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THE PLEA OF DOUBLE JEOPARDY IN MISSOURI

(Continued from the April Issue)

RICHARD W. MILLER*

VII. DISCHARGE OF THE JURY BEFORE A VERDICT IS ENTERED

At early common law in England the discharge of the jury in a criminal proceeding for any reason, after the case had advanced to such a state that jeopardy had attached, but before a verdict of an acquittal of the accused, operated as a perpetual discharge of the prisoner.¹³⁰ This ancient practice, however, could not withstand the exigencies of justice and has been greatly relaxed and modified until the general modern rule is that the court may discharge a jury where the ends of justice will be better served by allowing the discharge.¹³¹

The discretion which lies within the breast of the court to discharge the jury is said to be one which must be based on manifest necessity.¹³² In the absence of manifest necessity the defendant may demand that the discharge of the jury be considered as an acquittal of the offense charged and thus a bar to a subsequent prosecution for that same offense.¹³³

Whenever the accused confesses his guilt in open court, there no longer exists the necessity for the jury to bring in a verdict.¹³⁴ In such a situation, the jury may be lawfully discharged, without the discharge operating as a perpetual dismissal of the offense charged.¹³⁵

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130. 4 BLACKSTONE'S COMMENTARIES 361; 2 COKE UPON LITTLETON 227b, 3 Inst. 110.

131. *Thompson v. United States*, 155 U.S. 271 (1894); *United States v. Perez*, 22 U.S. (9 Wheat.) 194 (1824); *United States v. Watson*, 29 Fed. Cas. No. 16,651 (1868); *Logan v. United States*, 144 U.S. 263 (1892).

132. *Ibid.*

133. *United States v. Perez*, *supra* n. 131; *United States v. Watson*, *supra* n. 131; Keegan, *Double Jeopardy, Discharge of Jury Without "Manifest Necessity"*, 27 GEO. L. J. 495 (1939); Seals, "Former Jeopardy Plea No Bar Where Court Proceedings Dismissed Due to Manifest Necessity," 2 S.C.L.Q. 183 (1949).

134. *State v. Williams*, 320 Mo. 296, 6 S.W.2d 915 (1928).

135. *Ibid.* After qualifying a panel of twelve jurors, the defendant at the close of the opening statement for the state confessed his guilt in open court before the court and jury and stated he was guilty as charged in the information. The court ordered the jury to retire and then the court heard evidence relating to

A. Failure to Arraign the Defendant

Inasmuch as the accused is not placed in jeopardy until there has been a proper indictment or information filed, and he has been duly arraigned before the court, the discharge of the jury for failure to arraign the accused will not sustain a plea of prior jeopardy on a subsequent arraignment.¹³⁶ Where the prosecuting attorney in open court informed the court that no information was filed in the said cause and on the following day he came into court and by leave of court filed an information in the case, and thereafter an order discharging the jury was entered, this procedure was upheld by the Supreme Court of Missouri as not placing the defendant in jeopardy a second time.¹³⁷

In the case of an appeal from a judgment of conviction of a misdemeanor in the justice of the peace court to the circuit court, the fact that the accused was never arraigned before the justice of the peace neither destroys the jurisdiction of the circuit court, nor does the subsequent arraignment and trial *de novo* in the circuit court put the defendant twice in jeopardy.¹³⁸

The Supreme Court of the United States has decreed that the discharge of the jury in order to enable the accused to be again arraigned and pleaded is clearly "within the bounds of sound judicial discretion."¹³⁹

the charge and fixed the punishment at death. The defendant maintained that after the jury was sworn, the court erred in accepting the plea of guilty in pronouncing sentence, when in fact his plea was a plea of guilty to the court and jury, and inasmuch as the jury was discharged without returning a verdict and fixing a punishment, the defendant had been in jeopardy and should be held acquitted. The Supreme Court of Missouri stated: "After the plea of guilty, no issue remained before the court, for there was nothing to try. Defendant judicially admitted guilt, that is, pleaded guilty to the court,—and it became the duty of the court to fix the punishment, which was done. The plea of guilty to the court and to the jury was tantamount to a plea of guilty to the court; the words 'and to the jury' failing to add to or take away from the force of the plea."

136. *Lovato v. New Mexico*, 242 U.S. 199 (1916); *State v. Schyhart*, 199 S.W. 205 (Mo. 1917); *State v. Arthur*, 32 Mo. App. 24 (1888).

137. *State v. Schyhart*, *supra* note 136 at p. 209. "We conclude that the defendants could not have been in jeopardy for the reason that on the alleged former hearing no information had been filed."

138. *State v. Arthur*, *supra* n. 136.

139. *Lovato v. New Mexico*, *supra* n. 136. Defendant was indicted for murder and a jury was duly impaneled and sworn to hear the cause. After the witnesses for both sides were called and sworn the court dismissed the jury on the grounds that the defendant had not been arraigned and had not pleaded. The accused was immediately arraigned and pleaded "not guilty," whereupon the same jury was impaneled and the trial proceeded.

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B. *End of the Term of Court*

Under Section 510.320, no trial or proceeding in a criminal case is necessarily terminated by the expiration of the term of court at which it was commenced, but it is within the discretion of the judge to continue such trial or proceeding in all respects as if the term had not expired or to continue the trial into a special term or into the next regular term of the court.¹⁴⁰ Applying this statute in the light of common law principles regarding the lawful discharge of a jury, the discharge of a jury during the trial of a case due to the expiration of the term of court will not be a bar to a subsequent prosecution at the next term of court.¹⁴¹

C. *Inability of the State to Produce Witnesses*

After the jury has been duly impaneled and sworn to try a criminal cause, the failure of the prosecuting attorney to have present sufficient witnesses or sufficient evidence to prove the offense charged does not constitute a manifest necessity for the discharge of the jury before giving their verdict.¹⁴² Nor would the failure of the court to discharge the jury in such a situation defeat the ends of public justice.¹⁴³

This is an extension of the well recognized principle that in the absence of sufficient evidence to convict, the prosecuting attorney cannot, by any act of his own, deprive the defendant of the constitutional benefit prohibiting a person from being twice put in jeopardy for the same offense.¹⁴⁴ As was stated in *Cornero v. United States*:

140. MO. REV. STAT. (1949); Continuances granted on application of either state or accused or by court of its own motion. MO. REV. STAT. § 545.710 (1949); Supreme Court Rule 25.08.

141. *State v. Jeffers*, 64 Mo. 372 (1877).

142. *Hunter v. Wade*, 169 F.2d 973 (10th Cir. 1948): "The constitutional guarantee against double jeopardy protects an accused against the second trial where the jury in the first trial was discharged solely on the ground that witnesses for the government were absent and therefore their testimony could not be adduced." *Cornero v. United States*, 48 F.2d 69 (9th Cir. 1931); *State v. Webster*, 206 Mo. 558, 105 S.W. 705 (1907); *State ex rel. Meador v. Williams*, 117 Mo. App. 564, 92 S.W. 151 (1906).

143. *Cornero v. United States*, *supra* n. 142.

144. *Cornero v. United States*, *supra* n. 142; *State ex rel. Meador v. Williams*, *supra* n. 142; *State v. Webster*, *supra* n. 142; *Ex parte Lange*, 18 Wall. 163 (1873); *Jarl v. United States*, 19 F.2d 891 (8th Cir. 1927); *United States v. Shoemaker*, 27 Fed. Cas. No. 16,279. The district attorney entered a nolle prosequi after the jury had been impaneled and witnesses sworn, jeopardy had attached; COOLEY, CONSTITUTIONAL LIMITATIONS 467 (7th ed. 1903).

We are here dealing, however, with a fundamental right of a person accused of crime guaranteed to him by the Constitution and such right cannot be frittered away or abridged by general rules concerning the importance of advancing public justice.¹⁴⁵

Since the failure of the state to produce a witness is not sufficient necessity to warrant a discharge of the jury, whenever an accused's trial has proceeded to where jeopardy has attached, if the jury is discharged for inability of the state to produce a witness, then the accused may plead this prior trial as a bar to a subsequent prosecution for the offense charged.¹⁴⁶

An example of this principle is illustrated by a prosecution for gambling where the jury was duly impaneled and sworn and the trial proceeded with the prosecuting attorney putting on and examining four witnesses. At the conclusion of the testimony of these witnesses, the prosecuting attorney by leave of court stopped the trial and withdrew the submission of the cause from the consideration of the jury, because of the absence of a witness of the state upon whose testimony the indictment had been found and who had failed to attend the trial, although subpoenaed. This was done against the objection and over the protest of the defendants. It was held that the defendants were thereby put in jeopardy and were entitled to be discharged.¹⁴⁷

To gain a better insight into this problem, consider what the effect would be if the rule were otherwise. Every criminal trial, at once, would be subject to numerous emergencies which would arise during its progress, either from defect of preparation on the part of the prosecuting attorney, insufficiency of the testimony of the witnesses, the unexpected absence of a

145. *Cornero v. United States*, *supra* n. 142.

146. *Cornero v. United States*, *supra* n. 142; *State ex rel. Meador v. Williams*, *supra* n. 142; *State v. Webster*, *supra* n. 142; *Hunter v. Wade*, *supra* n. 142.

147. *State ex rel. Meador v. Williams*, *supra* n. 142. The principles set forth in this case were cited and approved by the Supreme Court of Missouri in the case of *State v. Webster*, *supra* n. 142. With reference to discharge of the jury because of insufficient evidence as constituting a bar to further proceedings, it was stated therein: "We are unwilling, even though in some instances a guilty man may escape punishment, to view lightly the constitutional provisions as heretofore indicated, guaranteeing protection to the citizen. In this case we have no hesitancy in saying that it was the duty of the trial court, upon the disclosure of the record now before us, to have sustained the plea of former jeopardy interposed by the defendant and discharged him from further prosecution for the offense charged in the information." The Webster case has an additional feature in that there was a quashing of the information filed, as well as the discharge of the jury.

witness or the impeachment of a witness on the part of the state. In such a situation either the prosecuting attorney or the court would be allowed to withdraw the case from the jury and put the defendant in jeopardy a second time, or even a third time. The trial of a cause could be repeated until the defendant had been so harassed that a verdict could be finally rendered against him.

While the absence of a witness from a trial is an event which the prosecuting attorney should and could have guarded against,¹⁴⁸ what is the effect where a witness appears but refuses to be sworn? Is this so out of the ordinary in the trial of an action that the prosecuting attorney could not have been expected to foresee it? Such a distinction was made in *United States v. Coolidge*,¹⁴⁹ where the court held that under the circumstances the refusal of an essential witness for the prosecution to be sworn on the ground that he had conscientious scruples against taking an oath, was sufficient necessity to warrant the court in discharging the jury. And the Supreme Court of the United States upheld a decision that the failure of witnesses for the state to give testimony before a jury constituted a manifest necessity under the law of North Carolina for withdrawing the case from the jury and impaneling a new jury.¹⁵⁰

D. Disqualification of a Juror

1. Prior Service as a Grand Juror

It is the statutory law of Missouri that any person who served as a member of a grand jury or any other inquisitorial body by which an indict-

148. *United States v. Watson*, 29 Fed. Cas. No. 16,651 (1868). A jury had been duly impaneled and sworn to try a criminal case. A juror was withdrawn and the case postponed without the defendant's consent because of the absence of a witness for the prosecution. The court held that since it was not shown that the absence of witnesses occurred under such circumstances to create a manifest necessity for withdrawing a juror, discharge of the jury was equivalent to an acquittal and the defendant could not again be tried for the same offense.

149. 25 Fed. Cas. No. 14,858 (D.Mass. 1815). The case was not directly raised on the matter of double jeopardy but was raised on the resistance of the defendant to the prosecuting attorney's motion to discharge the jury. The court remanded the case for trial for failure of an essential witness to take the oath, because of conscientious scruples against taking an oath.

150. *Brock v. North Carolina*, 344 U.S. 424 (1952). Petitioner was indicted and tried in a North Carolina state court for assault with a deadly weapon. Two witnesses for the state refused to give any testimony before the jury so the state, contending that such testimony was essential to prove its cause, moved that the

ment or presentment was found in any cause shall not serve as a petit juror on the trial of that cause.¹⁵¹ It has not been determined in Missouri whether this statutory prohibition of prior service on the grand jury renders a discharge of the juror a necessity upon the matter being known by the court, or whether it merely raises a question of implied bias which the accused may challenge or waive.¹⁵² The Supreme Court of the United States decided, in *Thompson v. United States*,¹⁵³ that prior service on a grand jury constituted a situation of manifest necessity for the discharge of that juror from the petit jury. This decision of the Supreme Court seems consonant with the proper sphere in which the grand jury and petit jury operate.¹⁵⁴ Since the grand jury determines whether there are sufficient facts presented to warrant an indictment then, if a member of the grand jury was allowed to sit upon a jury, would not his mind also be partial to a certain extent on the evidence presented during the trial, and

court withdraw a juror from the sworn panel and declare a mistrial. The court did so on the grounds that it was within the discretion of the common law of North Carolina to declare a mistrial and require the defendant to be presented to another grand jury.

151. MO. REV. STAT. § 546.110 (1949). "No person who was a member of the grand jury or inquest by which any indictment or presentment was found in any cause shall serve as a petit juror on the trial of such cause."

152. 1 BISHOP, CRIMINAL LAW § 876, p. 486.

153. 155 U.S. 271 (1894). Petitioner was indicted for murder and the jury being impaneled and sworn, the trial commenced. After the Government had presented one witness, the court, over the objection of the defendant, discharged the jury on the grounds that one of the jurors was disqualified to sit on account of having been a member of the grand jury that returned the indictment in the case. A new jury was sworn and the trial proceeded resulting in a conviction. In holding that the defendant was not twice put in jeopardy, the court stated ". . . courts of justice are invested with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all of the circumstances into consideration, there is a manifest necessity for the acts or the ends of public justice would otherwise be defeated and to order a trial by another jury; and that the defendant is not thereby twice put in jeopardy within the meaning of the Fifth Amendment to the Constitution of the United States."

154. The reason why grand jurors are not entitled to sit as petit jurors is found in the history of the jury system. The rationale still exists today, however. "Instead of taking separate verdicts from numerous vills and hundreds, they selected a petty jury of twelve from among the numerous jurors present in court, and took the verdict of these twelve. It regularly happened that at least some of these twelve had also been members of the presenting jury for it must be remembered that the whole principle of jury trial was to get information useful to the Crown from those people most likely to have it—the principle of the ancient inquisition. It is at this point that we first find signs of a rational approach to jury trial. The indictors were under some pressure to maintain their accusation and a subsequent acquittal occasionally landed the indictors themselves in prison. It is therefore clear that a prisoner could not expect a disinterested verdict from a petty jury consisting wholly or partly of indictors." PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 119 (2d ed. 1936).

thus destroy the impartiality required by the Missouri Constitution.¹⁵⁵

The discharge of the jury because one of the jurors was a member of the grand jury which found the indictment would be based on manifest necessity, and hence a discharge under these circumstances could not be pleaded as a bar to another prosecution for the same offense.¹⁵⁶

2. Bias or Prejudice of a Juror

The actual bias or prejudice of a juror is regarded as sufficient justification for the discharge of the jury without prejudicing the right of the state to bring the accused to trial before another jury.¹⁵⁷ Any bias or prejudice is a direct violation of the Missouri Constitution which provides that the accused shall have the right to a "speedy public trial by an *impartial* jury of the county."¹⁵⁸

The purpose of this constitutional provision is to effectuate the administration of a code of justice which requires that verdicts in criminal as well as civil suits shall be found by impartial juries as a result of honest deliberations, absolutely free from prejudice or bias.¹⁵⁹ This constitutional provision is equally applicable whether the juror's bias is toward the state or toward the accused, for the public as well as the accused has rights which must be safeguarded.¹⁶⁰ As it is the right of the accused to have his case tried by an impartial jury, so also do the people have an equal right to have their case tried by an impartial, unbiased jury.¹⁶¹ If during the progress of a trial it should become known to the court that some member or members of the jury have preconceived biases or prejudices preventing them from being impartial in the cause, it would be a travesty upon the administration of justice to allow the case to proceed to a verdict with the result that the accused could plead this prosecution as a bar to a subsequent prosecution for the same offense. It is undeniable under the common law and the Missouri Constitution that the accused has the right to a trial by a just and impartial jury, but it is also true that the accused does not have a

155. Art. I, § 18 (a) (1945).

156. *Thompson v. United States*, 155 U.S. 271 (1894).

