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CRIMINAL LAW—DOUBLE JEOPARDY—PROHIBITION AGAINST SECOND TRIAL FOR GREATER OFFENCE AFTER CONVICTION ON LESSER CHARGE—Everett Green was tried by jury in the District of Columbia upon an indictment charging arson and first degree murder. The jury found Green guilty of arson and second degree murder, but their verdict was silent as to the first degree murder charge. After judgment on this verdict, Green appealed the murder conviction and obtained a reversal by the Court of Appeals because of insufficient evidence. Green was again tried on remand to the trial court under the original indictment. His defence of double jeopardy was overruled and the jury found him guilty of murder in the first degree. A mandatory death sentence was imposed and Green again appealed. The Court of Appeals affirmed. The Supreme Court, with four Justices dissenting, held that Green's constitutional right to protection against double jeopardy under the Fifth Amendment had been violated and reversed the conviction. *Green v. United States,* 78 Sup. Ct. 221, 2 L.ed. 2d 199 (U.S. 1957).

In reaching this conclusion, Mr. Justice Black, writing for the Court, carefully examined the varied reasoning and precedents concerning the defense of double jeopardy. The theories that an appeal by a defendant from a criminal conviction "waives" the defense of double jeopardy or that jeopardy continues throughout the trial, appeal and new trial were not found to be acceptable. This opinion adopts the theory that a conviction for a lesser included offense implies an acquittal as to the greater offense in the indictment and that therefore no new trial upon the greater charge may be allowed to follow an appeal from such a verdict.

The conclusion reached by this decision has its basis in the early English Rule, once held in this country, that no new trial could be granted after a verdict resulting in either an acquittal or a conviction, since this would constitute double jeopardy or hazard. *United States v. Gibert,* 25 Fed. Cas. 1287, No. 15,204 (C.C. Mass. 1834). Five years later this rule was rejected by the Indiana Circuit, which modified it to allow a new trial when requested by a defendant. *United States v. Keen,* 26 Fed. Cas. 686, No. 15,510 (C.C. Ind. 1839). However it was still maintained that a verdict of acquittal could not be set aside by any court. A similar holding followed in 1871, which rested upon the opinion that no double jeopardy ensued in an appeal taken by a defendant, since by his voluntary request for a new trial, he has attempted to relieve himself of his present jeopardy and encounters only this same hazard and not a new one. *United States v. Harding,* 26 Fed. Cas. 131, No. 15,301 (C.C. Tenn. 1871).

While it is recognized that a few states do allow appeals by the prosecution after acquittal or conviction, the federal rule is that no criminal case can be appealed by the Government upon a writ of error, but only upon a certificate of division of opinion by a lower tribunal. *United States v. Sanges,* 144 U.S. 310 (1892). Appeals are held to be limited to the defense on the ground that an appeal by the prosecution would violate the prohibition against double jeopardy. U. S. CONST. amend. V; *United States v. Ball,* 163 U.S. 662 (1896). The deeply-rooted criminal law principle which prohibits an appeal from a verdict of acquittal

has again been recognized by the Supreme Court in a recent decision. *Peters v. Hobby,* 349 U.S. 331,344 (1955).

A case which arose in the Philippine Islands is the only previous instance in which the precise double jeopardy problems of the principal case squarely faced the Court. *Trono v. United States,* 199 U.S. 521 (1905). The defendant had been acquitted of murder and convicted of assault. Upon his appeal, the Supreme Court of the Philippine Islands reversed the trial court and convicted him of homicide. The Supreme Court affirmed this ruling on the grounds that the defendant had waived his former jeopardy by appeal and had no right to limit this waiver by relying on the previous acquittal. Such reasoning seems to stretch the theory of waiver, particularly in view of a later Supreme Court definition: "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst,* 304 U.S. 458,464 (1938).

The *Trono* decision was preceded in the Philippines by another case in which the government appealed an acquittal, which resulted in a conviction by the appellate court. In this case, as in *Trono,* the Court held that the Statute [32 STAT. 691 (1902)] relating to the Islands adopted the double jeopardy clause of the United States Constitution which guarantees freedom from retrial for the same offense after an acquittal. *Kepner v. United States,* 195 U.S. 100 (1903). It is interesting to note that Mr. Justice Holmes filed a dissent in this earlier case, asserting that the statutory right of appeal by the government continued the initial jeopardy and could not create a new peril to the defendant. In the *Trono* case, Holmes concurred in the result, but without comment. So far it appears that no decision of the Supreme Court has been based upon this theory of continuing jeopardy, which is expressly rejected in the instant case. In a third case arising in the Philippine Islands, Mr. Justice Holmes, writing for the Court, flatly followed the *Trono* decision and held that the Supreme Court of the Philippine Islands could lawfully increase the sentence of a defendant upon his appeal. *Flemister v. United States,* 207 U.S. 372 (1907). For a similar case, see *United States v. Gonzales,* 206 F. 239 (W.D. Wash. 1913).

