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SOME ASPECTS OF DOUBLE JEOPARDY

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INTRODUCTION

THE formulation of the classic axiom that "No man should be twice punished for the same offense" is credited to Sir Edward Coke, who, among other offices, served as Attorney General for England beginning in the year 1594. The principle was deemed so basic that it was embodied in our Federal Constitution and in the Constitutions of most of the states. Thus, the Fifth Amendment to the Constitution of the United States reads in part: ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . ." and the Constitution of the State of New York contains a similar provision.[1]

"Jeopardy" generally means exposure to loss or injury and is synonymous with peril, hazard or risk.[2] In law, jeopardy is that status which attaches to a person when he is put on trial before a court of competent jurisdiction on an indictment or information, which is sufficient in form or substance to sustain a conviction, and a jury has been charged with his deliverance.[3] As was said in *People* ex rel. *Totalis v. Craver*,[4] "It is the peril in which a prisoner is put when he is regularly charged with a crime before a tribunal, properly

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[1] N. Y. CONST. Art. I, § 6 (1938).

[2] People *ex rel.* Totalis v. Craver, 174 Misc. 325, 20 N. Y. S. 2d 533 (Sup. Ct. 1940).

[3] *Ibid.* See 15 AM. JUR. CRIMINAL LAW § 359 (1938). In Kepner v. United States, 195 U. S. 100, 126 (1904), the Court held that the constitutional provision against double jeopardy can have no application unless the prisoner has theretofore been placed on trial. For example, Justice Brandeis said in Collins v. Loisel, 262 U. S. 426, 429 (1923), "The preliminary examination of one arrested on suspicion of a crime is not a trial; and his discharge by the Magistrate upon such examination is not an acquittal . . . (People v. Dillon, 197 N. Y. 254, 256)."

[4] 174 Misc. 325, 326, 20 N. Y. S. 2d 533, 535 (Sup. Ct. 1940).

organized and competent to try him." The same thought has been expressed in somewhat similar language: ". . . when a person has been placed on trial on a valid indictment or information before a court of competent jurisdiction, has been arraigned, and has pleaded, and a jury has been impaneled and sworn, he is in jeopardy, but . . . until these things have been done, jeopardy does not attach." [5]

Prior to 1946 when the Federal Rules of Criminal Procedure became effective a defendant presented an objection on the ground of former jeopardy by a plea in bar.[6] However, in the federal courts today, the accused raises the objection by a motion before trial under Rule 12 of the Federal Rules of Criminal Procedure.[7]

Offense Against Two Sovereigns

Notwithstanding any state or federal constitutional protections against double jeopardy, it is clear that where an act offends against the law of both a state and the federal government both sovereigns may prosecute and punish. This principle is simple, but, as with many such principles, difficulties arise in its application.

The case of *People* ex rel. *Liss v. Superintendent* [8] is an apt example. A husband and wife were indicted in a federal district court in Brooklyn, New York, and charged with violation of the federal narcotics laws.[9] Shortly before, the

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[5] 22 C. J. S. § 241 (1940). *See* McCarthy v. Zerbst, 85 F. 2d 640, 642 (10th Cir. 1936), *cert. denied,* 299 U. S. 610 (1936). The protection secured by the double jeopardy provision applies to misdemeanors as well as felonies. *Ex parte* Lange, 18 Wall. 163 (U. S. 1873). *See* Jarl v. United States, 19 F. 2d 891 (8th Cir. 1927).

[6] United States v. Murdock, 284 U. S. 141, 151 (1931); United States v. Lanza, 260 U. S. 377, 379 (1922); United States v. Ball, 163 U. S. 662, 665 (1896); *Ex parte* Nielson, 131 U. S. 176, 177 (1889); Brady v. United States, 24 F. 2d 399, 405 (8th Cir. 1928); Gardes v. United States, 87 Fed. 172, 173 (5th Cir. 1898).

[7] Subdivision (b)(I) and (II) of Rule 12 is the governing provision. For a form of motion to dismiss, see Form 19 in the Appendix to the Federal Rules of Criminal Procedure. It need merely be stated that the defendant moves that the indictment be dismissed on the ground that the defendant has been in jeopardy of conviction of the offense charged therein in the case of U. S. v. ..... in the District Court for the ..... District of ....., Case No. ..... terminated on .....

[8] 282 N. Y. 115, 25 N. E. 2d 869 (1940).

