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# Criminal Procedure -- Double Jeopardy: In the Interest of Public Justice

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In short, it must be expected that very few cases will arise under the act, with the card issuer being content to bear the losses,[41] though passing them on in part to the consumer and the merchant through increased costs.

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## Criminal Procedure—Double Jeopardy: In the Interest of Public Justice

The "universal maxim of the common law,"[1] that no one should be twice vexed for the same cause, was elevated to a position of constitutional dignity by the adoption of the fifth amendment.[2] Today, it is among the most fundamental guarantees of the Bill of Rights.[3] However, before a man can "be twice put in jeopardy of life or limb"[4] there must have been initial jeopardy. The Court of Appeals for the Seventh Circuit, in *United States ex rel. Somerville v. Illinois*,[5] recently considered the problem of when and under what circumstances jeopardy is deemed to have attached so as to bar a subsequent prosecution. Petitioner Donald Somerville was indicted for theft on March 19, 1964. On November 1, 1965, his case

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the immediate implication is that the definition can apply to only one transaction and not to a series of transactions. From a pragmatic point of view, this is untenable since it would wipe out effective limitation of liability and destroy the intent to protect the cardholder which is the basis of the act. Testimony before the committee that entertained the bill reveals that the spokesman for the American Bankers Association assumed the limitation to apply to a series of unauthorized uses rather than to each unauthorized use of the card. His statement was *not* contradicted. *1969 Hearings* 107. If this assumption is not borne out in the courts, the need for liability insurance will be renewed.

[41] According to a representative of the Federal Trade Commission, earliest indications under the act point to this result since most companies are not bothering to meet the requirements. Raleigh News and Observer, Jan. 28, 1971, at 35, col. 3.

[1] 4 W. BLACKSTONE, COMMENTARIES *335.

[2] "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V. *See* J. SIGLER, DOUBLE JEOPARDY, THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 1-37, 226 (1969) [hereinafter cited as SIGLER].

[3] Benton v. Maryland, 395 U.S. 784, 793-96 (1969). This case applied the double jeopardy provision of the fifth amendment to the states through the fourteenth amendment.

[4] U.S. CONST. amend. V.

[5] 429 F.2d 1335 (7th Cir. 1970). The Supreme Court has recently vacated the seventh circuit's decision in *Somerville* and remanded the case for reconsideration in light of the decisions in *United States v. Jorn*, 91 S. Ct. 547 (1971), and *Downum v. United States*, 372 U.S. 734 (1963). 39 U.S.L.W. 3436 (U.S. Apr. 6, 1971). These cases are discussed generally *infra*.

came to trial, and twelve jurors were duly impaneled and sworn. The following day the state's attorney moved for a mistrial and to *nolle prosequi* on the ground that the indictment did not allege a crime and was therefore void.[6] The motion was granted over the defendant's objection. On November 3, a corrected indictment was returned under which Somerville was subsequently convicted, his claim of double jeopardy having been rejected.[7]

Somerville filed a petition for habeas corpus asserting that jeopardy had attached upon the selection and swearing of the jury and that retrial after the discharge of the jury subjected him to double jeopardy in violation of the fifth amendment. The Court of Appeals for the Seventh Circuit affirmed the dismissal of the habeas corpus petition by the district court, holding that the discharge of a jury impaneled and sworn under an invalid indictment did not bar reprosecution on the ground of double jeopardy.[8]

Confusion has consistently surrounded the double jeopardy proscription of the fifth amendment. Although it is one of the most litigated portions of the Bill of Rights, it is extremely difficult to predict with precision the outcome of any defense predicated upon double jeopardy.[9] One of the major areas of uncertainty is that which is concerned with the attachment of jeopardy. While the Supreme Court has not yet ruled upon the question raised in *Somerville*, an examination of prior double jeopardy decisions may serve to reveal the ultimate outcome of any appeal on the issue.

A statement of what has been characterized as "the general rule" notes that "a person is not in jeopardy until he has been arraigned on a valid indictment . . . and a jury has been impaneled and sworn . . . ."[10] Decisions

[6] The indictment failed to alleged intent to deprive the owner permanently of the use or benefit of the property, an essential element of the offense sought to be charged, and its omission rendered the indictment invalid. 429 F.2d at 1336 & n.2.

