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## PROSECUTION UNDER STATE LAW AND MUNICIPAL ORDINANCE AS DOUBLE JEOPARDY

CHARLES M. KNEIER\*

Prosecution under both state and federal law for the same act does not constitute double jeopardy.<sup>1</sup> A person so prosecuted is not placed in double jeopardy since he is being tried in two jurisdictions for offenses against different sovereignties. A distinction is thus drawn between the offense against the law and the act constituting the offense.<sup>2</sup>

Following this principle, may a person be prosecuted under both municipal ordinance and state law for the same act? Does the act in this case constitute two offenses? Or is the city in such case acting as an agent of the state, and would prosecution for the violation of both the ordinance and the state law constitute double jeopardy, being prosecution twice by the state? This question has arisen in several recent cases in connection with the prohibition laws, where an act was in violation of both the state law and the municipal ordinance.<sup>3</sup>

The courts are not in agreement as to the answer to these questions. While the weight of authority is that prosecution by both the state and the municipality does not constitute double jeopardy there is a

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<sup>1</sup>*Fox v. Ohio*, 5 How. 410 (U. S. 1847); *United States v. Marigold*, 9 How. 560 (U. S. 1850); *Moore v. Illinois*, 14 How. 13 (U. S. 1852); *United States v. Lanza*, 260 U. S. 377, 43 Sup. Ct. 141 (1922); *Martin v. United States*, 271 Fed. 685 (C. C. A. 8th, 1921); *United States v. Ratagczak*, 275 Fed. 558 (N. D. Ohio, 1921); *Singleton v. United States*, 287 Fed. 353 (C. C. A. 4th, 1923); *Gilbert v. State*, 19 Ala. App. 104, 95 So. 502 (1923); *Little v. Commonwealth*, 197 Ky. 320, 247 S. W. 2 (1923); *Rambo v. State*, 38 Okla. Cr. 192, 259 Pac. 602 (1927); *State v. Moseley*, 122 S. C. 62, 114 S. E. 866 (1922); *State v. Jewett*, 120 Wash. 36, 207 Pac. 3 (1922).

<sup>2</sup>*United States v. McCain*, 1 F. (2d) 985 (E. D. Pa. 1924).

<sup>3</sup>Where municipal courts and state courts are given concurrent jurisdiction to try offenses against state law, trial in either jurisdiction bars prosecution in the other. This would clearly be putting a person in double jeopardy for the same offense. "When the law confers upon municipal officers jurisdiction to try offenses against the state, it makes such officers its officers in the trial of such cases, and it is not analogous to the trial for a mere violation of a city ordinance." *Brooks v. State*, 155 Ala. 78, 82, 46 So. 491, 492 (1908); *Dowling v. City of Troy*, 1 Ala. App. 508, 56 So. 116 (1911); *Ex parte Ratley*, 188 Ala. 107, 66 So. 147 (1914); *Jackson v. State*, 136 Ala. 96, 33 So. 888 (1903); *Gustin v. State*, 10 Ala. App. 171, 65 So. 302 (1914); *cf. Thon v. Commonwealth*, 72 Va. 887 (1878); *Morganstern v. Commonwealth*, 94 Va. 787, 26 S. E. 402 (1896); *Bryan v. Commonwealth*, 126 Va. 749, 101 S. E. 316 (1919).

minority view holding that the act constitutes a single offense. It is the purpose of this paper to point out and consider the reasoning of the courts in support of these two views.

The constitutions of most states prohibit the placing of a person in double jeopardy for the same offense.<sup>4</sup> These state constitutional provisions against double jeopardy are, however, "merely declaratory of the ancient principle of the common law."<sup>5</sup> The Supreme Court of Missouri has stated that "it goes without saying that the common law as to double jeopardy is in effect in this State, unless the same has been changed by the Constitution or statutory enactment."<sup>6</sup> Thus we may say that double jeopardy is prohibited in all states by constitutional provision, statutory enactment, or by the principles of the common law.

