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opinion that the "authorization test" is the better and more logical one, it seems that the result reached by the Pennsylvania court is correct. It is doubtful whether Adams was impliedly authorized to use his car by the statement of the superintendent. If this is true, then under the "authorization test" the master cannot be liable for the negligent conduct of his servant when said servant uses an instrumentality without the authorization of said master. *A fortiori* if the statement may be construed as implied authorization, then under the "test" the master would be liable for the servant's negligent use of the instrumentality.

Henry V. Scheirer

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## PLEAS OF DOUBLE JEOPARDY AND AUTREFOIS CONVICT OR ACQUIT

Although the purpose of the criminal law is to prevent and punish offenses against the people, it also does much to secure just treatment for the accused. Just as the civil law protects a person from continuous persecution by one who has an alleged claim against him, so the criminal law provides that the state cannot repeatedly try a man for the same offense. The weapons furnished to the accused in the latter field of law are the pleas of double jeopardy and of autrefois convict or autrefois acquit. In a general way these pleas have much in common, but several distinct differences exist in their origin and application.

The plea of double jeopardy arises from Article I, section 10 of the Pennsylvania Constitution of 1874. It is there stated, "No person shall, for the same offense, be twice put in jeopardy of life or limb." This provision has remained the same throughout the various constitutions of the state, and constructions thereof by the cases are equally applicable regardless of the year in which they were decided.

The early case of *Commonwealth v. Cook*<sup>1</sup> formulated certain general rules applicable to the provision, and these same rules exist today. With the facts of this case in mind the plea of double jeopardy can be more adequately discussed. This was a case of indictment for first degree murder brought against three defendants. The jury agreed as to the verdict to be rendered against two, but not as against the third. The trial judge discharged the jury, refusing to receive the verdicts that had been reached, so that it was not known what the verdict was, nor against which two it was directed. Subsequently Cook was re-indicted for the same offense, and he entered a plea of double jeopardy. Upon its denial in the lower court, the defendant appealed to the Supreme Court where Chief Justice Tilghman rendered the opinion in favor of the plea.

Jeopardy, in the meaning of the Constitution, comes into existence when the jury is panelled and sworn,<sup>2</sup> and not until then.<sup>3</sup> Therefore, if the oath has not yet been administered,<sup>4</sup> or if a mere preliminary hearing is held, such as to determine if the accused has been properly indicted by name,<sup>5</sup> no jeopardy results. The jeopardy involved is that "of life or limb." From this phrase the courts have concluded that this guarantee to accused persons is present only in cases of capital offenses, for imprisonment does not imperil life or limb.<sup>6</sup> Therefore, as the situation exists today, the plea of double jeopardy factually requires that there has been an indictment for first degree murder, and that a jury has been sworn and charged with the life of the defendant. No prior actual conviction or acquittal is neces-

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<sup>1</sup>Comm. v. Cook, 6 S. & R. 577 (1822).

<sup>2</sup>Hilands v. Comm., 111 Pa. 1 (1885).

<sup>3</sup>Alexander v. Comm., 105 Pa. 1 (1884).

<sup>4</sup>McFadden v. Comm., 23 Pa. 12 (1853); Comm. v. Cury, 287 Pa. 557 (1926).

<sup>5</sup>Alexander v. Comm., 105 Pa. 1 (1884).

<sup>6</sup>McCreary v. Comm., 29 Pa. 323 (1857); Comm. v. Freedman, 94 Pa. Super. Ct. 491 (1928); Comm. v. Keeper of Phila. Co. Prison, 76 Pa. Super. Ct. 98 (1921).

sary,<sup>7</sup> and, as will be shown, the majority of controversies over the plea have arisen upon the effect to be given to the discharge of the jury.

Under the earlier English practice Lord Coke stated as law that a jury could not be discharged in a capital case until a verdict was reached although both the defense and prosecution agreed to such discharge.<sup>8</sup> The rule was without foundation, and as settled in *Kinlock's Case*, *Foster* 22, ceased to be so rigid, and a discharge is now allowed if it is done for the defendant's benefit and he consents thereto,<sup>9</sup> or if a case of *absolute necessity* exists. What is absolute necessity has usually been a question to be applied to the facts of a particular case. It is well settled, however, that such necessity exists (1) when there has been a tampering by the defense with the jury or with a witness for the prosecution; (2) when the prisoner becomes insane after making his plea or during the trial; (3) and when a jurymen becomes incompetent to serve.<sup>10</sup>

From the above summary of rules as to absolute necessity it can readily be surmised that mere disagreement is not sufficient to warrant a discharge of the jury without the defendant's consent; and this is the law.<sup>11</sup> The reason lies in the fact that a disagreement is an advantage that cannot be taken from the prisoner without his consent. Further, if a jury could be so discharged it would lead to few verdicts in capital cases, and give non-believers in capital punishment a way out of their difficulty when called to serve as jurors.<sup>12</sup>

It is at this point that the plea of double jeopardy becomes effective. As is said in *McFadden v. Common-*

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<sup>7</sup>Comm. v. Cook, 6 S. & R. 577 (1822); Comm. v. Fitzpatrick, 121 Pa. 109 (1888).

