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Plea of Double Jeopardy in Missouri, The

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THE PLEA OF DOUBLE JEOPARDY IN MISSOURI†

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INTRODUCTION

A principle prevails in the jurisprudence of the common law "that, when a matter has fairly passed to final adjudication, it cannot be litigated in any fresh suit between the same parties."[1] Whether the controversy be a civil case or a criminal prosecution, the need for preventing successive litigations of the same issues between the same parties is equally recognized by the courts.[2]

This fundamental axiom, shielding a defendant from repeated prosecutions for the same offense, has reverberated in the hallowed corridors of Anglo-Saxon Law through the plea of former jeopardy.[3] The doctrine of res judicata, long recognized in civil practice, was formulated into the criminal procedure as a complementary principle to the plea of former jeopardy.[4] The doctrine of res judicata, however, receives no constitutional sanction either in the United States Constitution or the Missouri Constitution.

Although this article concerns the constitutional protection against a man being put twice in jeopardy for the same offense, and hence the doctrine of res judicata is thereby excluded, cursory mention should be made of res judicata for a comparative and contrasting insight into the plea of former jeopardy. Basically stated, res judicata in criminal prosecutions means that: "When the second suit is upon a different cause of action, but between the same parties as the first, the judgment in the former action operates as an estoppel in the latter as to the every point and question

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1. 1 BISHOP, CRIMINAL LAW § 826, p. 461 (3d ed. 1865).
2. *Res Judicata as a Plea in Bar in Criminal Prosecutions*, 25 VA. L. REV. 839 (1939).
3. 4 BLACKSTONE, COMMENTARIES 335.
4. Duchess of Kingston Case, 20 St. Tr. 355 (1779).

which was actually litigated and determined in the first action, but it is not conclusive as to other matters which might have been, but were not, litigated or decided.'"[5] Negatively expressed, the plea of former jeopardy is that: "Unless the first indictment were such as the prisoner might have been convicted upon proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second.'"[6]

The plea of former jeopardy, therefore, only bars a prosecution which charges an offense identical in law and fact to an offense for which the defendant was anteriorly tried.[7]

As an illustration, consider the case of *United States v. Meyerson*,[8] wherein the defendant Katz was indicted and acquitted of using the mails to defraud by sending misleading statements to creditors. Thereafter, Katz was indicted for conspiracy to violate the Bankruptcy Act—the same scheme of which he was previously acquitted. The court in sustaining the motion of Katz to quash the indictment stated:

> By a parity of reasoning, the Katz motion cannot be sustained as a plea of autrefois acquit in bar to the indictment, because the offenses are not identical. The prior judgment of acquittal is, however, conclusive upon all questions of fact or of law distinctly put in issue and directly determined upon the trial of the former indictment.[9]
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> If upon the former trial the innocence of Katz of any participation in the conspiracy now charged against him was adjudicated and determined, the pending indictment should be quashed as against him.

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5. Dwyer, *Acquittals or Convictions as Bars to Prosecutions for Perjury*, 1 DUKE B. J. 101 (1951).

6. Vandercomb's Case, 2 Leach 708 (1796).

7. *Ibid.* United States v. Meyerson, 24 F.2d 855 (S.D. N.Y. 1928). A conviction of defendant Meyerson of using the mails to defraud by sending misleading statements to creditors did not bar a subsequent prosecution for conspiracy to violate the Bankruptcy Act. "There is no identity of offenses, and therefore no merit in the plea of autrefois convict."

8. 24 F.2d 855 (S.D. N.Y. 1928).

9. Citing Frank v. Mangum, 237 U.S. 309 (1915); Coffey v. United States, 116 U.S. 436 (1886); United States v. Oppenheimer, 242 U.S. 85 (1916); Collins v. Loisel, 262 U.S. 426 (1923); United States v. McConnel, 10 F.2d 977 (E.D. Pa. 1926).

The plea of former jeopardy, therefore, affords no protection to a defendant when the offenses charged in the consecutive prosecutions are not identical, even though as a result of the acquittal in the prior case an element which goes to the essence of the state's second case was decided adversely to the state in the prior case.[10] However, since res judicata in criminal prosecutions is the same as collateral estoppel in civil actions,[11] in the situation above, the plea of res judicata was correctly pleaded as an estoppel to the further litigation of any issues decided in the previous case.[12]

The mere statement of the principle that no man should be twice tried for the same offense is not too difficult to comprehend; the difficulty lies in the application of that principle. This paper will set forth the essentials necessary before the plea of double jeopardy may be invoked, and the main exceptions to those rules.

I. Constitutional and Common Law Provisions

The 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,"[13] finds expression in the Constitution of Missouri, as follows:

> That no person shall be compelled to testify against himself in a criminal cause, nor shall any person be put again in jeopardy of life or liberty for the same offense after being once acquitted by a jury; but if the jury fail to render a verdict, the court may in its discretion discharge the jury and commit or bail the prisoner for trial at the same or next term of court; and if judgment be arrested after a verdict of guilty on a defective indictment or information, or if judgment on a verdict of guilty be reversed for error in law, the prisoner may be tried anew on a proper indictment or information, or according to the law.[14]

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10. United States v. Meyerson, *supra* n. 7. For a more complete discussion of the doctrine of res judicata in criminal prosecutions, vide, McLaren, *The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases*, 10 Wash. L. Rev. 198 (1935).
11. Restatement, Judgments, §§ 68-72 (1942).
12. United States v. Meyerson, 24 F.2d 855 (S.D. N.Y. 1928).
13. 4 Blackstone, Commentaries 335.
14. Mo. Const. art I, sec. 19 (1945).

Although freedom from being twice put in jeopardy of life or limb is expressed in the fifth amendment of the Constitution of the United States, the phraseology employed therein is more akin to that used in Blackstone than that employed in the Missouri Constitution.[15]

Since the Federal Bill of Rights is directed against acts of the United States and not of the states themselves, the immunity from twice being put in jeopardy as guaranteed by the fifth amendment applies only to procedure in trials of criminal causes in the federal courts and does not apply to a trial of criminal prosecutions by the state.[16] Nor is the fifth amendment in regard to the plea of former jeopardy applicable against the state by the ordination of the fourteenth amendment that no state shall "deprive any person of life, liberty or property without due process of law."[17]

The common law rule against double jeopardy still prevails in Missouri and as such precludes a second conviction or acquittal for the same offense.[18] The plea of double jeopardy as such was unknown to the

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15. U.S. CONST., amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

16. State v. Berry, 298 S.W.2d 429 (Mo. 1957); Brock v. North Carolina, 344 U.S. 424 (1952); Palko v. Connecticut, 302 U.S. 319 (1937); Twining v. New Jersey, 211 U.S. 78 (1908); Twitchell v. Pennsylvania, 74 U.S. (7 Wall) 321 (1868); Fox v. Ohio, 5 How. (U.S.) 410 (1847); Barron *ex parte* Tiexnan v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1883); State v. Stroemple, 355 Mo. 1147, 199 S.W.2d 913 (1947), *cert. denied,* Skiba v. Missouri, 331 U.S. 857 (1947); *Ex parte* Dixon, 330 Mo. 652, 52 S.W.2d 181 (1932); State v. McWilliams, 267 Mo. 437, 184 S.W. 96 (1916).

