its terms limited to included crimes. . . . [I]f, however, the acts are separate, it will not apply. Here one single act is not the basis of the two charges; [the assault in the first degree and the attempted robbery] were separate and distinct and involved two different kinds of conduct, even though arising out of the same transaction.²⁹

On the face of the words used, New York has not by its approach reached the problem which the California court solved in the principal case, *i.e.*, the interpretation of the word act. New York has chosen to interpret the entire statute and in so doing has used the word act to help define its interpretation.³⁰ This difference could be ignored as a matter of placing emphasis; however, since this word is so clearly the key to both statutes, it would seem that through non-definition of the word act, New York's courts have left themselves vulnerable to attack.³¹

²⁶ The logical explanation for this is that of these three states, only New York has had more than a handful of cases in point arise. Utah has said emphatically that its statute will apply only in cases in which there is one *act*. However, in the only case to date in which this statute has been involved, the Utah court said only that the statute in question "refers to *one* act or omission. Obviously a burglary in and of itself is *one* act, requiring no theft, and a larceny is *another* or second act requiring a theft." *State v. Jones*, 13 Utah 2d 35, 368 P.2d 262, 263 n.3 (1962).

In the few occasions in which Arizona has construed its double punishment statute, it has held uniformly that the statute will not operate unless the two alleged crimes have identical components. Therefore, since burglary and grand theft do not have identical components, separate punishments could be given for that combination in Arizona. *State v. Hutton*, 87 Ariz. 176, 349 P.2d 187 (1960); *State v. Westbrook*, 79 Ariz. 116, 285 P.2d 161 (1954); *State v. Sullivan*, 68 Ariz. 81, 200 P.2d 346 (1948).

²⁷ 2 N.Y.2d 259, 140 N.E.2d 282 (1957).

²⁸ N.Y. Pen. Law § 1938. This statute is New York's counterpart to California's double punishment statute. Except for two or three unimportant words, the statutes are identical.

²⁹ 140 N.E.2d at 286.

³⁰ These cases have helped define the terms "separate and distinct" and "single inseparable act." *People v. Repola*, 305 N.Y. 740, 113 N.E.2d 42 (1953); *People v. Plesh*, 283 App. Div. 868, 130 N.Y.S.2d 157 (1954); *People v. Zipkin*, 202 Misc. 552, 118 N.Y.S.2d 697 (Monroe County Ct. 1952).

³¹ Although New York has not met the main problem squarely since it has chosen not to define the word "act," the decisions of the New York cases have a consistency which is not present among California decisions. For examples of California's inconsistency, see text accompanying notes 12-19 *supra*. For examples of New York's consistency, see note 28 *supra*.

The approaches of New York and California can also be distinguished by the manner in which the facts are adjudged by the jury. In New York an objective basis will be used in elevating the evidence;³² that is, the jury will decide whether a defendant's actions can be compartmentalized into two or more acts and whether there was more than one kind of conduct. California's intent and objective test, on the other hand, requires a subjective inquiry. On the surface the objective approach might appear to be more trustworthy; however, resort to subjective intent is replete throughout the criminal law³³ and has proven to be adequate.³⁴

In *People v. McFarland* the dissent³⁵ advanced a multi-pronged attack on the intent and objective test. Basically, the arguments were: (1) another statute forbids such an interpretation; (2) the problem of double punishment should be solved by using a case-by-case, factual analysis; (3) the application of the intent and objective test will have a diversionary effect on the jury in carrying out its functions; and (4) the appellate courts are becoming a second trier of fact through the application of this test. As to the dissent's first argument, there is no clear expression of legislative intent to prevent the court from adopting its interpretation of the double punishment statute. In fact, this very important touchstone, which is so heavily relied upon in the similar area of the federal law,³⁶ is almost un-

³² That the New York courts will use an objective basis is divulged implicitly by such statements as: "Here, one single act is not the basis of the two charges; they were separable and distinct and involved two different kinds of conduct, even though arising out of the same transaction." *People v. Jackson*, 2 N.Y.2d 259, 140 N.E.2d 282, 286 (1957).

³³ This is not to imply that subjective intent has no place in civil actions. In fact, most suits of a testamentary or contractual nature will be determined through this method.

³⁴ The crime of murder furnishes an appropriate example. In every jurisdiction, a malicious, subjective intent must be proved to be possessed, either expressly or imputedly, by an accused before he can be convicted of the highest degree of murder. No other method has been discovered which will deal as well with this serious crime.

³⁵ Justice Schauer, who wrote the dissenting opinion in the present case, had written dissenting opinions on two previous occasions in which he voiced his disapproval of the intent and objective test. *Seiterle v. Superior Court*, 57 Cal. 2d 397, 369 P.2d 697, 700 (1962); *Neal v. State*, 55 Cal. 2d 11, 357 P.2d 839, 845 (1960). In the present case two other justices concurred in the dissent.

³⁶ The question of double punishment has been in issue in several recent federal cases. See *Milanovich v. United States*, 365 U.S. 551 (1961); *Heflin v. United States*, 358 U.S. 415 (1959); *Prince v. United States*, 352 U.S. 322 (1957); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952). In each case, the United States Supreme Court relied heavily on the intent of Congress in enacting the particular statute in question. These decisions, in fact, turned on the discernment of this Congressional intent.

