

## RAISING THE PLEAS IN BAR AGAINST A RETRIAL FOR THE SAME CRIMINAL OFFENCE

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Where a criminal charge has been adjudicated upon by a Court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence.<sup>1</sup>

### I. INTRODUCTION

The practical effect of the common law principle against double jeopardy is the proscription against retrials for the same criminal offence following an acquittal or conviction.<sup>2</sup> Pleading double jeopardy<sup>3</sup> is not to be equated with a defence to a criminal charge, the former operating to prevent the second prosecution from proceeding *ab initio*, the latter being a mitigating factor against the accused's criminal liability which the trial court may take into consideration when imposing sentence.

The constituent rules of double jeopardy jurisprudence are not easily applied in practice and, therefore, necessitate a more detailed examination. To determine in any particular case whether the pleas in bar, *autrefois acquit* (former acquittal) or *autrefois convict* (former conviction) against a second trial for the same

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<sup>1</sup> *R. v. Miles* (1890) 24 Q.B.D. 423 at 431 (Q.B.) *per* Hawkins J.

<sup>2</sup> The significance of a retrial following a conviction is that if the accused had formerly been convicted of a lesser-included criminal offence and fresh and viable evidence of the accused's guilt of a compound offence subsequently emerges, then he cannot at present be retried for the greater offence, the most common example being a former conviction for manslaughter where evidence now establishes that the accused was in fact guilty of the greater offence, murder.

<sup>3</sup> At common law, the principle against double jeopardy was expressed by the four pleas in bar, *autrefois acquit*, *autrefois convict*, *autrefois attaint* and former pardon. However, given that the former two pleas in bar are most relevant to contemporary criminal procedure, they will be the focus of this article.

criminal offence are available to the accused, it is generally accepted<sup>4</sup> that there are three essential criteria to be satisfied:

- The accused had formerly been in jeopardy (or peril) of a lawful conviction before a court of competent criminal jurisdiction;
- The former criminal trial must have concluded with a final determination of the facts at issue, *i.e.* that there has been a final verdict, either of acquittal or conviction, following a trial on the merits;
- The criminal offence for which the accused has been charged on the second occasion is the same or substantially the same offence as that for which he had formerly been acquitted or convicted.

Before discussing the criteria for the pleas in bar, it is first necessary to address some preliminary issues, namely the procedures to be followed when pleading double jeopardy and the applicability of the pleas in bar.

## II. PROCEDURAL REQUIREMENTS

The general rule is that the pleas in bar are raised at the arraignment, at which point the accused is entitled to plead not guilty, in addition to the pleas in bar of the indictment.<sup>5</sup> However, statute law in Ireland<sup>6</sup> has made provision for the abolition of the preliminary examination or arraignment in the District Court for indictable offences. Accordingly, the accused would be well advised to raise the pleas in bar once he has been arrested and charged with the commission of the same criminal offence. Furthermore, there does not appear to be any legal restriction against pleading double jeopardy during the course of the criminal trial.

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<sup>4</sup> Ryan, E., and Magee, P., *The Irish Criminal Process* (Mercier Press, Dublin, 1983), pp. 272-275; Sandes, R., *Criminal Law and Procedure in the Republic of Ireland* (3<sup>rd</sup> ed., Sweet & Maxwell, London, 1951), p. 117; Turner, J.W.C., (ed.), *Kenny's Outlines of Criminal Law* (19<sup>th</sup> ed., Cambridge University Press, Cambridge, 1966), p. 606, para. 743.

<sup>5</sup> *Connelly v. DPP* [1964] A.C. 1254 at 1303 (H.L.) *per* Lord Morris. The pleas in bar are most likely to be made at the arraignment stage at which point the prosecution will either concede to the accused's plea whereupon the accused will immediately be discharged, or alternatively answer the plea by way of replication.

<sup>6</sup> Part III of the Criminal Justice Act, 1999.

The pleas in bar should be reduced to writing, signed by defence counsel, and where the prosecution disputes this as is most likely, they should do so by replication, which involves filing a notice to the effect that the prosecution denies the accused's plea of former acquittal or conviction.<sup>7</sup> However, the prosecution's assertion that the accused was not either formerly acquitted or convicted for the same criminal offence may not be sustained where a formal record of the trial court substantiates the accused's contention. A former conviction or acquittal may not only be established by the production of a certified record of the trial court, but also by other evidence if necessary.<sup>8</sup> Consequently, the accused may establish what evidence was adduced during the course of the former criminal trial in order to establish a former acquittal or conviction. Nevertheless, the trial court, at the subsequent hearing of the issue, is entitled to enquire as to the legality of the former trial court's jurisdiction, *i.e.* if the proceedings during the former trial were *ultra vires*, the verdict of that court will be deemed void *ab initio* of legal efficacy and, accordingly, may not form the basis of the pleas in bar against a second trial for the same criminal offence.

Where the accused raises the pleas in bar, a jury is empanelled to determine the validity of the pleas.<sup>9</sup> The onus of proof rests with the accused on the balance of probabilities and the jury must be satisfied that there has been a former acquittal or conviction for the same criminal offence arrived by a court of competent criminal jurisdiction following a trial on the merits.<sup>10</sup> If the jury finds in favour of the accused, then he must be discharged in respect of the entire indictment or to those counts in the indictment to which the plea in bar had been considered by the jury (finding in the accused's favour).<sup>11</sup> Conversely, if the jury finds against the accused, then he is

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<sup>7</sup> *Flatman v. Light* [1946] 1 K.B. 414 at 419 (K.B.D.) *per* Lord Goddard C.J.

<sup>8</sup> *Connelly v. DPP* [1964] A.C. 1254 at 1306-1307 (H.L.) *per* Lord Morris's (6<sup>th</sup> principle).

<sup>9</sup> *The People (DPP) v. O'Shea* [1982] I.R. 384 at 432 (S.C.) *per* Henchy J. In accordance with the principles of natural justice, where a jury has been empanelled for the purpose of determining the pleas in bar, then that same jury should not try the case having previously considered the guilt or innocence of the accused. It is a fundamental principle of natural justice that a court or tribunal must be impartial in its adjudication of the facts at issue, commonly expressed by the maxim *nemo iudex in causa sua*.

<sup>10</sup> Sandes, R., *Criminal Law and Procedure in the Republic of Ireland* (3<sup>rd</sup> ed., Sweet & Maxwell, London, 1951), p. 118; Ryan, E., and Magee, P., *The Irish Criminal Process* (Mercier Press, Dublin, 1983), p. 278; Bing, I., *Criminal Procedure and Sentencing in the Magistrates' Court* (3<sup>rd</sup> ed., Sweet & Maxwell, London, 1994), p. 108, para. 5-57.

<sup>11</sup> Ryan, E., and Magee, P., *The Irish Criminal Process* (Mercier Press, Dublin, 1983), pp. 278-279.

entitled to plead over, *i.e.* plead “not guilty” to the offence charged in the second indictment. Consequently, the accused may be re-indicted in respect of the same criminal offences(s) or those offence(s) in respect of which the jury found that he had not been lawfully tried and either acquitted or convicted on a former occasion. However, where the offence involved is a non-arrestable offence, it appears that judgment on a plea of *autrefois acquit* or *autrefois convict* is final, although the trial court, in its discretion, may and usually does grant the accused the same privileges as are allowed in the case of an accused being charged with an arrestable offence (previously a felony at common law).<sup>12</sup> This rule is most likely directed at finality in litigation with respect to summary proceedings where the offences are relatively minor, as opposed to the consequences flowing from a conviction following a trial on indictment. English criminal procedure may be distinguished from that operative in Ireland, in that a trial judge alone in the absence of a jury decides the issue of a former verdict of acquittal or conviction upon which the accused may raise the pleas in bar to a second indictment for the same criminal offence.<sup>13</sup>

### III. APPLICABILITY OF THE PLEAS IN BAR

Although the pleas in bar technically are not applicable in the case of misdemeanours (summary offences) before the English Magistrates’ courts, it appears nevertheless that double jeopardy rules are at least recognised by the Magistrates’ courts in the case of summary trials.<sup>14</sup> Thus, the dismissal of an information (summons)

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<sup>12</sup> Sandes, R., *Criminal Law and Procedure in the Republic of Ireland* (3<sup>rd</sup> ed., Sweet & Maxwell, London, 1951), p. 118; Turner, J.W.C., (ed.), *Kenny’s Outlines of Criminal Law* (19<sup>th</sup> ed., Cambridge University Press, Cambridge, 1966), p. 607, para. 744 explains: “In misdemeanours, by a harsh rule, judgement on a plea of *autrefois acquit* or *convict* is final, so that if the accused be defeated on it he cannot proceed to establish his innocence, but must be sentenced. Yet in felony or treason he is allowed to ‘plead over’, *i.e.* to put in a further plea of ‘not guilty’.”

<sup>13</sup> Section 122 of the Criminal Justice Act, 1988 (U.K.). Prior to the enactment of this statutory provision, English law required that a jury be empanelled to determine the issue of former jeopardy.

<sup>14</sup> Bing, L., *Criminal Procedure and Sentencing in the Magistrates’ Court* (3<sup>rd</sup> ed., Sweet & Maxwell, London, 1994), p. 108, para. 5-57 explains that: “While *autrefois convict* and *acquit* are technically pleas only available on indictment, a dismissal of any information has the same effect as an acquittal on indictment and the courts have applied the same principles to summary proceedings as for trials on indictment.” Likewise, in *DPP v. Porthouse* (1989) 89 Cr.App.R. 21 at 23 (Q.B. – D.C.) May L.J. stated: “As an actual plea of *autrefois acquit* or *autrefois convict* can only be raised at a trial on indictment, it cannot be entered in a magistrates’ court, but the same principles apply.”

because the prosecution have adduced no evidence in circumstances where the information is defective with the result that the accused could not lawfully have been in jeopardy will not bar a fresh information being issued against the accused.<sup>15</sup> Other instances before the Magistrates' courts where fresh information was permitted for the same criminal offence include the dismissal of the summons before the accused has pleaded,<sup>16</sup> the withdrawal of a summons,<sup>17</sup> or the dismissal of the original charge in substitution of a new charge more appropriate to the facts in issue.<sup>18</sup> However, in consideration of the English Court of Criminal Appeal ruling in *R. v. Beedie*<sup>19</sup> it is perhaps more appropriate to deal with cases of this nature (summary offences) from the perspective of being an abuse of the process of court because the charges with which they are concerned do not fall within the narrow confines of the principle of *autrefois*. Indeed, the Supreme Court of Canada, in *R. v. Riddle*,<sup>20</sup> has held that, in cases of summary proceedings, the proper form of the pleas in bar to a second summons for the same criminal offence is *res judicata* and, accordingly, any further purported adjudication of the same issues would constitute an abuse of the process of the court.

It has been stated that the operative criminal procedure before the criminal courts in Ireland is that the pleas in bar are applicable only to trials on indictment.<sup>21</sup> This view was also expressed by the Supreme Court in *A.G. v. Mallen*<sup>22</sup> where Lavery J., delivering the judgment of the Court, said that “[S]trictly such pleas are appropriate only to trials on indictment, as Blackburn J. observed in *Wemyss v. Hopkins*.”<sup>23</sup>

However, Lavery J. appears to have misinterpreted the judgment of Blackburn J. in *Wemyss v. Hopkins*.<sup>24</sup> In that case, the appellant was summarily convicted of driving a carriage on a highway negligently causing injury and damage to the respondent. He was subsequently convicted for unlawfully assaulting the respondent on the same facts. Blackburn J. explained that “[W]here

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<sup>15</sup> *DPP v. Porthouse* (1989) 89 Cr. App. R. 21 (Q.B. – D.C.).

<sup>16</sup> *Williams v. DPP* (1991) 93 Cr. App. R. 319 (Q.B. – D.C.).

<sup>17</sup> *Davis v. Morton* [1913] 2 K.B. 479 (K.B.D.).

<sup>18</sup> *R. v. Dabhade* (1993) 96 Cr. App. R. 146 (C.C.A.).

<sup>19</sup> [1998] Q.B. 356 (C.C.A.).