In the states which hold that a city may be constitutionally authorized to punish an act, even though it is also an offense under state law, the view taken is that the test of double jeopardy "is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offence."<sup>7</sup> The act is held to constitute two distinct offenses against separate jurisdictions and the situation is considered to be analogous to those cases where the same act is punishable under a congressional statute

<sup>4</sup>CONST. OF ALA., art. 1, § 9; CONST. OF ARIZ., art. 2, § 10; CONST. OF CAL., art. 1, § 13; CONST. OF COLO., art. 2, § 18; CONST. OF DEL., art. 1, § 8; CONST. OF FLA., Decl. of Rights, § 12; CONST. OF GA., art. 1, § 1 (8); CONST. OF IDAHO, art. 1, § 13; CONST. OF ILL., art. 2, § 10; CONST. OF IND., art. 1, § 14; CONST. OF KAS., Bill of Rights, § 10; CONST. OF KY., § 13; CONST. OF LA., Bill of Rights, § 9; CONST. OF ME., art. 1, § 8; CONST. OF MICH., art. 2, § 14; CONST. OF MINN., art. 1, § 7; CONST. OF MISS., art. 3, § 22; CONST. OF MO., art. 2, § 23; CONST. OF MONT., art. 3, § 18; CONST. OF NEB., art. 1, § 12; CONST. OF NEV., art. 1, § 8; CONST. OF N. H., art. 16; CONST. OF N. J., art. 1, § 10; CONST. OF N. M., art. 2, § 15; CONST. OF N. Y., art. 1, § 6; CONST. OF N. D., art. 1, § 13; CONST. OF OHIO, art. 1, § 10; CONST. OF OKLA., art. 2, § 21; CONST. OF ORE., art. 1, § 12; CONST. OF PA., art. 1, § 10; CONST. OF R. I., art. 1, § 7; CONST. OF S. C., art. 1, § 17; CONST. OF S. D., art. 6, § 9; CONST. OF TENN., art. 1, § 10; CONST. OF TEXAS, art. 1, § 14; CONST. OF UTAH, art. 1, § 12; CONST. OF VA., art. 1, § 8; CONST. OF WASH., art. 1, § 9; CONST. OF W. VA., art. 3, § 5; CONST. OF WIS., art. 1, § 8; CONST. OF WYO., art. 1, § 11.

<sup>5</sup>Harris v. State, 17 Okla. Cr. 69, 84, 175 Pac. 627, 631 (1918).

<sup>6</sup>State v. Linton, 283 Mo. 1, 8, 222 S. W. 847, 849 (1920).

<sup>7</sup>State v. Stewart, 11 Ore. 52, 4 Pac. 128 (1883); Mayhew v. City of Eugene, 56 Ore. 102, 104 Pac. 727 (1909); State v. O'Donnell, 77 Ore. 116, 149 Pac. 536 (1915); Harlew v. Clow, 110 Ore. 257, 223 Pac. 541 (1924); Miller v. Hansen, 126 Ore. 297, 269 Pac. 864 (1928); Claypool v. McCauley, 131 Ore. 371, 283 Pac. 751 (1929); Thiesen v. McDavid, 34 Fla. 440, 16 So. 321 (1894); Greenwood v. State, 65 Tenn. 567 (1873); State v. Sanders, 68 S. C. 192, 47 S. E. 55 (1904).

and also under a state law.<sup>8</sup> The municipal ordinance is held to be for the preservation of the good government, order and security of the city, and the state law for the maintenance of the public peace and dignity of the state.<sup>9</sup>

The Supreme Court of Alabama has held that the municipal ordinance is not to punish for an offense against the criminal justice of the state but to "provide a mere *police regulation* for the enforcement of good order and quiet within the limits of the corporation."<sup>10</sup> The court took the view that the offenses against the corporation and the state are "distinguishable, and wholly disconnected, and the prosecution at the suit of each proceeds upon a different hypothesis."<sup>10a</sup>

A similar view has been taken by the Court of Appeals of Maryland. It has held that the municipal ordinance is an exercise of the police power and is not the same as the general judicial power of the state to punish offenses made such by general law. The ordinances are "but a part of the *police* power, as contradistinguished from the regular judiciary powers of the State."<sup>11</sup> The Supreme Court of Minnesota has also taken the view that though the municipal ordinances are given the force of law by the charter, yet they relate solely to the purposes of the municipal government, and "prosecutions for their violation have no reference, as a general rule, to the administration of criminal justice by the state."<sup>12</sup>

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<sup>8</sup>Hughes v. People, 8 Colo. 536, 9 Pac. 50 (1885); McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516 (1892); Gillooley v. Vaughn, 92 Fla. 943, 110 So. 653 (1926); Sutton v. City of Washington, 4 Ga. App. 30, 60 S. E. 811 (1908); State v. Preston, 4 Idaho 215, 38 Pac. 694 (1894); *In re* Henry, 15 Idaho 755, 99 Pac. 1054 (1909); State v. Cole, 118 Wash. 511, 203 Pac. 942 (1922).