[7] People v. Somerville, 88 Ill. App. 2d 212, 232 N.E.2d 115 (1967), *leave to appeal denied*, 37 Ill. 2d 627, *cert. denied*, 393 U.S. 823 (1968).

[8] United States *ex rel.* Somerville v. Illinois, 429 F.2d 1335 (7th Cir. 1970).

[9] SIGLER 226.

[10] McCarthy v. Zerbst, 85 F.2d 640, 642 (10th Cir.), *cert. denied*, 299 U.S. 610 (1936). *See also* Amrine v. Times, 131 F.2d 827, 834 (10th Cir. 1942). The rule is different in a nonjury trial. There jeopardy is not deemed to have attached until the court has begun to hear evidence. McCarthy v. Zerbst, 85 F.2d 640, 642 (10th Cir. 1936). *See also* 22 C.J.S. *Criminal Law* § 241 (1961). These rules as to the time of the attachment of jeopardy have been supported as well-founded:

> By the time the jury has been sworn or evidence introduced, the accused has been put to substantial trouble and expense and there has been considerable investment of judicial resources. To delay attachment of jeopardy to some later trial stage maximizes the risk of harassment of the accused and enables the prosecution to escape a particular jury. On the other hand, to

of the Supreme Court, however, tend to discount the importance of a valid indictment. In *United States v. Ball*,[11] the defendant was tried and acquitted under an indictment later adjudged "fatally defective."[12] A new indictment was returned against him, and he was found guilty, the court denying his plea of former jeopardy. The Supreme Court recognized that to allow a public officer, whose business it was to draw a correct indictment, to allege his own inaccuracy or neglect as a reason for a second trial was "'like permitting a party to take advantage of his own wrong,'"[13] and it held that the verdict of acquittal was conclusive notwithstanding the invalidity of the indictment. This view was recently reaffirmed in *Benton v. Maryland*,[14] in which the state's argument that one cannot be placed in jeopardy by a void indictment was characterized as "strange . . . since petitioner could quietly have served out his sentence under this 'void' indictment had he not appealed . . . ."[15]

*Downum v. United States*[16] represents a Supreme Court decision that is factually similar to *Somerville*. A jury had been selected and sworn when the prosecution asked that it be discharged because of the absence of a key witness. This was done over the objection of the defendant. Two days later a second jury was impaneled, and the defendant was found guilty. The Court reversed the conviction, holding that the defendant's retrial subjected him to double jeopardy. The majority in *Somerville* made no attempt to distinguish *Downum*. The dissent, however, carefully noted the similarities and criticized the majority's departure from precedent:

> Both cases were dismissed on motion of the Government because of its own fault. In Downum, it was the failure of the Government to procure the attendance of a material witness; in the instant case, it was an allegedly defective indictment for which it was responsible.[17]

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advance attachment of jeopardy to an earlier point in the proceeding . . . unduly discounts the state's legitimate interest in bringing offenders to trial. Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1275 (1964). The Model Penal Code suggests that jeopardy attach in all cases upon the swearing of the first witness, evidencing the belief that there should be no distinction between jury and nonjury trials. MODEL PENAL CODE § 1.08(4) (Proposed Official Draft 1962); MODEL PENAL CODE § 1.09, Comment (Tent. Draft No. 5, 1956).

[11] 163 U.S. 662 (1896).

[12] *Id.* at 664. The indictment had been attacked on appeal by Ball's two codefendants, who had been found guilty.

[13] *Id.* at 668.

[14] 395 U.S. 784 (1969).

[15] *Id.* at 796.

[16] 372 U.S. 734 (1963).

[17] 429 F.2d at 1338.

