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"alternative type of promotional service or facility which is of equivalent measurable cost"²⁶ may be substituted in its place.

It could be argued with some merit that the same type of policy rules should apply to other industries inasmuch as their problems, in part, are not unlike those in the Cosmetic Industry.

Although the Commission and the courts have indirectly approved only one interpretation of the phrase "proportionally equal terms," this is by no means the only ratio that would be valid under the Act. The real hope of the phrase lies not in its ambiguous past nor its equally uncertain present but in future liberal constructions which the judicial and administrative bodies must, of necessity, place upon it.

EDWIN S. PRESTON, JR.

Criminal Law—Former Jeopardy—Discharge of Jury Held to Bar Subsequent Prosecution

Defendant was on trial for murder. At the end of the third day of the trial the jurors were taken to a local hotel for the night. During the night, the police, upon being called to investigate the conduct of the jurors, found three in an intoxicated condition. When court was convened the next day, in the absence of the jury and upon the testimony of the officers, the judge withdrew a juror and declared a mistrial. The defendant objected to the order of mistrial, and upon the court's overruling the objection, duly excepted. At a later trial the defendant was convicted of manslaughter, the court overruling a plea of former jeopardy, to which the defendant duly excepted. On appeal, the Supreme Court in a unanimous decision vacated the judgment, held the order of mistrial improper and sustained the defendant's plea of former jeopardy¹

The principle that a person shall not be twice put in jeopardy for the same offense is deeply rooted in American jurisprudence.² It is well established that jeopardy attaches when a competent jury is sworn

²⁶ See note 23, *supra*.

¹ State v. Crocker, 239 N. C. 446, 80 S. E. 2d 243 (1954). The city police officers testified that they observed three jurors moving along the halls of the hotel in an intoxicated condition. The sheriff testified that he observed one of the jurors in an intoxicated condition either from alcoholic beverages or narcotic drugs, and had to threaten arrest before the juror would become quiet and re-enter his room.

² The Federal Constitution and all of the state constitutions, except the Constitutions of Connecticut, Maryland, Massachusetts, North Carolina, and Vermont, contain prohibitions against double jeopardy. The states that do not have a constitutional provision have the principle as a part of their common law. State v. Benham, 7 Conn. 414 (1829); Gilpin v. State, 142 Md. 464, 121 Atl. 354 (1923); Commonwealth v. McCan, 277 Mass. 199, 178 N. E. 633 (1931); State v. Clemmons, 207 N. C. 276, 176 S. E. 760 (1934); State v. O'Brien, 106 Vt. 97, 170 Atl. 98 (1934). See A. I. L., *Administration of the Criminal Law*, Commentary to § 6 (Proposed final draft for 1935) for a complete listing of the Constitutional provisions.

and impaneled to try the case.³ If the discharge of the jury and the declaration of a mistrial is at the instance or with the consent of the defendant, this constitutes a waiver, and he cannot later maintain a plea of former jeopardy.⁴

Early decisions gave the courts little authority to discharge the jury and declare a mistrial for any cause, without prejudicing the state's right to proceed again.⁵ However, the strict rule of those decisions has been greatly relaxed and the present-day rule is that a trial judge may discharge a jury and declare a mistrial without working an acquittal of the defendant when there is a manifest necessity or when justice would be better served under the circumstances.⁶ North Carolina classifies the types of necessity warranting the discharge of the jury into two kinds: "physical necessity" and the "necessity of doing justice."⁷ Necessity for a mistrial arising from misconduct of one or more of the jurors might well fall into either class.⁸

The impossibility of defining all of the circumstances under which

³ *Westover v. State*, 66 Ariz. 145, 185 P. 2d 315 (1947); *State ex rel. Larkins v. Lewis*, 54 So. 2d 199 (Fla. 1951); *State v. Hutter*, 145 Neb. 798, 18 N. W. 2d 203 (1945); *State v. Bell*, 205 N. C. 225, 171 S. E. 50 (1933); 22 C. J. S., *Criminal Law* § 241 n. 64 (1940).

