

indictment was invalid or for some reason the trial's results were voidable, a judgment of acquittal must nevertheless remain undisturbed.¹⁰⁴

Acquittal by the Trial Judge.—When a trial judge acquits a defendant, that action concludes the matter to the same extent that acquittal by jury verdict does.¹⁰⁵ There is no possibility of retrial for the same offense.¹⁰⁶ But it may be difficult at times to determine whether the trial judge's action was in fact an acquittal or whether it was a dismissal or some other action, which the prosecution may be able to appeal or the judge may be able to reconsider.¹⁰⁷ The question is “whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.”¹⁰⁸ Thus, an appeal by the government was held barred in a case in which the deadlocked jury had been discharged, and the trial judge had granted the defendant's motion for a judgment of acquittal under the appro-

gree murder lacked the necessary finality of an acquittal, and found that Double Jeopardy did not bar a subsequent prosecution for those crimes. Three dissenting Justices held that Double Jeopardy required a partial verdict of acquittal on the greater offenses under the circumstances.

In *Schiro v. Farley*, 510 U.S. 222 (1994), the Court ruled that a jury's action in leaving the verdict sheet blank on all but one count did not amount to an acquittal on those counts, and that consequently conviction on the remaining count, alleged to be duplicative of one of the blank counts, could not constitute double jeopardy. In any event, the Court added, no successive prosecution violative of double jeopardy could result from an initial sentencing proceeding in the course of an initial prosecution.

¹⁰⁴ In *United States v. Ball*, 163 U.S. 662 (1896), three defendants were placed on trial, Ball was acquitted and the other two were convicted, the two appealed and obtained a reversal on the ground that the indictment had been defective, and all three were again tried and all three were convicted. Ball's conviction was set aside as violating the clause; the trial court's action was not void but only voidable, and Ball had taken no steps to void it while the government could not take such action. Similarly, in *Benton v. Maryland*, 395 U.S. 784 (1969), the defendant was convicted of burglary but acquitted of larceny; the conviction was set aside on his appeal because the jury had been unconstitutionally chosen. He was again tried and convicted of both burglary and larceny, but the larceny conviction was held to violate the Double Jeopardy Clause. On the doctrine of “constructive acquittals” by conviction of a lesser included offense, see discussion *infra* under “Reprosecution After Reversal on Defendant's Appeal.”

¹⁰⁵ *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570–72 (1977); *Sanabria v. United States*, 437 U.S. 54, 63–65 (1978); *Finch v. United States*, 433 U.S. 676 (1977).

¹⁰⁶ In *Fong Foo v. United States*, 369 U.S. 141 (1962), the Court acknowledged that the trial judge's action in acquitting was “based upon an egregiously erroneous foundation,” but it was nonetheless final and could not be reviewed. *Id.* at 143.

¹⁰⁷ As a general rule a state may prescribe that a judge's midtrial determination of the sufficiency of the prosecution's proof may be reconsidered. *Smith v. Massachusetts*, 543 U.S. 462 (2005) (Massachusetts had not done so, however, so the judge's midtrial acquittal on one of three counts became final for double jeopardy purposes when the prosecution rested its case).

¹⁰⁸ *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).