17. State v. Berry, *supra* note 16. Notwithstanding many earlier federal court cases to the contrary, the Supreme Court of the United States has never held that an act consummated in the state court which would be violative of the fifth amendment if done in the federal courts, ipso facto, constitutes a violation of the due process clause of the Fourteenth Amendment. In fact, some recent cases have held that even though these acts would have been violative of the fifth amendment if done in the federal court they did not violate the fourteenth amendment to the Federal Constitution since they were done in the state court. Palko v. State of Connecticut, *supra* n. 16; Brock v. North Carolina, *supra.* Contrary to these decisions, and giving many of the reasons why the fifth amendment should apply to the state by innuendo to the fourteenth amendment is *Ex parte* Ulrich, 42 Fed. 587 (W.D. Mo. 1890); vide, Young, *Double Jeopardy Under the Fourteenth Amendment,* I LAW & L. N. 1 (1947).

18. State v. Toombs, 326 Mo. 981, 34 S.W.2d 61 (1930); State v. Snyder, 98 Mo. 555, 12 S.W. 369 (1889); *Ex parte* Dixon, *supra* n. 16.

common law of England, the plea being autrefois acquit or autrefois convict which were applicable only if there had been a conviction or an acquittal. In reference to this, Blackstone makes this statement:

> First, the plea of autrefois acquit or formal acquittal is grounded on this universal maxim of the common law of England—no man is to be brought into jeopardy of his life more than once for the same offense and hence it is allowed as a consequence that when a man is once found not guilty upon any indictment or other prosecution before any court having competent jurisdiction of that offense, he may plead such acquittal in bar of any subsequent accusation for the same crime.[19]

Therefore, in Missouri the accused is doubly protected, not only by article 1, section 19 of the Missouri Constitution, but also by the provisions of the common law.[20] This constitutional provision is not a mere affirmation of the common law for:

> . . . the English maxim is necessarily no more than the expression, by individual judges or text writers, of what they suppose to be the principle governing the adjudged law, and that, if the law as decided in the cases should be found differing from the maxim, it, and not the maxim, must lead the judgments of the English courts.[21]

In this country, the maxim as stated in the various constitutions is foremost, with the cases decided according to the interpretation of the constitutional provision.[22] Certainty, therefore, inured to this common law maxim by its adoption as a constitutional provision.

Furthermore, this right accorded to the accused and protecting him from the undue harassment and vexatiousness of being tried a number of times for the same offense is as sacredly guarded as all the other constitutional rights relating to criminal proceedings, such as the right to trial by

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19. BLACKSTONE, COMMENTARIES, *supra.*
20. State v. Snyder, *supra* n. 18; State v. Toombs, *supra* n. 18; *Ex parte* Dixon, *supra* n. 16.
21. 1 BISHOP, CRIMINAL LAW § 828, p. 461 (3d ed. 1865).
22. *Ibid.*

jury,[23] the right to a speedy trial,[24] and the right to be prosecuted for a felony or misdemeanor only by indictment or information.[25]

II. Proceedings and Offenses in Which Former Jeopardy is a Defense

The fundamental conception of jeopardy and its consequential plea of former jeopardy in both its constitutional and common law meaning is that it is applicable only to cases involving criminal prosecution[26] and does not apply to any proceedings of a civil nature.[27]

This precept prevails even though the parties in the first suit, whether it be civil or criminal, are the same parties in the second suit.[28] The reason for this lies within the trial of the case itself. For civil procedure is completely incompatible with the accepted rules and constitutional guarantees which govern the trial of criminal prosecutions;[29] for instance, in a civil case there is no burden upon the government to prove its case beyond a reasonable doubt,[30] and the government is not denied the right to appeal from an adverse decision.[31] The defendant in a civil case is completely devoid of all constitutional rights, as known to criminal procedure, such as the right to be confronted with witnesses against him,[32] or even the right to refuse to testify in a case.[33]

The determination of whether a case is civil or criminal, and the application of the double jeopardy clause accordingly, has been an exacting task for the courts in certain instances. The cases have been dichotomized into

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23. Mo. Const., art. 1, sec. 22 (a) (1945).
24. *Id.* § 18 (a).
25. *Id.* § 17.
26. Rex Trailer Co. v. United States, 350 U.S. 148 (1955); United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); Helvering v. Mitchell, 303 U.S. 391 (1938); Donnelly v. Steele, 180 F.2d 1019 (8th Cir. 1950).
27. Waterloo Distilling Corporation v. United States, 282 U.S. 577 (1931); The Palmyra, 12 Wheat. 1 (U.S.) (1827).
28. Coffey v. United States, 116 U.S. 436 (1886).
29. Helvering v. Mitchell, *supra* n. 26.
30. United States v. Regan, 232 U.S. 37 (1914).
31. United States v. Zucker, 161 U.S. 475 (1896); United States v. Regan, *supra* n. 30; Helvering v. Mitchell, 303 U.S. 391 (1938).
32. Grant Brothers Construction Company v. United States, 232 U.S. 647 (1914); United States v. Zucker, *supra* n. 31; Helvering v. Mitchell, *supra* n. 31.
33. Helvering v. Mitchell, *supra* n. 31; United States *ex rel.* Dilokumsky v. Tod, 263 U.S. 149 (1923).

civil actions of a remedial nature brought primarily to protect the government from financial loss, and criminal actions commenced for the purpose of authorizing punishment as a vindication of public justice.[34] Only this latter group subjects the defendant to jeopardy within the constitutional meaning.[35] Following this bifurcation, where a statute, besides making an act a crime, also permits the recovery of a penalty for its commission, the trial of the accused for the crime does not constitute a bar to a subsequent action for the penalty, since said action is not deemed to be within the constitutional guarantee against double jeopardy.[36]

The doctrine of double jeopardy is also inapplicable to a proceeding in rem in the nature of a forfeiture, since it is the property which is proceeded against and not a particular person whose guilt or innocence is the subject of determination.[37] Other proceedings where a plea of double jeopardy does not exist are where a parole violator is required to serve the balance of his sentence, although the serving thereof extends beyond the date the original sentence would have expired if no parole had been granted;[38] where the proceedings are had under the Habitual Criminal

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34. 1 BISHOP, CRIMINAL LAW § 838, p. 465 (3d ed. 1865).

35. United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); Helvering v. Mitchell, 303 U.S. 391 (1938).

36. Helvering v. Mitchell, *supra* n. 35; United States *ex rel.* Marcus v. Hess, *supra* n. 35. The main exception to this is Coffey v. United States, 116 U.S. 436 (1886), which held that this general rule did not apply to a situation where there had been an acquittal upon a criminal charge followed by a civil action requiring a different degree of proof.

37. Waterloo Distilling Corporation v. United States, 282 U.S. 577, 581 (1931): "A forfeiture proceeding under R. S. 3257 or 3281 is *in rem*. It is the property which is proceeded against and by resort to a legal fiction held guilty and condemned as though it were conscious, instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished. Forfeiture is no part of the punishment for the criminal offense. Origet v. United States, 8 S. Ct. 846, 125 U.S. 240, 31 L. Ed. 743 (1888). The provison of the Fifth Amendment to the Constitution of the United States in respect to double jeopardy does not apply."

The Palmyra, 12 Wheat. (U.S.) 1, 7 (1827), wherein the Supreme Court of the United States stated: "Many cases exist where there is both forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this court understands the law to be, that the proceeding *in rem* stands independently of and wholly unaffected by any criminal proceeding *in personam*. This doctrine is deduced from a fair interpretation of legislative intention, apparent upon its enactment." Vide, Murphy v. United States, 272 U.S. 630 (1926).