<sup>9</sup>*Ex parte* Simmons, 4 Okla. Cr. 662, 112 Pac. 951 (1911); Cumpton v. City of Muskogee, 23 Okla. Cr. 412, 225 Pac. 562 (1923); *In re* Monroe, 13 Okla. Cr. 62, 162 Pac. 233 (1917).

<sup>10</sup>Mayor etc., of Mobile v. Allaire, 14 Ala. 400, 403 (1848).

<sup>10a</sup>*Ibid.* Also see: Black v. State, 144 Ala. 92, 4 So. 611 (1906); Leigebert v. State, 17 Ala. App. 551, 86 So. 126 (1920); Williams v. State, 18 Ala. App. 218, 90 So. 36 (1921); Courson v. State, 18 Ala. App. 538, 93 So. 223 (1922); Leach v. State, 20 Ala. App. 15, 100 So. 306 (1924); Morgan v. State, 20 Ala. App. 581, 104 So. 341 (1925); Marchman v. State, 21 Ala. App. 421, 109 So. 121 (1926).

<sup>11</sup>Shafer v. Mumma, 17 Md. 331, 336 (1861); Norwood v. Wiseman, 141 Md. 696, 119 Atl. 688 (1922).

<sup>12</sup>State v. Lee, 29 Minn. 445, 451, 13 N. W. 913, 914 (1882); State v. Oleson, 26 Minn. 507, 5 N. W. 959 (1880); State v. Bell, 26 Minn. 388, 5 N. W. 970 (1880); State v. Cavett, 172 Minn. 16, 214 N. W. 479 (1927). Also see: Bueno v. State, 40 Fla. 160, 23 So. 862 (1898); Robbins v. People, 95 Ill. 175 (1880); Johnson v. State, 59 Miss. 543 (1882); State v. Lytle, 138 N. C. 738, 51 S. E. 66 (1905); Koch v. State, 53 Ohio St. 433, 41 N. E. 689 (1895).

In upholding prosecution under both state law and municipal ordinance for the same act, the Supreme Court of Louisiana has taken the view that when the municipality punished it was for "an offence against the right of the corporation, for which fine and imprisonment may be imposed, and in thus punishing, it is the particular offence against the corporation that is punished, and not the act of assault and battery denounced throughout the State."<sup>13</sup> The court held that the provision forbidding double jeopardy "was not intended to apply to trial under corporate proceedings for wrongs done and the violation of ordinances adopted with the view of maintaining peace and security under corporate authority, so far as to operate a bar to prosecution on the part of the state."<sup>13a</sup> The purpose of the ordinance was "not to punish for an offense against the criminal justice of the country, but to maintain due regulation as an incident of the existence of the corporate organization."<sup>13b</sup>

The Supreme Court of Arkansas has stated that since many acts are often more injurious and the temptation to do them much greater in cities than in the state generally, "[w]hen done in such localities they are not only wrongs to the public at large, but are additional wrongs to the corporations."<sup>14</sup> The court held that such acts could and should be made penal by the incorporated cities and villages, although they were already made so by state law. In considering the question of double jeopardy the court said: "When made penal by the State and the city or town, each act becomes a separate offense against the State and the municipality. In that event the penalty imposed by the city or town is superadded to that fixed by the general law, on account of the additional wrong done—for the offense against the municipality. In such case the wrong doer would not be twice punished for the same offense."<sup>14a</sup>

A different line of reasoning has been used in some states to sustain the right of prosecution under both state law and municipal ordinance. In a case before the Supreme Court of Indiana in 1861 where the question of double jeopardy was presented, the act of the state legislature incorporating the City of Richmond provided for the recovery of a penalty for the violation of any ordinance, by-law, or police regulation, in an action of debt. A subsequent act of the legislature prohibited the sale of liquor in the city and authorized the

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<sup>13</sup>State v. Clifford, 45 La. Ann. 980, 982, 13 So. 281 (1893).

<sup>13a</sup>*Ibid.*

<sup>13b</sup>*Ibid.*

<sup>14</sup>Van Buren v. Wells, 53 Ark. 368, 373, 14 S. W. 38, 39 (1890).

