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Recent Criminal Cases

RECENT CRIMINAL CASES

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INSANITY DEFENSE — MALINGERING.—[Colorado] The defendant was charged with murder. He had shot and killed two men without warning, following a dispute over some hay on his ranch. He pleaded not guilty by reason of insanity, but the jury found him guilty of murder in the first degree and fixed his penalty at death. During the trial two physicians testified for the people that the defendant was sane at the time of the homicide. The director of the State Psychopathic Hospital expressed the opinion that not only was the defendant sane at the time of the homicide, but also that he was sane when examined, and that he was only malingering. Defendant was declared sane by witnesses who had known him for from seven to thirteen years. The defendant's witnesses were all members of his family exept one. That one did not express an opinion as to the prisoner's sanity, but the other witnesses testified that his sister and three of her children were afflicted with insanity and that defendant himself was not "right in his mind." They further testified that the accused acted insane while in jail. The testimony of the deputy sheriff was to the effect that the defendant, while in jail, only acted insane when he was being watched, "that he heard the defendant whispering, but not unless others were around and the defendant thought they were looking; that the defendant got so he would not pay any attention to the witness, but if anybody came in with the witness, the defendant 'would put on a show' for them; that is to say, he would throw all sorts of things, would grab a quilt and put it over his head, 'or something like that.' The witness also testified that on one occasion, when some plumbers left late at night after working at the jail, the witness turned out the light and slammed the door and then watched the defendant through a hole that the plumbers had made in the wall in the course of their work; that the defendant had been dancing around all afternoon with a quilt over his shoulders, and had bedding scattered all around; that after the witness slammed the door the defendant stood listening and when he could not hear anything and thought everybody was gone, his appearance and actions changed; that he quit 'acting up,' took the quilt off and laid it on the opposite bunk, shook the dust out of his bedding, folded it up, and 'made his bed like anybody would.'" *Held:* judgment affirmed, on the theory that the defendant was merely feigning insanity: *Farmer* v. *People* (Colorado, 1932), 7 P. (2d) 947.

Simulation of insanity presents one of the oldest and most important

extra-legal questions existent in criminal law. That it is no new subterfuge is attested by the fact that over two thousand years ago Lycophron (285-247 B. C.), a Greek savant of the time of Ptolemy Philadelphus, spoke of the feigned madness of Ulysses, assumed by him in an effort to avoid military service: *Goodwin,* "Insanity and the Criminal," p. 88. There were other celebrated individuals of ancient days who also simulated insanity during times of stress or danger. King David, Brutus, the expeller of the Tarquin, and Solon the Athenian may be cited: *Jones and Llewellyn,* "Malingering," p. 286. Of late years, following the great development of the insanity defense in murder trials, the question of malingering has been squarely presented to American courts. The defense of insanity has proved very effective in freeing murderers, and consequently it has been used more than any other defense. Attorneys have introduced the plea merely as legal strategy knowing at the time that it was not justified and that there was not the slightest possibility of their clients being mentally diseased: *Current History,* August, 1930, p. 943. "The guilty have escaped not only from conviction but from confinement in humanely managed asylums": *Boies,* "The Science of Penology," p. 214. "Monstrous verdicts of 'not guilty' have followed so frequently as at last to arouse general indignation": *Kavanagh,* "The Criminal and His Allies," p. 90.

