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TAXATION VERSUS DIRECT CONTROLS, IN UNDER-DEVELOPED ECONOMIES

by

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Taxes and fiscal policy in under-developed countries, bear specific features which need to be emphasized. This will be done with reference to the three main objectives of taxation in the special conditions of under-development, namely: capital formation, economic planning and social equity.

On the whole, much doubt will be thrown on the efficiency of taxation in tackling, adequately and promptly, the real problems of under-development and "economic exposure".

This paper is an attempt to show that taxation cannot be heavily relied upon, either as a revenue mobilizer, as an economic planner, or as a medium of social equity, within a developing economy and an "emergent" state(1).

Direct controls and drastic measures, within the framework of national plans, form the most appropriate approach, in this case, especially at the early stages of development. At subsequent phases, tax policy will be more efficient and operative.

SECTION I. — CAPITAL FORMATION

In a highly developed economy, a large flow of corporate and personal savings is generated by high average income. Investment, in industry or agriculture is spontaneous, or self-generating, owing to the prevalence of what the French call: "L'esprit capitaliste", or "l'esprit de commerce". Savings are automatically absorbed in productive investment. Therefore, fiscal policy aims, mainly, at minimizing the interference of taxation with investment incentives.

As a matter of fact, in a highly developed economy, of the capitalistic type, the state has a minor rôle in the process of capital formation, as this is primarily undertaken by the private sector, by automatic and semi-automatic forces.

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(1) The author of this paper has constantly in mind the desiderata of the peoples of ex-colonies and semi-colonies of Africa and Asia.

On the other hand, the Afro-Asian countries are caught in the vicious circle of poverty, proceeding from low incomes, to high consumption propensities, to low saving propensities, to low rates of capital formation, to low per capita incomes again.

If this vicious circle is to be broken, the central problem becomes one of increasing capital formation, the main key to development. In under-developed countries, private initiative cannot be relied upon to achieve the required rate of capital accumulation. This is due to sundry considerations. Some investments need huge funds which could only be secured by the state. Certain investments are profitless, or yield very little. Other types take quite a long time before any remuneration can be expected from them. Moreover, feudalism, imperialism and social rigidity, run counter to productive investment. The international demonstration effect(1) results in the dissipation of incomes in conspicuous consumption,(2) their "loss" by transfer abroad, diversion of a considerable part of the meagre savings into real estate, inventory speculation, the holding of precious metals, currency and foreign exchange.

Consequently, in conditions of under-development, investment has to be "planned" or "induced", since it is not "spontaneous". The state, in this case, must assume an active and leading rôle.

In the writer's view, capital formation, in the public sector, cannot count on taxation as a revenue mobilizer.

It is true that *indirect taxation* can be helpful in this connection(3). There are the taxes on imports, exports and commodity taxes. However, these have their limitations, since the equity aim conflicts with the revenue aim. Furthermore, the fluctuations of world market demand and prices and the elasticity of demand, are likely to affect the yield of export taxes(4). Protectionism for the new industries and foreign exchange restrictions will affect the yield of import duties. As the developmental programmes will most probably require the limitation of imported consumer goods, and the grant of concessi ons for imported machinery, we will, eventually, reach the stage when the receipts from customs duties will be decreasing rather than increasing. The decrease becomes most

(1) Nurkse, Ragnar: Problems of Capital Formation in Underdeveloped Countries. Oxford, (1958).

(2) This is another factor making for low domestic savings, especially in feudalistic states, like Seoudi Arabia. We may add that "conspicuous consumption" is also conducive to "conspicuous production".

(3) An under-developed economy has to rely, for funds, on indirect taxes rather than on direct taxes, during the early stages of development, inspite of the regressiveness of the indirect levies.

(4) Export taxes yield more receipts when they are ad valorem, not specific.

tangible once industrialisation reaches an advanced stage and the national economy acquires more balance. As for the taxes lived on locally produced goods and services, they have an adverse effect on industrial development, since they are liable to raise the price of domestic manufactures and tend to restrict the local market(1).

When we come to the prospective yield of direct taxes in under-developed countries, we find that they are not a handy revenue source. Though income taxes and business taxes have to be levied on account of the Social Solidarity Principle and equity considerations, they have their limitations too(2).

PERSONAL INCOMES are low and the cost of living is often high(3), therefore most money-earners ase living on subsistence level. The big size of families will naturally call for considerable claims for exemptions and refunds. The subsistence farmer cannot be satisfactorily reached by an income tax because most of his real income cannot be properly assessed(4). As production in the subsistence sector will be highly taxed (or untaxed), there will be a tendency to divert effort from the money sector to the subsistence sector, to the detriment of the national economy as a whole.(5) One must also add that, at the initial stage, the administration costs of the income tax will be high, the tax rates low and the progression slow. Not much revenue can thus be expected. Moreover, illeteracy characterizes farmers, wage earners, independent craftsmen and small shopkeepers. So these become unable to fill out income tax returns or to file claims for exemptions and refunds. Voluntary compliance, a requirement for satisfactory income taxation, does not always obtain.

In consequence, the income tax, in under-developed countries, cannot be used as a mass tax and cannot be expected to finance development in the immediate future. Its application is, however, recommended so as to serve as an embryo for more redistributive taxation at subsequent stages, and as a means

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(1) The writer wishes to emphasize here that when the under-developed country relies mainly on taxes (especially indirect taxes) the burden is likely to be very high (*e.g.*, India). The low-income groups will suffer, while big business may be realizing high profits. Reliance on the profits of government monopolies and nationalized industries will be a better financial and social solution.

(2) We omit talking of tax avoidance and tax evasion, so widespread in the Middle East, owing to immature "Tax Consciousness" and to traditional "crise de confiance" between governed and governors (*i.e.*, the Houkouma). The foreign firms also resort to much evasion and avoidance.

(3) For many reasons, especially increasing population (lower mortality rates) which leads to increased demand on foodstuffs.

(4) This is the case in a Dual Economy, where the subsistence sector (production for use) co-exists with the money sector (production for the market).

(5) This is particularly the case with the progressive income taxes, taxes on commodities with a high income elasticity of demand, taxes on the sale of output in general and the taxes on the principal cash crops.

to acquire experience in the administration and the manipulation of the tax(1). Familiarization with the technical complexities of income taxation needs time(2).

Turning to *business taxation* as a revenue source, it is not so reliable in a developing economy. Industrial firms and foreign investments, in extractive industries, need encouragement through tax concessions and tempoiary tax exemptions(3). If we want private industrial investment to flourish, manufacturing industries ought to be lightly taxed(4). Some economists, like Nicholas Kaldor and Colin Clark, think that all investment should be free from taxation.

Moreover, economic planning, in the newly independent states, brings about an expansion of the public sector and results in more government monopolies and nationalized industries. The corollary is reduced receipts from the business profits tax.

Concerning *land and agricultural taxes* as a source of funds, we find that Japan, in 1870's and 1880's had recourse to stiff taxation of agriculture. The land tax was drastically tightened up and thus brought in nearly 4 5 of total receipts. By siphoning off part of the increase in agricultural productivity, it became possible to finance capital works and industrial plants.

However, this tax is not a practical solution in the Sudan, since most of the huge agricultural schemes lie in the public sector, the government thus getting a share in the profits(5). This share is not a tax (6).

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(1) The spread of the co-operative movement will greatly facilitate taxation of agricultural profits. Co-operatives keep accounts and permit collection at the source.

(2) Great progress has been achieved in taxing personal income in both India and Venezuela. *See*:

Public Finance Surveys, India and Venezuela,
United Nations Publications.

(3) These are effective where foreign investors operate through local subsidiaries. The tax concessions are not effective where the foreign investor receives domestic tax credit only in respect of foreign income taxes actually paid abroad. In the latter case, a tax concession granted by the capital-importing country, will merely result in a reduction of the tax credit and a corresponding increase of the foreign income tax liability.

(4) Ref. to Prof. Arthur Lewis.

Also compare Japan in the 1880's where manufacturing industries were lightly taxed, and sometimes subsidized.

In Egypt manufacturing industries are exempted from business taxes for a period five of years (amendment in 1953 of Profits Tax Law).

(5) The government sharing the profits with the tenant-farmers. Compare: Guezira Scheme, Tokar Scheme, Gash Scheme.

(6) In the Sudan there is the Land Tax and Oshur (tithe) paid to the local authorities. The rates are proportional and very low.

The writer recommends the introduction in the Egyptian Region (United Arab Republic) of a tax on the net profits from agricultural invetsment. Such profits are, at present, taxed only when specifically realised by joint stock (limited liability) companies.

In the Sudan, no tax is levied on the profits of "any agriculture undertaking the water for which is supplied by shaduf, sagia, matara, natural flooding or rainfall". Section 9(1)(b) of B.P.T.

The Business Profits Tax law (B.P.T.) also exempts pump schemes growing fruits, vegetables, food crops for human consumption or fodder. Section 9 – subsection I (iii). These exemptions are not justified.

The conclusion which we want to underline is that the mobilization of resources, for capital formation in under-developed countries, cannot depend on taxation, if we mean to implement huge developmental programmes in the present, not in the future.

Three main revenue sources are here proposed; government monopolies and nationalized industries, forced loans and money creation.

Three main revenue sources are here proposed; government monopolies and nationalized industries, forced loans and money creation.

One cannot neglect foreign loans from international financial institutions, foreign banks and governments. We also mention the subsidies and technical assistance programmes(1). Reinvestments of business profits, or self-financing, seem commendable in under-developed countries(2).

We will mainly emphasize the three potential revenue sources mentioned above. We do not mean, however, to exclude taxation as a revenue mobilizer. We simply mean that, at the early stages of development, the tax system of Asian and African countries, may be primitive or inadequ ate to the extent that revenue will not respond, at all to an increase in the national income(3). With the process of development, however, and thanks to the application of a modern tax system, taxation will become an efficient instrument of compulsory saving and a dependable source of funds (4).

1. — GOVERNMENT MONOPOLIES AND NATIONALIZED INDUSTRIES:

This is an important source of government funds (in the form of profits) often neglected by under-developed countries.

In the Sudan, the state agricultural schemes already constitute an important revenue source (5).

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(1) These are the *external* sources of finance. We are mainly concerned, in this study, with the discussion and comparison of the various types of *internal* sources of finance.

(2) *i.e.*, ploughing back the profits into the enterprise. The tax system could be made to encourage self-financing.
However, self-financing does not always secure the required type of investment.

(3) As in the Sudan at present.

(4) In under-developed countries, the propensity to save is low owing to low per capita income and conspicuous consumption. The automatic forces, including population increase, make for the additional income going into consumption. The state must here assume the problem of choice between consumption and saving, and has the duty of appropriating, through taxation, a share in national income that increases at each of the successive stages of development policies.

(5) In the Sudan Budgetary Estimates, for the financial year 1960/61, the following items of revenue yield the indicated percentages: Direct taxes 2.61 – Indirect taxes about 47% – Sugar monopoly 11.57% – Government share in the profits of agricultural schemes 13.31%
There is no internal borrowing in the Sudan. By comparison, internal borrowing in Egypt forms 39% of national income.

Similar government schemes could be created in the southern three provinces for the cultivation of tobacco, tea, coffee, cocoa or castor(1).

The sugar monopoly, in the Sudan, already yields about five million pounds annually. The state could extend the monopoly idea to the export (not necessarily production) of gum arabic, and probably the export of cotton(2). The profits thus accruing to the treasury, including foreign currency, can be used to implement the capital developmental policy now embodied in the proposed Seven Year's Plan for the Sudan (3).

It is also suggested, here, that the state could create, or appropriate, certain highly profitable manufacturing monopolies, such as matches, cigarettes, alcohol, salt... Some will require the application of a protective, or even prohibitive, tariff system.

Clearly, the importance of this source of finance goes pari passu with the expansion of the public sector.

It is to be noticed that nationalization gives the government all the profits, while taxation gives it only part of the profits. Moreover, nationalization allows direct orientation of production by the planning authorities and permits a better distribution of incomes and wealth.

2. — Forced Loans:

These loans could be imposed on the commercial middle classes in the towns, as did Japan by the end of the 19th century, and/or imposed on certain categories of high income groups of government officials and firms' employees.

Business and industrial concerns could also be forced, by legislation, to invest a fixed percentage of net profits in government bonds, as happens now in the United Arab Republic, where such percentage amounts to five per cent(4).

Banks could also be obliged to invest in government securities part of their total assets. This is the case in different countries.

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(1) The three provinces are: Upper Nile, Bahr Elgazal, Equatoria.

(2) We recommend, in this connection, the study of the "marketing board system" of West Africa, Uganda and Burma.

For the United Arab Republic, we propose government monopolization of the export of the cash crop, or cotton.

(3) Government purchases of gum arabic and cotton could be (but not necessarily) financed through money creation. These raw materials are then exported for machinery.

(4) The idea of forced loans was also applied in Italy and Germany after the First World War, and in France, Britain and Germany during the Second World War, when the aim was to absorb excess money to prevent inflation.

Also compare Soviet Russia, where forced loans are a revenue source to finance develoopment.

From this exposition, one should not, however, deduce that private investment has no part to play. On the contrary, increased capital accumulation and basic investments (road construction, irrigation schemes and so on) lead to higher marginal efficiency of capital and expanded production. External economies are created for private investment.

3. — MONEY CREATION:

Money creation assumes various forms.

The government could borrow directly from the central bank. The development banks could receive budgetary appropriations. The government could increase the share-capital of the industrial and agricultural banks it owns, or participates in. These banks will invest indirectly, by giving loans, or directly, by creating schemes and enterprises of their own.

In the writer's opinion, the central bank, in underdeveloped countries, could and should, indulge directly or indirectly in commercial and industrial projects.

The commercial banks could be induced, or directed, to extend credit facilities to selected businesses and industries.

The writer is not unaware of the risks of inflation involved in this method of financing during the initial phase of development, especially in a country like the Sudan where inflation is already there since the Korean War, where production lacks elasticity and where there is under-population. The latter fact means that labour will have to be withdrawn from activities where it is employed, thus leading to increasing wages and prices.

However, the planning authorities should see to it that money creation be used to finance quick-yielding projects, of the consumption type. We thus obtain more products in face of more purchasing power. An adequate pricing policy, and occasionally, a ration system, ought to be devised(1). Above all production must be planned(2).

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(1) Absorption of excess purchasing power, by means of taxation and borrowing, must also be resorted to, especially at later stages of development.

Inflation has adverse economic and social effects. It increases the costs of development, widens the gap between the social strata, causes capital flight and generates disequilibrium in the balance of payments (*i.e.*, increased imports and decreased exports).

(2) The government could resort to money creation in order to buy part of the cash crop, export it and use on proceeds to buy machinery required for development.

SECTION II. — ECONOMIC PLANNING

This is the second objective of taxation.

In the writer's view, the tax measures, as manipulated in developed countries for planning purposes, bear fruit. This is not always the case in an under-developed economy.

An advanced and diversified economy has a wide variety, a whole panoply, of taxes, direct and indirect, which can be successfully wielded to promote economic stability and attain higher living standards (1).

Concerning qualitative planning, we find that the stimulation of certain types of investment, which is here mainly private, will call for directional tax concessions, extensive carry-overs of net business losses, accelerated depreciation, preferential rates for reinvested business profits, or alternatively, additional taxes in profits declared as dividends. Consumption of given commodities could be fostered, or discouraged, by manipulation of the specific sales taxes and customs duties.

When we come to quantitative planning, we find that "aggregate effective demand" can be increased in depression(2), or decreased in prosperity, thanks to compensatory fiscal policy.

In a diversified economy, the economic fluctuations are due to "endogenous factors", which lie within the authorities' sphere of influence(3). In the down-swing, the government enjoys a wider range of action, in taxation. The tax burden could be alleviated so as to footer investment and consumption, and thus lead to more employment and expanded national income (4). In the upswing, the taxes will be raised with a view to check inflation (5).

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(1) Economic planning is a means to an end, namely: material welfare. It is not an end in itself. In other words, planning is not a socio-economic doctrine. It can be applied within the framework of capitalism as well as socialism.

Planning is the machinery, not the philosophy.

We may discern successively; mere interventionism, programming, flexible planning and integral or total planning.

(2) By means of Deficit Financing.

(3) An advanced economy possesses a production system that is both diversified and elastic. There is no concentration on any one activity (*e g*, agriculture) and no emphasis on any one cash crop.

(4) A developed economy, in periods of depression and over-savings, needs a larger flow of spending (*i.e.*, more consumption spending) as well as increased investment, private and public.

In an under-developed economy, increased consumption will merely hamper capital formation, which is particularly lacking in this case, owing to low savings, inadequate financial institutions and certain apprehensions about indigenous administrative capacity, future economic policy and the prospects of political stability.

Therefore, if expanding consumption expenditure leads to expanding investment in mature economics (thanks to the accelerator effect), it amounts to reduced investment and increased imports in under-developed economies.

(5) Equally efficient is the (indirect) method of public debt, as a fiscal device, *i.e.*, government borrowing in boom, and adequate repayment policy to appropriate groups in slump.

It is noteworthy that the tax policy of developed countries, will not face the dilemma faced by the underdeveloped countries viz; that high levels of taxation are required to finance public investment, while the same high burden will deter private investment.

As for the Afro-Asian states, they are characterized by "economic exposure", due to a "mono-cultural" and "export-orientated" economy. Production is neither diversified nor elastic (1). Such countries are exposed to the buffetings of fluctuating world market demand and prices. The increase in exports, in volume or value, means more purchasing power and is thus conducive to a rise of the internal level of prices, since home supply is relatively inelastic. On the other hand, expanding (government) expenditure does not necessarily benefit the country, since part of it will be siphoned off the economy through a gap in the multiplier namely; the high propensity to import. Such an economy is fraught with "exogenous factors" not always easy to control by the national government.

The under-developed countries are beset by two major problems, viz: deficiency of capital formation, and external destabilizing influences (2).

The duty of the planning authorities is therefore twofold: increasing capital formation and also economic stabilization. The state has to assume an active and direct rôle in this respect. In the first place, it has to increase the volume of productive investment. In the second place, it has to diversify production so as to confer upon it an element of stability, thus making it less vulnerable (3).

In the writer's view, tax policy is not an efficient planning medium for the solution of the specific problems of under-developed countries. Tax policy presupposes a given infra-structure, both economic and social, which does not obtain in the "new" (or emergent) countries, affected by investment inertia, imperialistic banking and monopolies, feudalistic social relations and low administrative services.

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(1) This means "distortion" or "deviation" of the economic structure of underdeveloped countries.

(2) By contrast, in developed countries, the main problem is one of eventual oversavings and cyclical depressions.

(3) The writer fully agrees with Paul Baran that, "The injection of planning into a society living in the twilight between feudalism and capitalism cannot but result in additional corruption, arger and more artful evasions of the law and more brazen abuses of authority." The Economics of underdevelopment. Agarwala and Singh p. 89.

Investment(1), in under-developed countries is not so sensitive to the classical measures of taxation or interest rates, especially when we require investment of certain types. What is needed, in this case, is direct and central economic planning, by means of pluri-annual production programmes. Such policy will avail itself of physical controls, licensing systems, direct credit control, pricing, rationing, control of foreign trade in quantity, quality and orientation, exchange control for the rational use of foreign currencies and the prevention of remittances abroad. Nationalization and government monopolies permit the effective direction of production and exports.

This is the way to develop the economy of the newly independent states, and to reduce the sensitiveness of their balance of payments, in a word: to modify and rectify their traditional and lop-sided economic structure.

It must be mentioned that many under-developed countries lack a modern tax system that can be manipulated easily or satisfactorily.

This does not mean, however, that there is no scope at all for tax policy and technique, in Africa or Asia. Customs duties can be raised to obtain a more diversified economy (fostering industrialisation). Export and import taxes can be used to counteract the inflationary tendencies of increased foreign demand of the cash crop of an "export economy" or "one-crop economy".

Furthermore, insofar as taxation shifts demand from luxury items, generally imported, to commodities of current consumption, domestically produced, we can expect a broadening of the home market. This is also reached when redistributive fiscal policy increases the productivity and real income of the bulk of the population.

Section III. — SOCIAL EQUITY

Developed countries can, with good prospects, resort to progressive income taxes, capital taxes, property taxes and death duties in order to achieve a more equitable distribution of income and wealth.

The under-developed countries of Asia and Africa, cannot easily employ taxation as an instrument of social change, especially for changing the relationship between landlords and tenants (*i.e.* feudalism) or for neutralizing the hardships of foreign monopolies.

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(1) We mean here: private investment.

These countries are rather in need of more frank and far-reaching measures. These can be illustrated by profound agrarian reforms, restriction of inheritance rights, new and progressive social legislation, limitation of dividend distributions, particularly if they are made outside the country, regulation and control of stock exchange operations, restriction of inventory speculation as well as speculation in land and buildings, restriction of the holding of real estate, foreign exchange and precious metals, house rent fixing including measures to increase the supply of cheap housing facilities, nationalization of certain activities, and so on.

These direct measures can be used to rectify fundamentally, or greatly improve, the classical and unfair social structure within backward countries and former colonies(1).

However, taxation could still be used by underdeveloped countries, as an instrument of more social justice, but perhaps in some different way.

