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Federal and State Prosecutions for Same Offense

A. G. H.

West Virginia University College of Law

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There is no principle better established in the common law, or more fully recognized in the federal and state constitutions than that a person shall not be twice put in jeopardy for the same offense. The problem presented is whether a defendant, who, by committing a single act violates both a state and a federal statute designed to punish the actor for such offense, is protected by the constitutional prohibitions against double jeopardy. The situation occurs when the state and the federal government each has made the act committed an offense punishable under its laws and (1) the defendant subsequent to a state conviction or acquittal is involved in a federal prosecution under the federal law or, (2) the defendant is being tried by a state court after he had either been acquitted or convicted by a federal court. In two recent cases before the Supreme Court of the United States, which involved these situations, it was

1 U. S. CONST. amend. VI; W. VA. CONST. art. 3, § 5; Green v. United States, 355 U.S. 184, 187 (1957). All states, either expressly in their constitutions or as part of their common law prohibit double jeopardy.
held that such procedure did not place the defendant in double jeopardy and thus did not violate the constitutional guarantee.\(^2\)

The problem of successive prosecutions by a state and the federal government is not a new one. The cases decided in the Supreme Court indicate that there have been two lines of thought on the subject. In the earliest case dealing with a fact situation which was similar to those in the *Abbate* and *Bartkus* cases, the court, in reply to defendant's contention that admitting the state's jurisdiction would bar court martial authority or else subject defendant to possible subsequent prosecution, observed that: "... If the jurisdiction of the two courts be concurrent, the sentence of either court, either of conviction or acquittal might be pleaded in bar of the prosecution before the other. ..."\(^3\)

The dissenting opinion in agreeing with the majority on this point, expressed the view that such a procedure would be "repugnant to both the principles of the common law, and the genius of our free government."\(^4\) Following this early approach, it would seem that trial by the state and the federal government for the same offense was contrary to the principles of justice as well as the express language of the constitution.

However, in subsequent cases there was a complete transition from the doctrine that a prior conviction or acquittal in the courts of one sovereign would be a bar to a prosecution in the courts of the other sovereign. In the first of these cases the Supreme Court decided that one act could constitute an offense against the United States and a state and consequently each government could punish that portion of the offense that contravened its law.\(^5\) Thus in *Fox v. Ohio*,\(^6\) the Supreme Court decided that a state could punish the fraud in passing counterfeit coins and the United States could punish the counterfeiting which was an offense against its laws, and which resulted from the same act. Shortly after this decision, the Court held that the federal government could punish the same act.\(^7\) These decisions led to the concept that the same act could constitute two entirely separate and distinct offenses.

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\(^3\) Ibid.

\(^4\) Ibid.


\(^6\) Ibid.

In a later decision, however, the Supreme Court, in a case that was a clear instance of successive prosecution by different states, expressed the view that the court which acquired jurisdiction of the person first could prosecute him and that the court's judgment was final, and would prevent the courts of another jurisdiction from prosecuting the offender for the same infraction.\(^8\)

In *Lanza v. United States*, the first case concerning a situation of possible double prosecution in which the Supreme Court was unable to avoid this result,\(^9\) the Court accepted as settled law that: "... [A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment . . . applies only to proceedings by the Federal Government, . . . and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority."\(^10\)

This decision established a rule of successive prosecution which was followed with approval in an overwhelming number of decisions.\(^11\)

The West Virginia law concerning the successive prosecutions rule is consistent with this federal rule and the rule of the majority of the states. The substance of the principle is embodied in the following statement: "... by a single act of engaging in the manufacture or sale of intoxicating liquors, one may be guilty of two offenses, one against the state and the other against the United States, and the conviction and punishment for such offender for one of such offenses is no bar to his prosecution in the courts of the other sovereignty for the offense against it."\(^12\) Consistent with this view, the West Virginia court in a later case held that the double jeopardy provision of the West Virginia constitution could not be

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\(^8\) Nielson *v.* Oregon, 212 U.S. 315, 320 (1909).

\(^9\) See: *Grafton v. United States*, 206 U.S. 333 (1907) which held that since the court martial and the Phillipine Criminal Court derive their authority from the same ultimate source (the federal government) an acquittal by the court martial prevents subsequent prosecution in the civil courts for violation of a statute punishing the same offense. See also, *United States v. Mason*, 213 U.S. 115, 124 (1909).


\(^12\) *State v. Henson*, 91 W. Va. 701, 702, 114 S.E. 273 (1922).
pleaded as a defense by one indicated under the state statute upon the ground that he had been previously indicted, tried, and convicted under a federal statute penalizing the same act. The West Virginia court, reasoned that the court would not deprive the state government of an essential element of sovereignty by holding the state government powerless to punish a person who has also violated the state law, although the accused had already been prosecuted by the federal government for the same act.

However, some states, by statute, now provide that a conviction or acquittal in a prosecution by another jurisdiction is a defense to the prosecution in such state. New York, for example, has enacted a statute which provides that "when an act charged as a crime is within the jurisdiction of another state, territory, or country, as well as within the jurisdiction of this state, a conviction or acquittal thereof in the former is a bar to the prosecution or indictment therefor in the state." The action taken by such states reflects a dissatisfaction with the result reached by the Lanza interpretation.

