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Penal Ordinances In California *

THE PROBLEM STATED

IT HAS been said that "there is nothing in the law more complex and abstruse" than the American municipal corporation.¹ Certainly there is no branch of the law more resplendent with conflicting rules and principles and with fallaciously subtle and specious reasoning, or in which Judge Bourquin's remark that "precedent can be found for anything" finds more ample support. This is particularly true of that phase of this field which concerns penal ordinances.

To mention only three of the many questions which have received varied, and at times fanciful, answers: Is a proceeding to impose a sentence of fine and/or imprisonment for the violation of a municipal ordinance a criminal prosecution? Can a municipal corporation impose penalties for acts which are likewise criminal under the laws of the state? If so, can a prosecution under the ordinance be pleaded in bar to a prosecution under the statute?

It is said that "the weight of judicial authority" declares that such a prosecution "is in the nature of a civil action."² This has proved a particularly handy theory in that it offers a convenient subterfuge by which to evade the constitutional rights of persons accused of crime.³

* This article is one of a series dealing with overlapping national, state, and local criminal laws and their effect upon the constitutional rights of persons accused of crime. For previous articles by the same author, see *The Lanza Rule of Successive Prosecutions* (1932) 32 COL. L. REV. 1309; *The Scope and Nature of Concurrent Power* (1934) 34 COL. L. REV. 995; *The Bill of Rights and Criminal Law Enforcement* (1934) 175 ANNALS AMER. ACAD. OF POL. AND SOC. SCI. 205; *Immunity from Compulsory Self-Incrimination in a Federal System of Government* (1934-1935) 9 TEMPLE L. Q. 57, 194. And see my *Municipal Ordinances Supplementing Criminal Laws*, to be published in the January issue of the Southern California Law Review.

Again it is my privilege to express my gratitude to the Social Science Research Council, through whose courtesy I spent a year doing the field work which underlies all of these studies.

¹ DILLON, MUNICIPAL CORPORATIONS (5th ed., 1911) §33.

² 3 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed., 1928) §1136.

³ "This court has already adopted the view that in prosecutions for the violation of a municipal ordinance . . . the constitutional provisions relating to indictments . . . in criminal cases do not apply." *McInerney v. Denver* (1892) 17 Colo. 302, 308, 29 Pac. 516, 518, denying a jury trial. Trial by jury was denied for similar

Its principal shortcoming is that if true, no fine or imprisonment could be imposed. This has led to the interesting refinement that "It is therefore a quasi-civil and criminal action. Partaking of some of the features of each, its similitude to either is not complete. In pleading it is more like a civil action, but in its effect and consequences it more nearly resembles a criminal proceeding."⁴ Such a rule is doubly handy in that the court can stress either the civil or the criminal aspects, depending upon the desired conclusion.⁵ A few courts, of opinion that the "civil" side of such actions disappeared when the common law limitations upon municipal penalties⁶ were abandoned, have ventured the

reasons in *Hunt v. City of Jacksonville* (1894) 34 Fla. 504, 16 So. 398; *Hood v. Von Glahn* (1892) 88 Ga. 405, 14 S. E. 564; *Littlejohn v. Stells* (1905) 123 Ga. 427, 51 S. E. 390; *City of Mankato v. Arnold* (1886) 36 Minn. 62, 30 N. W. 305; *Ogden v. City of Madison* (1901) 111 Wis. 413, 87 N. W. 568. Other cases are collected in DILLON, *op. cit. supra* note 1, §527; 3 McQUILLIN, *op. cit. supra* note 2, §1163. This doctrine must not be confused with the very different one that the defendant can be tried by a judge alone because he is accused of a "petty offense." Such a view concedes that the action is criminal, but denies that it comes within the scope of this particular guarantee; although, to be sure, the sole reason for classing it as a "petty offense" may be that it is brought under an ordinance.

Equally enticing are the possibilities of using illegally secured evidence, securing a conviction without proving guilt "beyond a reasonable doubt," and appealing from a verdict of acquittal, all of which would seem to follow logically from this illogical premise. *City of Greeley v. Hamman* (1888) 12 Colo. 94, 20 Pac. 1; *State v. Lee* (1882) 29 Minn. 445, 457, 13 N. W. 913, 917; *State v. Nelson* (1923) 157 Minn. 506, 196 N. W. 279; *Kansas City v. Clark* (1878) 68 Mo. 588; *Cape Girardeau v. Smith* (Mo. 1933) 61 S. W. (2d) 231, 232. And see *Northville v. Westfall* (1889) 75 Mich. 603, 42 N. W. 1068; *Milwaukee v. Ruplinger* (1914) 155 Wis. 391, 395, 145 N. W. 42, 43; *Milwaukee v. Johnson* (1927) 192 Wis. 585, 213 N. W. 335.

⁴ 3 McQUILLIN, *loc. cit. supra* note 2, quoting *Stevens v. Kansas City* (1898) 146 Mo. 460, 465, 48 S. W. 658, 659.

⁵ The Minnesota and Missouri cases furnish excellent examples of the flexibility of this doctrine. See, among others, *State v. Oleson* (1880) 26 Minn. 507, 5 N. W. 959; *State v. Lee*, *supra* note 3; *City of Mankato v. Arnold* (1886) 36 Minn. 62, 30 N. W. 305; *State v. West* (1889) 42 Minn. 147, 43 N. W. 845; *State v. Harris* (1892) 50 Minn. 128, 52 N. W. 531; *State v. Robitshek* (1895) 60 Minn. 123, 61 N. W. 1023; *State v. Stone* (1905) 96 Minn. 482, 105 N. W. 187; *City of Madison v. Martin* (1909) 109 Minn. 292, 123 N. W. 809; *State v. McDonald* (1913) 121 Minn. 207, 141 N. W. 110; *State v. Brooms* (1918) 139 Minn. 402, 166 N. W. 771; *State v. Nelson*, *supra* note 3; *Village of Crosby v. Stemick* (1924) 160 Minn. 261, 199 N. W. 918; *City of Red Wing v. Nibbe* (1924) 160 Minn. 274, 199 N. W. 918; *State v. Anderson* (1925) 165 Minn. 150, 206 N. W. 51; *Weich v. City of Red Wing* (1928) 175 Minn. 222, 220 N. W. 611; *State v. Thornton* (1866) 37 Mo. 360; *Kansas City v. Clark*, *supra* note 3; *Ex parte Hollwedell* (1881) 74 Mo. 395; *St. Louis v. Knox* (1881) 74 Mo. 79; *St. Louis v. Vert* (1884) 84 Mo. 204; *St. Louis v. Weitzel* (1895) 130 Mo. 600, 31 S. W. 1045; *State v. Muir* (1901) 164 Mo. 610, 65 S. W. 285; *State v. Freeman* (1893) 56 Mo. App. 579.

⁶ "By the law of England as it was when we received thence our unwritten law, such corporation could not . . . authorize an indictment or a summary prosecution . . . nor could it provide either imprisonment or disfranchisement for disobedience. Therefore the ancient by-laws used to direct that, for a breach of a provision, the offender forfeit a sum named. The forfeiture was not recoverable

opinion that they are criminal, unsoftened by a *quasi*.⁷

In the earlier period of our history, and particularly the other side of 1850, it was generally assumed that, in the absence of express authorization, an ordinance undertaking to punish acts already criminal under the laws of the state was void.⁸ Although New England still clings to this doctrine,⁹ in most of the other states opposition to coordinate legislation has broken down completely. Thus in Missouri¹⁰ proof of identity establishes that the two are in harmony rather than in conflict, while the Wisconsin court¹¹ has reversed the earlier rule and requires a specific provision to invalidate such ordinances.

In 1868, when Judge Cooley published his famous treatise on *Constitutional Limitations*, the weight of authority was decidedly in favor of the view that when both an ordinance and a state law prescribe a penalty for a given act, a conviction or acquittal under one is a bar to a prosecution under the other.¹² But his misconstruction of the prece-

in the court of the corporation, . . . for the principle, that no man shall be a judge in his own case, forbade. The method mostly employed for recovering the penalty was by an action of debt, or sometimes of assumpsit, in some one of the other courts, commonly one of the courts at Westminster Hall." BISHOP, STATUTORY CRIMES (3d ed. 1901) §403. And see DILLON, *op. cit. supra* note 1, §608.

⁷ DeQueen v. Fenton (1911) 98 Ark. 521, 136 S. W. 945; State v. Keenan (1889) 57 Conn. 286, 18 Atl. 104; Jaquith v. Royce (1876) 42 Iowa 406.

⁸ "This hy-law must either virtually repeal the act of the legislature, or it must impose an accumulative fine of \$100 on the penalty provided by the act of 1784. The first is too absurd to obtain any advocate; and the last, too extravagant to admit of argument." Schroder v. City of Charleston (S. C. 1815) 3 Brevard 533, 540. The same arguments are elaborated more fully in Southport v. Ogden (1854) 23 Conn. 128, 132-133.

⁹ Shelton v. City of Shelton (1930) 111 Conn. 433, 150 Atl. 811; Commonwealth v. Turner (1848) 55 Mass. (1 Cush.) 493; Commonwealth v. Newhall (1910) 205 Mass. 344, 91 Atl. 206; State v. Angelo (1902) 71 N. H. 224, 51 Atl. 905; State v. Pollard (1859) 6 R. I. 290, 295; State v. Thurston (1907) 28 R. I. 265, 66 Atl. 580; *In re* Snell (1885) 58 Vt. 207, 1 Atl. 566; St. Johnsbury v. Thompson (1887) 59 Vt. 300, 9 Atl. 571.

¹⁰ "We consider the ordinance . . . to be in harmony with the statute. They each . . . cover the same subject, and have the same object." City of Glasgow v. Bazan (1902) 96 Mo. App. 412, 416, 70 S. W. 257, 258. And see Duluth v. Evans (1924) 158 Minn. 450, 197 N. W. 737.

¹¹ Hack v. City of Mineral Point (1930) 203 Wis. 215, 221, 233 N. W. 82, 84.