157. *Simmons v. United States*, 142 U.S. 148 (1891); *United States v. Morris*, 26 Fed. Cas. No. 15,815 (D.Mass. 1851).

158. Art. I, § 18 (a) (1945).

159. *United States v. Morris*, *supra* n. 157.

160. *Ibid.*

161. *Ibid.*

vested right to a trial by a jury some member of which has obtained a place on that jury with the express purpose either of acquitting or convicting the accused.¹⁶²

Needless to say, when a biased or prejudiced juror has obtained his place on a jury by fraud, perjury or collusion, so as to have a specific result reached, this also falls under the general rule that the discharge of the jury for this reason will not prejudice the right to bring the accused to trial before another jury.¹⁶³

In addition to the constitutional provision granting the accused the right to trial by an impartial jury, it has been enacted by the legislature that where an indictment or information alleges an offense against the personal property of another, neither the injured party, nor relatives of the injured party, nor any person who is a relative of the prosecutor or the defendant, shall be a competent juror in the trial of the case.¹⁶⁴

The discovery that a juror was acquainted with the accused prior to the criminal proceedings being brought would also be justification for the discharge of the jury and the impanelment of another jury to try the accused for the same offense.¹⁶⁵ Such acquaintance destroys the absolute

162. MO. REV. STAT. § 546.120 (1949); *United States v. Morris*, *supra* n. 157. "It is an entire mistake to confound this discretionary authority of the court to protect one party of the tribunal from corruption or prejudice with the right of challenge allowed to a party; and it is, at least equally a mistake to suppose, that in a court of justice either party can have a vested right to corrupt a prejudiced juror who is not fit to sit in judgment in the case." This was also cited in *Simmons v. United States*, *supra* n. 157.

163. There are no Missouri cases on this point. *United States v. Morris*, *supra* n. 157. The withdrawal of a case from the jury after the jury had been impaneled and sworn and some witnesses had been examined upon a showing made by the district attorney that one of the jurors had a definite bias in the case, was held not to sustain a plea of former jeopardy when the jury was discharged and defendant was again put on trial before an impartial jury.

164. MO. REV. STAT. § 546.120 (1949): "Where any indictment or information alleges an offense against the person or property of another, neither the injured party nor any person of kin to him shall be a competent juror on the trial, nor shall any person of kin to the prosecutor or defendant in any case serve as juror on the trial thereof."

165. *Simmons v. United States*, 142 U.S. 148 (1891). Petitioner was indicted for aiding and abetting the carrying out of an embezzlement. A jury was duly impaneled and sworn and one of the jurors stated on his voir dire that he had no acquaintance with the accused and had never seen him to his knowledge. The case was commenced, and witnesses were examined on behalf of the Government until the district attorney entered an affidavit showing that the juror and the

impartiality which is necessary to effectuate the proper administration of a criminal proceeding.¹⁶⁶

Any formation or expression of opinion, that the defendant is either guilty or not guilty, by one of the jurors before the trial has commenced would justify a dismissal of the jury. The discharge of the jury under such circumstances would not sustain a plea of former jeopardy by the defendant in another trial before an impartial jury.¹⁶⁷ Also falling under this constitutional provision would be any tampering with jurors such as communication with jurors during the progress of the trial where by reason of these outside influences brought to bear upon the juror, the jurors, or any of them, might be subject to such bias or prejudice as not to stand as an impartial agent between the government and the accused in the case.¹⁶⁸

accused not only knew each other but for a while had lived next door to one another. In this case it was held to be clearly within the authority and discretion of the trial judge to order the jury to be discharged and put the defendant before another jury, and that the defendant was not thereby put in jeopardy within the meaning of the Fifth Amendment to the Constitution of the United States.

166. *Supra* n. 165.

167. MO. REV. STAT. § 546.130 (1949). "Persons whose opinions are such as to preclude them from finding any defendant guilty of an offense punishable with death shall be ineligible to serve as jurors on a trial of an indictment or information charging any such offense, unless such disqualification is waived by the representative of the state when selecting the jury in any such case."

MO. REV. STAT. § 546.140 (1949). "No witness in any criminal case shall be sworn as a juror therein if challenged for that cause before he is sworn; and if any juror shall know anything relative to the matter in issue, he shall disclose the same in open court."

MO. REV. STAT. § 546.150 (1949). "It shall be a good cause of challenge to a juror that he has formed or delivered an opinion on the issue, or any material fact to be tried, but if it appear that such opinion is founded only on rumor and newspaper reports, and not such as to prejudice or bias the mind of the juror, he may be sworn."

MO. REV. STAT. § 546.160 (1949). "All challenges for cause may be tried by the court, on the oath of the person challenged, or on other evidence, and such challenges shall be made before the juror is sworn; but if the cause of challenge be discovered after the juror is sworn, and before any part of the evidence is delivered, he may be discharged, or not, in the discretion of the court."

There are other statutes declaring the standards of competency for a person to sit as a juror. MO. REV. STAT. §§496.100 and 497.200 (1949). The failure to comply with the requisites of these statutes does not appear to warrant the discharge of the jury on grounds of manifest necessity, since the violation of these statutes would not go to the bias or prejudice of a juror in a particular case.

168. *United States v. Haskell*, 23 Fed. Cas. No. 15,321 (E.D.Pa. 1823). Among the illustrations given in this case as to what would constitute adequate necessity in the dismissal of the jury, is where the prisoner had tampered with some member of the jury.

E. *Illness or Misconduct*

1. *Illness of the Judge, Juror, or the Accused*

Notwithstanding the general principle that a defendant in a criminal court should not be twice placed in jeopardy for the same offense, it lies within the discretionary power of the trial court to discharge a duly impaneled jury without the consent of the defendant because of the illness of a judge, juror, or the accused himself.¹⁶⁹ These exceptions are based on common sense and justice recognized by the law,¹⁷⁰ and supported by universal authority, for "sickness may come, unknown before it comes. And if, while the cause is on trial, it falls on the judge or a jurymen or the prisoner," then the court has the power "to interrupt the proceedings before final verdict rendered, this result shows that no jeopardy existed in fact, though believed to exist, and the prisoner may be required to answer anew."¹⁷¹

This right to discharge the jury due to illness also extends to the illness of counsel when there is no associate counsel to continue the case.¹⁷²

To obtain a more complete comprehension of this situation, consider the case wherein the accused was indicted by the grand jury in the state criminal court for bigamy, arraigned, and entered a plea of not guilty. After the jury was duly impaneled and sworn to try the cause, the state proceeded, introduced evidence, and examined witnesses. On the second day of trial they adjourned the case so that the trial of another case which was set could be heard. On the fifth day from the start of the trial the judge announced he was not feeling well enough to proceed with the trial and ordered, against the objection of the accused's counsel, that the jury in the case be finally discharged and the cause be continued for further trial within one month. The defendant was remanded to jail, whereupon he filed with the Federal District Court for the Eastern District of Missouri his petition for discharge by the writ of habeas corpus on the grounds that he was placed in jeopardy and the illegal discharge of the jury in the former proceeding stood as an acquittal.¹⁷³

169. COOLEY, CONSTITUTIONAL LIMITATIONS 468 (7th ed. 1903).

170. *State v. Miller*, 331 Mo. 675, 56 S.W.2d 92 (1932).

171. 1 BISHOP, CRIMINAL LAW § 869, p. 482 (3d ed. 1865); *State v. Ulrich*, 110 Mo. 350, 19 S.W. 656 (1892).

172. *United States v. Watson*, 28 Fed. Cas. No. 16,651 (S.D.N.Y. 1868).

173. *Ex parte Ulrich*, 42 Fed. 587 (W.D. Mo. 1890). The federal court proceeded in this case as though it was granted the authority to act by the Fourteenth Amendment. Such authority does not exist as was previously discussed.

In deciding this case the federal court did not deny the discretionary power of the trial court to discharge a jury on account of the illness of the judge, juror, or the accused; in fact it affirmed that such discretionary power existed. However, the court did state, and based its opinion on the fact, that the defendant had been put in jeopardy by the commencement of the case and that, by discontinuing the case and trying another case, the accused was denied the speedy trial to which he was entitled under the Constitution. Since the defendant was put in jeopardy and should have been extracted by a determination of the jury that he was either guilty or not, he was discharged.

Defendant was then re-indicted in the state court and the situation was reconsidered by the Supreme Court of Missouri, which recognized that the district court judge had gone behind the discretionary power of the state trial court and had held that in this specific instance the dismissal of the jury on the illness of the judge was an abuse of the discretionary power of the court. As the court stated:

The question that at once arises, conceding that sickness of the judge is a good cause for discharging the jury, who is to determine this? The judge himself, or some bystander, or the attorneys for the defendant, or some other court having no jurisdiction in the case, or this court upon appeal? It seems to us that the question at once suggests its proper answer. From the necessity of the case, the trial judge must determine this himself.¹⁷⁴

There are two reasons why the discretionary power of dismissal of the jury by the court should not be retrospectively examined by other tribunals: 1) The discretionary power as a matter of course can lie nowhere else, for "it is merely an incidental matter arising in the progress of the trial, and in no way connected with the question before the jury, of guilty or not guilty."¹⁷⁵ 2) If it were the rule that an actual necessity must exist for discharge of the jury, then in the case of the sickness of a judge or the

174. *State v. Ulrich*, *supra* n. 173; *United States v. Perez*, 9 Wheat. 576, 22 U.S. 194 (1824). "The finding of a cause for withdrawing a juror or taking a case from a jury is a judicial act; the authority to do it is entrusted by law to that other court, and no other court can revise its decision . . . where a judicial act is to be done upon proof laid before the tribunal and the act is done, it is to be presumed that the necessary facts were proved and no other tribunal is at liberty to re-examine the question."

175. *United States v. Haskell*, 26 Fed. Cas. No. 15,321 (E.D. Pa. 1823).

juror, the defendant might object that the sickness was so slight or so irrelevant as not to require absolutely that the trial be stopped.

As the illness of a judge is sufficient necessity for the discharge of the jury and a retrial of the case, so also is the sickness¹⁷⁶ or death of a juror,¹⁷⁷ a manifest necessity for the discharge of that jury and the impaneling of another jury to try the case.

If physical disability or sickness renders a juror unable to continue in the case and is deemed a sufficient necessity for the dismissal of the jury, then obviously, the insanity of one of the jurors is also sufficient cause for the dismissal of the jury.¹⁷⁸ It would also seem that the fact that the incapacity or an illness of the juror was brought about by his own gross misconduct, such as excessive use of alcohol resulting in intoxication, makes no difference so far as the interest of justice is concerned: his condition still would be a justifiable reason for the discharge of the jury.¹⁷⁹ Any other result in the case of insanity or intoxication would give an insane or drunken juror the power to defeat entirely the ends of justice.

It appears to be a moot question whether the illness or death of a member of the juror's family is sufficient justification for declaring a mis-

176. *State v. Miller*, 331 Mo. 675, 56 S.W.2d 92 (1932). Appellant was placed on trial for murder, a jury was duly impaneled and sworn and a number of witnesses were called to testify on behalf of the state. At this point of the trial a member of the jury became ill and was given medical attention. On the following day, the physician attending the sick juror was called to testify concerning the condition of the juror, and stated that, in his opinion, the juror would be unable to resume his duties in the case. Thereupon the trial court made the following order: "On account of the illness of the juror in this case, it will be necessary that a mistrial be had and another trial be had of this cause and the jury may be discharged from further service in this case." The appellant excepted to the court's ruling and entered a plea of former jeopardy. The Supreme Court of Missouri denying the exception to the ruling stated: "If the rule were otherwise, the ends of public justice would often be defeated by some unforeseen event beyond human control." *Hector v. State*, 2 Mo. 166 (1829). "Another point made by the prisoner's counsel is whether after a jury had been sworn, heard the evidence and retired to consider their verdict, they can be discharged on account of the sickness of one of the jurors. In this case the juror was sworn and on his oath declared he was unable, by reason of sickness, to serve any longer and then the whole were discharged. We are of the opinion that there is no error on this point."

177. *State v. Jeffers*, 64 Mo. 376 (1847); *Ex parte Ulrich*, *supra* n. 173.

178. *People v. Olcott*, 2 Johns. Cas. 301, 1 Am. Dec. 168 (1801). "All the authorities admit that when a juror becomes mentally disabled by sickness or intoxication it is proper to discharge the jury." *State v. Whitman*, 93 Utah 557, 74 P.2d 696 (1937); *Commonwealth v. Davis*, 266 Pa. 245, 110 Atl. 85 (1920).

179. *United States v. Haskell*, *supra* n. 175; *State v. Tyson*, 138 N.C. 627, 50 S.E. 456 (1905).

trial or discharging a jury in a criminal case.¹⁸⁰ Although there are no Missouri decisions on the point, it would seem that the discretionary power in such a situation would lie in the judge to determine whether the serious illness or death of a very close relative of a juror constitutes such a mental strain on the juror as to incapacitate him intellectually from the proper performance of his duties.¹⁸¹

Under Section 546.030, the accused in a criminal case must be in court at all stages of the proceedings, and if this provision is not complied with, and defendant is absent from any proceeding, then a mistrial results.¹⁸² Under this statute the court must discontinue the case upon the sickness of the accused, and it cannot be reconvened until the accused is well enough to proceed. But the question arises, and it has been contested, if the accused must be present in court at all stages of the proceedings, but the accused is so sick that the trial cannot be continued, will the discharge of the case while the accused is not in court be a bar to the subsequent prosecution of that case? The posing of the question answers itself, for the inherent humanity and justice for which the law perpetually strives would require that the prisoner, for the mere declaration of a mistrial, should not be brought into court if he is so sick that his life would be endangered.¹⁸³ As

180. *Spelce v. State*, 20 Ala. App. 412, 103 So. 694 (1924); *Rittenberry v. State*, 30 Ga. App. 289, 117 S.E. 765 (1923); *Salistean v. State*, 215 N.W. 107 (1927). Sickness of juror's wife and death of his child warranted discharging the jury and did not thereby effectuate an acquittal of the charges being tried against the defendant. Contrast with *Woodward v. State*, 42 Tex. Crim. Rep. 188, 56 S.W. 135 (1900); *Upchurch v. State*, 36 Tex. Crim. Rep. 624, 38 S.W. 206 (1896).

181. *Spelce v. State*, *supra* n. 180; *Salistean v. State*, *supra* n. 180.

