

1890

# Once in Jeopardy

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C o r n e l l U n i v e r s i t y S c h o o l o f L a w

OWEN L. POTTER

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-1890-

## ONCE IN JEOPARDY.

The maxim that no person shall be twice put in jeopardy of life or limb is as old in English law as Magna Charta itself. It is a principle that comes to us from a time when cruel and unusual punishments were common. Cooley Const. Law 296-8. This great fundamental principle of reason and justice is deeply imbedded in the very foundations of the common law, as one of its safeguards to protect human life.

If we reflect, that at the time this maxim came into existence almost every offense was punished with death or other punishment touching the person, we can easily see the necessity for its existence, at that time, and how carefully it has since been guarded down to the present period.

We believe that the criminal jurisprudence of every civilized country recognized and adopted a similar provision.

It certainly existed in English law, and Blackstone says: "It is a universal maxim of the common law of England that no man is to be brought into jeopardy of his life more than once for the same offense". Black. Com. 335.

The safeguard is broader in its application than as stated by Blackstone, for the two kindred maxims of the common law.

Nemo debet vexari pro una et eadem causa and Nemo debet bis puniri pro uno delicto, these two maxims have long guarded

the rights of successful litigants in civil, and prevented oppression in criminal, cases, not only so far as life is concerned, but also with respect to property, limb and liberty. Brooms Legal Maxims 347-50.

We find a similar maxim in the civil law, non bis in idem, which leads us to believe that the principle was at one time universally recognized. Lactantius Inst. Div. bk 7 ch 8.

The English common law not only prohibited a second punishment for the same offense, but it went further and forbade a second trial for the same offense, and this to whether the accused had suffered punishments or not, and whether in the former trial a person had been acquitted or convicted.

In England this maxim of the common law, is a matter of practice that has fluctuated and varied at different times and which cannot now be regarded to-day as finally settled.

Rex. v. Winsor L.R. 1 Q.B. 289.

It matters but little with us as to the history of this great principle, as we adopt it as our unbending rule, and to which the decisions of our courts must conform. This right is guaranteed to the citizens of the United States by the U.S. Const. Amend. Art. 5 and while this provision does not bind the states, a question on which the authorities formerly differed, but which is now well settled: nearly all the American States have adopted similar provisions in their constitu-

tions, and even in those which do not have a similar provision, adopt and follow the principle as one fully established and settled at common law.

The question when a person on trial for a crime is first put in jeopardy within the meaning of the constitutional guaranty is one upon which there has been some diversity of judicial opinion. In *Teat v State* 53 Miss. 453 Chalmers.J., delivering the opinion of the court, said: "There are few questions in criminal law upon which the authorities are more irreconcilably at conflict than the one presented by these views. Without elaborating a question which has been so often and so exhaustively discussed, we feel no hesitation in announcing our concurrence in that line of decisions which holds that a person is placed in jeopardy, whenever, upon a valid indictment, in a court of competent jurisdiction, and before a legally constituted jury, his trial has been fairly entered upon; and that if thereafter the jury is illegally, improperly, and unnecessarily discharged by the court, it operates as an acquittal, so that he cannot thereafter be arraigned for the same offense!

Bishop says: "Without a jury, set apart and sworn for the particular case, the individual defendant has not been conducted to his period of jeopardy. But when according to the bet-

ter opinion, the jury being full, is sworn, and added to the other branches of the court, and all preliminary things of record are ready for trial, the prisoner has reached the jeopardy from the repetition of which our constitutional rule protects him." Bishop Crim. Law I . 1015. These views are undoubtedly sustained by the great weight of american authority Cooley Const. Lim. 327. Hines v State 24 Ohio St 134. King v People 5 Hun 297 O'Brian v Com. 9 Bush 333. People v Cage 48 Cal. 323. Joy v State 14 Ind. 139. Adams v State 99 Ind. 244. State v Redman 17 Iowa 323. Alexander v Com. 105 Pa. St. 1. McFadden v Com. 23 Pa. St. 12. Whitmore v State 43 Ark. 271. State v Davis 31 West Va. 390. State v Stewart 4 Pac. Rep. 128 Grogan v State 44 Ala. 9. In re Spier 1 Dev. 491.

Another view is that jeopardy begins only after verdict.

People v Goodwin 18 Johns. 187. United States v Gilbert 2 Sumn. 19.

This is the view taken by the United States Supreme Court and also of the courts of New York Texas. Miss. and some others United States v Perez 9 Wheaton 579. Taylor v State 35 Texas 97. Pizano v State 20 Texas App. 139. Brink v State 18 Texas App. 344.