38. Hedrick v. Steele, 187 F.2d 261 (8th Cir. 1951).

Act;[39] and where there was an erroneous imposition of two sentences for a single offense of which the accused was convicted.[40]

The phrase, "life or liberty" as used in the Missouri Constitution, and "life or limb" as used in the United States Constitution, if strictly construed, would apply only to crimes involving the deprivation of the use of the defendant's body.[41] This phrase, however, has been construed in its liberal sense, so as to embrace all cases wherein a second prosecution is undertaken for either a felony or misdemeanor of which the defendant has been previously placed in jeopardy and has been acquitted or convicted.[42]

Needless to say, when a defendant relies upon a plea of former jeopardy, the subsequent proceedings upon which his plea is premised must have been valid.[43] Where the first prosecution is a mere sham instituted by the defendant himself as a shield from the consequences of a real prosecution, such actions being a fraud upon the criminal justice of the state, will not only not be allowed to succeed, but will not constitute a bar to a subsequent prosecution for the same offense, the fraud of the defendant nullifying the conviction.[44]

However, where there is a trivial deviation as to one of the requisites for a properly conducted trial, if such requisite does not go to the merits

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39. State v. O'Brien, 252 S.W.2d 357 (Mo. 1952), *cert. denied*, 345 U.S. 929 (1952). Article I, Section 19 of the Missouri Constitution "has application in instances where the accused is 'acquitted'. The Habitual Criminal Act goes only to the punishment, not the guilt or innocence of the accused or the offense on trial, and provides a greater punishment for second or subsequent offenses on account of the persistencies of the accused in perpetrating crimes. The punishment is not for the prior offense. The holdings are that the proceedings had under said act did not place the accused twice in jeopardy or conflict with other constitutional inhibitions."

40. Holiday v. Johnston, 313 U.S. 342 (1941); White v. Pescor, 155 F.2d 902 (8th Cir. 1946).

41. *Ex parte* Lange, 18 Wall. 163 (1873); 1 BISHOP, CRIMINAL LAW, *supra*.

42. *Ex parte* Lange, *supra* n. 41; Fox v. Ohio, 5 How. 439 (1847); Jarl v. United States, 19 F.2d 891 (8th Cir. 1927); Berkowitz v. United States, 93 Fed. 452 (3d Cir. 1899).

43. State v. Cole, 48 Mo. 70 (1871).

44. State v. Cole, *ibid.* The defendant having committed an assault and battery appeared before a justice and instituted proceedings against himself and was fined $3.00 and costs. Subsequently the injured party initiated criminal proceedings for the same offense against the defendant. Whereupon the defendant pleads the former conviction in bar of this second prosecution. "It is apparent that the first prosecution was a mere sham, gotten up by the defendant to shield him from the consequences of a real prosecution followed up by a real prosecutor. His action in that respect was a fraud upon the criminal justice of the state. . . ."

of the case itself, then the verdict in such case, being on the merits, will bar a subsequent prosecution for the same offense.[45]

III. Elements of Former Jeopardy

The legal jeopardy of an accused in a criminal prosecution requires:

A) that he shall have been tried upon a valid indictment or information;

B) that the court trying him shall have competent jurisdiction;

C) that he shall have been arraigned;

D) that he shall have pleaded to the indictment or information; and

E) that a competent jury shall have been duly impaneled and sworn to try the case.[46]

Each one of these prerequisites must exist before it shall be deemed that jeopardy has attached in the case.[47]

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45. State v. Stuart, 316 Mo. 150, 289 S.W. 822 (1926). The verdict, which was entered by the jury, was insufficient in that it did not name the defendant therein. The state alleged that such verdict, being insufficient, was invalid and hence the accused could be tried for the same offense on a subsequent prosecution. The Supreme Court of Missouri stated that even though the verdict was insufficient in that it did not name the defendant, it possessed the necessary requisites for a valid verdict and "possessed of these requisites, will be sufficient, when a judgment is properly rendered thereon, to bar another prosecution for the same offense."

46. State v. Miller, 331 Mo. 675, 56 S.W.2d 92 (1932); State v. Linton, 283 Mo. 1, 222 S.W. 847 (1920); State v. McWilliams, 267 Mo. 437, 184 S.W. 96 (1916); State v. Keating, 223 Mo. 86, 122 S.W. 699 (1909); State v. Webster, 206 Mo. 558, 105 S.W. 705 (1907); State v. Manning, 168 Mo. 418, 68 S.W. 341 (1902); State v. Wilson, 39 Mo. App. 187 (1890); *Ex parte* Snyder, 29 Mo. App. 256 (1888); State v. Snyder, 98 Mo. 555, 12 S.W. 369 (1889); State v. Wisebeck, 139 Mo. 214, 40 S.W. 946 (1897); State v. Hays, 78 Mo. 600 (1883).

The most cogent restatement of the necessary requisites constituting "jeopardy" is found in Cooley, Constitutional Limitations 467 (7th ed. 1903). "A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been impaneled and sworn. The defendant then becomes entitled to a verdict which shall constitute a bar to a new prosecution; and he cannot be deprived of this bar by a *nolle prosequi* entered by the prosecuting officer against his will or by discharge of the jury and continuance of the clause."

47. State v. Buente, 256 Mo. 227, 165 S.W. 340 (1914); State v. Taylor, 171 Mo. 465, 71 S.W. 1005 (1903); State *ex rel.* Meador v. Williams, 117 Mo. App. 564, 92 S.W. 151 (1906); State v. McWilliams, 267 Mo. 437, 184 S.W. 96 (1916); State v. Keating, 223 Mo. 86, 122 S.W. 699 (1909); State v. Webster, 206 Mo. 558, 105 S.W. 705 (1907); State v. Manning, 168 Mo. 418, 68 S.W. 341 (1902); State v. Wisebeck, 139 Mo. 214, 40 S.W. 946 (1897); State v. Linton, 283 Mo. 1, 222 S.W. 847 (1920); State v. Miller, 331 Mo. 675, 56 S.W.2d 92 (1932).

Therefore, the submission of an indictment to a grand jury or the mere pendency of an indictment or information without the other elements being present in no way can be said to place the defendant in jeopardy.[48]

A. *Valid Indictment or Information*

The Missouri Bill of Rights provides: "That no person shall be prosecuted criminally for a felony or misdemeanor otherwise than by an indictment or information, which shall be concurrent remedies. . . ."[49] That there be a valid indictment or information entered in a criminal prosecution is not only inextricably necessary for the proper disposition of a criminal cause,[50] but until an indictment or information is entered, no jeopardy whatsoever has attached to the accused.[51]

If an indictment or information is entered in a criminal cause, but said indictment or information is so defective or insufficient in form or substance that it is wholly incompetent for the sustentation of a conviction, said indictment or information is tantamount to not having been entered at all and a conviction rendered thereon cannot be pleaded as a bar to a subsequent prosecution on a valid indictment or information.[52]

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48. State v. Rozell, 279 S.W. 705 (1926); State v. McWilliams, 267 Mo. 437, 184 S.W. 96 (1916); State v. Goddard, 162 Mo. 198, 62 S.W. 697 (1901); State v. Vinso, 171 Mo. 576, 71 S.W. 1034 (1903); vide, O'Leary, *Criminal Law—Former Jeopardy—When Jeopardy Attaches*, 15 NOTRE DAME LAW 148 (1940).

49. MO. CONST. art. I, § 17 (1945).

50. MO. REV. STAT. § 545.010 (1949), which provides that felonies and misdemeanors may be prosecuted either by indictment or information; Supreme Court Rule 21.01.