A short review of a few of the most celebrated malingering cases of the last decade or two will tend to show the extended use made of feigned insanity in order to procure the acquittal of guilty defendants. The case of George Remus is a recent example of the modern use of the insanity defense where malingering was obviously present. Remus murdered his wife in cold-blood, pleaded insanity, and after a long-drawn out legal battle, during which he feigned insanity, he was eventually committed to a hospital for the insane and a short while later set free: In re *Remus* (1928) 119 Ohio St. 166, 162 N. E. 740. The widely-known case of Russell Scott also exhibited unmistakeable evidence of malingering in insanity, but the defendant's own suicide prevented the success of his plea: *People* v. *Scott* (1927) 326 Ill. 327, 157 N. E. 247. The case of Harry Thaw, and his escape from the death penalty on the grounds of alleged insanity, is too well known to merit description: *Mackenzie,* "The Thaw Case," p. 299. *People* v. *Thaw* (1915) 154 N. Y. S. 949. In addition a mention may be made of the Robin, Graham, and Lincoln cases in which pleas of feigned insanity met with varied degrees of success: *Outlook and Independent,* February 6, 1929, p. 205. See also: *People* v. *Schmidt* (1915) 216 N. Y. 324, 110 N. E. 945; *People* v. *Krauser* (1925) 315 Ill. 485, 146 N. E. 593; *People* v. *Costello* (1926) 320 Ill. 79, 150 N. E. 712.

In order to prevent such deception various tests have been devised in an effort to determine the question of alleged mental unsoundness in criminal cases. *Goodwin* lists six such tests in his "Insanity and the Criminal," p. 95.

(1) What is a possible cause of the defendant's insanity? (Heredity, physical injury, worry, etc.)

(2) The insane exhibit a peculiar eye expression which a malingerer cannot indefinitely simulate. In the presence of the sus-

pect, imply that he is a malingerer. Then watch to see if his eye expression betrays an appreciation of the situation.

(3) What is the condition of the prisoner's memory as to events unrelated to the crime?

(4) A true lunatic, especially a maniac, rarely sleeps soundly. The malingerer, often exhausted by the effort of malingering, is a sound sleeper.

(5) An imposter may threaten suicide. The genuine suicide-to-be rarely proclaims his intention in advance.

(6) Certain bodily responses accompany the forms of true insanity. Physical tests, such as ascertaining blood-pressure, pulse, condition of the tongue, behavior of the pupil of the eye, etc., can be made by medical men as an aid in discovering a malingerer.

Other suggested tests are:

(7) An insane person will not admit that he is mad. Does the suspect vigorously assert his insanity, as is the usual case with malingerers?: *Collie,* "Malingering," p. 423.

(8) Letters written by the insane can rarely be imitated. Each type of insanity produces its special variety of letter. Peruse a recent letter written by the suspect, or request him to write one: *Ibid,* p. 425.

(9) A malingerer, suddenly awakened from sleep, may answer a question or two intelligently before he realizes his error: (1928) 24 *The Medico-Legal Journal,* 78.

(10) Insanity often develops so slowly and insidiously as to be almost unobserved by relatives and friends. Does the suspect suddenly begin acting insane after his arrest, seemingly without sufficient cause?: *Hoag and Williams,* "Crime, Abnormal Minds, and the Law," p. 91.

In the instant case it is unfortunate that the court does not discuss the reasons the physicians gave to support their opinion that the defendant was sane. By the statement that "there is no necessity for repeating" the reasons we do not know whether scientific tests were used in a solution of this case. Or, if used, the number and quality of them is in doubt. The court does not mention a single test that might have aided it in affirming the judgment.

A solution of the subject of malingering has been attempted by various states. Legislation has been passed relating to the insanity of the defendant after his indictment but before trial. The state most progressive in this respect is Massachusetts. In 1921 that state passed a law "making it mandatory to report to the department of mental diseases for examination any person indicted by a grand jury for a capital crime or who has previously been convicted of a felony or known to have been indicted for any offense more than once. Under this law the examination is compulsory, is made by impartial psychiatrists from the State department of mental diseases as a matter of routine *before* trial, or any other action is taken. Thus an unbiased report by competent medical experts is secured and made a matter of record at the very outset of the proceeding. In practice this has resulted in saving long and costly trials as the findings have usually been accepted by the prosecuting attorney, the defendant's counsel and the court as a satisfactory basis for disposing of a case without trial": *The Survey,* May, 1925, pp. 218-219.

Acts of Mass., 1921, c. 415, as amended by Acts, 1923, c. 331; Acts, 1925, c. 169; Acts, 1927, c. 59; Acts, 1929, c. 105.

