"JEOPARDY" DURING THE PERIOD OF THE YEAR BOOKS*

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"I detest the attempt to fetter the law by maxims," said Lord Esher. "They are almost invariably misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them."¹ Well might these words apply to the maxim that "a man's life shall not be placed twice in jeopardy for the same offense". In some form or other this maxim is included in most of the constitutions of the states of the United States.² It is a part of the common law of England and of the remaining American states. Yet it is still being interpreted and the body of law on the subject is large and ever-growing.³

Blackstone has stated the common law principle governing two trials for the same offense as follows: "The plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime."⁴ (Italics added.) It is to be noted that the guaranty included in the constitutions of the American states and in the Federal Constitution differs from this statement of Blackstone, first, in that it is broader and not limited to jeopardy of life, that is, to felony cases, and second, that it omits the second sentence quoted above, which gives as the basis for a plea of former acquittal only a verdict of the jury finding a man not guilty.

The most superficial study of American cases must show that the constitutional guaranty can never be taken literally. Jeopardy, it is said in

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¹Yarmouth v. France, 19 Q. B. D. 647, 653 (1887). The Justice was speaking of the maxim *volenti non fit injuria*.

²See COMMENTARIES ON THE ADMINISTRATION OF CRIMINAL LAW (Am. Law Inst. 1932) Tentative Draft No. 2 § 8, at 56.

³A recent decision in Pennsylvania has changed the law as to the effect of the attaching of "jeopardy" in cases less than capital. Commonwealth v. Simpson, 310 Pa. 380, 165 Atl. 498 (1933). This case holds that after jeopardy has attached on a prosecution for a capital offense, a discharge of the jury without the defendant's consent and without absolute necessity prevents a second prosecution for murder, but does not prevent a second prosecution for a lesser offense included in the first indictment.

⁴BL. COMM. *335.

innumerable cases, attaches when a jury is sworn in a criminal case to try the prisoner. Accepting this meaning of "jeopardy", then, according to the literal interpretation of the constitutional guaranty that a man shall not be twice put in jeopardy, it follows that if a jury is discharged after jeopardy has attached, no matter how imperative such discharge is, and however beneficial to the defendant himself, the defendant cannot be put on trial again for the same offense. No court has ever gone to such lengths in upholding this interpretation of the guaranty. Countless exceptions are made and will continue to be made as occasions arise which compel one trial to be stopped.⁵ The judge trying the case may die, one of the jurors may become insane, the defendant's witnesses may be wrongfully detained by the prosecution, an earthquake may occur after the jury is sworn,—the occasions are legion which might interrupt a trial, where, in justice to all, the defendant ought to be put on trial a second time. It was for this reason that one court was driven to rule that jeopardy must have been intended to mean a verdict of a jury; otherwise, as no express exception in case of necessity was made to the principle in the Constitution it would have to be a rule without exception.⁶ Other American cases have adopted the same rule.⁷ But in a majority of the American states the rule is that where the jury has been sworn in a criminal case, if it is discharged before rendering a verdict *for a reason not legally sufficient*, this is a violation of the common law principle and the constitutional guaranty against putting a man "twice in jeopardy" and is "equivalent to an acquittal".⁸ The defendant can, therefore, plead his "former acquittal" in bar of another trial for the same offense. Some states have even provided for a plea of former jeopardy, in addition to the plea of former acquittal.⁹ The English courts, however, have decided that while there is a rule of practice which requires that a jury be kept together until it has rendered its verdict, the practice has varied at different times in English legal history, and has never had any connection with the principle which allows a plea of a former acquittal or former conviction. Therefore, a discharge of the jury before verdict, even for a reason which is not legally sufficient, does not operate to bar a second prosecution of the defendant for the same offense. According to these decisions, the

⁵ See COMMENTARIES ON THE ADMINISTRATION OF CRIMINAL LAW (Am. Law Inst. 1932) Tentative Draft No. 2 § 6, at 36.

⁶ See *United States v. Haskell*, 4 Wash. 402, 410 (C. C. Pa. 1823).

⁷ See *People v. Goodwin*, 18 Johns. 187, 203 (N. Y. 1820); *Hoffman v. State*, 20 Md. 425 (1863); *Lovern v. State*, 140 Miss. 635, 105 So. 759 (1925) (under the constitution of the state); *Smith and Bennett v. State*, 41 N. J. L. 598 (1879); *State v. Van Ness*, 82 N. J. L. 181, 83 Atl. 196 (1912) *semble*. See also *United States v. Bigelow*, 3 Mack. 393, 421 (D. C. 1884); COMMENTARIES ON THE ADMINISTRATION OF CRIMINAL LAW (Am. L. Inst. 1932) Tentative Draft No. 2 § 8, at 90.

⁸ See COMMENTARIES ON THE ADMINISTRATION OF CRIMINAL LAW (Am. L. Inst. 1932) Tentative Draft No. 2 § 8, at 91.

⁹ *Id.* at 96.

common law plea of *autrefois acquit* was based on a verdict of a jury, and not on the "equivalent of an acquittal".¹⁰

The guaranty that no person shall be put twice in jeopardy for the same offense can be interpreted either as a "maxim of law" or as a "statement of law". If the former, its only significance is to embody in a popular and easily quoted form the set of rules governing the matter of two trials for the same offense. If interpreted as a statement of law, on the other hand, it is a rule absolute and subject to no exceptions. Anyone who attempts to frame in one statement the complete set of rules governing the matter of two trials for the same offense will realize at once the impossibility of the task. No rule can be formulated prohibiting a second prosecution of the same offense which does not immediately require an exception or qualification.¹¹ For this reason it can readily be seen that the guaranty is in reality nothing more than a maxim, or convenient handle to use in prohibiting a second trial for the same offense.¹² American courts which have ruled that "jeopardy" attaches when a jury is sworn and that a discharge of the jury before verdict prevents a second trial for the same offense, have fallen into the error of regarding the constitutional guaranty and the common law principle as a "statement of law" to be applied literally, rather than as a maxim of law expressing a great general principle. Nevertheless, when occasions arise where the discharge of a jury is imperative and in the interest of justice, they uniformly hold that this "statement of law" is not without exceptions.

