

tion related to the defendant's factual guilt or innocence.¹²¹ Such dismissals relating to guilt or innocence are functional equivalents of acquittals, whereas all other dismissals are functional equivalents of mistrials.

Reprosecution Following Conviction

A basic purpose of the Double Jeopardy Clause is to protect a defendant "against a second prosecution for the same offense after conviction."¹²² It is "settled" that "no man can be twice lawfully punished for the same offense."¹²³ Of course, the defendant's interest in finality, which informs much of double jeopardy jurisprudence, is quite attenuated following conviction, and he will most likely appeal, whereas the prosecution will ordinarily be content with its judgment.¹²⁴ The situation involving reprosecution ordinarily arises, therefore, only in the context of successful defense appeals and controversies over punishment.

Reprosecution After Reversal on Defendant's Appeal.—

Generally, a defendant who is successful in having his conviction set aside on appeal may be tried again for the same offense, the assumption being made in the first case on the subject that, by appealing, a defendant has "waived" his objection to further prosecution by challenging the original conviction.¹²⁵ Although it has char-

¹²¹ *United States v. Scott*, 437 U.S. 82 (1978) (at close of evidence, court dismissed indictment for preindictment delay; ruling did not go to determination of guilt or innocence, but, like a mistrial, permitted further proceedings that would go to factual resolution of guilt or innocence). The Court thought that double jeopardy policies were resolvable by balancing the defendant's interest in having the trial concluded in one proceeding against the government's right to one complete opportunity to convict those who have violated the law. The defendant chose to move to terminate the proceedings and, having made a voluntary choice, is bound to the consequences, including the obligation to continue in further proceedings. *Id.* at 95–101. The four dissenters would have followed *Jenkins*, and accused the Court of having adopted too restrictive a definition of acquittal. Their view is that the rule against retrials after acquittal does not, as the Court believed, "safeguard determination of innocence; rather, it is that a retrial following a final judgment for the accused necessarily threatens intolerable interference with the constitutional policy against multiple trials." *Id.* at 101, 104 (Justices Brennan, White, Marshall, and Stevens). They would, therefore, treat dismissals as functional equivalents of acquittals, whenever further proceedings would be required after reversals.

¹²² *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

¹²³ *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873).

¹²⁴ A prosecutor dissatisfied with the punishment imposed upon the first conviction might seek another trial in order to obtain a greater sentence. *Cf. Ciucci v. Illinois*, 356 U.S. 571 (1958) (under Due Process Clause, Double Jeopardy Clause not then applying to states).

¹²⁵ *United States v. Ball*, 163 U.S. 662 (1896). The English rule precluded a new trial in these circumstances, and circuit Justice Story adopted that view. *United States v. Gilbert*, 25 Fed. Cas. 1287 (No. 15,204) (C.C.D.Mass. 1834). The history is briefly surveyed in Justice Frankfurter's dissent in *Green v. United States*, 355 U.S. 184, 200–05 (1957).