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NOTES

DOUBLE JEOPARDY AND DUAL SOVEREIGNS

The first part of this paper is directed toward searching for an expression, in a religious code or ethical system which exerted some influence on English thought, of a philosophical position which might have formed the basis for the legal principle known as "double jeopardy."¹

One system, the impact of which was largely transmitted through Christianity, was the Hebrew religious code.² The basis of Hebrew law was the Pentateuch,³ and there are no explicit references in it to two punishments for the same conduct. There are passages which are subject to the interpretation that they indicate that two punishments for the same conduct would have offended the Hebrew sense of justice. For example, after Cain had killed Abel and God had banished Cain:

Cain said, 'My punishment is too great to bear. You are driving me today from the soil; and from your face I shall be hidden. And I shall be a fugitive and a wanderer on the earth, and whoever finds me will kill me.' But the Lord said to him, 'Not so! Whoever kills Cain shall be punished sevenfold.' Then the Lord gave Cain a token so that no one finding him should kill him.⁴

Obviously this is not a conclusive passage.

Horowitz mentions a situation where the Hebrew law punished by lashes the killing of a dam and her young on the same day. It was also forbidden to offer a sacrifice to an idol and the punishment was death.⁵

1. U.S. CONST. amend. V: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ." At the English common law this principle was embodied in the plea of *autrefois acquit* or *convict*. 2 HAWKINS, PLEAS OF THE CROWN 515 (8th ed. 1824).

2. There is no logical reason why the sources of the Jewish law should not be examined, but rather a practical one that the sources are not definitely known. The prevalent opinion is that the Hammurabi code was not a model for the Jewish lawmakers but that both drew upon a common source of ethical principles. There is some evidence that parts of the Hebrew law were a gloss upon the Babylonian law. For example, burning is mentioned in *Leviticus* 20:14 and 21:9 as a punishment for the same two offenses set forth in the Hammurabi code for which burning is prescribed, *i.e.* incest and in chastity in a priest's daughter. HAMMURABI, THE BABYLONIAN LAWS 54 (ed. by Driver and Miles 1952).

3. The "Torah of Moses" including the first five books of the Bible: *Genesis, Exodus, Leviticus, Numbers, and Deuteronomy*.

4. *Genesis* 4:13.

5. HOROWITZ, THE SPIRIT OF JEWISH LAW 170 (1953).

He then quotes from the Torah that, “. . . for one offense only one punishment might be inflicted, not lashes and then the death penalty. Makkot 13b.”⁶ This seems to be the only explicit reference to double jeopardy in the Hebrew law, and there seems to be none in the Babylonian code of Hammurabi.

A direct impact of the Mosaic law on English law is noticed in the reign of Alfred beginning in 871 A.D. Alfred issued a set of laws largely taken from Mosaic law which included the Ten Commandments, and extracts from Exodus and Acts.⁷ There is no reference to double jeopardy in these passages and the impact is not certain.

Christianity was heir to the ethical evolution of Judaism and it had a tremendous influence on English law. Through the Church, the philosophical position on double punishment expressed in the Hebrew law⁸ could have been transmitted to English thought. Christianity was introduced in England during the later years of the Roman occupation but was virtually crushed by the Anglo-Saxon invaders in the fifth century.⁹ The reconversion of Great Britain began in 597 A.D. with the arrival of St. Augustine,¹⁰ and for the next 1000 years played an increasingly important role in British affairs. By the twelfth century some persons were amenable to the jurisdiction of both royal and ecclesiastical courts, and the loyalties owed to each were potentially incompatible. The great conflict between Thomas Beckett, Archbishop of Canterbury, and Henry II in the twelfth century was partly based on the Church's desire to try and punish violators of the law who were clerks. Beckett said that persons amenable to both jurisdictions should not be tried twice—they should be tried only in the Church courts.¹¹ Henry II demanded that “criminous clerks” be accused in the royal court, tried and if found guilty unfrocked in the Church court, and returned to the royal court for punishment. This was inserted in the third clause of the Constitution of Clarendon.¹²

It is not apparent that the Constitution of Clarendon provided for trying anyone twice at all. It did provide for two punishments in that the clerk was tried in a Church court and if found guilty, unfrocked, and then sent back to the royal court for punishment. In the Church court, unfrocking was the punishment for murder.¹³ It was of a different sort

6. *Ibid.*

7. 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 53 (1883); LUNT, HISTORY OF ENGLAND 45 (Rev. ed. 1928).