51. United States v. Brimsdon, 23 F. Supp. 510 (W.D. Mo. 1938). State v. Long, 324 Mo. 205, 22 S.W.2d 809 (1930); State v. McWilliams, 267 Mo. 437, 184 S.W. 96 (1916); State v. Manning, 168 Mo. 418, 68 S.W. 341 (1902). A defendant cannot be put in jeopardy on any charge which is not contained in the indictment, even though evidence in the case tends to show that he is guilty of that charge.

52. State v. Manning, *supra* n. 51. The accused was indicted for an assault, but the indictment failed to name that the accused was the person committing the assault and in fact named another party as the party committing the assault. The Supreme Court of Missouri held: "So that the sufficiency of his plea is narrowed to the one inquiry, was the indictment on which he was on trial in that case a valid indictment, and such a one as would support a valid judgment? If it was, he is entitled to his discharge. If it was not, then it was no bar to the present prosecution. . . ." The indictment in the previous case, "was invalid on its face and no judgment could have been rendered against the defendant, and hence the plea in bar was lacking in this essential as to a good plea of former jeopardy."

State v. Keating, 223 Mo. 86, 122 S.W. 699 (1909). "As this court decided on the former appeal that this information was insufficient as to both counts, nothing further need be added to show that that conviction on the second count and the acquittal by entrance on the first count neither amounted to jeopardy within the meaning of our Constitution and law."

Notwithstanding this general rule, Missouri has provided several curative statutes for defects which are so minor that they do not require the court to set aside the verdict.[53] The presence of one of these minor defects, not being sufficient to set aside a verdict, is also insufficient to sustain the contention that the defendant was not in jeopardy under such an indictment.[54]

The general rule, therefore, is that jeopardy does not attach until a valid information or indictment has been filed in the case. The effect of an acquittal or conviction on a defective indictment or information will be discussed in a subsequent section.

B. *A Court of Competent Jurisdiction*

Before a person can be said to have been put in jeopardy of life or limb, the prior court in which he was acquitted or convicted must have had sufficient jurisdiction to try him for the offense charged.[55] This jurisdiction must have extended not only over the offense charged, but also over the defendant himself who has been brought into court by due process based upon legal proceedings.[56] When the court, before which the former

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53. MO. REV. STAT. § 545.030 (1949), which provides eighteen omissions or mistakes which are deemed so minor that no indictment or information shall be deemed invalid, nor any trial, judgment or other proceedings thereon be stayed or arrested because of the presence of said omissions or mistakes in the indictment. Vide, Supreme Court Rule 24.11.

54. State v. Linton, 283 Mo. 1, 222 S.W. 847 (1920). An information was filed intending to charge the defendant with the crime. Defendant was arrested and entered his plea thereon but there was a defect in the information in that it incorrectly stated what the defendant's name was. The court held that such a prosecution on this information placed the defendant in jeopardy so as to bar another prosecution under an amended information, in view of the curative Missouri statute.

55. Grafton v. United States, 206 U.S. 333 (1907). "We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb, the court in which he was acquitted or convicted must have jurisdiction to try him for the offense charged." United States v. Ball, 163 U.S. 662 (1896); *Ex parte* Lange, 18 Wall. (U.S.) 163 (1873); State v. Payne, 4 Mo. 376 (1836).

56. *Ex parte* Reed, 100 U.S. 13, 23 (1879). The Supreme Court of the United States in referring to a court martial proceeding said: "The court had jurisdiction over the person and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings cannot be collaterally impeached for any mere error or irregularity, if there were such, committed within the sphere of its authority. Its judgments, when approved as required, rest on the same basis, and are surrounded by the same considerations, which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under like circumstances."

trial took place, had jurisdiction neither of the offense nor of the person, the accused cannot be deemed in law or in any other sense to have been put in jeopardy by this trial because no valid and binding judgment could have been rendered by such a court.[57]

Since an accused is not deemed to be in jeopardy unless the court in which the action is brought has jurisdiction of the offense, it would of necessity follow that an acquittal or conviction by a judicial body of the United States is no bar to an indictment for the same offense in the state court if the federal court in the first instance had no jurisdiction over the offense.[58]

At common law it was a universal rule that crimes were only to be prosecuted in the county in which they were committed.[59] This catholic maxim has been recognized by Article 1, Section 18 (a), of the Missouri Bill of Rights which unequivocally grants to every citizen the right of a public trial "by an impartial jury of the body of the county."[60] The plea of former jeopardy, therefore is, a valid defense only if the offense was committed in the county where the accused was formerly tried. Therefore if the crime was committed in the county where the second action is pending, then the former proceeding in the other county, the court there being without jurisdiction over the offense, could in no way be considered to have put the defendant in jeopardy.[61]

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57. Grafton v. United States, *supra* n. 55; United States v. Ball, *supra* n. 55; State v. Payne, *supra* n. 55; State v. Bacon, 170 Mo. 161, 70 S. W. 473 (1902).

58. There are no Missouri cases on this point. State v. Roede, 107 Utah 538, 155 P.2d 741 (1945); Bylew v. Commonwealth, 91 Ky. 200, 15 S.W. 356 (1891).

59. 4 BLACKSTONE, COMMENTARIES 303; Holder v. St. Louis & Santa Fe Ry., 155 Mo. App. 664, 135 S.W. 507 (1911), states: ". . . The county is the unit by which the venue of an offense is to be determined, and to which the territorial jurisdiction of the statutory inferior courts of limited powers is curtailed, unless otherwise limited by the statute creating the court or defining its territorial authority."

60. MO. CONST., art. I, § 18 (a) (1945).

61. State v. Bacon, *supra* n. 57. The accused was convicted in Wright County of embezzling the proceeds of a draft for $36.00 which had been given the accused in Douglas County with instructions from his bailor to take it to Wright County and cash it. Although the accused was acquitted in Douglas County of a charge of embezzling the draft, since he was vested with the authority by the bailor to take the draft to Wright County, this acquittal in Douglas County did not bar the subsequent prosecution in Wright County since the offense of embezzlement arose in Wright County when he converted the proceeds of the draft to his own use; vide, Holder v. St. Louis & Santa Fe Ry., *supra* n. 59.

C. *Arraignment of the Accused*

Although the arraignment of the accused does not amount, ipso facto, to the joining of the criminal issues between the accused and the state so as to constitute putting the accused in jeopardy,[62] until the accused has been arraigned and has pleaded he is not in jeopardy.[63] Irrespective of the fact that the case may have proceeded as far as having the jury duly impaneled and sworn, and testimony adduced from witnesses presented therein, the accused, not having been arraigned, is still deemed not to have been put in jeopardy.[64]

However, the fact that the record does not show that the defendant has been duly arraigned is not fatal to the accused's pleading that he has already been placed in jeopardy. If such an arraignment has taken place, and all other elements of jeopardy are present, then the defendant has been placed in jeopardy.[65]

Although the general rule in the United States courts formerly was to require an arraignment and a plea before the defendant was considered in jeopardy,[66] it was held in *Garland v. Washington*[67] that in criminal trials before the United States courts, the requirement of an arraignment and plea is merely a formality and that a conviction in the absence thereof does not deprive the defendant of any substantial rights. Therefore, in the

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62. Bassing v. Cady, 208 U.S. 386 (1908); vide, STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 297 (1st ed. 1883).