<sup>14a</sup>*Ibid.* 374, 14 S. W. at 39.

council to carry out the provisions of the act and to provide for the recovery of penalties "in the manner provided in the act of incorporation." The court held that the recovery of the penalty was thus a civil suit and not a criminal prosecution; since the city was authorized to proceed for the penalty "in the manner authorized by the act of incorporation," it was an "action of debt" by the city against the offender.<sup>15</sup>

The Supreme Court of Wisconsin in considering the question of double jeopardy has also taken the view that the violation of the municipal ordinance is not a crime. As stated by the court, "The fact that the ordinance provides that the offense 'shall be punished by a fine' does not necessarily lead to the conclusion that the offense is criminal or *quasi* criminal in its nature. When used in a city ordinance, the term 'punished by fine' implies a mere forfeiture or penalty collectible by civil action in the name of the city, in which case the city has the right of appeal."<sup>16</sup> The court went on to point out that subjecting one to a penalty under an ordinance, and to criminal prosecution are "distinct in their legal character, both as to the nature and quality of the offenses and the jurisdiction offended against."<sup>16a</sup>

While the Supreme Court of Missouri earlier took the view that prosecution under both state law and municipal ordinance would constitute double jeopardy, in later cases it was stated that other rulings had thrown a different light on the subject of the nature of a city ordinance and caused doubt to arise as to the correctness of its former view. The court now held that prosecution under both city ordinance and state law did not constitute double jeopardy since it

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<sup>15</sup>Levy v. State, 6 Ind. 281, 284 (1855). Also see: Thomas v. City of Indianapolis, 195 Ind. 440, 145 N. E. 550 (1924).

<sup>16</sup>City of Milwaukee v. Johnson, 192 Wis. 585, 589, 213 N. W. 335, 337 (1927).

<sup>16a</sup>*Ibid.* 590, 213 N. W. at 337. Also see: People v. Smith, 146 Mich. 193, 109 N. W. 411 (1906); People v. Jackson, 8 Mich. 110 (1860). The Supreme Court of Illinois has stated that "[a] suit by a city or village to recover a penalty for the violation of an ordinance is a civil suit, and the rules applicable to criminal procedure have no application thereto." City of Chicago v. Williams, 254 Ill. 360, 363, 98 N. E. 666, 667 (1912). Also see: City of Chicago v. Knobel, 232 Ill. 112, 83 N. E. 459 (1908). The Supreme Court of Michigan has held, however, that "[a]n ordinance, validly enacted, prohibiting certain acts under fines, penalties, or imprisonment, is, within the jurisdiction of the municipality enacting it, as much entitled to respectful obedience, and is as much the law of the land for that locality, as a law enacted by the Legislature; and a person violating it commits an offense, and in one sense a crime, for which he may be sentenced, if under the authority of a statute the ordinance so provides, to imprisonment at hard labor." People v. Hanrahan, 75 Mich. 611, 620, 42 N. W. 1124, 1127 (1889).

did not regard "the violation of the ordinance under consideration as a *crime*, since 'a crime . . . is an act committed in violation of a *public law*.'"<sup>17</sup> The prosecution for violation of the city ordinance was "but a *civil suit*."<sup>17a</sup>

In the cases where it has been held that prosecution for the same act under state law and municipal ordinance would constitute double jeopardy, the courts point out that the right of the municipality to define and punish crimes arises from the delegation of power to it by its superior sovereign, the state. In the prosecution of such crimes under this delegated authority the municipality is thus acting as an agent of the state and to permit "double prosecution would be to allow the state, once directly and once through an agency, to prosecute for the same act."<sup>18</sup>

This was the earlier view taken by the Supreme Court of Missouri. It held that if a municipality took cognizance of an act made an offense by its ordinances and punished it, the person thus punished could not be subjected to punishment by the state for the same act. The court stated that in view of the prohibition on double jeopardy, "[t]o hold that a party can be prosecuted for an act under the state law after he has been punished for the same act by the municipal corporation within whose limits the act was done, would be to overthrow the power of the general assembly to create corporations to aid in the affairs of the state. For a power in the state to punish, after a punishment has been inflicted by the corporate authorities, could only find a support in the assumption that all the proceedings on the part of the corporation were null and void."<sup>19</sup> As has been pointed out above, however, the court later abandoned this view. The court now held that prosecution for violation of the municipal ordinance was "but a civil suit."<sup>20</sup>

The Supreme Court of Errors of Connecticut has also taken the view that so far as a general statute of the state covers the same ground as a city ordinance, both cannot be enforced in respect to the same act so as to subject a party to a double penalty. In considering this question the court has said: "It is a case of two jurisdictions dealing with the same subject matter. Both however cannot be enforced in respect to the same act so as to subject a party to a double

<sup>17</sup>City of Kansas v. Clark, 68 Mo. 588, 589 (1878).