8. See note 5 *supra*.

9. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 8 (5th ed. 1956).

10. *Ibid.*

11. *Id.* at 17.

12. SMITH, HISTORY OF ENGLAND 61 (1949).

13. *Id.* at 60.

than the death penalty inflicted in the royal courts, but it was the punishment provided for in the ecclesiastical courts. It may be that Beckett's fight against allowing a person to be tried twice was not directed specifically at the Constitution of Clarendon but rather to a less clearly defined, as yet unrealized practice.¹⁴ In any case it is the type of argument that is readily seized upon and later magnified into an immutable principle of the law, as was done with Magna Carta by Lord Coke.¹⁵ The murder of Beckett forced Henry to capitulate to the Church position.¹⁶

There is no evidence of a direct link between the rabbinic law on double punishments and Beckett's position in twelfth century England, but Christianity adopted or carried on much of the ethical tradition of Judaism. When the principle concerning double jeopardy is found in different ethical systems at different periods of time, this is evidence that the principle is felt to be basic to a just legal system. On the other hand, it could be argued that in one sense, double punishment for the same conduct is implicit in Christianity. The ecclesiastical courts punish now and God will also punish later. Thus it seems that double punishment was accepted by Jews and Christians alike from the very inception of their religion.

Another major influence on English law was the Roman law which was exerted through the treatise writers, especially Bracton. Directly or indirectly, Bracton derived most of the definitions and principles from the Roman system because no other was then in existence.¹⁷ It had little effect on modes of procedure, however. The clergy were students of Roman law, and the earliest justices of the common law courts, as well as the chancellors, were taken from the higher orders of ecclesiastics.¹⁸ When those judges had to formulate principles they naturally would turn to the ideas they were familiar with from the study of Roman law. By the fourteenth century the clergy's monopoly on education was broken and there began arising a group of secular writers trained in the Roman law.¹⁹ Thus the Roman law had a continuing impact on English law.

There seems to have been no reference in Bracton to the problem of double jeopardy but it becomes important a few centuries later. There is evidence that the principle of double jeopardy was not native to England and that it therefore came from the continent either through Roman law

14. It is interesting for our purposes as a statement of a philosophical position on the question of double jeopardy held by a very influential Englishman. Casting the philosophical thought into the legal mold would come later.

15. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27 (1914).

16. SMITH, *op. cit. supra* note 12.

17. 1 STEPHEN, *op. cit. supra* note 7, at 52.

18. Lobingier, 25 A. B. A. J. 265 (1939).

19. SMITH, *op. cit. supra* note 12, at 109.

or more likely through the canon law of the Church. The Anglo-Saxons had a system where the King exacted a penalty for criminal behavior and the injured party was also allowed to demand a penalty.²⁰ This practice continued after the Conquest in the form of the appeal,²¹ *but the punishment by one party precluded further punishment by the other*. Henry VII did force passage of a statute which allowed an appeal to be brought after an acquittal on an indictment for murder.²² It is significant in that a statute was required to allow successive prosecutions and prevent a verdict from being a bar to any further prosecution. The statutory exception was limited to acquittals in murder cases, and *in practice the accused was still only tried once*.²³

Other Anglo-Saxon principles were slowly subverted and erased by the introduction of Roman law through the Norman clergy, *e.g.*, the presumption of innocence.²⁴ Double punishment for the same conduct may have followed the same pattern.