63. Lovato v. New Mexico, 242 U.S. 199 (1916); State v. Gould, 261 Mo. 694, 170 S.W. 868 (1914); State v. Arthur, 32 Mo. App. 24 (1888); State v. Weber, 22 Mo. 321 (1855).

64. State v. Gould, *supra* n. 63. The defendant was held not to have been in jeopardy a second time even though the jury had been sworn before the arraignment. The accused could be arraigned subsequently and the jury resworn.

State v. Weber, *supra* n. 63; Lovato v. New Mexico, *supra* n. 63. The defendant was held not to be placed in jeopardy a second time even though in the first trial of the case the jury had been duly impaneled and sworn and witnesses for both sides had been called before it was learned that the defendant had not been properly arraigned.

65. MO. REV. STAT. § 546.020 (1949); Supreme Court Rule 25.04.

66. United States v. Riley, 27 Fed. Cas. No. 16,164 (S.D. N.Y. 1864). "By inadvertence, the jury was impaneled and sworn before the defendant had been arraigned, or had in any manner answered to the indictment. The prisoner was, in contemplation of law, *coram non judice*. The proceeding impaneling the jury at that time was a mere nullity. The defendant could not have been required to proceed to trial. It was, therefore, not merely a discretion but it was a duty, of the court, to disregard the irregular proceeding, and, after the prisoner had been arraigned and had pleaded to the indictment, to direct the jury to be impaneled in the regular order."

67. 223 U.S. 642 (1914).

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United States courts the element of arraignment and plea thereon is not essential for the defendant to be placed in jeopardy,[68] but it still remains a requisite in the state courts of Missouri.[69]

D. *Pleading to the Indictment or Information*

In Missouri the plea to the indictment or information is concomitant with the arraignment itself in that at the arraignment "it shall not be necessary to ask" the accused

> . . . how he will be tried; and if he deny the charge in any form, or require a trial, or if he refuse to plead or answer and in all cases when he does not confess the charge to be true, a plea of not guilty shall be entered, and the same proceedings shall be had, in all respects, as if he had formerly pleaded not guilty to such indictment or information. . . .[70]

The mere entry of a plea of not guilty, directly or indirectly, to an indictment or information does not of itself place the defendant in jeopardy.[71] If no further action is taken on the plea of not guilty by the prosecution, such indictment and plea thereunder will not constitute a bar to a subsequent prosecution for the same offense on the grounds of prior jeopardy.[72] However, where a plea of guilty is entered in open court and voluntarily made by the accused, the acceptance and entrance by the court of said plea would constitute a conviction of the accused, thereby placing him in jeopardy, and having the further effect of barring a subsequent prosecution for that offense.[73]

If defendant is permitted to withdraw his plea of guilty on the grounds that he was misled or induced to plead guilty by fraud, mistake, misapprehension, fear, persuasion, or any other measure which would defeat a volitional act on his part,[74] it would not seem consonant with the principles of public justice to allow the accused to plead this as a bar to a subsequent

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68. Clawans v. Rives, 104 F.2d 240 (D.C. Cir. 1939).
69. State v. Gould, 261 Mo. 694, 170 S.W. 868 (1914).
70. Mo. REV. STAT. § 546.020 (1949); Supreme Court Rule 25.04.
71. Bassing v. Cady, 208 U.S. 386 (1908).
72. *Ibid.*
73. State v. Hamilton, 337 Mo. 460, 85 S.W.2d 35 (1935).
74. State v. Reynolds, 355 Mo. 1013, 199 S.W.2d 399 (1947); State v. Hovis, 353 Mo. 602, 183 S.W.2d 147 (1944).

prosecution.[75] One of the guiding precepts of the criminal law of Missouri, therefore, is that any withdrawal by leave of court of a plea of guilty may not be set up as a bar to a subsequent prosecution for the same offense.[76]

E. *A Duly Empaneled and Sworn Jury*

Jeopardy cannot be considered to have attached to the defendant until the jury has not only been duly impaneled, but duly sworn to try the case,[77] for it is not until this point in the proceeding has been reached that the jury is deemed to be charged with the trial of the accused.[78] However, jeopardy may attach to the defendant in a trial without a jury where defendant either waives the right to trial by jury, or the offense for which he is charged is of such a nature and before such a tribunal that the tribunal although having proper jurisdiction is not constituted to provide jury trials.[79]

The effect of a decision rendered by an improperly constituted jury will be discussed in detail in the section pertaining to discharge of the jury.

IV. Preliminary Examination

The constitutional provision against double jeopardy can have no application unless the question submitted for the determination of the court is one which goes to the question of the guilt or innocence of the accused.[80] Hence any issues which are brought forth on motion, and are merely collateral to the trial of the case, do not put the defendant in jeopardy, and as a result will not sustain a plea of former jeopardy.[81]

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75. There are no Missouri cases on this point. Vide, Supreme Court Rule 27.-25; People *ex rel.* Grogan v. Morhaus, 270 App. Div. 871, 60 N.Y.S.2d 326 (3d Dep't 1946); *Ex parte* Wilkerson, 73 Okla. Cr. 32, 117 P.2d 172 (1941), *cert. denied* 314 U.S. 697 (1941).

76. People *ex rel.* Grogan v. Morhaus, *supra* n. 75.

77. Cornero v. United States, 48 F.2d 69 (9th Cir. 1931); State v. Webster, 206 Mo. 558, 105 S.W. 705 (1907); State v. Wisebeck, 139 Mo. 214, 40 S.W. 946 (1897).

78. *Supra* n. 77.

79. When the accused enters a plea of guilty, he thereby waives trial by jury, but is considered nevertheless to be in jeopardy.

80. Collins v. Loisel, 262 U.S. 426 (1923).

81. State v. Herring, 92 S.W.2d 132 (Mo. 1936); Collins v. Loisel, *supra* n. 80.

The plea of double jeopardy itself, not being directed toward the issue of the guilt or innocence of the accused, does not constitute a hearing on the issue of such guilt or innocence and thus does not place the accused in jeopardy.[82] Since neither an acquittal of an habitual criminal charge[83] nor the setting aside of a nolle contendere[84] goes to the question of the guilt or innocence of the defendant, said motions do not constitute a bar to a subsequent prosecution for the same offense.

As the plea of double jeopardy cannot be predicated upon the mere presentation of collateral or preliminary issues to the court, so also the plea of double jeopardy may not be predicated upon a preliminary hearing or the result of that hearing.[85] A preliminary examination before a magistrate,[86] or a commissioner,[87] or any other judicial official having only limited jurisdiction, does not constitute a trial in any sense of the word and as such does not operate to put the defendant in jeopardy. This rule is applicable: 1) where the accused person was discharged for want of probable cause upon a preliminary examination before a commissioner;[88] 2) where the accused arrested on suspicion of a crime was discharged upon a preliminary examination before a magistrate;[89] and where the dismissal

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82. There are no Missouri cases on this point; State v. Hager, 61 Kan. 504, 59 Pac. 1080 (1900).

83. State v. Herring, *supra* n. 81. "The habitual criminal charge goes only to the punishment not the guilt or innocence of a defendant," and therefore any hearing on the habitual criminal charge in no way puts the defendant in jeopardy. State v. Long, 324 Mo. 205, 22 S.W.2d 809 (1929).

84. Stewart v. United States, 300 Fed. 769 (8th Cir. 1924).

85. Collins v. Loisel, 262 U.S. 426 (1923); United States *ex rel.* Rutz v. Levy, 268 U.S. 390 (1925); State *ex rel.* Board of Education of City of St. Louis v. Nast, 209 Mo. 708, 108 S.W. 563 (1908).