The purpose of this article is to show the early history of the term "jeopardy" and the origin and interpretation of the maxim that a man's life shall not be twice "put in jeopardy" for the same offense. In the reports of the Year Books, which covered the period from approximately 1290 to 1535, the word "jeopardy" occurs only eleven times¹³ in reports involving

¹⁰ See *Reg. v. Charlesworth*, 1 B. & S. 460, 507 (1861) and *Winsor v. Queen*, L. R. 1 Q. B. 289, 303, 390 (1866). See also *United States v. Bigelow*, *supra* note 7, at 421. It is worth noting that in the French criminal procedure of the present day there is no doctrine of "jeopardy"; it is possible, though apparently rarely done, to discharge a jury and to postpone the case to another assise and before another jury, even where the reason is that more information is needed by the prosecution. See 4 GARRAUD, D'INSTRUCTION CRIMINELLE ET DE PROCÉDURE PÉNALE (1926) 324.

¹¹ For a draft of the rules governing this matter, see THE ADMINISTRATION OF CRIMINAL LAW (Am. L. Inst. 1932) Tentative Draft No. 2, §§ 1-29.

¹² Coke defines a maxim as a "proposition, to be of all men confessed and granted without proof, argument, or discourse". 1 INST. *67. In a general way, this is true of the proposition that a man's life shall not be twice put in jeopardy for the same offense; but as a statement of law it is certainly not true. Broom, in discussing the maxim *nemo debet bis vexari pro una et eadem causa*, says that this "expresses a great fundamental rule of our criminal law, which forbids that a man should be put in jeopardy twice for one and the same offence. It is the foundation of the special pleas of *autrefois acquit* and *autrefois convict*." But he states that the maxim can "never be relied upon where the former proceedings were fraudulent and collusive", and he gives other instances where it does not apply. BROOM, LEGAL MAXIMS (9th ed. 1924) 230.

¹³ Trin. 9 Hen. V, f. 7, pl. 21 (1421); Hil. 21 Hen. VI, f. 28, pl. 12 (1443); Hil. 33 Hen. VI, f. 1, pl. 6 (1455); Mich. 34 Hen. VI, f. 9, pl. 19 (1455); Hil. 8 Ed. IV, ff. 24, 25, pl. 7

criminal cases,¹⁴ and in only three of these instances¹⁵ was it used in the statement that a man's life shall not be twice "put in jeopardy" for the same offense. In other words, it will be shown that, although the word "jeopardy" began early to have some legal significance, it was not originally connected with the maxim that a man's life cannot twice be jeopardized for the same offense.

Under the criminal procedure of the period of the Year Books, a body of rules grew up prescribing when a second trial for the same offense was allowed and when prohibited. There was a principle of *res judicata* which prevented two prosecutions under certain circumstances, although those words were never used in the Year Book reports. But it was not a correct statement of law as it existed at that period to say that a man's life could not be put "twice in jeopardy" for the same offense. This was true whether the "putting in jeopardy" occurred when the jury was sworn or even after an acquittal or conviction. During this period a man might legally be put "twice in jeopardy" of his life because of the dual system of prosecution, by indictment and by appeal. This dual system of prosecution continued in England until 1819,¹⁶ though the appeal became obsolete long before this time. Prosecution by appeal was the older method and during the period of the Year Books was commonly used in cases of treason, homicide, robbery, larceny, rape and mayhem.¹⁷ The party to whom the "suit of vengeance", as it was called, was allowed¹⁸ first took out a writ of appeal and thereafter framed a charge against the defendant, or appellee. An indictment for the same offense could also be brought, but the appeal was deemed to have priority¹⁹ during the period within which an appeal might

(1469); Hil. 16 Ed. IV, f. 11, pl. 6 (1477); Hil. 16 Ed. IV, f. 11, pl. 7 (1477); Mich. 21 Ed. IV, ff. 73, 74, pl. 57 (1481) (the word is obviously used in its popular meaning here); Trin. 22 Ed. IV, f. 19, pl. 46 (1482); Hil. 9 Hen. VII, f. 19, pl. 14 (1494); Mich. 20 Hen. VII, f. 11, pl. 21 (1504) (the word seems to be used in the popular sense here). The adjective "jeopardus" appears in the following cases, apparently having only the popular meaning: P. 4 Ed. IV, f. 10, pl. 14 (1464) and 4 Ed. IV, f. 11, pl. 18 (1464).

¹⁴ Several of these cases were civil actions of conspiracy, but as will be shown later, these were based on the fact that criminal prosecutions had previously been brought maliciously against the plaintiff.

¹⁵ Hil. 21 Hen. VI, f. 28, pl. 12 (1443); Hil. 16 Ed. IV, f. 11, pl. 6 (1477); Hil. 9 Hen. VII, f. 19, pl. 14 (1494). Three civil cases were found in which the term "jeopardy" was found, and undoubtedly more could be uncovered on research. P. 11 Hen. IV, f. 65, pl. 25 (1410); Mich. 2 Rich. III, ff. 14, 15, pl. 39 (1484); and P. 5 Hen. VII, f. 18, pl. 11 (1490). In the last case cited, it is said that because of the "jeopardy of doubt" whether the law is as stated by counsel for the other side the plea should be decided in favor of the one entering the plea. This shows the older meaning of "jeopardy" as "even chance". See NEW ENGLISH DICTIONARY tit. Jeopardy.

¹⁶ The criminal appeal was abolished by the statute 59 GEO. III, c. 46 (1819).

¹⁷ 2 HAWKINS, PLEAS OF THE CROWN (6th ed. 1788) c. 23, §§ 15, 29 *et seq.* Appeals of treason and arson early became obsolete. *Id.* at §§ 29, 73.

¹⁸ See *ibid.* for the rules prescribing who had the right to sue an appeal in any given case.

¹⁹ 17 Seld. Soc., 1 & 2 Ed. II, 42 (1308-9); 40 Ass. f. 261, pl. 18; Mich. 11 Hen. IV, f. 94, pl. 56 (1410); Hil. 8 Hen. V, f. 6, pl. 26 (1421). In one case the appeal of an infant was abated since an infant could not sue during his nonage. He asked to have the *venire facias* to sue for the king, but this was denied. The suit of the king must wait on the mere chance that another, having the right to appeal, might sue within the year. 40 Ass. f. 254,

be brought,—that is, in general, a year and a day.²⁰ If an appeal, properly framed and brought by the proper person, was abandoned, it became possible for the prosecution to continue *on the appeal* “at the suit of the king”. The king, in other words, stepped into the position of the party to whom the suit rightfully belonged, and the prosecution was uninterrupted. If, however, an appeal was quashed because the charge was not properly framed or because the wrong person sued, it was not possible for the prosecution to continue on the appeal.²¹ In such event, the suit of the king had to be by indictment.