[9] 43 Stat. 657 (1924), 21 U. S. C. § 174 (1946).

police had discovered a quantity of morphine in their home. Upon the trial, the husband was convicted, and the wife acquitted.[10]

After the wife's acquittal, an information was filed against her in the Court of Special Sessions for the City of New York, County of Kings, charging violation of the New York Public Health Law, which made the unauthorized possession of any narcotic drug unlawful. This information was based upon the possession of the identical narcotics referred to in the federal indictment. Substantially the same testimony was offered by the prosecution at the trial of the information in Special Sessions as was relied upon by the Federal Government in the former trial, and the wife was convicted in the state court. However, before she was sentenced by Special Sessions, the wife instituted a habeas corpus proceeding; the writ was sustained by the New York Supreme Court at Special Term but dismissed by the Appellate Division.[11]

However, the Appellate Division was in turn reversed by the Court of Appeals.[12] The state's highest tribunal pointed out that, while two sovereigns may punish for the same offense when it is a crime against each, the statute involved in the state prosecution plainly excepted a case where a person had been convicted or *acquitted* of the same act or omission under the federal law. Speaking for the Court, Judge Loughran said:

"No person shall be subject to be twice put in jeopardy for the same offense." (N. Y. Const. Art. 1, Sec. 6.) This constitutional guaranty is invoked by the relator in opposition to the present prosecution against her in this state for what she asserts is the same *offense* of which she was acquitted in the federal court. She is wrong in that position. A single act which violates both federal and state criminal laws is generally held to result in distinct offenses against the two separated governments. "Each government in determining what shall be an offense against its peace and dignity is exercising its

[10] The conviction was affirmed in United States v. Liss, 105 F. 2d 144 (2d Cir. 1939).

[11] People *ex rel.* Liss v. Superintendent, 257 App. Div. 865, 13 N. Y. S. 2d 787 (2d Dep't 1939).

[12] People *ex rel.* Liss v. Superintendent, 282 N. Y. 115, 25 N. E. 2d 869 (1940).

own sovereignty, not that of the other. It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. . . ."

The relator also contends, however, that the present prosecution against her is outlawed by the very statute which the People say she transgressed. In this contention we think she is right. . . . Since the want of jurisdiction of the Court of Special Sessions was apparent upon the face of the conceded facts, the case was clearly an appropriate one for the remedy of habeas corpus.[13]

Also illustrative of the difficulties encountered in applying the dual sovereignty principle is *Grafton v. United States.*[14] There a soldier had been acquitted on a manslaughter charge by a general court martial convened in the Philippine Islands, the crime charged was a violation of the 62d Article of War.[15] Subsequently, a criminal information in the name of the United States was filed in a Philippine court charging him with the same offense committed in violation of a local law. The United States Supreme Court held that the acquittal of the accused by the court martial precluded his again being tried for the same offense in the civil court, for the reason that he would thus be put twice in jeopardy of punishment. The 62d Article of War was a federal statute, and the general court martial was a federal tribunal. The Philippine Act was a local law, and the Philippine court of first instance was a local court. But both of the laws and both of the courts owed their existence to the same authority. The decision thus rested upon the ground that the soldier, having been acquitted by the federal tribunal, could not be subjected to prosecution in any other court, civil or military, of the same sovereignty.[16]

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[13] *Id.* at 118-120, 25 N. E. 2d at 870-871. The statute which the court relied upon as forbidding the state prosecution was N. Y. Public Health Law § 445:

"*Effect of acquittal or conviction under federal narcotic laws*

No person shall be prosecuted for a violation of any provision of this article if such person has been acquitted or convicted under the federal narcotic laws of the same act or omission which, it is alleged, constitutes a violation of this article. Added L. 1933, c. 684, eff. July 1, 1933."

[14] 206 U. S. 333 (1907).

[15] Now A. W. 96, 41 STAT. 806 (1920), 10 U. S. C. § 1568 (1946).

[16] It should be noted that the Court grounded its holding not on the double jeopardy provision of the then A. W. 102 (now in substance A. W. 40,

During the prohibition period, the problem again came before the Supreme Court in *United States v. Lanza.*[17] It was there held that conviction and punishment in a state court under a state law for making, transporting and selling intoxicating liquors was not a bar to a prosecution in a federal court under the National Prohibition Law for the same acts. The Supreme bench stated:

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.[18]

It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

CLOSELY RELATED OFFENSES

From a study of the cases, it plainly appears that closely related offenses are separately punishable without any violation of the double jeopardy provisions.

