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will in the future, has, along with other principal jurisdictions, engaged quite frequently and adeptly in the art of verbal rationalization to achieve an equitable end despite the general rule against the delegation of legislative authority to an individual.

LACY H. THORNBURG

Criminal Law—Former Jeopardy—Effect of Mistrial Resulting from Prosecutor's Inability to Proceed

Where the state's principal witnesses refused to testify on the ground of self-incrimination, the trial court declared a mistrial over the defendant's objection. Subsequently, when the state was able to procure the testimony of the witnesses the defendant was tried by a new jury and convicted of unlawful secret assault over his objection that he had been in jeopardy at the first trial. The North Carolina Supreme Court affirmed¹ the conviction and certiorari was granted by the United States Supreme Court wherein it was held in a five to two decision that the declaring of a mistrial and requiring the defendant to be presented to another jury, in accordance with North Carolina practice, was not a violation of the due process clause of the Federal Constitution.²

The Federal³ and most state⁴ constitutions guarantee that a person shall not twice be in jeopardy for the same offense. In those states where the constitution is silent, former jeopardy is a part of the common law,⁵ but it is not one of the privileges and immunities protected by the Fourteenth Amendment.⁶ By the greater weight of authority jeopardy attaches within the constitutional provision or the common law at the time a proper jury is impaneled and sworn to hear the evidence.⁷ Discharge of the jury thereafter absent manifest legal necessity for so

¹ State v. Brock, 234 N. C. 390, 67 S. E. 2d 282 (1951).

² Brock v. State of North Carolina, 73 S. Ct. 349 (1953).

³ U. S. CONST. AMEND V.

⁴ 1 BISHOP, CRIMINAL LAW §981 (9th ed. 1923).

⁵ The Constitutions of Connecticut, Maryland, Massachusetts, North Carolina, and Vermont do not contain prohibitions against double jeopardy; however, each of these states has the prohibition as part of its common law. State v. Benham, 7 Conn. 414 (1829); Gilpin v. State, 142 Md. 464, 121 Atl. 354 (1923); Commonwealth v. McCan, 277 Mass. 199, 178 N. E. 633 (1931); State v. Clemmons, 207 N. C. 276, 176 S. E. 760 (1934); State v. O'Brien, 106 Vt. 97, 170 Atl. 98 (1934). Eight states, because of specific constitutional provisions, hold that there must be an acquittal or conviction before jeopardy attaches. See A. L. I., *Administration of the Criminal Law*, Commentary to § 6 (Proposed final draft for 1935) for a complete listing of the Constitutional provisions.

⁶ In Palko v. State of Connecticut, 302 U. S. 319 (1937), the state appealed pursuant to a Connecticut statute whereupon a reversal for errors of law was obtained. It was held that the statute was constitutional since the due process clause of the Fourteenth Amendment does not protect an individual against double jeopardy in a prosecution by a state. Hence, the Connecticut statute here in question does not necessarily violate the Fourteenth Amendment because a similar act of the federal government would violate the Fifth Amendment.

⁷ 22 C. J. S. *Criminal Law* § 241 n. 64 (1940).

doing, is equivalent to an acquittal and to thereafter subject the defendant to another trial constitutes double jeopardy.⁸ It is generally conceded, however, that the trial court may discharge the jury without working a dismissal of the defendant in such instances, where, in the sound discretion of the trial judge, there is manifest necessity for the act or the ends of public justice would otherwise be defeated.⁹ The discretion is not absolute, and will be reviewed where its abuse appears.¹⁰ The so-called exceptions¹¹ to the prohibition against double jeopardy embrace cases where the trial is halted due to causes beyond the court's control¹² and generally have to do with the physical condition of the judge,¹³