In many of these countries, the distribution of real property, urban and rural, is more uneven than the distribution of income. Large landholdings are held idle or under-cultivated. Therefore, it is often better to impose steeply graduated taxes on property(1), land value increments and net wealth. This discourages the accumulation of landholdings, induces their subdivision, and gradually fosters the full utilization of land (this also means less absenteeism). It is recommendable to introduce progressive taxes on capital gains, or on net income including capital gains, so as to discourage the holding of real property for speculative purposes, and to curb speculative investments generally(2).

It is also desirable to introduce, on a *permanent* basis, a tax on speculative profits resulting from black market operations (speculation in scarce goods) and stock exchange manipulations(2).

Besides, there is room for an export tax, ad valorem (not specific)(4). This tax could be geared towards income taxation by considering the presumed costs and the value of exports, and by applying a progressive rate(5).

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(1) These countries have, above all, the duty to corect their archaic economic and social structures.

The measures mentioned will also accomplish a radical change in the structure of effective demand, increase savings for investment purposes and induce the reallocation of productive resources.

(2) The property taxes have the further advantage of being easy to administer.

A proportional property tax, with a relatively high level of basic exemptions, may be more progressive than personal income taxation, in some countries.

(3) Especially in periods of inflation and land booms.

(4) This is particularly the case when economic progr ammes and plans bring about quantitative, qualitative and price controls, and the expectation of burther controls.

(5) It is noteworthy that the taxes proposed above, have great economic and social significance in under-developed countries. They impede inflation and mitigate the unjust distribution of incomes and wealth, nurtured by growing speculation orby fluctuating world prices.

(6) These suggestions could be applied, for instance, in Uganda where export taxes are a main source of revenue (there is no african income tax).

CONCLUSION

Fiscal policy and tax measures are less efficient in solving thespecial problems of under-developed countries than they are in advanced countries, notably of the capitalistic type.

To be more accurate, one must discern two stages, or phases of development, so far as the African and Asian countries are concerned, namely: the initial and the subsequent stages.

During the starting phase, the direct method of planning and central control is the most effective in our attempt to modify the feudalistic social structure and the "distorted" production pattern of the under-developed countries.

The tax measures, when applied at these early stages, will rather be of a subsidiary nature. In other words, taxation will be of relatively less reliability.

At subsequent development stages, tax and fiscal policies will be more helpful and increasingly operative.

In all cases, tax techniques, manipulations and structures, will have to be modified to suit the special conditions of under-development and economic "exposure" and will, also, have to be reviewed at each of the successive developmental programmes, or planning periods, of the emergent nation.

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LA CAPACITE MATRIMONIALE CHEZ LES PEUPLES AFRICAINS *

par

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Nous nous proposons dans cet article d'étudier la capacité matrimoniale chez les peuples africains. Nous entendons par "capacité matrimoniale" les trois factultés suivantes :

1) Liberté reconnue à l'homme et à la femme quant au choix de son futur conjoint;

2) Droit accordé à la famille de s'opposer au choix fait par l'un de ses membres;

3) Capacité de l'homme et de la femme de conclure, de par lui-même, son contrat de mariage.

Il va sans dire que les peuples africains, dans plusieurs endroits du Continent, ne vivent plus sous leurs conditions traditionnelles. Ils ont subi, en effet, diverses influences extérieures qui n'ont pas manqué de laisser leurs traces sur leurs traditions et institutions. C'est pourquoi nous avons jugé important d'envisager l'étude de la capacité matrimoniale, tout d'abord, sous les conditions traditionnelles, pour essayer ensuite de discerner les changements dus aux influences de l'Islam, des Missions chrétiennes et des conditions de vie nouvelles qui ont eu le plus grand effet sur les coutumes africaines.

(*) Ceci est le résumé de l'article publié dans ce même numéro en arabe. Nous y renvoyons le lecteur quant à la bibliographie.

Section I

LA CAPACITE MATRIMONIALE DANS LA SOCIETE TRADITIONNELLE

1. — *Choix du conjoint*

Rôle de l'homme :

Pour se rendre compte du rôle joué par l'homme dans le choix de sa future épouse il convient de distinguer deux cas : le premier est celui où il s'agit d'un fils qui vit encore sous le toit paternel, soumis à la puissance du père. Le deuxième est celui où il s'agit d'un homme déjà marié et qui n'est plus soumis à la puissance paternelle.

A) Si nous consultons les traditions de divers peuples africains, au sujet du rôle joué par le jeune homme dans le choix de sa future épouse, nous constaterons que les peuples africains se divisent, en la matière, en deux grandes catégories. L'une comporte des peuples qui reconnaissent au père le droit de marier son fils sans avoir à se soucier du désir de celui-ci. Chez ces peuple, le père jouit donc d'un droit de contrainte matrimoniale à l'égard du fils non encore marié. Celui-ci ne peut que se soumettre au choix fait en son compte par le père. Dans la majorité des cas, le fils accepte le choix paternel. Il y a, en effet, certaines considérations qui poussent le fils à ne pas agir autrement. Le mariage africain exige un certain paiement à la famille de la future épouse, le paiement est fait par le père, étant donné que le fils lui-même ne possède pas de quoi pourvoir à cet engagement. Si le fils s'opposait au choix paternel il s'exposerait au refus du père de fournir ce paiement pour la fille de son propre choix. En outre, la coutume, en conférant au père le droit de marier son fils, rend difficile la situation de ce dernier s'il s'opposait à la volonté paternelle. Le fils qui agit de la sorte risque de s'attirer le blâme des parents et amis ; le père peut menacer son fils récalcitrant de le déshériter ou de le chasser de la maison paternelle. Enfin, étant donné que la polygamie est permise, le fils sait que plus tard il pourra prendre en mariage la fille de son choix.

La deuxième catégorie comporte des peuples qui, au contraire, nient au père tout droit de marier son fils malgré lui. Chez ces peuples le fils se marie donc selon sa propre volonté. Si son père

lui choisit une certaine jeune fille, il faudra que le fils approuve le choix paternel. Toutefois, cela ne signifie pas, qu'en pratique, les parents respectent toujours ce qu'exige la coutume, et qu'ils ne cherchent jamais à forcer leur fils à se marier à une personne qui ne répond pas à son désir. En effet, rien n'empêche, en pratique, que tel ou tel père s'efforce de contraindre son fils à se marier avec la fille qu'il lui choisit. Mais ces cas semblent être rares, puisque le père agissant de la sorte s'exposerait à l'indignation et au blâme des parents et des amis. L'opinion publique chez les peuples africains est, en effet, une garantie efficace contre toute dérogation aux règles de la coutume.

B) Le fils qui s'est déjà marié, et qui veut contracter un deuxième mariage n'est soumis à aucun droit de contrainte de la part de son père. Le fils en se mariant se libère, dans une grande mesure de la puissance paternelle. Dorénavant, tout ce qu'il acquiert lui revient personnellement, puisqu'il a son patrimoine propre. C'est lui, et non plus son père, qui fournit le paiement nécessaire pour son second mariage. L'homme qui se marie pour la deuxième fois est normalement d'un âge mûr et il est inconcevable qu'il soit soumis, à ce sujet, à un droit de contrainte.

Rôle de la femme :

Il faut distinguer, ici aussi, entre la fille qui se marie pour la première fois et la femme qui s'est déjà mariée une fois, et veut contracter un nouveau mariage soit parce qu'elle est divorcée, soit parce qu'elle est veuve.

A) Les peuples africains se divisent, quant au rôle joué par la fille dans le choix de son futur mari, en deux catégories :

La première catégorie comprend des peuples qui reconnaissent au père un droit de contrainte matrimoniale à l'égard de sa fille. Chez ces peuples le père a le droit de marier sa fille selon sa propre volonté, sans tenir compte des désirs de celle-ci. Nous pouvons en donner les exemples suivants :

Chez les Tswanas, la fille n'avait pas le droit de choisir son conjoint. Elle était obligée de se soumettre à la volonté de son

père. Si elle refusait, elle pourrait être forcée, le cas échéant, par le châtiment.(1)

Chez les Kipsigis, il n'est pas supposé que la fille ait une opinion personnelle quant à son futur époux.(2)

Chez les Bantous du Kavirondo, le père a le droit de contraindre sa fille à se marier avec l'homme qu'il lui choisit.(3)

Chez les Azandes, la fille était complètement soumise à la volonté de son père quant à son mariage.(4)

Ces peuples donnent au père, donc, un droit de contrainte à l'égard de sa fille. Toutefois, il ne faut pas imaginer que les parents usent toujours de leur droit. Dans la majorité des cas les filles se soumettent volontairement au désir de leurs parents et acceptent le choix fait pour elles. Mais il arrive parfois que la fille éprouve de l'aversion profonde à l'égard de l'homme choisi pour elle, et s'obstine, à le refuser malgré tous les efforts déployés pour la convaincre. Dans un tel cas, rien n'empêche son père de laisser tomber le choix qu'il a fait pour elle. En effet, il y a quelques considérations qui empêchent le père de continuer ses efforts pour forcer sa fille à se marier à un homme qui lui répugne. D'abord, il sait bien qu'un mariage conclu dans des circonstances pareilles n'aura pas beaucoup de chance de réussir. Et un mariage non réussi expose le père de la femme à pas mal de difficultés, en raison de l'obligation de restituer le paiement fait à l'occasion du mariage. Ce père craint en outre que sa fille ne se suicide ou ne prenne la fuite.

La deuxième catégorie comprend des peuples qui, au contraire, ne reconnaissent au père aucun droit de contrainte à l'égard de sa fille. Chez ces peuples, la coutume oblige le père de demander l'avis de sa fille, et de le prendre en considération. La fille ne peut être mariée à un homme qui lui répugne ou qu'elle ne veut pas. Il nous paraît que ces peuples sont les plus nombreux. En tout cas ils sont les plus nombreux parmi ceux dont l'occasion nous a été donnée de consulter les traditions. Chez un nombre de peuples de cette deuxième catégorie, les cérémonies du mariage

(1) Schapera, A. Handbook of Tswana law and custom, p. 128.
(2) Peristiany, The social institutions of the Kipsigis, p. 57.
(3) Wagner, The Bantu of North Kavirondo, p. 46.
(4) Baxter and Butt, The Azande and related peoples, p. 68.

comportent certaines mesures formelles, ayant pour but, de s'assurer du consentement de la jeune fille. L'obtention du consentement de la jeune fille constitue le premier pas dans les cérémonies du mariage. Celui qui veut se marier avec une certaine jeune fille doit s'assurer, tout d'abord, de son sentiment à son égard, de crainte que le projet matrimonial n'échoue en raison de son refus. Dans ce qui suit, nous allons donner quelques exemples significatifs des peuples de cette deuxième catégorie :

Chez les Hottentots, la fille jouit de la plus grande liberté dans le choix de son conjoint. Les cérémonies du mariage comportent une formalité destinée à s'assurer du consentement de la fille. Quand un jeune homme désire se marier avec une certaine jeune fille il doit obtenir son approbation formelle. Dans ce but, il lui présente une baguette, si elle la prend, la casse en deux, et jette l'une de ces deux parties sur sa poitrine, cela signifiera qu'elle consent à sa proposition.(1)

Chez les Pondos, la fille jouit d'une grande liberté dans le choix de son futur époux. L'un des hommes Pondo décrit le commencement des cérémonies du mariage de la manière suivante : Un homme vient chez le père de la jeune fille lui demander sa main au nom de l'un de ses amis. Le père lui dit : "Va, et parle à la fille". L'homme y va. Si la fille est consentante, elle dit : "Je désire voir l'homme qui veut être mon mari". Alors vient l'homme qui la demande en mariage. La fille lui dit : "Comme tu as déjà parlé à mon père, adresse-toi à moi".(2)

Chez les Wembas, la coutume fait du consentement de la fille, une partie indispensable des cérémonies du mariage. Quand un homme trouve une jeune fille qui lui convient, il envoie son intermédiaire en lui disant : "Va, et demande si elle consent à se marier avec moi et entends ce qu'elle dit". L'intermédiaire va à la maison de la fille, il l'appelle en lui disant : "J'ai un message pour vous madame. Mon camarade m'a envoyé pour le délivrer. Il dit : "J'aime cette femme et je veux me marier avec elle. Ceci est le message que je suis venu délivrer". Puis la fille consent en disant : "Qui a refusé une offre de mariage ?" Je crois que deux sont mieux qu'un, si les deux se sont mutuellement agréés". L'intermédiaire

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(1) Schapera, The Khoisan peoples of South Africa: Bushmen and Hottentots, p. 244.
(1) Campbell, In the heart of Bantuland, p. 151.
(2) Hunter (Monica), Reaction to conquest, p. 187.

du mariage se retourne et dit : "Oui, elle consent". Dans la nuit, celui qui veut se marier va lui-même rendre visite. Il dit à la jeune fille : "Je veux que tu sois ma femme". La fille répond : "Oui, monsieur, je consens tant que tu m'aimes vraiment". L'homme répond : "Oui, vraiment, madame, et sans mensonge, je t'aime". Puis la fille consent en disant : "Bon, alors, si tu m'aimes — Mais souviens-toi que je ne veux pas être la femme d'un polygame puisque la polygamie n'est pas bonne pour la femme". L'homme répond : "Non, je ne prendrais jamais une autre. Je veux seulement me marier avec toi !" La fille consent de nouveau en disant : "Bon, allons-nous marier".

Chez les Nuers, un jeune homme ne demande la main d'une jeune fille qu'avec son propre consentement. Il doit avec ses amis parler aux membres de sa famille et ceux-ci se consultent avec leurs proches parents. Ils savent ce qui se passe longtemps avant qu'on leur demande formellement sa main. Quand une jeune fille informe les hommes de sa famille qu'il y a des hôtes au dehors qui veulent leur parler, les hommes se rendent aussitôt compte du but pour lequel ils sont venus. L'aspirant entre avec ses amis, ils s'assoient à droite, les parents de la fille à gauche et ils disent que la fille les a acceptés et demandent si les grands les acceptent aussi.(1)

B) La femme qui s'est déjà mariée et veut contracter un nouveau mariage, jouit d'une grande liberté dans le choix de son nouvel époux. La femme n'est soumise quant à son second mariage à aucun droit de contrainte. Chez tous les peuples africains on lui laisse le soin de choisir son nouveau mari. Cette liberté accordée à la femme va de soi chez les peuples qui reconnaissent à la jeune fille le droit de consentir au choix de son futur époux. Chez les peuples qui reconnaissent au père un droit de contrainte matrimoniale la liberté accordée à la femme qui veut contracter un nouveau mariage, se justifie par l'âge mûr de cette femme et l'expérience qu'elle a acquise de son précédent mariage. Si le précédent mariage s'était soldé par un divorce, il paraîtrait illogique de la forcer à se marier avec un homme qui lui répugne.

II. — *Droit de veto reconnu à la famille*

Le mariage africain est une affaire trop importante pour n'intéresser que les deux époux. Ses effets dépassent de loin les relations entre époux, il crée un lien entre les deux familles compor-

(1) Evans — Pritchard, Kinship and marriage among the Nuers, p. 60.

tant des droits et devoirs réciproques. C'est pourquoi la coutume reconnaît à la famille un droit de veto à l'égard du mariage projeté par l'un de ses membres. Ce droit de veto vise d'une part à la sauvegarde des intérêts de la famille contre une mésalliance. Il est, d'autre part, un moyen mis à la disposition de la famille pour empêcher un mariage auquel manquent les éléments nécessaires de réussite. Les peuples africains reconnaissent certaines considérations pouvant justifier l'opposition de la famille. Nous exposerons, dans ce qui suit, les plus importantes parmi elles :

1) Proche parenté faisant obstacle au mariage. Il se peut que deux jeunes gens se connaissent et veulent contracter un mariage. Quand l'affaire est portée à la connaissance des parents, il se peut que ceux-ci découvrent entre les deux jeunes gens une parenté proche emp'chant le mariage et dont les jeunes gens eux-mêmes ne se doutaient pas, étant donné l'extension de la parenté chez les peuples africains.

2) Pauvreté du jeune homme et de sa famille. Le mariage comporte pour le mari certaines charges d'ordre économique. Il doit faire un paiement à la famille de sa future épouse et il doit, après le mariage, subvenir aux besoins de sa femme. S'il est clair que le jeune homme est trop pauvre pour faire face à ses obligations pécuniaires, les parents de la fille s'opposeront à son choix.

3) Inimitié entre les deux familles.

4) Situation inférieure au point de vue social de la famille de l'un des deux jeunes gens par rapport à la famille de l'autre.

5) Mauvaise réputation de la famille à laquelle appartient le jeune homme ou la jeune fille. La réputation la plus mauvaise chez les peuples africains est celle d'exercer la magie noire.

6) Paresse ou non respectabilité du jeune homme, paresse aux moeurs faciles de la jeune fille.

III. — *Capacité de conclure le mariage*

Il faut distinguer, à cet égard, entre l'homme et la femme.

Si l'homme se marie pour la première fois, il ne participe pas personnellement, en règle générale aux négociations ou à la conclusion de son mariage. Les négociations sont menées et le mariage est conclu par le père, le frère aîné ou un autre parent plus âgé.

L'homme qui se marie pour la deuxième fois mène, personnellement, les négociations de son mariage. Toutefois, il est d'usage qu'il s'entoure des proches parents, spécialement ceux plus âgés que lui.

Quant à la femme, elle ne participe pas aux négociations de son mariage et surtout à la discussion du paiement fait à cette occasion. En règle générale, elle n'assiste pas aux entretiens où se discutent ces questions, et si elle est présente, elle n'y prend pas une part active. La discussion du "mahr" (paiement fait à l'occasion du mariage) et la conclusion du mariage sont laissées aux soins de son père et, à défaut, d'un homme quelconque de ses proches parents. La femme n'est, donc, pas qualifiée pour conclure elle-même son mariage.

Section II

EVOLUTION DE LA CAPACITE MATRIMONIALE

1. — *Influence de l'Islam*

De nombreux peuples de l'Afrique Occidentale ont embrassé l'Islam. Pour se rendre compte de l'influence de l'Islam sur la capacité matrimoniale, il nous faut résumer les enseignements à cet égard de la Doctrine Malékite, répandue dans l'ouest africain :

1) La Doctrine Malékite distingue en ce qui concerne le consentement de la fille, entre la fille vierge, c'est-à-dire celle qui se marie pour la première fois, et la fille non vierge, c'est-à-dire celle qui s'est déjà mariée. Elle reconnaît au père un droit de contrainte à l'égard de la première, mais elle ni ce droit quant à la seconde.(1)

2) La Doctrine Malékite ne reconnaît pas à la femme le droit de conclure elle-même son mariage. La femme doit toujours être représentée par un tuteur matrimonial qui est en règle générale son père ou à défaut, un homme quelconque de ses proches parents.(2)

Nous voyons par ce qui précède que la Doctrine Malékite est en accord avec les coutumes africaines en ce qui concerne l'inca-

(1) La Doctrine Hanafite exige le consentement de la fille majeure, vierge ou non vierge.
(2) La Doctrine Hanafite, au contraire, reconnaît à la femme le droit de conclure elle-même son contrat de mariage.

pacité de la femme de conclure elle-même son mariage. Les peuples africains qui embrassent l'Islam (et suivent le rite Malékite) n'ont aucun besoin de changer leurs coutumes à cet égard.

La question du consentement de la fille exige un peu plus de détails. Nous savons, en effet, que les peuples africains se divisent à cet égard en deux catégories opposées. Les peuples africains qui reconnaissent au père un droit de contrainte sur sa fille, ne sentent, quand ils embrassent l'Islam et suivent le rite Malékite, aucun besoin de changer leurs coutumes à cet égard. Ce rite, comme nous l'avons dit, reconnaît au père un droit semblable. La question est plus difficile pour les peuples dont les coutumes donnent au père un droit de contrainte à l'égard de sa fille. Si l'un de ces derniers peuples embrasse l'Islam, il y aura une certaine contradiction entre la règle coutumière et la règle enseignée par la doctrine Malékite en la matière. Certains peuples ont gardé la règle coutumière bien qu'ils suivent le rite Malékite. Cependant, il semble que la plupart des peuples islamisés, ont tendance à suivre la distinction faite par le rite Malékite entre la fille vierge et celle non-vierge.

Nous croyons que l'adoption de la règle Malékite ira de pair avec l'augmentation de l'influence de l'Islam. Toutefois, il faut se rappeler que le rite Malékite ne doit pas être tenu responsable chaque fois que nous trouvons un peuple islamisé reconnaissant au père le droit de contrainte. Il se peut, en effet, que ce droit ait pour origine la coutume ancienne. Pour savoir si le droit de contrainte chez un certain peuple était dû au rite Malékite ou bien à la coutume ancienne, il faudrait savoir ce qui se passait avant la conversion de ce peuple à l'Islam.