<sup>20</sup> [1980] 1 S.C.R. 380 at 389 (S.C.). *per* Dickson J.

<sup>21</sup> Ryan, E., and Magee, P., *The Irish Criminal Process* (Mercier Press, Dublin, 1983), p. 275.

<sup>22</sup> [1957] I.R. 344 (S.C.).

<sup>23</sup> *Attorney General v. Mallen* [1957] I.R. 344 at 353 (S.C.) *per* Lavery J.

<sup>24</sup> (1875) L.R. 10 Q.B. 378 (Q.B.).

the conviction is by a Court of competent jurisdiction, it matters not whether the conviction is by summary proceeding before justices or by trial before jury.”<sup>25</sup>

It is clear from this judicial statement that the rules of double jeopardy jurisprudence are equally applicable to both trials on indictment and offences that are tried summarily. Although *Wemyss v. Hopkins* was a decision of the English court of Queen’s Bench, there have been a number of Superior Court decisions in Ireland that have applied the principle against double jeopardy to offences tried summarily.<sup>26</sup> However, it is most likely that a second trial for the same criminal offence before the District Court in Ireland would be estopped on the basis of an abuse of the process of the court, rather than an application of the rules of *autrefois*.

It is arguable that the application of double jeopardy rules exclusively to trials on indictment may violate an accused’s constitutional right to equality before the law, unless this departure can be justified on other grounds.<sup>27</sup> This is especially true in view of the fact that a particular canon of common law criminal procedure, that which prevents the harassment of an accused person through successive trials for the alleged commission of the same criminal offence, is applicable only to trials on indictment. Admittedly, trials on indictment carry heavier penalties and involve a greater degree of trauma and adverse social stigma for the accused. However, this can equally be true where the accused has been summoned in respect of a multiplicity of offences which, when combined, have the potential to cause even greater harassment of and distress to the accused. A case on point is the recent scenario involving *Mr. McBriarty*, wherein the accused was issued with approximately 160 summonses charging him with over 190 offences mainly relating to alleged breaches of licensing laws and road traffic offences. Although all of the summonses were subsequently withdrawn, the cumulative effect of these summonses, if the accused was convicted on all charges, would undoubtedly have the potential of distressing the accused to an even greater extent than if he had been convicted of a number of indictable offences. Accordingly, if an accused has been acquitted of a multitude of summary offences and the prosecution subsequently issue fresh

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<sup>25</sup> (1875) L.R. 10 Q.B. 378 at 381 (Q.B.).

<sup>26</sup> In the *People (DPP) v. O’Shea* [1982] I.R. 384 at 416 (S.C.), Walsh J. explained that: “The plea of *autrefois acquit* is as equally applicable to convictions in non-jury trials as it is to convictions arising from jury trials.” See also *O’Leary v. Cunningham* [1980] I.R. 367 (S.C.); *A.G. (O’Maonaigh) v. Fitzgerald* [1964] I.R. 458 (S.C.).

<sup>27</sup> Article 40.1 of the Constitution of Ireland, 1937.

summonses for the same criminal offences, then this must surely violate the fundamental objective of the double jeopardy proscription.

#### IV. FORMER JEOPARDY FOR THE SAME CRIMINAL OFFENCE

It is a fundamental rule of double jeopardy jurisprudence that the accused was formerly in peril<sup>28</sup> of conviction for an offence known to the law by a court of competent criminal jurisdiction before he can raise the pleas in bar against a second prosecution for the same or substantially the same criminal offence.<sup>29</sup> It is imperative, therefore, that the former criminal trial had concluded with a verdict of either acquittal or conviction following a trial by a court of competent criminal jurisdiction *intra vires*.

##### A. Attachment of Jeopardy

In determining whether or not the accused was formerly in peril of conviction and the imposition of punishment for the commission of the same criminal offence, it is necessary to establish that jeopardy had attached to the former criminal trial.<sup>30</sup>

Procedural issues, such as the criminal investigation process which occurs before the commencement of the criminal trial, does not *per se* place the accused in jeopardy or peril of conviction for the purposes of double jeopardy jurisprudence. Moreover, the accused cannot be said to have been in jeopardy if the former criminal court did not have jurisdiction to try the criminal offences charged. It is, therefore, necessary to determine the point at which jeopardy may be said to have attached to the former criminal trial, thereby placing the accused in peril of conviction and forming the basis of the pleas in bar against a subsequent indictment for the same criminal offence.

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<sup>28</sup> See generally, Stephens, D.J., "In Jeopardy" [1972] *Criminal Law Review*, 361; Comley, W.H., "Former Jeopardy," 35 *Yale Law Journal* 674 (1926).

<sup>29</sup> In the *People (DPP) v. O'Shea* [1982] I.R. 384 at 416 (S.C.), Walsh J., referring to the plea in bar, *autrefois acquit*, observed that: "It is a good plea in bar so long as that acquittal stands, and it implies a previous acquittal by a court of competent jurisdiction. An acquittal on the merits includes an acquittal on all legal pleas or defences, such as that a limitation period has run, and 'the merits' are not confined to pleas which are morally good."

<sup>30</sup> Note, "Double Jeopardy: The Reprosecution Problem," 77 *Harvard Law Review* 1272, 1275 (1964) (stating "[W]hether the policies behind the double jeopardy prohibition are effectively served depends in part on the stage of the proceedings at which jeopardy is deemed to attach. From that point the prosecution will have no second opportunity to convict the accused.").

Jeopardy will not be deemed to have attached where the prosecution has entered a *nolle prosequi* or where there has been a mistrial or a hung jury. The same is true where the first trial has been terminated for any other legally significant reason, such as where the trial judge acquits the accused on a trial on indictment so that the case does not go to the jury.<sup>31</sup>

It is also worth noting that jeopardy is deemed to have attached following a plea of guilty, or *nolo contendere*, which effectively amounts to a conviction once it has been formally accepted by the trial court. This may, however, give rise to some procedural difficulties if the accused subsequently withdraws his plea of guilty, especially in Ireland, where, in the case of indictable offences, the accused, in most cases, has a constitutional right to trial by jury.<sup>32</sup> It is doubtful if this right can be waived by the trial court refusing the accused's request to change his plea to not guilty and have his case tried by a jury of his peers.

The general rule in most common law jurisdictions is that the attachment of jeopardy in the legal sense only arises following a lawful acquittal or conviction on the merits of the particular case. This may be contrasted with the United States where the Supreme Court has established the rule that jeopardy attaches to the initial stages of the criminal trial, *i.e.* before a formal verdict has been reached. The United States' approach in determining that jeopardy attaches once the trial has commenced undoubtedly affords undue protection for the accused facing a criminal trial for the alleged commission of a criminal offence. A certain result of this procedure is that many individuals, who have been investigated and indicted for the commission of a criminal offence and who more than likely are in fact guilty of the offences charged, will be "acquitted" with the result that they cannot be retried.

The operative procedure in the United States is that jeopardy or peril of conviction is deemed to have attached to a trial on indictment when the jury has been empanelled and sworn,<sup>33</sup> *i.e.* when the entire jury has been selected and has taken the oath required for jury service, or in the case of a non-jury trial, when the trial court begins

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<sup>31</sup> In the *People (DPP) v. O'Shea* [1982] I.R. 384 at 407 (S.C.), O'Higgins C.J. explained that: "...[a directed] acquittal results in no trial because it is not in fact the verdict of the jury. It follows, therefore, that the person accused has not been in jeopardy."

<sup>32</sup> Article 38.5 of the Constitution of Ireland, 1937.

<sup>33</sup> *Downum v. United States*, 372 U.S. 734 (1963) (S.C.); *Crist v. Bretz*, 437 U.S. 28 (1978) (S.C.).

to hear evidence.<sup>34</sup> The rationale for the early attachment of jeopardy in the United States is that, by the time the jury has been sworn in or evidence introduced in the case of a trial without a jury, the accused has been put to a substantial expense in addition to being traumatised by the experience of facing a prosecution and the possibility of a conviction (with the imposition of punishment) for a criminal offence. Thus delaying the attachment of jeopardy to some later stage of the proceedings will increase this anxiety. However, the public interest<sup>35</sup> in ensuring that those who are undoubtedly guilty of the commission of criminal offences should be tried and punished accordingly must surely outweigh the delaying of the attachment of jeopardy until a final verdict of acquittal or conviction has been recorded by the trial court following the conclusion of the trial on the merits of the case. Indeed, the early attachment of jeopardy in the United States is undoubtedly based on a literal reading of the Federal Constitution Fifth Amendment guarantee against double jeopardy, not to be placed twice in jeopardy of “life or limb,” which had a factual meaning throughout the development of the common law. However, it is submitted that the United States approach to the attachment of jeopardy does not serve the wider interests of the criminal justice system, *i.e.* the proper investigation and prosecution of those individuals who are undoubtedly guilty of the commission of criminal offences.<sup>36</sup>

In contrast to the United States procedure, English law retains the rule that jeopardy is not deemed to have attached to a former

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<sup>34</sup> *McCarthy v. Zerbst*, 299 U.S. 610 (1936) (S.C.). Note, “Double jeopardy: The Re prosecution Problem,” 77 *Harvard Law Review* 1272, 1275 (1964) (“In contrast to the English practice of conditioning jeopardy upon entry of a verdict of acquittal or conviction, jeopardy attaches in the United States federal courts when the jury has been empanelled and sworn or when the court in a nonjury trial has begun to hear evidence.”).

<sup>35</sup> In *Downum v. United States*, 372 U.S. 734, 736 (1962) (S.C.), the United States Supreme Court *per* Douglas J., delivering the opinion of the Court, explained that: “At times the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him may be subordinated to the public interest – when there is an imperious necessity to do so.”

<sup>36</sup> The attachment of jeopardy at this early stage of the trial in the United States undoubtedly fails to protect the interests of society and overall public confidence in the criminal justice system, as it greatly enhances the possibility that guilty persons may be “acquitted” in the absence of a completed trial on the merits. The logical approach would be that followed in other common law jurisdictions which require a recorded verdict of either acquittal or conviction by the former trial court following a completed trial on the merits before jeopardy can be said to have attached. This would certainly reduce the possibility that accused persons, who in all probability are guilty of the offence(s) charged, may be released from the jurisdiction of the courts without further prosecution.

criminal trial before a verdict of either acquittal or conviction has been recorded by the trial court.<sup>37</sup> Thus, where a jury has been discharged without giving a verdict, the accused may be re-indicted for the same criminal offence without violating the common law principle against double jeopardy.<sup>38</sup> Therefore, before the accused may be said to have been in jeopardy of conviction at the first trial, the trial court must have recorded a formal verdict of conviction or acquittal following a trial on the merits. This may be evidenced by the production of a certified copy of the trial court's recorded verdict.<sup>39</sup>

### *B. Procedural Irregularities*

If the proceedings during the course of the former criminal trial were legally invalid due to some procedural irregularity, such as where the offence charged was defective and struck out,<sup>40</sup> or where the indictment was bad for duplicity,<sup>41</sup> the verdict of the court, whether of acquittal or conviction, would not be legally binding and consequently could not be raised as a plea in bar against a subsequent criminal trial for the same criminal offence.<sup>42</sup> This rule of law is also applicable in the United States, where it has been held that the verdict pronounced by a court lacking personal or subject-matter

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<sup>37</sup> Kirk, M.S., "Jeopardy During the Period of the Year Books," 82 *University of Pennsylvania Law Review* 602, 603 (1934).

<sup>38</sup> In *R. v. Robinson* [1975] 1 All E.R. 360 at 366 (C.C.A.), James L.J., speaking for the English Court of Criminal Appeal, explained that: "A conviction or acquittal is arrived at the proper conclusion of the matter and there is no conclusion of the matter until, the verdict is given to the court."

<sup>39</sup> The verdict of the trial court, whether of conviction or acquittal, is an integral part of the formal record of the trial proceedings.

<sup>40</sup> *DPP v. Porthouse* (1989) 89 Cr.App.R. 21 (Q.B.-D.C.).