¹² This view was supported by the doctrine that an ordinance punishing acts which are criminal under the statutes is void since otherwise the corporation, by being the first to prosecute, could oust its principal of jurisdiction. And see Berry v. People (1865) 36 Ill. 423, 429; City of Madison v. Hatcher (Ind. 1847) 8 Blackford 341, 344; Indianapolis v. Blythe (1850) 2 Ind. 75; State v. Simonds (1834) 3 Mo. 414; State v. Cowan (1860) 29 Mo. 330; State v. Hambleton (1860) 29 Mo. 336; State v. Tilton (1860) 29 Mo. 336; State v. Thornton (1866) 37 Mo. 360.

The contrary view found support in Mayor v. Rouse (1845) 8 Ala. 515; Mayor v. Allaire (1848) 14 Ala. 400; Levy v. State (1855) 6 Ind. 281; Ambrose v. State (1855) 6 Ind. 351; Waldo v. Wallace (1859) 12 Ind. 569, and Mayor v. Hyatt (N. Y. 1854) 3 E. D. Smith 156. Of these, only the Allaire and Levy cases actually involved successive prosecutions.

dents¹³ gave added impetus to the contrary view, so that by the turn of the century it could be said, "It is now settled beyond a doubt that the same act may constitute an offense against both the state and a municipality, and may be punished by either or by both."¹⁴

Although the cases are surprisingly uniform in this conclusion, there is remarkable diversity in the reasons given to support it. It has been

¹³ COOLEY, CONSTITUTIONAL LIMITATIONS (1868) p. 199. In addition to Mayor v. Rouse, Mayor v. Allaire, Levy v. State, Ambrose v. State and Mayor v. Hyatt, all *supra* note 12, he cited Greensboro v. Mullins (1849) 13 Ala. 341; City of Amboy v. Sleeper (1863) 31 Ill. 499; Lawrenceburg v. Wuest (1861) 16 Ind. 337; St. Louis v. Bentz (1847) 11 Mo. 61; St. Louis v. Cafferata (1856) 24 Mo. 94; Rogers v. Jones (N. Y. 1828) 1 Wendell 237; People v. Stevens (N. Y. 1835) 13 Wendell 341, and Blatchley v. Moser (N. Y. 1836) 15 Wendell 215, as authority for the conclusion that "the clear weight of authority" holds that "the same act may constitute an offense both against the State and the municipal corporation, and both may punish it without violation of any constitutional principle." He added that this rule is "within the principle of Fox v. Ohio (1847) 5 How. (46 U.S.) 410 and Moore v. People (1852) 14 How. (55 U.S.) 13, "sustaining (*obiter*) successive state and federal prosecutions. Only two cases, Jefferson City v. Courtmire (1846) 9 Mo. 692 and Slaughter v. People (Mich. 1842) 2 Douglass 334, the second of which was not in point, were cited for the rule that a general grant of authority gives "no power to pass an ordinance for the punishment of indictable offenses"; and State v. Cowan, *supra* note 12, was offered as the lone authority for the rule that a prosecution under an ordinance can be pleaded in bar to a prosecution for the same offense as a crime against the state.

Although the appearance of this passage proved the turning point in the law, an examination of the "authorities" cited reveals a startling miscarriage of the doctrine of *stare decisis*. Greensboro v. Mullins did not even involve the question of coordinate laws, nor did the court discuss it. City of Amboy v. Sleeper did sustain coordinate legislation, but it did not so much as mention the question of dual prosecutions; and the same court, two years later, had stated, "The jurisdiction is concurrent, and judgment in a case brought by the city for a violation of this ordinance would be a bar to a recovery by the state for the same cause." Beery v. People, *supra* note 12. Undoubtedly Lawrenceburg v. Wuest did sustain coordinate legislation, but no question of double jeopardy was involved or discussed. The same is true of the two Missouri cases, in addition to the fact that in State v. Thornton, *supra* note 12, the same court had ruled that the unconstitutionality of successive prosecutions "is so well settled in this State that it would be idle to discuss it." The opinion in Rogers v. Jones went no further than to express a willingness to sustain coordinate legislation.

But it is People v. Stevens and Blatchley v. Moser which seem the most strangely out of place. Neither involved a municipal ordinance, as both arose under a statute providing that one selling liquor without a license should forfeit \$25 in an action brought by the town overseers of the poor and be proceeded against for a misdemeanor. In holding that a single sale justified both actions, the court wrote: "It is undoubtedly competent for the legislature to subject any particular offence, both to a penalty and a criminal prosecution; it is not punishing the same offence twice. They are but parts of one punishment; . . . That they are enforced in different modes of proceeding, and at different times, does not affect the principle. It might as well be contended that a man was punished twice, when he was both fined and imprisoned, which he may be in most misdemeanors." People v. Stevens, *supra* at 342.

¹⁴ Note (1902) 92 Am. St. Rep. 89, 100, which gives an excellent collection of cases on this and allied subjects.

said that one remedy is *private* and the other *public*;¹⁵ that one is civil and the other criminal;¹⁶ that "each proceeds upon a different hypothesis—the one contemplates the observance of the peace and good order of the city—the other has a more enlarged object in view, the maintenance of the peace and dignity of the state."¹⁷ Others have felt controlled by their assumption that the state prosecution was conducted under the judiciary power, while that of the city was held under the police power;¹⁸ although why this should make any difference it is hard to understand. Still other courts have based their rulings upon the doctrine that the guarantee against successive prosecutions only applies to a second jeopardy of life and limb,¹⁹ or a second imprisonment,²⁰ while the Louisiana court has conceded that in its opinion "there is more safety to the community in two conservators of the peace than in one"²¹—a frank assertion that this guarantee is out of place in the modern world.²² A few, while openly despairing of the soundness of any of the many premises advanced, have simply chosen to drift with the tide.²³

There has been a marked tendency in the direction of resting this rule upon analogy to the similar rule sustaining successive state and federal prosecutions.²⁴ Thus it is commonly said that since "in such

¹⁵ See *Blatchley v. Moser*, *supra* note 13, which later cases accept as sustaining coordinate state and local laws.

¹⁶ *State v. Muir* (1901) 164 Mo. 610, 65 S. W. 285, reversing the earlier Missouri cases cited *supra* note 12.

¹⁷ *Mayor v. Allaire* (1884) Ala. 400, 403, paraphrased in *City of Anderson v. O'Donnell* (1888) 29 S. C. 355, 369, 7 S. E. 523, 529; *State v. Mills* (1929) 108 W. Va. 31, 150 S. E. 142, and in 3 *McQUILLIN*, *op. cit. supra* note 2, §934.

¹⁸ *State v. Clifford* (1893) 45 La. 980, 981, 13 So. 281, 282.

¹⁹ *Commonwealth v. Gilbert* (1831) 29 Ky. 184, 187-188.

²⁰ *Moundsville v. Fountain* (1885) 27 W. Va. 182, 192-193, 202; *Jones v. State* (1854) 15 Ark. 261.

²¹ *State v. Clifford*, *supra* note 18; *Benning, J.*, dissenting in *Mayor v. Hussey* (1857) 21 Ga. 80, 94; *State v. Lee* (1882) 29 Minn. 445, 454, 13 N. W. 913, 916.

²² And see *Greenwood v. State* (1873) 65 Tenn. 567, 575: "He can readily avoid such inflictions by obedience to the laws of [both]. . . . If he chooses to defy constituted authority, courts . . . should feel but little sympathy with such offenders."

²³ "While I cannot help regarding these distinctions as refined, and more fictitious than real, and while the reasons given in the decisions in justification of what, after all, is practically double punishment for the same act, fail to satisfy me of the logical soundness of the doctrine, yet the great weight of authority . . . [sustains successive prosecutions] . . . and we must therefore yield assent to the doctrine." *Hughes v. People* (1885) 8 Colo. 536, 537-538, 9 Pac. 50, 51. And see *Wong v. Astoria* (1886) 13 Ore. 538, 543-544, 11 Pac. 295, 296.

²⁴ See, among many, *Van Buren v. Wells* (1890) 53 Ark. 368, 14 S. W. 38; *Chicago v. Union Ice Cream Co.* (1911) 252 Ill. 311, 315, 96 N. E. 872, 874; *State v. Kirk* (1873) 44 Ind. 401, 408; *State v. Sly* (1872) 4 Ore. 278; *State v. Moseley* (1922) 122 S. C. 62, 114 S. E. 866. And see the cases cited *infra* notes 25-27. Even the fact that *Grafton v. United States* (1907) 206 U. S. 333, held that the doctrine is not available where one government owes its legal existence and its powers to

case there are two political powers offended by one and the same fact," two legally distinct offenses have been committed.²⁵ The South Carolina court furnished a delightful variation of this rule when it held that the offense is double because there are two offenders: "One is an offense committed by a corporator and the other is as a citizen of the state."²⁶ A few courts, attempting to press the analogy still further, have ruled, "Each has its own laws and its own tribunals for the punishment of offenses against these laws, and neither tribunal can take cognizance of offenses against the laws of the other power, any more than a state court can punish offenses against the laws of the United States and *vice versa*."²⁷ But the Oregon court, when faced with such a statement a year later, conceded that it had not been in a serious frame of mind when it wrote it, and sustained successive prosecutions before the same judge of the same court, the second having been brought while the first was still pending on an appeal from a conviction.²⁸

It would seem evident that we have been slowly and surely entangling ourselves in a quagmire of sophistic reasoning. But parents' eyes are partial, even of their brain children; and so we should expect no early re-examination of the basic concepts upon which we have erected our doctrines of civil crimes, coördinate laws, and successive prosecutions. But the California lawyer who attempts to act upon the basis either of these doctrines themselves or of the supposed principles upon which they rest goes far astray. Not one of the rules which are commonly said to be "definitely established" is applicable here. Nor is there another state of the Union in which the same rules are in force. Our flag may carry a grizzly bear, but at times we are the Lone Eagle State.

the other, has had no appreciable influence on the municipal cases. See *State v. Rhodes* (1922) 146 Tenn. 398, 409-410, 242 S. W. 642, 643. And compare *Moundsville v. Fountain* (1885) 27 W. Va. 182, 198-199 with *State v. Mills*, *supra* note 17.

²⁵ *Fortner v. Duncan* (1891) 91 Ky. 171, 175, 15 S. W. 55, 55-56. In *McInerney v. Denver* (1892) 17 Colo. 302, 307, 29 Pac. 516, and *State v. Lee* (1882) 29 Minn. 445, 451, 13 N. W. 913, 914, the court preferred to speak of "separate jurisdictions," while the Florida court preferred the more sedate "separate and distinct bodies politic." *Theisen v. McDavid* (1894) 34 Fla. 440, 444, 16 So. 321, 322.