The philosophical prohibition against double punishment is well suited to being cast into a legal framework. In the English common law, this took the form of a dilatory plea of *autrefois acquit or convict*.²⁵ The first square holding that a prosecution in a foreign country in a court of competent jurisdiction would be a bar to another prosecution in England for the same conduct was *King v. Hutchinson*.²⁶ The defendant killed a Mr. Colson in Portugal and was acquitted there. The King wanted Hutchinson tried again when he had returned to England but the judges agreed that the acquittal in Portugal was a bar to further prosecution.

Two other cases are often relied on to show that the British rule prohibited successive prosecutions by dual sovereigns.²⁷ In one case, the court held that an acquittal in a court of grand sessions in Wales was a bar to further prosecution in an English court.²⁸ But this case arose after several statutes²⁹ had been passed extending English law to all of

20. *Id.* at 24.

21. 1 STEPHEN, *op. cit. supra* note 7, at 244.

22. 3 Hen. 7, c. 1.

23. 1 STEPHEN, *op. cit. supra* note 7, at 249.

24. Lobingier, *supra* note 18, at 269.

25. 2 HAWKINS, *op. cit. supra* note 1, at 515.

26. 3 Keb. 785, 84 Eng. Rep. 1011 (K.B. 1678). The facts are not reported at this cite but were gleaned from two other cases. *Beak v. Thyrwhit*, 3 Mod. 194, 87 Eng. Rep. 124 (K.B. 1689); *King v. Roche*, 1 Leach 134, 168 Eng. Rep. 169 (Crown 1775).

27. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932); Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 U.C.L.A. L. REV. 1 (1956). Mr. Grant cites *King v. Thomas*, *infra* note 28, and *King v. Roche*, *supra* note 26, as foreign sovereign cases. It is submitted that this is erroneous.

28. *King v. Thomas*, 1 Lev. 118, 83 Eng. Rep. 326 (K.B. 1664).

29. 27 Hen. 8, c. 26; 34 Hen. 8, c. 26.

Wales and ordering the justices to administer justice to all "according to the laws, statutes, and customs of the realm of England."³⁰ Thus when the case arose, Wales had been legally incorporated into England and the court was holding that successive prosecutions in English courts under English law were prohibited.

A similar situation was presented in a case where the defendant killed a man at the Cape of Good Hope and was acquitted there.³¹ He was tried again in England and the prosecution moved that the jury be charged as to the defendant's pleas of *autrefois acquit* and not guilty. The court refused saying that the jury would have to find on both charges, and if they found for the defendant on the former the second would be barred. This is not a foreign sovereigns problem either, because the Cape of Good Hope was an English colony and operated under English law.³²

In both of these cases the court held that successive prosecutions by the same sovereign for the same conduct was prohibited. These cases do not directly support the rule that successive prosecutions by different sovereigns for the same conduct is prohibited, but they are evidence that the rule against successive prosecutions in general was well established.

The double jeopardy clause was adopted by the writers of the United States Constitution without extended debate or explicit indication of the meaning it was intended to have. They said that it was to be "declaratory of the law as it now stood" and was to conform to the "universal practice in Great Britain and in this country."³³ It was proposed that the Fifth Amendment only bar successive prosecutions "for the same offense by any law of the United States."³⁴ This was not adopted.

The fact that there is no record of any debate or controversy over putting the clause in the Bill of Rights seems to indicate that it expressed a universal sentiment on the part of the colonial leaders. If the clause had been susceptible of several different interpretations, its insertion in a basic legal document surely would have stirred up controversy and debate. The clause was also put into several of the early state constitutions.³⁵

King v. Hutchinson is the clearest expression of what the English practice was at the time of the adoption of the Federal Bill of Rights, and

30. 34 Hen. 8, c. 26.

31. *King v. Roche*, 1 Leach 134, 168 Eng. Rep. 169 (Crown 1775).

32. 1 Stephen, *op. cit. supra*, note 7, at 214.

33. Note, 53 Nw. U. L. Rev. 521 (1958).

34. *Id.* at 527.

