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Constitutional Law -- Double Jeopardy -- Effect of Mistrial -- Plea of Autrefois Acquit

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CASES NOTED

CONSTITUTIONAL LAW—DOUBLE JEOPARDY—EFFECT OF MISTRIAL—PLEA OF AUTREFOIS ACQUIT

The state entered a motion for a mistrial on the grounds of newly discovered evidence, which evidence tended to exculpate the defendant, and the jury was discharged without the defendant's consent. Defendant's plea of autrefois acquit to a new indictment was denied. *Held*, on appeal, *reversed*. The defendant's plea should have been sustained, and the new indictment as against him dismissed, to preserve his constitutional protection against double jeopardy. State v. Locklear, 16 N.J. 232, 108 A.2d 436 (Sup. Ct. 1954).

Although the National Government, and most of the states, have a prohibition embodied in their constitutions against placing a person twice in jeopardy for the same offense, it is not purely a Constitutional product,[1] but is also declaratory of the ancient principles of common law[2] When jeopardy attaches is a question upon which all the authorities are not agreed.[3] Generally, in the absence of consent by the accused or an urgent necessity, a jury once impaneled and sworn in a criminal case cannot be discharged before a verdict without effecting an acquittal of the accused and preventing him from again being placed upon trial for the same offense under the former jeopardy doctrine.[4] However, the discharge of a jury in case of a manifest necessity does not afford the basis of a plea of former jeopardy.[5]

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1. U.S. CONST. AMEND. V. (. . . nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb . . .); FLA. CONST. DECLARATION OF RIGHTS, § 12 (1944).

2. Rex v. Vandercomb, 2 Leach 708, 168 Eng. Rep. 455 (1796).

3. People v. Terrill, 132 Cal. 497, 498, 64 Pac. 894, 895 (1901). "Jeopardy attaches when a defendant is placed upon his trial before a competent court and jury upon a valid indictment."; Klein v. State, 157 Ind. 146, 147, 60 N.E. 1036, 1037 (1901). "A defendant is not in legal jeopardy, within the constitutional restriction, until he has been put upon his trial before a court of competent jurisdiction upon an indictment or information which is sufficient in form and substance, to sustain a conviction"; State *ex rel.* Larkin v. Lewis, 54 So.2d 199, 201 (Fla. 1951). "In absence of circumstances justifying declaration of a mistrial jeopardy attaches when the court is legally constituted, has jurisdiction of the cause and accused, when the charge is legally sufficient on which to predicate a verdict and judgment and when the jury is sworn."; State v. Rook, 61 Kan. 382, 59 Pac. 653, 655 (1900). "A defendant in a criminal case can not be said to be in jeopardy unless he has been arraigned, or waived arraignment, and pleaded not guilty or had such plea entered for him . . . ."

4. Cornero v. U.S., 48 F.2d 69 (9th Cir. 1931); Bell v. State, 44 Ala. 393 (1869); State *ex rel.* Alcala v. Grayson, 156 Fla. 435, 23 So.2d 484 (1945); Ryan v. McNeill, 141 Fla. 304, 193 So. 67 (1940); Smith v. State, 135 Fla. 835, 186 So. 203 (1939); State *ex rel.* Dato v. Nimes, 134 Fla. 675, 184 So. 244 (1938).

5. State *ex rel.* Alcala v. Grayson, 156 Fla. 435, 23 So.2d 484 (1945); State *ex rel.* Dato v. Himes, 134 Fla. 675, 184 So. 244 (1938); Holt v. State, 160 Tenn. 366, 24 S.W.2d 886 (1930).

To be sure, it would be impossible to define *all* the circumstances which would render it possible for the court to declare an urgent, manifest or imperious necessity. Except as found in decided cases,[6] the circumstances that may constitute an urgent necessity justifying the discharge of a jury in criminal cases are left to the sound discretion of the presiding judge, acting under his oath of office and having due regard for the rights of the accused and the state.[7] A trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice.[8] For whatever cause a jury is discharged, it must take place in open court.[9]

In the instant case the state made its motion for a mistrial after the trial had consumed 19 days and all the evidence had been presented. The attorney for the state admitted, on oral argument, that the new evidence was exculpatory toward defendant and not incriminating. As a general rule, in most jurisdictions, in the absence of statute,[10] a state cannot appeal or bring a writ of error proceeding from a judgment in favor of the defendant in a criminal case.[11] Likewise, in criminal cases when new evidence is discovered, after a verdict, the defendant cannot be tried again since to do so would constitute double jeopardy.[12] Bearing these two general principles in mind, the state's purpose in asking for a mistrial becomes readily discernible. However, there apparently is no logical reason why this exculpatory evidence should be grounds for a mistrial since there would be no undue hardship on either side if this new evidence were presented before the court, and the jury allowed to consider it in the light of all the other evidence. Not to do so would seem to be an abuse of the absolute necessity rule and would result in the unnecessary harassing of the defendant.[13]

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6. U.S. v. Perez, 9 Wheat. 579 (U.S. 1824); State v. Nelson, 19 R.I. 467, 34 Atl. 990 (1896); Green v. State, 147 Tenn. 299, 247 S.W. 84 (1923).