²⁶ *State v. Sanders* (1903) 68 S. C. 192, 195, 47 S. E. 55, 56, which sustained successive prosecutions. This ruling was obviously patterned after *Moore v. Illinois* (1852) 14 How. (55 U. S.) 13, 20, in which a *dictum* favoring successive state and federal prosecutions was built upon the statement that "every citizen of the United States is also a citizen of a State or Territory." Neither opinion intimated what was to be done where the defendant is alien to one or both governments.

²⁷ *State v. Charles* (1871) 16 Minn. 474, 478; *Miller v. Hansen* (1928) 126 Ore. 297, 300-301, 269 Pac. 864, 865.

²⁸ *Claypool v. McCauley* (1929) 131 Ore. 371, 283 Pac. 751. And see *State v. Oleson* (1880) 26 Minn. 507, 510.

I.

CONSTITUTIONAL AND STATUTORY BACKGROUND
CONSTITUTION OF 1849

Since 1879 counties, cities, towns, and townships have received the greater part of their legislative powers by direct grant in the fundamental law. Under the Constitution of 1849, however, "the local authorities possessed only such powers as were expressly, or by necessary implication, conferred upon them by their charters" or other statutes.²⁹

Although counties and townships seem to have played a very minor legislative role under the original constitution, the legislature, from its very first session, was extremely liberal in granting such authority to cities and towns.³⁰ Although the latter were restricted to imposing penalties for the violation of their ordinances not exceeding a fine of \$100,³¹ all cities incorporated at the first session, except Benicia, were authorized to provide penalties up to \$500 fine and 10 days' imprisonment.³² The following year Benicia³³ and Sacramento³⁴ were empowered to provide penalties of \$500 and 60 days, while Monterey³⁵ was restricted to \$100 and 30 days. Five years later San Francisco³⁶ was given authority to provide for penalties not exceeding \$1,000 and 6 months, and the following year Marysville³⁷ was expressly authorized to sentence those violating its ordinances to labor in the city "chain gang." The California city had become of age.

In keeping with the accepted doctrine of the times the constitution, in providing for the appellate jurisdiction of the supreme court, classified cases involving "the legality of any . . . municipal fine" with civil cases at law rather than with criminal actions.³⁸ The legislature commonly followed the same classification in providing for the jurisdiction of trial courts, even though the sentence might include both fine and

²⁹ *Ex parte* Campbell (1887) 74 Cal. 20, 23, 15 Pac. 318, 319.

³⁰ An Act to Provide for the Incorporation of Cities, Cal. Stats. 1850, p. 87, §11; an Act to Provide for the Incorporation of Towns, Cal. Stats. 1850, p. 128, §6.

³¹ Cal. Stats. 1850, p. 128.

³² *Ibid.* p. 70, §5; p. 96, §1; p. 121, §5; p. 124, §5; p. 131, §5; p. 150; p. 155; p. 172; p. 223, art. III, §1. Those incorporated by application to the county court were governed by *ibid.* p. 87, §11, which authorized the same penalties. Benicia was limited to \$500 and 5 days. *Ibid.*, p. 119, §3.

³³ Cal. Stats. 1851, p. 348, art. III, §6 (26). If the prisoner was required to labor the period of imprisonment was halved.

³⁴ *Ibid.*, p. 391, §7.

³⁵ *Ibid.*, p. 369, art. III, §6 (20).

³⁶ Cal. Stats. 1856, p. 145, §74 (11).

³⁷ Cal. Stats. 1857, p. 40, art. III, §7 (14). The period might not exceed 3 months.

³⁸ CAL. CONST. (1849) art. VI, §4.

imprisonment.³⁹ Its provision that fines for the violation of town ordinances should be "recovered before any justice of the peace by suit in the name of the inhabitants of the town"⁴⁰ would seem to contemplate a civil action, although one defaulting in the payment of his fine might be imprisoned up to 50 or 100 days.⁴¹ This conclusion is substantiated by the fact that it felt called upon to specify that "persons living in the town shall be competent jurors and witnesses" in such suits.⁴² Identical language was used in the San Diego Charter of 1876,⁴³ and when the statutes were codified four years earlier actions brought in police courts by complaint "for violation of an ordinance" were classified as "civil actions" and placed in the Code of Civil Procedure.⁴⁴

But the legislature did not feel restricted to treating municipal ordinance cases as civil actions. As early as 1861, in the San Francisco charter of that date, it provided that "every violation of any lawful ordinance . . . is hereby declared a misdemeanor, or public offense,"⁴⁵ and similar provisions were inserted in many later charters.⁴⁶ Wherever this was done the charter likewise directed that such prosecutions should be conducted in the name of the people of the state.

CONSTITUTION OF 1879

Constitutional powers of municipal corporations. Article XI, section 11 of the new constitution provided, "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." This marks the passing, in California, of the standard American rule that such units "are but the agents of the state, without power to do a single act beyond the boundaries set by the . . . legislature,"⁴⁷ and the substitution of a constitutional status closely approximating that of the state in a federal system. The authority conferred by this clause has been uniformly construed to be "as broad as that of the legislature

³⁹ See Art. V, §§ 2, 3 of the Nevada, Benecia and Monterey charters, Cal. Stats. 1851, pp. 339, 348 and 367.

⁴⁰ Cal. Stats. 1850, p. 129.

⁴¹ Cal. Stats. 1851, p. 282, §626; Cal. Stats. 1857, p. 151, §2; CAL. PEN. CODE §1446.

⁴² *Supra* note 40.

⁴³ Cal. Stats. 1875-76, p. 806, §12.

⁴⁴ §§ 929-933 (§§ 121-121e, since 1933) which have remained virtually unchanged to the present day.

⁴⁵ Cal. Stats. 1861, p. 544, §74 (11).

⁴⁶ See, among many, those of Stockton, Cal. Stats. 1871-72, p. 595, §61; San Jose, Cal. Stats. 1873-74, p. 395, §7; Los Angeles, Cal. Stats. 1877-78, p. 642, art. XII, §23. And see the Municipal Incorporation Act, Cal. Stats. 1883, p. 93 §§ 64 (9), 319, 622, 769, and 867.

⁴⁷ *Ryan v. City of New York* (1904) 177 N. Y. 271, 274, 69 N. E. 599, 600.

itself" in these fields and to be subject solely to the limitations specifically set forth,⁴⁸ i.e. that its exercise must be confined to the territorial limits of the corporate unit⁴⁹ and that in case of conflict the state law shall prevail. It has been aptly described as "itself a charter for each [municipal corporation] in the state,"⁵⁰ providing the irreducible minimum of their jurisdiction.⁵¹

The constitutional position of cities and towns having freeholders' charters was still further enhanced in 1896, when they were granted control over "municipal affairs" and their authority in this field made superior to that of the state government.⁵² Although no such authority was granted to counties or townships, the tremendous expansion which has taken place in the recognized scope of the police power⁵³ has carried with it a corresponding increase in the legislative competency of all local governments under the original grant of 1879.

As the authority thus directly granted in the constitution is to "make and enforce" ordinances in these fields, it includes "power . . . to prescribe punishment for disobedience of [such regulations] by fine . . . or

⁴⁸ *Odd Fellows' Cemetery Ass'n v. San Francisco* (1903) 140 Cal. 226, 231, 73 Pac. 987, 988; *Denton v. Vann* (1908) 8 Cal. App. 677, 679-680, 97 Pac. 675, 675-676; *Boyd v. City of Sierra Madre* (1919) 41 Cal. App. 520, 523, 183 Pac. 230, 232; *In re Isch* (1917) 174 Cal. 180, 181, 162 Pac. 1026.

⁴⁹ It would seem that county authority only extends to those portions of the county not embraced in any city or town. *Ex parte Roach* (1894) 104 Cal. 272, 277, 37 Pac. 1044, 1046; *Ex parte Pfirrmann* (1901) 134 Cal. 143, 66 Pac. 205; *In re Knight*, (1921) 55 Cal. App. 511, 203 Pac. 777. *Cf. People v. Velarde* (1920) 45 Cal. App. 520, 526, 188 Pac. 59, 62, intimating that the right of the county to forbid acts neither expressly permitted nor prohibited by city ordinance may still be an open question.

⁵⁰ *Ex parte Campbell* (1887) 74 Cal. 20, 26, 15 Pac. 318, 321. Of course the fact that a given city or county has a freeholders' charter is of no significance. *Ex parte Tuttle* (1891) 91 Cal. 589, 590, 27 Pac. 933, 934; *Ex parte Lacey* (1895) 108 Cal. 326, 41 Pac. 411; *In re Montgomery* (1912) 163 Cal. 457, 460, 125 Pac. 1070, 1071; *In re Isch*, *supra* note 48; *Dwyer v. City Council* (1927) 200 Cal. 505, 511-512, 253 Pac. 932, 934-935; *In re Newell* (1906) 2 Cal. App. 767, 84 Pac. 226.

⁵¹ "The legislature has no authority to limit the exercise of the power thus directly conferred . . . by the organic law." *In re Ackerman* (1907) 6 Cal. App. 5, 10, 91 Pac. 429, 431. *Accord: Ex parte Daniels* (1920) 183 Cal. 636, 641, 192 Pac. 442, 445; *In re Iverson* (1926) 199 Cal. 582, 586, 250 Pac. 681, 682. And compare *Switzer v. Santa Fe Ry.* (1930) 104 Cal. App. 138, 156-157, 285 Pac. 918, 926 with *Oregon-Washington R. R. Co. v. Washington* (1926) 270 U. S. 87 and *Napier v. Atlantic Coast Line R. R. Co.* (1926) 272 U. S. 605.

⁵² Art. XI, §6, as amended in 1896 and again in 1914; art. XI, §8, as amended in 1914. See the cases cited in *Pasadena v. Charleville* (1932) 215 Cal. 384, 10 P. (2d) 745. The provision does not promise to be of particular importance in the field of criminal law, *Helmer v. Superior Court* (1920) 48 Cal. App. 140, 191 Pac. 1001, although it has been held to include power to determine who shall prosecute municipal ordinance offenses. *Fleming v. Hance* (1908) 153 Cal. 162, 94 Pac. 620.

