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## Constitutional Law—Mistrial in Absence of Legal Error Held Due Process

Irwin N. Davis

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## RECENT DECISIONS

### CONSTITUTIONAL LAW—MISTRIAL IN ABSENCE OF LEGAL ERROR HELD DUE PROCESS

*A.*, *B.*, and *C.* were indicted for assault. *A.* and *B.*, tried together, were convicted. Before judgments were entered, *C.* was brought to trial; *A.* and *B.* being called as witnesses for the prosecution. When they successfully invoked the privilege against self-incrimination, the prosecutor obtained a mistrial so that he would later be able to use their testimony. In a subsequent trial of *C.*, the testimony of *A.* and *B.* was introduced in evidence. *Held*: Conviction affirmed. *C.* was not denied the essentials of a fair trial in violation of the Fourteenth Amendment. *Brock v. State of North Carolina*, 73 S. Ct. 349 (1953).

While the concept of double jeopardy cannot be exactly defined for all purposes, it is generally held that jeopardy attaches when a person is regularly charged with a crime before a tribunal properly organized and competent to try him, *i. e.*, when the jury is impanelled and sworn. *Kepner v. United States*, 195 U. S. 100 (1904); *Sanford v. Robbins*, 115 F. 2d 435 (5th Cir. 1940); *State v. Kinghorn*, 56 Wash. 131, 105 Pac. 234 (1909); *cf. Clawans v. Rives*, 104 F. 2d 240 (D. C. Cir. 1909); *State v. Yokum*, 155 La. 846, 99 So. 621 (1923), which require that a witness be sworn before jeopardy attaches. When a trial is discontinued, the question arises whether a subsequent trial of the defendant would subject him to double jeopardy within the prohibition of the doctrine. According to *United States v. Perez*, 9 Wheat. 579 (U. S. 1824), the court has "the authority to discharge a jury from giving a verdict, 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." See *Thompson v. United States*, 155 U. S. 274 (1894); *Wade v. Hunter*, 336 U. S. 684 (1949); *People ex rel. Brinkman v. Barr*, 248 N. Y. 126, 161 N. E. 444 (1928).

To lay down a precise rule for determining when a discharge will be deemed "necessary" would seem to be impossible. A discharge of the jury has been said to be no bar to a second trial where: (1) the jury was discharged because it could not agree, *United States v. Perez, supra*; (2) one of the petit jurors was a member of the grand jury which returned the indictment, *Thompson v. United States, supra*; (3) essential witnesses were urgently needed to aid in the prosecution of a war, *Wade v. Hunter, supra*; (4) the presiding judge became ill and could not continue, *People ex rel. Brinkman v. Barr, supra*; (5) one of the jurors was found

to be insane, *United States v. Haskell*, 26 Fed. Cas. 207, No. 15, 321 (C. C. E. D. Pa. 1823). See A. L. I., ADMINISTRATION OF THE CRIMINAL LAW 72 (Tent. Draft 1935). However a discharge of the jury was held to be a bar to a second prosecution where: (1) a witness failed to return from recess, *State v. Little*, 120 W. Va. 213, 197 S. E. 626 (1938); (2) there was insufficient evidence to prosecute, *People v. Barrett*, 2 Caines 304 (N. Y. 1805); (3) merely as a matter of convenience, the trial judge withdrew from the indictment several counts included in a subsequent trial, *United States v. Kraut*, 2 F. Supp. 16 (S. D. N. Y. 1932); (4) defendant's counsel, disregarding a warning against such remarks, stated that the prosecuting witness was being "forced" to testify, *Armentrout v. State*, 214 Ind. 273, 15 N. E. 2d 363 (1938); (5) the district attorney failed to subpoena his two material witnesses and was unable to proceed in their absence, *Cornero v. United States*, 48 F. 2d 69 (9th Cir. 1931). See A. L. I., ADMINISTRATION OF THE CRIMINAL LAW 87 (Tent. Draft 1935).