<sup>41</sup> *DPP v. Taylor* [1992] 1 Q.B. 645 (D.C.). See generally, Williams, G., "The Count System and the Duplicity Rule" [1966] *Criminal Law Review*, 255; Turner, J.W.C., (ed.), *Kenny's Outlines of Criminal Law* (19<sup>th</sup> ed., Cambridge University Press, Cambridge, 1966), p. 595, para. 725.

<sup>42</sup> Richardson, P.J. (ed.), *Archbold: Criminal Pleading, Evidence and Practice 2003* (Sweet & Maxwell, London, 2003), p. 384, para. 4-146, explains: "...generally it may be laid down that whenever, by reason of some defect in the record – either in the indictment, the place of trial, the process or the like – the prisoner was not lawfully liable to suffer judgement for the offences charged against him in the first indictment as it stood at the time of its finding, he has not been in jeopardy in the sense which entitles him to plead the former acquittal (or conviction) in bar of a subsequent indictment." Likewise, Turner, J.W.C., (ed.), *Kenny's Outlines of Criminal Law* (19<sup>th</sup> ed., Cambridge University Press, Cambridge, 1966), p. 606, para. 743, explains that: "A prisoner cannot have been in jeopardy if the indictment was legally invalid; for no conviction upon it would have been effectual. If therefore he defeats it by some plea to the jurisdiction...or by getting it quashed, he will still remain liable to be again indicted on the same charge." case, and that the accused must have been in jeopardy of conviction."

jurisdiction is a nullity and may not be pleaded in bar to a second trial for the same criminal offence.<sup>43</sup> The rationale for this procedure is that, where the indictment is defective, the accused cannot be said to have been legally in peril of conviction and the imposition of punishment, *i.e.* he was not previously in jeopardy of being convicted and punished for the same offence charged in the subsequent indictment.<sup>44</sup> Thus, the accused cannot complain if he is indicted on a second occasion for the same criminal offence subsequent to the quashing of an acquittal or conviction based on a defective indictment or an indictment in excess of the jurisdiction of the court. Likewise, where a conviction or acquittal has been quashed as being beyond the jurisdiction of the trial court, this will not form the basis of the pleas in bar against a second trial for the same criminal offence. A verdict of acquittal or conviction before a court having no jurisdiction (*ultra vires*) to try the offences charged is, like all the proceedings in the case, absolutely void and therefore no bar to a subsequent trial before a court having jurisdiction (*intra vires*) to try the offence charged.<sup>45</sup>

Although there is *dicta* to the contrary,<sup>46</sup> it is submitted that, where a conviction has been overturned on the grounds that it was based on an erroneous decision, this will not bar a subsequent indictment for the same criminal offence because there is no former verdict of conviction in the subsequent indictment upon which to base the plea in bar, *autrefois convict*. It is arguable that the quashing of a conviction on the basis that it involved a breach of fair procedures amounts to an acquittal which may be pleaded in bar to a subsequent indictment for the same criminal offence. In these circumstances, the quashing of a conviction means that there is no

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<sup>43</sup> *United States v. Ball*, 163 U.S. 662, 669 (1896) (S.C.) *per* Gray J.

<sup>44</sup> Note, "Double Jeopardy: The Reprosecution Problem," 77 *Harvard Law Review* 1272, 1275 (1964) ("Truly defective indictments have, after all, only a limited capacity to harass, and in flagrant cases the victim of this abuse of governmental power may obtain relief by means of injunctive proceedings.").

<sup>45</sup> In *DPP v. Porthouse* (1989) 89 Cr. App. R. 21 at 24 (C.C.A.), May L.J. explained that: "A defendant is twice vexed only when he was in peril of a valid conviction upon his first trial. Accordingly, *autrefois acquit* is not available unless the first trial was before a lawfully constituted court, having jurisdiction in the matter, and trying an offence known to the law in accordance with law. An acquitted defendant has been in peril if he has been at risk of such a conviction." Likewise, in *Lewis v. Mogan* [1943] 1 K.B. 376 at 380 (K.B.), Charles J. said: "On the question whether the respondent was entitled to plead *autrefois convict* in my judgement, the short answer is that he was not, because the charge against him had never previously been dealt with by a court of competent jurisdiction."

<sup>46</sup> *The State (Tynan) v. Keane* [1968] I.R. 348 at 355 (S.C.) *per* Walsh J.

former verdict of acquittal or conviction upon which to base the pleas in bar. However, if a conviction is quashed based on the facts, then this may support a plea of former acquittal for in these circumstances. Based on the facts of the case as presented in evidence, the accused was as a matter of fact innocent of the offences charged, such as where the accused has been charged with murder committed within the Irish jurisdiction but the accused can establish that he was an Erasmus student based in France at the time the murder was committed.

It is a general requirement of double jeopardy jurisprudence that the former criminal trial must have been before a court of competent criminal jurisdiction. Thus, for example, where the former proceeding was merely a disciplinary inquiry with the imposition of sanctions, this will not form the basis of the pleas in bar to a subsequent criminal trial based on the same facts. Double jeopardy jurisprudence is concerned with the same criminal offence. In the Canadian Supreme Court case, *Wigglesworth v. R.*,<sup>47</sup> a police officer had been disciplined by an internal policy disciplinary inquiry for an assault and was subsequently charged with a criminal assault; the former disciplinary inquiry into the circumstances of the assault could not form the basis of the pleas in bar; the disciplinary inquiry not being a court of competent criminal jurisdiction. The same rule of law has been applied in England where the applicant had previously been disciplined for breach of internal prison rules and subsequently charged with a criminal offence based on the same facts. As the former disciplinary proceeding was not deemed to have been a court of competent jurisdiction for the purposes of double jeopardy jurisprudence, the pleas in bar to the subsequent criminal charge based on the same facts would be estopped.<sup>48</sup> This procedure is also applicable in Ireland where a former verdict of either acquittal or conviction by a court of competent criminal jurisdiction will not bar a subsequent disciplinary inquiry into the surrounding facts leading to the investigation and prosecution of the accused.<sup>49</sup> Conversely, should the individual firstly be subject to a disciplinary inquiry, this will not bar a subsequent criminal trial based on the same facts.

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<sup>47</sup> [1987] 2 S.C.R. 541 (S.C.); see also, *R. v. Shubley* [1990] 1 S.C.R. 3 (S.C.).

<sup>48</sup> *R. v. Hogan*; *R. v. Tompkins* [1960] 2 Q.B. 513 (C.C.A.).

<sup>49</sup> *A.A. v. The Medical Council* [2002] 3 I.R. 1 (H.C.); *McCarthy v. Garda Commissioner* [1993] 1 I.R. 489 (H.C.); *McGrath v. Garda Commissioner (No. 1)* [1991] 1 I.R. 69 (S.C.).

In the event that the accused has been charged with an offence unknown to the law, then the verdict of the trial court will not form the basis of the pleas in bar because the accused could not legally have been in peril of conviction and the imposition of punishment.<sup>50</sup> Moreover, if the former criminal trial was a *coram non judice*, then a second trial may proceed without violating the double jeopardy prohibition as the former criminal trial was a nullity. Therefore, the accused could not have been in jeopardy of a lawful conviction for the court would be deemed to have conducted its proceedings *ultra vires*.<sup>51</sup> Likewise, where the former criminal trial has resulted in a mistrial, *i.e.* the entire proceedings are deemed to be invalid because of some fundamental error in those proceedings, this will not ground the pleas in bar because there has not been a trial on the merits resulting in a formal verdict of acquittal or conviction being recorded.<sup>52</sup>

An irregularity in an indictment may be rectified during the course of the criminal trial, a procedure authorised by statute in Ireland.<sup>53</sup> Thus, the trial court has a duty to amend the indictment before or after the arraignment, unless this would result in an injustice either against the accused or, indeed, against society if the prosecution are unable to proceed with its prosecution of the accused because of the failure of the court to make the necessary amendments. Accordingly, it appears that where the trial judge was under a duty to amend a defective indictment, but had failed to do so, then an acquittal will not form the basis of a plea in bar to a subsequent indictment in the correct form.<sup>54</sup> The English superior courts also require that the trial judge amend a defective indictment where it is appropriate to do so, *i.e.* where such an amendment would not cause an injustice.<sup>55</sup>

Accordingly, where the former criminal trial had concluded or was aborted prematurely due to the presence of procedural irregularities, the accused cannot be said to have been in former

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<sup>50</sup> *The People (A.G.) v. Edge* [1943] I.R. 115 (S.C.); *The Minister for Supplies v. Connor* [1945] I.R. 231 (H.C.).

<sup>51</sup> *R. v. Cronin* (1938-40) Cr. App. R. 179 (C.C.A.).

<sup>52</sup> In *Crane v. D.P.P.* [1921] 2 A.C. 299 at 332 (H.L.), a *venire de novo* case, Lord Sumner explained that: "Acquittal implies that a true legal trial has been had. Here there has legally been none at all, but only a semblance of one, a mistrial, which does not count."

<sup>53</sup> Section 6(1) of the Criminal Justice (Administration) Act, 1924.

<sup>54</sup> Indeed, it is also true to say that in these circumstances the accused was not legally in peril at the former trial which would have formed the basis of the plea in bar *autrefois acquit*.

<sup>55</sup> *R. v. Fraser* (1922-23) 17 Cr.App.R. 182 (C.C.A.).

jeopardy for the same criminal offence charged in a subsequent indictment. Therefore, the pleas in bar may not be raised.

*C. Suspended Prosecution Insufficient for Pleading Former Jeopardy*

Where an accused has been charged with a criminal offence, but the prosecution decides not to proceed with the prosecution, this abstention will not amount to an acquittal and accordingly will not form the basis of the plea in bar, *autrefois acquit*, against a subsequent trial for the same criminal offence because the accused had not previously been in jeopardy for the offence charged.<sup>56</sup> Statute law in Ireland provides that where the trial has commenced and the prosecution subsequently enters a *nolle prosequi* before a verdict has been reached, this will operate as a stay on those proceedings.<sup>57</sup> However, this procedure does not result in an acquittal and may not be relied upon as the basis of the plea in bar, *autrefois acquit*, against a second trial for the same criminal offence.<sup>58</sup> Thus, the entry of a *nolle prosequi* is more accurately described as a stay on proceedings rather than a complete bar to a second trial for the same criminal offence, the former not amounting to a final verdict of acquittal by the trial court, which may form the basis of the plea in bar, *autrefois acquit*, against a further prosecution for the same criminal offence. However, if it can be established that the entry of a *nolle prosequi* by the prosecution constitutes an abuse of the process of the court, there is both Canadian<sup>59</sup> and Australian<sup>60</sup> judicial authority to the effect that what would otherwise be a stay on further proceedings *per se* would be converted into an abuse of the process of the court and accordingly the accused could plead *autrefois acquit*. Is this procedure justifiable? What if the prosecution cannot proceed because its principal witness has been threatened by the accused (or his associates) and so a *nolle prosequi* is entered as an interim

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<sup>56</sup> *The State (Shanahan) v. A.G* [1964] I.R. 239 (S.C.); *R. v. Manchester City Stipendiary Magistrate, ex parte Snelson* [1977] 1 W.L.R. 911 (Q.B.D.).

<sup>57</sup> Section 12 of the Criminal Justice (Administration) Act, 1924 provides that a *nolle prosequi* may be entered at any time after the indictment is preferred to the jury and before their verdict.

<sup>58</sup> In the *People (D.P.P.) v. Quilligan (No. 2)* [1989] I.R. 46 at 49 (S.C.), Walsh J. explained that: "A person who is discharged in consequence of a *nolle prosequi* cannot be heard to plead *autrefois acquit* in the event of the prosecution being reinstated." Likewise, in *R. v. Richards* [1988] L.R.C. (Crim.) 72 (C.C.A.), the Jamaican Court of Criminal Appeal held that the *nolle prosequi* being properly entered nullified the previous proceedings thereby permitting the prosecution to prosecute the offences charged on a second occasion for the same criminal offence.

<sup>59</sup> *R. v. Jewitt* (1985) 20 D.L.R. (4th) 651 (S.C.).