<sup>17a</sup>Ibid. 590; State v. Muir, 164 Mo. 610, 65 S. W. 285 (1901).

<sup>18</sup>See dissenting opinion in State v. Tucker, 137 Wash. 162, 164, 171, 242 Pac. 363, 364, 366 (1926).

<sup>19</sup>State v. Cowan, 29 Mo. 330, 332 (1860); State v. Simonds, 3 Mo. 414 (1834); State v. Thornton, 37 Mo. 360 (1866).

<sup>20</sup>Supra note 17, at 590.

penalty. In such cases the superior jurisdiction would ordinarily prevail to the exclusion of the inferior."<sup>21</sup>

The Supreme Court of Michigan has taken a similar view relative to double prosecution. It has held that where a municipal ordinance and state law are merely auxiliary or cumulative and cover the same offense, "prosecutions may be instituted under either law, and the court that first acquires jurisdiction over the person of the accused has exclusive jurisdiction to hear, try, and determine the case; and a conviction for an offense which is the same in both laws will be a bar to a prosecution for the same offense under the other law."<sup>22</sup>

The minority view seems worthy of more consideration than it has thus far received. When seeking to maintain order and suppress crime it is the holding of the courts that the city is acting as an agent of the state. In the enforcement of law the state must either delegate the power of punishment or retain it. If it delegates the power to the city, the ordinance becomes "a law within its sphere of operation."<sup>23</sup>

It has been held by the Supreme Court of the United States that there may not be prosecution under a federal statute after a defendant has been prosecuted in a territorial court of the Philippines for the same act. The court pointed out that while punishment under state law and federal law does not constitute double jeopardy, a different situation exists in the relationship of the Philippines and the United States. In the former case the act constituted two offenses, one against the United States and the other against a state; but the same act could not be considered to constitute two offenses "where the two tribunals that tried the accused exert all their powers under and by authority of the same government. . . ."<sup>24</sup>

The position of the city in the governmental system of the state is such that a similar view might well be taken relative to prosecution by both as double jeopardy. When engaged in the enforcement of law the city may be considered an agent of the state. The Supreme Court of South Carolina has pointed out that: "The inhabitants of a city have no inherent right to direct its affairs. All their rights are conferred upon them by the law making power of the State. . . . In short, the municipality is not in any legal sense the agent of its inhabitants, either singly or collectively, but is a legal institution in the

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<sup>21</sup>State v. Welch, 36 Conn. 215, 217 (1869); Southport v. Ogden, 23 Conn. 128 (1854); State v. Flint, 63 Conn. 248, 28 Atl. 28 (1893).

<sup>22</sup>People v. Hanrahan, *supra* note 16a, at 628, 42 N. W. at 1130.

<sup>23</sup>Martin v. Herzog, 228 N. Y. 164, 169, 126 N. E. 814, 815 (1920).

<sup>24</sup>Grafton v. U. S., 206 U. S. 333, 355, 27 Sup. Ct. 749, 755 (1907). Also see: U. S. v. John B. Colley, 3 Philippine 58 (1903).

nature of a governmental agency, deriving its powers from the State."<sup>25</sup>

The Supreme Court of the United States has also pointed out that municipal corporations are "created by the authority of the legislature, and they derive all their powers from the source of their creation, except where the Constitution of the State otherwise provides. They have no inherent jurisdiction to make laws or to adopt governmental regulations, nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters or other statutes of the State. . . . [T]he powers of the organization may be modified or taken away at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic."<sup>26</sup>

The doctrine of an inherent right of local self government which was followed for a time in a few states is being gradually abandoned.<sup>27</sup> And even in the states having constitutional home rule, law enforcement has not been considered to be a matter of municipal concern but rather a matter of general interest and subject to state control.<sup>28</sup> Thus when engaged in the maintenance of law and order, either by municipal ordinance or by the enforcement of state law, the municipality is properly considered an agent of the state. Prosecution by both city and state would, according to this view, be double prosecution for the same act,—once by the state directly and once by its agent, the municipality.