In *Blockburger v. United States,*[19] the question before the United States Supreme Court was whether the same act, namely the sale of narcotics, constituted two offenses: (1) that of selling the forbidden drugs except in or from the original stamped package, and (2) that of selling such drugs not in pursuance of a written order of the person to whom the sale was made. It was held that although there was but

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41 STAT. 805 [1920], 10 U. S. C. § 1565 [1946]) but on the double jeopardy provision of the Act of Congress establishing a civil government in the Philippines, 32 STAT. 691, 692 (1902). See opinion of the Court in 206 U. S. at 345 and 355. Also see People v. Wendel, 59 Misc. 354, 112 N. Y. Supp. 301 (Sup. Ct. 1908), which held that the *Grafton* decision was not applicable to a court-martial conviction of a national guard officer, but that he still had to stand trial on a subsequent indictment of grand larceny in the state court. *See Ex parte* Benton, 63 F. Supp. 808 (S. D. Cal. 1945).

[17] 260 U. S. 377 (1922).

[18] *Id.* at 382.

[19] 284 U. S. 299 (1932). *See* Gavieres v. United States, 220 U. S. 338 (1911), where the Court overruled the double jeopardy plea in prosecutions for insulting a public official and for disorderly conduct growing out of the fracas.

one sale, two offenses were committed, and that the test to be applied to determine whether there are two offenses or only one is whether conviction for each offense requires proof of a fact which the other does not.

Mr. Justice Sutherland cited a Massachusetts ruling to the effect that "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." [20] Applying the enunciated test, the Court concluded that, although both sections were violated by one sale, two offenses had been committed.[21]

The case of *Helvering v. Mitchell* [22] presents another interesting factual pattern involving the double jeopardy safeguard as applied to similar offenses. Mitchell was found by the Commissioner of Internal Revenue to have fraudulently deducted in his income tax return an alleged loss of approximately $3,000,000 for a purported sale of bank stock to his wife, and to have fraudulently failed to report some $666,000 received by him as a distribution from the management fund of the National City Bank. The commissioner notified Mitchell that there was a deficiency in his return of approximately $728,000 and on account of the fraud the commissioner sought a 50% addition thereto in the sum of $364,000. A civil action was commenced against Mitchell on this claim.

Prior to this time Mitchell had been indicted under the Revenue Act for wilfully attempting to evade or defeat income taxes. He had been tried on the indictment and acquitted on all counts. The first count was based on the deficiency of $728,000 due to his alleged fraudulent deduction on the wash sale to his wife and the failure to report the income from the management fund. The fraud penalty of $364,000 was not involved in the indictment.

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[20] Blockburger v. United States, 284 U. S. 299, 304 (1932).

[21] The court also stated that the case of Ballerini v. Aderholt, 44 F. 2d 352 (5th Cir. 1930) was not in harmony with its views and was disapproved. *See* Morgan v. Devine, 237 U. S. 632 (1915).

[22] 303 U. S. 391 (1938).

The Court of Appeals for the Second Circuit held that the prior judgment of acquittal was not a bar to the civil action under the doctrine of res judicata, and it affirmed the $728,000 assessment. It held, however, that in the civil suit the 50% fraud penalty was barred by the prior acquittal in the criminal action.[23]

Mitchell petitioned the Supreme Court for certiorari to review so much of the judgment as upheld the assessment of the deficiency of $728,000 but certiorari was denied on that point although the commissioner's petition to review the denial of the 50% fraud penalty was granted. In the Supreme Court, Justice Brandeis observed that Congress imposes either criminal or civil sanctions to insure honest disclosure by taxpayers in income tax matters and he pointed out:

> Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether § 293(b) [of the Revenue Act of 1928 (the 50% fraud penalty)] imposes a criminal sanction.[24]

The Court held that it did not and that the 50% addition to the tax was not primarily punitive but rather a remedial sanction and as such could be imposed by a civil procedure to which the constitutional guaranties governing the trial of criminal prosecutions did not apply.[25]

Similarly, in *Albrecht v. United States*[26] the double jeopardy provision of the Constitution was held to be no barrier to separate sentences for possession and sale of intoxicating liquor in violation of the National Prohibition Act, even though the same liquor was involved, and the defendants could not have sold without having possessed. The indictment contained a separate count of possession and a separate count of sale as to each sale made on particular days to informers who purchased liquor at Albrecht's place of