2. — *Influence du Christianisme*

Le consentement des futurs époux est un des éléments essentiels du mariage chrétien. Pour que le mariage soit valable il faut que l'homme et la femme, aient mutuellement consenti. Les missions chrétiennes en Afrique s'efforcent de faire entrer dans les mœurs des peuples africains le principe du libre choix. Elles font de tout leur mieux pour convaincre les pères de ne pas marier leurs filles sans tenir compte de leurs désirs. En procédant au mariage à l'église, le missionnaire s'assure du consentement de la fille et refuse de présider au mariage si les parents de la fille

veulent lui imposer un homme dont elle ne veut pas. Il est évident que les efforts des missionnaires, à cet égard, se heurtent, à la résistance des pères chez les peuples dont les coutumes leur confèrent un droit de contrainte matrimoniale. Le résultat dépend du degré de la christianisation du peuple. Les Abyssins, qui se sont convertis au christianisme depuis déjà longtemps, n'ont pas réussi jusqu'à présent à adopter le principe chrétien du libre consentement des deux futurs époux. Chez eux, la fille est encore mariée selon la volonté du père.

3. — *Influence des conditions de la vie nouvelle*

L'influence des conditions de la vie nouvelle peut se résumer de la manière suivante :

A) Sous les conditions traditionnelles de la vie africaine les jeunes gens ne peuvent en règle générale acquérir des biens qu'à travers leurs parents. Les conditions nouvelles leur ont permis de gagner de l'argent d'une manière indépendante, en offrant leurs services aux Européens dans les villes et les centres industriels. Par conséquent, les fils de familles indigènes sont devenus capables de fournir le paiement nécessaire pour leur mariage sans dépendre, sous ce rapport, de leur père. Ceci leur a conféré une plus grande liberté dans le choix de leur futur conjoint.

B) Le père de famille jouit sous les conditions traditionnelles, d'une grande puissance sur ces enfants. Tout dans la vie traditionnelle travaillait pour en faire une puissance sérieuse et respectée. Au contraire, dans les conditions nouvelles, elle subit des atteintes graves et finit par s'affaiblir. La perte du droit de contrainte matrimoniale est à la fois un résultat et un indice de l'affaiblissement de cette puissance.

C) Les autorités européennes ont promulgués, dans les villes, des codes de droit inspirés de ceux des pays coloniaux. Ces codes comportent des règles régissant le statut personnel. Les autorités européennes permettent, en règle générale, l'application de ces codes aux Africains résidant dans les villes. Ainsi un Africain peut se marier selon le code de droit européen et dans ce cas il n'est soumis qu'aux exigences de ce code, qui reconnaît à chacun le droit de choisir librement son conjoint.

CONCLUSION

De ce qui précède il ressort que :

1) Les peuples africains ne suivent pas une règle identique quant à la liberté accordée au jeune homme et à la jeune fille. D'aucuns reconnaissent au père un droit de contrainte matrimoniale sur ses enfants, d'autres au contraire, exigent leur consentement. Les gens qui se sont déjà mariés et veulent contracter un nouveau mariage ne sont soumis à aucun droit de contrainte, et cela est vrai même pour les peuples qui confèrent au père un droit de contrainte à l'égard de ses enfants qui se marient pour la première fois.

2) Les peuples africains reconnaissent à la famille représentée par le père ou à son défaut le parent masculin le plus proche et le plus âgé, un droit d'opposition au choix fait par l'un de ses membres. Ce droit d'opposition est conféré à la famille pour sauvegarder à la fois l'intérêt de la famille et celui du membre intéressé. Nous avons passé en revue les considérations qui sont regardées comme justifiant l'emploi de ce droit.

3. Les peuples africains ne reconnaissent pas à la femme la capacité de faire partie elle-même du contrat du mariage. Les négociations sont menées et le mariage est conclu entre son père ou, à défaut, son plus proche parent du sexe masculin d'une part et le futur mari ou le père de celui-ci, d'autre part. Cela est vrai même pour les peuples qui exigent le consentement de la fille. L'obtention de son consentement constitue, chez ces peuples, le premier pas dans les formalités du mariage.

4) La conversion à l'Islam sous la forme du rite Malékite n'influe pas sur la coutume des peuples africains convertis, quant à la règle concernant la non-participation de la fille ou de la femme à la conclusion du mariage, puisque le rite Malékite, comme nous l'avons déjà vu, considère la femme comme incapable de conclure elle-même le contrat de mariage.

De même l'adhésion au rite Malékite n'amène aucun changement de coutume chez les peuples qui reconnaissent au père un droit de contrainte matrimoniale à l'égard de sa fille. Le seul changement à cet égard est peut-être la reconnaissance au fils du droit de choisir librement sa femme. Il en est autrement pour les peuples qui nient tout droit de contrainte matrimoniale à l'égard des filles.

Nous avons remarqué la tendance chez ces derniers, vers l'adoption quant à la fille de la distinction suivie par le rite Malékite entre la fille vierge et la fille non-vierge, c'est-à-dire, en général, entre la fille qui se marie pour la première fois et celle qui s'est déjà mariée. Le résultat en est que la fille, en se mariant pour la première fois, perd la liberté qui lui était reconnue anciennement par les coutumes païennes.

5) Les missions chrétiennes s'efforcent de faire adopter le principe de consentement de la fille au choix de futur époux, par les peuples africains qui ne lui reconnaissent pas ce droit. Les missions ont, sans doute, réalisé quelque succès à cet égard mais il semble que ce succès est encore minime.

6) Les conditions de la vie nouvelle sont en faveur d'une liberté plus grande aux jeunes gens dans le choix de leur conjoint. Cela a été le résultat de l'affaiblissement général de la puissance paternelle, caractéristique de la vie nouvelle et de la possibilité pour les fils de gagner indépendamment de quoi payer la somme nécessaire pour leur mariage.

DOUBLE JEOPARDY COMPARED WITH NON BIS IN IDEM (*)

by

Dr. AHMAD FATHY SOROUR

Section 1

WHEN DOES JEOPARDY AND RES JUDICATA ATTACH

In general. — The general principle of common law is *nemo debet bis vexari* — a man must not be put twice in peril for the same offence.(1) This rule was applied by the plea of autrefois acquit and autrefois convict.(2) The Non bis in idem rule has been settled in the same spirit. A man cannot be tried again for the same offence.

The determination of the moment of attachment of jeopardy and res judicata is one of the important issues distinguishing between them.

We have to emphasize first that the attachment of jeopardy has taken in the United States a more conclusive meaning than in England. We shall begin with the position in the United States so that we may compare it with others in comparative law.

We shall see how the notion of jeopardy is distinguished from the notion of res judicata in its attachment; the former is before final judgment and the latter is when the judgment becomes final. But in which two step of the proceedings before final judgment does jeopardy attach ? That is what we shall discuss now.

(*) See "L'Egypte Contemporaine" No. 308, April 1962 for the first part of this article.

(1) Turner: Kenny's outlines of criminal law, Cambridge, 1952, p. 499.

(2) Thomas Starkie: A treatise on criminal pleading, 1824, p. 349.

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JEOPARDY

The position in the United States:

The general rule. — The general rule in the United States is that jeopardy attaches when jury is sworn to try the case.(3) It has been suggested that the origin of this rule is supported by the English rule of practice which compelled a jury once sworn in the trial of a case to be kept together until it rendered a verdict.(4) It has been commented on this origin that it had grown probably out of the exigencies of early times when jurors of the counties where the facts occurred were summoned to give testimony at Westminster on a trial based on those facts, and that "it seems not to have been an invariable rule and has never been found to have had any connection, in the cases at English common law, with the problem of two trials for the same offence." (5)

However it has been held that where the case is tried by the court without the intervention of a jury, jeopardy attaches when the court after the accused has been indicted or informed and arraigned, begins the hearing of the evidence.(6) It is not required that the trial be terminated by a judgment of conviction or acquittal.

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(3) U.S. — Sanford v. Robbins, 115 F. 2d 435; cert. denied 312 U.S. 697 (1940); Himmelfarb v. U.S., 175 F. 2d 924, cert. denied 338 U.S. 860 (1949); Corrado v. U.S., 210 F. 2d 712 (1954).

Cal. — People v. Hawkins, 127 Cal. 372 (1899); People v. Hess, 107 Cal. App. 2d 407 (1951); People v. Blau, 140 Cal. App. 2d 193 (1956).

N.Y. — People v. Colon, 184 N.Y.S. 2d 537; Mathias v. O'Hara 200 N.Y.S. 2d 1731 (1960).

Mo. — State v. Snyder, 12 S.W. 369, 98 Mo. 555 (1889); State v. Buente, 165 S.W. 340, 256 Mo. 227 (1914); State v. Miller, 56 S.W. 2d 92, 231 Mo. 675 (1933).

(4) Kirk: Jeopardy "during the period of the year books, 82 University of Pennsylvania L. Rev. 602, 612 (1934).

(5) Kirk: Supra, p. 612.

(6) U.S. — Wade v. Hunter, 72 F. Supp. 755, reversed 169 F. 2d 973, affirmed 336 U.S. 684 (1947); U.S. v. Narvaez-Granillo, 119 F. Supp. 556 (1954); McCarthy v. Zerbst, 85 F. 2d 640, cert. denied 299 U.S. 610.

Cal. — Exparte Harron, 191 Cal. 457, People v. Matiasevich 12 Cal. App. 2d Supp. 759; People v. Garcia, 120 Cal. App. Supp., 767.

N.Y. — People exrel. Cohen v. Collins, 265 N.Y.S. 475; People v. Colen, 184 N.Y.S. 2d 537.

The draft of the model penal code. — The Introduction of the draft of the model penal code (1935) has held that it is not clear why the courts selected the swearing of the jury as the point in the proceedings at which the defendant comes in jeopardy rather than at arraignment, or plea, or even at the finding of an indictment, and that it would seem to be more reasonable to hold that he is not in jeopardy until the evidence has shown a *prima facie* case against him, for there would be no danger of conviction until that point.(7) But no doubt that the need for a more definite and certain time is preferred to all other considerations.(8)

The draft of 1956 has changed the existing rule which distinguished between a trial before the judge and a trial before a jury. Under this draft the termination of the prosecution is improper if it takes place after the first witness is sworn but before a verdict, unless it falls within two situations: 1) The consent of the defendant to the termination or if he waives his right to object to it. 2) Where the termination is justified under manifest necessity. Although it is impossible to list all the circumstances which will cover this manifest necessity, the draft of 1956 is somewhat more specific, listing four general reasons which, already, justify termination: (9) 1) Physical necessity. 2) Legal necessity, if there is a legal defect in the proceedings, which would make any judgment entered upon a verdict reversible as a matter of law. 3) Prejudicial conduct. 4) A "Hung jury". 5) False statements of juror on voir dire (sect. 1.09 (4).

Discharge of jury. — The general rule is that a discharge of jury after the joepardy has attached is equivalent to a verdict of acquittal.(10) But this strict rule has been greatly relaxed to the necessities of justice, and the general modern rule is that the

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(7) A.L.I. Administration of criminal law, double jeopardy, 1935, p. 8.

(8) See Double Jeopardy in California, 36 Cal. L. Rev. 431, 433 No. 18 (1948).

(9) Comment on sect. 1.09, draft of 1956, p. 54.

(10) U.S. — U.S. v. Harriman, 130 F. Supp. 198 (1955); Cornero v. U.S., 48 F. 2d 69, 71 (1931); U.S. v. Watson, 28 Fed. 499.

Cal. — People v. Hunckeler, 48 Cal. 331 (1874); Jackson v. Superior Court, 10 Cal. 2d 360 (1937); Burns, Inre, 78 Cal. App. 2d 182 (1947); People v. Burns, 84 Cal. App. 2d 18 (1948).

Mo. — State v. Webster, 105 S.W. 705, 206 Mo. 558 (1907).

N.Y. — Epting v. Devoe, 133 N.Y.S. 2d 129, 206 Misc. 278, reversed 136 N.Y.S. 2d 650; Schell, 118 N.Y.S. 2d 481, 203 Misc. 689 (1953); People exrel. v. Cosey, 297 N.Y.S. 13 (1938); People exrel v. Murphy 280 N.Y.S. 405 (1935).

court may discharge a jury without working an acquittal of the defendant in any case where the ends of justice, under the circumstances, would otherwise be defeated, and it is impossible to define all the circumstances which would render it proper to interfere.(11) The California penal code and New York code of criminal procedure have agreed that the jury may be discharged in the following cases: 1) Consent of both parties (sect. 1140 Cal. and sect. 428 N.Y.). 3) When a juror becomes sick or unable to perform his duty (sect. 1123 Cal and sect. 416 and 428 N.Y.). The New York criminal procedure code adds in sect. 428 that the jury can be discharged upon the occurence of some injury or casualty affecting the defendant, the jury or one of its members, or the court rendering it inexpedient to keep them longer.

But it has been suggested that a statutory enumeration of cases of manifest necessity might help to alleviate the situation; but as a fact no legislature could possibly foresee all the contingencies which may arise to give birth to manifest necessities. To determine when and under what conditions the necessity to discharge the jury can be exercised is a matter of judicial discretion.(12) We shall discuss thereafter the consent of the defendant and some application of the necessity to justify a discharge of the jury.

1) *Consent of the defendant.* — It has been held that where the defendant consents to the action of the state trial court in discharging the jury and declaring a mistrial, he is deemed to have waived the constitutional bar to a second trial.(13) In our opinion it is not a waive of protection against double jeopardy, because there is no jeopardy at all if the discharge has been justified by the consent of the defendant. In general, silence or failure to object

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(11) U.S. v. Perez, 22 U.S. 579 (1824); Devlin, Inre, 139 Cal. App. 2d 810 (1956); McCabe v. County Court of Bronx County, 199 N.Y.S. 2d 247.

(12) Note in 27 Georgetown L.T. 495, 496 (1939); U.S. v. Perez, 22 U.S. 579 (1824); Stocks v. State, 91 Ga. 831, 835 (1893); State v. Van Ness, 82 N.J.L. 181, 182 (1912); State v. Davies, 80 N.C. 384, 387 (1879).

(13) U.S. — Raslich v. Bann, 273 F. 2d 420 (1960); U.S. v. Stein, 140 F. Supp. 761 (1956); U.S. v. Harriman, 130 F. Supp. 198 (1955).

Cal. — People v. Balock, 53 Cal. 2d 798 (1960); People v. Agnew, 77 Cal. App. 2d 748 (1947); People v. Mills, 148 Cal. App. 2d 392 (1957); People v. Baillie, 133 Cal. App. 508 (1933); People v. Kelly, 132 Cal. App. 118 (1933).

Mo. — State v. Williams, 6 S.W. 2d, 915, 320 Mo. 296 (1928).

N.Y. — People v. Dodson, 157 N.Y.S. 2d 7 (1951).

against the jury is not considered as consent.(14) But that does not prevent the court from concluding the implied consent of the defendant in certain circumstances.(15)

2) *Manifest necessity.* — The courts have held that there are manifest necessity in a number of applications :

A) *Discharge of jury for inability to agree (Hung jury).* — It is well settled that the discharge of the jury, if it fails to agree, and there is no reasonable expectation that the jurors will be able to agree. is not an acquittal.(16) But, as the Supreme Court of the United States has said;(17) constitutional prohibition against double jeopardy prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing trial when it appears that jury might not convict, but jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where unforeseeable circumstances arise during the first trial making its completion impossible, such as failure of jury to agree on a verdict.

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(14) U.S. — Himmelforb v. U.S., 175 F. 2d 924, cert. denied 338 U.S. 860 (1949).

Cal. — People v. Valenti, 49 Cal. 2d 199 (1957).

N.Y. — People v. Epstein, 8 Misc. 2d 364, 170 N.Y.S. 577 (1957). But it is considered as an implied Consent in some jurisdictions: See the cases in 22 C.J.S. 262 and A.L.R. 2d 782, 791 (1959).

(15) In people v. Kelley, 132 Cal. App. 118 (1933) that the phrase of accused's counsel stating that he was satisfied that "this case should either result in a mistrial or an instructed verdict" implied consent that such a result should obtain. In state v. Reynolds, 345 Mo. 79 (1939) it was held that the "continuance" asked by the defendant after the jury is sworn implied a consent to the discharge of the jury. In people v. Caballero, 194 Misc. 145, 84 N.Y.S. 2d 762 (1948) it was held that an accused who requested and obtained the privilege of an adjournment in order that he might obtain the services of an attorney of his own choice was held to have consented to the declaration of a mistrial.

(16) U.S. — Gilmore v. U.S., 264 F. 2d 44, cert. denied 359 U.S. 994 (1959); U.S. v. Perrone, 161 F. Supp. 252 (1958), Marienfeld v. U.S., 214 F. 2d 682, cert. denied 348 U.S. 865 (1954).

Cal. — People v. Deerman, 169 Cal. App. 2d 808 (1959); People v. Westwood, 154 Cal. App. 2d 406 (1957); People v. Agnew, 77 Cal. App. 2d 748 (1947).

N.Y. — Bianculli v. McDonnell, 103 N.Y.S. 2d 853 (1951); Savarese v. Foster, 83 N.Y.S. 2d 583, affirmed 86 N.Y.S. 2d 654, appealed dismissed 87 N.E. 2d 61 (1948); People v. Schumetterer, 50 N.Y.S. 2d 297 (1944).

Mo. — State v. Dunn, 80 Mo. 681 (1883); State v. Copeland, 65 Mo. 497 (1877).

(17) Green v. U.S., 355 U.S. 184, 78 S. ct. 221 (1958).

B) *Illness or disability of juror to perform his duty.* — It is generally held, where the trial court has properly discharged a jury because of the illness or insanity of a juror, that such discharge does not constitute a bar to a second trial of the defendant for the same offence.(18) Some courts held that the illness or death of a member of the juror's family is a sufficient cause to discharge a jury, on the ground that his state of mind might and naturally would have rendered the juror in capable of that calm and deliberate consideration and reasoning which is of the essence of the office of juror, and for the absence of which, in any member of the panel, the jury should be discharged.(19) The discharge was also considered because of a conversation about the case between the complaining witness and the foreman of the jury during the progress of the trial,(20) when one of the jurors is found to be disqualified to sit on the case, where outside influences are brought to bear on the jury pending the trial so that they are no longer unbiased.

C) *Other causes of manifest necessity.* — It is impossible to define all the circumstances which would render the proper discharge of the jury for reasons of manifest necessity.(21) The American law Institut (22) has collected a great number of cases alleging different examples of these reasons, as illness of judge. illness in judge's family, when the state has not served on the principal witness an order to produce a document alleged to be forged, when a witness for the government refuses to be sworn, when the state's witnesses disappeared at the trial, when the solicitor is suddenly taken ill and there are no associates who can proceed with the case, where there is a variance between the charge and the evidence, when the judges of the circuit court can not agree

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(18) U.S. — U.S. v. Fernandez, 1 Porto Rico Fed Rep. 453 (1903).
Cal. — People v. Ross, 83 Cal. 383 (1890).
Mo. — State v. Miller, 331 Mo. 675 (1932).
N.Y. — People exrel. v. Freiberg, 243 N.Y.S. 590, 137 Misc. 314 (1930).

(19) Rittenberry v. State, 30 Ga. App. 289 (1923) for the illness of juror's wife; Hawes v. State, 88 Ala. 37 (1889) for the illness of his wife; Spelce v. State, 20 Ala. App. 412 (1924) for the death of his mother. See 53 A.L.R. 1062 for other cases.

(20) People v. Fishman, 64 Misc. 256, 119 N.Y. Supp. 89 (1909). See a note in 13 Fordham L. Rev. 96 (1944).

(21) Green v. U.S., 355 U.S. 184, 78 S.Ct. 221 (1958).

(22) Administration of criminal law (1935) p. 79, etc.

on a point of law and the question is certified to the Supreme Court for decision, when the end of term is reached and if any circumstances should providentially happen to interrupt the trial. It has been held recently in a federal case (U.S. v. Gori)[23] that it is a proper discharge of jury because of misconduct on the part of the district attorney.[24] However, it was held before[25] that where the mistrial was declared due to the conduct of the prosecutor, the defendant's subsequent plea of former jeopardy was sustained. The majority in the Gori case stated that the prosecutor "did nothing to instigate the declaration of a mistrial and that he was only performing his assigned duty under trying conditions." We understand from this statement that the majority did not find any misconduct on the part of the district attorney. However, the Federal Appellate Court found that it might not interfere with the trial judge's responsibility for the conduct of a criminal trial by deciding merely on the basis of the written record on appeal whether the judge's action was properly taken to avoid prejudice resulting from shades of expression of feeling in the emotionally charged atmosphere of trial.

Improper discharge of jury. — It has been held that an erroneous discharge of the jury by the court terminates the proceeding and bar further prosecution of the defendant of the offence charged. It was held that discharge of the jury because the prosecutor declared nolle prossequi when he found his evidence insufficient to convict, will bar another prosecution.[26] Some courts held that it shall be improper if the court erroneously held that a juror is not qualified.[27] We have found that the Federal Appellate Court in the Gori case has decided not to interfere with the trial judge's responsibility for the conduct

(23) U.S. v. Gori, 282 F. 2d 43 (1960).

(24) On the first day of trial, the examination of witnesses by the prosecutor was continuously interrupted by defense counsel's objections and the trial judge's orders that numerous questions be reframed. That afternoon, the trial judge became increasingly irritated by the prosecutor's questioning of his witness and bruptly declared a mistrial because of misconduct on the part of the district attorney. See also Lovato v. New Mexico. 242 U.S. 199 (1916).