182. Mo. REV. STAT. (1949): "No person indicted for a felony can be tried unless he be personally present, during the trial; nor can any person be tried or be allowed to enter a plea of guilty in any other case unless he be personally present, or the court and prosecuting attorney shall consent to such trial or plea in the absence of the defendant; and every person shall be admitted to make any lawful proof by competent witnesses or other testimony in his defense; provided, that in all cases the verdict of the jury may be received by the court and entered upon the records thereof in the absence of the defendant, when such absence on his part is willful or voluntary, and when so received and entered shall have the same force and effect as if received and entered in the presence of such defendant; and provided further, that when the record in the appellate court shows that the defendant was present at the commencement or any other stage of the trial, it shall be presumed, in the absence of all evidence in the records to the contrary, that he was present during the whole trial."

183. *Cf. State v. McCrary*, 287 S.W.2d 785 (Mo. 1956), where the defendant inadvertently absented himself just before the jury reported and was discharged for failure to agree after two days' deliberation. The defendant waived his right to be present and the discharge was not an acquittal.

a practical consideration—what assistance to his counsel would a prisoner be at such a time?

2. Misconduct of a Jury

The rule anciently prevailed at common law that after the jury retired to deliberate on their decision, they might be discharged and a new jury sworn to try the cause if the jury or any member of the jury separated.¹⁸⁴ This strict precept has been amended by legislative enactments so as to allow the jurors to separate in certain instances,¹⁸⁵ but if the jury ever

184. In *Hanscom's Case*, 2 HALE, PLEAS OF THE CROWN 295 (1778), it was stated by the court that if after the jury is sworn and has departed from the court to deliberate and one of them willfully goes out of town whereby only eleven remain, the eleven cannot give any verdict without the twelfth. The twelfth, therefore, may be confined for his contempt of the court and the jury may be discharged, a new jury sworn and new evidence given and a verdict taken of the new jury without the defendant availing himself of the plea of prior jeopardy.

185. *People v. Olcott*, 2 Johns. Cas. 301, 1 Am. Dec. 168 (1801), in which Judge Kent states: "This power in the court (to discharge a jury under certain contingencies), so far from impairing the goodness or safety of trial by jury must add to its permanence in value. The doctrine of compelling a jury to unanimity by the pains of hunger and fatigue, so that the verdict, in fact, be founded not on temperate discussion and clear conviction but on strength of body is a monstrous doctrine that does not as St. Germaine evidently hints, stand with conscience, but is altogether repugnant to a sense of humanity and justice. A verdict of acquittal or conviction obtained under such circumstances can never receive the sanction of public opinion, and the practice of former times, of sending the jury in cart from one assize to another, is properly controlled by the improved manners and sentiments of the present day."

The ideas of Judge Kent find exemplification in the following statutes:

MO. REV. STAT. § 546.230 (1949): "With the consent of the prosecuting attorney and the defendant, the court may permit the jury to separate at any adjournment or recess of the court during the trial in all cases of felony, except in capital cases; and in misdemeanors the court may permit such separation of the jury of its own motion, but when the juries are permitted to separate, after being impaneled as provided for in this chapter, and at each adjournment the court must admonish them that it is their duty not to converse among themselves, nor to suffer others to converse with them or in their hearing on any subject connected with the trial, or to form or express any opinion thereon until the case is finally submitted to them."

MO. REV. STAT. § 546.240 (1949): "When the argument is concluded, the jury may decide in court or retire for deliberation. They may retire under the charge of an officer who, in case of a felony, shall be sworn to keep them together in some private or convenient room or place and not permit any person to communicate with them, nor do so himself, unless by order of the court, or to ask them whether they have agreed upon their verdict; and when they have agreed, he shall return them into court, or when ordered by the court. The officer shall not communicate to any person the state of their deliberations; provided, however, when there are women members of a jury, they may be kept separate from the men members of the jury, if any, and under the charge of a woman officer of the court during any time when the court is not in session, or in which they are not deliberating upon their verdict."

separates without leave of court after retiring to deliberate upon their verdict, or has been guilty of any misconduct which tends to prevent a fair and due consideration of the case, then this will not only be grounds for a new trial but will entitle the court to discharge the jury and impanel a new jury without allowing the accused to plead this as a bar to a subsequent prosecution.¹⁸⁶

The reason that the misconduct or separation of a juror or the jury vests the court with the power to discharge the jury without the defendant being able to raise this matter on a plea of double jeopardy arises out of the exigency of the situation itself.¹⁸⁷ For to hold otherwise would place it within the power of a single juror by misconducting himself, or by absconding and separating himself from the rest of the jury, to create a perfect protection to the accused against the legal consequences of his crime.¹⁸⁸

Misconduct, ipso facto, will not be sufficient to constitute a discharge of the jury; the irregularity or misconduct must be such that a lawful verdict is prevented from being produced in the case (as in the case of intoxication where the juror must be so drugged that he cannot render an intelligent verdict).

In all felony cases, except capital cases, the mere fact of the separation of the jury without permission of the court before the case has been submitted to it will not furnish grounds for the discharge of the jury unless it appears that they have been tampered with or have acted improperly.¹⁸⁹ However, in all felony cases, "if after the case has been submitted to the jury for its determination but before a verdict has been reached, there is an

186. Mo. REV. STAT. § 547.020 (1949): "The court may grant a new trial for the following causes, or any of them: . . . 2) When the jury has been separated without leave of the court, after retiring to deliberate upon their verdict, or has been guilty of any misconduct tending to prevent a fair and due consideration of the case; . . ."; Supreme Court Rule 27.19; Supreme Court Rule 27.26.

187. *United States v. Haskell*, 26 Fed. Cas. No. 15,321 (E.D. Pa. 1823). The fact that a juror after the jury had left the courtroom went out of town constituted a case of necessity such as would authorize the court to discharge the jury. For further reasoning on this subject, vide, *Mirachi, Criminal Law—Double Jeopardy—Juries—Separation, Discharge—Reconsideration of Verdict*, 21 TEMP. L. Q. 391 (1948).

188. *United States v. Haskell*, *supra* n. 186.

189. *State v. Dougherty*, 55 Mo. 69 (1874); *State v. Matrassey*, 47 Mo. 295 (1871); *State v. Brennon*, 45 Mo. 329 (1870).

opportunity that improper influence could be used on any juror, that alone will require a new trial, even though it could be shown that improper influence was not exercised."¹⁹⁰

The reason for the strictness of this rule against any misconduct or separation of the jury which would allow improper influences to be placed upon the jurors is to protect that all-important sanctity of an impartial verdict. As Judge Kent stated:

A verdict obtained unfairly, by secret and artful, or bold and direct influence over the jury by the parties, their friends, or bystanders, would, if admitted to be recorded, be a disgrace to the administration of justice. The power of discharging a jury, in these and other instances, which might be enumerated, is a very salutary power, calculated to preserve that mode of trial in its purity and vigor.¹⁹¹

The misconduct of the officer of the court, without other proof of tampering, will not constitute a sufficient necessity to dismiss or a dismissal of the jury.¹⁹²

The trial judge has an hiatus through which he must proceed, averting the Scylla of allowing the case to proceed when a juror has been tampered with, but avoiding the Charybdis of discharging the jury when the jury may have been tampered with but such meddling has not affected their impartiality. In the latter instance there might be the danger of the accused being allowed to plead such a discharge as a bar to a subsequent prosecution.

F. *Failure of Jury to Agree Upon a Verdict*

After the jury retires for the purpose of considering their verdict, there are very few circumstances in which they might lawfully be discharged without effectuating a bar to a subsequent prosecution for the

190. *State v. Dodson*, 338 Mo. 846, 92 S.W.2d 614 (1936) (pertinent cases cited therein).

191. *People v. Olcott*, *supra* n. 185; *vide*, *Pemmer v. United States*, 350 U.S. 377 (1956).

192. *Vide*, Mo. REV. STAT. § 547.020 (1949).

same offense.¹⁹³ However, recognizing that the state has an equal right for a unanimous verdict of conviction, just as the defendant has the same right of unanimity for an acquittal, it is stated in the Missouri Constitution that "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."¹⁹⁴ Interpreting this section of the Missouri Constitution, the Supreme Court of Missouri stated, "Upon the first trial of this case the jurors were unable to agree upon a verdict and for that reason were discharged, but the 'hung jury' was not an 'acquittal' of the defendant, did not entitle him to a discharge, and he was not thereby placed in jeopardy within the meaning of the constitutional provision."¹⁹⁵

The landmark case involving the discretionary power of a judge to discharge a jury, which is unable to render a verdict, is *United States v. Perez*,¹⁹⁶ wherein the accused was put upon trial for a capital offense and the jury, being unable to agree, was discharged by the court. This discharge of the jury was without the consent either of the accused or of the prosecuting attorney. The Supreme Court of the United States declared:

We are of the opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all of the circumstances into consideration, there is a manifest necessity for the act, or where the ends of public justice would have otherwise been 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

193. *State v. Jeffers*, 64 Mo. 376 (1877): ". . . an acquittal by them can only be evidence by their verdict, and the record before us shows no such verdict and only that they retired to consider their verdict. After a jury retires for this purpose, there are three ways in which they might lawfully be discharged. 1) By turning into the court a verdict for conviction or acquittal; (2) by being discharged by an order of court because of the inability to agree upon a verdict, or by consent of defendant or by some unavoidable cause such as the sudden death of a juror; and, 3) by the expiration of the term of court in which the trial is pending."

194. MO. CONST., Art. 1, § 19 (1945).

195. *State v. Berry*, 298 S.W.2d 429, 431 (Mo. 1957).

196. 9 Wheat. 576, 22 U.S. 579 (1824).

caution, under urgent circumstances, and for very plain and obvious causes, and, in capital cases, especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion rests, in this, as in other cases, upon the responsibility of the judge under oaths of office.

The sound discretion referred to in this decision is that discretion of the trial court which is involved in the determination of when, and after how long a deliberation, the jury should be discharged for inability to agree upon a verdict.¹⁹⁷ In weighing the proper exercise of this power, the court must consider that the accused is entitled to have the jury given a reasonable time in which to agree upon a verdict before a mistrial should be declared and the jury discharged.¹⁹⁸

This discretionary power of the court to discharge¹⁹⁹ has been held not to be abused by discharging the jury for inability to agree after three days,²⁰⁰ less than two days,²⁰¹ one day,²⁰² seventeen hours,²⁰³ and even

197. *State v. Matrassey*, 47 Mo. 295 (1871); *State v. Scott*, 45 Mo. 302 (1870).

198. COOLEY, *CONSTITUTIONAL LIMITATIONS* 469 (7th ed. 1903).

199. *State v. Matrassey*, *supra* n. 197. "The court has the undoubted authority in its discretion to discharge the jury when it becomes satisfied that they would be unable to agree on a verdict."

200. *State v. Dunn*, 80 Mo. 681 (1883). Defendant was indicted for murder in the second degree, pleaded not guilty and the cause was tried before a duly impaneled and sworn jury, which after retiring for one day returned to the court and being unable to agree were discharged without objection from the defendant. At the next term, the defendant was reindicted on charge of murder in the first degree for the same killing. After the defendant's special plea of former acquittal was denied, the cause was retried before a new jury. After three days' deliberation the jury returned and informed the court that it was unable to reach a verdict, whereupon the jury was discharged over the objections of the defendant. The defendant was thereupon tried before a third jury and found guilty of murder in the second degree. "In this case the jury had not been out three days and are not prepared to say that the prisoner's objection alone should outweigh all other circumstances of public justice or control the honest discretion of the court in deciding, as it seems to have done, that the jury in point of fact were unable to agree upon a verdict, and, if so, its powers and duty to discharge the jury cannot be questioned and such discharge of the jury so ordered constituted no bar to another criminal trial."

201. *Logan v. United States*, 144 U.S. 263 (1892). The jury retired and considered their verdict for four hours after which time they returned to the court and informed the court that they were unable to agree. The Supreme Court stated: "The plea of former jeopardy was rightly held bad. . . . upon those facts where the discharge of the jury was manifestly necessary in order to pre-

after deliberating less than four hours.²⁰⁴

The Supreme Court of the United States has indirectly held that the discretionary power of the trial court to discharge a jury which is unable to agree is a final determination of that factor and no succeeding court can go behind the discharge and determine that the discretionary power was abused.²⁰⁵

The Supreme Court of Missouri, in considering this issue, stated:

We must take for granted, in the absence of all of the records and opposition thereto, that the discretion which the Constitution manifestly confers was not unsoundly exercised by the court.²⁰⁶

vent a defeat in the ends of public justice was a question to be finally decided by the presiding judge in the sound exercise of his discretion."

Keerl v. Montana, 213 U.S. 135 (1909). Defendant was tried and convicted of murder but the judgment was reversed by the Supreme Court of Montana. Upon a second trial, the jury retired for deliberation on July 12 and on July 14 they returned into court and stated that they were unable to agree, whereupon the court discharged the jury from further consideration of the cause. On the third trial the defendant interposed the plea of once in jeopardy on the grounds that the jury was improperly discharged at the end of the second trial. Upon the authority of the cases previously cited, the Supreme Court held that the discharge of the jury in this situation was not a bar to a subsequent prosecution and "the record shows that the jury were kept out at least 24 hours and probably more and trial court found that there was a reasonable probability that the jury could not agree." *State v. McCrary*, 287 S.W.2d 785 (Mo. 1956). The jury was out approximately two days and failed to bring in a verdict.

202. *Dreyer v. Illinois*, 187 U.S. 71 (1902). The jury retired at four o'clock in the afternoon to consider their verdict and returned at 9:30 the succeeding morning, declaring to the court that they were unable to agree upon a verdict, whereupon the court discharged them. The defendant maintains that this amounted to an acquittal. The court followed and cited *United States v. Perez*, 9 Wheat. 576, 22 U.S. 194 (1824), and held that dismissal of the jury in this situation was not a bar to a subsequent prosecution for the same offense; *State v. Dunn*, *supra* n. 200.

203. *State v. Copeland*, 65 Mo. 497 (1877). The jury retired on the fourteenth day of the month to consider their verdict and on the fifteenth day of the same month again came into court and stated that they could not agree and were thereafter discharged. The court denied that this constituted a bar to subsequent prosecution.

204. In *Ex parte Ruthven*, 17 Mo. 541 (1853), the accused was indicted for murder and the trial continued for twelve days, after which the cause was committed to the jury who retired to consider their verdict. After an absence of a few hours, the jury returned to court and announced that they could not agree. The judge directed the jury to retire for half an hour or an hour and he would consider whether they should be discharged. It was at the expiration of this fixed period that they came into the courtroom and were discharged by the court without the consent of the prisoner or his counsel.

205. *United States v. Perez*, *supra* n. 202.

206. *State v. Copeland*, *supra* n. 203.

Therefore, the ability of the trial court to discharge a jury cannot be questioned either as to whether the jury was out long enough or whether the jury was hopelessly deadlocked. These are matters which can only be determined by the trial court, although notwithstanding the fact that the inherent discretion of the court to discharge the jury when they failed to enter a verdict is a sound legal discretion which should not be retrospectively questioned by an appellate court, it has been suggested that whenever it appears that the discretion has been arbitrarily or unsoundly exercised, such discharge in legal contemplation operates as an acquittal within the meaning of the Constitution.²⁰⁷ The reviewing court should no more be allowed to determine whether the trial court was warranted in discharging the jury for failure to bring in a verdict and whether the jury had been out a reasonable time, than to determine whether the judge, juror, or the accused was sick enough to warrant discharging the jury.

