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Former Jeopardy

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FORMER JEOPARDY.

Of the many safeguards provided for the protection of the accused in a criminal trial, few are more valuable, or have a wider field for their application than that declared in the words, "No person shall, for the same offense, be twice put in jeopardy of his life or limb."¹ Nearly all of the state constitutions contain similar provisions. The provision in the United States Constitution² binds only the federal power.³ However, the safeguard against being placed twice in jeopardy existed before the adoption of the constitutions. Blackstone says it is a universal maxim of the common law that "no man is to be brought into jeopardy of his life more than once for the same offense."⁴ It seems, therefore, that the constitutional provisions are merely declaratory of the common law.⁵ But under the constitutions, the maxim has been given a wider application than was given under the common law, or than is given under a strict construction of the constitutional provision, a person being in jeopardy of his life or limb only in capital offenses. The constitutional provisions, however, have been construed liberally, and they apply to all criminal offenses, both felonies and misdemeanors.⁶ In misdemeanors, if no imprisonment is imposed, but only a penalty, the action is considered as a civil suit and the prohibition does not apply.⁷

A person is in legal jeopardy when he is put upon trial before a court of competent jurisdiction, upon indictment or information, which is sufficient in form and substance to sustain a conviction, and a jury has been impaneled and sworn.⁸ The rule as thus stated has been approved and followed in numerous cases.⁹ It does not matter how the first action was terminated

¹ Ky. Constitution, Section 13.

² Amendment V.

³ *Fox v. Ohio*, 5 How. 410.

⁴ IV. Bl. 335.

⁵ *State v. Duvall*, 65 South. 904.

⁶ *Commonwealth v. Prall*, 146 Ky. 109, 142 S. W. 202.

⁷ *James v. Helm*, 129 Ky. 323, 111 S. W. 335.

⁸ *Cooley's Constitutional Limitations*, 7th ed., p. 467.

⁹ *Williams v. Commonwealth*, 78 Ky. 93 (Conviction possible under first indictment, dismissal bars second prosecution); *Bennett v. Commonwealth*, 150 Ky. 604, 150 S. W. 806 (Indictment dismissed because insufficient, no bar). *Scott v. Commonwealth*, 204 Ky. 625, 265 S. W. 20 (Court's dismissal of warrant without trial is no bar to second prosecution). *Blyew v. Commonwealth*, 12 K. L. R. 742, 15 S. W. 356 (First court had no jurisdiction, action does not bar second prosecution).

if jeopardy has attached, it is a bar to another prosecution. It may be by a discharge of the jury without the consent of the defendant, and without necessity;¹⁰ a quashing of the indictment;¹¹ a dismissal of the action through mistake, as, for instance, to the court's jurisdiction.¹² But it has been held that since by statute the Commonwealth's attorney only may dismiss a prosecution based upon a good indictment, a judge's dismissal is reversible error, and not a bar to a subsequent trial. However, if the judge gives a peremptory instruction to acquit, it is a bar.¹³

The Kentucky Code makes some changes in regard to what termination of an action will or will not bar another prosecution. "If the demurrer be sustained because the indictment contains matter which is a legal defense or bar to the indictment, the judgment shall be final, and the defendant shall be discharged from any further prosecution for the offense."¹⁴ "An acquittal by a judgment upon a verdict, or a conviction, shall bar another prosecution for the same offense, notwithstanding a defect in form or substance in the indictment on which the acquittal or conviction took place."¹⁵ The dismissal of the indictment by the court, on demurrer, except as provided in Sec. 169, or for an objection to its form or substance taken on the trial, or for variance between the indictment and the proof, shall not bar another prosecution for the same offense."¹⁶ This last-mentioned provision has been construed, in so far as it says that the dismissal of an indictment for variance between the indictment and the proof shall not bar another prosecution, not to prevent the first action from being a bar, where the variance was immaterial, and conviction was possible.¹⁷ Two other sections¹⁸ have been held to be unconstitutional in so far as they authorize, after jeopardy attaches, the dismissal of an indictment so that it may not operate as a bar to a future prosecution for the same offense.¹⁹

¹⁰ *O'Brian v. Commonwealth*, 9 Bush 333.

