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cile permit the action? If not, it is an indication that the state of domicile places its domestic relations policy above the liability for the negligence, and this should be the controlling factor—respect for the law of the state most intimately concerned with the domesticity of the parties. Such an approach would also prevent "forum shopping." On the other hand, if the state of domicile permits the action, then the substantive question of negligence and liability is determined under the law of the place where the accident occurred without regard to the capacity of the spouses to sue in that state.

The ultimate purpose in these actions is generally to collect liability insurance. In nearly all cases the place of domicile is also the place of the making of the contract. Aside from the limiting terms of the contract itself, if the law of the domicile does not permit the primary tort action and the above suggestion is followed, there will be no judgment to enforce against the insurer. Under the center of gravity approach, since insurance contracts are required to comply with the laws of the state where made (which is usually the place of domicile), again the major factor is domicile and not the law of the *lex loci delicti.*

By utilizing either the *lex domicilii* or the center of gravity approach, the *Stecker* case was correctly decided. The ultimate interpretation of its own statute falls upon the State of New York. To apply the substantive law of Connecticut to a New York insurance contract would be to disregard what earlier New York cases determined to be the purpose of the legislature in making the 1937 change in the state's insurance law—i.e., to prevent collusion. The element of collusion is equally present whether the accident occurred in New York or outside its boundaries.

WILLIAM O. ROBERTS, JR.

A DOUBLE JEOPARDY DILEMMA IN THE FEDERAL COURTS

As a general rule a person is first put in jeopardy when he has been placed on trial under a valid indictment before a court of competent jurisdiction, has been arraigned and has pleaded, and a proper jury has been impanelled and sworn to hear the evidence.[1] After jeopardy

[1]For example, "If, without a trial, the court quashes a valid indictment, or enters judgment for the defendant on his demurrer, believing it invalid, a trial may be had after the prosecutor has procured the reversal of these proceedings; because... the prisoner is not in jeopardy until the jury is impanelled and sworn." 1 Bishop, Criminal Law § 1027 (9th ed. 1923). See also Cornero v. United States,

has thus attached, a second prosecution will be barred upon entry of a nolle prosequi without the consent of the accused,[2] upon dismissal of a valid indictment,[3] or upon discharge of the jury without the consent of the accused.[4]

Even when jeopardy has attached, it is well established that the defendant may, by his own conduct, waive his defense of former jeopardy.[5] Consequently, a second prosecution for the *same offense* will be valid after an arrest of judgment on motion of the defendant,[6] after the granting of a new trial to the defendant by the trial court or the appellate court,[7] or after the discharge of the jury with the defendant's consent.[8] The scope of the waiver doctrine presents difficulties, however, when the defendant is convicted of a *lesser* offense than the crime charged in the indictment or information. For instance, when the jury returns a verdict of second degree murder upon a murder indictment, and on the defendant's motion a new trial is later granted, may the defendant then be convicted of first degree murder?

This question was recently decided by the United States Supreme

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48 F.2d 69 (9th Cir. 1931); United States v. Van Vliet, 23 Fed. 35 (E.D. Mich. 1885); Note, 24 Minn. L. Rev. 522, 527 (1940).

Jeopardy attaches in a case without a jury when the accused "has been indicted and arraigned, has pleaded and the court has begun to hear evidence." McCarthy v. Zerbst, 85 F.2d 640, 642 (10th Cir. 1936).

[2]Clawans v. Rives, 104 F.2d 240, 242 (D.C. Cir. 1939).

[3]Nolan v. United States, 163 F.2d 768, 770 (8th Cir. 1947); Wolkoff v. United States, 84 F.2d 17 (6th Cir. 1936).