Trial of the issue on an appeal prosecuted by the party injured could be by battle or by jury. Whenever the prosecution was at the suit of the king, however, whether on appeal or on indictment, trial had to be by jury.²² As the great majority of cases of appeal were tried by a jury,²³ there was

pl. 14. Later, however, the rules were relaxed which prevented a suit of the king being brought during the period within which an appeal might be brought, and the statute 3 HEN. VII, c. 1 (1487) established this practice as law.

²⁰ Originally the appellor had to show that he had made fresh suit in prosecuting his appeal. The Statute of Gloucester, 6 ED. I, c. 9 (1278), provided that an appeal should not “be abated for default of fresh suit if the party shall sue within the year and the day after the deed done”. The Statute seems to refer only to appeals of homicide. The words quoted, however, were considered in one case as applying to robbery. FITZHERBERT, ABRIDGEMENT tit. Corone, 184. A later case held that a man must show fresh suit on an appeal of robbery, and even though the appeal was not commenced within the year, if fresh suit were proved, the appeal was good. P. 7 HEN. IV, f. 43, pl. 9 (1406). There seems, therefore, to be doubt as to the time within which an appeal must be brought except as to appeals of death. See STAUNDFORDE, PLEAS OF THE CROWN (1583) 62 and 2 HAWKINS, PLEAS OF THE CROWN (6th ed. 1788) c. 23, § 33 (appeal of death), § 48 (appeal of larceny), § 72 (appeal of rape). There is also a difference of opinion as to the method of measuring the statutory period for an appeal of death. Staundforde considers it should be brought within a year and a day after the stroke given. STAUNDFORDE, *supra* at 63. But Hale denies this, saying that it is a year and day after the date of the death. 1 HALE, PLEAS OF THE CROWN (1847) 427.

²¹ “If the appeal was once good, and well taken and founded on true and substantial matter, and is thereafter abated by act of God or act of the party or by law, the felony being found, the king for his interest shall put the party to answer such appeal abated.” STAUNDFORDE, *op. cit. supra* note 20, at 148a. “But if it be pleaded on the appeal that the plaintiff is outlawed, or a man attainted or otherwise disabled from having an appeal . . . or that the appeal was not commenced within the year and day, or that the plaintiff had an older brother living to whom the appeal is given . . . all such matters which would have barred the plaintiff shall bar also the King from taking advantage of the appeal.” *Id.* at 149.

²² “*Rex non pugnāt, nec alium habet campionem quam patriam.*” 2 BRACTON, DE LEGIBUS ANGLIAE f. 142b. Originally the defendant on an appeal had to be tried by battle, but in the course of the thirteenth century the privilege was extended to him of choosing his mode of trial on an appeal. MAITLAND, PLEAS OF THE CROWN FOR THE COUNTY OF GLOUCESTER (1884) xxxvi *et seq.*

²³ “Rare are the examples of battels waged upon criminals in the annals of the *English laws*,” said Selden in 1640, “and (if I forget not) the least plural number doubled, comprehends as many as are therein reported with ensuing performance.” THE DUELLO OR SINGLE COMBAT c. viii. Only four cases were found by the writer in the Year Book reports wherein the trial by battle took place, although more cases showed that the defendant offered to prove “by his body”. These four cases were: Hil. 6 ED. III, f. 12, pl. 29 (1332); P. 25 ED. III, f. 85, pl. 31 (1350); Trin. 47 ED. III, f. 5, pl. 10 (1372); and Mich. 19 HEN. VI, f. 35, pl. 74 (1440). The first case cited is also found, practically verbatim in the report of Trin. 11 HEN. IV, f. 93, pl. 50 (1410). In P. 21 HEN. VI, f. 34, pl. 1 (1443), the reporter attributes it to H. 7 ED. IV, but this is obviously incorrect. The case must be from the reign of Edward the Third, since Herle, Chief Justice of the Common Bench during that reign, is named as deciding the case.

little difference in the procedure once the prosecution started. Conviction, in cases which could be prosecuted either by appeal or indictment, carried the sentence of death.²⁴

From this short summary of criminal prosecution during the period of the Year Books it is plain that courts were called upon frequently to decide whether a second prosecution for the same offense was permissible. For example, what was the effect of an acquittal or conviction on an appeal of the party as a bar to a prosecution by indictment?²⁵ What was the effect of an acquittal or conviction on an indictment as a bar to a prosecution by appeal of the party?²⁶ What was the effect of an acquittal or conviction at the suit of the king on an appeal as a bar to an indictment?²⁷ What was the effect of an acquittal or conviction on an indictment as a bar to a prosecution at the suit of the king on an appeal?²⁸ From early times it appears that an acquittal or conviction on a prosecution at the suit of one party operated generally to bar that party from a second prosecution of the same offense.²⁹ But the rules became more involved where the two prosecu-

²⁴ If the defendant on the trial by battle defended himself until the stars appeared (BRAC-
TON, *op. cit. supra* note 22, at f. 142) or, as Selden thinks, until sunset (*op. cit. supra* note
23, at c. xi) he was acquitted. But if he was conquered in battle, judgment was that he be
hanged. Coke says: "If the defendant in appeal be vanquished in the field, the record reciteth
the vanquishing in the field. *Ideo consideratum est, quod sus. per col.* and so it is when the
defendant is vanquished and slain in the field, yet the judgment is *ut supra*. Otherwise there
should be no escheat." 3 INST. *212.

²⁵ An acquittal on an appeal after a trial by jury was a bar to a prosecution for the
same offense by indictment. P. 9 Hen. V, f. 2, pl. 7 (1421); Mich. 34 Hen. VI, f. 9, pl. 19
(1455); Mich. 14 Hen. VII, f. 2, pl. 8 (1498). There is some doubt whether an acquittal
after a trial by battle was a bar to a prosecution by indictment. Fitzherbert cites a case to
show it was not a bar. ABRIDGEMENT tit. Corone, 375, citing H. 12 Ed. II. Staundforde
repeats this statement from Fitzherbert and says: "The reason seems to be that trial by battle
does not lie against the king; wherefore there is no reason why he shall be bound by such
trial." STAUNDFORDE, *op. cit. supra* note 20, at 106a; but he doubts the correctness of the
rule. No instance was found by the writer where an acquittal on an appeal was followed by
a prosecution by indictment for the same offense. After conviction on an appeal there could
be no second prosecution by indictment, since such conviction carried the sentence of death,
and if the defendant was pardoned this would operate to prevent a prosecution at the suit of
the king.