The Massachusetts legislation has met with marked success and has been widely approved. A study was made of 113 Massachusetts cases which arose after the law was enacted. Of the 113, only 7 "were diagnosed by the psychiatrists as having 'psychopathic personality' or 'constitutional psychopathic inferiority.'". Previously there had been a feeling that if medicine supplanted the law in this field, there would be a tendency to find all criminals irresponsible even in borderline cases. This study definitely expelled such a feeling: *McCarty* "Mental Defectives and the Criminal Law" (1929) 14 Iowa Law Rev. 401.

Colorado has passed legislation which is second only in importance to that enacted by Massachusetts: Session Laws of Colorado, 1927, c. 90. This legislation also attempts to place the insanity question in the hands of impartial scientists, but it approaches the problem in a different manner from that of Massachusetts. In Colorado, if the plea of insanity is raised, the defendant is committed to a State hospital for observation as was done in the case at point. A commission of one or more physicians, specialists in mental diseases, may also be appointed to examine the prisoner. This latter provision is not mandatory in the Colorado statute but is left in the hands of the trial judge, a non-medical person who must take the initiative. There is no evidence in the instant case that the judge in the exercise of his sound discretion appointed such a commission under his statutory power. The only proof that defendant was a malingerer was given in the usual way by testimony on behalf of the state. There was no report by an unbiased medical commission. The result reached was undoubtedly sound, but it clearly reveals the weakness of the Colorado statute in contrast to the Massachusetts one in not requiring a compulsory and impartial examination of a defendant pleading insanity instead of only a compulsory commitment to a State hospital. The requirement of compulsory examination as well as commitment as practiced in Massachusetts adequately illustrates the superiority of the Massachusetts statute as a model statute. See as to other state statutes on the subject: *Glueck* "Mental Disorder and the Criminal Law," p. 53 ff. and pp. 499-643.

Another solution of the problem was attempted when former Chief Justice Harry Olson of the Municipal Court of Chicago established a psychiatric laboratory designed to operate in connection with his court. He was one of the first to stress the practical importance of a better medical knowledge of prisoners. A few other laboratories were also established at the criminal courts, and they showed inherent merit. During the first ten years examinations and tests were made of over 40,000 cases in the criminal courts: 14 Iowa Law Rev. 408.

JOHN KNOX.

INDICTMENT AND INFORMATION—SUFFICIENCY [Oklahoma]. The defendant was charged by information with the crime of larceny of "domestic fowls," no designation being made as to the kind of fowl. The statute under which the defendant was charged makes it a felony to steal "domestic fowls," but

does not provide that any further designation be made as to the kind of fowl stolen: Okla. Comp. St. 1921 Sec. 2119. A demurrer was filed to the information and it was overruled. The defendant excepted, and on appeal the case was reversed and remanded with directions to sustain the demurrer for the reasons that the information did not state sufficient facts to advise the accused of the charge against him, and that it could not be ascertained from the allegations what class of domestic fowl or fowls the state was seeking to convict him of stealing: *Hemphill* v. *State* (Okla. Cr. App. 1931) 6 Pac. (2nd) 450.

It has been held that where there is a statute concerning the particular offense, it is sufficient and even advisable to describe the stolen property in the words of the statute: *Sloan* v. *State* (1873) 42 Ind. 570; *Long* v. *State* (1888) 23 Neb. 33; *State* v. *Wilson* (1912) 63 Ore. 344, 127 Pac. 980. But it has been said that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment charge the offense in the same generic terms as in the definition, but it must state the species and the particulars: *United States* v. *Cruishank* (1875) 92 U. S. 542; *Commonwealth* v. *Chase* (1878) 125 Mass. 202. This view seems to be generally followed by the courts in this country and apparently was favored in the instant case. Particularity and certainty in indictments and informations have been stressed by the courts in their overanxiety to protect the accused's rights so that he may be given a fair and reasonable opportunity to prepare his defense: *United States* v. *Hess* (1887) 124 U. S. 483, 8 Sup. Ct. Rep. 571; *People* v. *Bricker* (1920) 212 Mich. 137, 180 N. W. 383.

