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Improper Discharge of Jury before Verdict as Double Jeopardy

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STUDENT NOTE

IMPROPER DISCHARGE OF JURY BEFORE VERDICT AS DOUBLE JEOPARDY

A problem involving a conflict between individual and social interests, more serious than the brief opinion might lead one to suppose, is presented in the recent case of *State v. Little.*[1] In this case the defendant pleaded "not guilty" to an indictment for a felony. A jury was impaneled, and sworn to "try the issue" and make a "true deliverance" between the prisoner and the state. No evidence was taken. The court suspended proceedings for a noon recess, and state witnesses were directed to return at 1:30 o'clock. They failed to return, and at 2:00 o'clock the prosecuting attorney informed the court that the state was "not advised" whether the witnesses would return that day, or at all. It did not appear that they could not be found, nor that any effort was made to locate and bring them into court. On motion of the state, over defendant's objection, the court withdrew a juror and and declared a mistrial. Defendant was convicted at a subsequent term, after his plea of former jeopardy was disallowed. On writ of error, it was held that he had been once placed in jeopardy by the former proceeding, and could not legally be brought to trial a second time.

The opinion is based upon the following propositions:

1. That, under the West Virginia constitution,[2] a defendant in a criminal case is placed in jeopardy when a qualified jury is sworn, in a court of competent jurisdiction, to determine his guilt or innocence of a charge contained in a valid indictment.[3]

2. That this jeopardy, though once attached, may be set aside in certain situations, under the statutory provision authorizing discharge of a jury by the court when it can not agree, or when some "manifest necessity" appears.[4]

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[1] State v. Little, 197 S. E. 626 (W. Va. 1938).

[2] ". . . . nor shall any person . . . be twice put in jeopardy of life or liberty for the same offense." W. VA. CONST. art. III, § 5. The Fifth Amendment of the Federal Constitution, as the constitutions of several states, uses the language "life or limb".

[3] *Ex parte* Glenn, 111 Fed. 257 (N. D. W. Va. 1901); and dicta in State v. Shelton, 116 W. Va. 75, 178 S. E. 633 (1935); and State v. Runyon, 100 W. Va. 647, 131 S. E. 466 (1926). The proposition was not stated in State v. Gruber, 3 W. Va. 699 (1869), but the assumption that jeopardy attached when the jury was sworn seems necessary to the result reached. The opinion in State v. Davis, 31 W. Va. 390, 7 S. E. 24 (1888) collects cases on both sides of the question.

[4] *Ex parte* Glenn; and see State v. Shelton; State v. Runyon; State v. Davis, all *supra* n. 3.

3. That after the jury is sworn, any unauthorized discharge before verdict, over objection of the defendant, amounts to an acquittal, and is a bar to another trial for the same offense.[5]

No reason was shown why the trial court could not have suspended the trial, have committed the jury into the sheriff's custody, and have continued with other business until a reasonable effort was made to find the absent witnesses. Failure of these witnesses to return within half an hour after the session resumed, the court held, was not such a necessity as is contemplated by the statute. This view is supported by the few West Virginia cases on the subject,[6] recent decisions of other courts,[7] by earlier common law decisions,[8] and by text writers.[9]

A few opinions assert that jeopardy does not attach until verdict[10] but none is recent; and some of these courts have since held otherwise.[11] The vast majority of courts, with or without a statute

[5] See cases cited in n. 3 *supra.*

[6] In *Ex parte* Glenn, 111 Fed. 257 (N. D. W. Va. 1901), the petitioner was discharged in a *habeas corpus* proceeding because the record failed to show that a jury, discharged over objection of defendant after it had deliberated for some time, could not agree. It is said that a sufficient necessity for such discharge of the jury was not shown.

In State v. Gruber, 3 W. Va. 699 (1869), defendant pleaded "not guilty" and a jury was sworn. There then appeared some question of defendant's sanity at the time of the supposed offense. The court discharged the jury and impaneled another to inquire into defendant's sanity. The issue being found against defendant, he was tried on the criminal charge at a later term of court and was convicted. On appeal, he was discharged, because there was no manifest necessity for the discharge of the first jury.

But an improper separation of the jury, which would require reversal of a conviction, is a manifest necessity. State v. Shelton (as is the death of a son of a juror); State v. Davis, both *supra* n. 3.

[7] Cornero v. United States, 48 F. (2d) 69, 74 A. L. R. 797 (C. C. A. 9th, 1931) where a jury was discharged when the prosecution was unable to proceed because of the absence of witnesses, not summoned, but under bond to appear for sentence on the day of trial.