(25) Cornero v. U.S., 48 F. 2d 69 (1931).

(26) U.S. — U.S. v. Shoemaker, 2 McLean 114. (1840).
Mo. — State v. Webster, 206 Mo. 558 (1907).

(27) Tomasson v. State, 112 Tenn. 596 (1903); State v. McKee, 17 S.C.L. 651 (1830); Maden v. Emmons, 83 Ind. 331 (1882).

of a criminal trial. Some courts [28] held that it will improper if the jury are discharged because they are unable to agree. The American law Institute [29] has cited many cases alleging different causes of improper discharge as: if the district attorney was ill (without any showing that he was unable to conduct the case) and witnesses for the prosecution were absent, discharge to amend indictment when such amendment was an immaterial one, discharge to furnish defendant with a list of witnesses although there was no such necessity as the defendant had waived his right to such list, discharge when the state appealed an order of the court during the trial that three defendants be allowed to testify for each other, discharge of juror (or jury) so that the juror might be a witness.

The position in England:

In general. — We have seen from the above discussion how before any judgment or verdict, the jeopardy attaches the defendant, and that discharge of the jury without consent of the defendant or for any necessary cause, bars another prosecution for the same offence. The position in England is different. A new trial cannot be barred except by "autrefois acquit" or "autrefois covict". It is necessary that a final verdict should actually have been given. Under this principle it has been held that if the petty jury be discharged without a verdict this will no more prevent a second trial than would the fact of a former bill's having been ignored by a grand jury. The same notion has been held in some American cases. We shall study now the English position depending in our analysis upon some English cases.

The rule. — The exclusive consequence of the American rule of jeopardy is that improper discharge of jury bars another prosecution for the same offence. Such a rule, is commonly based on two statements by Coke and on a case found in the Year Books. Coke was of the opinion that in a capital case, a jury once sworn could not be discharged by the judge of his own direction until a verdict had been rendered.[30] Later it was maintained [31] that

(28) Commonwealth v. Cook, G.S. and R. 577 (Pensylvania) (1822); Mahala v. State, 10 Yerg. 552 (Tenn.) (1837).

(29) Administration of criminal law (1935), p. 90, etc.

(30) See Borell: Double jeopardy at common law, Intermaural L. Rev. of N.Y.U., p. 124, 126 (1953-55).

(31) Mansell's case (1584), Borel, supra.

the view of Coke must be construed as to authorize the defendant to waive his right that the jury might not be discharged without verdict. The Year Book case containing the statement requiring jurors to be kept together until they reached a verdict was not a criminal but a civil suit, before justices on assize. Eleven of the jurors agreed on the verdict, but the twelfth refused to agree and was sent to prison, the justices accepting the verdict of eleven. The justices of the Common Bench, however, held this procedure improper. The panel was quashed, the juror discharged from prison and the plaintif made to sue a new venire facias for an assize, that is, for another jury to try his case. The justices are reported to have said, "They ought to have carried the jurors about in carts until they were agreed.(32) It has been said that a lthough it was held improper to discharge the jurors in this case before they had rendered their verdict, yet a second trial of the action actually took place, but from the statement that the jurors should have been carried about in carts until they agreed, there has grown up a general belief that this was the practice in such a situation.(33) Mr. Kirk in his article about "jeopardy during the period of the Year Books" said that no case has been found in the reports of the Year Books in which it was pleaded in bar of a second prosecution that the jury was discharged before rendering a verdict.(34) However, he said, there was some evidence that jeopardy attached not when the jury was sworn to try the case, but at an earlier stage in the proceedings, when a plea of not guilty was entered.(35) However, there was one case during the reign of the Stuarts which went far beyond the view of Coke, and in which it was held that the jury might be discharged in a capital case — treason — even without consent of the defendant.(36) We have to notice that in this case the discharge of the jury was because the prosecution had failed to prove its case, which is not considered as a necessary cause of discharge.

Modern English doctrine has settled that jeopardy does not attach before acquittal or conviction.(37) We depend in our con-

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(32) Kirk: Jeopardy during the period of the year books, 82 U. Penn. L. Rev. 602, 610 (1934).
(33) Cited by Kirk; supra, p. 610.
(34) Kirk, supra, p. 611.
(35) See the cases cited by Kirk, supra, p. 611.
(36) Whitebread case (1679), cited vy Boral in double jeopardy at common law, 9 Intramural L. Rev. 124, 127 (1953-55).
(37) See Kirk, supra, 612.

clusions on the following cases, which will show us how the holding in some old cases that the jury must be kept together without discharge until they had rendered a verdict was merely a rule of practice and procedure, subject to variation by the authority vested in the courts to regulate their own practice, not a rule of positive law.

The Court of Queen's Bench discussed the issue of the phase of attachment of jeopardy in Reg. v. Charlesworth,(38) where on the trial of an information filed by the attorney general under the corrupt practices act, charging the defendant with bribery at a parliamentary election, the principal witness for the prosecution refused to answer certain questions, and was committed for contempt of court, and the judge discharged the jury without giving a verdict; subsequently the defendant obtained a rule, calling on the Crown to show cause why judgment should not be entered for the defandant, that he be dismissed or discharged of and from the premises and depart without any delay, and why the award of jury process and all other proceedings for a second trial should not be stayed. The Court of Queen's Bench in this case discharged that rule. It discussed two questions: 1) Whether the judge had authority to discharge the jury under the circumstances of this case. 2) Whether the effect of that discharge, if done without authority, entitles the defendant at once to the judgment "that he goes without delay." The court discussed the statement of Lord Coke that a jury once sworn and charged in the case of life or member cannot be discharged, and said that it did not embrace several of those cases in which it was admitted on all hands that a jury might be discharged, according to modern practice, as the case in absolute necessity, and that "a different practice existed in the courts anterior to the day at which Lord Coke write." The court added that the doctrine of Coke was not considered by the judges who followed him "as the true exposition of the law, or else this was considered not a rule of positive law, but simply of practice and procedure, subject to variation by the authority vested in the courts of this country to regulate their own practice." Then the court discussed two statements by Lord Holt and Blackstone and refused to apply one of them, and Justice Cockfurn delivered his opinion stating that he was not prepared

(38) 9 Cox's criminal cases 44 (1861).

either as a matter of law or as a matter of expediency, to give up the judicial authority of a judge presiding at a criminal trial, in a case where justice was frustrated by what might be deemed to be the act of the prisoner, something in which he concurred and co-operated, to allow justice to be defeated rather than exercise the authority which he might be delivered to possess of postponing the trial by discharging the jury. After that the court asked the main question in our issue : *Assuming even that the judge had no power to discharge the jury, or that he exercised it improperly, whether what he has done amounts to an acquittal of the prisoner?...* The court said that since the practice had been established from the day of Lord Holt, juries had not been discharged, and therefore the occasion of such a plea had never presented itself, and that the only plea which are known to the law of England is the plea autrefois acquit or autrefois convict, and "it is clear that this amounts to neither." Justice Cockburn said : "When you talk of a man being twice tried, that you mean a trial which proceeds to its legitimate and lawful conclusion by verdict; that when you speak of a man being twice put in jeopardy you mean put in jeopardy by the verdict of a jury." He concluded, therefore, that there had not been in this case a trial, that the accused had not been put in jeopardy, or that he was at all in a position, either in point of law or in point of fact, of a man who had been once acquited, and who, having been once acquitted, could not a second time be put on trial. Justice Crampton concurred, and said : "Upon a plea of autrefois acquit such a judgment might be given as the jury had actually pronounced their verdict." He added that this rule was held in England since the case of Conway v. The Queen, and that 'the modern cases since the case of Conway and Lynch, appear to be all but conclusive, to destroy the authority of the Conway and Lynch as a case that ought to guide our decision.

Justice Blackburn indicated the cases which rest their judgment on the general ground that the improper discharge of a jury could not be the subject of a plea.

We may have stated the opinion of the Queen's Bench somewhat laboriously, but the importance of the discussion and the principles embodied in this opinion may excuse our long statement. However, after the above discussion it seems clear how the English settled doctrine refuses to consider that the jeopardy attaches when the jury has been merely empaneled and sworn,

and as a consequent result, it does not consider the discharge of jury — even if it is improper — as a general ground to a plea of autrefois acquit.

The same principle was held by the Court of Queen's Bench (Exchequer Chamber) in Windsor v. The Queen,(39) in which the Court said: "Even if it was assumed, for the sake of argument, that the statement on the record led the judges of the Court of Error to the opinion that the order for the discharge in question was an improper exercise of discretion on the part of the judge who tried the case, still we should hold that such a discharge was *no legal bar to a second trial* either on the same or on a fresh indictment." The court emphasized the rule that the only pleas known to the law founded upon a former trial are pleas of a former conviction or a former acquittal for the same offence, but if the former trial had been abortive without a verdict, there had been neither a conviction nor an acquittal, and the plea could not be proved.

Thereafter, the Court of Criminal Appeal in Rex v. Lewis,(40) declared that the question of discharge of jury had been decided and the law settled in the two cases to which we have referred above (Windsor v. The Queen and Reg. v. Charlesworth). It decided that the right to plead autrefois acquit for discharging the jury *without necessity* (all the witnesses for the Crown were not present at the trial) *could not have arisen.* The court said that it *could not say it judicially,* but it should like to say that there is no necessity to discharge the jury in such a case.

The same rule has been confirmed by English authors.(41) Moreover, we have to notice that section 28 of the criminal procedure act (1851) provide that in any plea of autrefois convict or autrefois acquit it will be sufficient for any defendant to state that he has been lawfully convicted or acquitted (as the case may be) of the said offence charged in the indictment.(42) We can deduce

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(39) 1 The law reports (Court of Queen's Bench), 389 (1866).

(40) Rex v. Lewis, 22 Cox's criminal law 141, 142 (1909). See Rex v. Richardson and another, 23 Cox's criminal law, 332, 333 (1913).

(41) Thomas Starkie: A treatise on criminal pleading, 1824, p. 352. Turner: Keny's Outlines of criminal law, Cambridge, 1952, p. 500. Wilshere: The elements of criminal law and procedure, 1935, p. 278, 279.

(42) Halsbury's statute of England, second edition, 1948, v. 5, p. 717.

from this act that the legislation requires a real acquittal or conviction to sustain the plea.

We have to emphasize that although the modern English tradition requires a real conviction or acquittal to support the plea of autrefois convict or autrefois acquit, that does not mean at all that it falls under the "res judicata" requirement. It is true that the judgment shall be final because the state is prohibited from appeal, and that — as we shall see — if the judgment was set aside for nullity of proceeding it does not bar another prosecution. But we have to be aware that the doctrine of jeopardy is still governing the plea of autrefois acquit or autrefois convict, and that the room of appeal by the state is closed for that reason. In other words the state has no right to appeal on the basis of the notion of Double jeopardy, and for this reason it will be illogical to base on this rule the conclusion that the judgment will be final, and that its finality (res judicata) is the base of barring a second prosecution. The notion of jeopardy is also clear in what has been held that it was not necessary to support the plea of autrefois convict by the fact that the conviction should have been followed by sentence.[42a]

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RES JUDICATA

We have found that jeopardy attaches the proceedings before the final judgment, and that the American pattern of jeopardy is different from the English position.

The Indian and Japanese Constitution seem, at first glance to apply the Double jeopardy clause, but we have seen that they apply, on the contrary, the Non bis in idem rule which is based on the notion of res judicata.

We shall discuss the Indian, Japanese, German, French, and the United Arab Republic systems in order to ascertain their position towards res judicata, then we have to determine the meaning of finality of judgment which is the essence of res judicata.

(42a) R.V. Sheridan, 30 Cox. Crim. C. (1936)6.

The position in India :

The Indian Constitution lays down in art. 20 (2) that no person shall be prosecuted and punished for the same offence more than once. It was argued whether the word (and) in the phrase "prosecuted and punished" has been used disjunctively or conjunctively. It was said that the word had been used disjunctively in the sense of "or" and therefore, it is sufficient for the application of art. 20 (2) of the Constitution that the accused has only been prosecuted, but not also punished, so far. On the other hand, it was contended that the word had been used in its ordinary conjunctive sense, so that the said provision is not applicable since the accused though prosecuted has not yet been punished. The Himachal Pradesh J.C.'s Court held in this contention [43] the disjunctive interpretation "for otherwise the provision would be inapplicable in cases of acquittals, as it should be, and is under the corresponding provision of sect. 403 (1) of the code. It is, however, not necessary to go into the question, for, in whatever sense the phrase "prosecuted and punished" may have been used, it stands for a process in law one stage of which is *the passing of a judgment.* One result of the judgment may be acquittal... And it is of this acquittal (of Kalawati) in the course of "prosecution" if not "prosecution and punishment", that her learned counsel wants to take the advantage."

It is clear from the above decision that jeopardy cannot attach for mere prosecution, but as the Calcutta High Court held,[44] section 403 of the criminal procedure code which provided the double jeopardy immunity, does not apply unless the accused has been *tried* and convicted or acquitted. As a conclusion, although the Indian Constitution provides the clause of jeopardy it does not refer to the meaning of jeopardy as it has been settled, in general, in the United States, on the ground that there is no such jeopardy when the jury is empaneled and sworn. Under this rule it is easy to find the answer of the question when in a Court of Session or in a High Court [45] the jury is discharged, whether such discharge

(43) Benjit Singh v. State, 1952 Cri. L.J. 1720, 1725. See also the decision of the Supreme Court in Kalawati and another v. The State of Himachal Pradesh, 1953, Cr. L.J. 668 (1953).

(44) Kanai Hizra and others v. Golap. Hizra, 1953 Cr. L.J. 496 (1953).

(45) The Indian Criminal procedure code distniguishes between trial of summons. Cases by magistrates, trial of warrant. Cases by magistrates, summary trials and trial before High Courts and Courts of session. All trials before the High Court shall be by jury (sect. 267), but all trials before a court of session shall be either by jury, or with the aid of assessors (sect. 268).

is jeopardy or not. It was held by a Full Bench of the Bombay High Court [46] and the Calcutta High Court [47] that re-trial after the discharge of jury is not a new trial as contemplated by sect. 403 of the criminal procedure code.[48] But we have to notice that the Indian judge cannot discharge the jury except for the necessity of justice. However, it was held that the inherent power of the judge to discharge a jury is not confined to these cases, but plainly extends to cases of misconduct on the part of the jury and other cases where the judge finds reason for doubting the impartiality of the jury.[49]

The main question in such a problem is the meaning of discharge of jury without necessity of justice in the exercise of the judge's inherent power. Is it considered as an implied acquittal? Does it bar a next trial on the ground that the jeopardy has been realised when the jury has been empaneled and sworn? The answer is no. There is neither an implied acquittal, nor a jeopardy by mere oath of the jury. The Patna High Court decided in such a case that "...in any case it is obvious that even if the order discharging a jury in the exercise of the inherent power of a Sessions Judge were to be unjustified the only relief that the High Court could give would be to order a fresh trial before another jury." [50]

We have to be aware that under section 403 of the criminal procedure code a previous conviction or acquittal is necessary to bar a fresh trial and a previous punishment is not necessary for the purpose. This protection is broader than the protection

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(46) Government of Bombay v. Abdul Wahab, 1948, Cri. L.J. 378 (1945).

(47) Emperor v. Nirmal Kanta Roy, 1914 Cr. L.J. 460 (1914).

(48) A.I.R. Commentaries, 1956 V. 3, sect. 403 No. 7. The Code of criminal procedure provides that the discharge of the jury may be in the following cases: (1) Causes provided in sect. 282 which are: any sufficient cause prevents any juror from attending the trial on any day, or if he absents himself and it is not practicable to enforce his attendence, or if it appears that any juror is unable to understand the language in which the evidence is given or even after its interpretation. In such cases the jury shall be discharged if (a) when the jury originally consisted of nine persons, it falls below seven, or (b) when the jury originally consisted of seven persons it falls below five. (2) Under section 283 when the prisoner becomes incapable of remaining at bar. (3) Under sect. 383 wher, in trials before the High Court, the judge disagrees with the opinion of the majority of the jury.

(49) Bipat Gope v. Emperor (Patna High Court), 38 Cr. L.J. 777 (1936). See A.I.R. Commentaries, V. 2, supra, Sect. 282 No. 2 and other cases cited in this book.

(50) Bipat Gape v. Emperor, supra, p. 78.

provided in sect. 20 (4) of the Constitution. The sub-section shall not be applied except when the person has been *punished* before. Hence, it will not apply where at the previous trial the accused was not sentenced at all but, although convicted, was released on probation of good conduct instead of being sentenced under sect. 562 of the criminal procedure code. In conclusion if action is taken under sect. 562 and the accused, though convicted, is not punished, and there is no question of his being prosecuted and punished twice for the same offence; the fresh prosecution will not be barred under the Constitution, but it shall be barred under section 403 of the criminal procedure code.(51)

Now, we have to determine the meaning of the phrase "remains in force" provided in sect. 403 (1) of the criminal procedure code. It means that the judgment has not been set aside by a Court of Appeal or revision. It has been held that a judgment in favor of the defendant, though consequent on a misdirection or erroneously given on a special verdict, or on an insufficient indictment, so long as it stands unreversed, is a bar to a new indictment.(52) This means that the judgment must be irrevocable, so that it may bar another prosecution for the same offence. This conclusion means that the judgment which shall bar another prosecution must be res judicata.

The position in Japan :

Article 39 of the Japanese Constitution, as we have said holds the protection against double trial and punishment. Although it uses the expression "double jeopardy" it is clear from the Japanese Constitution and code of criminal procedure that the position in Japan is different from the tradition in the United States or England, and that it has been based on the doctrine of Non bis in idem.(53) The main requirement in the application of this rule is the res judicata of judgment, or in other words its finality (art. 337 C. Cr. Pr.). Therefore, we have to give the word "jeopardy" in Japan the meaning of "res judicata". Res judicata — as we shall see — realizes when the judgment or penal order becomes final.

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(51) A.I.R. Commentaries on the Constitution of India, 1954, p. 439.

(52) Sohoni's Commentaries on the Code of criminal procedure, p. 761.

(53) See Professor Dando in his article, supra, 1 Hôso Tikô 38, 47 (1949). Interpreted by Mr. Suzuki, prosecutor in Tokyo.

Moreover, the essence of the notion of jeopardy in the United States is based on trial by jury, and there is no jury in Japanese trials.

The position in Germany, France, and the United Arab Republic:

There is no doubt in these three jurisdictions that they ignore totally the American protection against double jeopardy, and they all acknowledge the principle of Non bis in idem.

There is no problem in Germany, because the constitutional provision (103—3) is quiet clear in holding this rule, and there is no suspicions of confusion between Double jeopardy and Non bis in idem.

Res judicata, as it has been settled, is only realized when the trial is terminated by a final judgment. (See sect. 246 G) of German C. Cr. Pr., art. 568 of French C. Cr. Pr. and art. 454 of Egyptian C. Cr. Pr.). However, Germany, Japan and the United Arab Republic [54] have acknowledged the penal order system as a substitute to the judgment in certain cases. Res judicata does attach the penal order when it becomes final (sect. 410 German C. Cr. Pr., art. 470 Japanese C. Cr. Pr. and 327 (4) Egyptian C. Cr. Pr.). The notion of the penal order is that the judge without public trial imposes the punishment in petty and minor offences. This system has been criticized on the ground that imposing punishment without public trial is similar to taxation not to punishment, and impairs the publicity of the proceedings and lessens the people's confidence in justice.[55] However, it has been noticed that the public welfare requires speed in deciding the cases, and the courts would be crowded by cases if the prosecution submits to them every trifle offence, and that will cause the delay of important trials.[56] Moreover, the law grants the defendant a right of objection (sect. 409 (1) German C. Cr. Pr. and 328 (1) U.A.R. C. Cr. Pr.) or of application for formal trial (art. 465 (1) Japanese C. Cr. Pr.). We have to notice that each of the Egyptian code (by objection) and the Japanese code (by application) authorizes the prosecution a right of formal trial. It is clear

(54) See also Italian code of criminal procedure (art. 506-510) and Turkish code of criminal procedure (art. 386).
(55) Mahmoud Moustafa; Criminal procedure, 1960-61, p. 421.
(56) Mahmoud Moustafa, supra, p. 422.

from the debates of the Egyptian code that the objection of the prosecution is prohibited if the penal order has been issued in accordance to law or to the claim of the prosecution. Moreover, the Egyptian code according to amendment in 1957, authorizes the prosecution the power to issue a penal order in certain misdemeanors (délits) determined by an order of the Minister of Justice, and in the contraventions which are not punished by imprisonment or any complementary punishment under the condition that there is no request of damage or restitution. In such a case the prosecution has no power to inflict a punishment which exceeds a fine of two hundred piasters.

Finality of Judgments :

In general. — The topic of finality of judgments involve many problems. First we have to determine on the definition of final judgment, as a requirement to apply the rule of Non bis in idem. Sometimes the term of finality is used in other situations. We have to determine the meaning of our requirement and choose it between the mass of definitions of similar finality of judgment.

