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Writ of Coram-Double Jeopardy Limitations

WRIT OF CORAM NOBIS—DOUBLE JEOPARDY LIMITATIONS—Juan S. Lopez, convicted on a criminal charge in the Lake County Criminal Court, paid his fine and served his sentence. Then he sought to obtain another trial, an acquittal in which would both save him from deportation based on the conviction and free him of the stigma cast by it upon his reputation. When he presented his petition to the aforementioned court for a writ of error coram nobis, the court refused him permission to file the petition; and he applied to the Supreme Court for a writ of mandate ordering the lower court to let him file. *Held,* for petitioner. The writ of error coram nobis is analogous to a new trial; in both types of procedure double jeopardy is waived. *State ex rel Lopez v. Killigrew and Smith,* Supreme Court of Indiana, February 20, 1931, 174 N. E. 808.

Jeopardy is held in most jurisdictions to begin when a jury is properly impaneled and sworn in by a court of jurisdiction to try the defendant upon an indictment duly found and formally adequate to sustain a conviction, though things may happen during the course of the trial which will leave the defendant subject to a trial before a new jury. *People ex rel Stabile v. Warden of City Prison of New York,* 202 N. Y. 138, 95 N. E. 729 (1911); *People ex rel Bullock v. Hayes,* 151 N. Y. S. 1075, 109 N. E. 77 (1915). Jeopardy does not attach in Indiana until the accused is put upon trial on a legal indictment before a competent jury and a court of jurisdiction. *Klein v. State,* 151 Ind. 146; *Warden v. Emmons,* 83 Ind. 331. Conditions subsequent, as it were, which may occur during trial and will terminate the privilege of pleading double jeopardy in another trial for the same offense include failure of jurors to agree (*White v. State,* 63 Fla. 49, 59 So. 17 [1912]); proper discharge of jury for inability to agree (*People ex rel Bullock supra; State v. Leach,* 180 Ind. 124); withdrawal of case from jury after discovering, following the swearing in, that one is disqualified (*Minyard v. State,* 17 Ga. App. 398, 87 S. E. 710 [1916]); *Adams v. State,* 99 Ind. 244); discharge of jury on defendant's objection because of court's failure to admonish them before separation (*State v. McKinney,* 76 Kan. 419, 91 P. 1068-1907). And, though statutory regulations in some states

modify the rule, there is great uniformity of decisions that reversal of judgment is a bar to the plea of former jeopardy.

One may be tried, convicted, and punished by both the state and Federal governments on the same set of facts involving violation of laws of both governments, the offenses being separate in legal contemplation; and double jeopardy does not occur. So may one be tried and punished for contempt for violating an injunction and again for violating a criminal law, though both arise from the same act. *State v. Shevlin-Carpenter Co.*, 102 Minn. 470, 113 N. W. 634 (1910); *Ex Parte Roper*, 61 Tex. Cr. R. 68, 134 S. W. 334. For protection against double jeopardy is limited to criminal prosecutions. *State v. Stevens*, 103 Ind. 55, 2 N. E. 214. No jeopardy attaches to a trial in the wrong jurisdiction, and a second trial in the vicinage of the crime involves no double jeopardy. 8 R. C. L. 137-138.

While a legal acquittal will bar a second trial for the same offense, a trial may be granted the accused on his own motion. *Ezzard v. State*, 11 Ga. App. 30, 74 S. E. 551. But "in considering the identity of the offense, it must appear by the plea that the offense charged in both cases is the same in law and in fact." Shaw, C. J., in *Commonwealth v. Roby*, 12 Pick (Mass.) 496. The same transaction may result in two similar offenses—A may murder two people at the same time and by the same act—and acquittal for one is no bar to prosecution for the other, the theory being that there are two distinct crimes. *Augustine v. State*, 41 Tex. Crim. 59, 52 S. W. 77. That *identity of transactions or acts* is the controlling consideration in determining double jeopardy is the rule in a great majority of the cases.