⁸ No necessity for discharge of the jury was shown where the trial judge became incensed with the defendant's attorney during the trial. *State v. Whitman*, 93 Utah 557, 74 P. 2d 696 (1937); *cf. State ex rel. Wilson v. Lewis*, 55 So. 2d 118 (Fla. 1951). No necessity for discharge was shown where the extent of the juror's illness was not revealed. *Commonwealth v. Baker et al.*, 280 Ky. 165, 132 S. W. 2d 766 (1939). Discharge on the prosecutor's motion that the defendant had not been arraigned supported a plea of former jeopardy and discharge of the jury amounted to an acquittal of the defendant. *State ex rel. Ryan v. McNeil* 141 Fla. 329, 193 So. 67 (1940); *accord*, *Griffin v. State*, 28 Ga. App. 767, 113 S. E. 66 (1922). There was no necessity for the trial judge's action in discharging the jury on information which would disqualify one of the jurors without examining said juror in open court. *Yarbrough v. State*, 210 P. 2d 375 (Okla. 1951); *accord*, *People v. Parker*, 145 Mich. 488, 108 N. W. 999 (1906). Illness of the district attorney and the absence of a witness for the state "is no grounds upon which in the exercise of sound discretion, a court can . . . properly discharge a jury, without consent of the defendant after the jury has been sworn and the trial commenced." *United States v. Watson*, 28 Fed. Cas. 499, 501, No. 16,651 (D. C. N. Y. 1868); *Murray v. State*, 210 Ala. 603, 98 So. 871 (1924). See cases cited in notes 17-23 *infra*, to the effect that the want of preparation on the part of the prosecution does not constitute a showing of necessity.

⁹ *State ex rel. Larkins v. Lewis*, 54 So. 2d 199 (Fla. 1951) (Defendant's misconduct); *United States ex rel. De Frates v. Ryan*, 181 F. 2d 1001 (1950); *Eetter v. State*, 185 Tenn. 218, 205 S. W. 2d 1 (1947); *People v. Schepp*, 231 Mich. 260, 203 N. W. 882 (1925); *State v. Palmieri*, 46 N. E. 2d 318, 322 (Ohio Ct. of App. 1938), *appeal dismissed*, 135 Ohio St. 30, 18 N. E. 2d 985 (1939) (Misconduct of defendant's attorney): "On the other hand, it is perfectly well settled, that where the state intervenes without such necessity, and prevents a verdict, the accused cannot be subjected to a further trial . . ." Justice Story stated the rule in *United States v. Perez*, 9 Wheat. 579 (U. S. 1824): "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, there is manifest necessity for the act, or the ends of 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. To be sure, the power ought to be used with the greatest caution, under urgent circumstances and for very plain and obvious reasons. . . ." (Italics added.)

¹⁰ See note 8 *supra*.

¹¹ *Cf. State v. Palmieri*, 46 N. E. 2d 318, 322 (Ohio Ct. of App. 1938), *appeal dismissed*, 135 Ohio St. 30, 18 N. E. 2d 985 (1939) (Dictum): "Strictly speaking, there can be no such thing as an exception to a constitutional guaranty that a person shall not twice be put in jeopardy for the same offense."

¹² *State v. Colendine*, 8 Iowa 288 (1859). See, A. L. I., *Administration of the Criminal Law*, Commentary to § 7, pp. 79-87 (Proposed Final draft for 1935) for a listing of cases where there was proper discharge of the jury.

¹³ *United States v. Bigelow*, 3 Mack 393, 401 (D. C. 1884) (Dictum); *State v. Bell*, 81 N. C. 591, 594 (1879) (Dictum).

jurors,¹⁴ or prisoner,¹⁵ or with some highly prejudicial conduct on the part of the defense at the trial.¹⁶

By the greater weight of authority, the discharge of the jury on account of the inability of the prosecution to proceed because of matters affecting witnesses is not sufficient ground upon which a court can properly discharge the jury and hold the defendant for a second trial.¹⁷ Discharge of the jury by the court is a bar to further prosecution and is equivalent to dismissal where such discharge is allowed for the reason that the prosecutor discovers that his evidence is insufficient to gain a conviction,¹⁸ or a witness for the state is not present in court,¹⁹ or the state's witness is incompetent to testify because of infancy,²⁰ or because

¹⁴ *United States v. Bigelow*, 3 Mack 393, 401 (D. C. 1884) (Dictum); *State v. Scruggs*, 115 N. C. 805, 20 S. E. 720 (1894).

¹⁵ *United States v. Bigelow*, 3 Mack 393, 401 (D. C. 1884) (Dictum); *State v. Garrigues*, 2 N. C. 241, 242 (1795) ("If the prisoner be a woman and be taken in labour").