If the power of the trial judge to discharge a jury when unable to agree is to be properly administered, it can only be administered by the trial judge whose decision should be final, for he is the only one who can properly discern at first hand the attitude of the jury and their inability to reach a verdict. The trial court, however, should exercise this power with the greatest caution, as the citizen with his life or liberty given into the hands of a jury is entitled to a fair consideration by them, and the accused should not be deprived thereof by the arbitrary action of the court in dismissing the jury.²⁰⁸

Undoubtedly, if the defendant consents to the jury being discharged, then he cannot complain at a later time that the court abused its discretion.²⁰⁹ However, even if the defendant does object to the order discharging the jury, that:

207. *State v. Dunn, supra* n. 200.

208. In regard to the reviewing power of a higher court, it would seem that an appellate court could only determine whether the jury was discharged for the reason that they were deadlocked and could not agree. If they were discharged for that reason the appellate court must sustain the discretionary act of the trial court and cannot look any further behind the decision.

209. *State v. Scott*, 45 Mo. 302 (1870). "I know of no law which prohibits the court from again putting the prisoner on trial at the same term, when the first trial has not resulted in a verdict. The record does not show that he suffered any injustice by the proceeding. He acquiesced in it at the time and we see no reason to interfere on that account." MILLER, CRIMINAL LAW § 186, p. 539 (1934).

. . . objection could not have the effect to divest a court of its conceded discretion to judge and determine whether the report of the jury so made to the court was true or not. It may be conceded that the request of the prisoner that the jury might be allowed or even required to further consider if their verdict ought not to be disregarded by the court in determining the question. Yet, without more it is in the sound discretion of the court to order their discharge if in view of all of the facts and circumstances it is satisfied that the jury are unable to agree after a reasonable time and opportunity has been afforded and they so report under oath.²¹⁰

In view of this, the consent or non-consent of the defendant is immaterial so long as the trial court is satisfied that an agreement upon the verdict cannot be reached by the jury.

G. *Effect of Manifest Necessity*

As we have seen, the jeopardy, from which the constitutional provision protects the defendant from being twice subjected, commences when the jury is sworn and is charged with the trial of the cause. Jeopardy, as such, becomes dependent upon the presumption that the tribunal will continue legally organized, with the accused being charged, to the end of the trial, and in the end, pronounce a valid judgment—either for or against the accused. Any incidence or happening in the case over which the court has no control, but which conclusively rebuts this presumption of finality of judgment, of necessity must also rebut the conclusion or presumption of the jeopardy of the prisoner by reason of the commencement of the trial.

Manifest necessity to discharge the jury exists where the circumstance which caused the court to enter such a discharge was a circumstance which was not and could not be controlled by any of the parties in the case, either the accused, the prosecution, or the court itself. Instances of this are failure to arraign the defendant; the sickness of the judge, juror, or the accused; the misconduct and separation of the jury; the end of the term of court, and the bias or prejudice of a juror. When the jury is discharged for any of these reasons, the accused may be retried, and the plea of former jeopardy is not available to him.

210. *State v. Dunn*, 80 Mo. 681, 688 (1883).

However, when the jury is discharged under circumstances which are within the control of the prosecutor or the court, then said discharge is not considered to be the result of manifest necessity on the part of the court to protect the ends of justice. Such instances are the discharge of the jury for inability of the state to produce witnesses or a discharge at the mere whim of the court. Whenever a discharge falls outside the orbit of "manifest necessity" then the accused may effectively plead twice being put in jeopardy as a bar to any subsequent prosecution for the same offense.

VIII. ACQUITTAL

In the case of *State v. Casey*,²¹¹ the defendant was indicted and tried for larceny and embezzlement. Under the instructions of the court, the jury found the defendant not guilty of embezzlement but guilty of larceny. The defendant's appeal was sustained on grounds that the conviction of larceny was promised on insufficient facts. The accused was ordered discharged since he could not be charged again with embezzlement, even though the facts warranted such an indictment under the evidence presented.²¹²

To analyze this case, we will have to reconsider the Missouri Bill of Rights, namely, "nor shall any person be put again in jeopardy of life or liberty for the same offense after being acquitted by a jury."²¹³ The accused, Casey, is protected not only by this constitutional provision but also by the provisions of section 556.260:

When a defendant shall have been acquitted upon a trial, on the merits and facts, and not on any grounds stated in section 556.250, he may plead such acquittal in bar to any subsequent accusation for the same offense, notwithstanding any defect in form or substance in the indictment upon which such acquittal was had.²¹⁴

The constitutional provision coupled with this legislative enactment clothed

211. 207 Mo. 1, 105 S.W. 645 (1907).

212. This situation is to be differentiated from the case where the defendant is not charged with two crimes but is charged with only one crime and a verdict is brought in by the jury for a crime of which the defendant was not charged in the indictment.

213. Mo. CONST., art. 1, § 19 (1945).

214. Mo. REV. STAT. (1949).

the accused with an immunity from further prosecution for the same offense after once being acquitted of that offense.²¹⁵

A. Same Offense

The prohibition against a person being twice placed in jeopardy means not only that one may not be tried twice for the identical act or crime, "but that the State cannot split up a single crime and prosecute it in parts or piecemeal."²¹⁶ Expressed in other words, "a prosecution for any part of a single crime bars further prosecution based upon the whole or any part of the same offense."²¹⁷

Before a defendant may enter a plea of former jeopardy on the grounds that he has been acquitted or convicted of that charge, defendant must show that the former acquittal or conviction was for the same offense as charged in the second indictment.²¹⁸ That there must be an identity of offenses for the defendant to plead twice being put in jeopardy was recognized as a settled principle of Anglo-Saxon law at the time of Blackstone.²¹⁹

The determinative test as to whether the offense charged in the second indictment is the same offense of which the defendant was previously prosecuted was set forth by Chitty as follows:

In order, however, to entitle the defendant to this plea, it is necessary, that the crime charged be precisely the same, and that the former indictment as well as the acquittal was sufficient. As to the first of these requisites, the identity of the offense, if the crimes charged in the former and present prosecution are so distinct, that evidence of the one will not support the other, it is inconsistent with reason, as it is repugnant to the rules of law to say, that the offenses are so far the same, that an acquittal of the one will be a bar to the prosecution for the other. But on the other hand it is clear, that if the charge be in truth the same, though the indictments differ in immaterial circumstances, the defendant may

215. *Burton v. United States*, 202 U.S. 344 (1906); *Hewitt v. United States*, 110 F.2d 1 (8th Cir. 1940), cert. denied 310 U.S. 641 (1940); *United States v. Brimsdon*, 23 F. Supp. 510 (W.D. Mo. 1938); *State v. Toombs*, 326 Mo. 981, 34 S.W.2d 61 (1931).

216. *State v. Brooks*, 298 S.W.2d 511, 513 (Mo. App. 1957).

217. *Ibid.*

218. *State v. Stephens*, 70 Mo. App. 554 (1897).

219. 4 BLACKSTONE, COMMENTARIES 335.

plead his previous acquittal with proper averments; for it would be absurd to suppose that by varying the day, parish, or any other allegation, the precise accuracy of which is not material, the prosecutor could change the rights of the defendant, and subject him to a second trial.²²⁰

In Missouri, the term, "same offense" "does not signify the same offense eo nomine, but the same criminal act, transaction, or omission."²²¹ If the evidence which is necessary to and is submitted in the second prosecution would have supported a conviction under the first prosecution, then the offenses are deemed to be identical and the subsequent prosecution is barred.²²² A plea of former jeopardy will be properly overruled if the offense charged in the second indictment requires proof of facts different from those necessary for a conviction under the first indictment.²²³

1. Prosecution for Commission of a Crime Within a Certain Period

Unless time is not of the essence of an offense,²²⁴ an acquittal or conviction of a crime does not constitute a bar to a subsequent prosecution for the same offense, if the latter offense is alleged to have been committed at a designated time, different from the date of the commission of the prior offense.²²⁵ A subsequent offense, identical in its elements to a prior offense but separate and distinct as to both time and place of commission, is not barred by a verdict rendered on the prior offense.²²⁶

220. CHITTY, CRIMINAL LAW §§ 452-3, p. 368 (1819).

221. *State v. Toombs*, 326 Mo. 981, 34 S.W.2d 61 (1931). See Note, 15 Mo. L. Rev. 185 (1950).

222. *Manning v. United States*, 275 Fed. 29 (8th Cir. 1921); *United States v. Halbrook*, 36 F. Supp. 345 (E.D. Mo. 1941); *State v. Hicklin*, 358 Mo. 1016, 218 S.W.2d 564 (1949); *State v. Toombs*, 362 Mo. 981, 34 S.W.2d 61 (1931); *State v. Headrick*, 179 Mo. 300, 78 S.W. 630 (1904), vide, *State v. Salter*, 256 S.W. 1070 (1923).

223. *State v. Hayes*, 296 Mo. 58, 246 S.W. 948 (1922); *State v. Toombs*, 362 Mo. 981, 34 S.W.2d 61 (1931); vide, *Kling, Former Jeopardy*, 15 Mo. L. Rev. 185 (1950).

224. *United States v. One Buick Coach Automobile*, 34 F.2d 318 (N.D. Ind. 1929).

225. *State v. Matkins*, 37 S.W.2d 422 (Mo. 1931); *State v. Florigan*, 355 Mo. 1169, 200 S.W.2d 64 (1947). Both cases involve the separate prosecutions for embezzling at different times; *State v. Hussey*, 145 Mo. App. 671, 123 S.W. 485 (1909). Defendant was prosecuted for two separate assaults on a policeman and not placed in jeopardy twice since the assaults, although committed on the same day, were committed at different times and places; *City of St. Joseph v. Dienger*, 165 Mo. 95, 65 S.W. 223 (1901); *State v. Stephens*, 70 Mo. App. 554 (1897); *State v. Maupin*, 71 Mo. App. 54 (1897).

226. *State v. Matkins*, *supra* n. 225; *State v. Florigan*, *supra* n. 225; *State v. Hussey*, *supra* n. 225; *State v. Burgess*, 268 Mo. 407, 188 S.W. 135 (1916). Embezzling at two different times from same person.

A prosecution for a continuing offense is a bar to any subsequent indictment for the same offense which was committed before the institution of the first prosecution.²²⁷ This anterior prosecution does not constitute a bar to a subsequent prosecution for the continuance of the offense after the date of the termination of the first prosecution in that a new offense is begun and is triable as such.²²⁸

2. One Crime an Element of Another

When a defendant is indicted for a greater degree of a crime and a conviction under such indictment may be obtained for a lower degree thereof, then the acquittal or conviction of the defendant on the greater degree of the crime bars a further prosecution on the lower degree of the crime, as well as any other offense for which the defendant could legally have been convicted under the first indictment.²²⁹

An acquittal or conviction for a lesser degree of the offense charged in the indictment bars a prosecution for the higher degree of the offense, if defendant under the indictment could legally have been convicted of the lesser degree.²³⁰ So, under an indictment for robbery in the first degree, a conviction of robbery in the second degree operates as a bar to the subsequent prosecution for robbery in the first degree.²³¹

3. Several Offenses Involved in the Same Transaction

The Supreme Court of Missouri has steadfastly refused to recognize what is known as the "same transaction rule."²³² Instead the court has preferred to follow the "separate or several offense doctrine" which means "that an offender is not to be exonerated from responsibility for his acts because his desires or passions persuade him or impel him to commit two or more offenses during a transaction or occasion."²³³

227. *State v. Lawson*, 239 Mo. 591, 145 S.W. 92 (1912) (continuing offense of gambling); *Miller v. Gerk*, 27 S.W.2d 444 (Mo. 1930) (continuing offense of failure to support a child).

228. *Miller v. Gerk*, *supra* n. 227.

229. *State v. Hamlin*, 171 S.W.2d 714 (Mo. 1943); Mo. REV. STAT. § 556.240 (1949).

230. *State v. Brannon*, 55 Mo. 63 (1874); *State v. Pitts*, 57 Mo. 85 (1874).

231. *State v. Brannon*, *supra* n. 230; *State v. Pitts*, *supra* n. 230. This is subject to the qualification that the judgment is not reversed on appeal.

232. *State v. Brooks*, 258 S.W.2d 511 (Mo. App. 1957).

233. *State v. Moore*, 326 Mo. 1199, 33 S.W.2d 905 (1931).

Therefore, if during the execution of a criminal transaction more than one separate and distinct criminal offense is committed, an indictment and prosecution on one of these offenses will not impede a later prosecution on the other offense.²³⁴ A single act may violate two statutes, and if each offense requires proof of additional facts, an acquittal or conviction under either does not exempt the accused from prosecution under the other.²³⁵

The offenses of larceny and obtaining money under false pretenses contain essentially different elements, hence an acquittal under an information for larceny is no bar to a subsequent prosecution, based on the same facts, for obtaining money under false pretenses.²³⁶ An acquittal of a charge of murder which was alleged to have transpired at the time of an attempted arson does not bar a prosecution for arson.²³⁷ The conviction of defendant of murder did not preclude a prosecution on robbery growing out of the same transaction.²³⁸

The determination of whether one offense contains an essential element of another offense primarily involves criminal law, not constitutional law. Hence for our consideration, these general rules, combined with the examples presented, are adequately illustrative of the necessity that the second prosecution be for the "same offense."

4. Offenses Against Different Sovereignties

If both the state and federal governments have jurisdiction over the same crime, both sovereignties have the right to punish the criminal for the same offense.²³⁹ Unless this right is abrogated by statute, an acquittal or conviction in the court of one sovereignty is not a bar to a prosecution by the other.²⁴⁰

234. *Thomas v. United States*, 156 Fed. 897 (8th Cir. 1908); *O'Malley v. United States*, 128 F.2d 676 (8th Cir. 1942); *State v. Hess*, 240 Mo. 147, 144 S.W. 489 (1912); *State v. Foley*, 247 Mo. 607, 153 S.W. 1010 (1913); *State v. Clark*, 220 Mo. App. 1308, 289 S.W. 963 (1927).

235. *Gray v. United States*, 14 F.2d 366 (8th Cir. 1926).

236. *State v. Anderson*, 186 Mo. 25, 84 S.W. 946 (1905).

237. *State v. Babbitt*, 228 Mo. 252, 128 S.W. 953 (1910).

238. *State v. Moore*, 326 Mo. 1199, 33 S.W.2d 905 (1931).

239. *Herbert v. Louisiana*, 272 U.S. 312 (1926); *Ex parte January*, 295 Mo. 673, 246 S.W. 241 (1922); *State v. Graves*, 346 Mo. 990, 144 S.W.2d 91 (1949).

240. *Herbert v. Louisiana*, *supra* n. 239; *Ex parte January*, *supra* n. 239; *State v. Graves*, *supra* n. 239.