<sup>60</sup> *Walter v. Gardiner* (1993) 177 C.L.R. (H.C.A.).

measure until the prosecution's principal witness can be placed in a witness protection programme? Should policy considerations with the objective of ensuring that the guilty are tried and punished override the accused's right in pleading former "acquittal" in these circumstances? It is submitted that such a strict application of double jeopardy jurisprudence is not in accordance with the rationale for the development of the proscription and fails to serve the broader interests of the criminal justice system operative in liberal democracies, *i.e.* the prosecution and punishment of those individuals who are undoubtedly guilty of the commission of serious criminal offences.

A more practical approach to the difficulties associated with the entry of a *nolle prosequi* was adopted by the Supreme Court in the *State (Walsh) v. Lennon*,<sup>61</sup> where the prosecution, having entered a *nolle prosequi*, subsequently re-tried the accused for the same criminal offence. O'Sullivan C.J., delivering the judgement of the Court, explained that:

In no case has it been decided that the entering of a *nolle prosequi* by the Attorney General [now the D.P.P.] is a bar to a fresh indictment for the same criminal offence, and it is well established that the discharge of an accused under a *nolle prosequi* does not amount to an acquittal...<sup>62</sup>

However, where the prosecution discontinues a criminal trial by the entry of a *nolle prosequi* rather than allowing the trial to proceed concluding in a verdict of acquittal or conviction, the status of such a stay on the proceedings will depend on the circumstances of each case. In the *State (O'Callaghan) v. O'hUadhaigh*,<sup>63</sup> where a *nolle prosequi* had been entered as a stay on the initial trial in the Circuit Court, the DPP subsequently sought to retry the accused for the same criminal offence. However, the High Court made an order of *certiorari* prohibiting the re-trial of the accused for the same criminal offence as otherwise would not accord with the standards of fair procedures required by the courts in the administration of justice.

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<sup>61</sup> [1942] I.R. 112 (S.C.).

<sup>62</sup> [1942] I.R. 112 at 130 (S.C.).

<sup>63</sup> [1977] I.R. 42 (H.C.).

It was established that, where the accused is being prosecuted anew on the same charges which had previously been withdrawn by the entry of a *nolle prosequi* by the prosecution, a second trial on the same charges this would “involve such a degree of unfairness to the accused person as to deprive him of his basic rights of justice at a criminal trial.”<sup>64</sup> Finlay P. was of the view that to allow the prosecution enter a *nolle prosequi* in every case where it appeared that it would not secure a conviction was contrary to the administration of justice, in that the prosecution would have knowledge of the defence’s strategies in the event of a retrial.<sup>65</sup> In effect, the DPP, by the entry of a *nolle prosequi* in the *State (O’Callaghan) v. O’hUadhaigh*, sought to avoid a ruling made during the course of the former trial in the accused’s favour.

The apparent inconsistency between the *State (Walsh) v. Lennon* and the *State (O’Callaghan) v. O’hUadhaigh* was somewhat clarified by the High Court in the *State (Coveney) v. Members of the Special Criminal Court*,<sup>66</sup> where Finlay P. explained that the decision by the Supreme Court in *State (Walsh) v. Lennon* was consistent with the general rule regarding the entry of a *nolle prosequi*. Thus, it appears that the decision in the *State (O’Callaghan) v. O’hUadhaigh* is confined to the facts of that particular case.<sup>67</sup> It seems, therefore, that whereas an acquittal will form the basis for the pleas in bar to a subsequent trial for the same criminal offence, it will depend upon the circumstances on which the *nolle prosequi* was entered to determine whether it will also found the pleas in bar. However, it is difficult to reconcile this with the rationale for the development of the common law proscription against double jeopardy. Furthermore, the procedure in most common law jurisdictions (with the exception of the United States) is that a final verdict of either acquittal or conviction by a former court of competent criminal jurisdiction is required to successfully raise the pleas in bar, *autrefois acquit* and *autrefois convict*, against a subsequent indictment for the same criminal offence. Accordingly, the entry of a *nolle prosequi* by the prosecution is not tantamount to an acquittal and should not operate to prevent a subsequent criminal trial for the same criminal offence.

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<sup>64</sup> *Kelly v. DPP and Her Honour Judge Catherine McGuinness* [1997] 1 I.L.R.M. 69 at 79 (S.C.) per Murphy J.

<sup>65</sup> [1977] I.R. 42 at 54 (H.C.).

<sup>66</sup> [1982] I.L.R.M. 284 (H.C.).

<sup>67</sup> That is to say, where the DPP had entered a *nolle prosequi* to avoid an adverse ruling, as opposed to the purpose of entering a *nolle prosequi*, pursuant to which the prosecution declares that they will not proceed with their case *per se*.

In any event, this “second criminal trial” would effectively be the first trial of the accused which would not violate the common law principle against double jeopardy. The Canadian Supreme Court has also ruled that, where the charges had been withdrawn prior to the commencement of the trial, the accused had not been in peril of conviction and, accordingly, could not plead *autrefois acquit* as a plea in bar to a second trial for the same criminal offence.<sup>68</sup>

The withdrawal of a summons on a case being tried summarily would be the equivalent to the entering of a *nolle prosequi* in the case of a trial on indictment,<sup>69</sup> neither of which will form the basis of the pleas in bar. In these instances, as the trial failed to proceed to verdict, the accused could not legally have been in former jeopardy. This is equally true before the English superior courts. In *Davis v. Morton*,<sup>70</sup> the English Court of King’s Bench held that the withdrawal of the first summons due to a technical informality was not equivalent to a dismissal which could be pleaded in bar against a second proceeding for the same criminal offence.

## V. FINAL VERDICT OF ACQUITTAL OR CONVICTION

One of the primary aims of double jeopardy jurisprudence is the preservation of the finality of judgements.<sup>71</sup> Accordingly, it is a strict requirement in most common law jurisdictions<sup>72</sup> that the former trial court had recorded a verdict of either acquittal or conviction, as the case may be, which may form the basis of the pleas in bar against a re-trial for the same criminal offence. Thus, the general rule is that a verdict of acquittal or conviction arises only at the proper conclusion of the criminal trial and there can be no conclusion of the trial until the verdict has been formally pronounced by the trial court.<sup>73</sup>

What is essential to a plea of *autrefois acquit* or *autrefois convict* is proof of a final verdict of acquittal or conviction recorded by a court of competent criminal jurisdiction, not so much that the accused had been in peril of conviction for a particular offence.<sup>74</sup>

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<sup>68</sup> *R. v. Selbi* [1990] 1 S.C.R. 277 (S.C.).

<sup>69</sup> *R. v. (McDonnell) v. Justices of County Tyrone* [1912] 2 I.R. 44 at 48 *per* Palles C.B. (K.B.).  
<sup>70</sup> [1913] 2 K.B. 479 at 486 *per* Avory J. (K.B.D.).

<sup>71</sup> *Crist v. Bretz* (1978) 437 U.S. 28 at 33 (S.C.) *per* Stewart J.

<sup>72</sup> The United States is a notable exception.

<sup>73</sup> *The People (DPP) v. O’Shea* [1982] I.R. 384 at 431-432 (S.C.) *per* Henchy J.; Devlin, P., *Trial by Jury* (Stevens, London, 1966), p. 75.

<sup>74</sup> *DPP v. Nasralla* [1967] 2 A.C. 238 at 250 *per* Lord Devlin (P.C.).

Where an accused has been charged with an indictable offence, he is generally entitled to a constitutional right to be tried by a jury of his peers.<sup>75</sup> Thus, where an accused has been acquitted by the trial judge's direction, this will not amount to an acquittal, particularly for the purposes of double jeopardy jurisprudence, because the case never went to the jury.<sup>76</sup> However, this raises the question as to the inviolability of the jury's verdict.<sup>77</sup> In the *People (DPP) v. O'Shea*,<sup>78</sup> the Supreme Court overruled precedents for over a century by allowing the DPP to appeal<sup>79</sup> an acquittal from the Central Criminal Court to the Supreme Court.<sup>80</sup> The Court based its decision on a literal reading of Article 34.4.3° of the Constitution of Ireland, 1937 which provides that the Supreme Court is vested with jurisdiction to hear appeals from *all* decisions of the High Court.<sup>81</sup> Although this right of appeal against an acquittal is no longer available to the prosecution,<sup>82</sup> the prosecution authorities are entitled to appeal other decisions, such as the trial judge's ruling to set aside a jury's verdict of guilty or indeed a hearing to suppress material evidence.<sup>83</sup> However, even if the prosecution succeeds in an appeal on these collateral issues (on a point of law) this may not form the basis of a retrial because of the doctrine of collateral estoppel.

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<sup>75</sup> Article 38.5 of the Constitution of Ireland, 1937. In the *People (DPP) v. Davis* [1993] 2 I.R. 1 at 13 (S.C.), the Supreme Court *per* Finlay C.J. explained that: "...the constitutional right to trial with a jury, contained in Article 38.5 of the Constitution has a fundamental and absolutely essential characteristic, the right of the jury to deliver a verdict." Likewise, in *Crist v. Bretz*, 437 U.S. 28, 36 (1978) (S.C.), Stewart J. noted: "Throughout the historic development of trial by jury in the Anglo-American system of criminal justice there ran a strong tradition that once banded together a jury should not be discharged until it had completed its solemn task of announcing a verdict."

<sup>76</sup> *The People (DPP) v. Quilligan* (No. 2) [1989] I.R. 46 at 50 (S.C.) *per* Walsh J.; *The People (DPP) v. O'Shea* [1982] I.R. 384 at 407 (S.C.) *per* O'Higgins C.J.; *The State (A.G.) v. Binchy* [1964] I.R. 395 at 415 (S.C.) *per* Ó Dálaigh J.; Devlin, P., *Trial by Jury* (Stevens, London, 1966), p. 75.

<sup>77</sup> The sanctity of the jury cannot be reconciled with human fallibility. Therefore, the verdict of the jury should not be unalterable.

<sup>78</sup> [1982] I.R. 384 (S.C.).

<sup>79</sup> "The appellate court sits as a thirteenth juror." *Tibbs v. Florida*, 457 U.S. 31, 42 (1981) (S.C.) *per* O'Connor J.

<sup>80</sup> See generally, Staines, M., "The Power of the Prosecution to Appeal Acquittals" (1983) 77 *Law Society Gazette* 29.

<sup>81</sup> The Central Criminal Court being the High Court exercising its criminal jurisdiction.

<sup>82</sup> Section 11 of the Criminal Procedure Act, 1993, as amended by the section 44 of Court and Court Officers Act, 1995; with the exception of an appeal on a point of law to the Supreme Court under section 34 of the Criminal Procedure Act, 1967, without prejudice to a verdict in favour of the accused.

<sup>83</sup> See generally, Law Reform Commission of Ireland, Consultation Paper, *Prosecution Appeals in Cases Brought on Indictment* (LRC CP 19-2002); Law Reform Commission of Ireland, Consultation Paper, *Prosecution Appeals from Unduly Lenient Sentences in the District Court* (LRC CP 33-2004).

A conviction alone may not be sufficient to ground the pleas in bar, as it is also necessary that the defendant had been sentenced accordingly, *i.e.* the finality of verdict requirement has been fulfilled.<sup>84</sup> Archbold<sup>85</sup> explains that “[T]he underlying rationale of *autrefois convict* is to prevent duplication of punishment; if the plea could be supported by a finding of guilt lone, a defendant might escape punishment altogether.”<sup>86</sup>

This statement of the law appears to overrule earlier English case law which had held that it was sufficient to establish a plea of *autrefois convict* based on a conviction even if the defendant had not been sentenced,<sup>87</sup> or where the accused had merely pleaded guilty,<sup>88</sup> or where a conviction had not been recorded in the court register.<sup>89</sup> However, the English Law Commission’s Report on *Double Jeopardy and Prosecution Appeals*<sup>90</sup> has recommended that a conviction for double jeopardy purposes should not be dependent on the passing of sentence, the verdict of guilty being sufficient.<sup>91</sup> This is a more logical approach in consideration that the rationale for the development of double jeopardy is the proscription against retrials for the same criminal offence following an acquittal or conviction or as a corollary against the imposition of multiple punishments upon conviction. In other words, it is the former verdict of either acquittal or conviction that constitutes former jeopardy which may be raised in bar against a further prosecution for the same criminal offence.