⁴ *Barrett v. Bigger*, 57 App. D. C. 81, 17 F. 2d 669 (1927), *cert. denied*, 274 U. S. 752 (1927); *Westover v. State*, 66 Ariz. 145, 185 P. 2d 315 (1947); *People v. Agnew*, 77 Cal. App. 2d 748, 176 P. 2d 724 (1947), *cert. denied*, 337 U. S. 909 (1949), *rehearing denied*, 337 U. S. 927 (1949), *rehearing again denied*, 338 U. S. 842 (1949); *Kamen v. Gray*, 169 Kan. 664, 220 P. 2d 160 (1950), *cert. denied*, 340 U. S. 890 (1950); *State v. Dry*, 152 N. C. 813, 67 S. E. 1000 (1910); *Etter v. State*, 185 Tenn. 218, 205 S. W. 2d 1 (1947); *Chamberlain v. State*, 146 Tex. Cr. R. 300, 174 S. W. 2d 604 (1943).

⁵ *Atkins v. State*, 16 Ark. 568 (1855) (urgent necessity); *McCorkle v. State*, 14 Ind. 39 (1859) (imperious necessity); *State v. Bass*, 82 N. C. 570 (1880) (great necessity); *State v. Ephraim*, 19 N. C. 162 (1836) (*evident, urgent, overruling necessity arising from matters beyond human foresight and control*). The Supreme Court of the United States had earlier indicated a relaxation of the rule, in holding that a mistrial could be proper where the ends of justice would otherwise be defeated. *United States v. Perez*, 9 Wheat. 579 (U. S. 1824).

⁶ "We think, that in cases of this nature, the law has invested courts of justice to discharge the jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of justice would otherwise be defeated." *United States v. Perez*, 9 Wheat. 579, 580 (U. S. 1824); *accord*, *Maddox v. State*, 230 Ind. 92, 102 N. E. 2d 225 (1951); *Baker v. Commonwealth*, 280 Ky. 165, 132 S. W. 2d 766 (1939); *Ex parte Earle*, 316 Mich. 295, 25 N. W. 2d 202 (1946); *State v. Bowman*, 231 N. C. 51, 55 S. E. 2d 789 (1949); *State v. Beal*, 199 N. C. 278, 154 S. E. 604 (1930); *State v. Cain*, 175 N. C. 825, 95 S. E. 930 (1918); *State v. Upton*, 170 N. C. 769, 87 S. E. 328 (1915); *State v. Tyson*, 138 N. C. 627, 628, 50 S. E. 456 (1905) ("It is well settled and admits of no controversy that in all cases, capital included, the court may discharge a jury and order a mistrial when it is necessary to attain the ends of justice."); *Yarborough v. State*, 90 Okla. Cr. R. 74, 210 P. 2d 375 (1949); *State v. Brunn*, 22 Wash. 2d 120, 154 P. 2d 826 (1945).

⁷ *State v. Beal*, 199 N. C. 278, 154 S. E. 604 (1930); *State v. Tyson*, 138 N. C. 627, 50 S. E. 456 (1905); *State v. Bell*, 81 N. C. 591 (1879); *State v. Wiseman*, 68 N. C. 203 (1873).

⁸ See *State v. Tyson*, 138 N. C. 627, 50 S. E. 456 (1905) (juror, because intoxicated, was physically unfit to continue: too, the ends of justice would be defeated if he were allowed to serve).

a discharge of the jury and an order of mistrial would be proper requires that this power rest in the sound discretion of the trial judge.⁹ It is generally held that the discharge of the jury will not be reviewed unless there is a clear abuse of this discretion.¹⁰ A few jurisdictions,¹¹ including North Carolina,¹² require the trial judge to find the facts upon which the order was based and set them out in the record in order that they may be reviewed by the appellate court upon the application of the defendant. In North Carolina, however, the finding of fact is required, and review of an order of mistrial allowed, only in capital felonies.¹³ Hence a plea of former jeopardy is not available in misdemeanors and non-capital felonies in the absence of a showing of "gross" abuse¹⁴ of discretion, since it is a non-reviewable matter resting in the discretion, of the trial court.¹⁵

⁹ *Simmons v. United States*, 142 U. S. 148 (1891); *United States v. Perez*, 9 Wheat. 579, 580 (U. S. 1824) ("They [trial courts] are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere."); *In re Ascher*, 130 Mich. 540, 90 N. W. 418 (1902); *State v. Bowman*, 231 N. C. 51, 55, S. E. 2d 789 (1949); *State v. Beal*, 199 N. C. 278, 154 S. E. 604 (1930); *State v. Tyson*, 138 N. C. 627, 50 S. E. 456 (1905); *State v. Wiseman*, 68 N. C. 203 (1873); *State v. Barnes*, 54 Wash. 493, 103 Pac. 792 (1909). *But cf. In re Spier*, 12 N. C. 491 (1828) and *State v. Garrigues*, 2 N. C. 241 (1795) where the discretionary power of the trial judge was denied.