The prosecution and conviction under a city ordinance is not a bar to a prosecution for the same transaction under state laws since the prosecution under the city ordinance is a mere civil proceeding.²⁴¹

B. *In Various Courts*

Whenever the defendant is acquitted of a criminal charge before a justice of the peace or a magistrate having jurisdiction to try the case and the ability to impose sentence, the defendant, having been put in jeopardy, is barred from being tried for that offense again.²⁴² The effect of this acquittal, whether it be direct or indirect, is that it bars any subsequent indictment or information being filed against the accused for the same crime, but another crime which forms an element or some portion of that crime is not barred if the justice of the peace or magistrate court has no jurisdiction of that specific offense or degree thereof.²⁴³

As an acquittal before a justice of the peace or in the magistrate's court is a bar to the subsequent finding of an indictment or information in any other court in the state, so also is an acquittal on an indictment in the circuit court a bar to subsequent criminal procedure before a justice of the peace; that is, if the defendant was indicted and acquitted for the same felony as described in the justice of the peace court.²⁴⁴

An acquittal on an indictment in the circuit court does not bar a subsequent prosecution before a justice of the peace for any minor offense which the defendant could not have been tried on in the circuit court for lack of jurisdiction.²⁴⁵ This is premised on the rule that, if the defendant was not or could not have been tried for the minor offense under the indictment, then he was not put in jeopardy for that offense and he can be subsequently prosecuted in the court of a justice of the peace for the minor offense.²⁴⁶ Under this rule an acquittal on an indictment for a felonious

241. *State v. Jackson*, 220 S.W.2d 779 (Mo. 1949); *State v. Muir*, 164 Mo. 610, 65 S.W. 285 (1901).

242. *State v. Polk*, 144 Mo. App. 326, 127 S.W. 933 (1910). The information contained three counts with the jury finding the defendant guilty on only the first count. On the defendant's appeal a trial "de novo" was held. The court ruled that the defendant, having been put in jeopardy and an acquittal, even though indirect, having been rendered in the justice's court, no further suit in any other court in the state could be maintained.

243. *State v. Gustin*, 152 Mo. 108, 53 S.W. 421 (1899).

244. *Vide*, *State v. Wichtman*, 26 Mo. 515 (1858).

245. *Ibid.*

246. *Ibid.*

assault will not bar a prosecution for a common assault and battery before a justice of the peace, because the defendant under the prior indictment could not be convicted for, nor put in jeopardy on, the minor offense.²⁴⁷

C. *In the Absence of a Jury*

The wording of the Missouri constitutional provision, namely, "after being acquitted by a jury,"²⁴⁸ becomes of great importance in determining whether an acquittal by a jury is one of the necessary elements in former jeopardy. We cannot consider this provision alone, however, but we must take into consideration section 556.260 of the statutes which provides that, "When a defendant shall have been acquitted upon a trial upon the merits and fact, . . . he may plead such an acquittal in bar to any subsequent accusation for the same offense."²⁴⁹

This section of the Missouri statutes extends the common law and constitutional immunity of twice being in jeopardy to those persons who have been acquitted upon a trial and that would include a trial before the court, sitting without benefit of a jury. Although there are no Missouri decisions to that effect, it would seem that following the above stated statutory provision, a direction of an acquittal by a court would bar a subsequent prosecution on the same charge in any other court in the state.²⁵⁰ This acquittal would extend only to those crimes upon which a direction of acquittal was specifically given, and any crimes or offenses which were discharged by the court, or any charges which were discharged before the defendant was put in jeopardy, would not serve as a plea of former acquittal on another trial.²⁵¹

D. *Defective Indictment*

At common law an acquittal upon an indictment would not support a plea of autrefois acquit, if the indictment was so defective that had it been

247. *Ibid.*

248. Mo. CONST. art. 1, § 19 (1945).

249. Mo. REV. STAT. (1949).

250. *Cornero v. United States*, 48 F.2d 69 (9th Cir. 1931) (a directed verdict); Supreme Court Rule 26.10.

251. *State v. Speer*, 6 Mo. 644 (1840). "The verdict of acquittal is a complete protection to the defendant against any further proceedings"; *State v. Wisebeck*, 139 Mo. 214, 40 S.W. 946 (1897).

objected to at the trial, either by motion in arrest of judgment or by writ of error, it would not have supported any conviction or sentence.²⁵² The basis for this doctrine is *Vaux's Case*, wherein it is stated:

Because the indictment in this case was insufficient, for this reason he was not *legitimo modo acquitatus*, nor was the life of the party in the judgment of the law ever in jeopardy.²⁵³

This, however, is not the rule in Missouri, for it is specifically set out by the statute that the defendant "may plead such acquittal in bar to any subsequent accusation for the same offense, notwithstanding any defect in form or substance in the indictment upon which acquittal was had."²⁵⁴ The rationale of holding that an acquittal, even though founded on a faulty or defective indictment, is still a bar to a subsequent prosecution for the same charge is found in the concept that the state should not be benefited by its own mistakes. The deprivation of the benefit of an acquittal by a jury on the suggestion that the indictment was incorrectly drafted would be permitting the state to take advantage of its own wrongs.

This legislative enactment is designed to prevent the defendant from being twice put in jeopardy, not from twice being punished, and the accused, whether the indictment is faulty or not, is equally put in jeopardy in the first trial. The prosecutor, if he be dissatisfied with the verdict in the first trial, should not be allowed to come before the court in a later proceeding and state that he had no venue or that his own indictment was deficient in other particulars and that, therefore, he should be granted another opportunity to convict the defendant.²⁵⁵ This principle was recognized and sustained by an early decision of the United States Supreme Court.²⁵⁶

252. 2 HALE, PLEAS OF THE CROWN 248, 394 (1778); 2 HAWKINS, PLEAS OF THE CROWN § 8 (1795).

253. 4 COKE 44. The only defect in the original indictment in *Vaux's Case* was that the defendant, being indicted for the murder of one Ridley, the indictment was insufficient to the extent that it did not expressly allege that Ridley drank the poison. The indictment merely stated that he took and drank, and it omitted the words, "said poison."

254. MO. REV. STAT. § 556.260 (1949).

255. 1 Johns. Cas. 66 (1806). Justice Livingston, in a dissenting opinion, gives a very thorough and complete summary of why the defendant should not be tried again, even though the indictment in the prior suit was faulty; vide, *Commonwealth v. Purchase*, 2 Pick. 521 (1824).

256. *Ball v. United States*, 163 U.S. 662 (1896). A general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder not objected to before the verdict as insufficient in that respect is a bar to a second indictment for the same killing.

The effect of this statute is to remove such procedural defects as lack of venue as cause for granting a new trial. If the court, however, lacked jurisdiction in the first instance, then an acquittal does not bar a subsequent prosecution, for the defendant actually was not in jeopardy.

E. *Verdict Rendered on Sunday*

In some jurisdictions, a verdict rendered on Sunday is null and void, and therefore a verdict of acquittal entered on Sunday would not be a bar to a subsequent prosecution on that verdict in those states. However, this is not consistent with the effect of a verdict for a verdict and discharge of a jury is merely a ministerial act involving no judicial discretion.²⁵⁷ Recognizing the proper function of the verdict, the Supreme Court of the United States held that a verdict may lawfully be received on Sunday, and, as such, be a bar to any further prosecution for the same offense.²⁵⁸

F. *Variance*

Where there exists a material variance between the charges set forth in the indictment and the proof adduced in the case, the defendant is entitled to an acquittal on the particular indictment.²⁵⁹ Such an acquittal does not constitute a bar to a subsequent prosecution and the accused may be tried and convicted on a subsequent indictment for the same offense or any degree thereof or of an attempt to commit such an offense.²⁶⁰ If the variance between the allegation contained in the indictment and the proof presented at the trial is immaterial, then such a variance should be disregarded, and if defendant is in fact acquitted because of such a variance, then this acquittal will be a bar to a subsequent prosecution for the same offense.²⁶¹

257. 3 BLACKSTONE, COMMENTARIES 277.

258. *Ball v. United States*, *supra* n. 256; Zacharias, *Effect of the Writ of Habeas Corpus on Double Jeopardy*, 14 CHI.-KENT L. REV. 156 (1936).

259. MO. REV. STAT. § 556.250 (1949). "When a defendant shall have been acquitted of a criminal charge upon trial, on the ground of variance between the indictment and the proof, or upon any exceptions to the form of substance of the indictment, or where he shall be convicted, but the judgment shall for any cause be arrested, he may be tried and convicted on a subsequent indictment for the same offense, or any degree thereof, or of an attempt to commit such an offense.

260. MO. REV. STAT. § 556.250 (1949).

261. *State v. Goff*, 66 Mo. App. 491 (1896). The court held that the mere variance in the day of the crime is not a sufficient variance to prevent a judgment from acting as a bar to a subsequent prosecution for the same offense; *vide*, Supreme Court Rule 26.04; Sawyer, *Autrefois Acquit and Decision Not "On the Merits,"* 2 RES JUDICATA 203 (1941).

IX. DISCHARGE

A. *Enabling Defendant to Testify for the State*

It is specifically provided by statute in Missouri that when two or more persons are jointly indicted the court may, at any time before the defendants have gone into their defense, direct a defendant to be discharged so that he may be a witness for the state.²⁶² Any time before the evidence is closed, a defendant against whom there does not exist sufficient evidence to put him on his defense, may be discharged for the purpose of giving testimony for his co-defendant.²⁶³ In both these instances, "the order of discharge shall be a bar to another prosecution for the same offense."²⁶⁴

In Missouri, therefore, the discharge of a co-defendant either for the purpose of using him as a state's witness or for the purpose of giving his testimony for a co-defendant is tantamount to an acquittal on the merits and bars a subsequent prosecution for the same offense.²⁶⁵

B. *Under Habeas Corpus Proceedings*

A discharge of the defendant on a writ of habeas corpus is not such a discharge as to bar a subsequent prosecution for the same offense, since a discharge under such a writ is a discharge from custody, not from the penalty imposed under the prior proceeding.²⁶⁶ Even though the defendant has served part of his sentence under the previous conviction, his discharge under a writ of habeas corpus and subsequent resentencing does not constitute putting defendant in jeopardy twice for the same offense.²⁶⁷

However, if the accused has suffered the full punishment prescribed in a sentence rendered in the prior case, and the prosecution attempts

262. Mo. REV. STAT. § 546.280 (1949).

263. *Ibid.*

264. *Ibid.*

265. Supreme Court Rule 26.07.

266. *State v. Schierhoff*, 103 Mo. 47, 15 S.W. 151 (1891).

267. *State v. Schierhoff*, *supra* n. 266. Defendant was found guilty of a felonious wounding and was fined \$100.00. Defendant filed a motion for a new trial but before it was disposed of, final judgment was rendered against him on the verdict. The court ruled that defendant was not placed in jeopardy even though he was imprisoned on execution issued thereon for failure to pay the fine. He was subsequently released on a writ of habeas corpus, due to the fact that the original judgment, sentencing him to prison was erroneous and illegal. The defendant may again be imprisoned under a sentence entered in the subsequent prosecution; *Ex parte Jilz*, 64 Mo. 205 (1876).

to re-try and re-sentence the accused on this count, this action is a derogation of an accused's right not to be put twice in jeopardy for the same offense.²⁶⁸

C. Failure of the State to Bring A Cause Within a Certain Term of Court

Recalling the utterance of Homer that "on the first day of his servitude the captive is deprived of one-half of his manly virtue,"²⁶⁹ the courts have recognized that each hour an accused is illegally restrained "is not only a degradation in its tendency, but is a crime against liberty."²⁷⁰ In view of this concept, the sole object and purpose of all criminal laws from first to last becomes one of insuring a speedy trial to the accused and thus guarding against a protracted imprisonment or harassment by a criminal prosecution.

In Missouri the accused's right to a speedy prosecution is set forth in the Constitution, namely: "That in criminal prosecutions the accused shall have the right to . . . speedy public trial by an impartial jury of the county."²⁷¹ A mere declaration, however, that the accused is entitled to a speedy trial is not an adequate protection to the accused unless sufficient sanction is to be imposed upon the state for failure to bring the accused to trial within a certain time. The means, sanctions or penalties which are employed for stimulating prosecutors and officers of the law to diligence in

268. *Bayless v. United States*, 147 F.2d 171 (8th Cir. 1945). The appellant was accused and pleaded guilty to stealing a motor vehicle and was sentenced to five years in prison, to run consecutively with a twenty year sentence imposed in another case against him. At the end of five years a writ of habeas corpus was granted appellant. It was found that the initial trial was void, so the government reindicted him for stealing a motor vehicle and the appellant was found guilty. The court stated: "The attempt of the government to subject the appellant upon this indictment for the identical offense for which he had suffered the full punishment prescribed in the sentence rendered thereon was contrary to the Fifth Amendment to the Constitution and constituted double jeopardy, forbidden by the amendment, and that he was entitled to be discharged before the proceedings under this indictment. . . . The five year sentence on its face had ceased to afford grounds for detaining him in prison, and upon that fact appearing, the judge in the habeas corpus proceedings would have no occasion to inquire into the validity of the sentence. Whether valid or invalid, it had served the purpose of a valid sentence and had caused the maximum imprisonment for the crime to be served, and all questions as to whether it ought to have been rendered or not were entirely moot." The Court of Appeals stated further that this was the first time in the history that a defendant had paid the full penalty for his crime and the government tried to re-prosecute because the indictment under which he had served the full penalty was faulty.

269. Cited in *Ex parte Ulrich*, 42 Fed. 587 (W.D. Mo. 1890).

270. *Ibid.*

271. Mo. CONST. art. 1, § 18 (a) (1947).

the prosecution was brought to the front by the legislature when it declared that the consequence of a failure to indict or to try the accused within a certain period operated as a discharge from the pending offense.²⁷²

In Missouri there are four legislative enactments protecting the accused in various situations from the failure of the state to prosecute within a certain length of time. Section 545.890 protects the defendant and gives him a discharge for the offenses stipulated in the indictment, if, having been committed to prison, he shall not be brought to trial before the end of the second term of court of the court having jurisdiction of the offense.²⁷³ Section 545.900 states that if the defendant is indicted for an offense and is placed on bail, and is not brought to trial before the end of the term of the court in which the cause is pending, then he shall be discharged from that offense.²⁷⁴ Section 545.910 sets forth the reasons for which a cause may be continued to the next term and if the accused is not brought to trial before the end of that term, then the state shall not be entitled to any further continuance of the case and the prisoner shall be discharged.²⁷⁵ Section 545.920 sets forth the various times at which the defendant shall

272. *State v. Wear*, 145 Mo. 162, 46 S.W. 1099 (1898). "That the legislature has the power to pass statutes of limitations which bar either civil or criminal prosecution no one has ever doubted. At the end of the designated period, whether the prosecution be civil or criminal, the bar of the statute attaches and that bar is a perpetual bar."

273. MO. REV. STAT. (1949). "If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense which shall be held after such indictment found, he shall be entitled to be discharged, so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner, or shall be occasioned by the want of time to try the cause at such second term."

274. MO. REV. STAT. (1949). "If any person indicted for any offense, and held to answer on bail, shall not be brought to trial before the end of the third term of the court in which the cause is pending which shall be held after such indictment found, he shall be entitled to be discharged so far as relates to such offense unless the delay happened on his application, or be occasioned by the want of time to try such cause at such third term."