[4]Wade v. Hunter, 336 U.S. 684, 688 (1949); Kepner v. United States, 195 U.S. 100, 128 (1904). In general see American Law Institute, Administraton of the Criminal Law: Double Jeopardy 61-72 (1935). The rule is subject to exception in those cases where "unforeseeable circumstances ... arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict." 336 U.S. at 689. See also Lovato v. New Mexico, 242 U.S. 199 (1916); Keerl v. Montana, 213 U.S. 135 (1909); Thompson v. United States, 155 U.S. 271 (1894); Logan v. United States, 144 U.S. 263 (1892); Simmons v. United States, 142 U.S. 148 (1891).

[5]See 1 Bishop, Criminal Law § 998 (9th ed. 1923); Miller, Criminal Law § 186(e) (1934).

[6]Coleman v. Tennessee, 97 U.S. 509 (1878); Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873); Pratt v. United States, 102 F.2d 275 (D.C. Cir. 1939). Bishop states that "whenever ... the defendant for any cause moves in arrest of judgment or applies to the court to vacate a judgment already entered ... he will be presumed to waive any objection to being put a second time in jeopardy ...." 1 Bishop, Criminal Law § 998, at 740 (9th ed. 1923).

[7]United States v. Ball, 163 U.S. 662, 672 (1896); Miller v. United States, 224 F.2d 561, 562 (5th Cir. 1955).

[8]See Miller, Criminal Law § 186(e), (g) (1934). For additional examples of when jeopardy does not attach see 1 Wharton, Criminal Law § 397 (12th ed. 1932). In considering the waiver doctrine, it is not to be assumed that the defendant would waive his defense of former jeopardy by appealing an acquittal. See Note, 24 Minn. L. Rev. 522, 534, n. 77 (1940).

Court in *Green v. United States*.[9] The accused, on trial for arson and first degree murder in the District of Columbia, was properly convicted of arson, but, because of an improper instruction by the trial judge, he was erroneously convicted of second degree murder.[10] On appeal, the second degree murder conviction was reversed and the case remanded for a new trial on the ground that the evidence could only sustain a conviction of first degree murder.[11] Upon a second trial for first degree murder, the defendant's plea of former jeopardy was rejected and a new jury found him guilty of first degree murder.[12] This second conviction was affirmed by the Court of Appeals for the District of Columbia.[13] After granting certiorari, the Supreme Court, in a five-to-four decision, reversed the first degree murder conviction of the second trial on the ground that it violated the double jeopardy provision of the Federal Constitution.[14]

In writing the majority opinion, Justice Black recognized that the Supreme Court, in *United States v. Ball*,[15] had embraced the principle

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[9]355 U.S. 184 (1957).

[10]The court of appeals determined that it was error to instruct on second degree murder because "all the testimony as to what occurred in the burning house pointed to murder in the first degree and nothing else." Green v. United States, 218 F.2d 856, 859 (D.C. Cir. 1955).

[11]See note 10 supra.

[12]D.C. Code Ann. § 22-2404 (1951) provides that the punishment of murder in the first degree shall be death by electrocution, and that punishment of murder in the second degree shall be imprisonment for life, or for not less than 20 years.

[13]Green v. United States, 236 F.2d 708, 710 (D.C. Cir. 1956), noted in 14 Wash. & Lee L. Rev. 228 (1957) and 66 Yale L.J. 592 (1957). Three judges dissented on the ground that the conviction of second degree murder at the first trial constituted an acquittal of first degree murder. Id. at 718.

By affirming the greater conviction, however, the majority of the court of appeals was consistent with its warning to the defendant when he appealed the lesser conviction: "In seeking a new trial at which—if the evidence is substantially as before—the jury will have no choice except to find him guilty of first degree murder or to acquit him, Green is manifestly taking a desperate chance. He may suffer the death penalty. At oral argument we inquired of his counsel whether Green clearly understood the possible consequence of success on this appeal, and were told the appellant, who is 64 years of age, says he prefers death to spending the rest of his life in prison. He is entitled to a new trial." Green v. United States, 218 F.2d 856, 859 (D.C. Cir. 1955).

[14][N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The phrase "life or limb" has not been construed strictly; it is held to apply to any criminal penalty. Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873).

