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UNMERITED CRITICISM OF THE FEDERAL SUPREME COURT

The recent decision of the Supreme Court in the case of *Doras Hebert et al v. Louisiana*,¹ in which the Court affirmed a decision of the Supreme Court of Louisiana and held that an act which violates the liquor laws of a state and of the nation is an offense against both sovereignties and may be punished by both, has called forth some vigorous criticism of that tribunal. Thus a great eastern daily says:

¹ Decided Oct. 13, 1926. Sup. Ct. Reporter Adv. sheet No. 3, p. 103.

It is inconceivable that a Supreme Court—any Supreme Court—should have made such a decision only a few years back. But since Volsteadism became the law of the land many things have changed. The Anti-Saloon League and the other forces backing this most asinine of laws have succeeded in changing the dignity and standing of the judiciary. With this spirit in the courts, it is not surprising that legal doctrines which had no place in justice or in common sense should be enunciated and supported.²

Not to be outdone a mid-western daily says editorially that “the unholy precedent of the Supreme Court will have its evil spawn,” for

There are other concurrent Federal and State laws, each one subject to the same interpretation, each one certain to drag its unhappy victims back and forth across the street—from one court to another. Thus Prohibition destroys, not only the written, but the unwritten law of the land.

The Constitution expressly forbids double jeopardy, but in the opinion of the Supreme Court this safeguard is meaningless where one violates both a Federal law and a law of a State. That is, however much it may be against the spirit of the Constitution or even the traditional custom of courts, which usually have not practiced double jeopardy, this sinister departure from American fairness becomes a terrible reality when the chief tribunal of the land is forced to construe the meaning of concurrent jurisdiction.

It was this intolerable condition that the makers of the Constitution had in mind when double jeopardy was forbidden. They knew very well that the zealot would never get done persecuting those who opposed him. Yet the United States Supreme Court, finding itself unable to set aside either the sovereignty of the Federal Government or that of the State, sets the Constitution aside at one point to sustain it at another.³

It is not the purpose of the present writer to express any opinion on the policy involved in the Eighteenth Amendment and the Volstead law or on the methods by which they are sought to be enforced, but he does desire to enter a respectful protest against such intemperate criticism of the Supreme Court.

That the criticisms quoted are unmerited and that they come nearly a hundred years too late will appear from a very brief review of the prior decisions of the Supreme Court. It will be recalled that the prohibition against double jeopardy is found in the Fifth Amendment.⁴ In one of the last great constitutional opinions written by Chief Justice Marshall, he demonstrated beyond a doubt that this and the other provisions of the first ten amendments were intended as restrictions on the powers of the National Government and not on those of the states. Said he:

² Baltimore Sun, as quoted in the Literary Digest, Nov. 20, p. 18.

³ St. Louis Post-Dispatch as quoted in Literary Digest, Op. Cit.

⁴ . . . “nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb.”

Had the people of the several states, or any of them, required changes in their constitutions; had they desired additional safeguards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands, and would have been applied by themselves . . . Had Congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language . . . Serious fears were extensively entertained that those powers which the patriot statesman, who then watched over the interests of our country, deemed essential to union, and to the attainments of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government, not against those of the local governments. In compliance with a sentiment thus generally expressed to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.⁵

From this decision of the great Chief Justice, which has never been questioned to this day, it is clear that the double jeopardy provision of the Federal Constitution only protects the citizen against being twice prosecuted in the Federal courts for one offense. The right thus secured to the citizen has been jealously guarded by the Court. Thus, where an American soldier in the Philippine Islands had been tried and acquitted of homicide in a United States military court and was later tried and convicted in the civil courts maintained by the United States in the Islands, the Supreme Court held that since both courts were established and maintained under the authority of the United States the second prosecution constituted double jeopardy, and so it reversed the judgment and ordered the prosecution dismissed.⁶ But this had nothing to do with the case where the same act violates the laws of two sovereignties, as in the case from Louisiana just decided. In such cases the Supreme Court, beginning with the case of *Fox v. Ohio*,⁷ decided in 1847, has uniformly held that there are two distinct offenses and each sovereignty has a right to vindicate its own laws. In that case, the offense involved was that of passing counterfeit coin, an act that the court held both state and nation had a right to forbid and punish. Three years later a similar result was reached on a similar state of facts, the court saying:

⁵ *Barron v. Baltimore* (1833), 7 Peters 243.

⁶ *Grafton v. United States* (1907), 206 U. S. 333. ⁷ 5 How. 410, 434.