⁵³ Contrast the present situation with the narrow views advanced in *In re Sic* (1887) 73 Cal. 142, 145, 14 Pac. 405, 406, 407.

imprisonment.”⁵⁴ Even penalties so severe as to render such acts indictable offenses and hence within the exclusive jurisdiction of the superior court have been sustained.⁵⁵ Indeed, it is an open question if there are any limits to this power other than the general ones in the bill of rights prohibiting excessive fines and cruel or unusual punishments.⁵⁶

Statutory powers. Under the new constitution, statutory provisions as to powers and penalties continued much as before. By the Municipal Corporation Act of 1883⁵⁷ violations of the ordinances of first⁵⁸ and fourth⁵⁹ class cities were declared to be misdemeanors, and the council was authorized to impose severe penalties of both fine and imprisonment. Third,⁶⁰ fifth,⁶¹ and sixth⁶² class cities (the last including all “towns”) were given a choice, the statute providing in each case: “The violation of any ordinance of such city shall be deemed a misdemeanor, and may be prosecuted by the authorities of such city in the name of the people of the state of California, or may be redressed by civil action, at the option of such authorities.” Maximum sentences were set at \$500 fine and 6 months’ imprisonment for cities of the third⁶³ class, and \$300 and 3 months for both of the others.⁶⁴ Second⁶⁵ class cities, for some strange reason, were restricted to fines not exceeding \$100, although one defaulting in the payment of such fine might be imprisoned not to exceed 50 days.

This statute is still in force in substantially its original form and is the basic law for sixth class cities and towns (those having a popula-

⁵⁴ *In re Guerrero* (1886) 69 Cal. 88, 96, 10 Pac. 261, 266.

⁵⁵ *People v. Fages* (1916) 32 Cal. App. 37, 162 Pac. 137; *In re Isch* (1917) 174 Cal. 180, 162 Pac. 1026; *People v. Velarde*, *supra* note 49; *In re Knight* (1921) 55 Cal. App. 511, 203 Pac. 777; *People v. Ellena* (1922) 56 Cal. App. 428, 205 Pac. 701, and *People v. Tomasovich* (1922) 56 Cal. App. 520, 206 Pac. 119 sustained ordinances of Butte, Riverside, San Bernardino and Sutter counties providing maximum penalties of \$600 fine and 7 months’ imprisonment. None of the four had statutory authorization to impose such a penalty.

⁵⁶ CAL. CONST. art. I, §6. A combination of the rules that the power “is as broad as that of the legislature itself” and that “the legislature has no authority to limit” it, *supra* notes 48 and 51, would indicate that these are the only limits. It is interesting to note that counties, never having been authorized by statute to create crimes, have frequently imposed more severe penalties under this clause than cities, which have abided by their charter provisions.

⁵⁷ Cal. Stats. 1883, p. 93; CAL. GEN. LAWS, act 5233.

⁵⁸ *Ibid.* §64 (9), authorizing penalties up to \$1,000 and 6 months.

⁵⁹ *Ibid.* §622, authorizing penalties up to \$500 and 3 months.

⁶⁰ *Ibid.* §529.

⁶¹ *Ibid.* §769.

⁶² *Ibid.* §867.

⁶³ *Ibid.* §524 (17).

⁶⁴ *Ibid.* §§ 764 (16), 862 (14).

⁶⁵ *Ibid.* §319.

tion of 3,000 or less) and for the smaller fifth class cities. The extension in 1892 of the home rule provisions of article XI, section 8 to cities having a population of not less than 3,500 has deprived it of all practical importance as to the other classes.⁶⁶ However, the freeholders' charters framed under this section and approved by the legislature have followed the precedents established in this and earlier acts.

Summary and comment. Municipal corporations derive the greater portion of their legislative power, including authority to impose penalties for the violation of their ordinances, by direct grant in the constitution. The legislature assumed that when only a money penalty is involved a proceeding to enforce it may be classed as a civil action, a view which finds support in the fact that the constitution groups cases involving "the legality of any municipal fine" with "cases at law." It also concluded that it could authorize municipal corporations to institute criminal actions, and this decision has been supplemented by the ruling of the supreme court that the constitution itself vests such authority in them. But neither the constitution nor the statutes gave the slightest key as to the validity of coördinate state and local laws. The legislative declaration that municipal ordinances must not be "inconsistent with"⁶⁷ or "repugnant to"⁶⁸ the laws of the state is no more definite than the constitutional mandate that they be "not in conflict with general laws," leaving it to the courts to decide if proof of identity establishes harmony or conflict.

Nor was there any key to aid in answering the second question which would immediately arise if the courts sustained coördinate laws: Can an offender be prosecuted under *either*, or under *both*? To be sure, the Penal Code provided: "Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of another state, government, or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense."⁶⁹ It would seem that a government so careful to guard against successive prosecutions arising from a foreign trial would scarcely intend to validate successive domestic prosecutions. Indeed, the clause would seem to expressly forbid sustaining successive

⁶⁶ Deering's note to this statute lists 145 sixth class and 3 third class cities organized under it. The list contains several inaccuracies, however, and there have been a number of changes following the census of 1930. I have not thought it worth while to attempt to bring it down to date.

⁶⁷ Cal. Stats. 1850, p. 128, §6.

⁶⁸ Cal. Stats. 1850, p. 87, §11. The same phrase was used in most early special charters. Since 1879 the tendency has been to follow the phraseology of CAL. CONST., art. XI, §11.

⁶⁹ CAL. PEN. CODE (1872) §656, which is still in force in its original form. A slightly narrower provision in Cal. Stats. 1851, p. 222, §94, survives as §793 of the same code.

prosecutions by analogy to the federal rule: for if a municipal corporation is "another government," it is within the scope of this statute; if it is not, it is difficult to see how the state-federal rule is in the least analogous. But if precedents prove anything, they show that it is dangerous to draw any conclusions from such a clause. Identical or essentially similar provisions occur in the laws of several other states,⁷⁰ but there does not seem to be a single reported case accepting such an act as an impediment to dual prosecutions.⁷¹

It would seem that the courts were left virtually with a *carte blanche*. They could accept, or reject, coördinate legislation. They could class municipal prosecutions as civil cases, and on the basis of this rule sustain an evasion of the guaranties thrown about those accused of crime, including the guaranties against a second prosecution for the same offense; or they could call them quasi-criminal, and thus postpone the day of reckoning through this more flexible doctrine. Although the constitution would seem to place difficulties in the way, they might go so far as to call them criminal. Even such a rule might not forbid successive prosecutions, for the doctrine that a single act gives rise to "dual offenses" would be readily available. Indeed, if there is a state in the Union in which the analogy to the *Lanza* rule is at all sound, California would seem to be that state. Section 656 of the Penal Code might prove an obstacle to such a holding, and of course the argument that "each has its own courts" for the enforcement of its own laws could not be used, since in California municipal and state cases have always been tried in the same courts.⁷² But the first is not insurmountable, and the second is not even a correct statement of the statutory,⁷³ let alone the constitutional,⁷⁴ relationships between our national and state governments.

⁷⁰ IDAHO REV. STAT. (1887) §7494; MONT. REV. CODES (Choate, 1921) §11583; NEV. REV. LAWS (1912) §6919; NEW YORK, COOK'S CRIMINAL AND PENAL CODES (1908) p. 66, §139; N. D. CODE CRIM. PROC. (1887) §82; S. D. COMP. LAWS (1929) §4516; UTAH COMP. LAWS (1917) §8522. And see ARIZ. REV. STAT. (1913) p. 151, §728; MINN. GEN. STAT. (1923) §9926; MISS. CODE CRIM. PROC. (1906) §1409; VA. CODE (1930) §4775.

⁷¹ *In re Henry* (1909) 15 Idaho 755, 99 Pac. 1054 and *State v. Cavett* (1927) 171 Minn. 505, 214 N.W. 479, sustained successive prosecutions while such statutes were in force. The digests are replete with cases in which the court expressed a willingness to do so.

⁷² See the statutes cited *supra* notes 30 and 57, and the charters of particular cities or towns; CAL. POL. CODE §§4426, 4427; CAL. PEN. CODE §1462. In the case of county ordinances, jurisdiction is dependent upon the maximum possible penalty. *In re Isch* (1917) 174 Cal. 180, 185, 162 Pac. 1026, 1028.

⁷³ 28 U. S. C. A. (1926) §§ 74, 75.

⁷⁴ See *Houston v. Moore* (1820) 5 Wheat. (18 U. S.) 1; *Tennessee v. Davis* (1879) 100 U. S. 257; *Maryland v. Soper* (1926) 270 U. S. 9; *Smith v. United States* (1932) 58 F. (2d) 735, *cert. den.* (1932) 287 U. S. 631; Warren, *Federal Criminal Laws and State Courts* (1925) 38 HARV. L. REV. 545. In Canada, and most other federal systems, there is only one set of courts.

The courts, and particularly the supreme court, did not hesitate in accepting this challenge for constructive legislation. And although we will note several conflicts and a few reversals, they have been surprisingly consistent, while at the same time remarkably independent, in their rulings.

II.

JUDICIAL DECISIONS

NATURE OF THE OFFENSE AND OF PROCEEDINGS FOR ENFORCEMENT

Questions as to the validity of penal ordinances and of provisions for their enforcement gave rise to surprisingly little litigation in the earlier years of statehood. It was not until 1887⁷⁵ that the first opinion was handed down by the supreme court on the right of a local government to punish acts likewise criminal under the laws of the state, although the question had been argued five years earlier.⁷⁶ The right to prosecute municipal ordinance cases in civil actions brought by the corporation in its own name seems to have passed unchallenged. At least a diligent search has failed to uncover a single case prior to 1880⁷⁷ in which this right was even called into question, and the World War was upon us before it faced the acid test of an express ruling.⁷⁸ Indeed, the first constitution had come and gone before the supreme court rendered its first opinion⁷⁹ on any of the numerous questions as to the legal status of such ordinances, and it was not until 1886⁸⁰ that it handed down its first opinion on a constitutional issue. In the meantime, however, certain *dicta* in the earlier cases had laid the groundwork upon which these later decisions were to build.