1) *Final judgment in view of the court which rendered it.* — When the court issues a judgment it has no jurisdiction to change or amend it. In other words, the judgment will be final. It has been held that once a sentence is validly and irrevocable made; it cannot thereafter be increased, notwithstanding of whether service of the specified term of imprisonment has begun,(57) and if the prompt correction of an inadvertently pronounced sentence made while the prisoner remained directly in custody of court and on premises of courthouse at the occasion of the original utterance of sentence did not constitute "cruel and unusual punishment". The court held that the oral utterance is an act of judgment but it is not an entirely unalterable one. Other events, as for example, entry of the order of commitments, are required to give it absolute finality. Until they occur, the court retains jurisdiction and power, within recognized limits, which need not be specified here, to make corrections, perhaps even other changes, which may be required by the right administration of justice. The United Arab Republic Supreme Court held that the court has no juris-

(57) Rowlery v. Welch, 114 F. 2d 499 (1940).

diction to try the defendant after it has rendered the judgment, notwithstanding the errors committed in the judgment.(58) The same meaning has been held by the Indian code of criminal procedure which provides in sect. 369 that when a matter has been finally disposed by a coury, the court in the absence of a direct statutory provision, has no power to review, override, alter or interfere with the judgment except for the purpose of correcting clerical errors.(59)

On the contrary, the German code of criminal procedure provides in sect. 306 (2) that if the court or the presiding judge whose decisions are attacked considers the appeal (Beschwerde) to be well-founded, they or he shall grant the relief sought; otherwise the appeal shall be submitted to the appellate court immediately or at most before three days have expired.(60)

Notwithstanding, the importance of this finality definition, it does not represent the meaning of finality as a requirement in res judicata to apply the Non bis in idem rule. However, we have to notice that the judgment becomes final, in the view of its court, even it does not become final in view of Non bis in idem. Yet, the finality in view of the court which has rendered the judgment does not bar a new prosecution except before its jurisdiction, contrary to the finality in view of Non bis in idem which bars the prosecution before all jurisdictions. The essence of the effect of the former finality is the exhaustion of jurisdiction, but in the latter finality it is the termination of the power of the state to prosecute and punish.

2) *Final decision in view of termination of litigation.* — The judgment becomes final if it terminates the particular litigation or definitely puts the case out of courts; otherwise it is interlocutory. In determining whether or not the judgment is final, the American courts have generally applied the mechanical test of looking at the face of the judgment to see if the rights of the parties have been fully determined, that nothing remains to be adjudicated, and that only ministerial acts remain to be

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(58) Except in cases of inadvertent mistakes or interpretation or inadvertent adjudication of some claims. See May 19, 1958, 9 Sup. Ct. 550, March 23, 1959, 10 Sup. Ct. 337.

(59) A.I.R. Commentaries, 1956, sect. 369, No. 1.

(60) In contrary to this case see section 311 (3) of the same code.

done.[61] In other words it has been held that the judgment becomes final when it judges the object of the cause of action and terminates the controversy.[62] It has been held that it is not considered a final judgment a ruling of the court granting a defendant's motion to transfer the case to another division, but that it is merely an interlocutory rule.[63] And it has been held that the order made on the motion to quash the search warrant is interlocutory merely,[64] and in general the order related to the suppression of the evidence is clearly interlocutory and not independently appealable.[65] The Egyptian Supreme Court has held that the order of refusal of collateral exceptions as nullity of an expert's report or a motion to appoint another expert, are not final judgments but merely interlocutory.

We have to notice that the final judgments, in view of the adjudication of litigation, are only the decisions which are considered to be final in view of Non bis in idem.[66]

Such classification of final decisions has no importance in Germany and Japan because they are not considered judgments, but merely orders (according to German law) or rulings (according to Japanese law).

The French [67] and the Egyptian doctrine [68] have settled the distinction between interlocutory (in its strict sense) and preparatory decisions. The difference between the two kinds of decisions does not depend on the content of the decision but on the scope of the court which issued such a decision. If the decision does express the opinion of the court in the case and determines the

(61) Bruce v. Tobin, 245 U.S. 18 (1917); Grays Harbor v. Coats-Fordney Co., 243 U.S. 251 (1917).

(62) Denuppé: La notion particulière de décision définitive en procédure pénale, p. 125 (Stefani: Quelques aspects de l'autonomie du droit pénal, Dalloz, 1956).

(63) Parr v. U.S., 225 F. 2d 329 (1955).

(64) Cogen v. U.S., 278 U.S. 221, 49 Sup. Ct. 118.

(65) U.S. v. Williams, 227 F. 2d 149 (1955); U.S. v. Wallace, 336 U.S. 793. It has been held that a judgment in an independent plenary proceeding for return of property and its suppression as evidence is final and appealable and the scope of relief in such a case may extend for beyond its effect on a pending trial; but a decision on a motion to return or suppress evidence in a pending trial may be no more than a procedure step in a particular case and in such event the effect of the decision would not extend beyond that case.

(66) Derruppé, supra, p. 124, etc.

(67) Derruppé, supra, p. 133, etc.

(68) Mahmoud Moustafa, Criminal procedure, Cairo, 1960-1961, p. 379, 398.

an expert to decide if the documents are false or not such a decision is interlocutory. In such a case the court is restricted by its interlocutory decision and has to base its judgment on its finding. But if it ordered an act to be done to clarify something in the trial, as hearing a witness or annexing a file of a previous case, such a preparatory decision does not restrict the court and it can change its mind about its execution or its finding. However, the distinction between these two kinds of pre-judgment decisions involves a difficulty in determining the best test to distinguish them.(69)

We have to be aware that the decision shall be final if it puts an end to the litigation even if it has been involved at pre-trial, as for elapse of time limitations or autrefois acquit or autrefois convict(70) (according to Non bis in idem) or incompetence.(71) In the case of competence the finality of the decision does not bar the trial before the competent jurisdiction,(72) but it only puts an end to the litigation of competence.

3) *The "finality" in Non bis in idem.* — We have found that Non bis in idem will be applied if the decision acquires res judicata. We have now to show that res judicata does not exist until the judgment becomes final. The question is when the judgment becomes final ? It becomes final when all the remedies are exhausted. The remedies differ according to the legal system. The discussion of these remedies lies beyond our present scope, but what we want to emphasize is that the decision operates res judicata, where all of the rooms of attack are closed. In other words, the decision must be irrevocable. This meaning is what the draft of the American model penal code (1956) provides when it says : (order or judgment for the defendant, which has not been set aside, reversed, or vacated). The phrase means that the decision becomes irrevocable. It is noticed that the draft before this phrase used the word (final) to express the meaning of termination of litigation, which we have discussed before.

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(69) Mahmoud Moustafa, supra, p. 398.

(70) A.L.I. Draft of 1956, p. 50.

(71) Mahmoud Moustafa, supra, p. 398.

(72) December 6, 1948, December 10, 1934, 2 Supt. Ct. Digest of criminal cases, p. 1165.

As the application of Non bis in idem is settled in American civil cases we have to find the application of the notion of "finality" in these cases. It has been held that the doctrine of res judicata is not effective when there has been no final judgment on all issues between the parties,(73) and that when the judgment has been confirmed by the appellate court, or when the time for appeal has expired, the judgment is admissible in evidence as res judicata and to raise an estoppel in bar of the ancien,(74) and that where the time for appeal from a judgment has not expired, the action is still pending although no appeal has been taken therefrom, and the judgment cannot be pleaded in bar to a cause of action involving the same matters alleged in a cross — complaint in another action.(75)

This above rule is considered as a universal requirement to apply the Non bis in idem rule. However, some codes allow an abridgment of the finality of judgments by extraordinary remedies, as re-opening of proceedings in the German code (sect. 359-373a), re-opening and extraordinary appeal in the Japanese code (art. 435-460), and revision in each of Egyptian (art. 441-453) and the French (art. 622-626) code. In these cases, although the judgment acquires res judicata it may be reversed for certain important exceptions. The policy of these exceptions is to reach the end of justice, which is the scope of Non bis in idem rule.

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(73) U.S. — City of Aurora v. West, 74 U.S. 82 (1868); Joseph and Son v Bullard Co., 79 F. 2d 192, cert. denied 296 U.S. 648 (1935); Kannel v. Kennedy, 94 F. 2d 487 (1938); Speed Products Co. v. Tinnerman Products, 222 F. 2d 610 (1955); Ramirez-Pabon v. Board of Personnel of Puert Rico, 254 F. 2d 1. (1958); U.S. v. 70.39 Acres of Land in San Diego Country, Cal. 164 F. Supp. 451.

Cal. — Pillsubury v. Superior Court, 8 Cal. 2d 469 (1937); Enterprise, Inc. v. Van Winkle, 39 Cal. 2d 210 (1952).

Mo. — Longmeyer v. Payne, 205 S.W. 2d 263 (1947).

N.Y. — Neivel Realty Corporation v. Prudence Bonds Corp., 271 N.Y.S. 209, 151 Misc. 737 (1937); Smith v. Kirkpatrick, 111 N.E. 2d 259, 305 N.Y. 66 (1952).

(74) U.S. — Inre Putnam, 111 F. Supp. 312 (1953); Pelham Co. v. Carney, 27 F. Supp. 388, affirmed 111 F. 2d 944 (1939).

Cal. — People v. Bank of San Luis, 159 Cal. 65 (1910).

Mo. — Adams v. St. Louis-San Francosco Co., 326 Mo. 1006 (1931).

N.Y. — Skinner v. Fourth Church, 264 N.Y.S. 812 (1933).

(75) Brown v. Campbell, 100 Cal. 635 (1893).
Adams v. St. Louis Co., 326 Mo. 1006 (1931).

Acts of examining and accusing authorities:

In general. — We have discussed the question when each of jeopardy and res judicata attaches. It remains an important issue about the effect of the acts of the examining and accusing authorities, whether res judicata or jeopardy may attach any of them.

Anglo-American doctrine. — It has been held in England that mere liberation on non suit of an accused is not equivalent to acquittal, and since the accused has not been placed in jeopardy at the hands of the jury, which alone could declare his guilt or innocence, he cannot plead autrefois acquit if the Crown should choose to indict him again for the same offence.(76)

In the United States it has been held that the pendency or failure of preliminary proceedings on one complaint is not a bar to a second complaint for the same offence.(77) The Supreme Court of the United States held that the discharge in habeas corpus based on mere irregularities in extradition proceedings does not operate as res judicata against a new proceeding for the same offence.(78) It is established that the action of the examining court is no bar to the right of the grand jury to inquire into the case and indict the accused even though he has been discharged on the preliminary examination.(79) Some courts, however, held that the statute does not permit informations to be filed where the defendant has been discharged on his preliminary examination, and as the law never sanctioned putting anyone on trial until probable cause has been made to appear, the examination becomes of no account if the prosecuting attorney can assume the right to file an information without this security.(80) The American law institute provides in the model code of criminal

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(76) R.V. Tremblay, 95 Can. Crim. 385 (1949), 14 English Imp. Digest 381.

(77) Orfield: Criminal procedure from arrest to appeal, 1947, 93. People v. Dillon, 197 N.Y. 254, 90 N.E. 820 (1910); State v. Britchett, 219 Mo. 690. Collins, v. Loisel, 262 U.S 426 (1923).

(78) It has been said that a judgment in habeas corpus proceedings discharging a prisoner held for preliminary examination may operate as "res judicata", But the judgment is "res judicata" only that he was at the time illegally in custody, and of the issued of law and fact necessarily involved in that result. (Collins v. Loisel, supra, p. 430).

(79) State v. Gieseke, 209 Mo. 331, 339, 108 S.W. 525 (1907).

(80) Mornissey v People, 11 Misch. 327, 341 (1863), People v. Evans, 72 Misc 367.

procedure (sect. 116) that, if upon the preliminary examination the defendant is discharged, an information may be filed against him only by leave of the court.

It is another question whether or not a grand jury may indict after an earlier failure to do so. Blackstone recognized resubmission to a new grand jury.(81) There is a tendency in the English cases to extend the doctrine to allow the re-submission at the same session.(82) Some courts held that if the grand jury at the assizes or sessions have ignored a bill, they cannot find another bill against the same person for the same offence at the same assizes or sessions, and if such other bill be sent before them, they should take no notice of it.(83) The federal courts allow complete freedom in re-submission, stating that the power and duty of the grand jury to investigate is original and complete. and is not therefore dependent for its exertion upon the approval or disapproval of the court; that this power is continuous and is therefore not exhausted or limited by adverse action taken, by a grand jury or by its failure to act, and hence may thereafter be exerted as to the same instances by the same or a subsequent grand jury.(84) Some courts held that such re-submission must be subject to approval by the court.(85) A distinction is made in some of the cases between the re-submission to a grand jury for reconsideration of the same bill of indictment which it has once rejected and the submission to them of a new bill for the same offence.(86) It was held that the former bill can only be submitted by the prosecuting attorney without order of court, but the sub-

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(81) 4 Blackstone 305 (1854).

(82) Regina v. Newton, 2 M. and Rob. 503, 175 Eng. Repr. 363 (1843).

(83) In Reg. v. Humphrey Car and M. 601, 174 Eng. Reprint 653 (1842); Reg. v. Austin, 4 Cox Cr. C., 385 (1850).

(84) U.S. v. Thompson, 251 U.S. 407, 40 S. Ct. 289 (1920); U.S. v. Bonavia, 41 F. 2d 366 (1930).

(85) People v. Neidhart, 35 Misc. 191, 71 N.Y. Supp. 591. (1901); People v. Dillon, 197 N.Y. 254, 90 N.E. 820 (1910); People v. Both, 118 Misc. 414, 193 N.Y. Supp. 591 (1922); People ex.rel. Flinn. v. Barr, 140 Misc. 422, 251 N.Y.S. 116 (1931). Section 270 of N.Y. Code of criminal procedure provides that the dismissal of the charge, whethen it be a felony or misdemeanor, does not, however, prevent its being again submitted to a grand jury or its being prosecuted in a court of special sessions, police court or city court, having jurisdiction to try and determine such charge, if the county judge of the county or justice of the supreme court so directs. But without such direction, it cannot be again submitted or further prosecuted. See section 28.966 of Michigan statutes annotated about failure of the grand jury to indict accused persons actually held in jail.

(86) Ronald Anderson: Wharton's Criminal law and procedure, 1957, V. 4, 1734.

mission of a new bill by the prosecuting attorney rests upon an order of the court.(87)

There is another question concerning an indictment or information which has been dismissed by the prosecuting attorney as susceptible of reinstatement.(88)

It is a general rule that a nolle prosequi, dismissal or discontinuance entered before the accused is placed on trial, for example, before he is called on to plead, or before the jury are empaneled and sworn, is not equivalent to an acquittal and does not bar a subsequent prosecution for the same offence.(89) The application of this general rule is affected in some jurisdictions according to whether the offence charged is a felony or a misdemeanor, as where statutes provide that a judgment of dismissal shall bar a second prosecution if the offence is only a misdemeanor, but not if it is a felony.(90) But it would seem that the entry of a nolle prosequi would terminate the particular indictment or information if made a matter of record.(91)

However, some courts have demanded for the re-submission a new evidence to justify such re-submission (92) and it has been held that the court should not grant permission to re-submit unless there is new evidence or if the first grand jury hearing has been defective or incomplete because of fraud, mistake, ignorance or negligence.(93) According to this view the dismission of prosecution acquires a provisionary quasi-jeopardy because it cannot be upheld except after a new evidence is submitted.

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(87) Com. v. Stoner, 70 Pa. Super 365, affd. 265 Pa. 139.

(88) 18 A.L.R. 386; 31 Michigan L. Rev. 1160; Wharton's Crim. law and proc., supra 1737; Orfield, supra, 176.

(89) Wharton's crminal law and procedure, supra, 1738. State v. Fleming, 7 Humph. 154; State v. Veterans of Foreign Wars, 223 Iowa 1146; State v. Peterson, 61 Minn. 73.

(90) Under California penal code (sect. 1387) dismissal of misdemeanor complaint bars to further prosecution unless order is explicitly made for the purpose of amending pleading, further prosecution is not barred where felony complaint was filed before motion to dismiss was made. Where the former information charged a misdemeanor, dismissal on motion of the prosecution is not an acquittal, and so does not bar prosecution for a felony. (People v. Brown, 42 Cal. App. 462; People v. Hinshaw, 194 Cal. 1, People v. Godlewski, 22 Cal. 2d 677· People v. Mithman, Cal. App. 2d 490, cert. denied 347 U.S. 991. See People v. Schmetterer, 50 N.Y.S. 2d 297.

(91) See 112 A.L.R. 386.

(92) State v. Branch, 68 N.C. 186 (1873); Richards v. State, 22 Neb. 145, 34 N.W. 346 (1887); State v. Harris, 91 N.C. 656 (1884).

(93) People v. Neidhart, 35 Misc. 191, 71 N.Y.S. 591 (1901); People v. Dziegiel 140 Misc. 145, 250 N.Y.S. 743.

Indian law. — There is a conflict of decisions where a complaint is dismissed or an accused is discharged by one magistrate, as to whether another magistrate of co-ordinate or inferior jurisdiction can start a fresh prosecution against the accused for the same offence. It has been held by the High Courts of Bombay,(94) Madras,(95) Rangoon,(96) Nagpur,(97) Punjab (98) and by the judicial commissioner's court of Peshawar (99) that a fresh prosecution can be started by such magistrate. A contrary view is held by the High Courts of Allahabad (100) and by the judicial commissioner's court of Sind (101) on the ground that it would be contrary to principle to allow one magistrate to displace the orders of another magistrate of equal rank and powers. It has also been held by a Full Bench of the Sind Judicial Commissioner's Court that where a complaint has been dismissed for default, there is no bar to the entertainment of a fresh complaint by the same magistrate or by his successor in office or by some other magistrate of co-ordinate jurisdiction.(102)

German law. — We have to distinguish between three cases :

(First) If the investigation does not indicate sufficient reasons for preferring public charges, the prosecution discontinues the proceeding (sect. 170 (2). In this case the Supreme Court (in the old system) held that a proceeding which is discontinued by the prosecution may be reopened any time even under the same circumstances, and even if no new evidence is discovered.(103)

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(94) In re Mahdeu Laxman, 26 Crim. L.J. 991 (1924). In that case the Bombay High Court held that an order of discharge does not operate as an acquittal and leaves the matter at large for all purposes of judicial enquiry.

(95) In re Innuswami case, Madras High Court; 33 Crim. L.J. 454 (1931).

(96) Usein v. Umungfyi case, 35 Crim. L.J. 802 (1933).

(97) Namdeo v. Emperor, 46 Crim. L.J. 327 (1943).

(98) Emperor v. Kiru, 12 Crim. L.J. 364 (1910).

(99) Khanimullah v. Emperor, 48 Crim. L.J. 750 (1947).

(100) Ranamand v. Sheri, 35 Crim. L.J. 1082 (19...).

(101) Raulat v. Emperor, 41 Crim. L.J. 248 (1939).

(102) Nathu v. Jagannath, 40 Crim. L.J. 745 (1940).

(103) V. 67, p. 316.

(Second) If the person requesting prosecution is identical with the injured party he is entitled to take recourse from the decision of discontinuing the prosecution to the superior prosecution official (sect. 172 (1), and if the superior prosecution official rejects the recourse the person requesting prosecution may move for a judicial decision (sect. 172 (2). The motion for a judicial decision shall be filed with the court competent to decide the case (sect. 172 (2). If the motion of judicial decision has been dismissed, public charges *may only be preferred on the basis of new facts or evidence.* (Sect. 174 (2).

(Third) Section 203 provides that the court orders opening of the main proceeding if the person charged, according to the result of the judicial examination,[104] or if such has not taken place, according to the result of the preparatory proceeding, appears reasonably suspected of having committed a punishable act. Section 204 authorizes the court not to open the main proceeding, whether a judicial examination has taken place or not. If a judicial examination has taken place, it shall be ordered that the prosecution of the person charged will be discontinued. Section 211 provides that the charges may be renewed only on the basis of new facts or evidence, if opening of the main proceedings was refused by a ruling no longer subject to review.[105] It is clear from that section that the prosecution after the decision of refusal to open the main proceeding — whether a judicial examination has taken place or not — cannot be reopened except on the basis of new facts or evidence.

In conclusion, we see how a court's judicial decision of dismissing the motion of the injured party requesting prosecution, or of refusing to open the main proceeding, has a provisionary quasi-res judicata, because the prosecution cannot be resumed in such a case except on the basis of new facts or evidence. But the decision of the prosecution upon investigations to discontinue the proceeding charges has no such quasi-res judicata, and the prosecution may be reopened without any limit.

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(104) The prosecution is entitled to file a motion to open a judicial examination if it presents substantial grounds on the basis of which such judicial examination appears necessary (sect. 178 (3). The motion may be refused only on the ground that the court is not competent, or that the criminal prosecution or the judicial examination is not permitted, or because the offense specified in the motion does not fall under a criminal statute (art. 180 (1).

(105) Section 210 provides that the prosecution may take an immediate recourse from the ruling whereby opening of the main proceedings was refused or, despite the prosecution's motion, transmittal to a court of a lower category was ordered.