¹¹ *Wilson and Tucker v. Commonwealth*, 212 Ky. 584, 279 S. W. 988.

¹² *Commonwealth v. Ball*, 126 Ky. 542, 104 S. W. 324.

¹³ *Commonwealth v. Adkins*, 171 Ky. 299, 138 S. W. 401.

¹⁴ Ky. Crim. Code, Section 169.

¹⁵ Crim. Code, Section 176.

¹⁶ Crim. Code, Section 178.

¹⁷ *Drake v. Commonwealth*, 29 K. L. R. 981, 96 S. W. 580; *Gaskins v. Commonwealth*, 97 Ky. 494, 30 S. W. 1017.

¹⁸ Crim. Code, Sections 243, 252.

¹⁹ *Williams v. Commonwealth*, 78 Ky. 93.

It was said in *O'Brian v. Commonwealth*,²⁰ that "Every interference on the part of the state after the jury has charge of the prisoner, by which the accused is prevented from having a verdict declaring his guilt or innocence, unless upon facts clearly establishing a case of necessity or showing the prisoner's consent, must operate as an acquittal, and this is the only mode of preserving and maintaining the constitutional provision on the subject."²¹ Two exceptions are named: a case of necessity; and the consent of the accused. There is no general rule as to when such a necessity exists as will prevent the discharge of a jury from operating as a bar to a second prosecution. The judges must exercise discretion in the matter and should discharge the jury "whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."²² In Kentucky, the sickness of a juror; the disagreement of the jury after a reasonable time for deliberation; the failure to find a verdict before the time fixed by law for adjournment, have been held sufficient to justify a discharge of the jury, so as not to constitute a bar to another action.²³ In other jurisdictions, the serious illness or insanity of the accused; illness, insanity, or death of judge or juror engaged in the trial; death of juror's mother; misconduct of a juror, and upon judicial inquiry a finding that a juror is prejudiced, have been held sufficient to justify discharge.²⁴

The consent of the accused that will waive his right of setting up former jeopardy may be either express or implied. It was held to be implied in *Riley v. Commonwealth*,²⁵ where the the defendant's counsel told the court it could take what action it thought proper, and the court thought it proper to discharge

²⁰ 9 Bush 333.

²¹ Accord: *People v. Warden of City Prison*, 202 N. Y. 138, 95 N. E. 729.

²² *United States v. Perez*, 9 Wheat. 579.

²³ *Hilbert v. Commonwealth*, 21 K. L. R. 537, 51 S. W. 817; *Yarbrough v. Commonwealth*, 89 Ky. 151; *Commonwealth v. Olds*, 5 Litt. 137.

²⁴ *State v. Richardson*, 47 S. C. 166, 25 S. E. 220; *Fails v. State*, 60 Fla. 8, 53 South 612; *State v. Hansford*, 76 Kan. 678, 92 Pac. 551; *People v. Sharp*, 163 Mich. 79, 127 N. W. 578; *Hedger v. State*, 144 Wis. 279, 128 N. W. 80.

²⁵ 190 Ky. 204, 227 S. W. 146.

the jury. But mere silence will not be construed into consent.²⁶ The appeal of the accused is a waiver of the defense of former jeopardy.²⁷

The difficult question often arises as to when the two offenses are the same. The same act may be an offense against two jurisdictions, or the offenses may be distinct, so that it is possible to base two prosecutions upon the same act.

If the same act is an offense against two jurisdictions, a prosecution by one does not bar that of the other. A conviction in a federal court under the federal laws does not bar a subsequent prosecution in the state court under the state prohibition laws upon the same facts.²⁸ But where there is concurrent jurisdiction if two courts of an offense against one sovereignty, the first to acquire jurisdiction cannot be ousted, and the first action is a bar to a second.²⁹ One who commits an act which is a contempt of court and also a crime may be proceeded against both by summary process, and by indictment, and neither proceeding will bar the other, since the act is an offense against the dignity of the court, and also against the dignity of the Commonwealth.³⁰ It was held in an early case that a prosecution under a city ordinance does not bar a prosecution by the state.³¹ But this applies only to prosecutions by the state under the common law and not under a statute;³² for by section 168 of the present Constitution, a municipal ordinance cannot impose a penalty for a violation thereof at less than that imposed by statute for the same offense, and a conviction or acquittal under either constitutes a bar to another prosecution for the same offense.