The first case of importance arose under the provision that the supreme court "shall have appellate jurisdiction in all cases in equity; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest or the value of the property in controversy, amounts to \$300; also, in all cases arising in the Probate Courts, and also in all criminal cases amounting to felony on questions of law alone."⁸¹ One Johnson, who had been fined \$100 for violation of a state law restricting the collection of tolls, insisted that the supreme court pass upon the validity of this fine either as a case involving "the legality of a toll" or of a "municipal fine."

⁷⁵ *In re Sic* (1887) 73 Cal. 142, 14 Pac. 405.

⁷⁶ *City of Santa Barbara v. Sherman* (1882) 61 Cal. 57. See *infra* note 111.

⁷⁷ *City of Santa Cruz v. Santa Cruz Ry. Co.* (1880) 56 Cal. 143.

⁷⁸ *Ex parte Clark* (1914) 24 Cal. App. 389, 141 Pac. 831.

⁷⁹ *City of Santa Barbara v. Sherman*, *supra* note 76.

⁸⁰ *In re Guerrero* (1896) 69 Cal. 88, 10 Pac. 261.

⁸¹ CAL. CONST. (1849) art. VI, §4.

The court brushed aside the somewhat absurd contention that *municipal* was used in its international law sense and hence embraced all domestic fines with the obvious response that it referred only to "local laws of particular places, such as towns or cities."⁸² Turning to the other alleged basis of jurisdiction, it stated, "The power conferred in the foregoing language relates to four separate branches of the general subject, which are separately and specifically enumerated: 1. Cases in equity. 2. All cases at law of a certain character. 3. All cases arising in the probate courts. 4. All criminal cases of a certain grade. In view of this clear and precise division of the subject-matter, aside from the ordinary import of the words 'cases at law,' it is clear that these words only refer to civil as distinguished from criminal cases."⁸³ Hence it held that the legality of a toll (and by necessary implication, of a tax, impost, assessment, or *municipal fine*) could only be passed upon in a civil case, the phrase merely specifying that such actions need not involve \$300.

This clear indication that the court considered that at least *some* municipal prosecutions are civil proceedings was strengthened by the unanimous opinion of Chief Justice Wallace in *Pillsbury v. Brown*.⁸⁴ The district attorney of San Joaquin County, being directed by law to handle all public offenses, assumed that it was his duty to prosecute violations of ordinances of the City of Stockton now that these were denominated misdemeanors. But when he sued to recover his fees the supreme court ruled against him, bolstering its conclusion that the statutes involved only contemplated misdemeanors committed in violation of a provision of the Penal Code or other state law with the assertion: "While there can be no doubt of the authority of the Legislature to provide that penalties for the breaches of city ordinances may be enforced [sic] by proceedings against offenders in the name of the People of the State, a serious question might arise as to its authority to enact, that the breach of any ordinance of the City Council thereafter to have passed should constitute a misdemeanor, since this would, in effect, be to delegate to the City Council the power to enact laws, in the strict sense."⁸⁵

Taken together, these two opinions would seem to indicate that at least some municipal prosecutions are strictly civil and none can be truly criminal. But ratification of the new constitution was closely followed by a *dictum* in *City of Santa Cruz v. Santa Cruz Railway*

⁸² *People v. Johnson* (1866) 30 Cal. 98, 102.

⁸³ *Ibid.* at 104-105.

⁸⁴ (1874) 47 Cal. 477.

⁸⁵ *Ibid.* at 480.

*Company*⁸⁶ to the effect that actions "brought to recover 'a fine, forfeiture, or penalty' imposed by an ordinance of the city" constitute "a class of actions which *perhaps* may be maintained in the Police Courts as 'civil actions,' where a certain and specific sum is imposed as a fine or penalty. . . . If such an action may be maintained . . . it must rest upon the theory that each corporator has agreed to pay the specific sum, fixed by way of penalty, in case he shall not comply with the ordinance." This would seem to indicate that the court was of opinion that a civil action would not lie unless the common law tests of *debt* were met, and the use made of italics shows that it entertained serious doubts even then. But it dropped the matter without going further because the case had been brought in a court having no jurisdiction over such actions.

The court was giving every impression of drifting in the direction of the rule that a municipal prosecution is neither civil nor criminal, but is an amorphous proceeding more properly spoken of as a *quasi*-criminal civil action. The probability of some such solution appeared the more probable in view of the fact that in the *Pillsbury* case it had not been the severity of the penalty as measured by the size of the fine or the duration of the imprisonment to which the court had objected, but solely its characterization as a *misdemeanor*; and it had intimated that possibly even this might be done, provided that it was clearly recognized that the term was applied loosely and solely for purposes of convenience, and without altering the true legal nature of the act by elevating it to the category of a *public* offense.⁸⁷ But when the City of Santa Barbara, in a vain effort to sustain its right to prosecute such an action in its own name, argued that "This is not a criminal prosecution for a public offense. If not clearly a civil action, it is at most *quasi*-criminal,"⁸⁸ the court replied: "This action is in no sense a civil action. The complaint demands that defendants be adjudged guilty of violating ordinance No. 62, and that they be punished by fine and imprisonment. If it be an action, it is criminal, and should have been prosecuted in the name of The People. (Section 684, Penal Code.)"⁸⁹

This statement has an advantage over the previous ones in that it is not a *dictum*, but an express holding. But it presents two difficulties. First, the ruling was based exclusively upon the Penal Code, without the slightest reference to the constitutional provision⁹⁰ on this subject. In *Pillsbury v. Brown* the court had stated that "there can be no doubt

⁸⁶ *Supra* note 77, at 148.

⁸⁷ *McNeady v. Hyde* (1874) 47 Cal. 481.

⁸⁸ *City of Santa Barbara v. Sherman* (1882) 61 Cal. 57.

⁸⁹ *Ibid.* at 58.

⁹⁰ Art. VI, §20.

of the authority of the Legislature to provide that penalties for the breaches of city ordinances may be enforced [sic] by proceedings against offenders in the name of the People of the State,"⁹¹ and this ruling amounted to little more than a statement that the legislature has directed that, where the possible penalties embrace both fine and imprisonment, they *must* be brought in their name. Second, the decision added still further to the logical web in which the court was rapidly entangling itself. The holding was predicated upon the theory that the action was a criminal one. Yet the sole source of jurisdiction to render any decision was the provision that an appeal lies in "cases at law which involve . . . the legality of any . . . municipal fine"—a clause which it had previously held⁹² applies exclusively to civil proceedings!

The decisive turning point in the law occurred in 1886, when one Guerrero sought freedom on a writ of *habeas corpus* because the ordinance under which he had been convicted declared that any violation of its provisions "shall be deemed a misdemeanor and punishable as such." Pointing out that the city had been specifically empowered to impose such penalties, the court stated: "It is the charter, passed by the legislature in the form of a law, and which has all the authority of a statute law, that declares that a violation of such ordinances shall be a misdemeanor."⁹³ Although this scarcely constituted a direct refutation of the premise, advanced twelve years earlier, that such a delegation of power would be unconstitutional, the conclusion of validity has been sustained in every case in which it has been raised, and has been expanded to the rule that "whatever the legislature may punish as a misdemeanor it may authorize a municipal corporation to punish as a misdemeanor."⁹⁴

Having thus sustained the power as one specifically and legally delegated by statute, the court continued, "Besides, . . . the constitution . . . empowered the municipality to make and enforce, within its limits, all such local, sanitary, and other laws as are not in conflict with general laws. The power thus delegated by the constitution itself . . . included a power to prescribe punishment for disobedience of laws by fine, penalty, or imprisonment. Denominating the act of disobedience a misdemeanor and making it punishable as such is within the power granted."⁹⁵ This settled that a power which the court had doubted if

⁹¹ *Supra* note 85.

⁹² *People v. Johnson*, *supra* note 82.

⁹³ *In re Guerrero*, *supra* note 80, at 96, quoting *State v. Tryon* (1872) 39 Conn. 183, 185.

⁹⁴ *Denninger v. Recorder's Court of City of Pomona* (1904) 145 Cal. 629, 637, 79 Pac. 360, 363.

⁹⁵ *In re Guerrero*, *supra* note 80, at 96.

even the legislature could confer is now possessed by municipal corporations even in the absence of statutory authorization.

This opinion was the first of a series of decisions which has definitely established that the purpose of penal ordinances is "the prevention of crime and the preservation of the public peace,"⁹⁶ and that proceedings for their enforcement are true criminal actions in every sense of the term. Hence defendants in such cases are entitled to all of the rights and privileges, constitutional as well as statutory, and are subject to all of the provisions, normally applying to persons accused of crime.⁹⁷

These decisions reached their logical fruition in 1914 in two opinions which deserve more than passing notice. The first⁹⁸ involved an ordinance of the City of Sanger providing that one guilty of an illegal sale of intoxicating liquor should be subject to a specific penalty of \$40, to be recovered in a civil action brought in the name of the city and enforced by execution.⁹⁹ Although such a procedure had been the only one open to towns under the original constitution,¹⁰⁰ and although it had been carried over as optional for all third, fifth, and sixth class cities under the act of 1883,¹⁰¹ the court of appeals, first district, held it unconstitutional in what is perhaps the classic statement of the California doctrine of the nature of municipal prosecutions.

Pointing out that the state constitution provides that "The style of all processes shall be 'The People of the State of California,' and all prosecutions shall be conducted in their name and by their authority,"¹⁰² the court said: "The supreme court has applied this provision . . . indifferently to cases, whether they arose under city ordinances or state statutes,¹⁰³ where the evident purpose and ultimate effect of the proceedings was to punish the defendant for an unlawful act; that

⁹⁶ *Ex parte Cheney* (1891) 90 Cal. 617, 621, 27 Pac. 436, 437.

⁹⁷ See *Taylor v. Reynolds* (1891) 92 Cal. 573, 28 Pac. 688; *Ex parte Wong You Ting* (1895) 106 Cal. 296, 297, 39 Pac. 627; *In re Wong Hane* (1895) 108 Cal. 680, 682, 41 Pac. 693, 694; *Miles v. Justice's Court of Pasadena* (1910) 13 Cal. App. 454, 110 Pac. 349, and the cases cited *infra* notes 98, 105 and 107.