Japanese law. — The rule is that the decision of the prosecution to drop the charge does not preclude him to renew the prosecution upon the same facts and evidence.(106) Article 340 provides that when a ruling dismissing prosecution as a result of its withdrawal, becomes final, new prosecution may be instituted for the same offence only when it is based upon a newly discovered material evidence. It is clear that in this case the decision of dismissing prosecution has a provisionary quasi-res judicata, because it bars a new prosecution for the same offence except upon a newly discovered material evidence. Upon a contrary interpretation, this exception emphasizes the general rule which we have held.

Professor Dando has commented on article 340 of the Japanese criminal procedure code, stating that although it is not unconstitutional it is improper and violates the spirit of the Constitution. However, he said that he had some doubt about its constitutionality, but he did not make any definite proposition. The ground of his view is that such an article (340) puts the defendant in unsafe position by endangering him to another prosecution after the first one has been dismissed and its dismissal became final.(107)

We agree with Professor Dando about the constitutionality of such a provision, but we base our doubt on another ground. Our ground is based on the decision which declares the dismissal of the prosecution. It is a judgment and not merely an act issued by the prosecution. There is no such doubt at all in the latter case, because according to the constitutional protection, Non bis in idem rule presumes a previous final judgment and not a mere act of proceeding. However, in our opinion the issue of constitutionality of such a provision is not quite strong, because the protection embodied in the Constitution only covers previous acquittal and punishment, and dismissal of prosecution is not acquittal. Professor Dando himself has interpreted the word acquitted to cover the meaning of "not guilty" and other kinds of acquittal provided in article 337 of the criminal procedure code, and nothing more.

French law. — If the examining judge (juge d'instruction) finds that the committed facts do not constitute an offense, or

(106) The High Court of Japan (in old system), May 7, 1927, 6 High Court Criminal report, 174.

(107) His article in 1 Hôrô Tikô 50 (1949), interpreted to me by Mr. Suzuki.

that the offender is unknown, or that there are no charges enough to justify prosecution, he shall close the examination by an order of not to prosecute (ordonnance de non-lieu) (art. 177).[108] If the judge finds that the facts constitute an offence, he renders an order to transfer the case to trial (ordonnance de renvoi).[109] The indicting chamber (chambre d'accusation) of the court of appeal has an exclusive jurisdiction to order the trial of felonies.[110] It may issue "un arrêt de non-lieu", which is substantially the same as the "ordonnance de non-lieu" of the examining judge (art. 212). It can transfer the case to trial by "un arrêt de renvoi" to a court of first instance (for a misdemeanor) or a police court (for a minor offence) (art. 213). It orders a decree of indictment (arrêt de mise en accusation) if the facts are sufficient to constitute a felony, transfering the case to the assize court for trial (art. 214). It is settled that the order of transfer to trial (ordonnance de renvoi) does not restrict the trial court by the juridical qualification given to the facts, neither in view of the examining judge nor in view of the indicting chamber.[111] But the order of not to prosecute (ordonnance de non-lieu) acquires a provisionary quasi-res judicata if it is not attacked by appeal or if its appeal is dismissed. The effect of such quasi-res judicata is that it is forbidden to renew the action before the examining judge or the indicting chamber,[112] except after finding new charges against the defendant (art. 188). Therefore, the quasi-res judicata of

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(108) Appeals may be taken against that order before the indicting chamber (chambre d'accusation) by the prosecutor (art. 185) or the civil party (art. 186). It is noticed that the prosecutor may appeal from any order of the judge, and the civil party may also appeal from orders refusing to investigate, and other orders which he can show its prejudice to his civil interests. The accused may appeal orders assuming jurisdiction, permitting civil claims to be filed, allowing extended preventive detention, or refusing provisional release (bail) (art. 186, 141, 139 and 87).

(109) If the offence charged is a petty (offense (contravention) the action shall be transferred to a police court (le tribunal de police) for trial (art. 178). If it is misdemeanor (délit), it shall be transferred for trial to the court of first instance called (le tribunal correctionel) (art. 179). If a felony is involved, the action shall be transferred to the indicting chamber (art. 181).

(110) The chamber may decide that further examination if it is necessary before the action can be transferred to trial (art. 201), by an order called "arrêt de plus ample informé" committing the action to one of its members or to an examining judge delegated for this purpose (art. 205).

(111) Crim. Jan. 4, 1924, Sirey 24-1-238; March 28, 1924, Sirey 25-1-1330; Crim. dec. 10, 1943, Dalloz Alph. 1944, 38. Donnedieu De Vabres, Criminal law. 1947, 882. Ganaud: Instruction criminelle, 1929, V. 6, 200,. 201.

(112) Crim. July 24, 1874 Sirey 75-1-43; April 3, 1909, Sirey 1912-1-566; Feb. 21, 1920, Sirey 21-1-231; June 23, 1949, Dalloz 1949, Semm. 41; July 13, 1950, Dalloz 1950, 685.

these orders is quite different from res judicata of the judgments. The former is provisionary contrary to the altter which is decisive. Moreover, even the French doctrine and jurisprudence [113] have held the effect of res judicata of the penal decision before civil courts, they have settled that the decisions of the examining jurisdiction have no quasi-res judicata before the civil courts.[114] Some courts found the reason of this exception in the provisionary effect of such decisions, the others based it on its preparatory nature.[115]

United Arab Republic law. — The general rule in the Egyptian criminal procedure code is that the prosecution cumulates the powers of prosecution and examining the case (art. 199), except in some few cases in which an examining judge may be delegated for the purpose of examination (art. 64, 65).[116] The Egyptian doctrine has well distinguished between the decision of the prosecution not to prosecute, before the preliminary examination, and the same decision after this examination. In the former case, when the prosecution's decision not to prosecute is rendered upon the mere information of the police or the judicial officers, such decision does not acquire any provisionary quasi-res judicata, because it does not restrict the prosecution in any way if it changed its mind and decided to prosecute the defendant, even without new evidence. As the Egyptian Supreme Court held, this kind of decision has an administrative nature because the prosecution renders it as an administrative agency not as a judicial organ. But in the latter case, if the decision of not to prosecute has been rendered after it or if the examining judge (in the few certain exceptions) has made the preliminary examination, its decision has a provisionary quasi-res judicata, and shall not be dropped except upon a newly discovered evidence before the prescription of the criminal action. This decision, if it is rendered by the prosecution is considered a judicial act, because it exercises such a judicial function as representative of the exam-

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(113, 114) Bouzat: Traité théorique et pratique de droit pénal (1951), p. 955. Lacoste, De la chose jugée en matière criminelle disciplinaire et administrative, 1914, 487. Cass. March 31, 1885, Sirey 1885-1-296; Orléans, November 1888, Sirey 1890-2-91; Cass. July 30, 1934 Gaz. Pol. 1934-1-2 542. Cass. Dec. 11, 1907, Dalloz 1958, Somm. 53.

(115) Derrupé: La notion particulière de décision définitive en procédure pénale, Quelques aspects de l'autonomie du droit pénal, 1956, p. 144.

(116) Before the legislative act No. 303, 1952, the judicial preliminary examination was in the competence of the examining judge alone.

ining judge who is originally competent wwith the preliminary examination, as prescribed in the original Egyptian code before its amendment in 1953, and in the French law.

The indicting chamber (chambre d'accusation) has a power to decide not to prosecute, and its decision, as in the French law, has a provisionary quasi-res judicata (act. 197).

The Egyptian code of criminal procedure grants the attorney general a power to repeal the judicial order of not to prosecute, during three months beginning from the date of the order, except if the indicting chamber upon the appeal of the victim or the injured party [117] confirmed such an order (art. 211).

As in France, it is settled in Egypt that the order of transfering the case to trial does not restrict the power of the trial court to change the juridical qualification of the act, or its appreciation of the evidence against the defendant.[118]

In Syria the general rule is similar to the French system, the examining judge — alone — has the power of making the preliminary examination.[119] The prosecution has no such power except in a few limited exceptions.[120] It is settled in Syria that the order of not to prosecute, issued by the examining judge, or the judge competent to transfer the case to trial (juge de renvoi), has a provisionary quasi-res judicata because it cannot be dropped except after discovering new evidence.[121] Also in Syria the decision of transfering the case to the court has no effect on the trial court.[122]

We have to notice here that the French doctrine of non quasi-res judicata of the judicial order of not to prosecute before the civil courts, has been applied in the two provinces of the United Arab Republic (Egypt [123] and Syria [124]), although it is settled — as in France — that the criminal judgments have res judicata

(117) Art. 162.

(118) April 8, 1935, 2 Crim. Ct. Digest 1202 No. 7; Feb. 10, 1936, 2 Crim. Supt. Ct. Digest 1202 No. 8; Feb. 9, 1942, 2 Crim. Supt. Ct. Digest 1202 No. 9, December 15, 1952, 2 Crim. Supt. Ct. Digest 1203 No. 18; May 17, 1955, 2 Crim. Sup. Ct. Digest 1204 No. 21.

(119) Howmad, Criminal procedure, 1957, 453.

(120) Art. 54 (1).

(121) Howmad, supra, 834, 836.

(122) Howmad, supra, 837.

(123) Mahmoud Moustafa, Criminal procedure, 1957, 155. October, 27, 1949, 30 Mohama 484 (a decision of the civil chamber of Supreme Court).

(124) Howmad, supra, 847.

before civil courts. This conclusion is clear from article 456 of the Egyptian code of criminal procedure and article 406 of the Egyptian civil code which provides that only criminal *judgment* restricts the civil judge.(125)

It is clear that the provisionary quasi-nature of res judicata of such orders is the true obstacle to grant them the same authority as cimiinal judgments.(126)

Conclusion :

We have seen that the judicial orders of not to prosecute have a provisionary quasi-res judicata in Germany, France and the United Arab Republic, with some different details. In Japan there is no provisionary quasi-res judicata except for the ruling of dismissal of prosecution as a result of its withdrawal (art. 340).

Section 2

JEOPARDY, RES JUDICATA AND FOREIGN PROSECUTIONS

In general. — It is an important issue to determine the effect of first trial, if the case involves two successive trials under different sovereignties for the same offence.

The common law regards a crime not only as "local" but as a breach of the sovereign's peace. But in earlier Roman law a crime is not considered as a breach of the sovereign's peace, but as a breach of the offender's absolute duty.(127) Therefore, the continental countries accepted easily the theory of jurisdiction based upon the social danger involved in the conduct, whereas the common law, which stressed the locus of the act, found difficulty in preventing double jurisdiction in cases where the crime breached the peace of two or more sovereignties.(128)

England. — In England it was held that a judgment of a foreign court of competent jurisdiction is apparently universally respected as a final conclusion of the matter. The leading Eng-

(125) Even there is no provision in Syria, it has been considered as a settled rule. (Howmad, supra, 847; June 8, 1953 (Supreme Court).

(126) See the critic of Dr. Gahli in his thesis of the force of criminal judgment before the civil court, 1960, 1929.

(127) Grant: The Lanza rule of successive prosecutions, 32 Columbia L. Rev. 1309, 1316.

(128) Grant: supra, p. 1317.

lish case is R.V. Hutchinson,[129] in which Hutchinson had killed one Colson in Portugal, and was acquitted there, and when subsequently indicted for the same act in England, he pleaded autrefois acquit. It was held that as he had been already acquitted of the charge by the law of Portugal, he could not be tried again for it in England.

United States. — The same question has arisen in the United States. It involves the authority of federal judgment before the state courts and vice versa, the authority of state judgment before the other states courts and the authority of the foreign country's judgment before state or federal courts.

1) *Federal and state trials.* — In Houston v. Moore (1820)[130] the Supreme Court of the United States held that it was "incapable" of comprehending how two distinct wills (Federal and states) could at the same time be exercised in relation to the same subject. But in United States v. Lanza (1922)[131] the Supreme Court held a different principle. It held that an act denounced as a crime by both national and state sovereignties is an offence against the peace and dignity of both, and may be punished by each, and that the Double jeopardy forbidden is a second prosecution under authority of the Federal government after a first trial for the same offence under the same authority.

The Lanza principle has been accepted without question in subsequent decisions of the Supreme Court,[132] and it has been considered in the courts of appeals to have established the general principle that a federal prosecution is not barred by a prior state prosecution of the same person for the same offences. Recently in March 1959, the Supreme Court has stressed the same principle in two cases[133] involving the same issue. The Supreme Court held in Abbate v. United States, in which after the defen-

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(129) 3 Keb. 785 (1677). See R. Thomas, 83 Eng. Rep. 326, 1172 (1662); R.U. Roche, 168 Eng. Rep. 169 (1775).

(130) 18 U.S. 1 (1820). The Supreme Court considered the same question in three cases between 1847 and 1852 (Fox v. Ohio, 46 U.S. 410 (1847); U.S. v. Marigold, 9 How. 650; Moore v. Illinois, 14 How. 13. The reasoning of the Court in these three cases was subsequently accepted by many decisions. (See the citation in Abbate v. U.S., 359 U.S. 187, 193 (1959).

(131) 260 U.S. 377, 43 Sup. 141 (1922).

(132) Citation in Abbat v. U.S., supra, p. 194.

(133) Abbate v. U.S., 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959); rehearing denied 360 U.S. 907 (1959).

dant was sentenced by the state court he was again tried in Federal court, that: "...if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecution bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered... But no one would suggest that, in order to maintain the effectivness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on acts which might also violate federal law. This would bring about a marked change in the distribution of powers to administer criminal justice, for the states under our federal system have the principal responsibility for defining and prosecuting crimes." (134) The same principle has been held recently in Bartkus v. Illinois, in which after the defendant was acquitted in a federal court he was again tried in a state court. The Supreme Court based its decision on: First, immunity from double prosecution for the same acts is not one of those immunities set out in the first eight amendments that have become valid against the states through the enactment of the Fourteenth Amendment. Second, the case comes under the "two sovereignties rules" that, as between federal and state governments, trial under the laws of one is no bar to an indictment of the same person for the same acts by the other.(135) Mr. Justice Frankfurter who delivered the opinion in Bartkus case, cited the decisions of twenty-seven states, which refused to rule that the second prosecution was or would be barred.(136)

It is clear that the dual sovereignty concept adopted in the Lanza case and stressed in subsequent decisions, is based on the practical necessity of permitting the state and federal governments to enforce laws which they enact in their respective fields of operation. But this rule has been severely criticized (137) as follows:

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(134) Note of John Bryant; 45 Cornell Law Quarterly 574 (1960).

(135) Note of William Bertlesman; 28 University of Cincinnati L. Rev. 518 (1959). The Supreme Court applied the doctrine of Palko v. Connecticut, 302 U.S. 319 (1937), that to be applied to the states an immunity mentioned in the first eight amendments must be one of those that "have been found to be implicit in the concept of ordered liberty."

(136) The rule that Federal trial does not bar state trial in the same offence has been held in Missouri (Exparte January, 246 S.W. 241, 295 Mo. 653 (1922); State of Inf. of McKittrick v. Graves, 144 S.W. 2d 91, 346 Mo. 990 (1940).

(137) See Grant: Successive prosecutions by state and nation, 4 U.C. L.A.I. (1956).

1) It is unsound to maintain that a state and the Nation can be considered two wholly separate sovereignties for the purpose of ollowing them both to do what, generally neither can do seraparately. If it has been recognized that most free countries have accepted a prior conviction elsewhere as a bar to a second trial in their jurisdictions, how can we conceive that the States are more distinct from the federal government than are foreign nations from each other.(138)

2) The Bill of Right's safeguard against Double jeopardy was intended to establish a broad national policy against federal courts trying or punishing a man a second time after acquittal or conviction in any court.

3) Double prosecution has produced irritation and feelings of injustice beyond any good they have accomplished.

4) It is at odds with civil law, international law, and common law, and results from a misapplication of the common law idea of crime as a violation of the sovereign's peace.

5) It is a means of evading the constitutionnal guarantees against illegal searches and seizures and compulsory self-incrimination. Such immunities in federal sovereignty may be evaded if the facts could be the basis of a prosecution in another sovereignty which denies any of these immunities.(139)

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(138) Mr. Justice McLean wrote his dissenting opinion in Fox case (Fox v. Ohio, 46 U.S. 410 (1847), as follows: "To punish the same act by the two governments would violate, not only the common principles of humanity, but would be repugnant to the nature of both governments. There is no principle better established by the common law, none more fully recognized in the federal and state constitutions, than that an individual shall not be put in jeopardy twice for the same offence. This is true, applies to the respective governments; but its spirit applies with equal force against a double punishment, for the same act, by a state and the federal government." See note in 28 University of Cincinnati L. Rev. 518 (1959); 17 St. John's L. Rev. 131 (1943); 32 Colum. L. Rev. 1309 (1932); 12 Cornell L.Q. 212 (1927); 7 B.U. L. Rev. 57 (1927); 8 Va L. Reg. 740 (1923); 23 Colum. L. Rev. 395 (1923). Note in Tennessee L. Rev. 27: 412 (1960). Dissenting opinion in Abbate cases, supra, p. 251, and in

(139) See Grant, Self-Incrimination in the modern American law, 5 Temp. L.Q. 368 (1931).
Bartkus case, supra, p. 150.

2) *Inter-States trials.* — As a general rule, in application of the opinions which we have discussed above, it is settled that where a person is acquitted or convicted in one state it is not a bar to a prosecution in another state.(140)

Following this principle, may a person be prosecuted under both municipal ordinance and state law for the same act ? Some courts held that the act constitutes two distinct offences against separate jurisdictions.(141) The Supreme Court of Missouri earlier held that a party could not be prosecuted for an act under the state law after he had been punished for the same act by the municipal corporation, "for a power in the state to punish, after a punishment has been inflicted by the corporate authorities, could only find a support in the assumption that all the proceedings on the part of the corporation were nulle and void."(142) However, the Missouri Court now holds that a conviction under a city ordinance is not a bar to a prosecution for the same act based on a state statute. The basis of its conclusion is its regard to the prosecution under the ordinance as a mere civil proceeding.(143) In California (144) it has been held that if the defendant was tried and convicted or acquitted under the municipal ordinance, he could not be again tried for the same offence under the general law. It is said that the California experience demonstrates that a system of municipal corporations with extensive legislative powers and authority to impose severe penalties can be integrated into the state's legal system without sacrificing the immunity from a second jeopardy for the same offence.(145)

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(140) Strabhar v. State, 55 F. La. 167 (1908); Phillips v. People, 55 Ill. 429 (1876); Bloomer v. State, 48 Md. 521 (1878); Commonwealth v. Andrews, 2 Mass. 13 (1806); Marshall v. State, 6 Neb. 120 (1877).

(141) Sutton v. City of Washington, 4 Ga. App. 30 (1908); State v. Cole, 118 Wash. 511 (1922); Gilhooley v. Vaughn, 92 Fla. 943 (1926).

(142) State v. Simonds, 3 Mo. 414 (1834); State v. Cowan, 29 Mo. 330 (1860); State v. Thronton, 37 Mo. 360 (1866).

(143) City of Kansas v. Clark, 68 Mo. 588 (1878); State v. Muir, 164 Mo. 610 (1901); State v. Jackson, 220 S.W. 2d 779 (1949); State v. Garner, 226 S.W. 2d 604 (1950); City of Webster v. Quick, 319 S.W. 2d 543; City of St. Louis v. Mueller, 313 S.W. 2d 189. The Supreme Court of Michigan has held that where a municipal ordinance and state law are merely auxiliary or cumulative and cover the same offense, "prosecution may be instituted under either law, and the court that first acquires jurisdiction over the person of the accused has exclusive jurisdiction to hear, try and determine the case; and a conviction for an offense which is the same in both laws will be a bar to a prosecution for the same offense under the other laws." People v. Hanrahan, 75 Mich. 611, 620, 42 N.W. 1124, 1127 (1889).

(144) In re Sic, 73 Cal. 142 (1887); Exparte Christensen, 85 Cal. 208 (1890); Exparte Taylor, 87 Cal. 91 (1890).

(145) See a good discussion in "Penal ordinances in California" by J.A.C. Grant, 24 Cal. L. Rev. 123-154 (1936).

3) *The United States and foreign countries.* — There is no doubt that the Lanza rule extends to the judgments issued by courts of foreign countries, according to the same policy. The court of general sessions in New York (146) held that where an Italian committed murder and assault in New York, and was tried and convicted in an Italian court of the crime committed in New York, pursuant to Italian law which makes it a crime for an Italian subject to commit certain crimes in foreign lands against the laws of the country where he resided, and on his return to New York after his release from Italian prison, was indicted for the committed crimes, he could not plead his conviction in the Italian court as a bar, in the absence of specific treaty binding the New York courts.

However, it was held in application of California penal code (sect. 793) that where a naturalized American citizen whose naturalization was not recognized by his native Greece was accused of murder in California and fled to Greece to escape, was tried in Greece and there sentenced for manslaughter, and on his return to California after having served his sentence was arraigned for the original crime, he could plead his judgment and sentence in the Greek court as a bar.(147)

Juridical propositions :

Dean Grant wrote in his article "Successive prosecutions by state and nation,(148) that if the Congress is not willing to trust the states, it can vest exclusive jurisdiction over any given line of conduct in its own courts, or allow state prosecutions to be brought only with the consent of the United States District Attorney or any other named official. If it permits concurrent jurisdiction to remain with the sattes, it should be bound by the consequences of its choice. If the defendant has been in jeopardy under

(146) People v. Papaccio, 251 N.Y.S. 717 (1931).