Double jeopardy provisions are embodied in the constitutions of most of the states. See Kneier, Prosecution Under State Law and Municipal Ordinance as Double Jeopardy, 16 Corn. L.Q. 201, 202, n. 4 (1931). The present comment is directed mainly to a consideration of a current double jeopardy dilemma in the federal courts. See Note, 24 Minn. L. Rev. 522 (1940), for an excellent discussion of double jeopardy in general.

[15]163 U.S. 662 (1896).

that a defendant may be tried a second time for the same offense when his prior conviction for that offense has been set aside on *his own* appeal.[16] *Green,* however, presented a different problem. There was no original first degree murder conviction upon which to base a second conviction following an appeal. Instead, at the first trial there was an "implied acquittal" of first degree murder. It was as "if the jury had returned a verdict which expressly read: 'We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree.' "[17] Thus, continued Justice Black, it could not be presumed that the defendant would voluntarily place himself in peril of being convicted of first degree murder when he had already been acquitted of that offense. The concept of waiver connotes a voluntary and knowing relinquishment of a right, and, when a defendant has been convicted of a lesser offense, "it is wholly fictional to say that he 'chooses' to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense."[18] In short, the majority opinion reflects the view that the retrial be limited to those issues brought into dispute by the appeal.[19]

It must be borne in mind that the waiver doctrine[20] is an exception to the well-settled rule that jeopardy attaches upon the swearing and impanelling of a jury.[21] As explained before, if there has been a dismissal of a valid indictment after the jury has been impanelled and sworn to hear the evidence, a second prosecution for the same offense will be barred.[22] Strictly, then, in any situation where jeopardy has properly attached, the defendant should be entitled to the benefit of an appeal without the hazard of a new trial for the same offense if the

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[16]The double jeopardy clause has been interpreted as prohibiting a right of appeal by the government in the federal courts. See Peters v. Hobby, 349 U.S. 331, 344-45 (1955); United States v. Ball, 163 U.S. 662, 671 (1896). Cf. Kepner v. United States, 195 U.S. 100 (1904); United States v. Sanges, 144 U.S. 310, 312 (1892). Comley, Former Jeopardy, 35 Yale L.J. 674, 678 (1926), criticizes the application of the double jeopardy doctrine to prevent appeals by the state.

[17]355 U.S. at 191.

[18]Id. at 192.

[19]In explaining the majority opinion, Justice Black declared that "Green was not convicted of first degree murder and that offense was not involved in his appeal. If Green had only appealed his conviction of arson and that conviction had been set aside surely no one would claim that he could have been tried a second time for first degree murder by reasoning that his initial jeopardy on that charge continued until every offense alleged in the indictment had been finally adjudicated." Id. at 193.

[20]See note 5 supra.

[21]See note 1 supra and accompanying text.

[22]See note 3 supra and accompanying text.

conviction is reversed. Nevertheless, such a literal interpretation of the jeopardy clause has not been adopted in the federal courts, and consequently, Justice Black's recognition of the soundness of *Ball,* which permits a retrial for the same offense after a conviction has been reversed on appeal, seemingly implies the necessity for something less than a literal interpretation of the double jeopardy provision of the Federal Constitution. The rationale of *Ball,* to circumvent a literal construction of former jeopardy, is based upon one of two theories: that the defendant "waives" his plea of former jeopardy by asking that a conviction be set aside;[23] or, that the second trial is but a continuing jeopardy that attached at the first trial.[24] According to Justice Black, neither of these theories is applicable to the greater offense in *Green* because the jury was "authorized" to find the accused guilty of either first or second degree murder.[25] The fact remains, however, that the jury was "authorized" to return a verdict of second degree murder only because the trial court erred by instructing on the lesser crime." [A]ll the testimony as to what occurred in the burning house pointed to murder in the first degree and nothing else."[26] It is logical to assume that had there not been the erroneous instruction on second degree murder, the jury would have returned a verdict of first degree murder in preference to a complete acquittal. Moreover, if such a conviction had been reversed on the defendant's motion, a second trial for first degree murder would have been valid under the principle established in *Ball.* It follows, therefore, that the right to a retrial for the so-called "greater offense" is actually not a right to retry the accused for a greater offense at all; rather, there should be a right of retrial for the *only* offense charged since first degree murder was the basis of the government's case, and it alone was sustained by the evidence. It must be remembered that the word "greater," under any context, is a relative term. In cases like *Green* it is imperative that a true legal relation exist between separate offenses rather than a colorable relation caused by a procedural error. Thus, when the defendant obtains a reversal, the right of the government to retry the defendant for first degree murder