⁹⁸ *Ex parte Clark* (1914) 24 Cal. App. 389, 141 Pac. 831.

⁹⁹ *Ex parte Clark*, *supra* note 78. The action was brought under CAL. CODE CIV. PROC. §§ 929-933, and the judgment was to be enforced under §684. But the trial court, assuming that CAL. PEN. CODE §1446, was applicable, had sentenced the petitioner to 40 days imprisonment on each of the six sales unless the fines were paid. Doubtless this error strengthened his contention that the action was criminal.

¹⁰⁰ See *supra* note 31.

¹⁰¹ See *supra* notes 60, 61, and 62.

¹⁰² Art. VI, §20.

¹⁰³ Of the cases cited, only *City of Santa Barbara v. Sherman*, *supra* note 76, concerned a city ordinance; and the opinion in that case had not mentioned the constitutional provision.

this would seem to be the true test by which the validity of the proceeding must be determined, regardless of the form of circumlocutions of the statute or ordinance, there cannot be much serious question. . . . It is urged by the respondent that the offense for which the defendant has been prosecuted is not such a public offense as to entitle it to the application of this section of the constitution . . . because it comes within that class of minor infractions of ordinances which are denoted in the decisions of several states as '*quasi* criminal.' . . . No such intermediate grade between civil and criminal breaches of legal obligations is known to our law. . . . 'A criminal action is an action, suit or cause instituted to punish an infraction of the criminal laws, and, with this object in view, it matters not in what form the statute may clothe it. It is still a criminal case.' . . . We think the offense to be clearly public in its nature, and the proceeding as clearly criminal in its character."¹⁰⁴

Although the express holding in this case was restricted to the necessity of proceeding in the name of the people,¹⁰⁵ this ruling was predicated upon the broader thesis that the defendant was entitled to all of "those safeguards which the law has invoked for the protection of the liberty, property, or honor of persons accused of public offenses—the right of trial by jury in proper cases; the right to stand mute and not to be required to be a witness against oneself; the right to have the presumption of innocence prevail until overcome by proof of guilt beyond reasonable doubt and to a moral certainty as contrasted with the mere preponderance of evidence required in civil cases; . . ."¹⁰⁶ Consequently even though it may still be possible, by proper legislation, to preserve the outer form of a civil action, little or nothing is to be gained thereby.

The second case involved the validity of a fine of \$400 imposed upon the Pacific Gas and Electric Company for violation of a Sacramento ordinance. The Company sought an appeal to the supreme court, but the case was rejected, the court stating: "It is argued that the term 'municipal fine' as used in the constitutional provision . . . includes fines imposed for a violation of a city ordinance. It has long been settled that actions of this character are criminal and not civil actions. *City of Santa Barbara v. Sherman*, 61 Cal. 57 (1882). Practically the same question that is involved here was before this court in

¹⁰⁴ *Ex parte Clark*, *supra* note 78, at 393-395, 141 Pac. at 832, 833.

¹⁰⁵ In *Ex parte Nicholls* (1925) 74 Cal. App. 504, 505-506, 241 Pac. 399, 400, counsel for the defense attempted to reopen the question by arguing that where a corporation is organized under a freeholders' charter "any prosecution for a violation of its ordinances can be maintained only in the name of the municipality." The court replied that the charter, the statutes, and the constitution all require that it be in the name of the state.

¹⁰⁶ *Ex parte Clark*, *supra* note 78, at 393, 141 Pac. at 832.

1866 in *People v. Johnson*, 30 Cal. 99, and was then decided adversely to appellant's contention. . . . Taking up the question of jurisdiction upon the theory that it involved the legality of a 'toll,' the court, after quoting the constitutional provision then in force, which is in all substantial particulars identical with that now in force, said: . . . 'it is clear that those words refer only to civil as distinguished from criminal cases.'"¹⁰⁷

This opinion is a beautiful illustration of the strained logic to which it has been necessary to resort in order to "reconcile" the early precedents with present doctrine. The Santa Barbara case was on all fours with the instant one. Both ordinances provided that their violation should constitute a misdemeanor, punishable by fine and/or imprisonment. In each case, only a fine had actually been imposed. Yet in 1882 the court had entertained the appeal and had decided the case upon the merits! In *People v. Johnson* we have an even more interesting situation, for its conclusion that the clause only applies to civil cases is used to dismiss one of the premises from which that conclusion was drawn: that prosecutions to collect "municipal fines" are cases of that very stamp.

Although the soundness of the present rule may be doubted when tested from a strictly logical view¹⁰⁸ or from that of history, it has much to commend it as a working doctrine. Certainly it has saved the profession an amount of mental and nervous energy that would have been wasted in spinning fine distinctions between civil and criminal actions and their *quasi*-civil-criminal cousin. It has lent a degree of

¹⁰⁷ *People v. Pacific Gas & Elec. Co.* (1914) 168 Cal. 496, 498-499, 143 Pac. 727, 728-729.

¹⁰⁸ The provision that an appeal lies to the supreme court in "cases at law which involve the . . . legality of any . . . municipal fine" has been nullified by the dual rulings that it only applies to civil cases, while all such fines are criminal. Logic requires that one or the other rule be abandoned. The original responsibility for this strange situation lies with those who, in drafting the constitution, grouped ordinance cases with civil actions and chose language poorly fitted to cover the more important municipal prosecutions, which would involve imprisonment as well as fines.

Under the present rules, one desiring to attack the legality of a municipal fine must do so through attacking the validity of the ordinance itself in a collateral action, unless the possible penalty is such as to render a violation of the ordinance an indictable offense, in which case an appeal lies to the district court of appeal and thence (by consent) to the supreme court. CAL. CONST. art. VI, §4, as amended. *Habeas corpus, In re Mingo* (1923) 190 Cal. 769, 214 Pac. 850; *certiorari, Denninger v. Recorder's Court of City of Pomona* (1904) 145 Cal. 629, 79 Pac. 360; *prohibition, Olivieri v. Police Court of City of Bakersfield* (1923) 62 Cal. App. 91, 216 Pac. 44, and *proceedings to enjoin enforcement, Atlas Mixed Mortar Co. v. Burbank* (1927) 202 Cal. 660, 262 Pac. 334, have all served to accomplish this purpose. And see *Miles v. Justice's Court of Pasadena*, *supra* note 97, and *Mann v. Scott* (1919) 180 Cal. 550, 182 Pac. 281 for other possible methods of placing such questions before the higher courts.

respectability to municipal ordinances that a Latin prefix would have weakened. And above all, it has saved us from that affront to the human intellect, the dogma that one who has served his term under a municipal ordinance can be again tried for the same act—even by the same court and the same prosecutor—and resented to the same jail because he has never been *in jeopardy* for the wrong he has committed, but has only paid his civil (or *quasi*-civil) debts to an injured party. If we chose to follow the “dual offense” doctrine, we would have to take it straight—and even then we would be handicapped by the fact that “both” offenses would be prosecuted in the same name, that of the people of the state.¹⁰⁹

VALIDITY OF ORDINANCES DUPLICATING STATE LAWS

The authority of a municipal corporation to punish acts which are likewise embraced within the criminal laws of the state was challenged in 1882,¹¹⁰ when an appeal was taken from an order of the superior court denying, although on purely statutory grounds, the existence of such power.¹¹¹ As the supreme court disposed of that case on other grounds, the issue was not passed upon until five years later, when one Sic contested the validity of his conviction under an ordinance of the City of Stockton declaring it a misdemeanor “for two or more persons to assemble, be, or remain in any room or place for the purpose of smoking opium.” Penal Code, section 307, made similar provision for “every person who visits or resorts to any such place for the purpose of smoking opium,” *such place* being defined as one “where opium is sold or given away, to be smoked at such place.” While the court conceded that the ordinance “is broad enough in terms to prohibit opium-smoking under all circumstances, except when the person ‘keeps moving,’”¹¹²

¹⁰⁹ As most ordinance cases are conducted in the name of the municipality the validity of the “dual offense” theory when both are conducted in the name of the state has seldom arisen. But see *In re Henry* (1909) 15 Idaho 755, 99 Pac. 1054, sustaining successive prosecutions, and *People v. Bussell* (1886) 59 Mich. 104, 111, 26 N. W. 306, 310, expressing a willingness to do so. *Cf. People v. Hanrahan* (1889) 75 Mich. 611, 42 N. W. 1124. And see *State v. Robitshek* (1895) 60 Minn. 123, 124, 61 N. W. 1023 and the California cases cited *infra* notes 116 and 126.

¹¹⁰ *City of Santa Barbara v. Sherman*, *supra* note 88.

¹¹¹ The police court sustained a demurrer to a complaint charging the keeping of hogs in such a manner as to be offensive to the senses or prejudicial to the public health. The superior court upheld this order, saying: “The ordinance is concerning nuisances which is [sic] provided for by the general laws of the state. . . . A general grant of power to make by-laws does not confer authority upon the corporation to make an ordinance punishing an act which is made punishable as a criminal offence by laws of the state.” Transcript on Appeal, *City of Santa Barbara v. Sherman*, No. 8,240.

¹¹² *In re Sic* (1887) 73 Cal. 142, 145, 14 Pac. 405, 406-407.

it construed it to apply only to opium dens.¹¹³ Thus narrowed, the question became, Is an ordinance valid which "denounces as criminal precisely the same acts which are . . . prohibited by the code?"¹¹⁴ The court replied in the negative in an opinion which may be reduced to the following propositions:¹¹⁵

1. "If tried and convicted or acquitted under the ordinance, he could not be again tried for the same offense under the general law."
2. "An ordinance must be conflicting with the general law which may operate to prevent a prosecution of the offense under the general law."
3. But a municipal corporation being a subordinate unit of government, it follows that it "can only pass ordinances punishing the same acts which are punishable under general laws, when expressly authorized to do so."
4. "No authority to pass such laws will be presumed from grants of power general in character," from which it follows that no authority had been granted here.
5. Since the Constitution limits counties, cities, towns, and townships to the passage of "such local police, sanitary, and other regulations *as do not conflict with general laws*," it follows that no such authority *can* be granted.