¹⁶ *State v. Palmieri*, 46 N. E. 2d 318 (Ohio Ct. of App. 1938), *appeal dismissed*, 135 Ohio St. 30, 18 N. E. 2d 985 (1939).

¹⁷ Where the district attorney entered trial of the case without sufficient evidence to convict, the court said: "An examination of the cases cited has disclosed the fact that no court has gone to the extent of holding that, after the impanelment of the jury for the trial of a criminal case, the failure of the district attorney to have present sufficient witnesses, or evidence to prove the offense charged, is an exception to the rule that the discharge of the jury after its impanelment for the trial of a criminal case operates as a protection against a retrial of the same case." *Cornero v. United States*, 48 F. 2d 69, 71 (9th Cir. 1931). See Note, 74 A. L. R. 803 (1931). This case was questioned in *Wade v. Hunter*, 336 U. S. 684 (1949), however, the fact situations involved in the two cases are substantially different.

¹⁸ In *State ex rel. Manning v. Hines*, 153 Fla. 711, 15 So. 2d 613 (1943), the court advised the prosecutor that the state's evidence was insufficient whereupon a mistrial was allowed. On appeal, the defendant was dismissed, the court finding that the trial judge had the power to declare a mistrial only in cases of *urgent necessity* or with the defendant's consent. *Gillespie v. State*, 168 Ind. 298, 80 N. E. 829 (1907) (Prosecutor failed to establish that any relationship existed between the defendant and one of the jurors); *State v. Webster*, 206 Mo. 558, 105 S. W. 705 (1907) (It appeared that the State's witness, upon whose affidavit the prosecution was based, had no knowledge of the alleged crime); *Klock v. People*, 2 Park. Crim. Rep. 676 (N. Y. 1856) (Prosecution proceeded without essential record evidence); *Villareal v. State*, 82 Tex. Cr. 327, 199 S. W. 642 (1917) (State's principal witness "surprised" the prosecutor with unsatisfactory testimony); *People v. Gehlbred*, 70 N. Y. S. 2d 819, 272 App. Div. 914 (1947).

¹⁹ In *State v. Richardson*, 47 S. C. 166, 170-171, 25 S. E. 220, 222 (1896), the prosecutor inadvertently allowed his witness to go home during the trial. The court said: "It would be a fearful thing to vest in the prosecuting officer the power to stop the trial after it has commenced, simply because such officer found that he was unable to establish the charge, by reason of the absence of a witness." In *State v. Little*, 120 W. Va. 213, 197 S. E. 626 (1938), the state's witnesses failed to return from lunch whereupon a juror was withdrawn over the defendant's objection. On appeal from a conviction at a subsequent trial, the court found that no necessity existed for the trial court's action since the jury might have been committed to the sheriff's custody while the prosecutor made a diligent search for the absent witnesses. *Pizano v. State*, 20 Tex. App. 139, 54 Am. Rep. 511 (1828) (Prosecutor's plea of surprise is of no avail where he has not shown diligence to obtain the state's witnesses for the trial); *State ex rel. Meador v. Williams*, 117 Mo. App. 564, 92 S. W. 151 (1906); *Allen v. State*, 52 Fla. 1, 41 So. 593 (1906).

²⁰ In *Hipple v. State*, 80 Tex. 531, 191 S. W. 1150 (1917), in the prosecution

the district attorney was ill without any showing that he was unable to conduct the case,²¹ or where the prosecutor believes he can be better prepared on another day,²² or for many other reasons²³ not attributable to any fault of the defense as this is not the type of necessity which authorizes the court to exercise its discretion.²⁴ There is authority, however, that in some instances the absence of a witness will permit discharge of a jury without barring a subsequent retrial of the defendant.²⁵ A notable case in this respect is *Wade v. Hunter*²⁶ where a general court-martial withdrew the charges against the accused because of the absence of witnesses and because of the intervening tactical situation.²⁷ Even under these compelling facts three dissenting justices were of the opinion "*that the harassment of the defendant from being*

for the alleged rape of a three year old girl, the state depended on the testimony of the child who the court determined to be incompetent to testify. The trial court granted the State's motion to withdraw the jury with the consent of the defendant's counsel. On appeal from a conviction at a subsequent trial, the court dismissed the defendant since (1) the incompetency of a three year old child to testify is not such an unexpected occurrence that no reasonable diligence could have anticipated, and (2) the consent of the defendant's counsel to discharge the jury after jeopardy has attached, nor the failure of the accused to protest, will bar a plea of former jeopardy on a subsequent trial.