From the point of view of policy it seems to be of doubtful justice to provide for prosecution by both state and municipality for the same act. Regardless of the legal theory, the practical effect is to punish twice

<sup>25</sup>*Ancrum v. Camden Water, Light and Ice Co.*, 82 S. C. 284, 294, 64 S. E. 151, 154 (1909).

<sup>26</sup>*Mount Pleasant v. Beckwith*, 100 U. S. 514, 524 (1880); *Meriwether v. Garrett*, 102 U. S. 501, 511 (1880); *Laramie County v. Albany County*, 92 U. S. 307 (1875). Also see: *Frederick v. Groshon*, 30 Md. 436, 444 (1869).

<sup>27</sup>On this principle see: *McBain, Doctrine of an Inherent Right of Local Self Government* (1916) COL. L. REV. 190, 299; *State v. Morris*, 199 Ind. 78, 155 N. E. 198 (1927); cf. *Booth v. McGuinness*, 78 N. J. L. 346, 75 Atl. 455 (1910); *State v. Denny*, 118 Ind. 449, 21 N. E. 274 (1888); *State v. Fox*, 158 Ind. 126, 63 N. E. 19 (1902); *State v. Barker*, 116 Iowa 96, 89 N. W. 204 (1902); *Lexington v. Thompson*, 113 Ky. 540, 68 S. W. 477 (1902); *People v. Hurlburt*, 24 Mich. 44 (1871).

<sup>28</sup>See for example: *Ex parte Sparks*, 120 Cal. 395, 52 Pac. 715 (1898); *Miner v. Justices' Court*, 121 Cal. 264, 53 Pac. 795 (1898); *State ex rel. Goodnow v. Police Commissioners of Kansas City*, 184 Mo. 109, 88 S. W. 27 (1904); *State ex rel. McNamee v. Stobie*, 194 Mo. 14, 92 S. W. 191 (1905); *McBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* (1916) pp. 133, 142, 255, 371, 467, 654.

for the same act. The Supreme Court of Colorado, though holding that such double prosecution does not constitute double jeopardy has stated that "[t]hough, if it be not so provided by statute, every fair-minded judge will, when pronouncing judgment in the second prosecution or proceeding, consider a penalty already suffered."<sup>29</sup> This raises the question as to whether provision should not be made by statute to meet this situation.

Some states have by statute or constitution prohibited prosecution for the same act under both state law and municipal ordinance. The Court of Appeals of Kentucky earlier took the view that there could be prosecution under both.<sup>30</sup> The constitution of the state was then amended to provide that: "No municipal ordinance shall fix a penalty for a violation thereof at less than that imposed by statute for the same offense. A conviction or acquittal under either shall constitute a bar to prosecution for the same offense."<sup>31</sup> This prohibition has been held not to apply to cases where the state acts under the common law. A conviction under a municipal ordinance of maintaining a nuisance by operating a pool room has been held not to bar a prosecution by the state for the same act, constituting a nuisance at common law, no penalty being prescribed therefor by statute.<sup>32</sup> But if the offense is statutory, there may not be prosecution for the same act by both city and state.<sup>33</sup>

In Alabama there was formerly a statute providing that prosecution for violation of a municipal ordinance would "bar a prosecution for the same, or substantially the same, offense in the state courts." The Court of Appeals of the state held that the clear intent of this provision was to prohibit a double punishment for the same act or conduct.<sup>34</sup> This law prohibiting such double prosecution was, however, repealed in 1915.<sup>35</sup>

Texas has also provided that no person shall be punished twice for the same act or omission, even though it be an offense against both the penal laws of the state and the ordinances of the city. The law provides, however, that no ordinance of a city shall be valid which

<sup>29</sup>McInerney v. City of Denver, *supra* note 8, at 307, 29 Pac. at 518.

<sup>30</sup>Kemper v. Commonwealth, 85 Ky. 219, 3 S. W. 159 (1887).

<sup>31</sup>CONST. OF KY., § 168.

<sup>32</sup>Lucas v. Commonwealth, 118 Ky. 818, 82 S. W. 440 (1904). Also see: City of Owensboro v. Simms, 99 Ky. 49, 34 S. W. 1085 (1896); Respass v. Commonwealth, 107 Ky. 139, 53 S. W. 24 (1899); Pineville v. Davis, 220 Ky. 95, 294 S. W. 766 (1927).