Statute law in Ireland<sup>92</sup> provides that where a conviction has been quashed by the Court of Criminal Appeal and a retrial is ordered, the accused may not raise the plea in bar, *autrefois acquit*, because of the absence of a former verdict of conviction. Clearly,

<sup>84</sup> Walsh, D., *Criminal Procedure* (Thomson Round Hall, Dublin, 2002), p. 788, para. 16-16; Turner, J.W.C., (ed.), *Kenny’s Outlines of Criminal Law* (19<sup>th</sup> ed., Cambridge University Press, Cambridge, 1966), p. 606, para. 743; Richardson, P.J., (ed.) *Archbold: Criminal Pleading, Evidence and Practice 2003* (Sweet & Maxwell, London, 2003), p. 382, para. 4-141; *R. v. Cole* [1965] 2 All E.R. 29 at 30-31 (C.C.A.) *per* Lord Parker C.J.

<sup>85</sup> Richardson, P.J., (ed.) *Archbold: Criminal Pleading, Evidence and Practice 2003* (Sweet & Maxwell, London, 2003).

<sup>86</sup> Richardson, P.J., (ed.) *Archbold: Criminal Pleading, Evidence and Practice 2003* (Sweet & Maxwell, London, 2003), p. 382, para. 4-141.

<sup>87</sup> *R. v. Sheridan* [1937] 1 K.B. 223 (C.C.A.).

<sup>88</sup> *R. v. Grant* [1936] 2 All E.R. 1156 (C.C.A.).

<sup>89</sup> *R. v. Manchester Justices, ex parte Lever* [1937] 2 K.B. 96 (K.B.D.).

<sup>90</sup> Law Commission for England and Wales, Report No. 267, *Double Jeopardy and Prosecution Appeals* (Cm. 5048, 2001).

<sup>91</sup> Law Commission for England and Wales, Report No. 267, *Double Jeopardy and Prosecution Appeals* (Cm. 5048, 2001), p.79, recommendation 23.

<sup>92</sup> Section 5(2) of the Courts of Justice Act, 1928.

where the accused successfully appeals against a trial court conviction with the result that the Court of Criminal Appeal quashes the conviction, he may not raise the pleas in bar against a subsequent indictment for the same criminal offence for there is no former verdict of either acquittal or conviction upon which to base the pleas in bar.<sup>93</sup>

In England, it has been held that where a conviction has been quashed by the Court of Criminal Appeal but an order for a retrial has not been made, the appellant is effectively in the same position for all purposes as if he had actually been acquitted.<sup>94</sup> However, this procedure is not tenable where the conviction was quashed because of some procedural irregularity, such as where it subsequently transpires that the search warrant, which led to the discovery of the prosecution's main evidence, was executed at a time when the legal validity of the warrant had expired. In other words, should those individuals who are undoubtedly guilty of the commission of serious criminal offences be exempt from further prosecution in such cases where fresh and viable evidence subsequently emerges establishing the accused's guilt?

It has also been suggested that, where a defendant succeeds in having his conviction quashed by the Court of Criminal Appeal and a new trial is ordered,<sup>95</sup> this procedure will not violate the double jeopardy proscription, as jeopardy is deemed to have continued from the original trial to the appeal process.<sup>96</sup> This concept of a continuing jeopardy originated in the United States in *Kepner v. United States*,<sup>97</sup> where the Supreme Court held that an appeal by the prosecution against the accused's acquittal violated the double jeopardy principle.<sup>98</sup> This case is better known for the dissenting judgement by Holmes J. in which he propounded the concept of a "continuing jeopardy" for appeals by the federal government to be upheld.<sup>99</sup> He explained that:

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<sup>93</sup> *United States v. Ball*, 163 U.S. 662, 672 (1896) (S.C.) per Gray J.

<sup>94</sup> *R. v. Barron* [1914] 2 K.B. 570 at 574 (C.C.A.) per Lord Reading C.J.

<sup>95</sup> Section 5(1) of the Courts of Justice Act, 1928.

<sup>96</sup> Patten, R., "Prosecution Appeal Against Judges' Rulings" [2000] *Criminal Law Review*, 971 at 973 ("There is no violation of the double jeopardy principle even if the appeal to the House of Lords culminates in another trial because this trial is the continuation of a process begun by the defence.")

<sup>97</sup> 195 U.S. 100 (1904) (S.C.).

<sup>98</sup> The majority ruling in *Kepner* is considered to be a Fifth Amendment mandate in the United States.

<sup>99</sup> 195 U.S. at 134 (S.C.).

It is more pertinent to observe that it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy on the same cause, however often he may be tried. *The jeopardy is one continuing jeopardy from its beginning to the end of the cause.*<sup>100</sup> (emphasis added)

Applying the “continuing jeopardy” concept, the prosecution would be permitted to appeal an acquittal on the basis that it was erroneous, which, if reversed by the appellate court, would pave the way for a retrial for the same criminal offence; the theory being that what is commenced by one court is effectively concluded by another. However, the majority opinion in *Kepner* rejected the concept of a “continuing jeopardy” on the basis that an acquittal terminated the initial jeopardy with the result that a retrial would undoubtedly place the accused in double jeopardy in contravention of the accused’s constitutional<sup>101</sup> right not to be placed twice in jeopardy for the same criminal offence.

The concept of a continuing jeopardy was followed by the United States Supreme Court in *Justices of Boston Municipal Court v. Lydon*<sup>102</sup> in the context of a trial *de novo*. The defendant had been convicted by a magistrate’s court and appealed on the ground that the evidence upon which he was convicted was insufficient to support the conviction. The trial court ruled that the defendant could not challenge his conviction in this way and that the only remedy open to him was a trial *de novo*. Against this, the defendant argued that, since the evidence adduced in the magistrate’s court was insufficient for a conviction, he should have been acquitted and furthermore that the trial *de novo* would place him in double jeopardy for the same criminal offence. However, a majority of the Supreme Court rejected this argument, ruling that both the trial in the magistrate’s court and the possible further trial *de novo* was a two stage continuous proceeding which did not constitute two separate trials against which the principle against double jeopardy could be pleaded. In other words, the jeopardy continued from the initial criminal trial to the trial *de novo* and was not a case of the

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<sup>100</sup> 195 U.S. at 134 (S.C.). However, the concept of a “continuing jeopardy” was rejected in this particular case, although it has found favour in other circumstances.

<sup>101</sup> Amendment V. of the United States Federal Constitution, 1787.

<sup>102</sup> 466 U.S. 294 (1984) (S.C.).

accused being placed twice in jeopardy for the same criminal offence, but rather a continuing jeopardy until a final verdict was concluded by the trial court.

There is a significant degree of logic to Justice Holmes' continuing jeopardy theory in that where a defendant successfully appeals against a conviction, there is no verdict recorded by the trial court to found the pleas in bar which would permit a re-prosecution for the same criminal offence. However, if the appellate court found that there had been insufficient evidence to sustain the conviction, it may amount to an abuse of the process of court to permit a retrial notwithstanding the absence of a final verdict of acquittal or conviction.

## VI. THE SAME CRIMINAL OFFENCE

The third requirement to be satisfied before the accused may raise the pleas in bar is that the second trial is for the same criminal offence or for an offence of which the accused might have been found guilty on a former criminal trial or is based on identical facts.<sup>103</sup> This issue is undoubtedly the most problematic and most litigated element of double jeopardy jurisprudence, as exemplified in *Connelly v. DPP*,<sup>104</sup> where Lord Hodson opined:

What is meant or involved in the words "the same crime"? It is in the answer to this question that so much difficulty has arisen and so much argument has been entertained down to the present day not only in this country but in other countries where the common law prevails.<sup>105</sup>

What may be relevant in determining whether the accused has been placed twice in jeopardy for the same criminal offence are the following factors: the elements (whether statutory or common law) of each offence, the evidence adduced during the course of the criminal trial to prove these offences, whether there were multiple victims or indeed discrete criminal acts (omissions) and the purpose

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<sup>103</sup> Ryan, E., and Magee, P., *The Irish Criminal Process* (Mercier Press, Dublin, 1983), p. 274.

<sup>104</sup> [1964] A.C. 1254 (H.L.).

<sup>105</sup> [1964] A.C. 1254 at 1331 (H.L.).

of the statutory provisions criminalising certain activity (did parliament provide for two statutes to criminalise the same conduct?). If the legislature had intended that two offences are to be treated the same, the principle against double jeopardy may be invoked so as to prevent a retrial. Conversely, if the legislature intended that the two (or more) offences in question were distinct, the accused will not be placed twice in jeopardy for the same criminal offence. The factors which will determine whether or not the accused is placed twice in jeopardy for the same criminal offence will be considered by the reviewing court.

The rationale for the development of double jeopardy jurisprudence is that it would be unfair to punish an individual twice if he has only committed one act that results in one harm. The central issue, therefore, is whether the accused has previously been convicted or acquitted of the same or substantially the same criminal offence as that charged in the subsequent indictment.

The second indictment must be for the same criminal offence both in fact and in law.<sup>106</sup> Thus, if the accused commits the same criminal offence on different occasions he will not be permitted to raise double jeopardy as a plea in bar to a subsequent indictment for the same criminal offence. For example, if the accused murders X on Monday and Y on Friday, he cannot plead his acquittal for the murder of X as a plea in bar against being prosecuted for the murder of Y. This is because the murder of Y involves a different set of facts, and it is not the law that a defendant shall not be punished twice for the same act.<sup>107</sup> Accordingly, there must be both a factual and legal nexus between the two criminal offences in order to be considered the same offence for the purposes of double jeopardy jurisprudence.

What if one act, omission or what is often termed a “criminal transaction” involves the commission of a criminal offence against more than one victim, such as where the accused brandishes a sword in a public place (an unlawful and dangerous act) with the result that there are multiple victims?<sup>108</sup> If the accused is prosecuted for grievous bodily harm against only one of the victims and is acquitted, does it necessarily follow that he is also to be acquitted of the injuries caused

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<sup>106</sup> *Connelly v. DPP* [1964] 2 All E.R. 401 at 433 (H.L.(E.)) *per* Lord Devlin. In *Connelly*, an acquittal on a charge of murder could not be raised in bar to a subsequent trial for robbery, even though the murder had been committed in the course of the robbery.

<sup>107</sup> *R. v. Thomas* [1950] 1 K.B. 26 (C.C.A.).

<sup>108</sup> See generally, Horack, Frank, E. J.R., “The Multiple Consequences of a Single Criminal Act,” 21 *Minnesota Law Review* 805 (1937).

to the other victims during the course of this “criminal transaction?” Canadian authority demonstrates that the courts will be reluctant to entertain the pleas in bar in these circumstances. In *R. v. Prince*,<sup>109</sup> the accused had stabbed the victim, a pregnant woman, in the abdomen region with the result that she gave premature birth a number of days later. The child died a short time after being born. On a charge of attempted murder of the victim (the mother of the child), the accused was acquitted and merely convicted of the offence of causing serious bodily harm to her. The accused was then indicted on a charge of manslaughter relating to the child’s death. His plea of *autrefois acquit* was rejected on appeal to the Supreme Court of Canada, largely because the offences charged in this case involved serious personal violence. Dickson C.J. explained that:

Society, through the criminal law, requires Prince to answer for both the injury to Bernice Daniels and the death of the child, just as it would require a person who threw a bomb into a crowded space to answer for the multiple injuries and deaths that might result, and just as it compels a criminally negligent driver to answer for each person injured or killed as a result of his or her driving.<sup>110</sup>

A given set of circumstances may satisfy the elements of a number of criminal offences. Offences for the purposes of double jeopardy jurisprudence are not defined by reference to separate titles or separate statutory provisions. Two offences may have different titles and be prohibited by different statutory provisions, yet constitute the same criminal offence for the purposes of double jeopardy jurisprudence. This scenario is specifically provided for by statute in Ireland.<sup>111</sup>

For the purposes of identifying the “same criminal offence test” to be adopted by the Superior Courts in Ireland, it is essential to conduct a comparative analysis of the various tests used by other leading common law jurisdictions to address this core issue of double jeopardy jurisprudence.