275. MO. REV. STAT. (1949). "If when application is made for the discharge of a defendant under either Section 545.890 or 545.900 the court shall be satisfied there is material evidence on the part of the state which cannot then be had, that reasonable exertions have been made to procure the same and that there is just ground to believe that such evidence can be had in the succeeding term, the cause may be continued to the next term, and the prisoner remanded or admitted to bail, as the cause may require. If the defendant shall not be tried before the end of the term last mentioned, the state shall not be entitled to any further continuance of the case, and the prisoner shall, if he requires it, be discharged."

be entitled to discharge.²⁷⁶

The ramifications surrounding these statutes are so multifarious that it would not be beneficial to go into them thoroughly. We are paramountly concerned with the effect of these statutes. It is true that at common law, in the absence of special statutes of limitations, the mere failure to find an indictment or to proceed with the case after indictment was brought would not operate as a discharge of the accused from the offense.²⁷⁷ Also, in some states, the statutes provide that the discharge shall be from imprisonment or bail, and without other language it has been held in these states, that this does not operate as a limitation to the bringing of a subsequent indictment on that case.²⁷⁸ However, in Missouri the statutes specifically provide that the failure to prosecute shall discharge the accused so far as relating to the offense or from the crime.²⁷⁹ A failure to prosecute, therefore, in Missouri works a final discharge from the offense.

When the requisite time has elapsed and no showing has been made by the state for further delay, the defendant is entitled as a matter of right to a judgment of discharge so far as relates to such offense.²⁸⁰ Such a discharge is equivalent to a verdict of acquittal with judgment thereon.²⁸¹

. . . it makes no difference that the defendant was never in fact put in jeopardy of life or limb, under the first indictment within the meaning of Article 5 of the Amendments to the Constitution of the United States as the order discharging him under section 4223 (*supra*) was and is an absolute acquittal of the offense

276. MO. REV. STAT. (1949). "In all cities or counties in this state in which there shall be more than two regular terms of the court having jurisdiction of criminal cases, the defendant shall not be entitled to be discharged for the reasons and under the circumstances mentioned in Section 545.890 until the end of the third term after the indictment was found and under the circumstances mentioned in Section 545.900 the defendant shall not be entitled to be discharged until the end of the fourth term after the indictment was found and in either case the matter of discharge shall, at the end of such third and fourth terms, be governed by the provisions of Section 545.910."

277. At common law, under the statutes of limitation, the failure to bring the indictments within a certain period of time did not work a discharge. *United States v. Cadaar*, 197 U.S. 475 (1905).

278. *State v. Jenkins*, 19 Wash.2d 181, 142 P.2d 263 (1943).

279. *State v. Wear*, 145 Mo. 162, 46 S.W. 1099 (1898). "If the defendant be out on bail and be not brought to trial before the end of the third term of the court in which the cause is pending, he is 'entitled to be discharged so far as relating to such offense.'"

280. *State v. Wear*, *supra* n. 279.

281. *Ibid.*

and a complete bar to any other further prosecution against him for the same offense.²⁸²

Although the aforementioned enactments providing for a speedy trial "are criminal statutes and should be strictly construed in the interest of liberty of the citizens,"²⁸³ the protection of said statutes, being enacted for the benefit of the accused, may be waived by him.²⁸⁴ These statutes provide that a defendant who was not tried after three terms of court may be tried if "the delay . . . be occasioned by the want of time to try such cause at such third term."²⁸⁵ If the court is satisfied that there is material evidence on behalf of the state which cannot then be had and reasonable attempts to procure the same have been exerted, and there is just cause to believe that such evidence can be obtained by the next succeeding term, the cause may be remanded to the next term.²⁸⁶ These exceptions arise out of the exigency of the situation itself and as such do not hinder but in fact further public justice.²⁸⁷

In all other instances except those enumerated above, if the cause proceeds beyond the third term without the accused being brought to trial,

282. *State v. Wear*, *supra*. n. 279 at p. 287. After the accused was indicted and held to answer on bail, he was not brought to trial before the third term of the court in which the cause was pending. Said delay did not happen on behalf of any application by defendant but at the instance and application of the state even though there was not a want of time on the part of the court to try the cause. The charges against the appellant were discharged. Thereafter the defendant was indicted again on the same charge and convicted of second degree murder. On appeal, the court held that the discharge acted as a final judgment against the accused and he could not be retried for the crime for which he was discharged. "No case can be found in the books where a person discharged because of the failure of the state to bring him to trial within a given time has ever been put on his trial for the offense from which he was discharged. . . ."

283. *State ex rel. Stephens v. Wurdeman*, 295 Mo. 566, 246 S.W. 189 (1922).

284. *State v. Hicks*, 353 Mo. 950, 185 S.W.2d 650 (1945); *State v. Nelson*, 279 S.W. 401 (1925); *State v. Pierson*, 343 Mo. 841, 123 S.W.2d 149 (1938).

285. Mo. REV. STAT. §§ 545.890 and 545.900.

286. *Id.* at § 545.910.

287. *State v. Wear*, 145 Mo. 162, 46 S.W. 1099 (1898). "This is the inflexible rule fixed by the law itself, when there are no delays occasioned by the defendant or want of time by the court to try the case and the fact that the time during which the defendant is out on bail may be extended beyond those terms, by reason of continuances on his part or on that of the court for want of time to try the case, does not do away with the statute being a statute of limitations, for such extensions of time are incident to all statutes of limitations. For although the time prescribed by the statute cannot be diminished, yet its running may be retarded in consequence of various circumstances occurring which the state mentions as hindering causes."

the accused is automatically²⁸⁸ entitled to a discharge which acts as an acquittal of the offense charged in the indictment²⁸⁹ and bars a subsequent prosecution for the same offense.

X. CONVICTION

The provision of the Missouri Constitution, "nor shall any person be put again in jeopardy of life or liberty for the same offense after being once acquitted by a jury,"²⁹⁰ does not strictly apply where the defendant was not acquitted, but was convicted, on the first trial. There are two reasons why a person who is convicted of an offense cannot be retried for that offense: 1) the common law rule that no person shall for the same offense be twice put in jeopardy is in force in this state, and, as such, precludes a second conviction and punishment for the same offense;²⁹¹ 2) Section 556.240 prohibits a person who has been convicted on an indictment from being tried again for the same offense.²⁹²

After being once convicted, a defendant cannot:

. . . thereafter be tried or convicted of a different degree of the same offense, nor for any attempt to commit the offense charged

288. *State v. Wear*, *supra* n. 287. Defendant does not have to demand a trial before he will be entitled to a discharge.

289. *State v. Bithorn*, 278 S.W. 685 (1925). Such statutes, although referring to discharge within a stated time after indictment, have been held to apply also to prosecutions by information.

290. Art. 1, § 19 (1945).

291. *State v. Toombs*, 326 Mo. 981, 34 S.W.2d 61 (1930); *State v. Linton*, 283 Mo. 1, 222 S.W. 847 (1920); *State v. Bockman*, 344 Mo. 80, 124 S.W.2d 1205 (1939). "We, therefore, hold appellant sufficiently invoked the protection of the rights under that maxim of the common law, approved by varying federal and state constitutional and statutory provisions that no man shall be twice put in jeopardy of life and limb or convicted for the same offense. There seems to have risen some confusion on the question of former jeopardy and our own reports are not entirely free from criticism along this line. After carefully reviewing many of the cases upon the subject we are led to the belief that this confusion arises by reason of failing to call to mind the law of former jeopardy first arose under the common law, and that in some State Constitutions, and the Federal Constitution, the old common law rule that no person shall for the same offense be twice put in jeopardy of life or limb is incorporated in its entirety. While in other State Constitutions, notably that of Missouri, apparently only a portion of the common law on the subject was incorporated and thereby removed from legislative interference. But it goes without saying that the common law as to former jeopardy is in effect in this state, unless the same has been changed or modified by the Constitution or by statutory enactment. The fact that the portion of the common law on this subject was written into our Constitution should certainly not be given the effect of having repealed the remaining portion of common law on the subject unless the constitutional provision should be found to be in conflict therewith."

292. MO. REV. STAT. (1949).

in the indictment, or any degree thereof, or any offense necessarily included therein, provided he could have been legally convicted of such degree or offense, or attempt to commit the same, under the first indictment.²⁹³

It is a principle too well established in American jurisprudence to call for extensive elaboration that one convicted in a court of competent jurisdiction and punished cannot thereafter be subject to a second punishment for the same offense.

If there is anything settled in the jurisprudence of England or America it is that no man can be twice lawfully punished for the same offense.

Also:

The Common Law not only prohibited the second punishment for the same offense but it went further and forbid a second trial for the same offense whether the accused had suffered punishment or not, or whether in the former trial he had been acquitted or convicted.²⁹⁴

No distinction is made in Missouri as to the effect of an acquittal or conviction on an indictment in regard to the plea of former jeopardy. A prior conviction, like a prior acquittal, can be pleaded as a bar to a subsequent prosecution for the same offense.²⁹⁵

A. Court of Competent Jurisdiction

A plea of former conviction to an indictment will not be sustained unless the prior conviction was had in a court which had jurisdiction of the case.²⁹⁶ A conviction, for instance in a justice of the peace court, would not be a bar to a subsequent indictment in another court if jurisdiction were expressly denied the justice of the peace.²⁹⁷

293. Mo. REV. STAT. § 556.240 (1949).

294. *Ex parte Lange*, 18 Wall. (U.S.) 163 (1873); *vide*, *United States v. Chouteau*, 102 U.S. 603 (1880); *State ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

295. *State v. Toombs*, *supra* n. 291.

296. *State v. Payne*, 4 Mo. 376 (1836).

297. *State v. Payne*, *supra* n. 296. Defendant was indicted for conspiring with others to unlawfully beat and assault another and was found guilty before the Justice of the Peace in St. Louis. Thereafter, the defendant was brought before the circuit court and pleaded the former conviction before the justice of the peace

If for any reason it can be said that the accused has not been accorded due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, then the defense of prior jeopardy will not protect the defendant from a new trial, for in holding that the previous trial was a nullity the court also must hold that the defendant had not been in jeopardy under the charge.²⁹⁸ The accused, therefore, not having been put in jeopardy by a void judgment of conviction, upon his discharge thereunder, may again be arrested and prosecuted.²⁹⁹

B. *Followed by a Judgment*

It has been held that a former conviction cannot be pleaded as a bar unless it has been followed by a judgment; the theory being that the whole proceeding is considered a nullity.³⁰⁰ This, however, does not appear to be the ruling of the common law, nor does it appear to follow the rationale of the plea of *autrefois convict*. As Blackstone says:

The plea of *autrefois convict* or of former conviction for the same identical crime, though no judgment was ever given or perhaps will be, (being suspended by benefit of clergy or other causes) is a good plea in bar to an indictment. And this depends upon the same principle as the former (that is *autrefois acquit*), that no man ought to be twice brought in danger of his life for one and the same crime.³⁰¹

Although no cases have been cited on the point in Missouri, since Missouri has adopted the common law and the common law forbids a second trial even though no judgment has been entered in the previous trial, there could be no second trial of the case.³⁰²

If the sentence had been entered, but not served, then a new sentence could be imposed.³⁰³ This is based on the premise that, "if at the time of

court. The Supreme Court of Missouri denied the plea, stating that the laws of Missouri "giving the Justice of the Peace jurisdiction expressly except from the jurisdiction of the Justice of the Peace all cases of riots. This case is thereby not triable before a Justice of the Peace." This jurisdiction to try riot cases belonging to the circuit court, the plea of the defendant is without merit.

298. *Mitchell v. Youell*, 130 F.2d 880 (4th Cir. 1942); *Bryant v. United States*, 214 Fed. 51 (8th Cir. 1914).

299. *Mitchell v. Youell*, *supra* n. 298; *Bryant v. United States*, *supra* n. 298.

300. *Pond v. State*, 120 Tex. Crim. 232, 48 S.W.2d 285 (1932).

301. 4 BLACKSTONE, COMMENTARIES 336.

302. *Kring v. Missouri*, 107 U.S. 221 (1883).

303. *Armenta v. United States*, 48 F.2d 568 (9th Cir. 1931).

the re-sentence, the defendant had not begun the service of his original sentence, then there is no question of jeopardy or double punishment. . . ."³⁰⁴ Also, the erroneous imposition of two sentences for a single offense of which he has pleaded guilty does not constitute double jeopardy.³⁰⁵ The proper remedy for the party is to apply for vacation of the sentence and a resentence in conformity to the statute under which he was adjudged guilty.³⁰⁶

C. Defective Indictment or Information

A Missouri Statute specifically provides that an accused may plead an acquittal as a bar to a subsequent prosecution even though that acquittal was had on an indictment which was defective in form or substance.³⁰⁷ This statute has been deemed inapplicable to instances where there was a conviction on a defective indictment or information on the previous trial.³⁰⁸ Since the provisions of the statute are delimited in favor of an acquittal, a conviction under a faulty indictment or information not putting a defendant in jeopardy, does not constitute a bar to a subsequent prosecution for the same offense on a valid indictment.³⁰⁹

D. Same Offense

The plea of *autrefois acquit* and the evidence which is adduced must show that the offense of which the defendant was convicted is the same offense as that charged in the subsequent indictment.³¹⁰ In this regard the same rules which apply to acquittal also apply to conviction.

304. *Ibid.*

305. *Holiday v. Johnston*, 313 U.S. 342 (1941).

306. *Ibid.*

307. Mo. REV. STAT. § 556.260 (1949).

308. *State v. Keating*, 223 Mo. 86, 122 S.W. 699 (1909); *State v. Hall*, 141 Mo. App. 701, 125 S.W. 229 (1910). Defendant was indicted on four counts charging violation of the option laws. The trial was held before a jury resulting in a conviction on the first count and an acquittal on the other three counts. Defendant appealed to the St. Louis Court of Appeals which held the indictment insufficient and discharged the defendant, whereupon the prosecuting attorney filed information on the same charges in the next term of court. The court held that the defendant may be tried on the count on which he was convicted, but not on the three counts on which he was acquitted, since this statute does not apply where there is a conviction, but only where there is an acquittal on the merits and the facts.

309. *State v. Keating*, *supra* n. 308; *State v. Manning*, 168 Mo. 418, 68 S.W. 341 (1902); *State v. Hall*, *supra* n. 308.

310. *State v. Wister*, 60 Mo. 592 (1876); *State v. Vollenweider*, 94 Mo. App. 158, 67 S.W. 942 (1902).

XI. WAIVER OF THE PRIVILEGE

The privilege of immunity from twice being put in jeopardy which is granted by the Missouri Constitution is a privilege which is personal to the accused alone, and being a privilege may be waived by him.³¹¹ The instances wherein, and the means whereby, an accused may waive his right to plead twice being put in jeopardy are multitudinous and to list each one at this time would merely be repetitious. The instances wherein a waiver occurs fall under the general rule that whenever the accused, by an affirmative act on his part, procures a prior judgment to be set aside or sets in motion the machinery for a judgment to be set aside, then by this affirmative act the accused has waived his right to plead this former judgment as a bar to a subsequent prosecution.³¹²

When a subsequent prosecution is commenced as to an offense for which the accused has already been put in jeopardy, the plea of former jeopardy is waived by failure of the accused to allege it as a defense, or if alleged as a defense, the failure of the accused to enter evidence and to do other affirmative actions consonant with pleading it as a defense. However, in the second prosecution if the information is drawn up in such a manner that the accused is unable to ascertain that this is the same prosecution for which he was formerly tried and placed in jeopardy, these facts negate any presumption or inference of waiver of the plea by the accused and hence the entrance of the plea of former jeopardy at the close of the trial would be a timely entrance.³¹³

A. Arrest of Judgment

The Missouri Constitution provides, “. . . and if judgment be arrested after a verdict of guilty on a defective indictment or information . . . the prisoner may be tried anew on a proper indictment or information or according to the law.”³¹⁴ It is provided by statute that when the defendant has been acquitted or convicted, “. . . but the judgment shall for any cause be arrested, he may be tried and convicted on a subsequent

311. *State v. Harper*, 353 Mo. 821, 184 S.W.2d 601 (1945); *Ex parte Dixon*, 330 Mo. 652, 52 S.W.2d 181 (1932); *State v. Reynolds*, 345 Mo. 79, 131 S.W.2d 552 (1939).