(147) Coumas v. Superior Court, 31 Cal. 2d 682 (1948).

(148) 4 U.C. L.A.I, 37 (1956). Furthermore, it has been suggested to prevent consecutive trials by the state and federal governments for the same act, to analyse the social interests affected by the offences against the two sovereignties (Kirckheimer: The Act, the offence and Double jeopardy, 58 Yale L.J. 513, 523 (1919). If the interests were the same, prosecution by one sovereignty would bar the other; if the interests sought to be protected were different, there might be separate prosecutions by each sovereignty. This suggestion does not solve the problem, but adds to it the difficulty of stating and defining the interests protected (45 Cornell L. Rev. 579).

a valid state law, it is submitted that the Fifth Amendment, properly construed, forbids that he again be placed in jeopardy for the same offence under a national law. And once he has been in jeopardy under the national law, no jurisdiction remains to be left with the states.

In fact legislative act is the decisive solution to such a problem.(149) In New York statutes (sect. 139 of criminal procedure code and article 33 of penal code) it is provided that when the offence is within the jurisdiction of another state, territory or country, as well as within the jurisdiction of New York state, a conviction or acquittal thereof in the former is a bar to a prosecution or indictment therefore in New York. In application of this provision it is settled that where some act constitutes crime against laws of the United States and of a state, conviction or acquittal under federal law in federal court constitutes bar in New York courts.(150) However, we have seen how the court of general sessions in New York refused to hold that an Italian judgment bars another prosecution in New York for the same offence.

Sections 656 and 793 of California penal code holds the same principle.(151) In People v. Candellria,(152) section 656 was applied to bar prosecution for robbing a federally insured bank when the defendant proved a prior conviction for robbery in the federal courts.

We have to notice that the foreign judgment does not bar state prosecution in the above cases except if the offence is the same in the two prosecutions.(153)

Model penal code :

Section 15 of the draft of the model penal code (1935) provides that a conviction unrevised, or an acquittal of a person on the

(149) See a collection of statutes which provided this solution in the comment on sect. 1.11 of the draft of model penal code (1956).

(150) People v. Parker, 25 N.Y.S. 2d 247, 175 Misc. 776 (1941); People v. Eklop, 41 N.Y.S. 2d 557, 179 Misc. 536 (1943); People v. Mongano, 57 N.Y.S. 2d 891 (1945); People v. Minogna, 54 N.Y.S. 2d 233; People exrel. Winelander v. Denno, 195 N.Y.S. 2d 165.

(151) See also Veh C., sect. 765 (a) providing the same principle.

(152) 139 Cal. App. 2d 432 (1956). See a note in 4 5Cal. L. Rev. 197 (1957).

(153) People exrel. Lias v. Superintendent of Women's prison, 25 N.E. 2d 869 (1940).

merits of a charge of violation of a provision of the criminal law of the United States or of another state or country is a bar to a prosecution of such a person in this state, based on the same facts as was the previous prosecution. This rule is accepted by the draft of 1956, except what was provided about former prosecution in a foreign country. The new draft does not consider a former judgment by a foreign country as a bar. It is commented that the matter of relationship between countries is best dealt with by international agreement.

India. — The general rule in the Indian penal code is that all crimes are local. This principle is provided in section 2 of the penal code which declares that every person (foreigners as well as citizens) shall be liable to punishment under the code for every act or mission contrary to the provisions thereof of which he shall be guilty within India. However, section 3 of the penal code provides that any person may be liable for any act committed by him beyond India if there is any Indian law to that effect. Section 4 of the same code provides that the code will apply to offences committed by: 1) any citizen of India in any place without and beyond India; 2) any person on any ship or aircraft registered in India wherever it may be.

It follows from what we have stated that an act committed *outside* India *by a foreigner,* is not an offence triable by Indian courts under their criminal code.(154) However, Indian courts have the power to try offences committed out of India by virtue of sections 3 and 4 of the penal code. In such cases, section 188 of the criminal procedure code provides that the offender can be dealt with in respect of the offence as if it was committed at any place in India at which he may be found. But the section imposes as a condition for the trial of an offender under it that the Political Agent, if there is one, for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired in India; and, where there is no political Agent, the sanction of the State Government shall be required. The Highest Sind Court (155) clarified the scope of requiring the certificate of the Political Agent of the local government, stating that the object of such a provision is to prevent the

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(154) A.I.R. Commentaries, 1953, sect. 177, p. 775.

(155) Jeramdas Vishendas v. Emperor, 36 Crim. L.J. 240 (1933).

accused being tried over again for the same offence in two different places. It was held [156] that the trial without a certificate of the Political Agent is void and could not be cured by a subsequent production of such certificate.

It has been noticed that even after the establishment of British sovereignty in India, British Indian and English courts continued to treat each other as foreign within the principles of private international law, and this rule continued even when a native state adopted the British Indian code as its own.[157] Nevertheless, Dean Grant commented that he had searched the Indian reports and literature in vain for any indication that British Indian courts refused to recognize pleas in bar based upon native state decisions, and that there was plenty of evidence to the contrary, and opportunities were constantly arising because of the broad scope of concurrent jurisdiction.[158]

Under the Indian Constitution there are three legislative lists : [159] a Union list, a State list, and a concurrent list. The latter list includes both criminal law and criminal procedure.

Article 254 of the new Constitution lays down a general rule that in case of repugnance of a state law with a Union law relating to the same matter in the concurrent list, the Union law will prevail and the state law will fail to the extent of the repugnancy, whether the Union law is prior or subsequent to the Union law.[160] This article is confined to conflict between two competing statutes of the Union and state legislatives.[161]

It is held that to establish repugnancy it is not necessary that one legislation should say "do" while the other legislation says "don't", and that repugnancy might result when both the legislatures covered the same field.[162]

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(156) Ram Charn v. The Crown, 1924 Indian Law Reports (Lahore) 416.

(157) Grant, 4 U.C. L.A.I., 28.

(158) 4 U.C. L.A.I., 29.

(159) See Seventh Schedule and article 246 of the Indian Constitution.

(160) Sub-article (2) of the same article engrafts an exception, that if the president assents to a state law which has been reserved for his consideration (art. 200), it will prevail notwithstanding its repugnancy to an earlier law of the Union.

(161) A conflict between two statutory orders made in the exercise of powers delegated by the two legislatures cannot be resolved by a reference to art. 254.

(162) Stewart v. Brojendra, A.I.R. 1939, Cal. 628.

The Supreme Court of India has held [163] that, "when there is legislation covering the same ground both by the Centre and by the Province, both of them being competent to enact the same, the law of the centre should prevail over that of the state."

The Indian penal and criminal procedure codes do not provide any rule for the effect of foreign judgments in India. However, it has been held that a judgment of acquittal or conviction passed by a foreign court in such a case will be a bar to proceedings being started against the alleged offender under section 188 in India.

The Australian Constitution provides a similar rule in section 109 which states that when a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid. It is held, similar to what is held in India, that when the Commonwealth evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field.[164]

The same position is held in Canada. It is settled that where an offence is created by Dominion legislation the penalties attached to that offence, as well as the offence itself, become matters which are excluded from provincial jurisdiction.[165]

Dean Grant commented on Indian cases, stating that "all that can be said for the present is that there have been many cases involving overlopping laws, but none sustaining or even discussing the possibility of successive prosecutions on the basis of the "sovereignties" concerned."[166]

Germany. — The rule in the German criminal code of 1871, as amended until 1953, is that the foreign judgment has no res judicata before the German courts. Section 3 (1) provides that the German criminal law applies to any act of a German national re-

(163) Zavebbhai v. State of Bombay, A.I.R. 1954. Sc. 752, Bombay High Court has held that the proper test is whether both the laws or whether both the laws can stand together. If effect cannot be given to both the laws and both the laws cannot stand together, then the law made by Parliament must prevail as against the law made by the state legislature. (State v. Zaverbbhai, A.I.R. 1953, Bombay 371).

(164) Clyde Engineering Co. Ltd. v. Cowburn, 37 C.L.R. 466 (1926).

(165) Provincial Secretary, v. Egan, 1941 S.C.R. 396, 403.

(166) Grant: 4 U.C. (L.A.I. Rev. 1, 34 (1956).

gardless of whether it was committed in Germany or abroad. Section 4 (2) provides that the German criminal law applies to an offence committed abroad by an alien, under certain circumstances. Section 5 provides that German criminal law applies to acts committed on a German ship or aircraft, regardless of the law of the place of the act.

However, the German law gives a limited effect to foreign judgment of conviction in section 7, which provides that any punishment already served abroad shall be deducted from the punishment to be inflicted, if a conviction in respect to the same offence is again imposed in Germany.

Japan. — The Japanese penal law (1907 as amended to 1958) has ruled the same German rule which denies the efficacy of foreign judgment's res judicata. Article 5 of the penal law provides that the rendition of a final decision against a person in a foreign country shall not preclude a further imposition of punishment in regard to the same act, but when the criminal has already served either in whole or in part the punishment pronounced abroad, execution of punishment shall be reduced or excused.

We have to notice the difference between the German and the Japanese law in providing the efficacy of serving punishment in execution of a foreign judgment. The difference seems in the authority which can decide the deduction of the served foreign punishment: While the German law provides that the deduction shall be from the punishment to be inflicted, the Japanese law provides that the execution of punishment shall be reduced or excused. In conclusion, we understand that the deduction of served foreign judgment is in the competence of the German court while in Japan it is in the competence of the executive authority which control the execution of the punishment.

Article 3 of the Japanese penal code provides that this code applies to every Japanese who commits one of certain crimes outside Japan, and article 4 from the same code provides that this code applies to a public officer of Japan who commits one of certain other crimes outside Japan.

France. — The new French code of criminal procedure (1957) provides in article 689 (1, 2) that the French citizen who commits out of France a felony (crime) in accordance to French law

may be tried by French jurisdictions, but if he commits out of France a misdemeanor (délit) falling under the French law he may not be tried by French jurisdiction except if the act is punished by the law of the foreign country in which it was committed.(167) Article 690 provides that who commits in France an accessory of a felony or misdemeanor consumated out of France may be tried by the French jurisdiction if the act is punished by both foreign and French law, under the condition that this offence is proved by a final decision of the foreign jurisdiction.(168) Article 692 provides that in the cases of the above articles the defendant shall not be prosecuted in France if he was tried in the foreign country by a final decision provided that in the case of conviction the punishment should be executed or exhausted by prescription or by act of grace.(169) Article 694 provides that every foreigner who shall be guilty out of France, whether as a principal or accessory of a felony or a misdemeanor which endangers the safety of the state, counterfeiting the seal of the state or national money in circulation, may be prosecuted and tried in accordance with French provisions if he is arrested in France or delivered by extradition.

It is clear from these provisions that the French law applies the principle of Non bis in idem on the criminal action which has been tried in foreign jurisdiction, under certain conditions. The French code of criminal procedure respects the res judicata of the foreign judgments in the following limits :

1) Who commits in France an accessory of a felony or a misdemeanor which is consummated out of France, will not be tried by French courts, except if this offence is proved by a final decision of the foreign jurisdiction. In such case the finality of the foreign decision is a requirement which must be acquired before prosecuting the accessory in France. But this does not mean at all that the French court shall be barred from trying the issues involved in the foreign judgment. In other words although this judgment is required to prosecute the accessory it has no res judicata before the French court. Moreover, the principle of res judicata cannot be applied in such case because of the diversity of parties.

(167) Article 689 (3) provides that sub art. (1, 2) is applicable to the foreigner who becomes a French citizen after committing the offense.
(168) It is a new rule in the cade.
(169) Similar to article 5 of the former code of criminal procedure.

2) In the cases of article 689 and 690 the final foreign judgment bars the prosecution in France, whether it is acquittal or conviction. The acquittal judgment requires its res judicata notwithstanding its grounds. In the case of conviction the punishment should be executed or terminated by prescription or act of grace. Some authors maintain that the final order of non-prosecution (ordonnance de non lieu) on the ground that the defendant is innocent, is similar to the judgment of acquittal.(170) However, the French legislation provides an exception on this rule for the national interest of the republic.(171) The French courts may try in accordance with French law every foreign convicted out of France, for committing a felony or misdemeanor against the safety of the state, counterfeiting the seal of the state, or the national money in circulation.

United Arab Republic. — Article 2 and 3 of the Egyptian penal code (1937) provide that this code is applicable in certain cases in which the crime is committed out of Egypt.(172) In these cases the Egyptian courts have concurrent jurisdictions with other competent foreign jurisdictions. The important question involved is when the defendant is tried in the foreign country in which he committed the crime. In this case we face the problem of international scope of the rule of Non bis in idem.

Article 4 (2) of the penal code distinguishes between two cases in which the defendant of an offence committed out of Egypt is acquitted or convicted by a foreign country. In the first

(170) Garraud: Traité théorique et pratique du droit pénal français, Paris V. 1, 1913, p. 416.

(171) Stefani et Levasseur: Procédure pénale, Précis Dalloz, 1959, p. 401.

(172) Article two provides that the Egyptian penal code shall further apply to: (1) who, by acts done outside Egypt, participate as principal or as accessory, to an offence committed either wholly or in part in Egypt; (2) Who, will be guilty of the committed act outside Egypt (a) an offence against the external safety of the state provided in Chapter I and II of Part II of this code; (b) Of an offence of forgery provided in article 206 of the present code. (c) Of an offence of counterfeiting and falsification of fiduciary or metallic money punished by article 202; or an offence of import or export of counterfeit, false, or altered fiduciary or metallic money, or putting it in circulation, or its detention for this purpose, or using it, as provided in article 203, in condition that it has a legal course in Egypt. Article 3 provides that every Egyptian who is guilty outside of Egypt of committing a misdemeanor or felony falling under the present code, is punishable in accordance with its provisions if he returns to Egypt, provided that the offence is punishable under the law of the country in which it has been committed.

case, the penal code applies strictly the principle of Non bis in idem in respect to the judgment of acquittal rendered by a foreign court, in accordance with Egyptian law. There is no doubt that the Egyptian code gives a kind of credit to foreign judgments of acquittal in favor of the accused. But this provision was criticized for its broad application. Suppose a person was accused in a foreign country for falsification of Egyptian money and was law. In such a case it should be regrettable if we considered this acquittal as an obstacle to prosecuting the defendant in Egypt. The Egyptian doctrine (173) proposed a distinction between the grounds of acquittal. If the acquittal by a foreign judgment is based on unsufficient proof or that the defendant did not commit the crime, in these cases this judgment acquires its res judicata before the Egyptian courts. But if the defendant is acquitted because the committed act does not imply the necessary elements of the offence in accordance with the foreign law, in this case the foreign judgment shall not bar the prosecution of the defendant according to article 2. This gap is avoided in the Italian penal code which gives the Minister of Justice a discretionary power to demand or not the trial of the national or foreigner who has been tried abroad (article 11 (2). It is held that the order of non-prosecution is not considered as a substitute of acquittal.(175) If the defendant is condemned by a foreign court for an offence committed out of Egypt, the foreign judgment does not bar the prosecution of the defendant in Egypt except if he proves that he had executed the foreign sentence (4 (2). Without execution of the punishment the foreign judgment of conviction has no res judicata in view of Egyptian courts. If the punishment failed by expiration of time limitation (prescription) or by amnesty or act of grace the Egyptian code would be applicable, because article 4 (2) requires the full execution of punishment to grant the foreign judgment its efficacy.(176)

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(173) Mahmoud Moustafa, General part, 1960-1961; Chéron and Aly Badawi: Nouveau code pénal égyptien annoté, V. 1, 1939, p. 24.

(174) We have to notice that the prosecution is prevented by article 3 because it requires that the act be punishable under the law of the country in which it has been committed.

(175) Chéron and Aly Badawi; supra, p. 25.

(176) Mahmoud Moustafa, supra; Chéron and Badawi, supra, p. 26.

It is held that if the foreign punishment has been executed in part owing to conditional liberation (libération conditionnelle) or act of grace or any other cause, the Egyptian court has to consider the period of this execution in deciding its judgment of conviction and determining the punishment.(177) This provision is criticized on the ground that it applies the consequence of res judicata of the foreign conviction, notwithstanding the risk which may endanger public interest if the defendant is submitted in the foreign country to a light punishment which is not proportionate at all to the damage or danger which affected the public interest of the nation.(178)

Conclusion :

It is clear that the Egyptian code is similar to the French in distinguishing between acquittal and conviction. But the French code does not discriminate between acquittal, prescription and grace, contrary to the Egyptian code. Moreover, the French code makes an exception on this rule, relating to the crimes committed by foreigners which endanger the national safety of the state or its seal or money. But in Egyptian law, such crimes and others similar to them provided in article 2 (2) do not constitute an exception to the rule of Non bis in idem in its international application, except if the ground of the foreign acquittal is that the act is not a crime in virtue of the foreing law which governs the jurisdiction of the crime.

The doctrine :

We have seen above how the rule of Non bis in idem is not strictly applied under foreign sovereignties, and how the rule of Double jeopardy, in the absence of a statute, is also not applied if the previous prosecution is held under foreign sovereignty.(178a)

We have now to discuss the position of the problem in the doctrine. As a matter of fact, there is a great diversity in opinions concerning the matter. We may arrange these opinions under two theories, the first denies the effect of the foreign judgment while the other is in favor of such an effect.

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(177) Chéron and Badawi, supra, p. 27.

(178) Chéron and Badawi, supra, p. 26.

(178a) See Harvard research in international law, V. 29, 1935, p. 602-616.

Arguments against the application of Non bis in idem:

1) Application of the rule conflicts with the principle of independence of sovereignties.(179)

2) Every state is the sole judge in deciding the suitable measures to maintain security in its land. The application of the Non bis in idem rule (or Double Jeopardy) to the foreign judgment will lead to substitute the foreign law for the national law in determining the just reparation of the trouble caused by the crime, while the exercise of power to punish might be considered as a simple reaction of the state against the persons who endanger its social order.(180)

3) The identity of parties as a requirement to apply the rule of Non bis in idem (and Double jeopardy) is not realised in applying it to foreign prosecutions, because the public party (prosecution) in every action is different.(181)

4) It would be inadmissible to consider a judgment of acquittal or of light punishment, issued by a foreign court, as a substitute to the safeguard of national guarantees which may require more severity in deciding the case. Moreover, the foreign judgment may be affected in certain circumstances by political reasons.(182)

5) The legislations which provided the Non bis in idem rule required in the case of conviction that the punishment be executed. It is a logical requirement to prevent the defendant who was convicted by a foreign court from getting immunity by escaping after the judgment to his native state. This requirement reveals the vice implied in the rule if it is applied in the international field.(183)

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(179) Perison: De l'effet des jugements étrangers rendus en matière pénale, thèse, Lyon, 1885, cited in Barbey: De l'application internationale de la règle Non bis in idem, thèse, Lausanne, 1930, p. 135, No. 1.

(180) Melli: Lehrbuch des internationalen Strafrechts und Strafprozessrechts, Zürich, 1910, cited in Barbey, supra, 136, No. 1; Travers: Le droit pénal international et sa mise en oeuvre en temps de paix et en temps de guerre, Paris, V. 3, p. 414 et 417.

(181) Travers: Les effets internationaux des jugements répressifs. Recueil des cours de l'Académie de droit international, 1924, p. 460.

(182) Barbey, supra, p. 137, 138.

(183) Barbey, supra, p. 140-142.

Arguments in favor of application of Non bis in idem :

1) Application of the Non bis in idem rule (or Double jeopardy) does not conflict with the independence of the states. Many legislations provide that the foreign judgments will have their effect as res judicata (or jeopardy) in the national courts. The principle of sovereignty does not conflict at all with the voluntary attribution of efficacity to foreign judgments.(184)

2) Every state has a duty to protect humanity in every place. The purpose of punishment of crimes is not limited by the cadre of the state, and beside the crimes which injure the order and security of national interests, there are crimes which injure the whole world community.(185)

3) There is no doubt that the rule of Non bis in idem (or Double jeopardy) presumes the identity of parties. But why may not the prosecution in public offences be considered a reyresentative of all the community and not only of the particular interests of the state ? It is true that every state has its political order which differs from state to state, but there are also a social order which in general is the same in all the states, and this kind of social order would be injured by public offences. such as murder and theft. Moreover, the moral views are universal in all the states, and inflicting the punishment is usually to protect these views. It is said that in most of the crimes the state does not protect merely its interest in punishing the offenders, but that it represents the universal interest. The international treaties, whether for extradition or reciprocal aid in repression of certain crimes which endanger the state's safety, prove that kind of salidarity which unifies the states in pursuing the defence against criminality.(186)

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(184) Barbey, supra, p. 145, 146. Travers: Le droit pénal international, V. 3, supra, p. 368.

(185) Barbey, supra, p. 147, 148.

(186) Donnedieu De Vabres: Les principes modernes du droit pénal international, Paris, 1928, p. 312, 313. Barbey; supra, 149-151.