35. N.H. CONST. art. I, § 16 (1784); PA. CONST. art. IX, § 10 (1780); DEL. CONST. art. I, § 8 (1792); N.Y. CONST. art. VII, § 7 (1821).

apparently the rule in that case was intended to be incorporated in the Fifth Amendment.

The present American doctrine was stated in *United States v. Lanza*, the first case to squarely present to the Supreme Court the question of the validity of a federal prosecution subsequent to a state prosecution for the same conduct.³⁷ The defendant was indicted in federal court for manufacturing, transporting, possessing, and having on hand materials for the manufacture of intoxicating liquor in violation of the National Prohibition Act. He filed a plea in bar alleging that an information had previously been filed in a state court and judgment rendered against him for the same conduct with the same liquor. The District Court overruled the United States' demurrer to that plea. The defendant's counsel based his case on the argument that the state's authority to prosecute violations of its prohibitions laws was grounded on the Eighteenth Amendment to the United States Constitution, and in principle it was as if both prosecutions were by the federal government and hence in violation of the double jeopardy clause. The Court rejected this contention and put itself in a position of having to decide the issue of the validity of successive prosecutions by a state and the federal government. The Court said:

We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may without interference by the other enact laws to secure prohibition with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

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 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

36. *United States v. Lanza*, 260 U.S. 377 (1922).

37. The Supreme Court first articulated the doctrine in a dictum in *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847). There the court upheld a state statute prohibiting the uttering of counterfeit coin saying that the defendant's argument that a state prosecution would bar a later federal one was erroneous. Both could validly punish the conduct if they saw fit. This dictum was re-iterated in a series of cases prior to the *Lanza* case. *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850); *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852); *Cross v. North Carolina*, 132 U.S. 131 (1889); *Crossley v. California*, 168 U.S. 640 (1898); *McKelvey v. United States*, 260 U.S. 353 (1922).

first trial for the same offense under the same authority.³⁸

The real question of state-federal successive prosecutions was not even argued by counsel because he restricted his case to the contention that both sovereigns derived their authority from the same source and hence the two prosecutions were really by the same sovereign. He did not argue that even if that were not so, the double jeopardy clause prohibits any type of state-federal successive prosecutions. In light of several strong dicta that state-federal successive prosecutions would be valid,³⁹ counsel may have felt that the argument he made was the only one available. But in none of those cases was the English case of *King v. Hutchinson* cited, and the double jeopardy question was not directly before the court for decision.

The fact that the offense was a violation of the Prohibition Act seemed to weigh heavily with the Court. It seemed to feel that if a state prosecution could bar a federal one, the race of offenders to plead guilty in sympathetic state courts would thwart enforcement of the federal law.⁴⁰ This indicates that the court might have gone the other way if the offense had been more serious and the peculiarities of prohibition law enforcement were absent.

In several cases following *Lanza* the doctrine was re-affirmed,⁴¹ but the facts were never such that a direct holding was made on the point until 1958. Then any speculation that the Supreme Court would abandon the *Lanza* rule either because of its injustice or the fact that it made good sense in prohibition cases but not in other more serious crimes was proved groundless in *Abbate v. United States*.⁴² The defendant was indicted and pleaded guilty to forming a conspiracy in Illinois to blow up a microwave communications network in Mississippi, Tennessee, and Louisiana, belonging to the Southern Bell Telephone and Telegraph Co. He was subsequently tried in a federal court for conspiracy to destroy a means of

38. 260 U.S. at 382.

39. See note 2 *supra*.

40. 260 U.S. at 385.

41. *Hebert v. Louisiana*, 272 U.S. 312 (1926) (state indictment for an act for which the defendant was already under federal indictment was not in derogation of the federal authority because both could punish for the same act); *Westfall v. United States*, 274 U.S. 256 (1929) (federal government could punish offenses against the state banks' property rights and double jeopardy would not apply). In *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937), the defendant argued that double punishment would result if the Sherman Act did not exclude local anti-trust laws. Held, that the double jeopardy clause would apply and prevent double punishment because both laws emanated from the same sovereign. This case is identical with the two English cases, *King v. Thomas*, *supra* note 28 and *King v. Roche*, *supra* note 31. See also *Jerome v. United States*, 318 U.S. 101 (1943); *Screws v. United States*, 325 U.S. 91 (1945).