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<sup>109</sup> [1986] 2 S.C.R. 480 (S.C.).

<sup>110</sup> [1986] 2 S.C.R. 480 at 506-507 (S.C.).

<sup>111</sup> Section 14 of the Interpretation Act, 1937.

### A. England

The requirement that the second indictment is for the same criminal offence was considered at length by the House of Lords in *Connolly v. DPP*.<sup>112</sup> The appellant was charged on two indictments, one charging him with murder and a second charging him with aggravated robbery. Both charges arose from the same incident.<sup>113</sup> He was tried and convicted on the charge of murder, but, on appeal, acquitted by the Court of Criminal Appeal. He was subsequently indicted on the charge of aggravated robbery and was convicted.<sup>114</sup> He appealed against this conviction on the ground that a plea of *autrefois acquit* should be allowed because the issue as to whether he took part in the robbery had been decided in his favour by the Court of Criminal Appeal on the murder charge arising from the same factual situation. Both the Court of Criminal Appeal and the House of Lords dismissed his appeal. On the trial for murder, the accused could not legally have been convicted of robbery. Moreover, the evidence required to prove the charge of robbery would have been insufficient to secure a conviction for murder or manslaughter. The House of Lords *per* Lord Morris<sup>115</sup> set out the governing principles concerning the applicability of *autrefois acquit* and *autrefois convict*.<sup>116</sup> With regard to the test for determining whether or not two criminal offences are the same for the purposes of double jeopardy jurisprudence, Lord Morris explained that:

...[Principle 7] what has to be considered is whether the crime or offence charged in the later indictment is the same or is in effect or is substantially the same as the crime charged (or in respect of which there could have been a conviction) in a former indictment and that it is immaterial that the facts under examination

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<sup>112</sup> [1964] A.C. 1254 (H.L.). It was decided in this case that the pleas in bar may be successfully raised against a charge in a subsequent indictment if the latter is one of which the accused could have been convicted of at the first trial.

<sup>113</sup> Two indictments were necessary in compliance with the practice laid down in *R. v. Jones* [1918] 1 K.B. 416 (C.C.A.), a practice which was expressly disapproved by the House of Lords in *Connolly v. DPP* [1964] A.C. 1254 (H.L.).

<sup>114</sup> The prosecution effectively adduced the same evidence as had been presented at the trial for murder.

<sup>115</sup> The speech of Lord Morris, albeit a minority judgement, is generally regarded as being the foundation of the modern law governing the pleas in bar, *autrefois acquit* and *autrefois convict*.

<sup>116</sup> [1964] A.C. 1254 at 1305-1306 (H.L.(E.)) *per* Lord Morris.

or the witnesses being called in the later proceedings are the same as those on some earlier proceedings.<sup>117</sup>

An offence for which the accused could have been convicted on the initial indictment concerns the power of a jury to acquit on the offence charged (*i.e.* the compound offence), but to convict of a lesser-included offence, the most common example being a conviction for manslaughter on a murder indictment. Later in his judgment, Lord Morris explained that:

It matters not that the incidents and occasions being examined on the trial of the second indictment are precisely the same as those which were examined on the trial of the first. *The court is concerned with charges of offences or crimes.* The test is, therefore, whether such proof as is necessary to convict of the second offence would establish guilt of the first offence for which on the first charge there could be a conviction.<sup>118</sup> (emphasis added)

That “the court is concerned with offences or crimes” clearly refers to the defining elements of criminal offences rather than the evidence adduced during the course of the former criminal trial. Lord Devlin approved of Lord Morris’s judgement and stated his conclusion succinctly in the following terms:

For the doctrine of *autrefois* to apply it is necessary that the accused should have been put in peril of conviction for the same criminal offence as that with which he is then charged. The word ‘offence’ embraces both the facts which constitute the crime and the legal characteristics which make it an offence. I would add one further comment. My noble and learned friend in his statement of the law, accepting what is suggested in some dicta in the authorities, extends the doctrine to cover offences which are in

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<sup>117</sup> [1964] A.C. 1254 at 1306 (H.L.(E.)).

<sup>118</sup> [1964] A.C. 1254 at 1309 (H.L.(E.)).

effect the same or substantially the same. I entirely agree...that these *dicta* refer to the *legal characteristics of an offence and not the facts* on which it is based...legal characteristics are precise things and are either the same or not.<sup>119</sup> (emphasis added)

Lord Devlin clearly focuses on the defining elements of individual criminal offences in order to determine if two offences are the same for the purposes of double jeopardy jurisprudence, rather than the evidence required to prove the offence(s) in the indictment. He stated that an offence “embraces both the facts that constitute the crime and the legal characteristics,” which of course implies that an accused may be prosecuted for the same criminal offence, so long as the second prosecution refers to a factually different offence. In other words, an accused may be prosecuted twice for the offence of burglary if the two offences are factually different, *i.e.* committed on different occasions (perhaps against different victims). It would be an affront to the criminal justice system if an accused could successfully raise the pleas in bar because he had already been convicted of an offence on a different occasion.<sup>120</sup> Furthermore, in *R. v. Beedie*,<sup>121</sup> the English Court of Criminal Appeal, applying *Connelly*, agreed that the principle of *autrefois* was to be narrowly defined and applied only where the same criminal offence, both in fact and law, was alleged in the second indictment as in the first.<sup>122</sup> Indeed, one may draw the inference from the Court of Criminal Appeal ruling in *Beedie* that the *Connelly* decision, which has been generally followed without much criticism, should no longer automatically be followed by trial courts.

The rules of double jeopardy jurisprudence proscribing a second trial for the same criminal offence are not applicable where the consequences of the accused’s criminal activity have changed. Thus, in *R. v. Thomas*,<sup>123</sup> the Court of Criminal Appeal held that where a defendant had been convicted of wounding with intent to murder and the person wounded subsequently died of the wounds inflicted, a plea of *autrefois acquit* may not be raised against a

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<sup>119</sup> [1964] A.C. 1254 at 1339-1340 (H.L.(E.)).

<sup>120</sup> The point being that, for the purposes of double jeopardy jurisprudence, the criminal offence challenged in the indictment must be the same criminal offence in both fact and in law as that for which the accused had formerly either been acquitted or convicted.

<sup>121</sup> [1998] Q.B. 356 (C.C.A.).

<sup>122</sup> [1998] Q.B. 356 at 360 (C.C.A.) *per* Rose L.J.

<sup>123</sup> [1950] 1 K.B. 26 (C.C.A.).

subsequent indictment for murder, as in these circumstances the accused is not being twice tried before a court of criminal jurisdiction for the same criminal offence.<sup>124</sup> In these circumstances, there is a separate and distinct new criminal offence (*i.e.* separate defining elements) that may be prosecuted without violating the common law double jeopardy prohibition. To allow the accused to successfully raise the pleas in bar in these situations would amount to an affront not only to the victim, but also to the requirements of a just and ordered society.

The English superior courts appear to be using the “same elements test” in determining what constitutes the same criminal offence which, it appears, will not necessarily prevent the evidence adduced during the course of the first criminal trial from also being presented at a subsequent trial for an offence committed on the same occasion.<sup>125</sup> Thus, the evidence adduced by the prosecution in order to prove the offence charged in the indictment may also be used at a subsequent trial of the same accused for a different offence, even if this latter offence arose out of the same factual situation as the initial offence charged. This is because the test used to determine sameness of offences is whether the defining elements of criminal offences are the same, not whether the factual circumstances are the same.

### *B. Ireland*

The test adopted by the Superior Courts in Ireland for determining whether two or more criminal offences are the same for the purposes of double jeopardy jurisprudence appears to be an implementation of the English test, *i.e.* that the second prosecution is for the same or substantially the same criminal offence or an offence for which the accused could have been found guilty of at the former criminal trial.<sup>126</sup>

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<sup>124</sup> Likewise, in *R. v. Tonks* [1916] 1 K.B. 443 at 450 (C.C.A.), Lord Reading L.C.J., delivering the judgement of the Court of Criminal Appeal, explained that: “In our view it is wrong to say that a person indicted for the manslaughter of a child whose death has occurred after the conviction of the same person for the wilful neglect of that child is twice put upon his or her trial for the same criminal offence.”

<sup>125</sup> In *R. v. Ollis* [1900] 2 Q.B. 758 (C.C.R.), evidence adduced at one trial was also entered at a subsequent trial of the accused. The issue for the Court of Crown Cases Reserved was whether this evidence should have been admitted at the second trial. Grantham J., at 766, explained that: “The real test is: was the first charge the same as that on which the prisoner is being charged again, or, was the evidence necessary to support the second indictment sufficient to prove a legal conviction on the first? If not, the evidence on the first charge can be used again, because it is being used in a different case, and on a different charge.”

<sup>126</sup> Ryan, E., and Magee, P., *The Irish Criminal Process* (Mercier Press, Dublin, 1983), p. 274; Sandes, R., *Criminal Law and Procedure in the Republic of Ireland* (3<sup>rd</sup> ed., Sweet & Maxwell, London, 1951), pp. 117-118.

In *Conlon v. His Honour Judge Cyril Kelly and the DPP*,<sup>127</sup> the applicant had been charged with a number of counts of fraudulent conversion together with one count of larceny. The jury failed to agree on the verdict and were discharged by the trial judge who also ordered a new trial. McGuinness J. explained that:

In the instant case the accused has neither been acquitted nor convicted on the original counts and makes no objection to retrial – or more properly a new trial – on these counts. The additional counts are not based on the same facts or on similar offences arising out of the same facts; they are different offences alleged to have been perpetrated on different victims, and with different evidence. The additional offences are alleged to be committed contrary to the same section of the same statute and are all offences of fraudulent conversion, but this does not bring them within the principle set out by Lord Morris in *Connelly's case*.<sup>128</sup>

It appears from this statement of the law that the test used by the Superior Courts in Ireland when determining the sameness of criminal offences for the purposes of double jeopardy jurisprudence is the “same elements test.” Furthermore, in *Re National Irish Bank (No. 2)*,<sup>129</sup> the High Court *per Kelly J.* explained that “...the principle of double jeopardy...is a narrow principle of limited effect. It concerns itself with identical or similar charges not with identical evidence.”<sup>130</sup>

Consequently, what constitutes the same criminal offence for the purposes of double jeopardy jurisprudence is determined by reference to the defining elements of individual offences.

An offence for which the accused may have been found guilty refers to a lesser-included (alternative) criminal offence of which the jury may convict the accused as an alternative to the greater (compound) offence charged in the indictment, the most common

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<sup>127</sup> High Court, unreported, McGuinness J., 14 December 1999.

<sup>128</sup> High Court, unreported, McGuinness J., 14 December 1999, at 10-11 of the unreported judgement.

<sup>129</sup> [1999] 3 I.R. 190 (H.C.).

<sup>130</sup> [1999] 3 I.R. 190 at 204 (H.C.).

example being a conviction for manslaughter as a lesser-included alternative on an indictment for murder. However, it is submitted that where the accused could have been convicted of an offence during the course of the former criminal trial, this should not form the basis of the plea in bar, *autrefois acquit*, against a subsequent trial for the same criminal offence. The basis for this proposition is that the rationale for the development of the common law principle against double jeopardy is the proscription of retrials following an acquittal or conviction, or indeed the imposition of multiple punishments upon conviction for the commission of the same criminal offence. Consequently, an offence for which the accused could have been convicted of at the former criminal trial, but was not, is not an acquittal *per se*, and accordingly does not form the basis of the pleas in bar.

### C. *United States*

The United States Supreme Court has struggled with a number of tests for determining the sameness of criminal offences for the purposes of double jeopardy jurisprudence, neither of which effectively prevents the prosecution from reintroducing the same evidence at subsequent trials. The principal tests invoked by the Court are the “*Blockburger/same evidence*” and the “*Ashe v. Swenson/same transaction*” tests of sameness of criminal offences.