The "test" whether a particular right falls within the protection of the due process clause of the Fourteenth Amendment is whether restriction of the right "violates a principle of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934). The protection against double jeopardy provided by the Fifth Amendment has been said not to be one of the fundamental rights coming within the scope of the Fourteenth Amendment. *Amrine v. Tines*, 131 F. 2d 827 (10th Cir. 1942). In *Palko v. Connecticut*, 302 U. S. 319 (1937), the question of the extent to which the Fourteenth Amendment provides protection against double jeopardy was before the Supreme Court. In that case, defendant was convicted of murder in the second degree, the state on appeal obtained a new trial on the ground of legal error, and on retrial defendant was convicted of murder in the first degree. However, the Court specifically avoided discussing the consequences of the retrial in case the proceedings were free from legal error. *Supra* at 328.

Unlike the *Palko* case, *supra*, there was no legal error in the instant case. The only ground for discharge of the jury here was to aid the prosecution's case. If the reasoning of the majority in the principal case were followed, the defendant might conceivably be subjected to a multitude of trials. The doctrine against double jeopardy was developed to prevent just that type of practice. Furthermore, the delay may weaken the defendant's case. Perhaps the limitations suggested by Frankfurter, J., in his concurring opinion would provide the necessary safeguards. He indicated that a court cannot rightfully discharge a jury "merely

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in order to allow a prosecutor who has been incompetent, or casual, or even ineffective to see if he cannot do better a second time." *Brock v. State of North Carolina*, *supra* at 351.

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### WILLS—NO ELECTION BETWEEN LEGACY AND QUANTUM MERUIT

Decedent orally promised to leave his five hundred acre farm to the plaintiffs if they would stay with him until he died. Plaintiffs devoted thirty-six years to the development of decedent's property. Decedent failed to devise the property but left the plaintiffs a \$30,000 legacy, which they accepted. *Held*: Although recovery for the breach of an oral contract was barred by the Statute of Frauds, recovery was possible in quantum meruit for the value of plaintiffs' services. *Turner v. White*, — Mass. —, 109 N. E. 2d 155 (1952).

The enforceability of agreements to make wills is governed by the law of contracts. *Emery v. Darling*, 50 Ohio 160, 33 N. E. 715 (1893). Promises to devise realty are within the section of the Statute of Frauds relating to the transfer of interests in land. In re *Sheldon's Estate*, 120 Wis. 26, 97 N. W. 524 (1903). Ordinarily a contract to will property is breached by the failure of the promisor to execute any will, *Mills v. Smith*, 193 Mass. 11, 78 N. E. 765 (1906), or by leaving a will with terms contrary to the contract. *Phalen v. U. S. Trust Co.*, 186 N. Y. 178, 78 N. E. 943 (1906). The breach occurs upon the testator's death, *Warden v. Hinds*, 163 Fed. 201 (4th Cir. 1908), unless he repudiates the contract during his lifetime. *Carter v. Witherspoon*, 156 Miss. 597, 126 So. 388 (1930). Upon the breach of an enforceable contract to make a will, the promisee can recover damages measured by the value of the property. *Roy v. Pos*, 183 Cal. 359, 191 Pac. 542 (1920). Where the oral contract is unenforceable, barring recovery of damages on the contract, the promisee may still recover for the reasonable value of services rendered to the deceased. *Robinson v. Raynor*, 28 N. Y. 494 (1864); *Hensley v. Hilton*, 191 Ind. 309, 131 N. E. 38 (1921). In the instant case the Massachusetts court allowed a recovery in quantum meruit to prevent the Statute of Frauds from being used to allow a defendant to receive valuable services without paying compensation. *Downey v. Union Trust Co.*, 312 Mass. 405, 45 N. E. 2d 373 (1942).

Granting the right to recover in quantum meruit, defendant claimed that the acceptance of the legacy barred the action. The defense relied on the principle that a person cannot take a benefit