Commonwealth v. Commander, 10 D. & C. 275 (Pa. 1928), in which absence of state witnesses resulted in the discharge. But in Pennsylvania the rule is limited to capital cases.

For a general treatment of the question see 1 BISHOP, CRIMINAL LAW (9th ed. 1923) 768.

[8] Perrin, J., in Conway and Lynch v. The Queen, 8 Ir. 149 (1845); and see cases collected in a note to Commonwealth v. Fells, 9 Leigh 613 (Va. 1838).

[9] 1 BISHOP, CRIMINAL LAW 752; 1 WHARTON, CRIMINAL LAW (11th ed. 1912) 510 *et seq.*

[10] Commonwealth v. Olds, 15 Ky. 137 (1824); O'Brian v. Commonwealth, 69 Ky. 563 (1869); People v. Goodwin, 18 Johns. 187 (N. Y. 1820); State v. Moor, Walker 134 (Miss. 1823); and see cases collected in State v. Davis, 31 W. Va. 390, 393, 7 S. E. 24 (1888).

[11] People v. Warden of the City Prison, 202 N. Y. 138, 95 N. E. 729 (1911); O'Brian v. Commonwealth, 72 Ky. 333 (1872), which expressly overrules prior decisions.

such as ours, are practically agreed that there must be a manifest, or urgent, or evident necessity for the discharge of a jury before verdict.[12] They are not in complete agreement as to what constitutes such a necessity. There are several classes of necessities. Some are described as physical; some as moral, or legal.[13] There has been little tendency to include within them any of those reasons for which juries have been discharged for inability of the prosecution to proceed because of matters affecting witnesses. In this class of cases, according to the great weight of authority, a discharge of the jury before verdict, without defendant's consent, operates as an acquittal.[14] But even in this class of cases, a few opinions concede necessity when the matter which results in such discharge is beyond the control of the court or prosecution, or could not reasonably have been anticipated by the exercise of due diligence.[15]

Jeopardy is defined as "exposure to, or danger of, death, loss or injury; danger; hazard; peril".[16] The definition is not useful here. It indicates merely that some danger is being guarded against, but does not define that danger. If the constitutional provision contains nothing more than the literal meaning of "danger of life" and "danger of liberty", it would seem that the hazard contemplated is a possibility of ultimate punishment. But the notion of double jeopardy obviously is not so restricted.[17] In determining what the dangers are which the constitution guards against, and what the protection is which the courts undertake to afford through their interpretations of the constitution, it will be helpful to trace briefly the historical development of the notion of double jeopardy, as it now exists.

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12 1 BISHOP, CRIMINAL LAW 752; 1 WHARTON, CRIMINAL LAW 513, stating the general rule.

The necessity is variously described as "extreme", "absolute", "inevitable", "imperative", and "legal". See cases cited in Simmons v. United States, 142 U. S. 148, 151, 12 S. Ct. 70, 35 L. Ed. 968 (1891).

13 State v. Slorah, 118 Me. 203, 106 Atl. 768, 4 A. L. R. 1256 (1919). And see Commonwealth v. Fells, 9 Leigh 613 (Va. 1838); Cluverius v. Commonwealth, 81 Va. 787 (1886); note on juries, 19 Va. 615 *et seq.* (1901). For a general treatment of necessities, see 1 WHARTON, CRIMINAL LAW 520-525.

14 Note (1931) 74 A. L. R. 803.

15 Among these are State v. Callendine, 8 Iowa 288 (1859); Pizano v. State, 20 Tex. App. 139 (1886); but the statements in both are dicta. See also Commonwealth v. Wade, 17 Pick. 395 (Mass. 1836).

16 *Ex parte* Glenn, 111 Fed. 257 (N. D. W. Va. 1901).