¹⁰ *United States v. Perez*, 9 Wheat. 579, 580 (U. S. 1824) ("But, after all, they [trial courts] have the right to order the discharge; and the security which the public have for faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office."); *Andrews v. State*, 174 Ala. 11, 56 So. 998 (1911); *People v. Simos*, 345 Ill. 226, 178 N. E. 188 (1931); *Ex parte Earle*, 316 Mich. 295, 25 N. W. 2d 202 (1946); *State v. Barnes*, 54 Wash. 493, 103 Pac. 792 (1909).

¹¹ *State v. Leunig*, 42 Ind. 541 (1873); *State v. Klauer*, 70 Kan. 383, 78 Pac. 802 (1904); *People v. Parker*, 145 Mich. 488, 108 N. W. 999 (1906); *State v. Conklin*, 25 Neb. 784, 41 N. W. 788 (1889); *Yarborough v. State*, 90 Okla. Cr. R. 74, 210 P. 2d 375 (1949); *State v. Bilton*, 156 S. C. 324, 153 S. E. 269 (1930); *State v. Whitman*, 93 Utah 557, 74 P. 2d 696 (1937).

¹² Finding of facts and setting them out in the record is emphasized in the North Carolina cases. See *State v. Beal*, 199 N. C. 278, 154 S. E. 604 (1930); *State v. Cain*, 175 N. C. 825, 95 S. E. 930 (1918); *State v. Tyson*, 138 N. C. 627, 50 S. E. 456 (1905); *State v. Bailey*, 65 N. C. 426 (1871).

¹³ *State v. Dove*, 222 N. C. 162, 22 S. E. 2d 231 (1942); *State v. Beal*, 199 N. C. 278, 154 S. E. 604 (1930); *State v. Tyson*, 138 N. C. 627, 50 S. E. 456 (1905). This rule seems peculiar to North Carolina. *But cf. State v. Bailey*, 65 N. C. 426, 428 (1871) ("In inferior misdemeanors, such as assaults, batteries, forcible trespass and the like, the Judges have a discretionary power to order mistrials, and in such cases their decisions cannot be reviewed by this Court, but even here mistrials should not be granted for slight causes. But in capital felonies, and in felonies not capital, and in misdemeanors where infamous punishments may be inflicted, as in perjury, conspiracy, and the like, the decisions of the Judges in the Court below may be reviewed in this Court. In such cases the Judges should find the facts, which this Court cannot review; but the law bearing upon the facts thus found are the subject of review in this Court by an appeal after the final decision in the Court below.').

¹⁴ *State v. Andrews*, 166 N. C. 349, 81 S. E. 416 (1914).

¹⁵ *State v. Guice*, 201 N. C. 761, 161 S. E. 533 (1931); *State v. Ellis*, 200 N. C. 77, 156 S. E. 157 (1930); *State v. Upton*, 170 N. C. 769, 87 S. E. 328 (1915); *State v. Wiseman*, 68 N. C. 203 (1873). *But cf. State v. Bailey*, 65 N. C. 426 (1871).

If the jury is discharged over the objection of the defendant, and on review it is determined that the surrounding circumstances and facts did not in fact necessitate an order of mistrial, the reasons for the action being legally insufficient, the plea of former jeopardy will be allowed.¹⁶

No definite rule can be formulated which will encompass all of the different types of misconduct which will be declared to be legally sufficient to support an order of mistrial. Each case must rest on its own surrounding facts and circumstances.¹⁷ However, a juror's misconduct on *voir dire* examination has been held to be misconduct sufficient to sustain the withdrawal of a juror more often, perhaps, than any other type of juror misconduct. Thus, in cases where a juror has falsely sworn that he was not acquainted with the defendant;¹⁸ withheld the fact that he was friendly¹⁹ or partial²⁰ to the defendant; concealed other facts;²¹ revealed that he had not told the truth concerning his scruples as to conviction on circumstantial evidence;²² and where he has fraudulently gained access to the jury for the purpose of acquitting the defendant,²³ the withdrawal of a juror and the declaration of a mistrial over the defendant's objection has been sustained.