²¹ *United States v. Watson*, 28 Fed. Cas. 499, 501, No. 16,651 (D. C. N. Y. 1868). The court therein said: ". . . No case to be found in the books has any such reason as is spread upon the record in this case been admitted in the absence of the consent of the defendant, to be a proper ground for discharging a jury after they have been sworn and impaneled to try an indictment . . . If I had any doubt as to the propriety of this course, I should resolve it in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion." (Italics added.)

²² *People v. Barrett*, 2 Caines 304, 308-309, 2 Am. Dec. 239, 241 (N. Y. 1805). The prosecutor was unable to prove the contents of a note since he had neglected to give the defense notice to produce such note. The court concluded: "To discharge a jury under such circumstances would be liable to great abuse and oppression. If the prosecutor disliked the jury . . . or hoped to, find the defendant less prepared at a future day, or wished unnecessarily to harass him, he might at anytime obtain his end, if, by solely the want of proof, after a jury was sworn, he could get rid of them."

²³ *State v. Colendine*, 8 Iowa 288 (1859) (Name of the State's witness was not indorsed on the indictment). In *State ex rel. Alcalá v. Grayson*, 156 Fla. 435, 437, 23 So. 2d 484, 485 (1945), the trial judge became convinced that one of the defendant's witnesses was committing perjury and a mistrial was ordered. The appellate court held this action to be error since the credibility of witnesses is for the jury. The court added: "If there were no other witnesses to sustain the state's case then it was a plain case where the prosecution could not make out a case. The apparent reason for halting the trial was the likelihood of the case terminating unfavorable to the State."

²⁴ *People ex rel. Stabile v. Warden of City Prison of the City of New York*, 202 N. Y. 138, 95 N. E. 729 (1911). Cf. *State v. Nelson*, 7 Ala. 610 (1845) (Prosecutor had no testimony on a collateral issue raised subsequent to the defendant's plea of not guilty).

²⁵ There is authority to the effect that a discharge of a jury for even an improper cause is not equivalent to a verdict. *United States v. Bigelow*, 3 Mack 393 (D. C. 1884); *Savell v. State*, 150 Ala. 97, 43 So. 201 (1907); compare *State v. Parker*, 66 Iowa 586, 24 N. W. 225 (1885), with *State v. Falconer*, 70 Iowa 416, 30 N. W. 655 (1886); *Reg. v. Charlesworth*, 1 B & S 460 (1861); *Reg. v. Winsor*, L. R. 1 Q. B. 289 (1866).

²⁶ 336 U. S. 684 (1949), *rehearing denied*, 337 U. S. 921 (1949); Comment, 23 *Temp L. Q.* 149 (1949-1950).

²⁷ The trial of petitioner (charged with having raped a German girl) was

repeatedly tried is not less because the army is advancing." In *U. S. v. Coolidge*,²⁸ the prosecutor claimed to be surprised by his principal witness' refusal to take an oath because of his religious belief and it was held that the defendant could be tried again. The court distinguished the case from the general rule since the refusal of a witness to be sworn is such an unusual occurrence that the prosecutor should not be expected to have foreseen it. It is submitted that these two cases are not authority in contravention of the general rule since the court may order a new trial where there exists urgent emergency which diligence could not have averted.

The principal case represents a remarkable deviation from established precedent as is noted by the vigorous dissent of Chief Justice Vinson²⁹ who foresees its result to mean that "the state is free, if the prosecution thinks a conviction cannot be won from the jury on the testimony at trial, to stop the trial and insist he be tried on another day when it has stronger men on the field." The majority of the court justified its conclusion on (1) the inapplicability of the Fifth³⁰ and Fourteenth Amendments,³¹ and (2) the rule of discretion as applied in North Carolina.