86. Collins v. Loisel, *supra* n. 85; State *ex rel.* Board of Education of City of St. Louis v. Nast, *supra* n. 85; United States v. Malfetti, 213 F.2d 728 (3d Cir. 1954).

87. United States *ex rel.* Rutz v. Levy, *supra* n. 85.

88. *Ibid.* The accused was discharged before a commissioner for want of probable cause in the hearing for removal to another federal district for trial. The court held this did not bar subsequent prosecution for the same offense since this proceeding did not constitute a trial within the meaning of the word "jeopardy."

89. Collins v. Loisel, *supra* n. 85; State v. Whalen, 148 Mo. 286, 49 S.W. 989 (1899). The court stated, "Even though the court of criminal correction had given the defendant a preliminary examination and had discharged him, this would not have been any bar to an indictment by the grand jury for the offense."; State *ex rel.* Board of Education of City of St. Louis v. Nast, *supra* n. 85. "The conclusion of the committing magistrate in no sense partakes of a judgment; for whether held over or discharged, it is no bar to a further prosecution by the state."

before the magistrate was for the purpose of allowing the accused to be tried by federal officials.[90]

However, where the statute specifically provides that the magistrate shall not only have jurisdiction over the preliminary examination but shall also try the cause, then it would seem that the discharge of the accused on this preliminary examination before such a magistrate would be a bar to a subsequent prosecution for that same offense.[91]

V. The Sustaining of a Demurrer or the Quashing or Dismissing of an Indictment

Since one of the prerequisites in a criminal prosecution for placing a defendant in legal jeopardy is that there be a valid indictment or information pending, where a demurrer is sustained,[92] or an indictment[93] or information is quashed,[94] or dismissed,[95] as being legally insufficient in form or substance to sustain a conviction, and the accused is thereby discharged, said discharge will not constitute a bar to a subsequent prosecution, the accused never having been put in jeopardy.[96]

Whether the order quashing the indictment or sustaining a demurrer

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90. United States v. Malfetti, *supra* n. 86. The defendant was arrested and charged by the police of Hoboken, New Jersey for the theft of goods being shipped. On further investigation it was determined that these goods were being shipped in interstate commerce, whereupon the magistrate dismissed the state charges and the accused was later tried before a federal court on federal charges. The court of appeals held that such action before the magistrate court did not place the accused in jeopardy since no attempt whatsoever was made to dispose or try the charge of theft.

91. There are no Missouri cases on this point; Hazelton v. State, 13 Ala. App. 243, 68 So. 715 (1915); Brown v. State, 105 Ala. 117, 16 So. 929 (1895). The recorder's court was a court of concurrent jurisdiction with the circuit court in Alabama and all judgments entered in the recorder's court are a bar to a subsequent prosecution in the circuit court.

92. Haugen v. United States, 153 F.2d 850 (9th Cir. 1946); United States v. Owen, 21 F.2d 868 (N.D. Ill. 1927).

93. United States v. Oppenheimer, 242 U.S. 85 (1916).

94. State v. McWilliams, 267 Mo. 437, 184 S.W. 96 (1916).

95. State v. Goddard, 162 Mo. 198, 62 S.W. 697 (1901); United States v. Rogoff, 163 Fed. 311 (S.D. N.Y. 1908).

96. United States v. Oppenheimer, *supra* n. 93; State v. McWilliams, *supra* n. 94; United States v. Rogoff, *supra* n. 95; State v. Goddard, *supra* n. 95; Haugen v. United States, *supra* n. 92; United States v. Owen, *supra* n. 92.

was entered before the jury was sworn,[97] or thereafter[98] does not seem to be of much import in these cases, since the entire transactions, from the finding of the indictment to the dismissal or demurrer, is made a nullity, and the defendant comes before the court on the second indictment as if the first charge had never been made.[99]

An order dismissing or quashing an indictment or information, or order sustaining a demurrer has been held not to bar a subsequent prosecution where there was filed an insufficient charge against the defendant,[100] or where an amended information was filed,[101] or where a new indictment was filed in another county.[102]

If the accused secures a decision from the court that the indictment or information is invalid, he thereby becomes estopped, when subsequently indicted, to assert that the former indictment was valid.[103] However, where the information is valid and the defendant files a demurrer to the evidence, which demurrer is sustained and the information or indictment is quashed

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97. State v. Goddard, *supra* n. 95.

98. Haugen v. United States, *supra* n. 92 (The case proceeded to the opening statement of the prosecution); Simpson v. United States, 229 Fed. 940 (9th Cir. 1916) (The trial proceeded to the close of the testimony and the argument to the jury); United States v. Rogoff, *supra* n. 95; United States v. Owen, *supra* n. 92 (after the jury had been sworn); State v. McWilliams, *supra* n. 94 (after the jury was sworn, but before a verdict was rendered).

99. United States v. Rogoff, *supra* n. 95.

100. *Ibid.* The defendant was indicted for the crime of perjury in connection with an examination in his bankruptcy proceedings. A motion to dismiss was granted on the grounds that the indictment did not show facts sufficient to constitute a crime in that it was not alleged that the proceedings in bankruptcy were pending before any court.

Simpson v. United States, *supra*. The defendant was indicted for the issuance of a fraudulent certificate of deposit on a national bank. Since the indictment omitted the charge that the certificate of deposit was issued without authority from the directors, the indictment was dismissed as insufficient. Haugen v. United States, 153 F.2d 850 (9th Cir. 1946).

101. Armstrong v. United States, 16 F.2d 62 (9th Cir. 1926). An amended information was filed which thereby set aside and abandoned the original information. The court stating: "The filing of the new information by the court's permission destroyed all functions of the old information as fully as though it had been dismissed by formal motion. State v. Hoffman, 17 Mo. App. 271."

102. State v. Goddard, 162 Mo. 198, 62 S.W. 697 (1901). While the cause was pending in the Circuit Court of Cass County, an indictment was preferred by the grand jury of Jackson County, thereupon the indictment was dismissed in Cass County. The court stating: "The dismissal of the first indictment of the facts of this case was in no sense a bar to a prosecution on the second. It was simply a discharge from the first indictment and not an acquittance of the offense, . . ."; State v. Patterson, 73 Mo. 695 (1881).

103. United States v. Owen, 21 F.2d 868 (N.D. Ill. 1927).

after jeopardy has attached, then the accused cannot be again prosecuted for the same offense.[104]

Also, if an indictment is dismissed on any grounds going to the matter of substantive law, such as the action being barred by the statute of limitations, this constitutes a bar to the second prosecution under a new indictment for the same offense, irrespective of any question of former jeopardy.[105]

VI. Nolle Prosequi

At common law a nolle prosequi could be entered at any time retracting the present proceeding on a particular bill, and it would not only be no bar to a subsequent prosecution on another indictment, but could be so far canceled as to permit a revival of proceedings on the original bill itself.[106] Although it is still undeniable that the prosecuting attorney has the right to abandon and dismiss a cause of action and enter a "nolle prosequi",[107] this right must now be exercised within certain prescribed limitations,

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104. State v. Webster, 206 Mo. 558, 105 S.W. 705 (1907). The information in the present action was valid upon its face. After an unsuccessful motion to quash it, both parties announced they were ready for trial. The jury was impaneled and sworn to try the cause and the state introduced evidence, whereupon the defendant filed a demurrer to the evidence which was sustained and the information quashed. The court dismissed the jury and ordered that the defendant be held for further prosecution. To all of which action on the part of the court, the defendant objected and insisted on his demurrer being sustained and that he be finally discharged. The Supreme Court of Missouri held, "in our opinion this action of the court in sustaining the demurrer to the evidence interposed by the defendant and the quashing of the information and the discharging of the jury over the objections of the defendant must be treated as an acquittal; . . ." and ". . . constitutes an absolute bar to the further prosecution of this defendant for the offense embraced in that information."