Other types of misconduct by members of the jury which have been held sufficient to sustain the withdrawal of a juror and the declaration of a mistrial include: a juror's becoming separated from the other members of the jury;²⁴ intoxication of a juror during trial²⁵ and during recess;²⁶ a juror's procuring liquor for other jurors;²⁷ a juror's asso-

¹⁶ State *ex rel.* Manning v. Hines, 153 Fla. 711, 15 So. 2d 613 (1943); Jordan v. State, 75 Ga. App. 815, 44 S. E. 2d 821 (1947); Maddox v. State, 230 Ind. 92, 102 N. E. 2d 225 (1951); Kamen v. Gray, 169 Kan. 664, 220 P. 2d 160 (1950), *cert. denied*, 340 U. S. 890 (1950); Mullins v. Commonwealth, 258 Ky. 529, 80 S. E. 2d 606 (1935); State v. Prince, 63 N. C. 529 (1869).

¹⁷ For a collection of cases and situations where the jury was discharged over the defendant's objection, see, WHARTON, CRIMINAL LAW, Vol. I, § 394 (1912).

¹⁸ Simmons v. United States, 142 U. S. 148 (1891).

¹⁹ Helton v. State, 255 S. E. 2d 694 (Tenn. 1953).

²⁰ Quinton v. State, 112 Neb. 684, 112 N. W. 881 (1924).

²¹ *In re Ascher*, 130 Mich. 540, 90 N. W. 418 (1902).

²² State v. Cain, 175 N. C. 825, 95 S. E. 930 (1918).

²³ State v. Washington, 89 N. C. 535 (1883) (without defendant's knowledge); State v. Bell, 81 N. C. 591 (1879) (at the instance of the defendant).

²⁴ Etter v. State, 185 Tenn. 218, 205 S. W. 2d 1 (1947).

²⁵ *In re Ascher*, 130 Mich. 540, 90 N. W. 418 (1902); State v. Tyson, 138 N. C. 627, 50 S. E. 456 (1905) (upon examining the juror, judge found him to be in a "nervous and besotted condition" and unfit to continue).

²⁶ Fetty v. State, 119 Neb. 619, 230 N. W. 440 (1930) (juror found unfit for duty after being jailed for public drunkenness); State v. Tyson, 138 N. C. 627, 50 S. E. 456 (1905) (juror drank before the trial, during the trial, and during recess). For a note concerning drunkenness of jurors and subsequent mistrials, see 9 NEB. L. BULL. 215 (1930).

²⁷ *In re Ascher*, 130 Mich. 540, 90 N. W. 418 (1902). This is an extreme example of misconduct on the part of the jurors; they concealed facts on *voir dire* examination, made statements showing prejudice, got the bailiff intoxicated, procured liquor for others, drank, and were found guilty of unauthorized communications.

ciation with an interested person;²⁸ and a juror's public statements indicating his unfitness for duty after he had been impaneled.²⁹ Conversely, where the bailiff bought beer at defendant's saloon which he gave to the members of the jury,³⁰ or where the foreman spoke briefly to the complaining witness,³¹ and where a juror during a recess wandered away from the custody of the officer in charge and visited a nearby restaurant,³² it has been held that the surrounding facts and circumstances did not constitute sufficient misconduct to sustain an order of mistrial over the defendant's objection.

In the light of the former jeopardy provisions of our constitutions and decisions,³³ it is obvious that extreme caution should be used in ordering discharge of a jury for alleged misconduct of one or more of its members. A mistrial should be ordered only under urgent circumstances, and especially in capital cases, only after a plain and obvious cause has been shown to exist.³⁴ When the misconduct of the juror or jurors occurs outside the courtroom and not in the presence of the judge, a competent judicial inquiry is necessary to determine the existence of a necessity for a mistrial.³⁵

Thus, where mere convenience is concerned, or where the conduct is an irregularity only, and where the trial judge does not properly investigate the surrounding circumstances, it is error to withdraw a juror and declare a mistrial and a plea of former jeopardy should be sustained.³⁶

²⁸ *People v. Bigg*, 237 Mich. 58, 297 N. W. 70 (1941); *People v. Diamond*, 231 Mich. 484, 204 N. W. 105 (1925).

²⁹ *People v. Schepps*, 231 Mich. 260, 203 N. W. 882 (1925) (juror stated publicly that he thought confining the jurors reflected on his honor and thereby prejudiced him against the state); *People v. Sharp*, 163 Mich. 79, 127 N. W. 758 (1910) ("When I am on a jury and I get my mind made up, by —, it will take more than they have got to change it."); *State v. Rector*, 166 S. C. 335, 164 S. E. 865 (1931) (juror's statement that he would disregard incriminating testimony because the witness was a Negro).