²⁶ Before the Statute of 1487, 3 HEN. VII, c. 1, an acquittal on an indictment was held to
bar a prosecution at the suit of the party for the same offense. Trin. 21 Ed. III, f. 23, pl.
16 (1346); 21 Ass. f. 76, pl. 4; Mich. 44 Ed. III, f. 38, pl. 35 (1369); Trin. 45 Ed. III, f.
25, pl. 36 (1370); Hil. 7 Hen. IV, f. 35, pl. 4 (1406); Mich. 31 Hen. VI, f. 11, pl. 6 (1452);
Hil. 16 Ed. IV, f. 11, pl. 6 (1477). There is a suggestion, however, that the law on this
point was different in earlier cases. See 24 Seld. Soc., Eyre of Kent, 85, 125 (1313); Hil. 17
Ed. III, f. 2, pl. 6 (1343); 17 Ass. f. 48, pl. 1 (1343). After the Statute of 1487 neither a
conviction nor an acquittal on an indictment was a bar to a prosecution for the same offense
by appeal, if the appeal was brought within the year.

²⁷ It seems that the second prosecution was barred. P. 4 Ed. IV, f. 10, pl. 14 (1464).

²⁸ An early case held that an indictment brought within the year was a nullity and not a
bar to a prosecution by appeal, even the prosecution continued at the suit of the king. 24 Seld.
Soc., Eyre of Kent, 85 (1313). A little later, however, we find a plea of a former acquittal
under such circumstances upheld. 14 Ed. III (R. S.) 154 (61) (1340). See also Hil. 21
Hen. VI, f. 28, pl. 12 (1443), and BROOKE, ABRIDGEMENT tit. Appeal 41.

²⁹ One indictment was a bar to a second. 24 Seld. Soc., Eyre of Kent, 73 (1313); *id.* at
127; Trin. 25 Ed. III, f. 87, pl. 16 (1350); 41 Ass. f. 253, pl. 9. One appeal was bar to an-
other by the same party. 24 Seld. Soc., Eyre of Kent, 125 (1313) *semble*; 47 Ass. f. 311,
pl. 7. For the exception see *supra* note 28.

tions for the same offense were instituted by different parties, that is, when one prosecution was an appeal of the party and the other was the suit of the king. Before the year 1487, an acquittal on an indictment was held to be a bar to an appeal of the party for the same offense.³⁰ But a conviction, followed by a pardon, was not a bar, for the pardon invariably was on the condition that the defendant "stand to right" (*stet recto*) to answer the suit of the party.³¹ In the year 1487, a statute was passed³² which provided that an indictment in homicide cases could be brought within the year allowed by law for the bringing of an appeal, and an acquittal or conviction on such indictment should not operate as a bar to an appeal by the proper party, if brought within the year.

It is apparent, therefore, that although there were rules of law which prescribed when a second prosecution for the same offense was barred, it was not a correct statement of law to say that, during this period of the Year Books and, in fact, until the abolition of the appeal in 1819,³³ a man's life was never to be put "twice in jeopardy" for the same offense. In the time of Queen Anne, a man was acquitted, against the evidence, on an indictment of murder. Chief Justice Holt *ordered* an appeal to be brought against him for the same offense. On this appeal he was convicted by a jury, and sentenced to death.³⁴ In another case in the same reign, a defendant was convicted on an indictment of murder and pardoned. He was then appealed for the same offense, convicted of manslaughter and again pardoned.³⁵ In 1818, when prosecution on appeal had become well-nigh for-

³⁰ See *supra* note 26.

³¹ 30-31 Ed. I (R. S.) 504, 514; 24 Seld. Soc., Eyre of Kent, 77 (1313). Maitland has said of this situation: "The King could not protect the man-slayer from the suit of the dead man's kin. Even when the pardon was granted on the score of misadventure, this suit was saved by express words." 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 482. But he seems to think that at least in the time of Henry the Third, although the suit of the party was saved, there was a way of avoiding execution of the judgment. He recounts how Mr. Justice Thurkelby was consulted by a friend who had obtained a pardon but was being appealed. "The advice that the expert lawyer gave was this:—You had better go to battle; but directly a blow is struck cry 'Craven' and produce your charter; you will not be punished, for the King has given you your life and members." (Citing LA CORONA PLEDÉE DEVANT JUSTICE: Camb. Univ. Libr. Mm. i. 27, f. 124.) *Id.* at 483. It may be that the particular form of pardon in the case presented to the Justice afforded him reason for giving his advice; it may be that it was possible in the time of Henry III for the king to pardon the execution of the sentence at the suit of the party; or it may even be that this expert advice, as has sometimes since then been the case, did not represent the true state of the law. It is certain, however, that according to the Year Books the King's pardon did not pardon either the suit of the party or the execution of sentence at the party's suit. "As the party had judgment on him", said Justice Huls, "the King cannot pardon him; wherefore if you do not allege a release or such matter by which the party shall be ousted of execution you shall . . . be put to execution." Mich. 11 Hen. IV, f. 16, pl. 36 (1409). The same was true where a man was outlawed at the suit of the king and at the suit of the party for the same offense; if the defendant did not show an agreement by the party to pardon the outlawry, the pardon of the king was of no avail. 42 Ass. f. 260, pl. 15.

³² 3 HEN. VII, c. 1 (1487).

³³ 59 GEO. III, c. 46 (1819).

³⁴ Young v. Slaughterford, Queen Anne's Cases 217, 228 (1709).

³⁵ Smith v. Bowen, Queen Anne's Cases 216, 230, 254 (1709). Another case is cited in 1 STEPHEN, HISTORY OF THE CRIMINAL LAW (1883) 345.

gotten, one Thornton was charged on indictment with the murder of one Mary Ashford, and was acquitted by a jury. The brother of the dead girl then appealed Thornton of the same offense.³⁶ By this time the maxim that a man's life ought not to be put twice in jeopardy for the same offense was so well entrenched in English law that the trial aroused much criticism, and in the following year a statute was passed abolishing the criminal appeal and, in consequence, trial by battle.³⁷

It having been shown that a man could be tried a second time for the same offense, even after an acquittal or conviction, it now remains to be seen what was the legal significance of the term "jeopardy" as used in the Year Books and at what point in the prosecution of a case such jeopardy attached.