The effect of the decisions has greatly limited the constitutional guarantee against double jeopardy. However, this being the view in the federal courts, in West Virginia and in the majority of the states, the purpose of this article is to examine the rule to ascertain the propriety of retaining it. It has been said that the purpose of the double jeopardy clause is to prevent a second punishment "so far as the common law gave that protection." The English common law view is that, if the state and federal courts should have concurrent jurisdiction, acquittal or conviction by one might be pleaded in bar of prosecution by the other. On an international scale it has been held that, where an act constitutes a crime against the law of nations punishable by any nation, a plea of prior conviction by one nation would prevent prosecution by another nation for that same offense. It should be noted that the federal and state double jeopardy problem is also paralleled in situations in-

14 State v. Henson, supra note 12, at 707.
15 N.Y. CRIM. PROCEDURE CODE § 139; Cal. PENAL CODE § 656.
16 N.Y. CRIM. PROCEDURE CODE § 139.
17 Ex parte Lange, 85 U.S. (18 Wall.) 163, 170 (1873).
18 Grant, Successive Prosecutions by State and Nation, 4 U.C.L.A. L. REV. 1, 8 (1956).
volving prosecutions by a state and a city, prosecutions by different states, and prosecutions involving offenses in separate counties. 20

It is true that a single act may violate two statutes if one of the statutes requires proof of a fact not required by the other statute, 21 and each statute is designed to protect a different social interest. 22 Under these considerations, if either the state or the federal government alone in the Abbathe or Bartkus cases, supra, had administered the double prosecution for the same infraction, it would have constituted double jeopardy.

The rule of successive prosecutions for the same offense by separate sovereignties can operate only if the state and the federal government can constitutionally exercise concurrent jurisdiction over the same offense. Under our federal system of government specific powers are delegated to the federal government. 23 All other powers not expressly granted are reserved to the states. 24 States may exercise powers delegated to the federal government, but if the federal government "occupies the field" the state may be precluded from acting. 25 Under this view the federal and state laws may not be operative at the same time with respect to the same subject and thus only one law may be enforced. Thus, it has been said that once Congress has acted, its law preempts all state laws penalizing the same offense. Nevertheless, if the court finds that Congress intended concurrent jurisdiction, then the state laws are valid. 26

Where concurrent jurisdiction does exist, it may be based on either the police power of the state or on a constitutional provision such as the Eighteenth Amendment which specifically provides for concurrent power. The prosecution of crimes against the state is an

20 State v. Mills, 108 W. Va. 31, 150 S.E. 42 (1929) (involving prosecutions by a state and a municipality). State v. Commonwealth, 239 Ky. 620, 40 S.W. 2d 389 (1931) (two different states); State v. Shimman, 122 Ohio St. 523, 172 N.E. 867 (1930) (offenses in separate counties). See also, 1 WHARTON, CRIMINAL LAW AND PROCEDURE §§ 145, 146 (12th ed. 1957). For an analogous situation see, W. VA. Code ch. 50, art. 18, § 1 (Michie 1955), which contains a proviso that "... whenever a person has been convicted in the municipal or police court of any incorporated town or city, such conviction shall be a bar to any criminal proceedings before a justice for the same offense."
22 Kirchheimer, The Act, the Offense and Double Jeopardy, 58 YALE L.J. 513 (1949).
23 U. S. CONST. art. 1, § 8.
24 U. S. CONST. amend. X.
26 Kelly v. Washington, 302 U. S. 1, 10 (1938).
area which has always been within the scope of state law enforcement. Federal legislation had introduced federal power into the area of routine law enforcement with the result that there is no longer the concept of rigid separation of federal and state powers in criminal law enforcement. In the field of true crimes against the state the doctrine of federal preemption would not be invoked to preclude the states from enforcing its criminal laws.

In *Pennsylvania v. Nelson*, the United States Supreme Court has indicated that the court is aware of the problem created by the American doctrine of dual sovereignties. The court held that Congress, in passing a sedition law, occupied the field in such a manner as to preclude enforcement of state laws on the same subject. The court observed that: "We are not unmindful of the risk of compounding punishments which would be created by concurrent state power. In our view of the case, we do not reach the question whether double or multiple punishment for the same overt acts directed against the United States has constitutional sanction. Without compelling indication to the contrary, we will not assume that Congress intended to permit the possibility of double punishment."

However, in a recent decision, the Supreme Court has backed down from the *Nelson* principle. In *Uphaus v. Wyman*, the court held that the Smith Act, although superseding the enforceability of state sedition statutes prescribing the same conduct, does not bar state prosecution for sedition against the state itself. When there is some aspect of local police power involved the state laws will still be operative. Thus both the state and the federal government can continue to punish such overlapping offenses as bank robbery and theft from a post office since the criminal conduct also involves a local breach of the peace.

The court in the *Lanza* and *Abbate* cases, *supra*, justifies the result that they reached on the basis of protection of federal law enforcement. The court reasons that, if the states alone were permitted to prosecute criminal acts and the states provided only a nominal punishment, the offender could submit to the state court and thus secure immunity from federal prosecution. In the normal situation, however, there would not be such a variance between punishment under a state law and the penalty under the federal

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28 Id. at 509-10.
law to warrant the above rationale. Furthermore, if the proceeding is a sham, or is a fraudulent one, there is no jeopardy and such a prior trial will not bar subsequent proceedings.\(^\text{30}\)

The rule permitting both sovereignties to punish an accused when a single infraction has been committed may be justified when balanced against the valuable American concept of concurrent power and dual sovereignties. In this respect, an integral part of the Bill of Rights has been subverted. The doctrine of federal preemption could be utilized only in certain limited situations to avert the inherent objectionability of double punishment by the separate sovereignties. It would not be invoked to preclude the states from enforcing its criminal laws. The remedy lies in the legislative branches to enact laws which expressly provide for the exemption from prosecution by another sovereignty, as has been done in several of the states.

A. G. H.

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