312. *State v. Austin*, 318 Mo. 859, 300 S.W. 1083 (1927); *State v. Herring*, 92 S.W.2d 132 (Mo. 1936).

313. *State v. Bockman*, 124 S.W.2d 1205 (Mo. 1939).

314. Mo. CONST., art. 1, § 19 (1945).

indictment for the same offense, . . .”³¹⁵ It is a settled principle of law in Missouri that under these constitutional and statutory provisions, any defendant in a criminal case who procures a verdict or judgment against him to be set aside³¹⁶ may be prosecuted again for the same offense of which he was previously convicted.³¹⁷

If a valid verdict which has been entered by a jury duly impaneled and sworn (and all the other prerequisites of jeopardy having been duly met) is set aside by the court sua sponte, said act is a bar to a subsequent prosecution for the same offense unless the accused voluntarily acquiesces and consents to the action of the court.³¹⁸

The United States Courts also recognize the right of an accused in a criminal case to have a verdict and judgment against him set aside. There is concomitant with this right of the accused, the right of the prosecution to procure a new indictment for the offense which has just been set aside.³¹⁹ When the indictment or information in the criminal prosecution is so defective or insufficient to charge the offense intended to be charged and the

315. Mo. REV. STAT. § 556.250 (1949).

316. Mo. REV. STAT. § 547.040 (1949); Supreme Court Rule 27.21. Motion in arrest of judgment is abolished.

317. *State v. Stroemple*, 355 Mo. 1147, 199 S.W.2d 913 (1947). Defendants were sentenced on pleas of guilty to informations charging armed robbery of a bank. Petition for writ of habeas corpus was sustained because of failure of trial court to appoint counsel. Defendants alleged that since they had been once tried for the same offense of armed robbery, that this was a bar to all subsequent prosecutions for the same offense. The court stated: “In these circumstances the appellants’ prior convictions upon their plea of guilty to the informations having been set aside as void, they could not validly support the pleas in bar that they had theretofore been placed in jeopardy for the same offense.” *Cert. denied*. *Skiba v. State of Missouri*, 331 U.S. 851 (1864).

318. *State v. Snyder*, 98 Mo. 555, 12 S.W. 369 (1889). The jury brought in the verdict which the court set aside sua sponte. The Supreme Court of Missouri held, “Therefore, the proceedings of the second trial being against law cannot be permitted to stand. The jurors were the sole judges of the heinousness of the offenses, and of the punishment to be meted out therefor; and so long as they assessed a punishment within the bonds prescribed by the statute, their verdict was beyond the control of any earthly power, so far as concerns setting aside and granting a new trial, in opposition to the will of the defendant. And such opposition will be presumed, where the record, as here, recited that the verdict was set aside by the court ‘on its own motion.’” *Ex parte Snyder*, 29 Mo. App. 256 (1883). The court recognized the fact that verdicts may be set aside and new trials may be awarded on the application of the defendant. “But whence comes the power of the trial judge, of his own motion, to vacate a verdict which he has received? Even by unnecessarily discharging the jury there is high authority for saying the act was tantamount to an acquittal.”

319. *Murphy v. Massachusetts*, 177 U.S. 155 (1900); *Ex parte Lange*, 18 Wall. (U.S.) 163 (1873); *United States v. Ball*, 163 U.S. 662 (1896).

defendant initiates a motion in arrest of judgment on the grounds of said defect or insufficiency on the sustentation of his motion by the court, the accused is not only estopped to deny that the information or indictment was defective or insufficient, but the accused becomes amenable to a subsequent prosecution for the same offense.³²⁰

B. Appeal

1. A Pending Appeal

The mere pendency of an appeal does not deprive the defendant of the right to assert the judgment being appealed as a bar to a subsequent prosecution for the same offense, until such time as the prior judgment shall be reversed by the appellate court.³²¹ This is based on the rationale that even though there may be pending a motion to appeal, the judgment entered in the case is still a conclusive judgment which will bar further prosecution, for "when one has taken his appeal from the judgment against him, whether for murder or for debt, he cannot be deprived of the rights to which the records show he is entitled."³²² The right to use this judgment as a bar cannot be wrested from the accused by any power.

A judgment of an appellate court does not become the decision of the court upon which a final judgment can be entered and thus sustain a plea of former jeopardy until final disposition of the pending motion for rehearing.³²³

2. Judgment Reversed on Appeal

Where the accused on his own motion procures an appeal and thereafter the first conviction is reversed and remanded, the accused becomes

320. *State v. Owen*, 78 Mo. 367 (1883). Defendant was indicted on two counts: first, for larceny and the second, for embezzlement. Upon trial, the defendant was found guilty of the first count and not guilty to the second. However, due to a fatal defect in the first count the judgment was arrested and upon a subsequent acquit which was overruled by the court.

State v. Broeder, 90 Mo. App. 156 (1901). "When an attempt by information has been made to charge the defendant of a crime, and he is before the court to answer the charge intended to be made against him, it would be a perversion of both the spirit and intent of the code of criminal procedure to discharge him before a valid information could be filed against him by the prosecuting officer for the reason the first information was insufficient to charge the offense intended to be charged." *Pratt v. United States*, 102 F.2d 275 (D.C. Cir. 1939).

321. *State v. Bockman*, 124 S.W.2d 1205 (Mo. 1939); *State v. Biesemeyer*, 136 Mo. App. 668, 118 S.W. 1197 (1909).

322. *State v. Biesemeyer*, *supra* n. 321.

323. *State v. White*, 363 Mo. 83, 248 S.W.2d 841 (1952).

estopped to plead the prior conviction as a defense to a subsequent prosecution, since the reversal of the first conviction and the remanding of the cause put it in the same position as if no proceedings had been had in the case against the accused.³²⁴

This rule is non-applicable to co-defendants when one defendant is acquitted of the charges and the second defendant is convicted. The reversal of the judgment of conviction of the latter defendant in no way affects the former defendant from pleading his acquittal as a bar to a subsequent prosecution.³²⁵

C. *Procuring a New Trial*

Although the Missouri Constitution specifically provides that no person shall "be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury,"³²⁶ whenever an accused person, convicted of a crime, procures a verdict against him to be set aside and a new trial granted on his motion, said affirmative acts are deemed to be a waiver of his constitutional protection against twice being put in jeopardy.³²⁷ The accused thereby becomes estopped to plead the former conviction as a bar to another trial for the same offense.

This postulate also applies if the court grants a new trial on its own motion while the motion by the defendant for a grant of new trial is pending, and the defendant acquiesces in a new trial being granted.³²⁸ But if the court of its own motion sets aside the verdict and orders a new

324. *Hill v. Texas*, 316 U.S. 400 (1942); *State v. White*, *supra* n. 323; *State v. Rozell*, 279 S.W. 705 (Mo. 1926); *State v. Goddard*, 162 Mo. 198, 62 S.W. 697 (1901).

325. *Ball v. United States*, 163 U.S. 662 (1896).

326. MO. CONST. art. 1, § 19 (1945).

327. *Stroud v. United States*, 251 U.S. 15 (1919); *United States v. Ball*, 163 U.S. 662 (1896); *Murphy v. Massachusetts*, 177 U.S. 155 (1900); *Hopt v. Utah*, 114 U.S. 488 (1885); *Louisiana v. Resweber*, 329 U.S. 459 (1947); *State v. Herring*, 92 S.W.2d 132 (Mo. 1936); *State v. Beard*, 334 Mo. 909, 68 S.W.2d 698 (1934); *State v. Austin*, 318 Mo. 859, 300 S.W. 1083 (1927); *State v. Patterson*, 88 Mo. 88 (1885); *State v. Bruffey*, 11 Mo. App. 79 (1881).

328. *State v. Harper*, 353 Mo. 821, 184 S.W.2d 601 (1945). The accused requested additional time in which to file a motion for a new trial and this was granted by the court. Thereafter the court, in the accused's presence and of its own motion, granted a new trial and the accused acquiesced as to this motion and applied for leave and was granted the right to file a new recognizance and thereafter participated in a second trial without interposing the plea of former jeopardy.

trial and the defendant objects thereto, the defendant in the subsequent trial is thereby placed in jeopardy for the second time.³²⁹

D. A Verdict Which Acquits in Part and Convicts in Part

If an indictment or information containing several counts charges the accused with the commission of several separate and distinct offenses and thereafter the accused is acquitted as to some of these counts and convicted under others, the sustention by the court of his motion for a new trial does not constitute a waiver for the offenses charged in the counts on which he was acquitted, but the accused may be subject to a subsequent prosecution for the offenses contained in the counts on which he was convicted.³³⁰ This principle is predicated on the idea that the defendant in his application for a reversal of the conviction seeks a reversal only as to that portion of the verdict which supports his conviction and seeks to retain not only those parts which sustain the acquittal, but the acquittal itself.³³¹

In view of Section 556.260³³² which allows the defendant to plead an acquittal upon the merits as a bar to a subsequent prosecution even though there have been defects in the form or substance of the indictment, a motion by the defendant to have the verdict set aside on the grounds of a faulty indictment is applicable only on those counts of the indictment on which the defendant was convicted.³³³ On those counts on which the defendant

329. *State v. Snyder*, 98 Mo. 555, 12 S.W. 369 (1889); *Ex parte Snyder*, 29 Mo. App. 256 (1888). Defendant was found guilty by a jury and a penalty was assessed thereon. The setting aside of such verdict as the penalty prescribed by the jury on the motion of the court itself was in contravention of the Missouri Bill of Rights and a violation of the clause that no person can be twice put in jeopardy of life or liberty.

330. *State v. Hall*, 141 Mo. App. 701, 125 S.W. 229 (1910).

331. *Ibid.*

332. MO. REV. STAT. (1949).

333. *State v. Hall*, *supra* n. 330. Defendant was convicted on one count for violation of the local option law and acquitted on three other counts. The court held the defendant could not be tried again for the offenses alleged on the three counts on which he was acquitted, even though the court held on appeal that the indictment was insufficient and discharged the defendant thereon. But the defendant could be reindicted and prosecuted for that count in the indictment for which he had been convicted.

State v. Kattlemann, 45 Mo. 105 (1864). Defendant was indicted on five counts for forgery and was tried on the whole indictment and found guilty on only the first count. The verdict was set aside and a new trial awarded defendant who was thereupon tried on the whole indictment at the second trial and found guilty on the first count and also on the third. The Supreme Court of Missouri stated: "This was an error. The verdict on the first trial was an acquittal on all but the first count and he should have been tried again upon that alone."

was acquitted, the acquittal would stand as a permanent bar to any subsequent prosecution thereon.³³⁴

1. Contradictory Verdicts

If two indictments or counts of an indictment charge the defendant with commission of the same offense, and a verdict of guilty is brought in on one count and not guilty on the other count, it is the law of Missouri that such a verdict is so patently contradictory that it cannot be considered a verdict either of conviction or acquittal.³³⁵ A reversal and remanding of the case for a new trial does not constitute putting the defendant in jeopardy a second time.³³⁶

The law formerly in Missouri was that when the offense charged in two counts of an indictment was the same, an acquittal of the defendant on the first count amounted to a bar to his conviction on the second count even though at the same time the jury had entered a verdict of guilty on the second count.³³⁷

2. Separate Offenses in the Same Counts

Where a statute permits a prosecution for two distinct, but separate and dependent offenses, such as burglary and larceny, in the same count or separate counts of the same indictment and the defendant is indicted for both burglary and larceny in one count and is convicted of the larceny but acquitted as to the burglary, the defendant's motion for a new trial

334. *State v. Hall*, *supra* n. 330; *State v. Kattlemann*, *supra* n. 333.

335. *State v. Akers*, 278 Mo. 368, 213 S.W. 424 (1919). Each count of the information charged the appellant with the commission of the identical crime. The verdict found the defendant guilty on the first count and not guilty under the second count. "The verdict is entirely inconsistent because the jury could not have legally found what the verdict says they did find. Appellant was either guilty or not guilty of the crime and could not have been both as found by the jury. We therefore think the verdict is too contradictory to support a judgment of conviction. . . . It is true that Article 2, Section 23 of the Missouri Constitution provides that the prisoner shall not again for the same offense be put in jeopardy 'after being once acquitted by a jury' but that constitutional provision undoubtedly has in contemplation a legal verdict of acquittal. The verdict held in review in the *Headrick* case and likewise the verdict in the case at bar, as has been pointed out above are too contradictory to be considered a verdict either of conviction or acquittal."

336. *State v. Akers*, *supra* n. 335.

337. *State v. Headrick*, 179 Mo. 300, 78 S.W. 630 (1904), *overruled by State v. Akers*, *supra* n. 335.

is not a waiver of his constitutional rights as to the acquittal.³³⁸ The acquittal in such a situation operates as a bar to a subsequent prosecution as to the burglary but the defendant may be re-tried on the offense of which he stood convicted, larceny.³³⁹

3. Withdrawal of a Count of an Indictment

Whenever several counts of an indictment are pending against the accused, the withdrawal of one of those counts from the consideration of the jury is an acquittal of the count withdrawn and forever bars a subsequent prosecution on that count.³⁴⁰ That withdrawal cannot be pleaded as a bar to the remaining counts of the indictment which were not withdrawn from the consideration of the jury.³⁴¹

4. A Verdict Silent as to Part of the Offenses Charged

If several indictments or counts in an indictment charge the defendant with the commission of separate and distinct offenses, and the jury brings in a verdict of guilty on one indictment or on one count of the indictment and is silent as to the remainder, the inadvertence of the jury is not reversible error.³⁴² Furthermore, the law treats such silence as an acquittal to all other indictments or counts as to which the jury remained silent.³⁴³ On a new trial being granted, defendant can be re-tried only on those indict-

338. *State v. Bruffey*, 11 Mo. App. 79 (1881). "If there had been two indictments, one for each of the crimes charged, and two separate trials, it will hardly be questioned that the granting of a new trial in one case would not reopen a verdict of acquittal in the other. Such an acquittal would be a perpetual bar under Article II, section 23 of our state constitution; . . . We are unable to see how the General Assembly can, by a statute regulating criminal procedure, deprive any citizen of a constitutional right. No such effect was intended and none can follow from a law which simply provides for the trial of two offenses charged under one indictment. The prosecution for burglary in this case was ended forever by the verdict of not guilty."

339. *State v. Bruffey*, *supra* n. 338.

340. *State v. Hess*, 144 S.W. 489, 240 Mo. 147 (1912). Defendant was indicted on two counts of arson. The first count was withdrawn from the consideration of the jury and the court determined that this in no way affected the other count pending before the jury, but was merely an acquittal on the count pending therein, and as such had the same effect as any other acquittal on subsequent prosecutions being held on that offense.

341. *Ibid.*

342. *State v. Hayes*, 78 Mo. 600 (1883); *State v. Cofer*, 68 Mo. 120 (1878).