The rule that an improper discharge of the jury operates as an acquittal of the defendant on the charge, and is a bar to a second prosecution for the same offense, is commonly based on two statements of Coke and on a case found in the Year Books. Coke says in one place, "A jury, sworn or charged in case of life or member cannot be discharged by the court or any other, but they ought to give a verdict."³⁸ And in another place, "To speak it here once for all, if any person be indicted of treason, or of felony, or larceny, and plead not guilty, and thereupon a jury is returned, and sworn, their verdict must be heard, and they cannot be discharged."³⁹ There is also a statement from a Year Book report concerning the necessity of keeping the jurors together until they have agreed. It is to be noted that Coke, although he stated the necessity of keeping jurors together in capital cases, did not mention the effect of a failure to follow that procedure. The Year Book case⁴⁰ 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 the eleven. The Justices of the Common Bench, however, held this procedure improper. The panel was quashed, the juror discharged from prison

³⁶ Ashford v. Thornton, 1 B. & Ald. 405 (Eng. 1818). It is to be noticed that the defendant could not plead *autrefois acquit* because of the Statute of 1487. Thornton elected to be tried on the appeal by battle, instead of by a jury. Evidently Ashford did not expect such a method of trial. He argued that the defendant was "ousted of battle" because the presumption of guilt was strong against him. The court ruled against the appellant's plea and allowed battle. The appellant, Ashford, thereupon discontinued the appeal, and the defendant was immediately arraigned on the appeal at the suit of the king. Now for the first time Thornton could plead his former acquittal at the suit of the king by indictment. He was thereupon discharged from the prosecution.

³⁷ *Supra* note 33.

³⁸ 1 INST. *227b.

³⁹ 3 *Id.* *110.

⁴⁰ 41 Ass. f. 253, pl. 11. This case is also cited by FITZHERBERT, ABRIDGEMENT tit. Verdict, 43, and by BROOKE, ABRIDGEMENT tit. Jurors, 29, Enquest, 65, and Verdict, 49. It may have been the frequent repetition of the case by Brooke and Fitzherbert which established the general belief in such a practice.

and the plaintiff 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." It is to be noted that although it was held improper to discharge the jurors before they had rendered their verdict, yet a second trial of the action actually took place. 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. It has been seriously questioned, however, whether this was ever in fact the practice in England.⁴¹ In another report of the same case nothing is said about carrying the twelve in carts until they agree.⁴² The case, therefore, offers no support for the proposition that an improper discharge of the jury in a criminal case before rendering a verdict is a bar to a second prosecution for the same offense.

There is evidence, on the other hand, that it was proper to discharge a jury after it had been sworn, and to begin the case again. It has been said of the cases tried at the Eyre of Kent in 1313 that the record shows "that cases were adjourned once or twice, or even oftener for further evidence. Perhaps one might even go so far as to say that they were revived, when some forgotten evidence was recovered or remembered."⁴³ Maitland, who makes this statement, may have warrant for it from his study of the records; his illustration, however, shows that a presenting jury first charged two persons with the death of another; later they added a third person to the list of the accused. It is impossible to determine from this what were the actual proceedings at the trial of each separate defendant and whether any interruption was permitted "for further evidence", as he says. One case from the reports of the Year Books, however, does show that jurors were sworn on an indictment of felony, and when it was found that the roll containing an entry of the indictment was not ready in court, the jurors were suffered to go at large and the next day "they were later sworn anew as if they had never appeared before".⁴⁴

The most positive evidence that it was possible, during the later Year Book period at least, to discharge a jury for certain causes after it had been sworn comes from a dialogue in *Doctor and Student*, which was published shortly after the close of the Year Book period. In this dialogue the student asks what procedure would be followed if one of the jurors knows the truth and refuses to be swayed by the other eleven jurors to give a verdict contrary to his conscience. Shall he, because food and drink are not allowed to jurors until they are agreed, be forced "to be eyther forsworne, or to be famished and die for lacke of meat?" The doctor answers that if

⁴¹ Reg. v. Charlesworth, *supra* note 10, at 498 n. (b).

⁴² Mich. 41 Ed. III, f. 31, pl. 36 (1367).

⁴³ 24 Seld. Soc., Eyre of Kent (1909) xlv.

⁴⁴ Hil. 7 Hen. IV, f. 39, pl. 2 (1406); FITZHERBERT, ABRIDGEMENT tit. Enqueste, 35; BROOKE, ABRIDGMENT tit. Jurors, 6.

"that appereth to the Justices by examinacion, the Justices maye in that case suffre them have bothe meate and drynke for a tyme to se whether they wyll agree, and if they wyll in no wyse agree I thinke that than the Justices may set such order in ye matter as shal seme to them by their discrecion to stand with reason and conscience by awardinge of a new enquest and by setting fines upon them that they shall find in defaute or otherwise as they shall thinke best by theyr discrecyon *like as they may do if one of the Juri dye before verdict, or if any other lyke casualties fall in that behalfe.*"⁴⁵ (Italics added.) Brooke, writing in 1560, also has a note to the effect that if one of the jurors dies before the verdict, a new inquest will be ordered.⁴⁶

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 accused had been prosecuted before for the same offense and the jury was discharged before rendering a verdict. From the evidence of these early reports, it would seem to be true, as was said much later, that the matter of keeping the jury together until they had rendered their verdict was "not considered a rule of positive law, but of practice and procedure, subject to variation by the authority vested in the Courts to regulate their own practice".⁴⁷

Although, as was said above, the attaching of jeopardy did not bar a second prosecution, it does appear that it had some legal effect. The evidence is, moreover, that jeopardy attached not when the jury was sworn to try the case, but at an earlier stage in the proceedings, namely, when a plea of not guilty was entered. This is gleaned from a number of statements of counsel and finally by the expressed opinion of a Justice of the King's Bench. In the first of these cases⁴⁸ the statement of counsel for the defendant, which was not refuted by the court, was that "jeopardy" had already attached when the jury had come, was sworn and was ready to pass on the case. The reporter of another case⁴⁹ states that "it was touched in this case" that jeopardy had not attached during the argument on a special plea. In a third report,⁵⁰ where the appellee, that is, the defendant on an appeal, had pleaded not guilty, and before the jurors had appeared, it was stated that jeopardy had attached. Finally in the fourth case,⁵¹ we have Justice Fairfax stating, "The defendant has pleaded a plea (not guilty) by which he has put his life in jeopardy." ⁵²

⁴⁵ DOCTOR AND STUDENT (1554) Dial. 2, c. 52.