A similar conclusion was reached in *Ex parte Christensen*¹¹⁶ three years later, but upon very different reasoning. A San Francisco ordinance required a city license for the retailing of intoxicants, and provided that an unlicensed sale should constitute a misdemeanor. Since the conduct of any business without a municipal license, where such license is required by ordinance, constitutes a crime under section 435 of the Penal Code,¹¹⁷ the penalty clause was held void, the court

¹¹³ *Ibid.* at 146, 14 Pac. at 407. It intimated that a broader construction would render the ordinance of very doubtful constitutionality, since "every man has the right to eat, drink, and smoke what he pleases in his own house." *Ibid.* at 145, 150, 14 Pac. at 406-408.

The court added the incidental remark, "Perhaps it would be enough to say that the offense charged in the complaint, of which respondent was convicted, may be, for aught that appears, the same as that prohibited in the code." *Ibid.* at 146, 14 Pac. at 406. This rule has not materialized, although it was applied in *Arfsten v. Superior Court* (1912) 20 Cal. App. 269, 128 Pac. 949. See *infra* note 146.

¹¹⁴ *In re Sic*, *supra* note 112, at 146, 14 Pac. 406.

¹¹⁵ *Ibid.* at 148, 14 Pac. at 408.

¹¹⁶ (1890) 85 Cal. 208, 24 Pac. 747.

¹¹⁷ *In re Lawrence* (1886) 69 Cal. 608, 11 Pac. 217, had already held that "The ordinance under which he was obliged to pay this tax was a 'law of this state' in the sense in which those words are used in §435 of the Penal Code." The later cases are collected in 16 CAL. JURIS (1924) 269.

explaining that "if both were valid, a man might be punished twice for the same offense."¹¹⁸

It was at this point that the bearing of certain liberal doctrines of California pleading, which were ultimately to revolutionize the rule of the *Sic* case, came to light. The complaint, filed in the name of the people of the state, alleged that the petitioner was doing business without a city license—the very offense covered by the code—and properly pleaded the ordinance¹¹⁹ requiring such license. Holding that specific reference to section 435 was unnecessary,¹²⁰ the court directed that the petitioner, who had sought to evade prosecution, should stand trial under the complaint as properly charging an offense under the Penal Code.

One could not well ask for a clearer or more sweeping rejection of the doctrine of coordinate laws than these two cases present, yet just a few months later the court came dangerously close to accepting that doctrine. Sections 370 and 372 of the Penal Code declared it a misdemeanor to obstruct a public street, including the sidewalks.¹²¹ The city, however, had power to "make a legal authorization of an obstruction,"¹²² and a San Jose ordinance of 1881 had authorized fruit stands, and the like, on the inner side of such walks. This privilege was abolished in 1890, so that a stand such as the defendant's once more became illegal under the state law. But in forbidding such stands, the city also provided a penalty for their maintenance; and Taylor was proceeded against under this ordinance, rather than under the state law, and convicted. In sustaining this conviction Judge Fox, three judges concurring, wrote: "We are of opinion that the City of San Jose 1) had authority, under its charter, to pass the ordinance, 2) that the same is not in conflict with the general law, and 3) that a conviction under either is a bar to a prosecution under the other."¹²³

¹¹⁸ *Supra* note 116, at 212, 24 Pac. at 748. The court purported to be interpreting the opinion in the *Sic* case.

¹¹⁹ Under the later cases, inferior courts must take judicial notice of ordinances. *Ex parte Davis* (1896) 115 Cal. 445, 47 Pac. 258; *Ex parte Hansen* (1910) 158 Cal. 494, 111 Pac. 528.

¹²⁰ A complaint need not follow the words of the statute, but need only set "forth the offense charged, with such particulars . . . as to enable the defendant to understand distinctly the character of the offense complained of." CAL. PEN. CODE §1426. Hence it is immaterial if it cites the wrong section of a statute, *In re Von Perhacs* (1923) 190 Cal. 364, 212 Pac. 689, the wrong statute; *Ex parte Rogers* (1911) 160 Cal. 764, 118 Pac. 242, or even if it does not cite any statute. *Ex parte Mansfield* (1895) 106 Cal. 400, 39 Pac. 775.

¹²¹ This construction had already been placed upon the code provisions in *Bonnet v. San Francisco* (1884) 65 Cal. 230, 3 Pac. 815, and *Marini v. Graham* (1885) 67 Cal. 130, 7 Pac. 442.

¹²² *Ibid.*

¹²³ *Ex parte Taylor* (1890) 87 Cal. 91, 95, 25 Pac. 258. I have numbered the phrases for convenience.

Of the three postulates laid down in this statement, the first is an unequivocal rejection of the third, fourth, and fifth of the propositions of the *Sic* case, while the second and third together constitute just as clear a dismissal of the second. Together they represent an abandonment of its ruling that "there is a conflict where the ordinance and the general law punish precisely the same acts" in favor of the standard American doctrine that proof of identity establishes an absence of conflict. But unlike the majority of our courts, they refused to predicate this conclusion upon the fiction of "dual offenses."

Had the majority rested its case upon this statement, it is evident that they would have completely remade the California law. It is by no means certain, however, that the process of change would have stopped here. In the short period of three and a half years¹²⁴ the court had passed successively from the rule that a municipal ordinance undertaking to punish an act which is criminal under the laws of the state is void, because an offender could not be proceeded against under both, to the rule that it is void because he could be proceeded against under both, and thence to the rule that it is valid, although he could only be prosecuted under one. Later cases might well have brushed aside the remark that "a conviction under either is a bar to a prosecution under the other" as an inconsiderate *dictum*, since the defendant was not being subjected to successive prosecutions, and fallen in line with the trend of the times in sustaining double punishment.¹²⁵ Indeed, the statement in the *Christensen* case that "if both were valid, a man might be punished twice"¹²⁶ would have made an excellent authority for such a ruling. California would then have joined with her sister states in declaring that the guarantee that "no person shall be twice put in jeopardy for the same offense" means, "unless both the city, or the county, and the state choose to punish it."

But the court did not stop here. "Even if this were not so," they

¹²⁴ The changing views reflected in these three opinions are not to be accounted for by changes in the personnel of the court. Of the six judges who decided *In re Sic*, *supra* note 112, three were still on the court which decided *Ex parte Christensen*, *supra* note 116. There were no changes in personnel between that case and *Ex parte Taylor*, *supra* note 123.

¹²⁵ For just such a line of development, starting with a decision on all fours with *In re Sic*, *supra* note 112, see *Schroder v. City of Charleston*, *supra* note 8; *Burton v. Williams* (1878) 11 S. C. 288; *City Council of Anderson v. O'Donnell* (1888) 29 S. C. 355, 7 S. E. 523; *City Council of Greenville v. Kemmis* (1900) 58 S. C. 427, 36 S. E. 727; *City Council of Abbeville v. Leopard* (1901) 61 S. C. 99, 39 S. E. 248; *State v. Saunders*, *supra* note 26.

¹²⁶ *Supra* note 118. The doctrine has tended to persist. "If both are valid, a man . . . has committed two offenses instead of one—one against the municipality and the other against the state." *Ex parte Daniels* (1920) 183 Cal. 636, 645-646, 192 Pac. 442. And see *Ex parte Hong Shen* (1893) 98 Cal. 681, 685, 33 Pac. 799, 801; *In re Knight* (1921) 55 Cal. App. 511, 517-518, 203 Pac. 777.

continued, "it is conceded that the acts charged constitute a violation of the statute in relation to the obstruction of streets. The complaint states facts which constitute a public offense under the statute, and alleges that they were done 'contrary to the form of the statute in such cases made and provided,'¹²⁷ and against the peace and dignity of the people of the state of California,' and the judgment is not in excess of that authorized by the statute. Both the offense and the penalty was [sic] within the jurisdiction of the justice's court."¹²⁸ Hence they sustained the sentence as one validly imposed following a lawful conviction under a state law. Mr. Justice Paterson,¹²⁹ who had dissented from the earlier reasoning, concurred in the conclusion, making the ruling unanimous.

This merely constituted carrying the doctrine laid down in the *Christensen* case one step further by applying it where the alleged invalidity of the ordinance was not discovered until after trial.¹³⁰ Of course in this form the rule was flatly contradictory to the disposition made of the *Sic* case, but the court held that since in that case "the question whether the judgment was valid notwithstanding the invalidity of the ordinance was not raised or considered"¹³¹ it was still an open one.

This second ground has survived to render the California law unique among all the states of the Union. But the doctrine of coördinate laws, although apparently followed, *sub silentio*, in a second San Jose case¹³² of the following year, was expressly rejected¹³³ four years later and from that day forward seems never to have been reasserted. After this brief respite the rule of *In re Sic* has returned to its own, with the result that

¹²⁷ See *infra* note 151.

¹²⁸ (1890) 87 Cal. 91, 95, 25 Pac. 258, 259.

¹²⁹ *Ibid.* at 95, 25 Pac. at 259.

¹³⁰ The opinion in that case seems to have taken this broader application for granted. "The case of *Sic* is not like that before us," the court wrote in reconciling the two. "There the law did not refer or relate to the ordinance, but each provision was complete in itself," where as in the instant case the statute punished a violation of the ordinance. *Ex parte Christensen*, *supra* note 116, at 212, 24 Pac. at 748. But this method of reconciliation was too narrow to sustain the broad rule laid down in the Taylor case.

¹³¹ (1890) 87 Cal. 91, 95, 25 Pac. 258, 259.

¹³² *Taylor v. Reynolds* (1891) 92 Cal. 573, 28 Pac. 688, which involved the same statutes and ordinances, holding that the defendant was entitled to a jury trial. Apparently the court felt that this trial was to be held under the ordinance. And see *In re Guerrero*, *supra* note 80, and *Ex parte Mirande* (1887) 73 Cal. 365, 14 Pac. 888, sustaining ordinances punishing the carrying on of certain activities without a municipal license. But the first was decided prior to *In re Lawrence*, *supra* note 117, which was the first case to hold such acts punishable under CAL. PEN. CODE §435, and there is no indication in the second that the court was aware of the fact that it was sustaining coördinate laws.

¹³³ *Ex parte Stephen* (1896) 114 Cal. 278, 282, 46 Pac. 86, 87.

in California, alone of the non-New England states, "we are met with the proposition that a local ordinance cannot prohibit exactly the same thing prohibited by the state law and still be valid."¹³⁴ But whereas in New England this rule would seem to rest upon the theory that only an express statutory authorization could validate such an ordinance,¹³⁵ in California it rests upon the broader ground that the constitution itself forbids coördinate laws.