4) The offences which are committed directly against the security of the state might be treated differently than other public offences. The injured or endangered state in political crimes is the sole interested party in considering the gravity of the crimes and the best means which realises the protection of its interests. In this kind of crimes it was held that the application of Non bis in idem rule will lead to some disadvantages, especially that sometimes the foreign states may not consider these acts as offences. But the public offences — in general — are provided in different legislations, notwithstanding the different in details. We have to bear in our minds those international conferences which are held periodically to determine certain general principles of criminal law. It is not sound to say that the foreign jurisdiction may differ in its appreciation of the crimes and punishments from the national jurisdiction. As a matter of fact the courts in one state differ in considering certain crimes under the same circumstances and may differ also in the punishment inflicted.

5) Strict respect of Non bis in idem requires its application, notwithstanding that the punishment is not executed. However, most legislations require the execution of punishment, its prescription or its termination by an act of grace or amnesty for applying the rule. There is nothing to prevent believing that in the near future the rule will be applied without any limitation.(188) The Swiss penal code (1937 amended to 1950) provides in article 3 (2) and 5 that if the accused does not execute all the punishment decided by the foreign court, or a part of it, he shall be submitted in Switzerland to the execution of this unexecuted punishment. This code does not merely apply the Non bis in idem rule to the foreign judgments, but it applies, moreover, its executory force.(189)

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(187) Barbey, supra, 156-160.

(188) Barbey, supra, 160, 161.

(189) André Panchaud: Code pénal suisse annoté, 1951, p. 10-12.

Conclusion :

We have summarized above the problem of Non bis in idem (and Double Jeopardy) in its application to foreign prosecutions in order to draw a picture of the limits of application of such a rule.

In our opinion, it would be very difficult to apply the notion of jeopardy and res judicata, further than its internal field. No doubt, such an application would meet many obstacles, as we have seen above. We have to distinguish between its international application, when the final judgment or the act of jeopardy is issued by a foreign country, and its application in the states of one country, as the United States. The problem in the former case is considered one of the problems of penal international law. Hence, it has to be governed by its rules and logic. In such case we cannot grant the foreign res judicata or jeopardy its juridical effect as in national courts. It is an international problem and must be solved by international ways, except if the national legislation solves the problem itself under the considerations of opportunity, humanity, equity and justice. But in the latter case, where the acts or judgments are rendered by the federal courts, or other states, such a case must be solved by other means. We have to emphasize first that it is not considered an international problem. We have have no need to repeat these severe critics (190) of dissenting judges and authors against what is settled in the United States that the federal prosecution does not bar state prosecution and vice versa ; and that one state prosecution does not bar the same prosecution in another state. In such a case, the legislation, as in New York and California, must give the foreign prosecution its effect. It does not seem too much to ask that citizens of the same country must feel that justice does not differ between states in this country.

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(190) See notes 137, 138, supra.

Section 3

VALIDITY OF JEOPARDY AND RES JUDICATA

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JEOPARDY

In general. — The considered jeopardy is the legal jeopardy which endangers the defendant to be convicted according to valid procedures. Therefore, it has been held that jeopardy does not exsist except under the following conditions :

1) Upon a valid indictment or information.
2) Before a court of competent jurisdiction and legal constitution.
3) After the defendant has been arraigned.
4) After he has pleaded to the indictment or information.
5) When a competent jury has been empaneled and sworn.
6) Upon a valid proceeding.

As a matter of fact, the scope of this research does not permit us to study in detail every condition of the validity of jeopardy. We shall only give a picture of the rule that jeopardy does not attach except on valid procedure.

England. — This rule is held in England.(191) In the case of R.V. Marsham, the defendant had been charged with assault and one of the witnesses for the prosecution, through an oversight which was not brought to the knowledge of the magistrate at the time, gave his evidence without being sworn and the magistrate convicted the defendant. Shortly afterwards, during the same sitting, the magistrate was informed by the irregularity. He reheard the case and convicted the defendant upon appeal; it was argued that the defendant had been twice in peril. The Court of Appeal rejected this contention on the ground that the first indictment was invalid.(192)

The same principle is settled in other English cases. It was held that a judgment for a prisoner on demurrer in a case of felony, on the ground that the indictment did not sufficently

(191) See 19 The Journal of Criminal law (Eng.) 72 (1955).
(192) 23 Cox, Crim. Cases 77 (1912).

charge the felony, was no bar to a subsequent good indictment for the same felony.(193) In Reg. V. Charlesworth it was held that "it is well known that though a jury have pronounced upon the case, yet, if their verdict be defective, it will not avail the party accused in the event of his being put on his trial a second time." (194)

It has been suggested (195) that proceedings which have all the outward appearance of a correct judicial trial may amount to a nullity if the necessary legal procedure is ignored or incorrectly followed, and that the test of the validity of all judicial proceedings can be summed up in the short question — Was the defendant placed in jeopardy by them ? If he was they were effective, if not they were a nullity. We do not agree with the above test. It is illogical to say that the proceedings shall be nul if the defendant is not placed by them in peril, but the contrary is true. In other words, the defendant shall not be in danger unless the proceedings are valid. No doubt this result is based on the conclusion of the nullity of proceedings.

However, it was held in Vaux's case that the void judgment must be reversed so that the jeopardy may not be valid.(196) The same principle has been held in the U.S. by the dissenting judge in the case of Coleman v. Tennsset,(197) who says: "Since the time of Lord Coke it has been settled law that such a plea is bad, unless contains the avernment that the prior judgment is in full force and unreversed."

United States. — The same rule is applied in the United States. It is clear that although the modern English tradition in determining when jeopardy does attach is different from the American tradition — almost the rule of the validity of jeopardy is in both systems, however.

It has been settled that there is no considered jeopardy if a conviction or acquittal is in a court which is not legally consti-

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(193) R. Richmond, 1 Cox, C.C. (1843).

(194) 9 Cox's C.C. 44 (1861).

(195) 19 Journal of Cr. L. 72 (1955).

(196) See A.L.I. (1935), p. 100.

(197) 97 U.S. 509.

tuted,(198) or having no jurisdiction,(199) or according to invalid indictment or information,(200) or in general upon invalid proceedings.(201) However, it has been held that if the court proceeds illegally after the prisoner has been placed in jeopardy, its illegal act cannot nullify the jeopardy.(202)

That is the rule of the validity of jeopardy in the United States. We have to clarify some major points in this issue as follows :

First : *Where the verdict or judgment is absolutely void :*

1) It has been held that a verdict of acquittal or conviction obtained by the accused by fraud and collusion is a nullity and does not put him in jeopardy. Connecticut is the only state that has a statutory provision concerning this problem.(203) Section 8878 of the Connecticut statutes (1949) provides that no acquittal or conviction for any criminal offence, had upon any complaint issued by the procurement or at the sollicitation of the person committing it, shall be a bar to another complaint or information for the same offence." This principle is prevent the possibility that the defendant might contrive, for example, to be

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(198) People exrel. v. Warden of Nassau County Jail, 199 N.E. 647, 269 N.Y. 426 (1936).

(199) U.S. — U.S. v. Sabella, 272 F. 2d 206 (1960); Johnson v. U.S., 269 F. 2d 769 (1959).
Cal. — People v. Hamberg, 84 Cal. 468, 472 (1890).
Mo. — State v. Bacon, 70 S.W. 473, 170 Mo. 161 (1902).
N.Y. — People v. Armstrong, 114 N.Y.S. 2d 871, 203 Misc. 105 (1952); People exrel. v. Wasmer, 104 N.Y.S. 2d 156, 201 Misc. 71 (1951); People v. Smith, 41 41 N.Y.S. 2d 512, 266 App. Div. 57 (1943). See collection of cases in A.L.I. (1935), p. 92, 93.

(200) U.S. — U.S. v. Narvaez-Granillo, 119 F. Supp. 556 (1954); Nolan v. U.S., 163 F. 2d 768, cert. denied. 68 S. Ct. 649, 333 U.S. 846 (1947); Haugen v. U.S., 153 F. 2d 850 (1946).
Cal. — People v. Lucas, 78 Cal. App. 421 (1926); People v. Giminiani, 70 Cal. App. 195 (1924).
Mo. — State v. Long, 22 S.W. 2d 809, 324 Mo. 205 (1930); State v. Keating, 122 S.W. 699, 223 Mo. 86 (1909).
N.Y. — People v. Bates, 124 N.Y.S. 2d 315 (1953); People v. Smith, 41 N.Y.S. 2d 512, 266 App. Div. 57 (1943). See collection of cases in A.L.I. (1935), p. 98, 99.

(201) US. — Martin v. Young, 134 F. Supp. 204 (1955); Stevenson v. Johnston 72 F. Supp. 627 (1947); Levine v. Hudspeth, 127 F. 2d (1942).
Cal. — People v. Stratton, 136 Cal. App. 201 (1934); People v. O'Brien, 129 Cal. App. 660 (1933).
Mo. — State v. Koerner, 51 Mo. 174 (1872).
N.Y. — Richardson v. Collins, 90 N.Y.S. 2d 583 (1949).

(202) People v. Warden, 199 N.E. 647, 269 N.Y. 426 (1936).

(203) A.L.I. 1935, p. 103. It has been held that a foreign judgment may be relied on where there is no evidence indicating fraud, collusion, trickery or subterfug on the part of defendant. (Coumas v. The Superior Court, 31 Cal. 2d 682, 688 (1948). See State v. Cole, 48 Mo. 70 (1871); State v. Cuatt, 70 Misc. 453, 458 and other cases cited in A.L.I. (1935) p. 104, 105 and A.L.I. (1956), p. 64, 65.

prosecuted before a justice of the peace before the full story was known, plead guilty and receive a minor fine for a serious offence.(204). Therefore, a defendant must have been a party to the fraud, and a conviction secured fraudulently by the state's officer cannot be avoided by the state, where the accused was not a party to the fraud.(205) Section II of the draft of the model penal code (1935) provides the same principle. The draft of 1956 in section 1.12 (2) proposed that the former prosecution be procured by the defendant without the knowledge of the proper prosecuting officer. It has been commented that the proposed statement rests upon the assumption that the state is protected if the proper attorney for the prosecution has notice of the proceeding.(206) This rule has been applied before in a case of bribery of the prosecuting attorney pending a prosecution which had been regulary commenced.(207) In this case the prosecuting attorney was bribed to secure an acquittal. The court held that the former prosecution is not absolutely void and does prevent a second prosecution on the ground of former jeopardy. It distinguished cases where the defendant himself instigated prosecution on the ground that in those cases the state was not in fact a party, whereas in the case under consideration the state was a party to the proceeding. It has been commented on this case that the fraud should be given the same effect whether the state is in fact a party to the proceeding or not.(208)

2) If the court has no jurisdiction its conviction or acquittal is absolutely void, and not only voidable, and therefore it does not bar subsequent prosecution and trial in a court which has jurisdiction.(209) The draft of the model penal code (1935) has provided this rule in section 8 which runs as follows: "Where a person has been acquitted or con-

(204) A.L.I. (1956), p. 65.
(205) State v. Reed, 26 Conn. 202.
(206) Draft of 1956, p. 65.
(207) Shideler v. State, 129 Ind. 523 (1891).
(208) Notes, 24 Minnesota L. Rev. 532 (1940).
(209) U.S. — Murphy v. Massachusetts, 177 U.S. 155; U.S. v. Ball, 163 U.S. 662, 669 (1896).
Cal. — People v. Hamberg, 84 Cal. 468, 472 (1890).
Mo. — State v. Payne, 4 Mo. 376 (1836).
N.Y. — People v. Hull, 131 Misc. 253 (1928).

victed of an offence he may be again prosecuted for the same offence if on the previous trial the court was not legally constituted or had no jurisdiction of him or the offence." The same principle has been provided in the draft of 1956 (sect. 1.12 (1).

Second : *Acquittal on the merits :*

It has been held that acquittal upon void or defective indictment or proceeding does not bar subsequent prosecution unless the defendant has been acquitted on the merits. This principle is provided in sect. 1022 of California penal code, sect. 34 of New York penal code, sect. 3696 of the Revised statutes of Missouri and the draft of the model penal code. (Sect. 9 of the draft of 1935 and sect. 1.9 (1) of the draft of 1956).(210)

Third : *Conviction upon invalid proceedings :*

It has been held in federal cases that if a judgment of conviction has been rendered upon invalid or defective indictment or other proceedings, if the court has jurisdiction, it stands good till it is unreversed, because it is only voidable and not void.(211) Judge Morrow in U.S. v. Olsen (212) has well said : "I am not prepared to say that the plea must also show that no appeal or writ of error has been taken from the judgment pleaded in bar." He mentioned in his judgment what Bishop in Criminal law (sect. 1021) had said : "Still, after a verdict of guilty on such indictment (invalid), and judgment rendered thereon, there can be no second prosecution while the judgment is unreversed ; not because there has been a jeopardy, for there has not, but because the judgment is voidable only, and of the same effect while it stands as a valid one."

It is clear from the above discussion that a distinction has been held between a void and a voidable judgment. In the former case, where the court has no jurisdiction, the jeopardy is null although the judgment is not reversed. In the latter case, the judgment is still valid till it is reversed. It is obvious that, if the

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(210) See in A.L.I. (1935) the statutes of other jurisdictions, p. 93, 94.

(211) U.S. v. Ball, supra, p. 670.

(212) 57 F. 579, 582 (1893). See Bryant v. U.S., 214 F. 51 (1914).

voidable judgment is acquittal on the merits, it shall be conclusive, because it is clear that it cannot be reviewed by appeal whether by the defendant or the prosecution.(213)

The draft of the model penal code (1935) provides in sect. 10 that where a person has been convicted of an offence he may be again prosecuted for the same offence if there was any defect, error, omission, irregularity or illegality in the indictment, the proceedings or verdict in the previous prosecution which would prevent a valid judgment being entered in the case. It seems from this section that the mere conviction — before entering the judgment — upon valid proceedings, even without reversal, does not bar subsequent prosecution. However, the same section provides that if judgment is entered and sentence has been partially or wholly executed the accused shall not be again prosecuted unless the previous trial was declared void at his instance. It seems from this section that a voidable judgment shall not bar another prosecution except after partial or whole execution of sentence.(214) This striction is not provided in the last draft (1956) which provides in section 1.12 (3) that a prosecution is not a bar if it resulted in a judgment of conviction which was held invalid in a subsequent proceeding on a writ of habeas corpus, coram, nobis or a similar process. Such section is similar to the federal cases which we have discused before.

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RES JUDICATA

The rule in the doctrine of res judicata is that the finality of judgment shall cover all of its errors and nullity. It has been said that the final judgment shall be a title of reality and validity. This rule means that res judicata shall not be abridged except by extraordinary statutory means of reviewing the final judgment.

As a matter of fact when the judgment becomes irrevocable it shall be presumed a valid act, whether it has been voidable for a defect in itself or in its prior proceedings. In consequence, the nullity of judgment — as a rule — shall be covered by its finality. Therefore, it is not sound to contend the Non bis in idem exception by alleging the nullity of the judgment.

(213) See U.S. v. Bail, supra, p. 671.
(214) The A.L.I. has indicated some cases of conviction, followed by punishment on a void indictment, which are held to bar a second prosecution for the same offence (Draft of 1935, p. 101-103).

However, we have to notice a doctrinal distinction between the degrees of nullity and the importance of this distinction on res judicata. The doctrine has distinguished between validity and invalidity, absolute nullity and relative nullity, remediable nullity and non remediable nullity and nullity and non-existence. The Egyptian criminal procedure code distinguishes between nullity from public policy and nullity from the parties' interest (art. 332 and 333), but this distinction has no importance if the judgment becomes final.(215) However, it has been said that if the final judgment is absolutely null, or non remediable null or non-existent, it does not acquire res judicata. In other words, in such cases the finality of judgment may be abridged, because the grave defect of the judgment prevents it from acquiring res judicata.(216) In Japan it has been suggested (217) that the non-existent judgment has no res judicata and Non bis in idem cannot be held, but the absolute nullity, although it prevents the judgment to be res judicata, does not bar the holding of Non bis in idem. The importance of such a view seems to be in the step of execution. As a consequence of holding that the judgment has no res judicata the execution shall not be allowed article (471 of the Japanese criminal procedure code provides that except as otherwise provided in this code, a decision shall be executed after if has become final).

The suggested tests to distinguish between the degrees of nullity, and non-existence are out of the scope of this comparative research.

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(215) Sorour: Theory of nullity in criminal procedure, thesis of doctorat, 1959, Cairo, p. 424.

(216) We have to clarify succinctly what is known as the doctrine of non-existence. The notion of non-existence depends upon the difference between non existence and nullity. It is based upon the difference between validity and existence. The procedural act has substantial elements to be existent and other elements to be valid. The act is considered non-existent because the elements of its existence in law or in fact do not exist. It is a difficult problem to determine the test of non-existence and distinguish it from nullity. There is no room in such a research to fish the different issues which are involved in the discussion of non-existence. We have to emphasize that the judgment which is considered as non-existent does not acquire "res judicata". The doctrine suggested an original action to be suited before the court which rendered the judgment to declare its non-existence. This doctrine is sattled in Italy after the general assembly of the Italian Supreme Court had held in June 1950 the distinction between non-existence and nullity.

We have to notice from the above discussion that in the jeopardy system, there is no difficult if a judgment is not rendered yet, and that if the proceedings are invalid or the court has no jurisdiction, the jeopardy is not available to bar another prosecution though it is voidable, until its reversal.

We have to notice that even the voidable jeopardy is presumed valid until the decision has been set aside, this validity is temporary until the decision becomes final. But in res judicata, the finality of judgment covers its voidable character. However, jeopardy and res judicata — concerning the voidable proceeding — are valid until the two are set aside : the first by ordinary review (appeal), and the second by extraordinary review (as re-opening). We have found in American cases applications of the notion of absolute nullity (if the court has no jurisdiction and if the judgment has been induced by fraud of the defendant), the notion known as the doctrine of res judicata in most of civil law countries. The application of such a notion induces the same result whether jeopardy or res judicata.

No doubt that the examples of a judgment which is induced by fraud of the defendant are interesting to every researcher in the nullity of proceedings affecting jeopardy and res judicata. So, we would like to stress this kind of applications.

Judgment rendered by fraud of defendant. — The Egyptian Supreme Court has held the same American principle in such issue.(218) It has happened that a defendant conspired with the victim that the latter suited him before the court by direct action, which is allowed to the injured party in misdemeanors, and to offer unsufficient evidence against him so that he may be acquitted. As a consequence of this conspiracy the defendant was acquitted. The defendant attacked the proceeding instituted by the prosecution on the ground that he has been acquitted before by a final judgment. The court refused his contention on the ground that the first criminal action had been based on fraud of the defendant. The Supreme Court confirmed the same principle. It is clear from this judgment that the Egyptian Supreme Court

(217) Tamiya: Non bis in idem in criminal procedure, 75 Hogaku Kjokai Zasski, 477 (1959); interpreted to me by the author of this article.

(218) 2 Omar reports 50, No. 59 (1930).

has considered the judgment rendered upon the defendant's fraud absolutely null, so that its finality does not cover its grave defect.

We do not agree with such a principle, though it has been held in American cases and by the model penal code and the Egyptian Supreme Coury. Although the act of procedure is a voluntary act, we have to notice that the role of volition is only considered in exercising this procedural act, and its does interfere in its juridical effects which the law has held before. In other words, the juridical effects of a procedural act are produced by law, and the party who makes such act has no power to change these effects. This difference depends on the differences between the contract and th procedural act. Although the partis have a vested power to determine the conditions and effects of their own contract, the person has no such power when he makes a procedural act. It is clear that the law itself arranges the procedural acts in a way to reach the ends of justice which do not depend upon the volition of the parties. Moreover, the elements of stability and security which must govern the acts of procedure de conflict with considering the real volition of the parties essential in determining the effects of proceedings. The good administration of justice must prevent such controversies on the real intent of the parties from exercising the procedural acts. Hence, we do not agree with searching in the intent of the defendant and annuling the proceedings which are acted by his fraud, because such an intent has no effect — in the right application of law — on the effects of the proceedings.

Professor Dando (219) in Japan has suggested to allow a re-opening of proceeding against the defendant if the judgment is based on bribery or fraud. But this view is contrary to the rules of re-opening in Japanese criminal procedure which does not allow a request for re-opening except for the benefit of the convicted accused (art. 425). Moreover, we do not understand how professor Dando tries to apply one of the American understandings of the notion of jeopardy though he himself declared clearly that the rule of Non bis in idem and not Double jeopardy is provided by the Constitution. The German code of criminal procedure has permitted in sect. 362 (1) the re-opening of proceedings against the accused in the event a document produced at the trial

(219) 1 Hôsôjikô 48 (1949) interpreted to me by Mr. Suzuki.

in his favor as authentic was false or forged. The Egyptian and French laws do not permit such extraordinary review except in favor of the defendant. Anyhow, if the German code permits the re-opening of proceeding in the case of certain kinds of the defendant's fraud, it means that thejudgment is voidable and not absolutely void.

The Indian Evidence code (1872) provides in section 44 that any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42 and which has been proved by the adverse party, was delivered by a court not competent to deliver it, *or was obtained by fraud* or collision.

It has been held that separate proceedings to set aside a judgment, order or decree on the ground of want of jurisdiction or fraud or collision, is not necessary.(220)

(220) Indian Evidence Code, commentaries on sect. 44. See Manjiajairam v. Kelekhan, 30 Crim. L.J. 763 (1929).

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