⁴⁶ ABRIDGEMENT tit. Jurors, 51.

⁴⁷ Reg. v. Charlesworth, *supra* note 10, at 500.

⁴⁸ Trin. 9 Hen. V, f. 7, pl. 21 (1421).

⁴⁹ Hil. 8 Ed. IV, f. 24, pl. 7 (1469), citing from a case in 3 Hen. VI.

⁵⁰ Hil. 16 Ed. IV, f. 11, pl. 7 (1477).

⁵¹ Trin. 22 Ed. IV, f. 19, pl. 46 (1482).

⁵² The word "jeopardy" seems to have come into usage in the English language during the 14th and 15th centuries. See NEW ENGLISH DICTIONARY. An early case in 1344 expresses the idea of the attaching of "jeopardy" when there is a plea, but the word "peryl" is used instead of "jeopardy". It was pleaded that there was another case of trespass for the same offense pending, on which defendant had pleaded to issue. "Wherefore", said the defend-

It would seem that if the attaching of jeopardy is to have legal significance, it is more logical to hold that it occurs when a plea of not guilty is entered rather than when the jury is sworn. In the popular sense of the term, a man may be said to be in "jeopardy" of conviction at any stage of the prosecution from arrest to the final review of the case by an appellate court. Although American courts say that a man is in *legal* jeopardy when a jury is sworn to try his case, yet it is undoubtedly true that a defendant could not legally be convicted unless there has been a valid indictment in a competent court, a plea (or waiver thereof), and, if the plea is "not guilty", a jury sworn and a *prima facie* case made out; for until these things have happened no valid judgment of conviction could be entered against him. Therefore, the accused ought not to be deemed to be in legal jeopardy until sufficient evidence has been introduced against him upon a valid indictment and in a competent court to warrant a verdict of conviction. No American court fixes this point in the trial as the time when jeopardy attaches. In modern English law the defendant is not in jeopardy even at this point—not until there has been a verdict of acquittal or conviction.⁵³ As between the modern American rule and the ruling of Fairfax, J., it seems more logical to hold that jeopardy attaches at the earlier time, namely, when the defendant pleads not guilty, rather than when the jury is sworn. Before the plea of not guilty is made, a verdict of conviction would be a nullity; the statement from the Year Book report is true that the defendant's life was not in jeopardy during the argument on a special plea, for if this is ruled against him no judgment of conviction can be entered; he can still plead over to the felony.⁵⁴ After he pleads not guilty, however, the defendant is to this extent in jeopardy in that for the first time he is in a position where a valid judgment of guilty can be entered against him. The only argument for holding that jeopardy attaches at the time the jury is sworn is the rule of practice which compelled a jury once sworn in the trial of a case to be kept together until it rendered a verdict. That, as has been stated above, was a rule of practice, growing 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.⁵⁵ 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 offense.

ant, "if you were to be answered in this Court, then, should you recover in this Court, we should never be admitted to allege the fact afterwards in the other Court; and so it would follow that we should be twice charged, because we have *at our peril* [peryl] pleaded to issue." (Italics added.) 18 Ed. III (R. S.) 364 (31) (1344).

⁵³ Reg. v. Charlesworth; Winsor v. Queen, both *supra* note 10.

⁵⁴ STAUNDFORDE, *op. cit. supra* note 20, at 98a: "*In favorem vitae*, the law permits him to plead over to the felony." See also Trin. 14 Ed. IV, f. 7, pl. 9 (1474). But this same report says, "If he *demurs* on a plea which is adjudged against him, he shall be hanged. Which was conceded."

⁵⁵ 43 Seld. Soc. (1926) xiii.

Although there is nowhere any intimation in the reports of the Year Books that the attaching of jeopardy had any effect in barring a second prosecution for the same offense, it does appear that upon the entry of a plea of not guilty some consequences ensued. The word "jeopardy" appears in the reports of the Year Books for the first time in 1421.⁵⁶ Before this date, it was stated in one case⁵⁷ that if a man pleaded not guilty he could not thereafter become an approver⁵⁸ and appeal others, since he had "joined a binding (*peremptoire*) issue". After a plea of not guilty it was too late to change to a plea of a former acquittal, according to another early case.⁵⁹ Also, after a plea of not guilty on an indictment it was too late to ask that the trial be postponed on the ground that there was an appeal pending for the same offense.⁶⁰ The reporter of another case was of opinion that when "jeopardy" had attached on an appeal the appellor could not appeal again for the same offense while the first appeal was pending.⁶¹ This is the only case in which it is suggested that after jeopardy attached a second prosecution of the same defendant was barred.

Another effect of the attaching of jeopardy was stated in another case.⁶² An appeal of robbery had been brought and the defendant pleaded not guilty and demanded a trial by battle. The plaintiff prayed that the defendant be ousted of battle since there was an indictment pending against him for the same robbery. Justice Fairfax had the indictment read, but, as it was not sufficient in form, he held it could not oust the defendant of his right to trial by battle. Then counsel for the appellor said, "We pray that we can imparl" (that is, adjourn to consider a new line of argument). Justice Fairfax answered: "That would be against reason, for the defendant has pleaded a plea by which he has put his life in jeopardy; wherefore there is reason that the plaintiff reply or otherwise he (the Justice) will dismiss the defendant from court."

Three cases show that the attaching of jeopardy on a criminal prosecution was necessary to sustain an action for damages for conspiracy to procure an indictment for a felony, or for a malicious appeal. By the *Statute of Westminster*⁶³ it was provided that if a person were acquitted *modo debito* of a charge of felony on an appeal, either at the suit of the party or at the suit of the king, damages for a malicious appeal could be

⁵⁶ Trin. 9 Hen. V, f. 7, pl. 21 (1421).

⁵⁷ Trin. 21 Ed. III, f. 18, pl. 25 (1346).