#### 1. *Same Evidence Test*

The modern manifestation of the same evidence test, first enunciated in *Blockburger v. United States*,<sup>131</sup> concerned congressional intent as to cumulative sentencing. The Supreme Court held that narcotics sales on consecutive days were separately provable. Sutherland J., delivering the opinion of the Court, explained that:

Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, *the test to be applied to*

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<sup>131</sup> 284 U.S. 299 (1932) (S.C.). The *Blockburger* test is effectively the Supreme Court’s present formulation of the same evidence test.

*determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.*<sup>132</sup> (emphasis added)

The essence of the *Blockburger* test is that it compares the defining elements of each criminal offence in order to determine whether “each provision requires proof of a fact which the other does not.” The test is satisfied if each provision (criminal offence) requires proof of an element, *i.e.* of the individual criminal offence which the other does not. In other words, even though offences may overlap, each individual offence must contain an element in its definition that the other does not in order to successfully raise the pleas in bar against a subsequent trial for the same criminal offence.<sup>133</sup> It is clear that this test places emphasis on the elements of the criminal offences under consideration, thereby preventing a second trial for an offence with the same elements. Accordingly, it may be described as a tool of interpretation, creating a presumption of legislative intent, but it is not designed to contravene such intent.<sup>134</sup> If the legislative intent is clear, it will determine the scope of what constitutes the same criminal offence for the purposes of double jeopardy jurisprudence.

The *Blockburger* test was applied in *Brown v. Ohio*,<sup>135</sup> although Powell J.<sup>136</sup> emphasised that the decisive question is whether each statutory provision requires proof of an additional fact which the other does not and compared the statutory elements (legal definitions) of the criminal offences involved. Furthermore, in *Illinois v. Vitale*,<sup>137</sup> having cited the *Blockburger* elements test of the same criminal offence, the Court *per* White J. said:

...if in the pending manslaughter prosecution Illinois relies on and proves a failure to reduce speed to avoid an accident as the reckless act necessary to prove manslaughter, [the defendant] would have a

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<sup>132</sup> 284 U.S. at 304 (S.C.).

<sup>133</sup> *Iannelli v. United States*, 420 U.S. 770, 785, n.17 (1975) (S.C.) *per* Powell J.

<sup>134</sup> Scheb, J.M., & Scheb, J.M., *Criminal Law & Procedure* (West/Wadsworth, California, 1999), p. 342.

<sup>135</sup> 432 U.S. 161 (1977) (S.C.).

<sup>136</sup> 432 U.S. 16, 166 (S.C.) *per* Powell J., (“Unless ‘each statute requires proof of an additional fact which the other does not...the Double Jeopardy Clause prohibits successive prosecutions as well as cumulative punishment.’”).

<sup>137</sup> 447 U.S. 410 (1980) (S.C.).

substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution.<sup>138</sup>

Following this decision, the Supreme Court tended to look outside the *Blockburger* test and considered the evidence necessary to prove the offences involved. Thus, even if offences are not the same following a strict application of the *Blockburger* test, if the evidence necessary to prove the offence charged in the first indictment is the same evidence to be used in a second trial, then the second prosecution will be prevented on grounds that it would place the accused in double jeopardy. This approach, established in *Illinois v. Vitale*,<sup>139</sup> was approved by a narrow majority in *Grady v. Corbin*,<sup>140</sup> where Brennan J. explained that:

...the Double Jeopardy Clause bars a subsequent prosecution in which the government, to establish an essential *element of an offense* charged in that prosecution, the government will prove *conduct that constitutes an offense* for which the defendant has already been prosecuted.<sup>141</sup> (emphasis added)

This became known as the “same evidence test,” the operative effect of which was to prevent a second trial based on the same conduct of the accused (proof of the same facts) as that which had been tried at the first trial. The effect of the decision in *Grady v. Corbin* was that the prosecution had to satisfy not only the *Blockburger* test, but also a “same conduct” test in order to retry the accused for the same criminal offence. More recently, however, in *United States v. Dixon*,<sup>142</sup> the Supreme Court clarified the use of the “same elements test” and, by a narrow majority, overruled *Grady v. Corbin*. In so doing, the Court replaced the same evidence test for double jeopardy purposes with the *Blockburger* “same elements test.” The United States Supreme Court *per* Scalia J. in *Dixon* explained that:

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<sup>138</sup> 447 U.S. at 420 (S.C.).

<sup>139</sup> 447 U.S. 410 (1980) (S.C.).

<sup>140</sup> 495 U.S. 508 (1990) (S.C.).

<sup>141</sup> 495 U.S. at 510 (S.C.).

<sup>142</sup> 509 U.S. 688 (1993) (S.C.).

In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the ‘same-elements’ test, the double jeopardy bar applies....The same-elements test, sometimes referred to as the ‘*Blockburger*’ test, inquires whether each offense contains an element not contained in the other; if not, they are the ‘same offence’ and double jeopardy bars additional punishment and successive prosecution.<sup>143</sup>

Later in his judgement, Scalia J. explained that *Grady v. Corbin* must be overruled on the basis that it has merely served to produce confusion and lacks constitutional and historical roots.<sup>144</sup>

## 2. Same Transaction Test

The “same criminal offence” requirement of the double jeopardy clause was somewhat redefined by the United States Supreme Court in *Ashe v. Swenson*<sup>145</sup> to mean “same transaction,” rather than “same evidence.”<sup>146</sup> The same transaction test recognises that, where two or more criminal offences are part of the same criminal transaction and no human act or agency such as medical negligence separates the offences, they are the same criminal offence for double jeopardy purposes. In other words, there can only be one criminal prosecution for the multiple ramifications of a single criminal transaction. Brennan J. opposed the *Blockburger* same evidence test, instead proposing to redefine the same criminal offence test to mean the same transaction, because the *Blockburger* same evidence test:

...does not enforce but virtually annuls the Constitutional guarantee. For example, where a single criminal episode involves several victims, under the ‘same evidence’ test a separate prosecution may be brought as to each...The ‘same evidence’ test permits multiple prosecutions where a single transaction is divisible into chronologically discrete crimes...Even a

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<sup>143</sup> *United States v. Dixon*, 509 U.S. 688, 696 (1993) (S.C.) *per* Scalia J.

<sup>144</sup> *United States v. Dixon*, 509 U.S. at 704 (S.C.) *per* Scalia J.

<sup>145</sup> 397 U.S. 436 (1970) (S.C.).

<sup>146</sup> Lugar, M.E., “Criminal Law, Double Jeopardy and *Res Judicata*,” 39 *Iowa Law Review* 317, 324 (1954) (describing the “same transaction” as “a group of closely related criminal acts.”).

single criminal act may lead to multiple prosecutions if it is viewed from the perspectives of different statutes.<sup>147</sup>

Justice Brennan continued:

In my view, the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction. This “same transaction” test of “same offence” not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all the issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience.<sup>148</sup>

The same transaction test of the same criminal offence undoubtedly serves the aim of justice, economy and convenience in criminal litigation because, in contrast to the same evidence test which allows the same evidence to be admitted in a second criminal trial, the same transaction test prevents repetitive litigation over the same factual connections. However, the major criticism of the same transaction test is that it prevents more than one prosecution where the accused is deemed to have committed a series of criminal acts during the course of a criminal transaction.<sup>149</sup>

#### *D. Canada*

The prevailing test for determining the sameness of criminal offences operative in Canada is the *Kienapple* principle formulated

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<sup>147</sup> 397 U.S. 436, 451-52 (1970) (S.C.), Douglas and Marshall JJ. concurring. Brennan J., at 452, continued: “Given the tendency of modern criminal legislation to divide the phrases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening. And given our tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution, the potentialities for abuse inherent in the ‘same evidence’ test are simply intolerable.”

<sup>148</sup> 397 U.S. at 453-454 (S.C.). [1970]

<sup>149</sup> However, it will be recalled that double jeopardy jurisprudence in the United States is an entrenched constitutional right and therefore will be afforded greater protection from the superior courts.

by the Canadian Supreme Court in *Kienapple v. The Queen*.<sup>150</sup> The application of the *Kienapple* principle prevents an accused from being convicted or punished for more than one offence arising from the same set of facts.<sup>151</sup> However, it is not applicable to offences involving different victims, thus lending credence to the rule of law inherent in the common law principle against double jeopardy that the offence must be the same both in law and in fact before a retrial is proscribed.<sup>152</sup> In *Kienapple*, the accused had been charged with two counts in respect of a single act of unlawful sexual intercourse, namely, rape and unlawful carnal knowledge. The Supreme Court adopted the “same elements” test in determining the issue of sameness of criminal offences. Laskin J., delivering the judgment of the Court, explained that:

In short, in relation to potentially multiple convictions, it is important to know the verdict on the first count, just as in the case of successive prosecutions it is important to know the result of the first trial. If there is a verdict of guilty on the first count and the same or substantially the *same elements* make up the offence charged in a second count, the situation invites application of a rule against multiple convictions.<sup>153</sup> (emphasis added)

This statement of the law clearly adopts the “same elements test” of sameness of criminal offences for the purposes of double jeopardy jurisprudence. Thus, for example, in *Pitt v. Warden of*

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<sup>150</sup> [1975] 1 S.C.R. 729 (S.C.). See generally, Klinck, D.R., “‘The Same Cause or Matter’: The Legacy of *Kienapple*” (1983) 26 *Criminal Law Quarterly* 280.

<sup>151</sup> In *R. v. Van Rassel* [1990] 1 S.C.R. 225 (S.C.), McLachlin J., speaking for the Supreme Court (at para. 27), clarified the *Kienapple* principle in the following terms: “This rule, which is said to be based on the broader principle of *res judicata*, applies when two separate charges are based on the same delict or cause. It prescribes that a conviction cannot be registered on the second charge if there has been a conviction on the first charge. *The same delict or cause is involved where there is no additional and distinguishing element contained in the offences that goes to guilt.*” (emphasis added)

<sup>152</sup> In *R. v. Prince* [1986] 2 S.C.R. 480 at 506-507 (S.C.), Dickson C.J. explained that: “...at least in so far as crimes of personal violence are concerned, the rule against multiple convictions is inapplicable when the convictions relate to different victims. Indeed, I believe it was never within the contemplation of the majority in *Kienapple* that the rule enunciated therein would preclude two convictions for offences respectively containing as elements the injury or death of two different persons.”

<sup>153</sup> [1975] 1 S.C.R. 729 at 751 (S.C.).

*Mountain Institution*,<sup>154</sup> the Supreme Court of British Columbia held that the *Kienapple* principle was of no assistance to the accused because the offence for which he was convicted was sufficiently distinct from the offence charged in the second indictment.<sup>155</sup> Furthermore, in *R. v. Prince*,<sup>156</sup> the Supreme Court clarified the *Kienapple* principle, concluding that there must be a sufficient factual and legal nexus between the two offences. Thus, there can be no legal impediment in placing an accused on trial on more than one occasion based on the same facts if the offences are different.

#### *E. Australia*

The prevalent test adopted by the superior courts in Australia for determining the issue of sameness of criminal offences for the purposes of double jeopardy jurisprudence is that enunciated in *Pearce v. The Queen*,<sup>157</sup> where the High Court of Australia *per* Kirby J. concluded that:

This Court should accept the same test for a complainant about duplication in a second indictment or second charge as that now adopted in England, the United States and other jurisdictions of the common law. To make the complaint good, it is necessary to show that the subject of the second prosecution or charge is the same criminal offence or substantially or practically the same. The last words allow for minor variations in the verbal formulae of offences under comparison. *It is necessary in each case to analyse the essential elements of offences said to be duplicated.* Minor differences in language may be disregarded. But elements which add distinct and different features (normally of aggravation) to the definition of an offence result in differentiation between charges which is legally significant. To prosecute an accused in respect of such different offences is not to offend the rule of the common law against double jeopardy.

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<sup>154</sup> (1993) CanLII 2199 (BC S.C.).

<sup>155</sup> It was held that the conviction of the accused for an act of unlawful carnal knowledge was not the same criminal offence as the finding that the accused was a criminal sexual psychopath.

<sup>156</sup> [1986] 2 S.C.R. 480 (S.C.).