The "valued right [of an accused] to have his trial completed by a particular tribunal"[18] is well recognized, and a recent decision stressed this consideration, emphasizing "the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate."[19] Nevertheless, it is clear that in some instances a trial must be discontinued after the jury is impaneled and sworn but before a verdict is reached without double jeopardy barring reprosecution. *United States v. Perez*[20] enunciated a rule in 1824 that has since been scrupulously followed by the courts:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.[21]

Thus, termination prior to the verdict is no bar to retrial where the jury is unable to agree,[22] where there is a possibility of juror bias[23] or one of the jurors is disqualified,[24] where necessary for tactical reasons in a military campaign,[25] or where the mistrial was declared in the sole interest of the defendant.[26]

It seems clear that where the termination is due to "a breakdown in judicial machinery"[27] there is no constitutional bar to reprosecution.[28]

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[18] Wade v. Hunter, 336 U.S. 684, 689 (1949).

[19] United States v. Jorn, 91 S. Ct. 547, 558 (1971).

[20] 22 U.S. (9 Wheat.) 579 (1824).

[21] *Id.* at 580.

[22] Keerl v. Montana, 213 U.S. 135 (1909); Dreyer v. Illinois, 187 U.S. 71 (1902); Logan v. United States, 144 U.S. 263 (1892); United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

[23] Simmons v. United States, 142 U.S. 148 (1891).

[24] Thompson v. United States, 155 U.S. 271 (1894).

[25] Wade v. Hunter, 336 U.S. 684 (1949). A court-martial was convened by a division of the Third Army, but rapid advancement into Germany rendered the distance of the witnesses so great that its continuation became impractical. The charges were then withdrawn and transmitted to the Fifteenth Army which conducted a second court-martial. This was held not to violate the double jeopardy provision of the fifth amendment.

[26] Gori v. United States, 367 U.S. 364 (1961). The trial judge, on his own motion and for reasons not entirely clear, declared a mistrial. The Supreme Court, inferring that the action was taken to forestall improper questioning by the prosecution, said that it was "unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial." *Id.* at 369.

[27] *Id.* at 372 (Douglas, J., dissenting).

[28] *See* Note, 77 HARV. L. REV., *supra* note 10, at 1276-81.

*Somerville* represents a much more difficult situation because the mistrial was declared at the request of the prosecution—due to its error—and over the objection of the accused. It seems doubtful that this termination would qualify under the "manifest necessity" rule outlined in *Perez*, especially when the rule is taken with Justice Story's admonition: "[T]he power [to discharge the jury] ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . . ."[29]

The foregoing indicates that the Supreme Court could easily hold Somerville's reprosecution invalid as an unconstitutional abridgment of the fifth amendment double jeopardy prohibition. But to do so would overlook the interest of society in the fair administration of justice. Though the double jeopardy doctrine has been justified as safeguarding interests of society, the accused, and the judicial system,[30] it is most often characterized as a measure for the protection of the defendant:

> The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[31]

Despite this emphasis, the Supreme Court recognized from the beginning that the interests of public justice should be the determining factor as to whether premature termination of a trial is permissible.[32] "Where . . . the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared . . . and [the defendant] may be retried consistently with the Fifth Amendment."[33] *United States v. Tateo*[34] clearly recognizes that society has an interest in determining guilt and punishing the guilty.[35]

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[29] 22 U.S. (9 Wheat.) at 580. This view was reiterated in *Downum* in which the Court quoted from an earlier opinion by Justice (then Judge) Story holding that the power to discharge the jury before it reached a verdict was to be exercised "'only in very extraordinary and striking circumstances.'" 372 U.S. at 736, *quoting* United States v. Coolidge, 25 F. Cas. 622, 623 (No. 14,858) (C.C.D. Mass. 1815).

[30] *See* Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 340-41 (1956); Note, 77 HARV. L. REV., *supra* note 10, at 1274.

[31] Green v. United States, 355 U.S. 184, 187-88 (1957).

[32] *See* text accompanying note 21 *supra*.

[33] Gori v. United States, 367 U.S. 364, 368 (1961).

[34] 377 U.S. 463 (1964).