⁵⁸ An approver was a person who confessed his guilt on a prosecution by indictment and appealed others of the same offense. 2 Hen. VII, f. 3, pl. 8 (1486); FITZHERBERT, ABRIDGEMENT tit. Corone, 50.

⁵⁹ 30-31 Ed. I (R. S.) 537.

⁶⁰ Mich. 31 Hen. VI, f. 11, pl. 6 (1452); FITZHERBERT, ABRIDGEMENT tit. Corone, 18. An additional reason may have been in this case that the jurors were in court ready to be sworn.

⁶¹ Hil. 16 Ed. IV, f. 11, pl. 7 (1477).

⁶² Trin. 22 Ed. IV, f. 19, pl. 46 (1482).

⁶³ WESTMINSTER II (13 Edw. I) c. 12 (1285).

assessed both against the appellor and against his abettors. There was also a common law action of conspiracy against persons who maliciously procured another to be indicted for felony.⁶⁴ In each of these situations it was necessary, *inter alia*, to show that the person who had been subjected to a malicious appeal or false indictment had been acquitted *modo debito*, or, as the cases generally put it, "*legitimo modo acquietatus*". A discharge of the defendant because of an abatement of the appeal,⁶⁵ or a demurrer⁶⁶ or because the defendant took to his clergy⁶⁷ was not such an acquittal. But if he was acquitted after "the life of the defendant was in jeopardy" he was *legitimo modo acquietatus*. This appears in three reports. In two the same set of facts appear, and the two reports seem to be different stages of the same case.⁶⁸ A principal and an accessory were accused of an offense on the same indictment. The principal was tried first and acquitted by a jury, and this acquittal operated to discharge the accessory, since an accessory could not be tried unless the principal felon was attainted. The accessory thereafter sued a writ of conspiracy against the persons who procured the indictment and claimed that he had been *legitimo modo acquietatus*. It was objected by the defendants that the plaintiff could not have this action of conspiracy because the principal in the former charge had been acquitted and therefore "the life of the accessory was never in jeopardy". But the court ruled that the accessory had an action of conspiracy when he with the principal was charged on the same indictment and the principal was acquitted, "for the life of the accessory was in jeopardy by one and the same thing". This case was later decided against the plaintiff on the ground that the writ failed to mention certain matters. In the next year, however, the plaintiff seems to have amended his complaint, for the same case is continued with the same arguments advanced regarding jeopardy. Littleton⁶⁹ seems to have agreed that the accessory's life was not in jeopardy by the trial of the principal, but, he said, since he had been *legitimo modo acquietatus*, he could sue this writ under the statute. Justice Danby, on the other hand, upheld the action because "in this case his life was in jeopardy by one and the same thing. For if the principal were attainted then those of the enquest ought to inquire if the accessory was guilty or not, if he had appeared."

In another case⁷⁰ the plaintiff sued a writ of conspiracy against certain defendants charging that they caused him to be indicted for the death of

⁶⁴ 2 Co. INST. *562. See also POLLOCK AND MAITLAND, *op. cit. supra* note 31, at 539.

⁶⁵ STAUNDFORDE, *op. cit. supra* note 20, at 169, citing FITZHERBERT, ABRIDGEMENT tit. Coroner, 201; 27 Ass. 77 and T. 9 Hen. IV.

⁶⁶ *Ibid.*, citing M. 21 Hen. VI.

⁶⁷ *Ibid.*, citing P. 17 Ed. II.

⁶⁸ Hil. 33 Hen. VI, f. 1, pl. 6 (1455); Mich. 34 Hen. VI, f. 9, pl. 19 (1455).

⁶⁹ This is probably the famous Littleton who was afterwards, in 1467, appointed Justice of the Common Bench. See Co. LITT. (1st Am. ed. 1853) XXIX.

⁷⁰ Hil. 21 Hen. VI, f. 28, pl. 12 (1443).

J. Païton and that he had been arraigned at the suit of the king and *legitimo modo acquietatus*. For the defendants it was argued that the plaintiff had not been *legitimo modo acquietatus* because there was an appeal pending against him for the same offense brought by the wife of J. Païton, which should have had precedence, and therefore the trial on the indictment was a nullity. Justice Newton held that the trial on the indictment was not a nullity. "If one be arraigned on an indictment within the year," he said, "this arraignment is lawful, and if he be acquitted, he shall not be arraigned at the suit of the wife or heir, for then he would put his life twice in jeopardy, and rather shall the wife or the heir lose their action, *et hoc in favorem vite*." Justice Ascue disagreed with the statement of Justice Newton that a man's life could not be twice put in jeopardy for the same offense. For, he argued, if a younger son brings an appeal, or a person claiming as heir where there is a wife living, and the defendant makes no objection, an acquittal on such a trial shall not be a bar to a prosecution at the suit of the older son in the one case, or the wife in the other. "So in several cases," he says, "a man shall put his life twice in jeopardy." The case shows that the Justices finally agreed that the first trial was not a nullity. It is clear from this difference of opinion as to the statement made by Justice Newton that the maxim was not an accepted principle in 1443.

As a term having some bearing on the question of two trials for the same offense the word "jeopardy" is to be found in two later cases during the Year Book period. In neither of these cases was there any expression of opinion by the Justices and in both it is doubtful whether the maxim was stated at the time of the prosecution or was added by some later commentator. In a *quare impedit* action,⁷¹ the statement was made by Justice Brian, "If one brings an appeal of the death of his father, it is a good plea to say for the defendant that formerly he was indicted, arraigned and acquitted of the same cause, etc. Judgment if action, etc." The report continues as follows: "Quod tota Curia concessit. Et le cause est pur ceo que le defendant ne mittera sa vie deux fois en jeopardy pur un meme cause." It would seem that it is not the Justice who has added the reason for the rule which he stated. His remark ends fittingly with the answer to the plea. The reporter then adds that the whole court conceded the truth of the Justice's statement. The note in French about jeopardy after the Latin sentence stating the agreement of the court may be either the opinion of the reporter or an interpolation of a later person, who was using the manuscript and making annotations. It would be impossible to determine this question without studying the manuscripts reporting this case.⁷²

⁷¹ Hil. 16 Ed. IV, f. 11, pl. 6 (1477).