The theory upheld by the Court in the case at hand was expressly denied in 1928, when it was decided that a conviction of manslaughter was not an acquittal of murder as set forth in the indictment. *Carbonell v. People of Porto Rico,* 27 F. 2d 253 (1st Cir. 1928). This court also added that its decision was made in the light of an interpretation of double jeopardy as framed in the Fifth Amendment. It is generally held that no double jeopardy necessarily ensues when an appeal is taken by a defendant in a federal court. If error is found, the defendant may be retried without violating his constitutional rights. *Bryan v. United States,* 338 U.S. 552 (1950); *United States v. Ball, supra.* Such a result was held although upon retrial the jury failed to recommend mercy in a conviction for murder in the first degree. This was explained on the theory that the conviction was identical in each trial, although the punishment was mitigated by the jury only after the first. *Stroud v. United States,* 251 U.S. 15 (1919).

Normally a defendant is in legal jeopardy once he is placed on trial before a jury. However, various reasons have been held sufficient to warrant the dismissal of a jury without the defendant's consent and without barring a second trial. Among these are bias of jury members [*Simmons v. United States,* 142 U.S. 148 (1891)]; failure to agree on a verdict [*United States v. Perez,* 9 Wheat. 579 (U.S. 1824)]; and emergency surgery required by the defendant during the course

of the trial [*United States v. Stein*, 140 F. Supp. 761 (S.D.N.Y. 1956)]. Such dismissals are entirely within the discretion of the trial judge and will not ordinarily be reviewed by a higher court. *United States v. Perez, supra.* Similar rules have developed in trials by court martial. Discontinuance of a trial due to movements of an invading army has been held to be no bar to a second court martial by the army moving into the occupied area. *Wade v. Hunter*, 336 U.S. 684 (1949).

A peculiar situation with respect to double jeopardy in court martial cases arises from the fact that Article of War 40 [10 U.S.C. 1511] requires that the members of the court and the reviewing officer must agree before sentence can be executed. Under this provision it has been held that double jeopardy does not result when a defendant is retried after the refusal of the commanding officer to give his approval to the initial conviction. *Brewster v. Swope*, 180 F. 2d 984 (9th Cir. 1950). Such a proceeding is not a complete "trial" until approved. A more lenient tendency in allowing second trials to stand has been exhibited by the Supreme Court in the review of state court decisions. An early case recognized the "implied acquittal" theory of the principal case where a defendant found guilty of second degree murder was later convicted of first degree murder. *Kring v. Missouri*, 107 U.S. 221 (1882). In 1910, the contention that a defendant was placed in double jeopardy by a retrial and conviction on a greater offense was held to be "absolutely without merit." The Court added, "It was not a case of twice in jeopardy under any view of the Constitution of the United States." *Brantley v. Georgia*, 217 U.S. 284, 285 (1910).

An interpretation of the Fourteenth Amendment regarding double jeopardy was nebulously set forth by Mr. Justice Cardozo in 1937. *Palko v. Connecticut*, 302 U.S. 319 (1937). An appeal by the state which resulted in a conviction for a greater offense than that of the original conviction was approved on the theory that such double jeopardy was not a fundamental principle of liberty and justice lying at the foundation of our civil and political institutions. This decision gave a reciprocal right of appeal to the state after a trial containing error. Mr. Justice Frankfurter attempted to further define the limits of state prosecution in a concurring opinion in a later case, in which he stated: A state falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he can do better a second time. *Brock v. North Carolina*, 344 U.S. 424, 429 (1953).

For a lengthy footnote listing state decisions allowing or rejecting retrial for the greater offence, see the dissenting opinion of the principal case. *Green v. United States*, 355 U.S. . . ., 78 S. Ct. 221, 238-240 n. 4, 2 L. Ed. 2d 199, 220-222 n. 4 (1957).

It is hoped that at least a part of the confusion evident from these federal decisions will be cleared away as a result of the holding in the principal case. Justice seems to require certainty in criminal convictions, and reopening counts of an indictment once closed by jury trial seems too great a price to pay for the right of appeal. A later decision extending a like construction of double jeopardy to trials in state courts and courts martial would be altogether desirable and might well result from the present zealous desire of the Supreme Court to safeguard civil and human rights.

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