<sup>8</sup>1 Inst. 227 b; 3 Inst. 110.

<sup>9</sup>Comm. v. Cook, 6 S. & R. 577 (1822).

<sup>10</sup>Comm. v. Cook, 6 S. & R. 577 (1822); *McFadden v. Comm.*, 23 Pa. 12 (1853); Comm. v. Fitzpatrick, 121 Pa. 109 (1888).

<sup>11</sup>*Hilands v. Comm.*, 23 Pa. 1 (1885); Comm. v. Cook, 6 S. & R. 577 (1822).

<sup>12</sup>Comm. v. Cook, 6 S. & R. 577 (1822).

*wealth*,<sup>13</sup> "discharge of jury in a capital case, after the trial has begun, is not a continuation of the cause. It is the end of it. And for all purposes of future protection it is the same to the prisoner as an acquittal, unless it was done with his consent, or demanded by some overwhelming necessity."<sup>14</sup> The use of the word "acquittal" here is somewhat misleading, for as has been shown above, no actual acquittal is necessary. Also, an unlawful discharge is only effective as to the allegations set forth in the indictment. In *Hilands v. Commonwealth*,<sup>15</sup> there was an indictment for murder and the jury was panelled and sworn. During the course of the trial the jury was separated over night with the consent of both the prosecution and defense. However, the judge considered this as an irregularity and discharged the jury without the defendant's consent. A new jury was panelled and sworn and the defendant pleaded double jeopardy. The plea was sustained by the Supreme Court, but the case was then remanded to the trial court for further action. That is, the plea of double jeopardy only extended to the indictment for murder, but would be no defense to an indictment for involuntary manslaughter.<sup>16</sup>

Two rather obvious rules are still to be noted. First, a plea of double jeopardy will only avail when the defendant has twice been put in peril for the same offense. Thus, if there is indictment for murder of two persons, a verdict on one indictment will not be a bar to trial on the other.<sup>17</sup> Second, a plea of double jeopardy will not be allowed if the first trial was discontinued due to request for new trial by the defendant, or upon order of the court to protect the accused from prejudicial circumstances which have arisen.<sup>18</sup>

Pleas of *autrefois convict* or *autrefois acquit* are not creations of statutes or constitutions, but come from the

<sup>13</sup>23 Pa. 12 (1853).

<sup>14</sup>*Hilands v. Comm.*, 111 Pa. 1 (1885); *Comm. v. Fitzpatrick*, 121 Pa. 109 (1888).

<sup>15</sup>111 Pa. 1 (1885).

<sup>16</sup>*Comm. v. Greevy*, 271 Pa. 95 (1921).

<sup>17</sup>*Comm. v. Vallota*, 279 Pa. 84 (1924).

<sup>18</sup>*Comm. v. Lutz*, 200 Pa. 226 (1901); *Comm. v. Gabor*, 209 Pa. 201 (1904).

common law. In Pennsylvania they are recognized by legislative enactment, but the only purpose thereof was to set forth the manner in which the defense may be pleaded.<sup>19</sup> When an analogy is drawn between these pleas in criminal practice and that of *res judicata* in the field of civil law, a basic requirement is distinctly shown; i. e., a plea of this defense requires that a verdict has been rendered in a former trial, and mere jeopardy is insufficient.<sup>20</sup> It must be noted that a discharge of the jury without *reasonable necessity* operates as a verdict of acquittal. By way of illustration, a failure of the jury to agree is reasonable necessity, but an inability of the prosecution to prove the facts stated in the indictment is not.<sup>21</sup> The advantage of *autrefois* pleas over that of double jeopardy lies in the fact that the former may be used as a defense to indictments for less than capital, as well as capital, offenses.<sup>22</sup>

The reason for allowing *autrefois* pleas are obvious, but a quotation from the case of *Commonwealth v. Greevy*<sup>23</sup> is worthy of note on the point:—"The jury system would become as nothing if in the administration of the criminal law, officers of the government were permitted time and again to bring a man to trial for the same alleged unlawful act, after a jury had upon a fair trial found him not guilty of the fact upon which all of the indictments depended. If the government could try a man a second time after one jury had found a fact in his favor, then there can be no limit to the number of times he may be brought to trial." The constitution provides that "trial by jury should be as heretofore, and the right thereof shall remain inviolate."<sup>24</sup> This also

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<sup>19</sup>1860 P. L. 437, sec. 30.