<sup>33</sup>White v. Commonwealth, 28 Ky. L. Rep. 1312, 92 S. W. 285 (1906).

<sup>34</sup>Cast v. State, 11 Ala. App. 177, 65 So. 718 (1914).

<sup>35</sup>Gen. Acts of Ala. 1915, p. 724. Bell v. State, 16 Ala. App. 36, 75 So. 181 (1917); Bell v. State, 200 Ala. 364, 76 So. 1 (1917).

provides a less penalty for an offense than is provided by the statutes of the state for the same offense.<sup>36</sup> A similar law has been enacted in Arkansas.<sup>37</sup> It has been held by the Supreme Court of that state that under this provision a man could not be prosecuted under a municipal ordinance for running a "blind tiger" and under state law for selling liquor without a license, where the same act constituted both offenses.<sup>38</sup>

Indiana cities have been prohibited from making acts punishable by ordinance which are already made public offenses and punishable by the state.<sup>39</sup>

In some jurisdictions the placing of a person in double jeopardy by prosecution under both state law and municipal ordinance has been avoided by holding that a municipality may not prohibit that which is already made penal by statute unless express and specific authority has been granted.<sup>40</sup> In a case before the Supreme Court of North Carolina in 1886 the legality of an ordinance of the city of Raleigh which made an assault upon a public officer of the city punishable by fine or imprisonment was under consideration. The court pointed out that to assault an officer was indictable under the general law of the state and held that an ordinance "that undertakes to make that which constitutes a criminal offence under the general law of the State, an offence against the town, punishable by fine or otherwise, is inoperative and void."<sup>41</sup>

The Supreme Court of Appeals of West Virginia has held that the police power of municipal corporations in that state depends upon the will of the legislature, and a city, town, or village can only exercise such power as is fairly included in the grant of powers. It was held that power conferred by the state law "to protect the persons and property of the citizens of such city, town or village, and to preserve peace and good order therein" did not confer power to punish acts made criminal by the state law, except such as would be attended with circumstances of aggravation not included in the state law. Thus it was held that the carrying of deadly weapons, being an offense fully provided for and punished by law, and being an act not in itself amounting to a breach of the peace, could not be made an offense and punished by municipal ordinance.<sup>42</sup>

<sup>36</sup>Davis v. State, 37 Texas Cr. 359, 39 S. W. 937 (1897).

<sup>37</sup>Richardson v. State, 56 Ark. 367, 19 S. W. 1052 (1892).

<sup>38</sup>Champion v. State, 110 Ark. 44, 160 S. W. 878 (1913).

<sup>39</sup>City of Frankfort v. Aughie, 114 Ind. 77, 15 N. E. 802 (1888).

<sup>40</sup>Thrower v. City of Atlanta, 124 Ga. 1, 52 S. E. 76 (1905); *Ex parte Fagg*, 38 Tex. Cr. 573, 44 S. W. 294 (1898); *Ex parte Bourgeois*, 60 Miss. 663 (1882).

<sup>41</sup>State v. Keith, 94 N. C. 933, 934 (1886).

<sup>42</sup>Judy v. Lashley, 50 W. Va. 628, 41 S. E. 197 (1902).

It has been held in California that a municipal ordinance is void, insofar as it makes precisely the same acts criminal as are declared such by the state law. The court pointed out that the state constitution limits the power of municipal corporations to the passage of ordinances not in conflict with the general laws of the state.<sup>43</sup>

The correctness of the holding in most states that prosecution by both municipality and state for the same act does not constitute double jeopardy seems open to question.<sup>44</sup> That there is actually double prosecution by the state seems to be supported by a consideration of the legal position of the city in the governmental system of the state. And from the point of view of policy it seems "contrary to principles of natural justice and humanity, and against the policy of the law to multiply or carve different crimes out of only one criminal act."<sup>45</sup>

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<sup>43</sup>*In re Sic*, 73 Cal. 142, 14 Pac. 405 (1887). Also see: *Menken v. City of Atlanta*, 78 Ga. 568, 2 S. E. 559 (1887).

<sup>44</sup>See I COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 414.

<sup>45</sup>*Champion v. State*, *supra* note 38, at 46, 160 S. W. at 878.