It may be observed that a few courts have not chosen to follow this seemingly well-established rule, and have held, particularly in cattle-stealing cases, that a general description in generic terms of the property stolen is sufficient: *People* v. *Littlefield* (1855) 5 Cal. 355; *State* v. *Dewitt* (1899) 152 Mo. 84, 53 S. W. 429; *Matthews* v. *State* (1899) 41 Tex. Cr. Rep. 98, 51 S. W. 915; *State ex rel. Esser* v. *District Court* (1918) 42 Nev. 218, 174 Pac. 1023; *Perkins* v. *State* (1931) 182 Ark. 1167, 34 S. W. (2d) 746. Under this view it seems that the instant case could have been decided differently with but little pressure on the conscience of the court. The Oklahoma statute reads as follows: "The indictment or information must contain a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended": Okla. Comp. St. 1921 Sec. 2556. The court applied this statute in arriving at its decision. May it not rationally be said that the accused was sufficiently informed of the offense with which he was charged? It would seem that the crime was so described as to be readily understood by "a person of common understanding." Is not the court backing away from its chief function of seeing that justice is done by finding that an indictment, which is set forth in generic terms and follows the words of the statute, is insufficient merely because it does not state particulars? The court could have adopted a less technical view and arrived at a more just and rational result. Courts recently have been favoring a more liberal inter-

pretation of indictments which are framed in the words of the statute; and apparently the tendency is away from the holding of the principal case.

EDWARD S. ALTERSOHN.

MANSLAUGHTER — ACCESSORY BEFORE THE FACT.—[Kentucky] Defendant was indicted for having aided and abetted in the killing of deceased, Sam Wright. The defendant, his wife, and Melvin Branham, the deceased principal in the crime, were members of a family divided into two quarreling factions. The above named persons composed one faction, and Sam Wright, his wife, Mahala Wright, and Henry Branham composed the other. The wife of the defendant went on the premises of the Wrights in search of her dog. When she found it, she commenced to whip it; her aunt Mahala Wright then interfered and the two women started to fight. Defendant being informed of this fight rushed to the scene followed by Melvin Branham who had a gun. They were stopped outside the premises by Sam Wright, the deceased, at the point of a gun. Defendant shouted to Melvin Branham, "Shoot him! God damn him! Shoot him!" Melvin Branham shot and killed Sam Wright, and the defendant was tried and convicted of being an accessory to the crime of manslaughter. *Held,* on appeal: judgment reversed on the ground that the lower court should have granted the defendant's motion and excluded the witnesses from the court room before the state opened its case to the jury. The decision however laid down the rule that the mere presence of the defendant, without more, at the time decedent was killed by another would not make the defendant criminally liable for homicide: *Ray* v. *Commonwealth* (1931) 43 S. W. (2d) 694.

This rule is supported by the great weight of authority both in this jurisdiction and other jurisdictions: *White* v. *People* (1876) 81 Ill. 333; *People* v. *Fay* (1888) 70 Mich. 421, 38 N. W. 296; *McCoy* v. *State* (1898) 40 Fla. 494, 24 So. 485; *Walker* v. *State* (1903) 118 Ga. 10, 43 S. E. 856; *Tucker* v. *Commonwealth* (1911) 145 Ky. 84, 140 S. W. 73. The presence of the defendant at the scene of the homicide is, however, one of the evidentiary circumstances for the consideration of the jury: *Burrell* v. *State* (1857) 18 Tex. 713; *State* v. *Maloy* (1876) 44 Iowa 104; *Burnham* v. *State* (1911) 61 Tex. Crim. Rep. 616, 135 S. W. 1175; *People* v. *Cione* (1920) 293 Ill. 321, 127 N. E. 646.