42. 359 U.S. 187 (1958).

communication operated and controlled by the United States. The defendant failed to convince the Court that the *Lanza* case should be overruled. This case is analogous to *Lanza* in that the defendant's three months sentence in the state court was extremely light in view of the possible federal penalty of five years in prison. This disparity of penalties gave rise to the same feeling found in the *Lanza* case, that the federal interest would be thwarted if barred by a state prosecution resulting in nominal punishment.⁴³ But the Court only mentioned this in passing and the case seems to eliminate any question as to whether the Fifth Amendment prohibits a federal prosecution subsequent to a state prosecution for the same conduct.

The issue before the court in the *Lanza* and *Abbate* cases was whether the double jeopardy clause of the Fifth Amendment prohibited a federal prosecution after a state prosecution for the same conduct. If the order of prosecution is reversed the defendant must argue that the state proceeding is prohibited and this cannot be based on the Fifth Amendment because it only applies to proceedings of the federal government.⁴⁴ The first case in the Supreme Court to directly present the question of the validity of a state prosecution subsequent to a federal prosecution for the same conduct was *Bartkus v. Illinois*.⁴⁵ The defendant was tried and acquitted in a federal court of robbing a federally insured state bank. He was then convicted in a state court for the robbery and sentenced to life imprisonment as an habitual criminal. Since the Fifth Amendment wasn't applicable the defendant had to rely on the due process clause of the Fourteenth Amendment. The Supreme Court held that state action prohibited by the due process clause is only that action which is "repugnant to the conscience of mankind."⁴⁶ The Court concluded that the judicial history of state-federal successive prosecutions was so inconclusive and even conflicting that to allow them would not be "repugnant to the conscience of mankind."

In Illinois the *Lanza* rule has not been accepted and has been repudiated by statute.⁴⁷ The statute, enacted in 1959, provides that whenever on the trial of a defendant it is shown that he has previously been tried under the laws of the Federal government, and the former trial was based

43. *Id.* at 195.

44. *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 180 (1833); *United States v. Lanza*, *supra* note 36, at 382.

45. 359 U.S. 121 (1958).

46. *Palko v. Connecticut*, 302 U.S. 319 (1937), cited in *Bartkus v. Illinois*, 359 U.S. at 127. In the *Palko* case the Court said that the privileges granted by the Bill of Rights were saved from state infringement when they had been found to be "implicit in the concept of ordered liberty." 302 U.S. at 325.

47. ILL. ANN. STAT. ch. 38, § 601.1 (Smith-Hurd 1959).

on the conduct for which he is being tried in Illinois, then the previous prosecution is a sufficient defense. This demonstrates that the Illinois legislature did not approve of the state or United States Supreme Court decision in the *Bartkus* case. Illinois has legislatively adopted the English rule laid down in *King v. Hutchinson*.

In the wake of the *Abbate* and *Bartkus* decisions the Attorney General advised all United States attorneys that the power of successive prosecutions must be used sparingly and only with his approval. He said:

No federal case should be tried when there has already been a state prosecution for substantially the same act or acts without the United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the department. No such recommendation should be approved by the Assistant Attorney General in charge of the division without having it first brought to my attention.⁴⁸

The *Abbate* and *Bartkus* cases seem to settle finally the question of the validity under federal law of successive prosecutions by the state and federal governments in favor of the *Lanza* rule. Those cases put the question squarely before the Supreme Court and it took a very firm position. The sequence of prosecution made no difference except as to the basis on which the defendants rested their cases. The rule was not restricted to cases where there is a real danger of the defendant's rushing to a sympathetic jurisdiction to gain immunity from stiffer penalties in the other, since in the *Bartkus* case the offence was robbery, and rarely will it be argued that any jurisdiction is sympathetic to robbers.