17 See Martin v. State, 163 Ark. 103, 259 S. W. 6 (1924); 1 BISHOP, CRIMINAL LAW 750.

Early in the history of the common law, judges exercised large powers. Not infrequently they suspended criminal prosecutions, discharged juries, and held defendants for later trial on such oppressive considerations as that it appeared, during the trial, that the evidence of the prosecution was insufficient to support a conviction, and that the crown required more time in which to bolster up its case.[18] Out of the abuses consequent upon this state of affairs arose a rigid rule that once a jury was sworn and charged with deliverance of a defendant, it could not be discharged until it had delivered a verdict.[19] This rule was applied, in substance, to civil cases as well. When modifications were made, they occurred first in civil litigation.[20] Next the relaxation extended to cases involving misdemeanors,[21] but in prosecutions for capital offenses, the rule continued for some time. Gradually a relaxation appeared there, in that it became permissible to discharge juries when they could not agree in a verdict, or when there was a manifest necessity for such discharge.[22] It then was held that a discharge of the jury before verdict, without consent of the defendant, in these cases, for any other reason than compelling necessity, amounted to an acquittal.[23] It must be remembered, that while these rules were evolving, there was a staggering number of capital offenses.[24] This fact, coupled with the now strange practices in the development of the jury system,[25] and the uncertain political organization of the

[18] See the opinion of Crampton, J., in Conway and Lynch v. The Queen, 8 Ir. 149 (1845).

[19] The rule is said to have had its basis in a dictum of Lord Coke, without prior judicial sanction, Commonwealth v. Fells, 9 Leigh 613 (Va. 1838). See 3d Co. INST. 110, and 1st Co. INST. § 366; 3 BAC. ABR. 768, 769; State v. Slorah, 118 Me. 203, 106 Atl. 768, 4 A. L. R. 1256 (1919).

[20] Crampton, J., in Conway and Lynch v. The Queen, 8 Ir. 149 (1845).

[21] As indicating that the rule as modified did not, in Virginia, apply to cases involving misdemeanors, see Commonwealth v. Fells, 9 Leigh 613 (Va. 1838); Wright v. Commonwealth, 75 Va. 915 (1882).

[22] 4 BL. COMM. 360; Crampton, J., in Conway and Lynch v. The Queen, 8 Ir. 149 (1845). And see Rex v. Edwards, E. R. 1812 C. P. 4 Taunt. 309, reported in 11 PETERSDORFF'S ABR. (1829) 744.

[23] Majority opinion, Conway and Lynch v. The Queen, 8 Ir. 149 (1845).

[24] See State v. Slorah, 118 Me. 203, 106 Atl. 768, 4 A. L. R. 1256 (1919).

[25] Accusation by the earliest form of grand jury was equivalent to conviction, subject to the change of ordeal by water; and conviction meant the loss of one's right hand, or one foot, or both; and banishment as well. But acquittal still resulted in banishment. See State v. Kavanaugh, 32 N. M. 404, 258 Pac. 209, 53 A. L. R. 706 (1927), quoting Mr. Justice Stephens, 1 HIST. CRIM. LAW OF ENGLAND (1883) 252.

If a court considered a verdict "notoriously wrong", the jury might be fined, or imprisoned, or otherwise punished. See 4 BL. COMM. 361.

Juries were coerced into agreement. A jury, having retired, could not have

times,[26] led to innumerable technicalities in the criminal law. As viewed from the comparative security of today, neither life nor property was safe. It may be that the notion of former jeopardy embraced an idea of protection against the danger of ultimate punishment;[27] and that, in its origin, it contemplated the necessity of some finality in judicial proceedings; but it seems obvious that its principal function became one of protecting criminal defendants from oppression, harassment and delay. The present notion of former jeopardy. has no necessary connection with the pleas of *autrefois acquit* and *autrefois convict*, which existed from earliest times[28] and which, like the doctrine of *res judicata* in civil litigation, are based upon a necessity that judicial proceedings have some finality.[29] A defendant who has been once tried is not only entitled to protection from a second punishment, but from a second proceeding. But if this were the only protection being afforded, no necessity is perceived for the application of any separate doctrine of former jeopardy, because the same protection would be afforded by the pleas of former conviction or acquittal.[30] As the decisions clearly indicate, the doctrine is made to preclude the state from placing one upon trial after he has once been placed upon trial, whether evidence was heard in the first proceeding or not; and though the merits of the case were not adjudicated, so long as the jury was discharged without sanction of the statute, or consent of the defendant, for any reason not regarded by the appellate courts as compelling. There is something to be said for a rule under which jeopardy would not attach until a later time in the course of a trial, but it would lessen the protection now being given, which is,

"meat, drink, fire, or candle" until it had agreed. 3 BAC. ABR. 768; 1st Co. INST. § 366.

If a jury had not agreed when the term ended, its members were carried in carts after the judge on his circuit. 3 BAC. ABR. 768.

