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Double Jeopardy

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COMMENT

DOUBLE JEOPARDY

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In two recent cases before the United States Supreme Court, *Abbate v. United States* [1] and *Bartkus v. Illinois* [2], the problem of whether or not a defendant could be tried for the same offense in a state court and a federal court arose. In each of these cases, of course, the defendant took the position that such a procedure placed him in double jeopardy. The court in each case disagreed and decided that this was not repugnant to the Constitution.

Despite the fact that these cases received wide publicity, the problem is by no means a new one. As early as 1820 in *Houston v. Moore* [3] this question was acknowledged. In that case, which involved a militia-man who refused to serve when called upon by the President of the United States, the issue arose as to whether or not the delinquent soldier could be made to face a state court-martial. In effect, he was contending that his offense was a federal one. The Court, speaking through Justice Washington, on the question of the state's jurisdiction said:

> "It was contended, that if the exercise of this jurisdiction, be admitted, that the sentence of the court would either oust the jurisdiction of the United States Court-martial or might subject the accused to be twice tried for the same offense. To this I answer, 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. . . ."

From this brief statement it appears that the Court was aware of this problem and appeared to be on the threshhold of the theory that, while there may be concurrent jurisdiction over a single act, only one conviction or acquittal therefore was possible. This theory, however, was discarded twenty-seven years later, in 1847, in *Fox v. Ohio*,[4] where it was held that a single act could be an offense against two sovereigns, the United States and the state. This doctrine was followed in two cases which were heard soon after the *Fox* case:

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[1] 79 Sup. Ct. 666 (1959).
[2] 79 Sup. Ct. 676 (1959).
[3] 18 U.S. (5 Wheat.) 1 (1820).
[4] 46 U.S. (5 How.) 410 (1847).

United States v. Marigold [5] and *Moore v. The People.*[6] In these three cases the concept of one act being two wrongs had its beginnings.

In all three of the foregoing cases the Court was careful to point out that the same crime was not being punished twice. The position of the Court was that the single act constituted two entirely separate offenses. In the *Fox* case, which involved the passing of counterfeit coins, the following statement was made in the majority opinion: [7]

> "The punishment of a cheat or a misdemeanor practiced within the state, and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties, and it is difficult to imagine an interference with those duties and functions which would be regular or justifiable."

The Court went on to conclude that it was possible for the state to punish the fraud occasioned by passing base coin and the United States could punish the counterfeiting thereof.

Similar conclusions were reached in both the *Marigold* [8] and *Moore* [9] cases. However, the Court was not unanimous in reaching these opinions. Justice McLean in a vigorous dissenting opinion in the *Moore* case made this observation:

> "It is contrary to the nature and genius of our government, to punish an individual twice for the same offense. Where the jurisdiction is clearly vested in the federal government, and an adequate punishment has been provided by it for an offense, no state, it appears to me, can punish the same act. The assertion of such a power involves the right of a state to punish all offenses punishable under the Acts of Congress. This would practically disregard, if it did not destroy, this important branch of criminal justice, clearly vested in the federal government. . . . It is no satisfactory answer to this, to say that the States and federal government constitute different sovereignties, and consequently may each punish offenders under its own laws." [10]

Eventually, in the case of the *United States v. Lanza,* all of these cases were cited by Chief Justice Taft in support of the proposition that a single act could simultaneously be two wrongs, each of which is punishable. The reasoning of the Chief Justice is best summed up from this quote:

> "It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be

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[5] 50 U.S. (9 How.) 560 (1850).
[6] 55 U.S. (14 How.) 13 (1852).
[7] See note 4 *supra,* opinion by Justice Daniel.
[8] See note 5 *supra.* In the Marigold case Justice Daniel said: ". . . the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each."
[9] See note 6 *supra.*
[10] See note 6 *supra* at 21. Justice McLean also disagreed with the result in the Fox case and dissented therein.