<sup>20</sup>*Comm. v. Freedman*, 94 Pa. Super. Ct. 491 (1928).

<sup>21</sup>*Comm. v. Hetrick*, 1 Woodward 288 (1866); *McCreary v. Comm.*, 29 Pa. 323 (1857); *Comm. v. Keeper of Phila. Co. Prison*, 76 Pa. Super. Ct. 98 (1921).

<sup>22</sup>*Comm. v. Markowitz*, 74 Pa. Super. Ct. 231 (1920); *Comm. v. Greevy*, 75 Pa. Super. Ct. 116 (1920)—reversed on other grounds 271 Pa. 95; *Altenburg v. Comm.*, 126 Pa. 602 (1889); *Comm. v. Mc. Evans*, 92 Pa. Super. Ct. 124 (1927).

<sup>23</sup>75 Pa. Super. Ct. 116 (1920).

<sup>24</sup>Art. I, sec. 6, Constitution of 1874.

means that the accused is entitled to "the fruits of the jury trial," and on this, bases his plea of *autrefois convict* or *acquit*.

The factual requirements of such pleas are (1) matter of record,—indictment, acquittal or conviction, and justices before whom the trial was held; and (2) matter of fact,—that defendant is the same person who was previously acquitted or convicted on the same facts now alleged.<sup>25</sup> As stated in *Commonwealth v. Forney*,<sup>26</sup> "The test in the plea of *autrefois acquit* is whether the evidence necessary to support the second indictment would have been sufficient to convict on the first. A former acquittal (or conviction) is only a bar when the defendant could have been convicted on the first indictment of the charge preferred in the second." Therefore, if certain facts have been passed upon and decided in a previous trial, the state cannot later attempt to prove these facts against the defendant, even though the second indictment is for an entirely different offense than was alleged in the first.<sup>27</sup>

It is interesting to note that in the cases of *Commonwealth v. Arner*,<sup>28</sup> and *Commonwealth v. Wible*,<sup>29</sup> the courts erroneously used the term "double jeopardy" for pleas which actually were of *autrefois convict*. These were both cases of indictment for fornication and bastardy, and rape. In one case there was a plea of guilty, and in the other, conviction of the former offense. Upon later indictments for rape, pleas of double jeopardy were entered and sustained—these decisions being contrary to the line of authority previously discussed, which holds that a plea of double jeopardy will only avail in capital cases. The *Wible* case claims that there is an analogous plea in the cases of lesser

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<sup>25</sup>*Comm. v. Greevy*, 75 Pa. Super. Ct. 116 (1920).

<sup>26</sup>87 Pa. Super. Ct. 451 (1926).

<sup>27</sup>*Altenburg v. Comm.*, 126 Pa. 602 (1889); *Comm. v. Altland*, 79 Pa. Super. Ct. 43 (1922); *Comm. v. Mc. Evans*, 92 Pa. Super. Ct. 124 (1927).

<sup>28</sup>149 Pa. 35 (1892).

<sup>29</sup>2 D. and C. 467 (1922).

crimes, but to speak of unnecessary analogies in the face of distinct differences is a dangerous practice.

What, then, are the differences which exist between the plea of double jeopardy, and the plea of *autrefois convict* or *acquit*? A review of the cases cited leads to the following conclusions:—1. The plea of double jeopardy originates from Constitutional provisions, while *autrefois* pleas find their source in the common law.

2. The plea of double jeopardy is only available in capital cases, while *autrefois* pleas are accessible under indictment for any crime.

3. *Autrefois* pleas require that there shall have been a verdict, an accepted plea of guilty, or a discharge of the jury without *reasonable necessity*. The plea of double jeopardy is available though no verdict has been given, if there was discharge of the jury without *absolute necessity*.

E. F. Hann, Jr.

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## PROMISSORY ESTOPPEL AS A SUBSTITUTE FOR CONSIDERATION

The recent case of *Langer v. Superior Steel Corporation*<sup>1</sup> presents the question of promissory estoppel in Pennsylvania as a substitute for consideration.

The defendant sent the plaintiff the following letter:

“Aug., 31, 1927.

“Mr. Wm. F. Langer,

“Dear Sir:

“As you are retiring from active duty with this company, as superintendent of the Annealing Department, on August 31, we hope that it will give you some pleasure to receive this official letter of commendation for your long and faithful service with the Superior Steel Corporation.

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<sup>1</sup>161 Atl. 571 (1932).