7. Logan v. U.S., 144 U.S. 263 (1892) (The jury in a capital case after considering the verdict for 40 hours were unable to agree. *Held*, they may be discharged by the court on its own motion); State v. Slorah, 118 Me. 203, 106 Atl. 768 (1919). (The defendant while viewing the scene of the crime with the jury cried out: "Take me away or I will go insane." *Held*, there was grounds for the discharge of the jury).

8. Brock v. North Carolina, 344 U.S. 424 (1952); Wade v. Hunter, 336 U.S. 684, 685 (1948) "The dissolution of the first court martial proceeding was dictated by the pressing military tactical situation."; State v. Grayson, 156 Fla. 435, 23 So.2d 484 (1945).

9. Kamen v. Gray, 169 Kan. 664, 220 P.2d 160 (1950); Holt v. State, 160 Tenn. 366, 24 S.W.2d 886 (1930).

10. Comm. v. Williams, 230 Ky. 82, 18 S.W.2d 882 (1929); Comm. v. Prall, 146 Ky. 109, 142 S.W. 202 (1912); State v. Brown, 8 Okla. Crim. Rep. 40, 126 Pac. 245 (1912); State v. Hotel McCreary Co., 68 W. Va. 130, 69 S.E. 472 (1910).

11. U.S. v. Weissman, 266 U.S. 377 (1924); City of Newark v. Pulverman, 12 N.J. 105, 95 A.2d 889 (Sup. Ct. 1953); State v. Hort, 90 N.J.L. 261, 101 Atl. 278 (1917).

12. *Cf.* Bizzell v. State, 71 So.2d 735 (Fla. 1954); Potter v. State, 91 Fla. 938, 109 So. 91 (1926).

13. People v. Barrett, 2 Caines N.Y. 305 (1805).

In Florida it is said that the causes which create the necessity must fall under one of three distinct categories.[14] Generally, as to the problem of what constitutes an extreme and absolute necessity, there is no acceptable categorical answer, as indicated.[15] It may be determined by the discretion of the trial judge, and may range from what the judge thinks are prejudicial remarks on the part of the defendant's attorney,[16] to a dismissal of a jury which could not agree after long deliberation.[17] In considering this aspect of what is an absolute necessity, we should be careful not to become over-zealous in our protection of the rights of the accused,[18] but we should equally bear in mind the protection of the public represented by the state. In the absence of any concrete principle, it appears that jeopardy will attach unless there arises some reason why the court cannot function.[19]

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DIVORCE—DIRECT AND COLLATERAL ATTACK—SUIT BY STRANGERS

Strangers to a divorce decree sought to attack it directly by a bill in the nature of a bill of review on the ground that the decree was obtained by fraud. Except for such divorce decree, appellants would be the sole heirs of the deceased. *Held,* such an attack may be made by a stranger to a decree when his interests are substantially affected thereby, but the decree will be set aside only insofar as his interests are concerned. *Jones v. Goolsby,* 68 So.2d 89 (Miss. 1953).

Subject to certain limitations, a court having jurisdiction of divorce cases may, for good cause shown and upon due proceedings, seasonably set aside or modify its own judgments or decrees of divorce on its own motion or on the application of one of the parties.[1] Whether a particular decree should or should not be opened,[2] modified,[3] or annulled,[4] rests largely within the discretion of the court.[5]

14. State *ex rel.* Alcala v. Grayson, 156 Fla. 435, 436, 23 So.2d 484, 485 (1945) (The causes which create the necessity must fall under one of three heads, namely: "(1) where the court is compelled by law to be adjourned before the jury can agree upon a verdict; (2) where the prisoner by his own misconduct places it out of the power of the jury to investigate his case correctly, thereby obtaining an unfair advantage of the state, or is himself . . . prevented from being able to attend to his trial; (3) where there is no possibility for the jury to agree upon and return a verdict.").

15. See note 7 *supra.*

16. Mack v. Comm., 177 Va. 921, 15 S.E.2d 78 (1941).

17. Smith v. State, 135 Fla. 835, 186 So. 203 (1939).

18. Kepner v. U.S., 195 U.S. 100, 136 (1904).

19. State *ex rel.* Alcala v. Grayson, *supra* note 14.

1. Ex *parte* Favors, 225 Ala. 675, 145 So. 146 (1932); Brook v. Baker, 208 Ark. 654, 187 S.W.2d 169 (1945); Reimers v. McElree, 238 Iowa 791, 28 N.W.2d 569 (1947).

2. Mitchell v. Mitchell, 97 N.J.Eq. 298, 127 Atl. 185 (Ct. Err. & App. 1925), *reversing,* 96 N.J.Eq. 29, 125 Atl. 490 (Ch. 1924).

3. Kunker v. Kunker, 230 App. Div. 641, 246 N.Y.Supp. 118 (3d Dep't 1930).

4. Walker v. Walker, 198 Wash. 150, 87 P.2d 479 (1939).

5. Keller v. Keller, 139 Ind. 38, 38 N.E. 337 (1894).