The majority decision in the instant case succeeds effectively in obfuscating the posture of the federal law on double punishment. It refers to the four Supreme Court decisions cited above and blandly states that each "emphasized the intent of the defendant." 376 P.2d at 456. A reading of these cases will show that although the Supreme Court refused to allow double punishment in each case, the decisions were not grounded on the intent of the defendant but on the intent of Congress.

Each of the federal cases cited by the majority involves plural violations of one federal statute while the instant case is concerned with a singular violation of more than one statute.

available. However, the dissent urged³⁷ that section 459³⁸ aids in interpreting section 654. Section 459 makes burglary a completed offense upon the entering of any house or structure with intent to commit a felony. The dissent argued that this section indicates that the legislature intended separate punishment for burglary and whatever other felony, if any, was committed.³⁹ However, it is just as logical to assume that the legislature was only concerned with making unlawful breaking and entering a criminal offense so that persons apprehended before completing their intended objectives would not be outside the law's reaches.

The dissent cannot be criticized for desiring a factual analysis of each case to determine whether the defendant shall be doubly punished. However, the intent and objective test is compatible with such an analysis. The majority has not rejected the use of a case-by-case analysis; rather, it has postulated a method whereby it can be accomplished. If the dissent is anxious about the true flexibility of the test, it must be admitted that such flexibility can be determined only by observing how readily susceptible of application the test is to the cases which arise. Subsequent to the instant case, five cases in which the intent and objective test was applied have been reviewed by California district courts of appeals.⁴⁰ Although the sample provided by these cases is inadequate upon which to base a generalization, it would appear that no injustice has resulted from section 654's application via the intent and objective test. In each case the court has been able to determine logically whether the two or more offenses were committed with one intent and objective. The inflexibility argument is valid only if the facts of each case will not fit into the mold provided by the test. Thus far this requirement is being met.

By its very words, § 654 would not be applicable to the situations in these federal cases, and they offer no substantiation whatsoever for the majority's decision. See *Clark v. United States*, 267 F.2d 99 (4th Cir. 1959), for a case which has made the distinction between plural violations of one statute and a single violation of two or more statutes.

³⁷ 376 P.2d at 462 (dissenting opinion).

³⁸ Cal. Pen. Code § 459 states:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach as defined by the Vehicle Code, vehicle as defined by said code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary.

³⁹ 376 P.2d at 462-63.

⁴⁰ *People v. Magee*, ___ Cal. App. 2d ___, 31 Cal. Rptr. 658 (Dist. Ct. App. 1963) (robbery and murder); *People v. Rosenberg*, ___ Cal. App. 2d ___, 28 Cal. Rptr. 214 (Dist. Ct. App. 1963) (grand theft and forgery); *People v. Keller*, 212 Cal. App. 2d 216, 27 Cal. Rptr. 805 (Dist. Ct. App. 1963) (conspiracy to commit burglary and attempted burglary); *People v. Morrison*, 212 Cal. App. 2d 33, 27 Cal. Rptr. 828 (Dist. Ct. App. 1963) (robbery and kidnapping for purpose of robbery); *People v. Jones*, 211 Cal. App. 2d 63, 27 Cal. Rptr. 429 (Dist. Ct. App. 1963) (burglary and robbery).

The dissent also claims that the trial court is guided away from a factual analysis of the evidence and instead becomes "enmeshed in a *post hoc* speculation as to the scope of the criminal's objective."⁴¹ Clearly, the jury will have an added responsibility; however, this in itself is not a reason to decry the test. It cannot be said that the adding of one duty to a jury's many duties will create an insoluble situation. The trier of fact has coped successfully with discerning subjective intent in many areas of the criminal law; it can be done here.

The dissent's fourth attack pertains to the appellate court and its function. The dissent said, "the applicability of the so-called 'intent and objective test' is apparently a game that any number can play."⁴² This statement was based on the fact that seventy-five per cent of the cases on double punishment which were heard between the times of the *Neal* and *McFarland* cases resulted in reversals of one or more convictions.⁴³ Thus, the dissent contended that the appellate courts obviously interpreted the *Neal* dictum "as a license to indulge at the appellate level in unbridled speculation as to the scope and content of the criminal's 'objective.'"⁴⁴ Such a situation would make the lower appellate court a second trier of fact, and the principle of appellate review, whereby the appellate court regards the evidence in the light most favorable to the finding of the original trier of fact,⁴⁵ would be emasculated if not discarded. Obviously, no newly conceived test, no matter what its import, should pre-empt or disrupt the time-tested balance of functions between the courts. While it is agreed that such imbalance could not be tolerated, this does not necessarily mean that the intent and objective test must be abandoned. The blame should be placed where it is deserved. This imbalance is not a fault of the test. Instead, it is a weakness of California's appellate system, and if nothing else, the California Supreme Court should re-appraise the lower appellate courts of their continuing role in maintaining this important balance. Therefore, none of the defects alleged as justification for the abridgement of the intent and objective test are as validly defacing as the dissenters claim.

⁴¹ 376 P.2d at 467.

⁴² *Ibid.*

⁴³ *Id.* at 468 n.3.

⁴⁴ *Id.* at 468.

⁴⁵ An appellate court is not a forum in which to make a new case. It is merely a court of review to determine whether or not the rulings and judgment of the court below upon the case as made there were correct. Any other rule, it has been well said, would overturn all just conceptions of appellate procedures in cases at law and would result in making an appeal in such action a trial de novo, without the presence of witnesses, or the means of correcting errors and omissions. *Warren v. Warren*, 93 Va. 73, 24 S.E. 913 (1896).