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[23] Mitchell v. Commissioner, 89 F. 2d 873 (2d Cir. 1937).
[24] 303 U. S. at 399.
[25] *See also* Hanby v. Commissioner, 67 F. 2d 125 (4th Cir. 1933), where it was held that a conviction for filing a false income tax return is no bar to a civil penalty action. The case is noted in 47 HARV. L. REV. 1438 (1934).
[26] 273 U. S. 1 (1927).

business. The defendants contended that the liquor for the sale of which they had been convicted, was the same liquor for the possession of which they had been convicted; and as they could not have sold such liquor without having possessed it, their conviction of having sold necessarily included the offense of having possessed. Thus, the defendants in the Supreme Court argued that the lower court in imposing upon them separate penalties for the sale and possession had subjected them to double punishment for the possession in violation of the Fifth Amendment.

However, the difficulty with the defendants' contentions lay in the elementary proposition that the power to define and prescribe the punishment for offenses against the United States rests with Congress.[27] The Supreme Court rejected their argument because it found that Congress intended to, and did, create distinct offenses. The Court held: "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction." [28]

It is likewise plain that conspiracy to commit an act, and the commission of the act itself are two distinct offenses and consequently separately punishable. An example of this rule is *United States v. Bayer.*[29] In that case one of the defendants was an Army officer who had been tried and convicted by a court-martial for conduct unbecoming an officer and for conduct prejudicial to good order and military discipline and of such a nature as to bring discredit upon the service. Shortly thereafter all of the defendants were indicted in a federal district court and subsequently convicted on an indictment alleging that the defendant officer and two other individuals entered into a conspiracy to defraud the United States of its right to the unbiased services of the defendant officer and that as part of such conspiracy the two individuals gave the officer money with intent to influence his actions.

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[27] *See* Morgan v. Devine, *237* U. S. *632, 639* (1915); Burton v. United States, *202* U. S. *344, 377-8* (1906).

[28] Albrecht v. United States, *273* U. S. 1, 11 (1927).

[29] 331 U. S. *532* (1947). *Cf.* Sealfon v. United States, *332* U. S. *575* (1948).

The Supreme Court held that the military and criminal offenses were not the same, even though they arose out of the same facts, and said:

> . . . we think the District Court correctly ruled that the two charges did not accuse of identical offenses. The indictment is for conspiring and we have but recently reviewed the nature of that offense. *Pinkerton v. United States,* 328 U. S. 640. Its essence is in the agreement or confederation to commit a crime, and that is what is punishable as a conspiracy, if any overt act is taken in pursuit of it. The agreement is punishable whether or not the contemplated crime is consummated. But the same overt acts charged in a conspiracy count may also be charged and proved as substantive offenses, for the agreement to do the act is distinct from the act itself. . . . In the court-martial proceedings, Radovich alone was accused. No conspiracy was alleged and the specification was confined to Radovich's receipt of money for effecting transfers. This was a substantive offense on his part under the Articles of War. The agreement with others to commit it constituted a separate offense, although among the overt acts proved to establish the conspiracy were the same payments and transfers. Both offenses could be charged and conviction had on each. The plea in bar was properly overruled.[30]

Therefore, it would seem that in determining questions of double jeopardy, it is not the identity of the evidence actually adduced to support the charge which is significant; rather the elements of the offense and the evidence required to establish those elements furnish the criterion for resolving the question of identity.[31] Along the same lines is an interesting case [32] where on the first indictment, one Rhinelander, along with others, was charged with stealing government pistols. He was acquitted on an instructed verdict. At the trial it was shown that he was not present at the time the pistols were stolen from the government armory and did not in any way participate in the original theft. However, it did appear that he became a party to the enterprise after the taking of the pistols. As a result a later indictment was filed against him charging the offense of receiving and concealing

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[30] *Id.* at 532-3.

[31] Pinkerton v. United States, 328 U. S. 640 (1945); Blockburger v. United States, 284 U. S. 299 (1932). *See also* Carter v. McClaughry, 183 U. S. 365 (1901).

