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Criminal Law--Double Jeopardy (Jerome v. United States, 63 Sup. Ct. 483 (1943))

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tees in the technical sense of the term, they occupy a fiduciary relation to stockholders respecting corporate transactions,[12] and a relation of trust to the corporation by being bound to exercise the strictest good faith in respect to its property and business.[13] The Act[14] denies to directors and officers the right to profit from short term dealings in the securities of their corporation by requiring the filing of statements of their security holdings in the company and further provides that profits made from dealings in such securities within any period of less than six months shall inure to the company. "The cases[15] upon which the Commission relied do not establish principles of law and equity which in themselves are sufficient to sustain its order," and I believe it will be difficult for them to enforce a penalty by way of limitation to cost upon the findings of a past transaction which has been harmful to the public interest or the interest of investors. Both subordination and the limitation to cost cases are cases[16] based on the fiduciary relationship, and in each of the cases the claimant was a stockholder. The leading subordination case is known as the *Deep Rock* case.[17] There the parent claimant in a reorganization proceeding was to receive stock in the new company. The court held that the parent's mismanagement, resulting in the subsidiary's insolvency, required the subordination of the parent's claim to that of preferred stockholders. This present decision eliminates any possibility of the court connecting the Deep Rock doctrine with a limitation to cost theory. The limitation to cost is a somewhat less drastic penalty than subordination for a similar type of situation.

M. M. D.

CRIMINAL LAW—DOUBLE JEOPARDY.—Defendant-appellant was convicted of violating a federal statute (12 U. S. C. A. § 588b) by entering a national bank in Vermont with intent to utter a forged

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[12] Heim v. Jones, 14 F. (2d) 29 (C. C. A. 8th, 1926).

[13] Elliot v. Baker, 194 Mass. 518, 80 N. E. 450 (1907).

[14] PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, § 17 (a and b).

[15] Magruder v. Drury, 235 U. S. 106, 35 Sup. Ct. 77, 59 L. ed. 151 (1914); Michoud v. Girod, 4 How. 503, 11 L. ed. 1076 (U. S. 1845). The Commission applied an analogy to the latter case which dealt with specific obligations of express trustees and in which case the following rule of equity is noted—"that a purchase by a trustee or agent of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not —*per interpositam personam*—carries fraud on the face of it." The Commission held here that even though the management does not hold the stock of the corporation in trust for the stockholders, nevertheless the duty of fair dealing which the management owes to the stockholders is violated if those in control of the corporation purchase its stock, even at a fair price, openly and without fraud.

[16] Pepper v. Litton, 100 F. (2d) 830 (C. C. A. 4th), *certiorari granted*, 307 U. S. 620 (1939).

[17] *See* Note, *The "Deep Rock" Doctrine: A Realistic Approach to Parent—Subsidiary Law* (1942) 42 COL. L. REV. 1124.

promissory note and thereby to defraud the bank. A federal statute [1] makes it a federal offense to enter a national bank "with intent to commit . . . any felony . . .". The utterance of a forged promissory note is a felony under the laws of Vermont [2] but not under any federal statute. Defendant was convicted below under the theory that the word "felony" as used in the federal statute was meant to include offenses which were felonies under state law. *Held,* conviction reversed because the word "felony" as used in § 2(a) of the statute does not incorporate state law and the defendant's act was no felony under any federal law.[3] *Jerome v. United States,* 63 Sup. Ct. 483 (1943).

One of the considerations involved in this decision is the principle that the double jeopardy provision of the Fifth Amendment [4] does not stand as a bar to federal prosecution, though a state conviction based on the same acts has already been obtained.[5] In view of this fact, Mr. Justice Douglas in his opinion states "that where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute." [6] The Fifth Amendment, like all other guaranties in the first eight amendments to the Federal Constitution, applies only to proceedings by the Federal Government.[7] The same act may constitute an offense against both federal and state laws and an acquittal or conviction in one jurisdiction will not prevent prosecution in the other.[8] In New York it was held [9] that the fact that the Federal Government made a certain act a crime was no bar to that state from including the same act as a crime in its Penal Law. The fact that it is entirely possible for a man to be punished twice for the same act, has been recognized by the courts [10] who have expressed abhorrence at such a result, unless the cases contained

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[1] BANK ROBBERY ACT, 48 STAT. 783, 50 STAT. 749, 12 U. S. C. § 588b, 12 U. S. C. A. § 588b, subd. 2a.