The rule for determining whether the two offenses arising out of the same act are the same is: when the facts necessary to convict on the second prosecution would necessarily have convicted on the first, the first is a bar to the second.³³ An acquittal

²⁶ *Robinson v. Commonwealth*, 88 Ky. 386, 11 S. W. 210.

²⁷ *Keifner v. Commonwealth*, 205 Ky. 634, 266 S. W. 354.

²⁸ *Hodges v. Commonwealth*, 198 Ky. 652, 249 S. W. 774.

²⁹ *Hawes v. Orr*, 10 Bush 431; *Commonwealth v. Overby*, 80 Ky. 208.

³⁰ *Long v. Commonwealth*, 177 Ky. 391, 197 S. W. 843; *State v. Gardener*, 72 N. C. 379.

³¹ *Commonwealth v. Parks*, 11 K. L. R. 403; Accord; *People v. Bingham*, 119 N. Y. Supp. 417.

³² *L. & N. R. R. Co. v. Commonwealth*, 144 Ky. 558, 139 S. W. 785.

³³ Bishop's New Crim. Law, 8th ed., p. 508; *Shirley v. Commonwealth*, 143 Ky. 183, 136 S. W. 227; *Scalf v. Commonwealth*, 195 Ky. 830, 243 S. W. 1034; *Lewis v. Commonwealth*, 201 Ky. 48, 255 S. W. 818.

or conviction for a breach of the peace, unless obtained by fraud or collusion³⁴ is a bar to a subsequent prosecution for assault and battery.³⁵ But a conviction or acquittal of rape is not a bar to a prosecution for incest.³⁶ An interesting case on the application of the rule is *Cooper v. Commonwealth*,³⁷ where the accused was acquitted of a charge of adultery and later indicted for false swearing in the former action that he had never committed the offense. The court said that the accused could not again be put on trial where the truth or falsity of the charge in the former indictment was the gist of the question under investigation. This is a doubtful case; it is clear the accused could not again be tried for adultery, but it is not so clear that the state should be barred from showing in a subsequent action that the accused was guilty of false swearing in the prior action. Not to hold otherwise is to put a premium on false swearing. In a later case a conviction for breach of the peace was held to be no bar to a prosecution for perjury committed at the former trial where accused testified he did not do the acts charged.³⁸ The court said that a conviction for a breach of the peace and one for perjury are different things, and if there was anything adjudicated on the former trial it was that the accused did do the acts with which he was charged, but that the Commonwealth was still under necessity of proving the same facts on the second trial because accused was entitled to face his accusers. This case and the preceding one are different in that there was a conviction in the latter and an acquittal in the former, but even with this difference, it is difficult to reconcile them.

A person who has been put in jeopardy for an offense which includes other offenses has been put in jeopardy as to all included offenses.³⁹ And a conviction or an acquittal for a lesser offense included in a greater will bar a prosecution for the greater.⁴⁰ There is a difference of opinion in the application of this rule in homicide cases. Some jurisdictions hold that if the prisoner is

³⁴ *Commonwealth v. Crowder*, 177 Ky. 268, 197 S. W. 643.

³⁵ *Commonwealth v. Hawkins*, 11 Bush 603; *Sexton v. Commonwealth*, 193 Ky. 495, 236 S. W. 956.

³⁶ *Burdue v. Commonwealth*, 144 Ky. 428, 138 S. W. 296.

³⁷ 21 K. L. R. 537, 51 S. W. 817.

³⁸ *Wadlington v. Commonwealth*, 22 K. L. R. 1108, 59 S. W. 851.

³⁹ *Commonwealth v. Browning*, 146 Ky. 770, 143 S. W. 407.