<sup>157</sup> [1998] H.C.A 57 (H.C.A.).

There is jeopardy; but it is not double because the offences are not legally the same.<sup>158</sup> (emphasis added)

Accordingly, it is the defining elements of individual criminal offences that are relevant in determining the sameness of criminal offences for the purposes of double jeopardy jurisprudence, not the surrounding facts or indeed the evidence adduced during the course of the former criminal trial.<sup>159</sup>

#### F. New Zealand

Legislation in New Zealand specifically prohibits the retrial of an accused person following a final acquittal, conviction or indeed a pardon.<sup>160</sup> In the *Ministry of Transport v. Hyndman*,<sup>161</sup> the accused was charged with driving a motor vehicle with excess breath alcohol and also with driving the same motor vehicle while under the influence of drink. The High Court of Auckland, in applying the provisions of section 358(1) of the Crimes Act, 1961, held that these offences were separate and distinct charges. Hillyer J., while not espousing any particular test for the sameness of offences, did rule that the offences in question, excessive breath alcohol and driving under the influence of drink, were separate and distinct offences for the purposes of raising the plea in bar, *autrefois acquit*. This would appear to comply with the general application of the “same elements” test of sameness of offences adopted in common law jurisdictions.

### VII. ACQUITTAL OR CONVICTION IN ANOTHER JURISDICTION

The common law had, by the 18<sup>th</sup> century, recognised acquittals or convictions for the same criminal offence in another jurisdiction for the purposes of raising the pleas in bar against a subsequent trial for the same criminal offence before a domestic court.<sup>162</sup> Statute law in Ireland has placed this procedure on a

<sup>158</sup> [1998] H.C.A. 57 at para. 125 (H.C.A.) *per* Kirby, J.

<sup>159</sup> Moreover, in *Rogers v. The Queen* (1994) 181 C.L.R. 251 (H.C.A.), the High Court of Australia held that where the pleas in bar are not available, a second prosecution may be stayed as being an abuse of the process of court. Indeed, it is an inherent power of the courts in common law jurisdictions to prevent an abuse of the court's process.

<sup>160</sup> Section 26 (2) of the Bill of Rights 1990; sections 358 and 359 of the Crimes Act, 1961.

<sup>161</sup> [1990] 3 N.Z.L.R. 480 (H.C., Auckland).

<sup>162</sup> *R. v. Roche* (1775) 168 E.R. 169 (Crown Cases).

statutory footing in specific instances.<sup>163</sup> Thus, double jeopardy protection from an Irish perspective has international status.

If a more formal recognition of international double jeopardy law is in fact recognised, the same criminal offence requirement of double jeopardy jurisprudence will need to be firmly established. In other words, the same criminal offence may have different titles in different countries or may have slight variations in the defining elements of the particular offences. If the accused has been tried and acquitted of the murder of a foreign national in this jurisdiction, can he be subsequently tried for manslaughter if he visits the jurisdiction of which the victim was a national? In these circumstances, there does not appear to be any legal impediment against the accused being tried in another jurisdiction where there are variations in the definitions of the offences. Each country's definition of certain criminal activity will be crafted according to the prevailing social attitudes to the offences in question. Thus, some jurisdictions may deem certain activity more heinous than another and this will be reflected in the relevant criminal law.<sup>164</sup> The difficulties associated with this aspect of double jeopardy jurisprudence came before the Canadian Supreme Court for consideration in *R. v. Van Rassel*,<sup>165</sup> where the accused, a Canadian police officer, had been acquitted before a United States court for the crimes of soliciting and accepting bribes from drug dealers in exchange for information regarding police investigations into the drug dealers activities. The accused was acquitted in the United States, but was subsequently charged for a similar offence in Canada, a breach of trust of his duties as a police officer. The accused pleaded that he had been formerly acquitted (*autrefois acquit*) by a court in another jurisdiction, namely the United States, for the same criminal offence. However, the Canadian Supreme Court rejected this plea because the charges in the indictment before the United States court were not the same as the

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<sup>163</sup> Maritime Security Act, 2004, s. 9; European Arrest Warrant Act, 2003, s. 41; Criminal Justice (Safety of United Nations Workers) Act, 2000, s. 10; Sexual Offences (Jurisdiction) Act, 1996, s. 9; Criminal Law (Jurisdiction) Act, 1976, s. 15.

<sup>164</sup> For example, in early sixteenth century England, there existed the criminal offence of being a vagabond and if over the age of eighteen years could be hanged if they did not obtain suitable employment for two years. In the seventeenth century, the most common of all crimes throughout Europe was witchcraft, a crime constructed in terms of religion. Theft offences are culturally specific concepts. Thus, Australian Aboriginals, like other indigenous communal societies, did not recognise the concept of theft because all property was communal.

<sup>165</sup> [1990] 1 S.C.R. 225 (S.C.).

charges before the Canadian courts, even though both of the indictments were based on the same facts.<sup>166</sup>

Thus, the same criminal offence dilemma may be somewhat relaxed when the accused is facing re-prosecution by a different country based on the same facts following his acquittal or conviction following a trial on the merits. Indeed, the accused may have been acquitted in another jurisdiction because of the availability of a defence to the charges in the indictment in that jurisdiction, but may nevertheless be re-indicted for the same criminal offence in a different jurisdiction where such a defence is not available under the law of that jurisdiction.

### VIII. LESSER-INCLUDED CRIMINAL OFFENCES

The problematic issue of determining the issue of “sameness” of criminal offences for the purposes of double jeopardy jurisprudence is further exacerbated when the additional factor is introduced to include offences of which the accused “could” have been convicted at the former criminal trial,<sup>167</sup> a procedure that is provided for by statute in Ireland.<sup>168</sup> In these circumstances, the accused is indicted for the commission of a “compound crime,” the most common example being murder and manslaughter. Specifically, if the accused is indicted for murder, the jury may return a guilty verdict of manslaughter as a lesser-included alternative. However, an acquittal of the greater charge (compound crime – in this case, murder), would also apply to lesser-included offences (in this case, manslaughter), assuming that the jury had returned a general verdict of either acquittal or conviction, as opposed to a partial verdict. Thus, a plea of *autrefois acquit* could be pleaded in bar against a subsequent trial for the manslaughter charge following an acquittal of the murder charge, notwithstanding that the ingredients or elements of these criminal offences are not the same.<sup>169</sup> Where, however, the jury return a verdict of acquittal on the greater charge in the “compound crime,” but are unable to agree on the lesser-included offence and expressly state this to be the case, then it appears that a plea of *autrefois acquit* may not be raised as a plea in

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<sup>166</sup> [1990] 1 S.C.R. 225 at 237 (S.C.) *per* McLachlin J.

<sup>167</sup> *A.G. (McElwain) v. Power* [1964] I.R. 458 at 485 (S.C.) *per* Ó Dálaigh C.J.; the *People (A.G.) v. O'Brien* [1963] I.R. 92 at 96 (S.C.) *per* Kingsmill-Moore.

<sup>168</sup> Subsections 9(6) and 9(7) of the Criminal Law Act, 1997.

<sup>169</sup> They are substantially the same.

bar to a second trial.

The issue of lesser-included offences for double jeopardy purposes is whether an acquittal on the greater charge necessarily involves an acquittal on the lesser-included criminal offence. If it does, the accused may not subsequently be indicted for the lesser-included offence following an acquittal. It is essential that the jury explicitly state the offence or offences for which they either acquit or convict the accused as there may be several counts in one indictment. It has been held that, where the accused has been acquitted of an offence which is a prerequisite to the commission of a greater offence, he cannot be retried on the greater offence.<sup>170</sup> The reason for this is that he was in jeopardy of conviction for the greater offence of which the jury was entitled to convict. Similarly, where the accused has been acquitted of the greater offence, this acquittal is deemed to include the lesser-included offence, unless the jury had returned a partial verdict of acquittal. There is, however, an exception to this general rule, in that a conviction for assault will not operate as a bar to a subsequent indictment for murder should the victim of the assault subsequently die as a direct consequence of the assault.

The inherent anomaly in the foregoing analysis is that, in consideration of the prevailing test for determining the issue of sameness of criminal offences for the purposes of double jeopardy jurisprudence, *i.e.* the “same elements test,” where fresh and viable evidence of the accused’s guilt of a compound criminal offence subsequently emerges following an acquittal for a lesser-included offence, the accused cannot be retried for the greater offence. It is submitted that the proper implementation of the test for determining the sameness of criminal offence for the purposes of double jeopardy jurisprudence, *i.e.* the “same elements test” does not preclude the retrial of an accused for a greater distinct criminal offence following an acquittal, or indeed a conviction, for a lesser-included offence.<sup>171</sup>

## IX. CONCLUSION

It is imperative to establish that the accused was, as a matter

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<sup>170</sup> *The People (A.G.) v. O’Brien* [1963] I.R. 92 (S.C.).

<sup>171</sup> Of course, if the accused had been formerly convicted of a lesser-included criminal offence and fresh evidence of his guilt of the greater offence subsequently emerges, credit must be given for time already served on the original conviction. Otherwise, the accused would be placed twice in jeopardy of the imposition of multiple punishments for the same criminal offence, a corollary of the common law proscription against double jeopardy.

of law, in jeopardy of conviction on a former occasion for the same criminal offence for which he is being prosecuted on the subsequent indictment. An acquittal or conviction has no legal significance unless jeopardy had attached and the accused has been in peril of conviction and the imposition of punishment for the same criminal offence. If the former criminal trial was fundamentally defective, the entire proceedings are deemed void *ab initio* with the result that the accused may be retried for the same criminal offence as he would not have been in former jeopardy for the purposes of double jeopardy jurisprudence. Truly defective indictments only have a limited capacity to harass the accused and, in blatant cases, the accused may obtain relief through injunctive proceedings on grounds that the second prosecution constitutes an abuse of the court's process.

Undoubtedly the crucial, and most litigated, issue of double jeopardy jurisprudence is determining when criminal offences are sufficiently alike to be the same. It is not the law that a person cannot be punished for the same act. Offences for the purpose of double jeopardy jurisprudence must be the same in both law and fact. Thus, if the accused has been either acquitted or convicted of a criminal offence, he may subsequently be indicted for that same criminal offence, so long as the facts are distinguishable, *i.e.* the same criminal offence was committed on a different occasion most likely against a different victim.

The "same elements" test of sameness of criminal offences, which appears to have been adopted by most common law jurisdictions, is the more logical approach in determining sameness of criminal offences for double jeopardy purposes. Otherwise, the prosecution would be required to prosecute at one trial all offences committed during the course of one "criminal transaction." The "same elements" test would permit the prosecution to re-indict the accused for an offence arising out of the same criminal transaction where it can be established that the offence in the second indictment may be distinguished by an examination of its defining elements. In other words, in circumstances where the accused is being prosecuted on a second occasion based on the same facts or evidence adduced at the former trial, he is not being retried for the same criminal offence.

The jury in a criminal case may be authorised either by

common law or statute to acquit the accused of the substantive criminal offence charged in the indictment, or alternatively convict the accused of a lesser-included offence (*e.g.*, convicting the accused of manslaughter where he had been indicted on a charge of murder). This rule applies where the jury have returned a general verdict of acquittal, thereby including an acquittal not only of the greater (compound) offence charged, but also of the lesser-included offence. However, this rule is inapplicable in circumstances where the jury return a partial verdict of acquittal only. This engenders the possibility of a second trial for the lesser-included offence about which the jury were undecided.<sup>172</sup>

In the final analysis, one may observe that, when pleading double jeopardy in bar against a subsequent criminal trial for the alleged commission of the same criminal offence, it is evident that the proscription against retrials is best described as a common law principle as opposed to being a rule of law, thereby incorporating a multitude of rules of criminal procedure constituting the common law proscription against retrials for the same criminal offence. Pleading double jeopardy is undoubtedly a burdensome and complicated procedure, but nevertheless of fundamental importance for accused persons placed twice in jeopardy for the same criminal offence.

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<sup>172</sup> In contrast, juries in Scotland are permitted to return an intermediate verdict of “not proven,” of which could create the possibility of a retrial for the offence charged but for which the jury did not formerly acquit.