[32] *Ex parte* Rhinelander, 11 F. Supp. 298 (W. D. Texas 1935).

government property with intent to convert the same to his own use and benefit, knowing that it had been stolen. Rhinelander sued out a writ but it was dismissed. The court held that the two offenses of stealing and receiving were predicated upon different sections of the statute, were entirely separate in law, and were dependent upon entirely different facts. It applied the "same or different evidence" test—a test, which if it discloses a difference, will, as Mr. Justice Rutledge pointed out in his concurring opinion in *District of Columbia v. Buckley,*[33] usually show a substantial difference. Thus, it is perfectly obvious that the evidence which will sustain a conviction for receiving and concealing stolen property will not, standing alone, sustain a conviction for stealing the property. Equally is it manifest that evidence which might sustain a conviction for stealing the property would be insufficient to sustain a conviction for the subsequent offense of receiving and concealing. The two transactions are separate and distinct.

In the cases which follow, the courts have held that double jeopardy did not exist and have separately sentenced the defendant for each offense no matter how closely the offenses were related and regardless of the fact that they were occasioned by one act or grew out of one transaction. One of the latest holdings is *United States v. Michener*[34] where the defendant was charged in the first count with causing a plate adapted for counterfeiting government obligations to be made on or about August 25, 1934; and, in the second count, with the possession of the same plate on or about that date and thereafter, with intent to use it in counterfeiting such obligations. The question presented was whether the defendant might be given consecutive sentences upon such indictment. In a 4 to 3 per curiam decision the Supreme Court, citing merely the *Blockburger,*[35] *Albrecht,*[36]

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[33] 128 F. 2d 17 (D. C. Cir. 1942).

[34] 331 U. S. 789, *per curiam reversing* 157 F. 2d 616 (8th Cir. 1946).

[35] See note 19 *supra* and text thereto.

[36] See note 26 *supra* and text thereto. In King v. United States, 280 U. S. 521 (1929), the Supreme Court, on the authority of the *Albrecht* case, affirmed per curiam a decision of the Court of Appeals for the Ninth Circuit, King v. United States, 31 F. 2d 17 (1929), holding that a conviction of the offense of selling morphine, not in or from the stamped package, was not a bar to a

and *Gavieres* [37] cases (discussed *supra*), reversed the Court of Appeals and upheld the district judge in his action of sentencing Michener to a term of fifteen years on each count of the indictment, the sentences to be served consecutively.

There are a multitude of similar instances where the courts have imposed separate sentences without violating the Fifth Amendment. By way of example, it has been held that a defendant was not exposed to double jeopardy where he was sentenced for agreeing to receive proscribed compensation and for receiving such compensation; [38] for breaking into a post office with intent to commit larceny and for committing the larceny; [39] for cutting each of a number of mail bags, even though all were cut in the course of one transaction; [40] for stealing mail bags and for abstracting their contents; [41] for unauthorized sales of cocaine to three different persons on different days (as against the contention that several offenses constituted a single continuous act inspired by the same intent); [42] for passing two different counterfeit notes of the same denomination; [43] for three murders on the same day, as to two of which the defendant was acquitted on the ground of insanity; [44] for assaults on each of two individuals even though they occurred very near each other in one continuing attempt to defy the law; [45] for homicide, where the accused had been convicted of assault and battery before the death of the injured person; [46] and for making a false entry in the books of a bank, showing a credit, and later making a false entry in a report of the condition of the bank, showing the same credit.[47]

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subsequent prosecution for the offense of shipping morphine in interstate commerce, without having registered or paid the special tax, even though the same morphine was involved in the two cases, the two offenses being perfectly distinct as a matter of law.

[37] See note 19 *supra*.
[38] Burton v. United States, 202 U. S. 344 (1906).
[39] Morgan v. Devine, 237 U. S. 632 (1915).
[40] Ebeling v. Morgan, 237 U. S. 625 (1915).
[41] Poffenbarger v. United States, 20 F. 2d 42 (8th Cir. 1927).
[42] United States v. Dougherty, 269 U. S. 360 (1926).
[43] United States v. Randenbush, 8 Pet. 288 (U. S. 1834).
[44] Hotema v. United States, 186 U. S. 413 (1902).
[45] Flemister v. United States, 207 U. S. 372 (1907).
[46] Diaz v. United States, 223 U. S. 442 (1912).
[47] United States v. Adams, 281 U. S. 202 (1930).