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[23]Trono v. United States, 199 U.S. 521, 533 (1905); Brewster v. Swope, 180 F.2d 984, 986 (9th Cir. 1950). Cf. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[24]Justice Holmes refused to recognize the waiver doctrine but permitted a retrial on the basis that jeopardy did not come to an end until the accused was acquitted or his conviction became final. Kepner v. United States, 195 U.S. 100, 135 (1904) (dissenting opinion). Under the Holmes view, however, the government could appeal an acquittal—a theory which has been consistently rejected by the Supreme Court. See note 16 supra.

[25]355 U.S. at 189.

[26]Green v. United States, 218 F.2d 856, 859 (D.C. Cir. 1955).

is nothing more than the application of a principle already recognized in *Ball.*[27]

The majority opinion asserts that the conviction of the lesser offense is to be interpreted as an "implied acquittal" of the greater. On the contrary, the conviction of the lesser offense appears to be an excellent example of jury leniency as a consequence of the jury's having been given an opportunity to convict for a lesser crime due to an error by the trial judge. When the jury found the defendant guilty of arson at the first trial, this verdict *necessarily* included the finding that death resulted from the commission of arson.[28] Therefore, the only possible verdict relative to the homicide would have been murder in the first degree, which, under the felony murder statute of the District of Columbia, merely requires a finding of guilty as to arson when a homicide results therefrom.[29] Consequently, the conviction of the lesser offense can be interpreted as nothing other than a compromise verdict, or, more simply, a good illustration of jury recognition of the criminal character of the defendant's conduct without applying the facts to the law. As Justice Frankfurter, writing the minority opinion in *Green,* aptly observed: "Surely the silence of the jury is not, contrary to the Court's suggestion, to be interpreted as an express finding that the defendant is not guilty of the greater offense. All that can with confidence be said is that the jury was in fact silent. Every trial lawyer and every trial judge knows that jury verdicts are not logical products, and are due to considerations that preclude accurate guessing or logical deduction. Insofar as state cases speak of the jury's silence as an 'acquittal,' they give a fictional description of a legal result...."[30]

Furthermore, if the verdict of guilty of second degree murder is to be interpreted as an "implied acquittal" of the crime of the first degree murder, and if the verdict from which the inference is drawn is set aside upon the defendant's motion, nothing remains from which such

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[27]It is necessary to re-emphasize the fact that the defendant appealed the lesser conviction. If the defendant had elected not to appeal, then there could have been no retrial for first degree murder for the same reason that the government may not appeal an acquittal. "The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him [the defendant] twice in jeopardy, and thereby violating the Constitution." United States v. Ball, 163 U.S. 662, 671 (1896). See note 16 supra.

[28]The undisputed testimony "shows beyond peradventure that Bettie Brown's death was caused by the fire in the house in which her body was found." Green v. United States, 218 F.2d 856, 859 (D.C. Cir. 1955).

[29]"Whoever... without purpose so to do kills another in perpetrating or attempting to perpetrate any arson... is guilty of murder in the first degree." D.C. Code Ann. § 22-2401 (1951).