This view is strongly combatted by Bishop, who says: There are a few cases in which it is laid down, at least in dicta,

that the jeopardy begins only after verdict rendered. The meaning of the constitution, it is said, is that no man shall be twice tried for the same offense. But the adjudications, even of these judges hardly sustain this proposition and the difference between the danger, or jeopardy of a thing and the thing itself, indicates the error on which these observations proceed. Indeed thus to substitute a word in the constitution for the word in it, is to take with it great liberties. Bishop Crim. Law I. 1018.

In the case of the People v Hunckler 48 Cal. 334. McKinstry J. says: "A defendant is placed in apparent jeopardy when he is placed on trial before a competent court and a jury impanelled and sworn. His jeopardy is real, unless it shall appear that a verdict could never have been rendered, by reason of the death or illness of the judge, or a jurymen, or that after due deliberation the jury could not agree, or by reason of some other like overruling necessity which compelled their discharge without the consent of the defendant."

This is a clear and concise statement of the correct doctrine, notwithstanding there are authorities to be found to the contrary both in the decisions of the courts, and in the text books on criminal law.

Former jeopardy is everywhere admitted to be a complete de-

fense, and being in jeopardy of an included offense constitutes such a jeopardy, as is a bar to a prosecution on an indictment for the greater crime.

There are many different expressions by which courts state the rule as to when jeopardy begins? and they differ only in form of expression, their effect being the same. Thus jeopardy begins whenever the jury has been sworn to try the cause.

*Kingen v State* 46 Ind. 132 When the accused has pleaded to the indictment, and the jury sworn to try the cause. *Com. v Cook* 6 Serg. & Rawle 577. *State v Redman* 17 Iowa 329.

When the case is submitted to the jury, and the case is submitted to the jury when the prisoner is arraigned, and the plea entered.

Where one is put upon his trial upon a valid indictment, for a capital offense. It may result in his condemnation, and hence he is in jeopardy. *Weinzorpflin v State* 7 Black. 191.

Where the indictment is good, and the jury are charged with the prisoner he is undoubtedly in jeopardy during their deliberation. Whenever a person shall have been given in charge on a legal indictment. *Wright v State* 5 Ind. 292.

In this country it may be generally said that the moment a full jury is impanelled and all have been sworn, from that moment his jeopardy contemplated by the constitution begins.

McFadden v Com. 23 Pa.St.12.

But some judges have said that a person was not placed in jeopardy until there has been a verdict, and also a judgment of the court upon it dictum of Washington.J., in U.S. v. Haskell 4 Washington 402.

But the fact that after a jury is once impanelled and sworn, even before verdict rendered, a prosecuting officer has no right to enter a nolle prosequi, a principle now everywhere admitted shows that a prisoner is in jeopardy before the jury have been delivered of their verdict.

In determining this question whether or not a prisoner has been in jeopardy so as to prevent his again being placed on trial for the same offense it is highly important to ascertain for what causes a jury may be legally discharged after they have been sworn and charged with the deliverance of the defendant. For if in a particular case the jeopardy has attached, though for an instant only, and there is afterwards such a lapse in the proceedings as requires a new jeopardy in distinction from the old, to procure a conviction, the defendant has thereby obtained the right to demand his discharge: and neither can the proceedings be carried on against further or new proceedings be instituted, because he cannot be brought twice in jeopardy.

Cooley Const. Lim. 326. Bishop Crim. Law I. 1016. O'Brian v. Com. 9 Bush 333.

In examining this subject we may group the cases into two general classes. First where any separation of the jury except in case of absolute necessity, such as may be considered the act of God is a bar to all subsequent proceedings.

Secondly where it is held that the discharge of the jury is a matter of discretion for the court, and when rightfully exercised it is no bar to a second trial for the same offense. The first group includes Pennsylvania, Tennessee, North Carolina, and Indiana.

In Pennsylvania this question of jeopardy was brought before the supreme court in 1822 in the case of Com. v. Cook 6 Serg. & Rawle 577. It will be well to remember that the constitutional provision of that State is exactly the same as that of U.S. In this case the defendant pleaded a special plea that the jury had been discharged on a former trial because they were unable to agree, this was against the consent of the defendant. The court held, that the discharge of a jury, because they were unable to agree was unlawful, Tilghman C.J. admitted that in cases of absolute necessity the jury may be discharged, but mere inability to agree is not such necessity. If a person had been tried on an invalid indictment and has been acquitted he may be tried again, because the court

could no have given judgment against him if he had been convicted. In 1831 a case where the defendant interposed a similar plea, the same court carried the doctrine of the above case still further. Gibson C.J., argued that no discretionary power whatever exists with the court to discharge a jury.