[2] P. L. 1933, §§ 8485, 8750.

[3] There is no common law offense against the United States. *See* United States v. Gradwell, 243 U. S. 476, 485, 37 Sup. Ct. 407, 410, 61 L. ed. 857 (1917); United States v. Hudson, 7 Cranch 32, 3 L. ed. 259 (U. S. 1812). But even if there was, forgery at common law was only a misdemeanor. *See* WHARTON, CRIMINAL LAW (12th ed.) 861.

[4] ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ." U. S. CONST. AMEND. V.

[5] Hebert v. State of Louisiana, 272 U. S. 312, 47 Sup. Ct. 103, 71 L. ed. 270, 218 A. L. R. 1102 (1926); United States v. Lanza, 260 U. S. 377, 43 Sup. Ct. 141, 67 L. ed. 314 (1922).

[6] See principal case, p. 486.

[7] Brantley v. Georgia, 217 U. S. 284, 30 Sup. Ct. 514, 54 L. ed. 768 (1910); Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672 (U. S. 1833).

[8] Hebert v. State of Louisiana, cited *supra* note 5; United States v. Lanza, cited *supra* note 5; Fox v. Ohio, 5 How. 410, 12 L. ed. 213 (U. S. 1847).

[9] People of the State of New York v. John Fury, 279 N. Y. 433, 18 N. E. (2d) 650 (1939).

[10] *See* Fox v. Ohio, cited *supra* note 8; United States v. Palan, 167 Fed. 991 (1909); People *ex rel.* McMahon v. Westchester County, 1 Park. Cr. Rep. 659 (N. Y. 1852).

such extraordinary facts as would warrant that result. The courts, however, have stated that being punished twice for the same offense is contrary to the fundamental concepts of the Bill of Rights, even though there is no technical bar to prosecution by both federal and state courts for the same act. In two cases where there was a double conviction in this manner the court either suspended sentence or imposed only a nominal penalty.[11] It is evident, therefore, that when the Court in *Jerome v. United States,* declined to construe a federal criminal statute so as to include state felonies within its scope, and gave as one of its reasons for so doing, the danger of double punishment for the same offense, it was following the principles enunciated in the aforementioned cases[12] which uphold the spirit of the constitutional guaranty as to the prevention of double jeopardy.

L. Y.

FEDERAL EMPLOYER'S LIABILITY ACT—MASTER AND SERVANT—ASSUMPTION OF RISK.—Death action brought under Federal Employer's Liability Act[1] by widow and administratrix of decedent, a railroad policeman employed by respondent. The complaint alleged negligence and failure to provide a reasonably safe place to work. Decedent was standing between two narrowly separated tracks in the respondent's unlighted switchyards on an exceedingly dark night, and as he was using a flashlight to inspect the seals of a slowly moving train, he was suddenly struck and killed by the rear car of a train which was backing in the opposite direction on an adjoining track. No warning by sound or light was conveyed to decedent.[2] Motion by defendant for a directed verdict on the ground that the evidence disclosed no actionable negligence—was granted. Circuit Court of Appeals affirmed,[3] holding that decedent had assumed the risk of his position and that therefore no duty was owing to him by respondent. On *certiorari* before the United States Supreme Court, *held,* reversed and remanded with directions. The 1939 amendment to the Federal Employer's Act[4] obliterated every vestige of "assumption of risk"

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[11] United States v. Holt, 270 Fed. 639 (1921); *cf.* United States v. Palan, cited *supra* note 10.

[12] See note 10 *supra.*

[1] 45 U. S. C. § 51 *et seq.,* 45 U. S. C. A. § 51 *et seq.* (1906), *repassed with alterations not material* (1908), cited *infra* note 10.

[2] Circuit Court found (128 F. [2d] 420, 422 [1942]) that it was "probable that Tiller did not hear cars approaching" from behind him.

[3] *Id.* at 420.

[4] 53 STAT. 1404, 45 U. S. C. § 54 (1939), ". . . employees shall not be held to have assumed the risks of employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." See note 13 *infra* for provision in § 54