In order that a defendant be guilty as an accessory before the fact to a homicide, he must have aided, abetted, assisted, or advised its commission, or must have been present with that purpose in mind, to the knowledge of the party actually committing the crime: *Horton* v. *Commonwealth* (1901) 99 Va. 848, 38 S. E. 184; *People* v. *Mills* (1903) 41 Misc. Rep. 195, 83 N. Y. Sup. 947; *State* v. *Bailey* (1908) 63 W. Va. 668, 60 S. E. 785. See: *Commonwealth* v. *Kern* (1867) 1 Brewst. (Pa.) 350; *Bast* v. *Commonwealth* (1907) 124 Ky. 747, 99 S. W. 978; *Way* v. *State* (1908) 155 Ala. 52, 46 So. 273. Therefore, if the defendant was present at the time and place of the crime and merely acquiesced in its commission without previous knowledge that the crime was going to be committed, he cannot be held as an accessory before the fact. So in the case of *Omer* v. *Commonwealth*

(1894) 95 Ky. 253, 25 S. W. 594, the court condemned an instruction by which the jury were in effect told that, if Oliver was fired upon and killed by someone other than Omer, with Omer's knowledge or consent, the defendant was guilty because that instruction did not require it to be Omer's previous knowledge or consent. Of course Omer knew at the time the firing was going on that it was being done, and the instruction was erroneous because it did not limit this to previous knowledge of Omer.

However, acquiescence without previous knowledge does not in all cases render the accused immune from being an accessory before the fact. Thus, where this acquiescence amounts to a negligent omission of a legal duty, whereby death ensues, there may be an indictment for murder or manslaughter: *People* v. *Diamond* (1902) 72 N. Y. App. Div. 281, 76 N. Y. S. 57, 175 N. Y. 517, 67 N. E. 1087; *Adams* v. *Commonwealth* (1908) 129 Ky. 420; *Powell* v. *U. S.* (1924) 2 Fed. (2d) 47; *Bishop,* "Criminal Law" (8th ed. 1913) vol. I, sec. 314. But it is emphatically asserted in these cases that such legal duty must exist. A casual spectator who fails to interfere in the commission of a crime would not thereby render himself a party to that crime: *Jones* v. *People* (1897) 166 Ill. 264, 46 N. E. 723. On the other hand a conductor of a train on which fifty gallons of whiskey were transported in such shape that he could not but have known of its presence was convicted for knowingly transporting liquor. The court said accused should have seen, as far as was reasonably within his power that the law was observed on his train: *Powell* v. *U. S., supra.*

The meaning of the terms "aid" and "abet" has become somewhat confused in a maze of definitions: *Baumgartner* v. *State* (1919) 20 Ariz. 157, 178 Pac. 30, 32; *People* v. *Barnes* (1924) 311 Ill. 559, 143 N. E. 445, 447; *Johnson* v. *State* (1926) 21 Ala. App. 565, 110 So. 55; *State* v. *Baldwin* (1927) 193 N. C. 566, 137 S. E. 590, 591. It would seem however that the surrounding circumstances of each case, determine whether or not the specific acts or words constitute aiding and abetting. Mere words alone, as in the principal case, which incite and encourage the commission of the crime have been held to be sufficient to make one an accessory before the fact: *Rasberry* v. *State* (1917) 80 Tex. Crim. App. 498, 191 S. W. 356. Or the defendant, though not actually doing the felonious act, by his will contributing to, or procuring it to be done: *True* v. *Commonwealth* (1890) 90 Ky. 651, 14 S. W. 684. Or the defendant sharing the criminal intent of the party committing the crime: *Triple H.* v. *Commonwealth* (1925) 141 Va. 577, 127 S. E. 486.

In the principal case, defendant was not only present, but by his words incited the commission of the crime. This was determined by the verdict in the lower court which is supported by a preponderance of authority: *Rasberry* v. *State, supra; Wynn* v. *State* (1885) 63 Miss. 260; *Creech* v. *Commonwealth* (1908) 32 Ky. L. Rep. 808, 107 S. W. 212; *Rose* v. *State* (1916) 79 Tex. Crim. Rep. 413, 186 S. W. 202. That judgment on this verdict was reversed in the instant case, because the witnesses were not excluded from the court before the state opened its case to the jury, a matter which was entirely discretionary

with that court seems to have been a miscarriage of justice.