Why it should be thought that the citizen has no other assurance than the arbitrary discretion of the magistrate, for the enforcement of the constitutional principle that protects him from being twice put in jeopardy of life or limb or member for the same offense I am loss to imagine. If the discretion is to be called in, there can be no remedy for the most palpable abuse of it, but an interposition of the power to pardon which is obnoxious to the very same objection. Surely every right secured by the constitution is guarded by sanctions more imperative. But in those States where the principle has no higher sanction than that derived from the common law, it is nevertheless the birthright of the citizen and demandable as such. But a right which depends upon the will of the magistrate is essentially no right at all: and for this reason the common law abhors the exercise of a discretion in matters that may be subjected to fixed and definite rules I take it on grounds of reason as well as authority, then, that a prisoner, of whom a jury have been discharged before ver-

dict given, may by pleading the circumstance in bar of another trial, appeal from the order of the court before which he stood, to the highest tribunal in the land, nor do I understand how he shall be said not to have been in jeopardy before the jury have returned a verdict of acquittal. In the legal as well as in the popular sense, he is in jeopardy the instant he called to stand upon his defense: for from that moment every movement of the commonwealth is an attack on his life:- and he not put out of jeopardy unless by verdict of acquittal. If the prisoner has been illegally deprived of his means of deliverance from jeopardy, every dictate of justice requires that he be placed on ground as favorable as he could have possibly have attained by the most fortunate determination of his chances. Com. v. Clue 3 Rawle 497.

In the case of Com. v Fitzpatrick 121 Pa.St. 109. The prisoner was indicted for murder, a trial was had and the case submitted to the jury, the jury was unable to agree, and after coming into court repeatedly were discharged, against the objection of the defendant. At the next term of court the case was again called for trial, a special plea was interposed. The court held following the earlier case that the defendant had been once placed in jeopardy and could not be tried

again for the same offense. The supreme court of Tennessee in Mahala v State 10 Yerg. 532 fully adopted the rule of the Pennsylvania cases. The defendant was on trial for murder, and the jury retired to deliberate about two o'clock P.M. they came into court several times in the afternoon, declaring they could not agree, but they were sent back, and kept together all night. About nine o'clock next morning, having come into court, they informed the judge that it was impossible for them ever to agree, whereupon they were discharged but such discharge was afterwards held erroneous. The reasoning of the cases in Pennsylvania say the court, is to our minds entirely satisfactory. If a moral impossibility, constitutes a case of necessity, it is manifest that the decision of the ~~inferior~~ inferior court can never be reversed. How can the superior court know whether the jury have agreed or not, and how long shall the inferior court be compelled to keep the jury together, before it shall be warranted in saying, that they cannot possibly agree? Shall it be an hour, a week, or a month? Upon the whole, the power of discharging a jury against the consent of the defendant, is of such a dangerous character, that we hesitate not in saying that it should not be exercised by the courts, when the jury cannot agree on a verdict, unless they be prevented by a physical

impossibility, and that when such impossibility does exist, the jury should be kept together until the court is about to adjourn, when of necessity they must be discharged.

The second group includes those States in which the discharge of the jury, when it takes place in the exercise of a sound discretion is not a bar to a second trial.

This is the view taken by the United States Supreme Court and of the Courts of New York Massachusetts and some others. Said Washington J. in a case where the jury, on a homicide trial had been discharged in consequence of the alleged insanity of one of them. "That although the court may discharge in cases of misdemeanors, they have no such authority in capital cases. We are clearly of the opinion that the jeopardy spoken of in this article of the U.S. Const. can be interpreted to mean nothing short of the acquittal or conviction of the prisoner, and the judgment of the court thereupon.

This was the meaning affixed to the expression by the common law, notwithstanding some loose expressions to be found in the decisions of some courts. United States v. Haskell 4 Washington 409.

In the Supreme Court of the United States this subject was brought up in 1824., upon a certificate of division in the

opinions of the judges of the Circuit Court for the Southern District of New York.

The jury were discharged in the court below on account of mere disagreement.

The question arises, whether the discharge of the jury by the court from giving a verdict upon the indictment, with which they were charged, without the consent of the prisoner, is a bar to any future trial for the same offense.