105. United States v. Oppenheimer, 242 U.S. 85 (1916). Of course the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon the grounds that the prosecution is barred goes to his liability as a matter of substantive law, and one judgment that he is free as a matter of substantive law, is as good as another."

106. State *ex rel.* Graves v. Primm, 61 Mo. 166 (1875).

107. "One of the ancient powers incident to the office of prosecuting attorney is the power, at the appropriate time to enter a nolle prosequi. . . . At common law the trial court has no power to enter a nolle prosequi . . . that power lies solely within the discretion of the prosecuting attorney and once he properly exercises that prerogative of his office," the court has "lost jurisdiction of the criminal cause." State v. Berry, 298 S. W.2d 429 (Mo. 1957); *Ex parte* Donaldson, 44 Mo. 149 (1869). The circuit attorney entered a nolle prosequi on an indictment for murder. The court stated, "this he had a right to do with assent of court at any time before the prisoner was put on trial. The prisoner never had any judgment of discharge entered in his favor; he was never put in jeopardy so he can see nothing to prevent his being further held amenable."

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and must be exercised at certain stages of the trial, or it will be considered an acquittal of the charges pending therefrom.[108]

A. *Entrance of Nolle Prosequi Before Beginning Trial*

It is clearly untenable either upon the principles of the common law or any provision of our constitution or statutes, that a nolle prosequi entered before the defendant is arraigned or called upon to plead, defendant not being put in jeopardy, can be considered equivalent to an acquittal and thus a bar to a subsequent prosecution for the same offense.[109] Nor does the entrance of a nolle prosequi before the jury is duly impaneled and sworn to try the case, the accused not having been put in jeopardy, effectuate an acquittal and constitute a bar to a subsequent prosecution for the same offense.[110]

Since the entrance of a nolle prosequi before the defendant has been put in jeopardy does not prevent another indictment being entered for the

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108. United States v. Shoemaker, 27 Fed. Cas. No. 16,279 (D. Ill. 1840); State v. Mason, 326 Mo. 973, 33 S.W.2d 895 (1930); State v. Linton, 283 Mo. 1, 222 S.W. 847 (1920); State v. Patterson, 116 Mo. 505, 22 S.W. 697 (1893); *Ex parte* Snyder, 29 Mo. App. 256 (1888).

109. United States v. Shoemaker, *supra* n. 108; State v. Hussey, 145 Mo. App. 671, 123 S.W. 485 (1909).

110. "And the entry of a nolle prosequi is not such a step in criminal procedure to compel the entry of a judgment of acquittal . . .", State v. Berry, *supra* n. 107; United States v. Shoemaker, *supra* n. 108; State v. Goddard, 162 Mo. 198, 62 S.W. 697 (1901); State v. Taylor, 171 Mo. 465, 71 S.W. 1005 (1903); *Ex parte* Donaldson, 44 Mo. 149 (1869); State v. Lopez, 19 Mo. 254 (1853); State v. Balch, 136 Mo. 103, 37 S.W. 808 (1896); State v. Hussey, 145 Mo. App. 671, 123 S.W. 485 (1909). A judgment of nolle prosequi was entered on an indictment for felonious assault and the defendant discharged. It was held that a subsequent indictment for the same assault charging a misdemeanor would not be barred as a result of the prior nolle prosequi being entered.

State v. Lonon, 56 S.W.2d 378 (1932). The appellant was indicted for robbery in the first degree. When the cause was called for trial, the prosecuting attorney in open court dismissed the case as to the appellant. Two weeks later the cause was reinstated on a motion of the prosecuting attorney. The court herein stated that said action would not constitute a bar to subsequent prosecution. ,

State v. Montgomery, 276 S.W.2d 166 (1955). The defendant was charged in the information with robbery in the first degree. Six months later the state filed a nolle prosequi because the defendant was convicted on a companion case. Six months after the nolle prosequi had been filed and after the end of the term in which it had been entered, the state filed a memorandum to reinstate the case in which the nolle prosequi had been filed. The court held, "It is, of course, elementary that the entry of the nolle prosequi in this case before the defendant was placed in jeopardy did not act as acquittal and did not bar subsequent prosecution for the same offense under a new indictment or information filed within the proper time."

same offense, but simply releases the defendant from the pending indictment and entitles him to be discharged under such circumstances, the defendant may again be held to answer to another indictment even though there has been an agreement between the defendant and the prosecuting attorney that there will be no indictments brought on the charges which are nol-prossed.[111] Also a dismissal before trial as to several counts of an indictment, none of the counts being included in crimes charged in the remaining counts, does not preclude a conviction on the remaining counts.[112]

Although an indictment is found in County *A*, on change of venue it may be sent to County *B*, and the accused may be tried in County *B*, notwithstanding the fact that a nolle prosequi was entered in County *A*.[113] Furthermore, another indictment for the same offense may thereafter be brought in County *A*, as soon as the indictment in County *B* has been quashed.[114]

Therefore, an entrance of a nolle prosequi at any time before the accused has been placed in jeopardy does not fall within the prohibitionary ambit of article 1, section 19, of the Missouri Constitution.[115] The continuous usage of a nolle prosequi in a case would fall under the constitutional provision denying the accused the right to a speedy trial and further prosecution might be precluded for that reason.[116]

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111. State v. Lopez, 19 Mo. 254 (1853). The accused was indicted for embezzlement and made an agreement with the circuit attorney in open court that if he pleaded guilty to some counts he would be discharged from others. The defendant accordingly pleaded guilty to four counts of the indictment and a nolle prosequi was entered against the remaining six. In denying that the nolle prosequi operated as a bar to future prosecutions on the remaining six the court held, "if such an agreement can be recognized anywhere, it must be by the executive on an application for pardon. . ."

112. Touhy v. Cox, 145 F.2d 107 (8th Cir. 1944).

113. State v. Balch, 136 Mo. 103, 37 S.W. 808 (1896). The entry of a nolle prosequi by the prosecuting attorney in the St. Louis Criminal Court and a subsequent change of venue to the St. Louis County Court does not bar a new indictment being found in the latter court. State v. Goddard, 162 Mo. 198, 62 S.W. 697 (1901). The voluntary dismissal of an indictment for murder by the prosecuting attorney by the entrance of a nolle prosequi after the granting of a change of venue and the finding of a second indictment does not constitute a bar to the prosecution or to the second indictment. State v. Taylor, 171 Mo. 465, 71 S.W. 1005 (1903).

114. State v. Patterson, 73 Mo. 695 (1881).

115. Bassing v. Cady, 208 U.S. 386 (1908); United States v. Shoemaker, 27 Fed. Cas. No. 16,279 (D. Ill. 1840); State v. Montgomery, 276 S.W.2d 166 (Mo. 1955); *Ex parte* Donaldson, 44 Mo. 149 (1869).

116. State v. Schyhart, 199 S.W. 205 (Mo. 1917); State v. Wigger, 196 Mo. 90, 93 S.W. 390 (1906); State v. Goddard, 162 Mo. 198, 62 S.W. 697 (1901); Fanning v. State, 14 Mo. 386 (1851).