ALVIN R. KATZ.

FORMER JEOPARDY — DECLARATION OF MISTRIAL — JUROR ACQUAINTED WITH FORMER ASSISTANT STATE'S ATTORNEY.—[Illinois] On a trial for conspiracy to suborn perjury, a juror was asked whether he knew anyone in the State's attorney's office. He mentioned a former assistant State's attorney, who entered the court-room shortly afterwards and spoke to one of the defendants, while waving with his hand to this juror. After the defense counsel had said that he had no objection, the court withdrew a juror and declared a mistrial. On writ of error to review the conviction at the ensuing trial, counsel for the plaintiff-in-error contended that the defendant did not consent to the withdrawal of the juror. *Held:* that the judgment should be affirmed on the ground that there was no error in the record requiring a reversal; that the withdrawal of the juror presented a case of absolute necessity in which the discretion of the trial judge was controlling: *People* v. *Simos* (Ill. 1931) 178 N. E. 188.

The decision is in accord with the general principle that the court may discharge a jury without working an "acquittal" of the defendant in any case where the ends of justice would otherwise be defeated, although it is usually held that a plea of former jeopardy will prevail unless there is an absolute necessity for the discharge to prevent a miscarriage of justice: *State* v. *Thompson* (1921) 58 Utah 291, 199 Pac. 161, note, 38 A. L. R. 697 (bystander commented to juror that "such a prosecution is a shame"; not such an absolute necessity as to defeat the plea of former jeopardy); *State* v. *Slorah* (1919) 118 Me. 203, 106 Atl. 768, note, 4 A. L. R. 1256 (defendant exclaimed, on a view with the jury, "take me away before I go insane again"; jury's discharge was an absolute necessity); *Armor* v. *State* (1906) 125 Ga. 3, 53 S. E. 815 (juror was prosecutor's relative; absolute necessity); *Simmons* v. *U. S.* (1891) 142 U. S. 148, 12 Sup. Ct. 171 (jury discharged because of juror's acquaintance with the defendant); *People* v. *Diamond* (1925) 231 Mich. 484, 204 N. W. 105 (juror asked the defendant's daughter at lunch whether they had a case); *State* v. *Bell* (1879) 81 N. C. 591 (juror had helped the defendant prepare his case); *State* v. *Sueing* (1873) 42 Ind. 541 (giving jury a can of beer did not necessitate their discharge). Service of petit juror on the grand jury which returned the indictment may be an "absolute necessity": *People* v. *Peplos* (1930) 340 Ill. 27, 172 N. E. 54; *Martin* v. *State* (1923) 161 Ark. 423, 256 S. W. 367; *Stewart* v. *State* (1864) 15 Ohio St. 155; contra: *O'Brian* v. *Commonwealth* (1872) 72 Ky. 333; and see, *Riley* v. *Commonwealth* (1921) 190 Ky. 204, 227 S. W. 146.

The Illinois provision against double jeopardy is: "No person shall . . . be twice put in jeopardy for the same offense": Constitution of 1870, Art. II, sec. 10. This defense may be shown under the plea of not guilty: *People* v. *Peplos,* supra; *Hankins* v. *People* (1883) 106 Ill. 628; *People* v. *Hawkinson* (1927) 324 Ill. 285, 155 N. E. 318; *People* v. *Brady* (1916) 272 Ill. 401, 112 N. E. 126. It is usually considered that jeopardy attaches when the jury is sworn: *Green* v. *State* (1923) 147 Tenn.