With the view of avoiding conflicts between the State and the Federal jurisdictions, this court in the case of *Fox v. The State of Ohio* have taken care to point out that the act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and the Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. We think this distinction sound⁸

Another case arose two years later involving the right of the State of Illinois to punish one of its citizens for "harboring and secreting a negro slave." The Supreme Court of the state and the Supreme Court of the United States upheld the Illinois statute in spite of the fact that the defendant might be punished a second time for the same act, under the Federal fugitive slave law. Speaking for the latter court, Justice Grier said:

Every citizen of the United States is also a citizen of a state or a territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus an assault upon the marshal of the United States, and a hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable for punishment; and the same act may be also a gross breach of the peace of the state, a riot, assault, or a murder, and subject the same person to a punishment, under the state laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable.⁹

The doctrine thus vigorously and repeatedly announced nearly a century ago was first applied to a liquor case in 1922, when the Supreme Court in a unanimous opinion by Chief Justice Taft held that one Lanza, who had already been punished for the violation of the prohibition laws of the State of Washington, could be again punished in the Federal Courts for the violation of Volstead law, growing out of the same acts of manufacture and transportation of intoxicating liquors. In his opinion the Chief Justice quotes the following language from an earlier case:¹⁰

In support of this position numerous cases are cited which like *Cross v. North Carolina*, 132 U. S. 131, hold that the same act may constitute a criminal offense against two sovereignties, and that

⁸ *United States v. Marigold* (1850), 9 How. 560, 569.

⁹ *Moore v. Illinois* (1852), 14 How. 13, 14 L. Ed. 306.

¹⁰ *Southern Ry. Co. v. R. R. Comm. of Indiana*, 236 U. S. 439, 445.

punishment by one does not prevent punishment by the other. That doctrine is thoroughly established. But, upon an analysis of the principle on which it is founded, it will be found to relate only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction. 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 regulation 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.¹¹

In view of this long and unbroken line of decisions it is surprising to find great newspapers saying that "it is inconceivable that the Supreme Court—any supreme court—should have made such a decision only a few years back," and that the court has been so influenced by the rabid reformers that it "sets the Constitution aside at one point to sustain it at another." It can hardly be said that this "unholy precedent" is the result of recent innovations that have "succeeded in changing the dignity and standing of the judiciary." Such criticisms can only tend to weaken the confidence of the people in this great tribunal which has to a remarkable degree kept itself free from the partisan bitterness and political turmoil that have marked many periods of our history as a nation.

That there is a question of policy involved in such double prosecutions is not to be denied. The court itself has recognized that fact, and in the case of *Fox v. Ohio* the court said:

It is almost certain that, in the benignant spirit in which the institutions both of the state and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But were a contrary course of policy and action either probable or usual, this would by no means justify the conclusion, that offenses falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration.¹²

With this question of policy the court involved in the recent case from Louisiana, had nothing to do. It was only called on to say whether the power existed. If the policy of double punishment is bad Congress and the state legislatures have it within their power to restrain their administrative officials from instituting a second prosecution where the offender has already suffered the penalty prescribed in another jurisdiction. Thus Chief Justice Taft in the *Lanza* case said:

¹¹ United States v. Lanza, 260 U. S. 377, 384.

¹² 5 How. 435.

If Congress sees fit to bar prosecution by the federal courts for any act when punishment for violation of state prohibition has been imposed, it can, of course, do so by proper legislative provision; but it has not done so. If a State were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect. But it is not for us to discuss the wisdom of legislation, it is enough for us to hold that, in the absence of special provisions by Congress, conviction and punishment in a state court under a state law for making, transporting and selling intoxicating liquors is not a bar to a prosecution in a court of the United States under the federal law for the same acts.¹³

The fact that cases of prosecution by both state and federal authorities for the same act are so rare, among the thousands of cases in which this is possible, shows that in practice our federal and state prosecuting officers recognize the policy involved and as a matter of comity in the great majority of cases refrain from prosecuting where the defendant has been punished in another jurisdiction.

C. S. POTTS.

THE EXCEPTIONS AS TO WORKS OF NECESSITY AND CHARITY IN SUNDAY LABOR LAWS

From the accounts in the newspapers on the following day throughout the country, there was a strict enforcement of the Sunday labor law in Irvington, N. J. on Sunday, December 12, 1926. Many of the newspapers and their readers regarded this action as a remnant of the old "Blue Laws" and not of much importance as they no doubt thought that Sunday labor laws are in existence in only a few states and cities, and that they, especially in the Western states, of course had no such laws. As a matter of fact, statutes prohibiting labor of one sort or another exist in every state and territory in the Union, but not in the District of Columbia and the Philippine Islands.¹ While it is true that in a few states not all labor on Sunday is prohibited, almost all the states have statutes prohibiting all labor on Sunday, except acts of necessity and charity. Although Sunday labor statutes may not always be enforced as penal statutes, their existence is important in other matters, such as defeating actions on torts and contracts.

Much space has been devoted in the digests and legal periodicals to the subject of Sunday laws in its various phases, and even books have

¹³ 260 U. S. 385.

¹ U. S. BUREAU OF LABOR STATISTICS BULLETIN No. 370 (May 1925). See p. 66, where citations are given to the various state statutes. Bill is now pending in Congress for Sunday rest law in District of Columbia (H.R. 10311).

It appears that Sunday laws have been repealed in California, and the law providing for one day's rest in seven substituted for them. General Laws of Calif. (1923), Act. 4718.