B. *Entrance of Nolle Prosequi After Beginning Trial*

After the accused is put on trial, that is before a court of competent jurisdiction, upon an indictment or information which is sufficient in form and substance to sustain a conviction, and the jury has been duly impaneled and sworn, the defendant then becomes entitled to a verdict which will constitute a bar to a new prosecution and he cannot be deprived of this bar by a nolle prosequi entered by the prosecuting officer against his will.[117]

The commencement of the trial changes the relation of the defendant to the case, thereby delimiting the right of the prosecutor to abandon his prosecution of the charges pending against the accused, for the prisoner, once having been charged as a culprit, becomes clothed with certain rights, granted by law, protecting him from the oppressiveness of numerous dismissals and re-indictments.[118] To preserve these rights from undue government encroachment, it is the law of both the United States[119] and the State of Missouri[120] that whenever an accused has been placed in jeopardy, the dismissal of the indictment pending against him without the consent of the accused is tantamount to an acquittal and bars further prosecution for the same crime.

Where there are several indictments or counts in an indictment, a nolle prosequi as to one or more counts of the indictment, or as to one or several of the indictments, entered after the trial has commenced does not constitute a bar to the prosecution on the remaining indictments or

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117. *Ex parte* Snyder, 29 Mo. App. 256 (1888).

118. United States v. Shoemaker, 27 Fed. Cas. No. 16,279 (D. Ill. 1840), wherein it was stated: "The discharge of the 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. But the entry of a nolle prosequi is imposed by no necessity. It may be a matter of discretion or policy; a discretion founded upon no fixed principle or guided by no known rule; or policy which may have for its object the oppression and conviction of the defendant."

119. *Id.* at p. 1069. "The nolle prosequi was entered without the consent of the defendant and against his remonstrance; and it was entered against his rights, without power or right by the prosecutor. On principle, therefore, we feel bound to say that the proceeding must be equivalent to a verdict of acquittal and as such with the judgment of the court thereon, is a bar to the present indictment."

120. State v. Mason, 326 Mo. 973, 33 S.W.2d 895 (1930); United States v. Farring, 25 Fed. Cas. No. 15,075 (D.C. Cir. 1834).

counts thereof[121] which were not nol-prossed, for the plea of autrefois acquit inures only to the indictments or counts not prosecuted by reason of the nolle prosequi.[122] However, if the indictment is in several counts and one of the counts is falsely drawn, a nolle prosequi as to the whole indictment, after the defendant has been put upon trial, will bar a subsequent prosecution on those counts which were validly drafted.[123]

After the trial has commenced, there are several instances where a nolle prosequi can be entered without effectuating a bar to a subsequent prosecution: 1) After the disagreement and discharge of the jury, a nolle prosequi will not bar another prosecution for the same offense;[124] 2) After a conviction and a new trial has been granted to the defendant, a nolle prosequi on the indictment on which he stood trial originally, will not

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121. State v. Lopez, 19 Mo. 254 (1953). The accused was indicted on ten counts and a nolle prosequi was entered on six of them. The court held this did not bar a prosecuton on the remaining four. State v. Hess, 240 Mo. 147, 144 S.W. 489 (1912); State v. Patterson, 116 Mo. 505, 22 S.W. 696 (1893).

122. State v. Patterson, *supra* n. 121. The defendant was indicted on three counts, and found guilty on the third count. The prosecuting attorney dismissed as to the second count. The court stated, "As the defendant was put on his trial on the second count and placed in jeopardy, the dismissal by the prosecuting officer as to such count operated as an acquittal of that count."

State v. Hess, *supra* n. 121. The defendant was indicted on two counts. At the close of the evidence, the court of its own motion withdrew from the consideration of the jury the first count of the indictment, and the jury convicted the defendant on the second count. The court stated: "By withdrawing the first count of the indictment after the jury was sworn, the defendant was acquitted of the charge contained in that count and cannot again be tried for the crime of arson in the fourth degree."

123. State v. Linton, 283 Mo. 1, 222 S.W. 847 (1920). An information was filed against William Linton on two counts, but through some mishap the first count charged one William Sharp with violation of the local option law. The second count charged Willam Linton with violating said option law by other unlawful acts. Defendant A.E. Linton was arrested on this first information, gave bond thereunder and appeared and answered ready for trial. Thereupon a jury was selected and sworn to try the cause. After discovering the mistake in the first count of the information, the prosecuting attorney entered a nolle prosequi on the whole cause and the jury was discharged over the protest, objection and exception of the defendant. The court held that this worked a bar to a subsequent prosecution on the count which was validly drafted.

124. "The 'hung jury' was neither a conviction nor an acquittal and the entry of a nolle prosequi . . ., was not an acquittal and, of course, did not place the defendant in jeopardy. . . . In the ancient and hortatory language of lawyers the effect of a nolle prosequi is to put the defendant without day; that is, he is discharged and permitted to leave the court without entering into a recognizance to appear at any other time; but it does not operate as an acquittal, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same indictment and he be tried upon it." State v. Berry, 298 S.W.2d 429 (Mo. 1957). People v. Lucas, 78 Cal. App. 421, 248 Pac. 691 (1925); State v. Hutter, 145 Neb. 798, 18 N.W.2d 203 (1945).

prejudice the right of the state to bring a new indictment;[125] and, 3) The entrance of a nolle prosequi at the request of the defendant is not a bar to future prosecution.[126]

When the indictment is quashed at the instance of the defendant, or the defendant not only did not object to the nolle prosequi being entered but sought most earnestly for it, even though jeopardy has attached the defendant cannot thereafter plead former jeopardy, when placed on trial on another indictment for the same offense.[127] This affirmative act on the part of the accused constitutes a waiver of his constitutional privilege.[128]

Except as stated above, when a nolle prosequi or a dismissal has been entered by the prosecuting attorney after the commencement of the trial, public justice would not be satisfied, and in fact would be defeated, by overthrowing the principles of former jeopardy and retrying the defendant. That the only recourse is to proceed against the prosecuting attorney himself, is recognized by statutory section 558.170, which provides that it shall be a misdemeanor for any prosecuting attorney or any assistant prosecutor in pursuance of a corrupt agreement with any defendant or defendants, or other persons, to enter a nolle prosequi as to any indictment, or to dismiss or fail to prosecute as provided by law in the indictment.[129]

(To be continued)

125. There are no Missouri cases on this point. Jacoby v. State, 210 Ind. 49, 199 N.E. 563 (1936); State v. Burke, 130 W. Va. 64, 42 S.E.2d 544 (1947).

126. Craig v. United States, 81 F.2d 816 (9th Cir. 1936), *cert. denied* 298 U.S. 690, *rehearing denied* 299 U.S. 620 (1936); United States v. Pendergast, 39 F. Supp. 189 (W.D. Mo. 1941). When a case has been dismissed by nolle prosequi, the defendants not objecting to the dismissal, the defendants have not been put in jeopardy; O'Malley v. United States, 128 F.2d 676 (8th Cir. 1942), *aff'd.* United States v. Pendergast, *supra. Appeal dismissed* Pendergast v. United States, 314 U.S. 574 (1941).

127. Craig v. United States, United States v. Pendergast, *supra* n. 126.

128. *Ibid.*

129. MO. REV. STAT. (1949). Notwithstanding this statute, prosecuting attorneys rarely have corrupt motives in entering a nolle prosequi.