⁷² The most plausible theory as to the origin of the reports of the Year Books is advanced by William Craddock Bolland, that they were notes of the proceedings as they occurred in court, written on scraps of parchment by junior members of the Bar, probably

In another report⁷³ an appeal was brought against one *J.* as principal and one *Alice* as accessory. *J.* pleaded that formerly he was arraigned of the same felony and was attainted. "And the plaintiff said that that appeal was commenced of another matter . . . And on that they were at issue." The report then continues: "But there see that the said *Alice* was not put to answer. For the accessory shall not be put to answer but where the principal is put to answer, and the principal shall not be put to answer for the same thing twice, for his life shall not two times be put in jeopardy for one and the same thing." Here again it is impossible to determine from the text when or by whom the statement as to jeopardy was made.

The only clearly judicial statement, therefore, in the Year Book reports that "a man's life ought not to be twice put in jeopardy for the same offense" is the statement made by Justice Newton, a statement which was not necessary for the decision of the case and which was questioned by Justice Ascue at the time it was made.

That the maxim was not an accepted principle during the period of the Year Books is borne out by the fact that contemporary writers did not mention it; and that the word "jeopardy" itself was not an accepted term can be seen from the fact that each of these same contemporary writers employed it very rarely. Statham, whose *Abridgment of the Law* appeared about 1488,⁷⁴ used the word "jeopardy" only once and then in connection with a malicious appeal.⁷⁵ The case which he digests did not, in the original, contain the term. Fitzherbert, whose *Grande Abridgement* appeared in 1516, used the word "jeopardy" only twice, both times in connection with the action of conspiracy.⁷⁶ Between the time when Fitzherbert's *Abridgement* appeared, in 1516, and 1560, when Brooke's *Abridgement* was published, the word "jeopardy" seems to have become better known. Eight of the nine Year Book cases where it was employed in a legal sense are to be found in Brooke's *Abridgement*,⁷⁷ and in seven of these

employed by a syndicate of lawyers. These notes were immediately dictated to a number of scriveners whose reports were, therefore, not original reports but transcripts. No original reports have ever been found. The Year Books did not begin to be printed until about 1481. BOLLAND, *THE YEAR BOOKS* (1921) 30-42. On the same subject, see 17 *Seld. Soc.* (1903) xi, xc; 26 *Seld. Soc.* (1911) xxiv; 42 *Seld. Soc.* (1925) xxxix. It is to be noted that if the last sentence of the report just cited is a later interpolation, it must have been added between the date of the case, 1477, and 1487, when the law stated by Justice Brian was changed by statute.

⁷³ Hil. 9 Hen. VII, f. 19, pl. 14 (1494).

⁷⁴ See COWLEY, *BIBLIOGRAPHY OF ABRIDGMENTS* (1932) xxix.

⁷⁵ STATHAM, *ABRIDGEMENT OF THE LAW* tit. Error, 14, a digest of P. 9 Hen. V, f. 2, pl. 7 (1421).

⁷⁶ ABRIDGEMENT tit. Conspiracy, 4, a digest of 33 Hen. VI, f. 1, pl. 6 (1455). Fitzherbert calls it "*en ieopardie*".

⁷⁷ The eight cases cited by Brooke are as follows: Trin. 9 Hen. V, f. 7, pl. 21 (1421); cited in Challenge, 50; Hil. 21 Hen. VI, f. 28, pl. 12 (1443), cited in Appeal, 41, and Corone, 48; Hil. 33 Hen. VI, f. 1, pl. 6 (1455), and Mich. 34 Hen. VI, f. 9, pl. 19 (1455), cited in Conspiracy, 2; Hil. 16 Ed. IV, f. 11, pl. 6 (1477), cited in Appeal, 102; Hil. 16 Ed. IV, f. 11, pl. 7 (1477), cited in Appeal, 103; Trin. 22 Ed. IV, f. 19, pl. 46 (1482), cited in Continuances and Imparlanes, 51; Hil. 9 Hen. VII, f. 19, pl. 14 (1494), cited in Appeal, 89.

the word jeopardy is used.⁷⁸ In addition to these cases Brooke employed the word in at least four other places.⁷⁹ In three of these he states the principle that "a man's life shall not be put twice in jeopardy for the same offense," although in none of the original cases cited for this principle was the maxim used. Notwithstanding the fact that Brooke thus states the principle in some cases, yet in another place he says: "See where the life of a man *can* be twice in jeopardy, as where he is arraigned at the suit of the younger son and acquitted, or of the heir and acquitted, where there is an older son in the one case or where the dead man had a wife living in the other case."⁸⁰

It would seem, therefore, that the maxim came to be generally known between the time of Fitzherbert's *Abridgement* and the publication of Brooke's *Abridgement*. It may be that Brooke himself was interested in the maxim which he found in the Year Book reports, and developed the idea in his digest of other cases where it appeared that a second trial for the same offense was barred. But that he himself was not the originator of the maxim can be seen from his digest of the cases where it is found in the Year Books.⁸¹

To sum up, three things are to be noted from the reports of the Year Books. First, the word "jeopardy" acquired a legal meaning in early times, but it was not originally of significance in connection with the matter of two trials for the same offense. Second, jeopardy attached, not when the jury was sworn, but at an earlier period in the prosecution of a case, namely, when a plea of not guilty was made. Third, it was not a correct statement of law that a man's life could not be twice "put in jeopardy", although a complicated set of rules had become formulated prescribing when a second trial for the same offense was barred.

⁷⁸ The word "jeopardy" does not appear in Brooke's digest of Trin. 9 Hen. V, f. 7, pl. 21 (1421).

⁷⁹ ABRIDGEMENT, tit. Corone, 182: "Note, that no one can take the privilege of the Church (that is, sanctuary) if he be not in jeopardy of his life." He cites no case for this statement. The three other instances are Appeal, 9, and Corone, 11, for the digest of Mich. 44 Ed. III, f. 38, pl. 35 (1369); Appeal, 12, for the digest of Trin. 21 Ed. III, f. 23, pl. 16 (1346), and Trin. 45 Ed. III, f. 25, pl. 36 (1370); and Corone, 49, which is stated to be a digest of 7 Ed. III [probably Hil. 7 Ed. III, f. 12, pl. 29 (1333)].

⁸⁰ ABRIDGEMENT tit. Corone, 48, and Appeal, 41.

⁸¹ Cf. Hil. 16 Ed. IV, f. 11, pl. 6 (1477), BROOKE, ABRIDGEMENT tit. Appeal, 102; and Hil. 16 Ed. IV, f. 11, pl. 7 (1477), BROOKE, tit. Appeal, 103.