If it be, then he is entitled to be discharged from custody: if not then he ought to be held in imprisonment until such trial can be had, we are of the opinion that the facts constitute no legal bar to a further trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think in all cases of this nature, the law has invested courts of justice with 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 justice would be defeated. They are to exercise a sound discretion on the subject: and it is impossible to define all the circumstances, and for very plain obvious reasons and in capital case courts should be especially cautious how they interfere with any of the rights in favor of the prisoner. But after all

they have the right to order the discharge: and the security which the public have for the faithful sound, and conscientious exercise of this discretion, rests in this as in other cases, upon the responsibility of the judges under their oaths of ~~the~~ office.

We are aware that there is some diversity of opinion and practice on this subject, in the American Courts, but after weighing the question with due deliberation, we are of the opinion that such a discharge constitutes no bar to a further proceedings, and gives no right of exemption to the prisoner from being again put on trial".

United States V. Perez 9 Wheaton 579.

.And while this case has been frequently cited and approved as an authority, it certainly rests upon debatable ground, as the facts show that the jury were discharged within half an hour after they had retired to deliberate upon their verdict. This particular case has been widely commented on and criticised, and its authority has been weakened, if not entirely overruled by the case of *Ex parte Lang* 18 Wallace 163.

In our own State of New York a person is not placed in jeopardy until a verdict has been rendered. This at least seems to be deducible from the authorities.

In the case of *The People v Goodwin* 18 Johns. 187. The defendant was indicted for manslaughter, the jury after a trial of five days, and after, being kept together to consider of their verdict for seventeen hours, declared that there was no possibility of their agreeing on a verdict, and it being within half an hour of the time when the court was bound to close its session the jury were discharged, and the prisoner again tried at another court.

Spencer C.J., says: "Upon full consideration I am of the opinion that, although the power of discharging a jury is a delicate and highly important trust, yet, it does exist in cases of extreme and absolute necessity: and that it may be exercised without operating as an acquittal of the defendant: that it extends as well to felonies as misdemeanors, and that it ~~exists~~ exists and may be discretely exercised in cases where the jury, from the length of time they have been considering a cause, and their inability to agree, unless compelled so to do from the pressing calls of famine or bodily exhaustion, and in the present case, considering the great length of time the jury had been out, that the period for which the court could legally sit, was nearly terminated, and that it was morally certain the jury could not agree before the

court must adjourn, I think the exercise of the power was discreet and legal. Much stress has been placed on the fact that the defendant was in jeopardy during the time the jury were deliberating. It is true that his situation was critical and there was as, regards him danger, that the jury might agree on a verdict of guilty, but in a legal sense he was not in jeopardy, so that it would exonerate him from a second trial. He has not been tried for the offense imputed to him, to render the trial complete and perfect, there should have been a verdict either for or against him. A literal observance of those cases where by the visitation of God one of the jurors should either die, or become utterly unable to proceed in the trial. It would extend, also to a case where the defendant himself should be seized with a fit and become incapable of attending to his defense: and it would extend to a case where the jury were necessarily discharged in consequence of the termination of the powers of the court.

In a legal sense therefore, a defendant is not put in jeopardy, until the verdict of the jury is rendered for or against him, and if for or against him, he can never be drawn in question again for the same offense".

In the case of *Sheppard v People* 25 N.Y. 406. Sheppard was indicted for arson in the first degree a trial was had, and

the jury found him guilty of the offense. The court held that a judgment having been rendered against the defendant that was irregular that he could not be subjected to another trial but should be discharged, and this though the defendant had in a motion in arrest of judgment had asked for a new trial. Sutherland J., says: "The circumstance, that the counsel of the prisoner, on moving in arrest of judgment, also asked for a new trial, I regard of no consequence. The constitutional provision is. "No person shall be subject to be twice put in jeopardy for the same offense". New York Const. Art. I Sec. 6. This provision may be considered as addressed to courts: and, if the prisoner is within its protection, he ought to be discharged, although his counsel did formally ask for a new trial".

Gardiner v People 6 Parker 155. Holds that a prisoner may be tried on a second indictment after a nolle prosequi or supersedeas of the first indictment, to which a plea to the jurisdiction had been overruled, on the merits, and does not place the defendant in jeopardy a second time.

People v Comstock 8 Wend. 549.

A new trial cannot be had where the prisoner has been acquitted. Nor will a writ of error lie at the suit of the people after judgment for the defendant in a criminal case.

People v Corning 2 N.Y. 9. But under the act of 1863 the judgment may be corrected.

Hussy v People 47 Barb. 503. The prisoner by obtaining a new trial waives his constitutional right to the plea of once in jeopardy and may again be tried a second time for the same offense.