³⁰ *State v. Leunig*, 42 Ind. 541 (1873) (jurors were taken by the bailiff, contrary to the orders of the court, to the public square, where he left them, and procured beer for them from defendant's saloon. The judge ordered a discharge of the jury, but on appeal this was reversed, the facts presenting no necessity for such discharge).

³¹ *People v. Fishman*, 64 N. Y. Misc. 256, 119 N. Y. Supp. 89 (Gen. Sess. 1909).

³² *Mullins v. Commonwealth*, 258 Ky. 529, 80 S. W. 2d 606 (1935).

³³ See note 2 *supra*.

³⁴ *United States v. Perez*, 9 Wheat. 579 (U. S. 1824); *In re Ascher*, 130 Mich. 540, 90 N. W. 418 (1902); *State v. Barnes*, 54 Wash. 493, 103 Pac. 792 (1909).

³⁵ *State v. Hansford*, 76 Kan. 678, 92 Pac. 551 (1907); *Salistean v. State*, 115 Neb. 838, 215 N. W. 107 (1927); *State v. Jefferson*, 66 N. C. 309 (1872); *Upchurch v. State*, 36 Tex. Cr. R. 627, 38 S. W. 206 (1896).

³⁶ See notes 25-27 *supra*; *State v. Crocker*, 239 N. C. 446, 80 S. E. 2d 243 (1954) ("Nor is there evidence that any of these jurors, when court convened Friday morning, were not 'clothed in their right minds' and able to proceed with their jury service. The record here shows that the testimony before the trial judge was heard in the absence of the jury. There is no indication that any of the jurors were questioned in open court or examined by a physician or other person relative

When, after a thorough examination by the trial judge as to the facts and circumstances surrounding the misconduct of the jury, he finds that justice would be better served if the jury were discharged, the general rule is that such a decision will not be disturbed on appeal, and on subsequent retrial, double jeopardy will not attach.³⁷

In view of the constitutional and common law prohibitions against double jeopardy, and consistent with the basic theory that such mistrial is to be used only in cases of manifest necessity, it is submitted that the decision in the instant case is sound.³⁸

GEORGE M. BRITT

Civil Procedure—Consent Judgments and Settlements—Right of Liability Insurer to Bind Insured

The North Carolina motorist who reads his liability policy carefully will probably notice that it contains a clause substantially as follows:

The Company shall (a) defend any suit against the insured alleging such injury, sickness, disease, or destruction and seeking damages on account thereof, even if such suit is groundless, false, or fraudulent; *But the Company may make such investigation, negotiation, and settlement of any claim or suit as it deems expedient.*¹ (Italics added.)

The usual policy also includes an express condition precedent to the insurer's obligation to indemnify the insured which requires him to forward immediately to the insurer any process, demand, notice, or pleading served on him because of an accident in which the insured was involved.²

to their fitness and competence to serve as jurors when court convened on Friday morning.") [Italics added.]

³⁷ See notes 18-24 *supra*. In the majority of cases in which a mistrial has been sustained over defendant's objection, the trial judge has personally examined the jurors to determine the necessity for a discharge of the jury.

³⁸ *State v. Crocker*, 239 N. C. 446, 453, 80 S. E. 2d 243 (1954). "Our holding here is that the facts and circumstances set forth in the findings of fact are not of such compelling nature as to justify a further relaxation of a rule of such importance in safeguarding the life and liberty of a citizen against repeated prosecutions for the same offense. The preservation of the salutary principle underlying the plea of former jeopardy in capital cases is of far greater importance than the service by this defendant of the prison term imposed by the judgment . . . upon her conviction for manslaughter."

¹ Because of this wording the standard indemnity policy is more than a mere contract of indemnity against actual loss in the sense of money paid. It is a contract of insurance against liability for damages, and the insurer adopts the liability of the insured, within policy coverage. *State ex rel. Boney v. Central Mutual Ins. Co. of Chicago*, 213 N. C. 470, 196 S. E. 837 (1938).

If the plaintiff and the defendant are both insured by the same company, the insureds must engage their own attorneys, and the policies become mere indemnity policies. *O'Morrow v. Borad*, 27 Cal. 2d 794, 167 P. 2d 483 (1946).

² *Hendrix v. Employer's Mutual Liability Ins. Co.*, 102 F. Supp. 31 (E. D. S. C. 1952); *Martin v. Traders & General Ins. Co.*, 258 S. W. 2d 142 (Tex. Civ. App. 1953). See *Stephens v. Childers*, 236 N. C. 348, 72 S. E. 2d 849 (1952).