299, 247 S. W. 84; *O'Donnell* v. *People* (1906) 224 Ill. 218, 79 N. E. 639 (jeopardy does not attach when only four jurors are sworn); *McFadden* v. *Commonwealth* (1854) 23 Pa. 12 (same for eleven); *Lovato* v. *N. M.* (1916) 242 U. S. 199, 37 Sup. Ct. 107 (jeopardy does not attach until the defendant pleads); *Huey* v. *State* (1920) 88 Tex. Cr. 377, 227 S. W. 186; note, 12 A. L. R. 1006.

Cases where the doctrine of absolute necessity has been recognized are those in which the defendant consents: *Riley* v. *Commonwealth*, supra; *Martin* v. *State* (1924) 163 Ark. 103, 259 S. W. 6, note 33 A. L. R. 133 (the defendant's consent was unnecessary when a juror had served on former trial of same case); *Hilands* v. *Commonwealth* (1885) 111 Pa. 1, 2 Atl. 70 (defense of former jeopardy was not waived by the defendant's consent to the jury's separation); *Cornero* v. *U. S.* (C. C. A. 9th 1931) 48 F. (2d) 69 (discharge of jury over the defendant's objection sustains plea of former jeopardy); either the judge, a juror or the defendant is sick or absent from court: *People* ex rel. *Brinkman* v. *Barr* (1928) 248 N. Y. 126, 161 N. E. 444 (judge sick); *Salistean* v. *State* (1927) 115 Neb. 838, 215 N. W. 107 (member of juror's family was sick; former jeopardy was no defense); *State* v. *Slorah*, supra.

If the jury is unable to agree after deliberating for a reasonable time, their discharge may not amount to an acquittal of the defendant: *U. S.* v. *Perez* (1824) 22 U. S. 579; *State* v. *Barnes* (1909) 54 Wash. 493, 103 Pac. 792 (forty-three hours); *Dreyer* v. *People* (1900) 188 Ill. 40, 58 N. E. 620 (sixteen hours); contra: *Bellis* v. *State* (1928) 157 Tenn. 177, 7 S. W. (2d) 46 (sixteen hours); *People* ex rel. *Stabile* v. *Warden* (1911) 202 N. Y. 138, 95 N. E. 279 (five hours). A jury was discharged after deliberating for five hours because the term of court had ended; a conviction of the defendant at a subsequent trial was affirmed: *Winsor* v. *The Queen* (1866) L. R. 1 Q. B. 289.

The majority of states have some provision in regard to double jeopardy, usually contained in the constitution. As has been seen, some confusion has arisen as to just when jeopardy attaches. This applies, also, to the "same offense" concept, which has been accelerated to a certain extent by the litigation under the Federal and State liquor legislation. In Ohio, a conviction for transporting liquor in one county allows a plea of former jeopardy to a prosecution in another county for the same transaction as it is a continuing offense: *State* v. *Shimman* (1930) 122 Ohio St. 522, 172 N. E. 367. But a person can be punished for the same crime in both Federal and State courts as these are violations of two laws: *U. S.* v. *Cruikshank* (1875) 92 U. S. 542; *U. S.* v. *Lanza* (1922) 260 U. S. 366, 43 Sup. Ct. 141. The same situation is applicable to violations of State laws and municipal ordinances: *State* v. *Cavett* (1927) 172 Minn. 16, 214 N. W. 479.

An acquittal of larceny obtained by false testimony does not allow recognition of the defense of former jeopardy in a prosecution for perjury: *People* v. *Niles* (1921) 300 Ill. 458, 133 N. E. 252, note 37 A. L. R. 1284; *People* v. *Melnich* (1916) 274 Ill. 616, 113 N. E. 971; *People* v. *Ashbrook* (1917) 276 Ill. 382, 114 N. E. 922; *State* v. *Cary* (1902) 159 Ind. 504, 65 N. E. 527; *Teague* v. *Commonwealth*