The *Lanza* rule is contrary to the English rule as embodied in *King v. Hutchinson*. The basis of the *Lanza* rule is two-fold. First, it is premised that the state and federal government are both sovereign and may punish violations of their respective laws; second, the word "offense" means a violation of a law promulgated by a sovereign. From the latter it follows that the same conduct will constitute as many "offenses" as there are sovereigns prohibiting that conduct. *King v. Hutchinson* held that a prosecution in any court of competent jurisdiction in a foreign land would bar further prosecution in England for the same act. Would anyone suggest that the English courts did not consider England and Portugal separate sovereigns, or that the English courts did not accept the fact that each sovereign may pass laws and punish their violation? They accepted the fact that either sovereign might punish the conduct but not both. If the word "offense" were defined by looking at

48. 27 U.S.L. WEEK 2509.

the conduct involved rather than focusing on the number of laws broken the *Lanza* rule would not follow. The English rule did not accept that premise of the *Lanza* rule. Both rules are equally logical results of their assumed premises. The reason for choosing one instead of the other, then, lies outside of the logic of the rules themselves.

The crucial factor in accepting the definition of "offense" set out in the *Lanza* case may have been the concept of federalism. In the early cases in both state⁴⁹ and federal courts⁵⁰ the double jeopardy problem was inextricably bound up with the concurrent powers dispute and was a subsidiary consideration in those cases. It seemed important to many to establish the premise firmly that the federal and state governments were each sovereign and each could promulgate criminal laws and punish their infraction. To hold that a prosecution by a state would bar a later prosecution by the federal government would have forced the federal courts to invalidate much state legislation in areas where the federal government had also legislated. The striking down of state laws, and hence giving appearance of derogating the states' sovereignty was avoided by saying that both could legislate and both could punish violations of their own legislation. This dictum was reiterated so often that in 1922 when *Lanza* was decided it was treated as a rule well-established since 1847.⁵¹

Though contrary to English precedent, the *Lanza* rule can be supported by an argument based on an analysis of the meaning of the word "sovereign." If the focus were on the people within the geographical limits of the jurisdiction allotted to the "sovereign," then it may be premised that the sovereign enacts criminal laws to protect the interests of the individuals subject to the sovereign's rule. It would be apparent that the federal sovereignty is not derived from the same group of individuals that state sovereignty is derived from. The crucial inquiry in double jeopardy cases would then be: Are the people's interests protected by the state law the same as those protected by the federal law? If the two laws protect different interests each should punish violations of its laws without regard for the other government's action. This argument can be illustrated in relation to *Abbate v. United States*. The state law protected private property of individuals from destruction and from the

49. State courts which held that the prior prosecution would bar any further prosecution: *State v. Antonio*, 3 S.C. Rep. (2 Tread.) 776 (1816); *Commonwealth v. Fuller*, 49 Mass. (8 Met.) 313 (1844); *State v. Randall*, 2 Aikens 89 (Vt. 1827). Held not a bar: *Mattison v. State*, 3 Mo. 421 (1834); *Hendrick v. Commonwealth*, 10 Va. Rep. Ann. 264 (1834). In all of these cases the issue was state-federal concurrent powers in the area of counterfeiting and in none of them was the validity of a second prosecution before the court for decision.

50. See note 37 *supra*.

51. *United States v. Lanza*, 260 U.S. 377, 382 (1922).

threat of destruction arising from a conspiracy to destroy the property. The federal law could be said to prohibit the conduct but in order to protect its communications network across the entire country in the interest of national defense. Distinct interests could almost always be noted and the result would probably not differ from that reached under the conceptualistic "dual sovereignty" theory.

A counterargument to the "protection of interests" rationale would be that both state and federal laws protect the same interests and one prosecution vindicates both laws.

Regardless of which rationalization for the *Lansa* rule is preferred the rule itself is in conflict with common law precedents and we ought to examine our reasons for the departure to insure that they are as sound as the reasons for the rule.