North Carolina is one of five states whose constitution makes no provision prohibiting double jeopardy; however, the common law of North Carolina does so prohibit.³² North Carolina, as do the great majority of the jurisdictions, holds that jeopardy attaches at the time the jury is impaneled and sworn.³³ Notwithstanding accord in basic principle, the application of the prohibition against double jeopardy in North Carolina is distinctly different from that as applied in the majority of American jurisdictions with respect to withdrawal of submission from the jury. The rule in effect provides that the trial judge possesses the discretion to declare a mistrial wherever he believes it proper in furtherance of justice and a plea of former jeopardy is no bar

commenced in the combat zone in Germany. After a continuance had been allowed to permit the hearing of other witnesses, a change in the tactical situation made prompt trial impossible and the charges were transferred to another headquarters where petitioner was tried and convicted by a new court martial. It is further noted that the charges were withdrawn by the action of the court martial and not the trial counsel (prosecution).

²⁸ 25 Fed. Cas. 622, No. 14,858 (Mass C. C. 1815).

²⁹ "For the first time in the history of this court, it is urged that the state could grant a mistrial in order that it might present a stronger case at some later trial and, in so doing, avoid a plea of former jeopardy in the second trial." *Brock v. State of North Carolina*, 73 S. Ct. 349, 352 (1953).

³⁰ *Palko v. State of Connecticut*, 302 U. S. 319 (1937) (see note 6 *supra*); *Twining v. State of New Jersey*, 211 U. S. 78 (1908).

³¹ *Palko v. State of Connecticut*, 302 U. S. 319 (1937).

³² See Note 5 *supra*.

³³ *State v. Bell*, 205 N. C. 225, 171 S. E. 50 (1933); 22 C. J. S., *Criminal Law* § 241 (1940).

on a subsequent prosecution.³⁴ In all cases involving misdemeanors and felonies less than capital such exercise of discretion is not the subject of review.³⁵ With respect to capital felonies, the trial judge is required to make a finding of facts showing necessity for discharge of the jury and his action in declaring a mistrial is subject to review on appeal,³⁶ since, in North Carolina, all capital cases are examined by the Supreme Court.³⁷ *Necessity* is liberally construed and includes in addition to cases of *physical necessity*; the necessity for *doing justice*.³⁸ The North Carolina decisions apply these rules allowing the trial court's discretion to declare a mistrial without respect to what provoked his action, and unless the crime charged is a capital felony, such action is not reviewable.³⁹ The jury may be dismissed without prejudice to the state's rights to again bring the defendant to trial where one of the jurors has become disqualified,⁴⁰ or where the jury is unable to agree on a verdict,⁴¹ or the term of court ends before the trial is concluded,⁴² or where physical necessity such as illness or intoxication halts the trial,⁴³ or where the indictment is defective,⁴⁴ or where the prosecutor was informed by the court that his evidence was insufficient to gain

³⁴ State v. Guice, 201 N. C. 761, 161 S. E. 533 (1931); State v. Ellis, 200 N. C. 77, 156 S. E. 157 (1930); State v. Andrews, 166 N. C. 349, 81 S. E. 416 (1914); State v. Bass, 82 N. C. 571, 575 (1880): "We hold therefore on a review of the cases in our reports, that his Honor has discretion to dissolve the jury and hold the defendants for a new jury, and the security for the proper exercise of his discretion rests not on the power of this court to review and reverse the judge, but on his responsibility under his oath of office" (Italics added.).

³⁵ The trial judge need not find the facts showing the necessity, nor is his action reviewable. Notwithstanding the rule, the North Carolina Supreme Court would review the trial court's action under circumstances establishing "gross" abuse. State v. Andrews, 166 N. C. 349, 81 S. E. 416 (1914).

³⁶ State v. Guice, 201 N. C. 761, 161 S. E. 533 (1931); State v. Cain, 175 N. C. 825, 95 S. E. 930 (1918); State v. Tyson, 138 N. C. 627, 50 S. E. 456 (1905); State v. Prince, 63 N. C. 529 (1869).

³⁷ State v. McCoy, 236 N. C. 121, 71 S. E. 2d 921 (1952).