> punished by each. . . . The defendents thus committed two different offenses by the same act, and a conviction by a court of Washington against that state is not a conviction of the different offense against the United States, and so is not double jeopardy."[11]

The case went on to quote from *Southern Railway Company v. R. R. Commission of Indiana*[12] establishing that the jurisdiction of one sovereign shall not preclude that of the other. This seems to completely destroy the theory of the *Houston* Case[13] that a proceeding in one jurisdiction is a bar to prosecution in the other.[14]

In one of the cases under consideration in this note, *Abbate v. United States*,[15] it is interesting to observe that the Court felt that they were being asked to overrule the preceding *Lanza* case. This they declined to do, Justice Brennan reasoning that:

> "Petitioner asks us to overrule *Lanza*. We decline to do so. No considerations or persuasive reasons not presented to the Court in the prior cases are advanced why we should depart from its firmly established principle. On the contrary, undesirable consequences would follow if *Lanza* were overruled . . . if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered." [16]

Bartkus v. Illinois[17] also put considerable emphasis on the *Lanza* case.[18]

There is one very noteworthy distinction between the *Abbate* and the *Bartkus* cases. The latter involved a state trial after a federal acquittal for the same acts; the former involved a federal conviction subsequent to a state conviction. Although not within the scope of this note, it is interesting to observe that this creates an odd situation in Pennsylvania where, as a general principle, the Commonwealth is not allowed to appeal acquittals. This then creates the

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[11] 260 U.S. 377, 382 (1922).

[12] 236 U.S. 439 (1915).

[13] See note 3 *supra*.

[14] In the Southern Railway case Justice Laman made this observation: "This concurrent jurisdiction may be either because the nature of the act is such that at the same time it produces effects respectively within the sphere of state and federal regulations and thus violates the laws of both, or where there is this double effect in a matter of which one can exercise control, but an authoritative declaration that the paramount jurisdiction of one shall not exclude that of the other." Chief Justice Taft included this quotation in his opinion in the Lanza case, 260 U.S. 384.

[15] See note 1 *supra*.

[16] 79 S. Ct. at 670, 671.

[17] See note 2 *supra*.

[18] Justice Frankfurter said: "While United States v. Lanza . . . was the first case in which we squarely held valid a federal prosecution arising out of the same facts which had been the basis of a state conviction, the validity of such a prosecution by the Federal Government has not been questioned by this Court since the opinion in Fox v. State of Ohio . . . more than one hundred years ago." 79 S. Ct. 676, 681. Justice Frankfurter goes into an exhaustive study of the historical background of this theory.

anomaly that the state cannot appeal, but if a federal offense can be discovered, the offender can still be convicted, even after a prior acquittal in the state.

In both of the cases being examined in this note, Chief Justice Warren and Justices Black and Douglas dissented from the opinion of the majority of the Court.[19] Their reasoning was somewhat akin to that of Justice McLean in the *Fox* case more than a century before, i.e., to try one twice on the same facts is repugnant to the constitutional guarantees against double jeopardy. In the *Bartkus* case, the dissenting opinion vigorously attacks the possibility of a federal conviction after a state acquittal in these words:

> "The Court's holding further limits our already weakened constitutional guarantees against double prosecutions. United States v. Lanza . . . allowed federal conviction and punishment of a man who had been previously convicted and punished for the identical acts by one of our states. Today, for the first time in its history, this Court upholds the state conviction of a defendent who had been *acquitted* of the same offense in the federal courts. I would hold that a federal trial following either state acquittal or conviction is barred by the Double Jeopardy Clause of the Fifth Amendment. . . . I think double prosecutions for the same offense are so contrary to the the spirit of our free country that they violate even the prevailing view of the Fourteenth Amendment. . . ." [20]

The dissent in the *Abbate* case advanced the proposition that it is absurd to let the two sovereigns do together what neither could do separately.[21]

In conclusion, the Supreme Court has clearly affirmed its position that a person may be tried twice for the same act but only for different offenses in a state and a federal court. This is true irrespective of whether the first trial results in a conviction or an acquittal. The decisions are far from unanimous, however, and the argument of the dissenters is best summed up in this quotation:

> "The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two "Sovereigns" to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, than when one of these "Sovereigns" proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct." [22]

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[19] In both instances Mr. Justice Black wrote the dissenting opinion.

[20] 79 S. Ct. 676, 695 (1959).

[21] Justice Black said: "I am also not convinced that a state and the Nation can be considered two wholly separate sovereignties for the purpose of allowing them to do together what, generally, neither can do separately." 79 S. Ct. 666, 675 (1959).

[22] Justice Black's dissent in Bartkus v. Illinois. See note 2 *supra.*