(1916) 172 Ky. 665, 189 S. W. 908. An acquittal of larceny does not bar a prosecution for burglary based on the same transaction: *Cambron* v. *State* (1922) 191 Ind. 431, 133 N. E. 498, note 19 A. L. R. 623; *Gordon* v. *State* (1882) 71 Ala. 315; *People* v. *Devlin* (1904) 143 Cal. 128, 76 Pac. 900; *State* v. *Hooker* (1907) 145 N. C. 581, 59 S. E. 866. But where the verdict on an information charging a burglarious entry, was guilty of larceny, there could be no further prosecution for larceny or burglary: *State* v. *Burnes* (1915) 263 Mo. 593, 173 S. W. 1070. Where one indictment charged murder by shooting and the second one, murder by striking with a gun there was no double jeopardy as the offenses charged are not the same: *Guedel* v. *People* (1867) 43 Ill. 227. Two injuries inflicted in the same transaction are sometimes considered two different offenses: *State* v. *Labbee* (1925) 134 Wash. 55, 234 Pac. 1049; *People* v. *Majors* (1884) 65 Cal. 138, 2 Pac. 744. The opposing view that a prosecution for one bars a prosecution for the other has been maintained in several cases, however: *Gunter* v. *State* (1895) 111 Ala. 23, 20 Sou. 632; *Clem* v. *State* (1873) 42 Ind. 420; *State* v. *Nelson* (1849) 29 Me. 329; *Griffith* v. *State* (1915) 93 Ohio St. 294, 112 N. E. 1017; *State* v. *Cooper* (1833) 13 N. J. L. 361 (conviction of arson barred prosecution for murder); *Smith* v. *State* (1929) 159 Tenn. 674, 21 S. W. (2d) 400 (conviction of manslaughter barred prosecution for assault and battery but not for driving an automobile while intoxicated); see *Wright* v. *State* (1897) 37 Tex. Cr. 627, 40 S. W. 491 (acquittal of one crime does not bar prosecution for another although a conviction might).

Into this array of decisions comes the American Law Institute's proposed restatement relating to double jeopardy. It states that at common law the doctrine was that an accused person had not been in jeopardy until the jury had rendered a verdict of either guilty or not guilty on the crime in question. A jury's discharge prior to such action was no bar to a subsequent prosecution. The basis for this view goes back to a statement by Lord Coke in which he says that after a jury has been impaneled it should not be discharged until a verdict is rendered: Co. Litt. 227 b; *Coke:* Third Institute 110; Hale P. C. 267. To argue the other way, a passage from the Doctor and Student, Dial. 2, cap. 52 and Hale P. C. 244 may be cited: *Reg.* v. *Charlesworth* (Q. B. 1861) 1 B. & S. 460, 101 E. C. L. 459; contra: *Reg.* v. *Wardle* (1842) Car. & M. 647.

The problem of the "same offense" is attacked in the American Law Institute's work by the test of the violation of the criminal law in connection with the similarity of the fact situation. It states that a jury may be discharged only when it is impossible to proceed without injustice. The provision that a conviction unreversed or an acquittal in one state bars a prosecution for the violation of the same part of the criminal law in another state or under the laws of the United States is, perhaps, more salutary than the decisions cited supra. Other clauses contain the following stipulations: where acquittals are obtained by technicalities such as errors in the indictment there may be a subsequent prosecution; a state is entitled to a new trial if the defendant has been acquitted and there

is a material error which would prejudice the state; when an acquittal or conviction of a person is obtained by some fraud or collusion on his part, it shall be no bar to another prosecution for the same offense; a verdict which is so imperfect as to render judgment on it impossible does not bar another trial; if a new trial is awarded, this does not constitute a second prosecution for the same offense; all pleas of double jeopardy, such as former acquittal, or conviction are abolished and the defenses are allowed to be shown under a motion to quash the indictment or information.

The preliminary draft of the American Law Institute on this subject should do much to relieve the confusion which, at present, surrounds the problem. That such revision was required, may be readily perceived by no more than a superficial survey of the cases such as has been attempted here. If the provisions are given proper recognition, they should tend to eliminate some of the difficulty which is associated with the idea of double jeopardy, now.

J. F. WATERMAN.