And the crime must either be the same in fact or be *necessarily* included in the former. *State v. Day*, 5 Pen. (Del.) 101, 58 Atl. 946. For when the facts *necessary* to convict on a second prosecution would not *necessarily* have convicted on the first, then the first prosecution will not be a bar to the second. *Miller v. State*, 33 Ind. App. 509, 71 N. E. 248. But if the facts requisite to conviction on the second prosecution would *necessarily* have convicted on the first, then, on grounds of double jeopardy, final judgment in the first will bar another prosecution. *State v. Elder*, 65 Ind. 282. Where a person is brought to trial and jeopardy attaches, he cannot thereafter be tried for a greater offense arising out of the same criminal act, unless there was fraud, connivance, or collusion in obtaining the results of the first trial. *State v. Elder, supra.* So, if one is tried for assault, he cannot thereafter be tried on the same set of facts for assault with intent to rape. And the same rule applies where the first trial is for the greater instead of the lesser crime: the accused cannot thereafter be tried for the lesser offense necessarily included in the greater.

But if, after conviction, a new fact arises from the same set of facts, so that a new *set* of facts results, the combination of the same facts plus the newly developed fact or facts will support a trial for a different crime. Thus, a conviction for assault while the victim is living will not bar a trial for his murder after his death caused by the same act of assault, the theory here being that a new fact—the death—has intervened, changed the character of the crime, and constituted a distinctly new one. *Diaz v. United States*, 223 U. S. 442. Logically, therefore, although a strong argument to the contrary may be founded on the theory of dissimilarity of the crimes

and intervention of the entirely new fact of death (14 L. R. A. (new series) 210), an *acquittal* of assault should bar a subsequent prosecution for murder based on the same facts, for, assault being a requisite element of murder, and defendant being proved not guilty of assault, it is difficult to understand how, under the rules announced in the preceding paragraph, the same assault could be made an issue a second time.

Waiver of double jeopardy protection can be effected in many ways. It is found in the arresting of judgment on motion of the prisoner, or in vacating the same on his motion; and he cannot thereafter plead the former jeopardy in bar to a subsequent indictment or trial. *People v. Ham Tong*, 155 Cal. 579, 102 P. 263 (1909); *People v. Zlatincke*, 152 Ill. App. 363 (1910). The constitutional *immunity* from second jeopardy is a personal privilege, which may be waived; the waiver may be either express or implied; and it is always implied when there is a failure to raise objections at the first opportunity—objections come too late for example when raised for the first time on a motion in arrest of judgment. *Levin v. United States*, 5 F. (2nd) 598. Some of the cases reveal a careless use of the term *right* by the courts in connection with protection against double jeopardy. But whatever name be applied, the concept continues unchanged in legal contemplation; and the fact remains that the protection can be waived expressly or impliedly. Apparently the general rule is that a tardy objection to double jeopardy is an implied waiver. What the real reason for the rule is, the books do not disclose. It may be punitive so as to discourage the strategic shift of waiting until the trial is finished and then setting at naught the expensive judicial procedure by calling up the plea of former jeopardy. Or it may be merely to prevent the defendant from "sleeping on his rights" and complaining after he awakens to a world too full of justice for his tastes.

Where the accused consented to the discharge of the jury after the trial had begun, in order that he might withdraw his plea of not guilty and demur to the indictment, he thereby waived the former jeopardy. *People v. Nash*, 15 Cal. App. 320, 114 P. 784. Application for a new trial is a waiver of double jeopardy, and is suing out a writ of error and obtaining a reversal. *State v. B——*, 173 Wis. 608, 182 N. W. 474 (1921); *People v. Fochtman*, 226 Mich. 53, 197 N. W. 166; *Watson v. State*, 224 P. 368 (Okl. Cr. App. 1924).

Two conclusions may be reached from the foregoing discussion. First, the principal case was correctly decided; under such facts as it presented, double jeopardy and all its consequences can be completely obviated. Second, three legal forces—limitation of conditions on which jeopardy may arise, recognition of the manifold conditions which terminate it after it has once come into existence, and the readiness with which a waiver of it is found by the courts—all tend to press in upon the constitutional protection and to restrict its successful employment as a defense to a relatively small number of situations.

H. W. J.