[26] When sovereigns frequently changed, any change might subject one to new prosecutions, at the whim of the then sovereign, or his favorites at court. See Commonwealth v. Olds, 15 Ky. 137 (1824).

[27] See 4 BL. COMM. 335; Commonwealth v. Olds, 15 Ky. 137 (1824).

[28] See 3d Co. INST. 213, 214.

[29] BROOM, LEGAL MAXIMS (9th ed. 1911) 273; 1 BISHOP, CRIMINAL LAW 727. It is suggested that the pleas of *autrefois acquit* and *autrefois convict* grew out of the maxim, "*nemo debet bis vexari pro una et eadem causa*", and that the notion of double jeopardy also sprang from the thought that no man ought to be twice vexed for one and the same cause. But if the original idea was one of finality, the present emphasis has shifted to the thought of protection from vexation. See State v. Lee, 65 Conn. 265, 30 Atl. 1110 (1894).

[30] Martin v. State, 163 Ark. 103 (1924); O'Brian v. Commonwealth, 69 Ky. 563 (1869); Commonwealth v. Olds, 15 Ky. 137 (1824); State v. Moor, Walker 134 (Miss. 1823); People v. Goodwin, 18 Johns. 187 (N. Y. 1820).

as it was in the beginning, a shield to innocent and guilty alike, against oppression, harassment, and even mere inconvenience and annoyance imposed by public officials who, by the yardstick of past experience, have not all been found honest and faithful in the execution of their public trusts. In this respect, is the notion of former jeopardy not being used also as a weapon for the enforcement of other constitutionaal and statutory provisions for trial without unreasonable delay?[31] And at whatever time jeopardy is made to attach, the rule would be arbitrary.

But most of the considerations which shaped the criminal law in its infancy no longer exist. Whatever the conditions of that time, those which now press for attention are radically changed. Aside from other decisions, the general rule, and its historical background, the present inquiry is concerned primarily, with a result which, upon its particular facts, is not wholly satisfying to the minds of reasonable men. What reasons, logical or practical, can be urged in favor of a rule, or principle, or standard which makes a discharge of the jury, under the circumstances that existed in this case, an acquittal of one charged with a felony?

1. It is said that our constitution requires this result. At the time it was adopted, the decisions of the Virginia courts had determined, beyond doubt, that a defendant was in jeopardy when put on trial upon a valid indictment, in a court of competent jurisdiction, before a jury qualified and sworn, and that, without consent of the defendant, the jury could not be discharged before verdict, except for necessity; and that, if it were so discharged without such necessity appearing, the effect was that of an acquittal.[32] The framers of our constitution "naturally" had in mind the common law of Virginia,[33] and it was carried into the constitution.[34] On this basis, our statute authorizing discharge of a jury when it can not agree, or when there is a manifest necessity for the discharge, is not in conflict with the constitution, but only states the law as it existed when the constitution was adopted,[35] and operates to set aside a jeopardy, once attached, when the statutory requirements are fulfilled. The doctrine, being firmly rooted in the constitution, is beyond the power of legislative change by statutes not

[31] Lee v. State, 26 Ark. 260 (1870).

[32] *Ex parte* Bornee, 76 W. Va. 360, 85 S. E. 529, L. R. A. 1915F 1093 (1915).

[33] The Virginia constitution until 1902 contained no provision prohibiting a second jeopardy.

[34] *Ex parte* Bornee, 76 W. Va. 360, 85 S. E. 529 (1915).

[35] A Virginia statute similar to ours was enacted in 1848.

in harmony with the common law,[36] and any alteration of it by the courts is unwarranted.

2. The only proper method of altering the constitution in any manner affecting fundamental rights is that of amendment.

3. The interest of the individual in trial without unreasonable delay, also guaranteed by the constitution; and the interest of the individual in security from oppression, harassment, inconvenience, and annoyance imposed by public officials for political ends, personal animosity, or other illegitimate reasons, requires protection. If juries could be discharged upon such trivial pretexts, and defendants be held in jail, or under bond, for trial later, the door would be opened to the same kind of abuses which led to the unqualified rule that a jury could not be discharged before verdict.[37] A prosecuting attorney, without evidence to convict, might contrive to imprison one for months without trial, by the device of obtaining a discharge of the jury on flimsy grounds, or might thus gain time in which to strengthen a weak case.

4. Whether or not one has committed an offense against the state, he is entitled to all the rights which the law reserves to him.[38] He is entitled to speedy trial, free from illegality, or unlawful influences. But there is also a chance that innocent persons, entitled to immediate acquittal, may be made to suffer.