343. *State v. Hayes*, *supra* n. 342; *State v. McCue*, 39 Mo. 112 (1866); *State v. Gannon*, 11 Mo. App. 502 (1882); *State v. Cofer*, *supra* n. 342; *State v. Patterson*, 116 Mo. 510, 22 S.W. 696 (1893); *State v. Polk*, 144 Mo. App. 326, 127 S.W. 933 (1910).

ments or counts of the indictment on which he was convicted in the prior prosecution.³⁴⁴ As to those offenses on which the jury was silent, he may plead those as a bar to a subsequent prosecution, just as if the jury had brought in a direct acquittal on those charges.³⁴⁵

The procurement or the acquiescence of the defendant in having the first verdict set aside is not to be construed as a waiver of the legal advantage of an acquittal which inured to him from the failure of the jury to make a direct finding on the pending indictment and counts of the indictment.³⁴⁶ By agreeing that the verdict which was rendered against him might be set aside, the defendant's agreement thereto cannot be construed as an agreement that an implied verdict of not guilty which was rendered in his favor on the silent counts should also be set aside, for his position in such a case would be no different than if a direct verdict of acquittal had been brought in by the jury.³⁴⁷

This general rule is applicable even though the indictments charge two different offenses involving the same transaction, such as rape and an attempt to commit a rape upon the same person.³⁴⁸ If the jury brings in a verdict on one count and is silent as to the other, this amounts to an acquittal of the count on which the jury was silent.³⁴⁹

344. *State v. Gannon*, *supra* n. 343; *State v. Polk*, *supra* n. 343.

345. *Ibid.*

346. *State v. Gannon*, *supra* n. 343. "The consent of the prisoner in this case to have the first verdict set aside, is not to be construed, we think, as an agreement on his part to waive any legal advantage from the failure of the jury to make a finding on the second count. He agreed that the verdict which was rendered against him might be set aside. He did not thereby agree that the implied verdict of not guilty, which had been rendered in his favor on the second count, should also be set aside. His position is certainly not worse than if he had applied for and obtained a new trial, in which case, under the ruling of the case of the *State v. Bruffey*, he could not again be put upon trial under the second count."

State v. Polk, *supra*. "When the defendant had been convicted on trial of only one of the three counts, on appeal, he could not again be tried on the counts on which he had been acquitted. His appeal on the count on which he was convicted, did not appeal the counts on which he had been acquitted."

347. *State v. Gannon*, *supra* n. 343; *State v. Polk*, *supra* n. 343.

348. *State v. Cofer*, *supra* n. 342.

349. *State v. Cofer*, *supra* n. 342. The defendant was indicted on two counts, one for committing and the other for attempting to commit a rape. The accused was tried on both counts and convicted on the count of committing rape. "If found guilty of committing the rape he could not have been found guilty of attempting the commission of the same rape," and therefore the silence of the jury on the count of committing the rape acted as an acquittal on that count and the defendant cannot be retried on that count.

However, if different indictments or counts of an indictment are simply formal variations, stating the same offense, and the jury returns a verdict of guilty as to one count but is silent as to the remaining counts, the silence of the verdict in such a case does not constitute an implied acquittal on such counts as to entitle the accused, if a new trial is granted, to be discharged as having been once acquitted.³⁵⁰

Any other view would, to our mind, lead to an absurdity. It would amount to saying that the mere inference of an acquittal arising from the silence of the verdict as to certain counts is strong enough to overcome a verdict of guilty finding expressly to the contrary under a count charging the identical crime.³⁵¹

As Shylock was frustrated in his attainment of a pound of flesh by the incongruity of not being able to take with the flesh one drop of blood, so also is the accused in the above situation frustrated in his attempt to have an implied acquittal overrule a direct conviction.

E. A Verdict Convicting of a Lower Degree of Crime Than Charged

As was discussed previously, an acquittal³⁵² or a conviction³⁵³ on an indictment for a greater degree of an offense is a bar to a subsequent indictment for a lesser degree of an offense included in the former, wherever under the indictment for the greater offense the defendant could have been convicted of the lesser. The converse of this is not true, however, where there is a conviction of a lower degree of a crime than charged and a new trial is granted by motion or on appeal.³⁵⁴

In a prosecution for a felonious assault with attempt to ravish, if defendant is convicted of a common assault and thereafter a new trial is granted, the cause stands as though there had been no trial and defendant may be re-tried for the felonious assault charged in the original information.³⁵⁵ The law decrees that there was no acquittal of the greater charge³⁵⁶

350. *State v. Reeves*, 276 Mo. 339, 208 S.W. 87 (1918).

351. *State v. Reeves*, *supra* n. 350. "The silence of the first verdict to counts two and three did not warrant an entrance of acquittal or amount to an acquittal thereunder."

352. *State v. Brannon*, 55 Mo. 63 (1874).

353. *State v. Ball*, 28 Mo. 327 (1858).

354. *Brantley v. Georgia*, 217 U.S. 284 (1910); *Irono v. United States*, 199 U.S. 521 (1905); *State v. Higgins*, 252 S.W.2d 641 (Mo. 1952); WHARTON, CRIMINAL LAW § 396, p. 559 (12th ed. 1932).

355. *State v. Higgins*, *supra* n. 354.

356. *Ibid.*

and hence no deprivation of any right accorded the defendant by Sections 556.240 and 556.260.³⁵⁷

Before Article II, Section 23 of the Constitution of 1875 was materially changed³⁵⁸ to add the words:

. . . and if judgment be arrested after a verdict of guilty, or a defective indictment, or if judgment on a verdict of guilty be arrested for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law.

it was the law of Missouri that a person who was indicted and tried on a greater offense and convicted on a lesser offense could not on a second trial be prosecuted for the greater offense if the prior judgment was reversed for error in law or set aside on a motion of the defendant himself.³⁵⁹

The ratiocination of these earlier decisions is that if a verdict of guilty of a lesser offense is entered, then of necessity it must be inextricably implied from the finding of guilty of the lesser offense that the defendant is not guilty of the greater offense.³⁶⁰ These decisions, however, fail to con-

357. Mo. REV. STAT. (1949).

358. *Kring v. Missouri*, 107 U.S. 221 (1883). "There is no question of the right of the State of Missouri, either by a fundamental law or by an ordinary act of the legislature, to abolish this rule, that it is a valid law as to all offenses committed after its enactment."

359. *State v. Brannon*, 55 Mo. 63 (1874). Although acquitted of the charge of grand robbery in the first degree the indictment also embraced the charge of grand larceny. The court stated: "But I submit, that the major includes the minor; that when one is charged with the crime of murder in the first degree, and is tried and acquitted by a jury, he cannot be again tried upon the same or another indictment for an inferior degree of homicide; and the same rule holds in a case of robbery in the first degree. If a new indictment were found against this defendant, for the same supposed offense, he could plead his acquittal in bar, and could not be again tried on the same indictment."; *State v. Ross*, 29 Mo. 32 (1859); *State v. Smith*, 53 Mo. 139 (1873); *State v. Ball*, 28 Mo. 327 (1858). These latter cases involve the defendant being charged with murder in the first degree and convicted of murder in the second degree. The court held that such a conviction barred the accused from being prosecuted again for first degree murder although he could be tried for second degree murder.

360. *State v. Ross*, 29 Mo. 32, 46 (1859). "Of what avail, then, is the constitutional protection, which is thus controlled by a technical notion of the entirety of a verdict, and leaves the accused the alternative of either asking relief from a violation of law only on condition of being tried a second time for an offense of which he has been declared by a jury of the country guiltless, or of submitting to the consequences of the error, whatever they may be, without regress. If he has the error corrected, he waives his claim to the rights which the law of the land promises him. If he has the error, for which he has been wrongfully convicted, corrected, he is only undoing what has been done in violation

sider that when the affirmative decision of guilty which furnishes the sole basis for the negative implication of not guilty is eliminated by the voluntary action of the accused seeking a new trial, then the negative implication should not be allowed to stand. This was clearly set forth in *Irono v. United States*, where the Supreme Court of the United States stated:

. . . it seems much more rational and in better accord with the proper administration of the criminal law to hold that, by appealing, the accused waives a right to thereafter plead once in jeopardy, when he has obtained a reversal of the judgment, even as to that part which acquitted him of the higher while convicting him of the lower offense. When, at his own request, he has obtained a new trial, he must take the burden with the benefit, and go back for a new trial on the whole case. It does not appear to us to be a practice founded on solid reason to permit such a limited waiver by an accused party while himself asking for a reversal of the judgment.³⁶¹

After being convicted of the lower degree of crime when charged with a higher offense, the accused by requesting a new trial waives any plea of former jeopardy which may have inured to him and consequently may be tried on the higher offense.³⁶²

This question as to the effect of a verdict which convicts of a lower degree of crime than charged arises mainly in cases of homicide. When the defendant is put to trial on this second indictment for murder in the first degree after he has been once tried and convicted of murder in the second degree,³⁶³ or convicted of manslaughter³⁶⁴ for the same offense, said

of his rights and the law of the land. He is thus necessarily once in jeopardy and convicted by reason of errors against which he protested, and in remedying which he must be subjected to a second trial. But not only so, the second trial, to which he is thus necessitated, if had at all, can only be obtained by submitting to a trial not only on the charge in which he was erroneously convicted, but also upon an offense upon which he was found not guilty."

361. *Irono v. United States*, 199 U.S. 521 (1905).

362. *State v. Beard*, 334 Mo. 909, 68 S.W.2d 698 (1934); *State v. Austin*, 318 Mo. 859, 300 S.W. 1083 (1927).

363. *State v. Stallings*, 334 Mo. 1, 64 S.W.2d 643 (1933); *State v. Beard*, *supra* n. 362; *State v. Goddard*, 162 Mo. 198, 62 S.W. 697 (1901); *State v. Billings*, 140 Mo. 193, 41 S.W. 778 (1897); *State v. Anderson*, 89 Mo. 135, 1 S.W. 135 (1886); *State v. Simms*, 71 Mo. 538 (1880); *State v. Kring*, 11 Mo. App. 92 (1881), *affirmed* 74 Mo. 612 (1883).

364. *Brantley v. Georgia*, 217 U.S. 284 (1910); *State v. Stallings*, 334 Mo. 1, 64 S.W.2d 643 (1933).

act is not deemed to be a violation of the Missouri Constitution of putting a man twice in jeopardy. Nor is it deemed to violate the "due process" clause of the Fourteenth Amendment of the Constitution of the United States.³⁶⁵

XII. APPEAL BY THE STATE

After jeopardy has attached in a criminal prosecution, the right of appeal does not lie on behalf of the state to reverse a judgment rendered in favor of the defendant because the effect of such an action would be to subject the defendant to a retrial after an acquittal, and thus would be putting the defendant twice in jeopardy for the same offense.³⁶⁶ The only exception to this rule is where the right to appeal is granted under, and in accordance with, statutory provisions.³⁶⁷

No rule of law is more firmly established in our criminal procedure than the rule holding that the right of appeal is based upon statute, and in the absence of a statute granting the right of appeal, no such right exists.³⁶⁸ A statute which gives the state a full right of appeal in criminal cases is not unconstitutional as being against the due process clause of the Fourteenth Amendment nor in derogation of the privileges and immunity clauses of the Federal Constitution.³⁶⁹

The right of the state to appeal in Missouri is governed by section 547.200 and section 547.210.³⁷⁰ The former statute sets forth that: "The state, in any criminal prosecution, shall be allowed an appeal only in the cases and under the circumstances mentioned in section 547.210." The state's right to appeal under this latter enactment extends only to appealing from sustained demurrers or exceptions to allegedly insufficient indictments or informations or when judgments thereon are arrested or set aside

365. *State v. Goddard*, 162 Mo. 198, 62 S.W. 697 (1901); *Brantley v. Georgia*, *supra* n. 364.

366. *United States v. Evans*, 213 U.S. 297 (1909); *Grafton v. United States*, 206 U.S. 333 (1907); *United States v. Sanges*, 144 U.S. 310 (1892); *State v. Hughes*, 223 S.W.2d 106 (Mo. 1949); *State v. Copeland*, 65 Mo. 497 (1877).

367. *State v. Hughes*, *supra* n. 366; *State v. Hunter*, 198 S.W.2d 544 (Mo. 1946); *State v. Reisman*, 225 Mo. App. 637, 37 S.W.2d 675 (1931); *State v. Craig*, 223 Mo. 201, 122 S.W. 1006 (1909); *State v. Beagless*, 174 Mo. 624, 74 S.W. 851 (1903).

368. *State v. Hunter*, *supra* n. 367; *State v. Hughes*, *supra* n. 366; *State v. Pottinger*, 287 S.W.2d 782 (Mo. 1956).

369. *Palko v. Connecticut*, 302 U.S. 319 (1937).

370. MO. REV. STAT. (1949).

for insufficiencies.³⁷¹ Even then, the right of appeal is hampered in its exercise by the discretion of the trial court.³⁷²

To enlarge the right of the state so as to entitle it to a new trial whenever in the course of the trial a material error has been made to the prejudice of the state would necessitate an amendment of the Missouri Constitution which specifically provides that, "no person after being once acquitted by a jury be again for the same offense put in jeopardy of life or liberty."³⁷³ In view of this constitutional provision, even if the state would secure a reversal on appeal, the defendant could not be retried by the state, because to do so would be putting the defendant in jeopardy for a second time.

XIII. CONCLUSION

The plea of former jeopardy is neither new nor is it strange to the law. It is as old as justice but as fresh as virtue itself and, like freedom, needs constant vigilance. This is illustrated by the fact that this plea arose at a time when the liberties and rights of man were subordinated to the rights assumed by the government. The constant fear that these liberties and rights will again be subordinated has nurtured the retention of this constitutional provision.

Now that the rights and liberties of the individual appear to be secure from governmental encroachment, some legal writers have given vent to the idea that the plea of former jeopardy should be revised so as to conform to present conditions. By a convenient, but highly misleading sophistry, these writers maintain that in the prosecution of a criminal cause the state be placed on an equal premise with the accused. From this postulate flows such changes as the right of the state to appeal from a criminal judgment in the same manner as the accused.

371. MO. REV. STAT. § 547.210 (1949): "When any indictment or information is adjudged insufficient upon demurrer or exception, or where judgment thereon is arrested or set aside, the court in which the proceedings were had, either from its own knowledge or from information given by the prosecuting attorney that there is reasonable grounds to believe that the defendant can be convicted of an offense, if properly charged, may cause the defendant to be committed or recognized to answer a new indictment or information, or if the prosecuting attorney prays an appeal to the appellate court, the court may, in its discretion, grant an appeal." Supreme Court Rules 28.04.

372. Section 547.210, *supra*.

373. MO. CONST. art. 1, § 19 (1945); Replogle, *Double Jeopardy—Appeal by the State as Subjecting Defendant to Double Jeopardy*, 7 MONTANA L. REV. 56 (1946); Johnson, *Constitutional Law—Double Jeopardy and the Right of the State to Appeal in Criminal Cases*, 1950 WIS. L. REV. 337.

There are two reasons why an equality between the prosecutor and the accused can never exist in the trial of a criminal case: 1) according to the Declaration of Independence and the fundamental philosophy of our country, the government was instituted not with rights paramount or even equal to the rights of an individual but for the protection of the rights of an individual; thus the rights inherent in an individual are superior to any rights which inure to the government; and, 2) only the accused is placed in jeopardy of life or liberty, the state never being subjected to that awesome circumstance.

In view of these facts, before any emasculation is effectuated in the plea of former jeopardy, it should be remembered that since the time Hammurabi published his code "to hold back the strong from oppressing the weak" the success of any legal system and the civilization which it governs has been measured not by the stringency of the laws, nor the percentage of convictions, but by its fidelity to the universal idea of justice.