[35] *Id.* at 466. "It would be a high price indeed for society to pay were every

Once the need to consider the interests of both parties is recognized, a balancing of these interests must inevitably follow. It is submitted that the exact point of the attachment of jeopardy is of no moment and that the controlling consideration when determining whether or not reprosecution of the defendant is permissible should be the overall interest of public justice, properly evaluated, giving due consideration to both the rights of the accused and the interests of society. In a sense a defendant is prejudiced from the moment suspicion focuses, and our heritage of sensitivity for the rights of the individual demands an acute awareness of this, but the value of an adjudication of guilt on the merits must not be underestimated.[36]

The policies underlying the double jeopardy provision of the Constitution were not sufficiently implicated in *Somerville* to preclude his reprosecution. Only two days had elapsed between the beginning of the first trial and the reindictment. This was not a case of "repeated attempts to convict . . . enhancing the possibility that even though innocent he may be found guilty,"[37] nor was it a harassing maneuver. The prosecutor acted in good faith at all times.

A holding that the discharge of a jury impaneled under an invalid indictment automatically erects a double jeopardy bar to reprosecution could force a useless proceeding at the expense of all concerned. Any attempt by the prosecution to correct an indictment the validity of which came under doubt after the seating of the jury would be discouraged, and any doubts of the defense would be reserved as a ground upon which to seek a new trial in the event of an unfavorable verdict.[38] The result would be a wasted initial effort in the event a later challenge to the validity of the indictment was sustained. Many of the fears the double jeopardy protection seeks to shield the defendant from would be realized, *i.e.*, the additional expense of an unnecessary proceeding and unduly prolonged embarrassment, anxiety, and insecurity.

The rule that jeopardy attaches when the jury is impaneled and sworn

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accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *Id.* *See also* United States v. Jorn, 91 S. Ct. 547, 554 (1971); Wade v. Hunter, 336 U.S. 684, 689 (1949).

[36] The defendant himself, in addition to society in general, has a positive interest in having the question of his guilt settled by a determination on the merits.

[37] *See* text accompanying note 31 *supra.*

[38] Retrial would clearly have been permissible had the trial proceeded to its conclusion and the defendant's challenge of the validity of the indictment been sustained. *See* United States v. Ball, 163 U.S. 662 (1896).

cannot, by necessity, preclude retrial in every instance where the jury is discharged prior to the verdict.[39] If the rule is retained, as it appears that it will be, there remains the necessity of determining under what circumstances retrial is precluded.[40] Under *Perez*, anytime the discharge is necessary in the interest of public justice reprosecution is constitutionally permissible. But society's interest in determining the guilt of an accused on the merits may be too easily subordinated to the rights of the accused by a protective court. Care must be taken to see that these competing interests are recognized and properly evaluated. Courts must see that retrial following a discharge of the jury does not violate policies undergirding the double jeopardy provision of the Constitution, but this determination must be made in light of the competing interests of society and the accused, and in the overall interest of justice. Overzealous concern for the rights of the defendant must not be allowed to present an "obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed."[41]

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## Criminal Procedure—State Hearsay Exception for Co-conspirator's Statement Held not to Violate Sixth Amendment Confrontation Clause

The hearsay rule,[1] because of its many exceptions,[2] abounds with controversy more than any other area in the law of evidence.[3] A particularly

[39] *See* United States v. Jorn, 91 S. Ct. 547, 554-55 (1971); SIGLER 74.

[40] *See* United States v. Jorn, 91 S. Ct. 547, 554-55 (1971). It has been suggested that the problem of attachment of jeopardy could be eliminated by the adoption of the English rule which requires a final judgment of acquittal or conviction to constitute prior jeopardy. SIGLER 223.

[41] Wade v. Hunter, 336 U.S. 684, 688-89 (1949).

[1] The hearsay rule has been defined as the exclusion "of testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and this resting for its value upon the credibility of the out-of-court assertion." C. MCCORMICK, LAW OF EVIDENCE § 225 (1954).

Historically there are several rationales for the rule, the most significant ones being that the adversary should have full opportunity for cross-examination; that testimony should be given under oath; that the trier of fact should have an opportunity to observe the demeanor of the witness; and that errors in transmission are nonexistent when the declarant is in court. *Id.* § 224.

[2] Under the hearsay exceptions the courts have admitted into evidence out-of-court statements to prove the truth of what was asserted. 5 J. WIGMORE, EVIDENCE § 1420 (3d ed. 1940) [hereinafter cited as WIGMORE].

[3] It has been estimated that the hearsay rule accounts for at least one third of