³⁸ In State v. Weaver, 35 N. C. 204 (1891), the defendant was on trial for a misdemeanor. The trial judge was of the opinion that the State's evidence was insufficient to gain a conviction so the jury was withdrawn and the defendant was subsequently brought back and convicted. This was held to be proper since *in the trial judge's discretion it was necessary to the ends of justice*. See, State v. Cain, 175 N. C. 825, 829, 95 S. E. 930, 931-932 (1918); State v. Beal, 199 N. C. 278, 295, 154 S. E. 604, 614 (1930). *But cf.* State v. Garriques, 2 N. C. 241 (1795); *In Re Spier*, 12 N. C. 491 (1828) (Urgent and overruling necessity).

³⁹ See Note 36 *supra*.

⁴⁰ State v. Cain, 175 N. C. 825, 95 S. E. 930 (1918) (Juror had told the solicitor on the voir dire examination that he could convict for murder in the first degree on circumstantial evidence, and after the trial had commenced, he stated that he could not so convict).

⁴¹ State v. Bass, 82 N. C. 570 (1880) (Good summary and history of the North Carolina rule); State v. McGinsey, 80 N. C. 377 (1879); State v. Johnson, 75 N. C. 123 (1876).

⁴² State v. Tilletson, 52 N. C. 114 (1859).

⁴³ State v. Tyson, 138 N. C. 627, 50 S. E. 456 (1905).

⁴⁴ State v. Ellis, 200 N. C. 77, 156 S. E. 157 (1930); State v. Drakeford, 162 N. C. 667, 78 S. E. 308 (1913).

a conviction,⁴⁵ or where the solicitor had failed to give notice for the production of documentary evidence which he deemed essential to the establishment of the state's case,⁴⁶ and finally, the circumstances of the present case, where the state procured a mistrial in order to obtain the testimony of witnesses not available at the trial.

The principal case is wholly consistent with prior North Carolina decisions; however, here for the first time, the Supreme Court of the United States has affirmed the application of the North Carolina rule of discretion in an extreme case. Should a case with similar facts come before the North Carolina court again, it is submitted that the present procedure should be re-examined to assure that the fundamental rights of the defendant are not violated.

JAMES T. HEDRICK

Insurance—Accident Policies—Construction of “Accidental Means” in Policy

Deceased was insured under a health and accident policy the pertinent clauses of which provided indemnity against “. . . bodily injuries sustained . . . through purely accidental means . . . independently and exclusively of disease and all other causes. . .”¹ On the date of his death he was employed by a roofing company and engaged in shingling a house. Following a brief rest in the shade he ascended a ladder carrying a 70-pound bundle of shingles, reached the top, and in attempting to move the bundle higher on the roof, collapsed and slumped over it. Minutes later he was dead. The coroner's report showed death to have resulted from acute coronary occlusion antecedently produced by heat exhaustion.

In beneficiary's action on the policy the jury found that (1) death resulted from bodily injuries, (2) such injuries resulted in death independently and exclusively of disease and all other causes, (3) such injuries resulted through purely accidental means, and (4) death was not caused solely by coronary occlusion but that heat exhaustion and

⁴⁵ In *State v. Dove*, 222 N. C. 162, 22 S. E. 2d 231 (1942), the solicitor moved to be permitted to offer additional evidence at a later trial *since such evidence was not then available*. The trial court ordered a mistrial over the defendant's objection. On appeal, the action was affirmed, and, since the ordering of a mistrial in cases of felonies less than capital is discretionary, the appeal is premature. *State v. Guice*, 201 N. C. 761, 161 S. E. 533 (1931); *State v. Andrews*, 166 N. C. 349, 81 S. E. 416 (1914); *State v. Weaver*, 35 N. C. 204 (1891).

⁴⁶ In *State v. Collins*, 115 N. C. 716, 20 S. E. 452 (1894), the solicitor requested the withdrawal of a juror and time allowed to serve the defendant with notice to produce an order which the solicitor deemed essential to the state's case. The withdrawal was ordered and this action was affirmed on appeal since a mistrial in a case not capital is a matter of discretion.

¹ 109 N. E. 2d 649 (Ohio 1952).