[30]355 U.S. at 214 (dissenting opinion).

an acquittal can be inferred. The verdict and its implications must fall together. Similar reasoning was expressed in the 1905 case of *Trono v. United States*,[31] which *Green*, in effect, overruled. In that case the defendants were prosecuted for murder in the first degree. They were acquitted of the crime of murder and convicted of the lesser included crime of assault. They appealed to the Supreme Court of the Philippines, and that court, operating under local procedure which permitted a review of both law and facts, reversed the judgment of the lower court and entered a conviction of murder in the second degree. Upon review by the United States Supreme Court, Justice Peckham regarded the question as though it had arisen in one of the federal courts, with the result that the opinion would be an interpretation of the double jeopardy provision of the Federal Constitution rather than an interpretation of local Philippine law.[32] The Court concluded that "the reversal of the judgment of conviction opens up the whole controversy, and acts upon the original judgment as if it had never been."[33] In other words, *Trono* represents the theory that the verdict of conviction is a "single entity," that a new trial necessarily reopens the whole proceeding, and that the defendant cannot stand on that part of the verdict which is beneficial to him and repudiate that which affects him adversely.[34]

The futility of favoring either the "single entity" theory or the "implied acquittal" theory becomes obvious upon the realization that neither provides a workable solution to the principal case. The basic premise to be remembered in all federal courts in which there has been a conviction of a lesser offense under an indictment charging a greater offense is that a verdict operates in a dual capacity while it stands unreversed; it is a conviction of the lesser offense, and it is a bar to a prosecution for the greater offense.[35] Beyond this, when the defendant

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[31]199 U.S. 521 (1905). In the words of the Court in Trono: "When at his own request he [defendant] has obtained a new trial he must take the burden with the benefit, and go back for a new trial on the whole case." Id. at 534.

[32]"We may regard the question as thus presented as the same as if it arose in one of the Federal courts in this country...." Id. at 530. In spite of this statement, Justice Black declared in the principal case: "We do not believe that *Trono* should be extended beyond its peculiar factual setting to control the present case. All that was before the court in *Trono* was a statutory provision against double jeopardy pertaining to the Philippine Islands—a territory just recently conquered with long-established legal procedures that were alien to the common law." 355 U.S. at 197. Note, however, that Justice Black was very careful not to expressly overrule Trono.

[33]Trono v. United States, 199 U.S. 521, 533 (1905).

[34]See Note, 24 Minn. L. Rev. 522, 536 (1940).

[35]See Trono v. United States, 199 U.S. 521, 533 (1905), where the Court stated: "As the judgment stands before he appeals, it is a complete bar to any further

obtains a reversal of the lesser conviction and a new trial is granted, *Green* asserts absolutely that the defendant can *never* be tried again for the greater offense, and *Trono* asserts absolutely that the defendant can *always* be tried again for the greater offense. The unfortunate fact remains that neither approach is practical. The history of *Green* reveals that the conviction of second degree murder at the first trial was set aside as being contrary to the evidence. The retrial resulted in a conviction of first degree murder, which the Supreme Court set aside as being a violation of double jeopardy. Consequently, the second reversal is tantamount to a complete bar to any further murder prosecution.[36] It would appear that the argument in favor of adopting *Trono* exists if for no other reason than to protect the interests of society from the present danger of unwarranted[37] appeals which revert murderers to the status of free men.[38]

Suppose, however, that the record of the principal case revealed that at the first trial there was a disputed question of fact concerning whether or not the deceased died as a result of the defendant's misconduct before the arson was committed or as a result of the arson. Suppose further that the jury resolved the fact that death occurred from some prior misconduct of the accused before the arson. Having

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prosecution for the offense set forth in the indictment, or of any lesser degree thereof." See also note 27 supra.

[36]Oliver Gasch, the United States Attorney whose office prosecuted the Green case, in response to an inquiry from the writer said: "In answer to your letter... you are advised that this office is unable to prosecute Green for either the crime of murder in the first degree or in the second degree. This office does not contemplate taking any further action so far as criminal prosecution is concerned in this case." Letter from Oliver Gasch, United States Attorney, Feb. 28, 1958, on file in the office of the Washington and Lee Law Review.