5. While greater liberality may properly be applied when juries are discharged for matters affecting members of the jury,[39] or affecting the judge,[40] or the defendant, the greatest opportunity for abuse lies in matters affecting witnesses for the prosecution, or the inability of the prosecution to proceed. This class of cases, therefore, requires closer scrutiny and a more severe application of the principle of manifest necessity.

6. To make an improper discharge of the jury in effect an acquittal, tends to cause public officials, responsible to the electorate, to proceed with greater caution in the preparation and conduct of criminal cases; and with increased respect for the rights of individual defendants.

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[36] *Ex parte* Bornee, 76 W. Va. 360, 85 S. E. 529 (1915).

[37] Mount v. State, 14 Ohio 295, 45 Am. Dec. 542 (1846); People v. Barrett, 2 Caines 304, 2 Am. Dec. 239 (N. Y. 1805); State v. Callendine, 8 Iowa 288 (1859).

[38] State v. Callendine, 8 Iowa 288 (1859).

[39] State v. Slorah; Commonwealth v. Fells, both *supra* n. 13; 1 BISHOP, CRIMINAL LAW 763; and dicta in State v. Davis, 31 W. Va. 390, 7 S. E. 24 (1888).

[40] State v. Tatman, 59 Iowa 471 (1882); 1 BISHOP, CRIMINAL LAW 763.

7. Statutes of limitation, and other statutory provisions for discharge for failure to prosecute, are inadequate to prevent the abuses contemplated in this inquiry.[41]

But, on the other hand, what arguments may be advanced to discredit a rule, or principle, which makes necessary the result reached in the case under consideration?

1. The law can not be static, like that of the Medes and Persians. Were it so, it could not have endured so long. Few indeed are the constitutions of any long duration which have not yielded up something of their original flavors to the demands of changing ideals; which have not enjoyed a largely wholesome growth through judicial interpretation. The constitution of West Virginia does not define jeopardy. Neither does any statute. The common law, which gave birth to the constitutional provision, has always been susceptible of change. When accepted ideals produced by changed conditions demand a different result, upon the same facts, from some result reached before, courts begin to distinguish cases theretofore regarded as indistinguishable, and the law progresses. When this occurs, constitutional provisions framed sufficiently broad, whether by accident or design, should not be so construed as to impede that progress, if no fundamental change is wrought. Indeed, if it were necessary to amend the constitution on such trivial considerations as the principal case concerns, the law would be in an evil way. Even conceding that the framers looked "naturally"[42] to the laws of Virginia, this still is true.

2. It may be that it was settled early in Virginia that jeopardy attached when one was placed upon trial and the jury was sworn; and that, without consent of the defendant, the jury could not be discharged before verdict, except for manifest necessity.[43] But it will be noted that the earliest opinions of the Virginia courts favored the more uncompromising rule then favored in England.[44] But, just as there had been a tendency in England to relax the rule, by enlarging the notion of necessity; so there was

[41] W. VA. REV. CODE (1931) c. 62, art. 3, § 1, and c. 62, art. 3, § 21.

[42] *Ex parte* Bornee, 76 W. Va. 360, 85 S. E. 529 (1915).

[43] Williams v. Commonwealth, 2 Gratt. 567 (Va. 1845). But compare the language of Brockenbrough, J., in Wortham v. Commonwealth, 5 Rand. 669 (Va. 1827).

[44] See Commonwealth v. McCaul, 1 Va. Cas. 271 (1815); and Williams v. Commonwealth, 2 Gratt. 567 (Va. 1845).

a tendency in that direction in Virginia.[45] And no case is found involving the facts of the principal case. How well settled, therefore, these questions were in Virginia, at the time our constitution was adopted, is open to argument. It is clear that, as to the necessity involved, no settled rule can be laid down, but that every case depends upon its own facts.[46]

3. Would a different result, from that reached on the facts of the principal case, work a fundamental change in the constitution? It is not perceived that it would, though, admittedly, reasonable men may differ as to what is or is not fundamental. The majority of a closely divided court, in *Kepner v. United States,*[47] thought that an appeal by the government was prohibited by the constitution. A minority thought the notion of double jeopardy should be confined to new and independent prosecutions. On the question of what is fundamental, the language of Mr. Justice Cardozo, in *Palko v. Connecticut,*[48] referring to the minority opinions in the *Kepner* case, including a dissent by Mr. Justice Holmes, is highly pertinent:

" . . . the dissenting opinions show how much was to be said in favor of a different ruling. Right minded men, as we learn from those opinions, could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case. Even more plainly, right minded men could reasonably believe that in espousing that conclusion they were not favoring a practice repugnant to the conscience of mankind."[49]

Even more pertinent is a reference to double jeopardy, in the same opinion:

". . . the tyranny of labels . . . must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other."[50]

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[45] Compare the opinions in Fell's Case, 9 Leigh 613 (Va. 1838), and Commonwealth v. McCaul, 1 Va. Cas. 271 (1815). The tendency to relax the rule also appears from the statute adopted in 1848. Indicating a general relaxation, see State v. Slorah, 118 Me. 203, 106 Atl. 768 (1919).

[46] State v. Little, 197 S. E. 626 (W. Va. 1938); State v. Gruber, 3 W. Va. 699 (1869); Commonwealth v. Fells, 9 Leigh 613 (Va. 1838).

[47] Kepner v. United States, 195 U. S. 100, 24 S. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655 (1904).

[48] Palko v. Connecticut, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 220 (1937).

[49] *Id.* at p. 323.

[50] *Id.* at p. 323. That other constitutional guaranties of jury trial, immunity from prosecution except by indictment, and immunity from self incrimination, are not fundamental, see 325, 326.

In *Palko v. Connecticut*[51] the defendant was convicted of second degree murder, and sentenced to life imprisonment. Upon appeal by the state, under a Connecticut statute, the judgment was set aside, and, on a second trial, the defendant was convicted of first degree murder and was sentenced to death. The United States Supreme Court affirmed the conviction. Mr. Justice Cardozo sums up the case in these words:

"Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate 'those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'? The answer surely must be no."[52]

In the light of these considerations, what fundamental principle would be violated by a different result in the principal case?

4. The interests of the individual in trial without unreasonable delay, and in security from oppression, harassment, inconvenience, and annoyance are not the only interests which the law is seeking to protect. There is also the public interest in the suppression of and punishment for crime. This interest grows more pressing with the increasing complexity of civilized life. The principal case involves a conflict of these interests. A result which too strongly favors the public interest at the expense of the individual interest would be no more capable of justification, perhaps, than a result too strongly favoring the individual interest over that of society. The question is one of delicate adjustment to effect a proper balance; and any balance which fails to consider the present crying need for more effective administration and enforcement of the criminal laws is likely to be wrong. A recognition of the necessity for more effective measures to cope with the criminal problem in general is indicated by the number of surveys conducted or proposed, as well as by the legislation of recent years. There has long existed a feeling that numerous legal technicalities, no longer useful, provide too many loopholes by which criminals go free. This among other influences, has tended to bring both the courts and the legal profession into public disrepute. The law has lagged behind the needs of the period. It is not open to serious dispute that too long an unfortunate tendency has existed to embrace an extreme in shielding the individual defendant from an-

[51] Palko v. Connecticut, 302 U. S. 319, 58 S. Ct. 149 (1937).
[52] *Id.* at 328.

noyance at the expense of the social good. It might have been supposed, but for the principal case, that the tendency in the law at present is in a reverse direction.[53]

5. Few will be disposed to deny the validity of the notion that it is better that a criminal occasionally go free than that an innocent person be unjustly made to suffer. But when "suffering" is reduced to "inconvenience" merely, the proposition becomes extremely doubtful. But in the principal case there is no such question involved. The defendant, whether guilty or innocent, is held to be acquitted; the social interest is improverished and reduced, and a possibly guilty person receives a figurative bonus, because of the ignorance, neglect, or mistake of public officials.

6. True, a guilty defendant is entitled to all the benefits which the law reserves to him, but the question itself is what the law reserves. As an organized society becomes more complex, it is necessary that some rights, not classed as fundamental, which the individual formally enjoyed, and which may once have been regarded as fundamental, be relinquished in favor of the security of the larger number. The individual interests to be surrendered in the present case are not fundamental.

7. It may be admitted, without justifying the result in the principal case, that extreme caution should be exercised by the courts wherever there is a reasonable possibility of serious abuse. Conceding that situations involving inability of the prosecution to proceed, because of matters affecting witnesses, requires closer scrutiny than other situations, some different means of control ought to be found, than one which holds the social interest for nothing, and contributes to the bankruptcy of criminal justice.

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[53] For an example of construction in favor of the public interest in suppressing crime, see People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926).