DOUBLE JEOPARDY AS APPLIED TO SITUATIONS TERMINATING A CRIMINAL PROSECUTION

Very often a prosecution comes to an end as a result of certain circumstances at the trial deemed unfair or prejudicial, and then the question arises whether a retrial of the defendant would subject him to double jeopardy. The doctrine of double jeopardy, as applied in the criminal courts of the United States, contemplates that these courts have ". . . the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere." [48] When a jury has been thus discharged, the defendant may again be tried for the same offense. This principle has been applied in a variety of circumstances. Thus, it is not double jeopardy if the first jury is discharged because of its inability to agree; [49] or because it appears, in the course of the trial, that a juror is acquainted with the defendant [50] or because one of the petit jurors was a member of the grand jury which returned the indictment.[51] The same rule has been applied to cases where the appearance of prejudicial articles in the public press was thought to make a fair trial impossible; [52] where the trial judge was of the opinion that his own remarks had been prejudicial; [53] where a juror appeared to be insane after the commencement of the trial; [54] where the defendant was not rearraigned after the overruling of his demurrer to the indictment.[55] Similarly, a retrial after a discharge of the jury

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[48] United States v. Perez, 9 Wheat. 579, 580 (U. S. 1824).

[49] *Ibid.*; Keerl v. Montana, 213 U. S. 135 (1909); Dreyer v. Illinois, 187 U. S. 71 (1902); Logan v. United States, 144 U. S. 263 (1892).

[50] Simmons v. United States, 142 U. S. 148 (1891); United States v. McCunn, 36 F. 2d 52 (S. D. N. Y. 1929).

[51] Thompson v. United States, 155 U. S. 271 (1894).

[52] *See* United States v. Montgomery, 42 F. 2d 254 (S. D. N. Y. 1930).

[53] United States v. Giles, 19 F. Supp. 1009 (W. D. Okla. 1937).

[54] United States v. Haskell, 26 Fed. Cas. 207, No. 15,321 (C. C. E. D. Pa. 1823).

[55] Lovato v. New Mexico, 242 U. S. 199 (1916); United States v. Riley, 27 Fed. Cas. 810, No. 16,164 (C. C. S. D. N. Y. 1864).

because of illness of the judge,[56] or of a juror [57] does not pave the way for a double jeopardy plea, even though the alternative of a discontinuance of the trial may exist. Nor is a defendant twice put in jeopardy if an indictment is dismissed and a subsequent grand jury inquires into the same charges on a resubmission by the District Attorney.[58]

It is clear that it is vitally important to determine whether the jury has been discharged for reasons of convenience or for reasons of necessity. For, as Mr. Justice McLean said on circuit long ago:

> The discharge of a jury in a criminal case, on the ground of a necessity which could neither be foreseen nor controlled, imposes no hardship on the defendant of which he has a right to complain. He, alike with the government, must submit to the law of necessity, which, of all other laws, is the most inexorable.[59]

Therefore, if a case is taken from the jury for reasons of convenience rather than necessity, the defendant is held to have once been in jeopardy, and may not be retried.[60] Where the prosecutor enters a *nolle prosequi* because his evidence appears insufficient, a later trial is barred;[61] and the

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[56] Freeman v. United States, 237 Fed. 815 (2d Cir. 1916).

[57] United States v. Potash, 118 F. 2d 54 (2d Cir. 1941), *cert. denied,* 313 U. S. 584 (1941).

[58] United States v. Rogoff, 163 Fed. 311 (S. D. N. Y. 1908); Simpson v. United States, 229 Fed. 940 (9th Cir. 1916). The right of the prosecutor to re-submit is recognized in United States v. Thompson, 251 U. S. 407 (1920).

[59] United States v. Shoemaker, 27 Fed. Cas. 1067, 1068, No. 16,279 (C. C. D. Ill. 1840). The most recent Supreme Court case involving the necessity principle seems to be Wade v. Hunter, 336 U. S. 684 (1949).

[60] There have been varying applications of the necessity principle, which are dependent upon differing views as to when jeopardy theoretically attaches. See Note, 24 MINN. L. REV. 522, 524 (1940). It is frequently said that jeopardy attaches as soon as the jury is impaneled and sworn, McCarthy v. Zerbst, 85 F. 2d 640, 642 (10th Cir. 1936); or once evidence is heard, Clawans v. Rives, 104 F. 2d 240 (D. C. Cir. 1939), and for those courts, a later discontinuance of the trial seems to constitute a recognized exception to the prohibition against double jeopardy. However, there are expressions to the effect that there can be no jeopardy until the verdict, United States v. Watkins, 28 Fed. Cas. No. 16,649 at 479 (C. C. D. C. 1829); United States v. Watkins, 28 Fed. Cas. No. 15,321 at 212 (C. C. D. Pa. 1823); or if the trial failed other than on the merits, Amrine v. Tines, 131 F. 2d 827, 834 (10th Cir. 1942). For the courts which take this view, prior discontinuance of a trial for necessity cannot, of course, involve the defendant in jeopardy.