⁴⁰ *Commonwealth v. Gill*, 28 K. L. R. 879, 90 S. W. 605; *Commonwealth v. Arner*, 149 Pa. St. 35, 24 Atl. 83.

put upon trial for murder and convicted of manslaughter and that verdict is set aside on defendant's application for a new trial or on his appeal, he cannot be again tried for murder.⁴¹ This is based upon the theory that the accused's request for a correction of the verdict is only for so much of it as convicts him of guilt and not for that which acquits him.⁴² The contrary line holds that if conviction for the lesser crime is reversed upon the voluntary appeal of the accused, he thereby waives the acquittal upon the higher charge, and, upon the conviction being set aside, is placed in the same position as if no trial had been had.⁴³ In Kentucky, a code provision is to the same effect, providing that a new trial places accused in the same position as if no trial has been had.⁴⁴ If on trial for murder, the prisoner is convicted of manslaughter, and obtains a new trial, he may be again tried for murder.⁴⁵

Statutes which provides for a severer punishment on conviction for a second or third offense do not violate the constitutional provision. It is held that the subsequent punishment is not imposed for the first offense, but for persistence in crime.⁴⁶

It has been held that where by statute, the state with the permission of the presiding judge, is allowed an appeal, it may take the appeal after a verdict of acquittal, upon the ground that it is a matter of procedure and that jeopardy has not attached.⁴⁷ But this case has been criticized as standing out in bold relief against the general rule. "The law almost universally prevalent is that a verdict of acquittal in a criminal case is final and conclusive, and that there can be no new trial of a criminal prosecution after an acquittal in it"⁴⁸ In Kentucky a right of appeal is given to the state in criminal cases.⁴⁹ But it is held that the accused, having been once acquitted, cannot be prose-

⁴¹ *Barnett v. People*, 54 Ill. 325.

⁴² *Commonwealth v. Dietrick*, 221 Pa. 7, 70 Atl. 275.

⁴³ *Trono v. U. S.*, 199 U. S. 521; *State v. Ash*, 68 Wash 194, 122 Pac. 995.

⁴⁴ *Crim. Code*, Section 270.

⁴⁵ *Commonwealth v. Arnold*, 83 Ky. 1.

⁴⁶ *Moore v. Missouri*, 159 U. S. 673; *Sturtevant v. Commonwealth*, 158 Mass. 598, 33 N. E. 648; *Mount v. Commonwealth*, 2 Duvall 93.

⁴⁷ *State v. Lee*, 65 Conn. 265, 30 Atl. 1110.

⁴⁸ *People v. Corning*, 2 N. Y. 9; *Kepner v. U. S.*, 195 U. S. 100.

⁴⁹ *Crim. Code*, Section 337.

cuted a second time after an appeal by the Commonwealth.⁵⁰ It seems that on such an appeal, any ruling of the lower court may be reviewed, whether such ruling is final or not, and without reference to whether the judgment is upon a verdict or on a demurrer, or whether it is a bar to another prosecution.⁵¹ It was said in *Commonwealth v. Matthews*,⁵² that the right was only fair to the public, and proper for its protection, because otherwise the guilty might escape by an acquittal resulting from legal errors.

L. H. STEPHENS.

THE WORK OF THE 1926 LEGISLATURE.

The 1926 session of the Kentucky General Assembly closed its biennial course of lawmaking and law repealing and adjourned sine die with more bills and less wrangling to its credit than any other general assembly that has convened at Frankfort within the last twenty years. This means that, to a certain extent at least, party bickering was given the minimum of time and legislation was expedited. The course of procedure was, in general, quite smooth. A close-up review of the conduct and achievements of the 1926 General Assembly can necessarily deal positively only with the nature of the measures passed and defeated and the conduct of the organization in control. The scope of the present article will only cover the former.

A total of 373 bills were passed during the 60 working days of the legislative session, from January 5 to midnight of March 17. This was 75 more than have been passed at any session since 1906. The nearest approach to this total was reached in 1924 when 298 bills were enacted into laws. Most of the new laws enacted pertain to the procedure of state and county officials in the conduct of the affairs of their offices and the administration of the affairs of the state through these officers. The result sought seems to have been to expressly regulate the activity of the various state officers in order to facilitate the administration of their business and to stop financial leaks in all of the depart-

⁵⁰ *Commonwealth v. Murphy*, 33 R. 141, 109 S. W. 353; *Commonwealth v. Matthews*, 89 Ky. 287, 12 S. W. 333.

⁵¹ *Commonwealth v. Cain*, 14 Bush 525.

⁵² 89 Ky. 287, 12 S. W. 333.