People v Ruloff 5 Parker 77. Where a person has been put on trial, a juror cannot be withdrawn without his consent.

People v Barrett 2 Caines Cas. 304. Grant v People 4 Parker 527. Klock v People 2 Parker 676. An arrest of judgment after conviction for felony is not a bar to a second indictment.

People v Casbourns 13 Johns. 351. In cases of misdemeanor the court may discharge the jury without the consent of the defendant and he may be tried again for the same offense.

People v Denton 2 Johns Cas. 275. A prisoner is not put in jeopardy where the evidence fails to establish the offense charged. Canter v People 1 Abb. Dec. 305.

A conviction for an assault and battery is no bar to an indictment for murder, where the assaulted person subsequently dies from the effect of the blows. Burns v People 1 Parker 182. In the case of Hartung v People 26 N.Y. 167 The defendant was tried and convicted of murder, the law as it then ex-

isted was changed and a new law enacted, governing the punishment of that crime. The court held, that the prisoner could not be tried again, nor be executed under a re-enactment of the old law. Denio C.J., said "The general rule as is well known, is that if a person has been once tried and convicted or acquitted he may plead such prior acquittal or conviction upon a subsequent arraignment for the same offense. These would be good pleas at common law, and the constitution only affirms the principle and renders it unalterable by any exertion of the law making power. But it does not apply where the indictment was so defective, that no lawful judgment could be rendered upon it, as in the case of a mistrial, as where there was no venire, or where the trial jury did not consist of the full number of twelve jurors".

In this and other cases of the same nature it may be said that the accused never was in legal jeopardy.

In the case of *People v Palmer* 109 N.Y. 413. The defendant Palmer was indicted for assault in the first degree, and upon his trial convicted for assault in the third degree, he appealed from this judgment and obtained a reversal for errors in the trial the court held that he should be tried again for assault in the first degree, and not simply of the lesser

grade of which he had been convicted.

The provisions of our Code of Criminal Procedure Sections 333, 339 relating to pleas only contemplate a plea of guilty, or not guilty, or of former conviction or acquittal of the offense charged, or of any matter of fact that tends to establish a defense of the crime charged, and with us the facts of former jeopardy, where there has been no conviction or acquittal should be given in evidence under a plea of not guilty, as a matter tending to establish a defense.

Thus we see that it is everywhere admitted that there exists causes for which a judge may discharge a jury, and thus compel the defendant to submit to another trial.

This is contrary to the early English law, as there was at one time an ancient tradition among English lawyers that a jury once charged in a capital case could not be discharged without rendering a verdict either for or against the prisoner, even with the consent of the prisoner and the attorney general. This rule is laid down and supported by so eminent an authority as Lord Coke's Inst. 110. 2276. We find the same rule in Hale's Summary of the Pleas of the Crown. In the case of the two Kinlocks which occurred in the year 1746 and reported in Fosters Crown Law 16. Mr Justice Foster

in delivering the opinion says: "My Lord Coke was one of those learned men who gave into tradition, as far, at least as concerneth capital cases; and he layeth down the rule in very general terms, but he hath not given us any of the principles of law or reason whereon he groundeth it".

And in this case above cited it was held that the court had the authority to discharge a jury and thus subject the prisoner to another trial.

Thus we see that from an early date the courts possessed and exercised the right to discharge a jury even in capital cases.

Among some of the causes in which it has been held proper for courts to discharge a jury are the following: Sicknes of the judge. Misconduct, sickness or incapacity of a juror. Sickness of the prisoner. Incapacity of a witness. Expiration of the term of court. And the inability of a jury to agree. As to cases of necessity for which a court may discharge a jury there is no middle ground, the court must determine when such a necessity has arisen as will warrant it in discharging a jury either in a capital case, or in the case of a misdemeanor, or the rule must be absolute, that after a jury are once sworn and charged, no other jury, can be in any event sworn in the same case.

The moment we admit cases of necessity to form exceptions, that moment we open a door to the discretion of the court to judge of that necessity, and to determine from the facts and surroundings of each case what combination of circumstances will create one.

We see from the cases cited in this article that all the authorities and cases that <sup>agree</sup> a person can only once be placed in jeopardy the only dispute being as to when that jeopardy is full and complete so as to be taken advantage of by the defendant.

We feel no hesitation in adopting the rule of the cases in Pennsylvania and Tennessee as being the one that is based on authority as well as reason, and which is consistent not only with our American form of government, but also as carrying out the ends of justice.

Owen L. Potter.