[61] Clawans v. Rives, 104 F. 2d 240 (D. C. Cir. 1939). *See* United States v. Shoemaker, 27 Fed. Cas. No. 16,279 at 1068 (C. C. D. Ill. 1840); People *ex rel.* Stabile v. Warden, 202 N. Y. 138, 151, 95 N. E. 729, 733 (1911). *Contra:* Bassing v. Cady, 208 U. S. 386 (1908), where the finding of an in-

same is true when he proceeds without having all his witnesses present,[62] or where the trial judge withdraws counts of an indictment from the jury's consideration purely as a matter of convenience.[63]

If a jury should be discharged for some reason, or the judgment reversed on some ground not invalidating the indictment, there is nothing to prevent a prosecutor from procuring a new indictment and charging the same offense in a different manner, and then proceeding on the new rather than an old indictment. As to this the Supreme Court has stated:

> As the effect of the reversal of the judgment in the former case was to set aside the judgment of conviction on the first and second counts of the original indictment, the way was opened for another trial on those counts. But the Government elected not to proceed under that indictment, but to have a new one embodying the same charge. . . . Its right to adopt that course cannot be questioned.[64]

Similarly, the plea will not be sustained where the first trial was on a fatally defective indictment, or before a court which had no jurisdiction;[65] or where the jury was discharged at the defendant's request because of the misconduct of the United States Attorney.[66] And one who upon conviction takes an appeal and obtains a new trial thereby waives his defense of double jeopardy, and at his second trial he may be convicted of an offense of a higher degree than that of which he was originally convicted.[67] However, a defendant was held to have been subjected to double jeopardy, where the

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dictment, followed by an arraignment, pleading thereto, repeated continuations and eventual dismissal at the instance of the prosecuting officer on the ground that there was not sufficient evidence to hold the accused, was held not to constitute double jeopardy.

[62] Cornero v. United States, 48 F. 2d 69 (9th Cir. 1931).

[63] United States v. Kraut, 2 F. Supp. 16 (S. D. N. Y. 1932).

[64] Burton v. United States, 202 U. S. 344, 380 (1905).

[65] Schoener v. Pennsylvania, 207 U. S. 188, 195-6 (1907); United States v. Ball, 163 U. S. 662, 669 (1896).

[66] Blair v. White, 24 F. 2d 323, 324 (8th Cir. 1928).

[67] Stroud v. United States, 251 U. S. 15, 18 (1919); Brantley v. Georgia, 217 U. S. 284 (1910); Trono v. United States, 199 U. S. 521 (1905); Murphy v. Massachusetts, 177 U. S. 155, 158-60 (1900); United States v. Ball, 163 U. S. 662, 671-2 (1896); People v. Palmer, 109 N. Y. 413, 17 N. E. 213 (1888), cited with approval in People v. McGrath, 202 N. Y. 445, 96 N. E. 92 (1911). *See also* Louisiana *ex rel.* Francis v. Resweber, 329 U. S. 459, 462, 463 (1946).

first trial started on Saturday and the court lost jurisdiction by holding over into Sunday, on which day defendant was found guilty by a jury and sentenced. The loss of jurisdiction did not change the fact that he had been placed in jeopardy.[68]

CONCLUSION

The authorities show that the double jeopardy clause, like the other clauses of the Fifth Amendment, was designed to afford an accused a maximum amount of security from arbitrary or tyrannical acts of government. It was not meant to serve as a suit of armor which might be indiscriminately used to clothe a wrongdoer and thereby prevent just and proper punishment for his crime. Thus the double jeopardy prohibition must be read in the light of judicial interpretation of its meaning and when so read, it is clear that an act which offends two sovereigns may be punished by each; that closely related, though distinct, offenses may be separately punished; and that above all, the provision may not be invoked until jeopardy has once truly attached.

[68] People *ex rel.* Meyer v. Warden, 269 N. Y. 426, 199 N. E. 647 (1936). See 11 ST. JOHN'S L. REV. 120 (1936); 5 BROOKLYN L. REV. 337 (1936); 5 FORD. L. REV. 359 (1936); 13 N. Y. U. L. Q. REV. 616 (1936).