[37]Since the accused preferred death to spending the rest of his life in prison, counsel for the defense gambled on the outcome of the principal case. See note 13 supra.

[38]In arguing for the adoption of the Trono rule, the Supreme Court of Nevada fervently contended: "There are many cases where a cold-blooded murderer, through the eloquence of his attorney, or sympathy for his relatives or those dependent upon him, or where a majority of a jury, believing the defendant guilty of murder in the first degree, in order to appease some member of the jury, or for other reasons, rather than to allow the accused to escape some punishment, or prevent a mistrial or total miscarriage of justice, agree to bring in a verdict of a lower degree of homicide, when, as a matter of right and justice, the defendant, if he got his just deserts, should be hanged by the neck until he be dead. The people of the state, representing the victim of the accused, on a new trial, if they can prove a clear and conclusive case of murder in the first degree, ought to be entitled to exact the full penalty of the law with equally as good a right as the defendant has to receive only the punishment provided by law for the lesser degree of crime, and to hold otherwise, we believe, would be a travesty of justice." Gibson v. Somers, 31 Nev. 531, 103 Pac. 1073, 1074 (1909).

thus eliminated the felony murder theory of the prosecution, a conviction for the lesser included offense of second degree murder would be justified.[39] Upon a subsequent reversal for some other error, such as misconduct of the jury, *Trono* would nevertheless permit a retrial for first degree murder because the first conviction is treated as if it never existed. In this instance, a second trial for first degree murder would appear to be a true violation of double jeopardy since a legitimate question of fact relating to the time of death had already been decided.

It is suggested that the approach of *Palko v. Connecticut*[40] should be adopted in the federal courts. This decision upheld the constitutionality of a state statute[41] which permitted the prosecution to appeal a conviction of second degree murder and on retrial to secure a conviction of first degree murder. In upholding the statute as not being in violation of the due process clause of the fourteenth amendment,[42] the Court placed great emphasis on the state's interest in obtaining a trial "free from the corrosion of substantial legal error."[43] Furthermore, since the statute did not permit successive trials of a defendant *validly* acquitted of a crime, there was found to be no unreasonable deprivation of any fundamental right of the accused.[44] Notwithstanding

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[39]For an excellent illustration of when the evidence warrants a second degree murder conviction under a prosecution for murder in the first degree, see Kitchen v. United States, 221 F.2d 832 (D.C. Cir. 1955), where a conviction of second degree murder was upheld under an indictment charging the defendant with killing the deceased during robbery. The evidence was such as to warrant the jury in finding that the defendant killed the victim but that he did not rob or attempt to rob him.

[40]302 U.S. 319 (1937).

[41]Conn. Gen. Stat. § 8878 (1949).

[42]U.S. Const. amend. XIV, § 1: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." An important factor in determining whether a state statute meets the requirements of due process of law is the status of the right at the time of the adoption of the Constitution. At common law a convicted person could not obtain a new trial by appeal except in certain narrow instances. See 1 Stephen, History of the Criminal Law of England, c. 10 (1883). The law has since evolved to the point where Palko permits a mutual right of appeal under state statute.

The common law rule prohibiting appeals should also be considered when interpreting the double jeopardy provision of the fifth amendment as applicable to the federal courts. The argument that the protection against double jeopardy was never intended to apply when the defendant appealed any conviction appears to be sound. The Court stated in Trono that "the constitutional provision was really never intended to, and, properly construed, does not, cover [sic] the case of a judgment under these circumstances, which has been annulled by the court at the request of the accused . . . ." Trono v. United States, 199 U.S. 521, 534 (1905).

[43]Palko v. Connecticut, 302 U.S. 319, 328 (1937). See 355 U.S. at 215-16 (dissenting opinion).

[44]In 1904, Justice Holmes, in advocating a right of the government to appeal, made a statement which is particularly significant when read in the light of the