Any doubt that may have existed relative to the constitutional status of this rule was removed by the decision in *In re Mingo*.¹³⁶ Prior to December 21, 1922, when the Wright Act,¹³⁷ adopting the provisions of the National Prohibition Act¹³⁸ as the law of the state, became effective, there was no state law forbidding the manufacture, possession, sale, etc., of intoxicants. Consequently the counties and cities had taken over this field,¹³⁹ and although many of them had modeled their ordinances upon the national law,¹⁴⁰ others had adopted more stringent regulations¹⁴¹ or had provided for more severe penalties,¹⁴² particularly as to the offense of possession. As the statute provided that "Nothing in this act shall be construed as limiting the power of any city or county, or city and county, to prohibit the manufacture, sale, transportation or possession of intoxicating liquors for beverage purpose,"¹⁴³ it was inevitable that the claim would be made that this validated a concurrent enforcement of such ordinances in their entirety. But the supreme court, in a unanimous opinion which quoted extensively from *In re Sic*, held otherwise. "A county ordinance punishing exactly the same act denounced by a state law," they said, "is in conflict therewith. . . . The

¹³⁴ *Ex parte Daniels* (1920) 183 Cal. 636, 645, 192 Pac. 442, 446-447.

¹³⁵ See *Shelton v. City of Shelton* (1930) 111 Conn. 433, 150 Atl. 811; *State v. Angelo* (1902) 71 N. H. 224, 51 Atl. 905; *State v. Thurston* (1907) 28 R. I. 265, 66 Atl. 580.

¹³⁶ (1923) 190 Cal. 769, 214 Pac. 850.

¹³⁷ Cal. Stats. 1921, p. 79.

¹³⁸ 85 STAT. (1919) 305.

¹³⁹ Although many chose to adopt the provisions of the state's local option act, Cal. Stats. 1911, p. 599, which continued in force until superseded by the Wright Act, *People v. Collins* (1921) 54 Cal. App. 531, 202 Pac. 344; *People v. Capelli* (1921) 55 Cal. App. 461, 203 Pac. 831, others preferred to draft their own laws under the powers conferred by the CAL. CONST., art. XI, §11.

¹⁴⁰ See *In re Kinney* (1921) 53 Cal. App. 792, 200 Pac. 966. The ordinances involved in *In re Knight* (1921) 55 Cal. App. 511, 203 Pac. 777 and *People v. Tomasovich* (1922) 56 Cal. App. 520, 206 Pac. 119, adopted the substantive provisions of the federal act but provided for more severe penalties for many offenses.

¹⁴¹ *In re Volpi* (1921) 53 Cal. App. 229, 235, 199 Pac. 1090, 1093; *People v. Ellena* (1922) 56 Cal. App. 428, 205 Pac. 701.

¹⁴² *In re Knight* and *People v. Tomasovich*, both *supra* note 140; *People v. Ellena*, *supra* note 141; *In re Polizzotto* (1922) 188 Cal. 410, 205 Pac. 676. And see the penalties provided in the local option act, *supra* note 139.

¹⁴³ Wright Act, *supra* note 137, §4.

situation is not changed by the legislative declaration that the act shall be construed as though there was no conflict."¹⁴⁴ This ruling was reaffirmed in 1926,¹⁴⁵ although the court sustained the ordinances in so far as they reached acts not punishable under the statutes.¹⁴⁶

CONVICTION UNDER A VOID ORDINANCE AS A LAWFUL
CONVICTION UNDER A STATE LAW

Although the doctrine of coördinate laws advanced in *Ex parte Taylor*¹⁴⁷ was due for rapid and complete extinction, the second theory advanced to sustain the ruling in that case has survived. In *Ex parte Mansfield*,¹⁴⁸ decided just five years later, the requirements for its application were liberalized by restricting the necessary contents of the complaint to a single item: that the defendant be "plainly informed of the nature of his offense."¹⁴⁹ The fact that the complaint on which the petitioner had been tried and convicted "referred only to the ordi-

¹⁴⁴ *In re Mingo* (1923) 190 Cal. 769, 771, 772, 214 Pac. 850, 850-851.

¹⁴⁵ *In re Iverson* (1926) 199 Cal. 582, 250 Pac. 681; *In re Simmons* (1926) 199 Cal. 590, 250 Pac. 684.

¹⁴⁶ The first held that a city may punish the sale of liquor for medicinal purposes in quantities exceeding 8 ounces but not in excess of 16 ounces, and the second that it may forbid the sale of liquors containing more than $\frac{1}{8}$ of 1% of alcohol by volume but not more than $\frac{1}{2}$ of 1%, as in each case the state law only punished sales exceeding the higher figure. Of course the fact that the ordinances were drafted in general terms, making no express exception as to acts falling within the scope of the state law, was unimportant. "From this comprehensive description we must exclude those condemned by the statute. As all are supposed to know the law, this can readily be done." *In re Murphy* (1900) 128 Cal. 29, 31, 60 Pac. 465, 466.

The companion rule that in a prosecution under such an ordinance the city need neither allege nor prove that the facts were not such as to bring the defendant's act within the scope of the statute and hence beyond the reach of the ordinance, *In re Murphy*, *supra*; *In re Iverson*, and *In re Simmons*, both *supra* note 145, often enables municipal corporations to evade the rule that they cannot punish acts which are criminal under the statutes. If the ordinance penalty exceeds that of the statute, it will be in the defendant's favor to prove that the alleged act, if committed as charged, constituted a violation of the statute; but it may be that this could not be done without proving that he had violated the statute. Compare *Odd Fellows' Cemetery Assoc. v. San Francisco* (1903) 140 Cal. 226, 73 Pac. 987 with *Ex parte Johnson* (1887) 73 Cal. 228, 15 Pac. 43. If the ordinance penalty is less than, or the same as, the statutory penalty, he ordinarily will not bother to do so. Nor can the state prosecute following such a trial, unless the defendant is acquitted or the action dismissed on the ground that he had violated the state law. A conviction, of course, would constitute a judicial finding that he had not violated that law, and an acquittal on the merits that he had not committed the alleged act. The parties being the same, both prosecutions being in the name of the state, the doctrine of *res judicata* applies. But if municipalities abuse this power the legislature can oust them of jurisdiction by taking over the entire field, as it has done in the case of motor vehicle traffic. *Ex parte Daniels* (1920) 183 Cal. 636, 192 Pac. 442.

¹⁴⁷ *Supra* note 123.

¹⁴⁸ (1895) 106 Cal. 400, 39 Pac. 775.

¹⁴⁹ And see *supra* note 120.

nance,¹⁵⁰ and did not conclude with the declaration that his acts were contrary to the form, force, and effect of the statute . . . ,”¹⁵¹ were held immaterial, the code making no mention of such a clause.¹⁵² As applied in numerous cases since that date,¹⁵³ it is now clear that, aside from thus stating an offense covered by the criminal laws of the state, the only facts necessary to sustain such a conviction as one properly secured under a state law are that the action be prosecuted in the name of the people of the state, and that the court trying the case have jurisdiction of the offense as one arising under state law.¹⁵⁴

Normally, no one of the three presents any difficulty in California. Since an ordinance is only void if it punishes “precisely the same acts” as those embraced in the statute, it would seem difficult indeed, in the average run of cases, to frame a complaint that would state an offense under the former without at the same time stating an offense under the

¹⁵⁰ Even this is unnecessary today, unless the case is tried in the superior court. See *supra* note 119.

¹⁵¹ (1895) 106 Cal. 400, 406, 39 Pac. 775, 777. This was a formula required at common law in all indictments and complaints. *Commonwealth v. Worcester* (1826) 20 Mass. (3 Pick.) 461; *Commonwealth v. Gay* (1827) 22 Mass. (5 Pick.) 44; *Stevens v. Dimond* (1833) 6 N. H. 330. When used in a state prosecution, it referred to the statute declaring the defendant's act illegal. When used in a municipal prosecution, it referred to the statute authorizing the corporation by ordinance, to punish the act. Hence there was an inconsistency in the previous cases accepting this clause, when obviously intended to convey the second meaning, as fulfilling the requirements of the first. See *Ex parte Christensen*, *supra* note 116, at 212, 24 Pac. at 748; *Ex parte Taylor*, *supra* note 123, at 95, 25 Pac. at 259. The present rule is much sounder.

¹⁵² See CAL. PEN. CODE §1426. Difficulty may yet arise as to major misdemeanors improperly brought under an ordinance, as the clause should appear in an information or indictment. CAL. PEN. CODE §951. But it would seem that its omission is not fatal, §960 of the same code providing, “No indictment, information, or complaint is insufficient, . . . by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits.” And see CAL. CONST. art. VI, §4½. As long as prosecutors continue to use this phrase in municipal cases the question will remain academic, however out of place it may be where the corporation derives its authority from the constitution and not from the statutes.

¹⁵³ *Ex parte Stephen* (1896) 114 Cal. 278, 46 Pac. 86; *Ex parte Sweetman* (1907) 5 Cal. App. 577, 90 Pac. 1069; *Ex parte Bagshaw* (1908) 152 Cal. 701, 93 Pac. 864; *In re Murphy* (1923) 190 Cal. 286, 212 Pac. 30; *In re Desanta* (1908) 8 Cal. App. 295, 96 Pac. 1927; *Olivieri v. Police Court of Bakersfield* (1923) 62 Cal. App. 91, 216 Pac. 44.

¹⁵⁴ The holdings would seem to require the conclusion that a defendant cannot protest that the prosecuting attorney was not qualified, under the statutes, to prosecute state offenses. There is no evidence, however, that counsel ever raised the issue.

Of course a sentence may have to be set aside, either as a whole or in part, as being in excess of that authorized by law. This can only occur where the sentence under the ordinance exceeds that authorized in the statute, *In re Mingo* (1923) 190 Cal. 769, 214 Pac. 850, or where they differ in kind. In the absence of statutory provision for a resentence, as in *Littlejohn v. Stells* (1905) 123 Ga. 427, 51 S. E. 390, an order setting aside the entire sentence requires a new trial.

latter. Such actions will be brought in the name of the people of the state as a matter of course. And it is rare, indeed, that the third will present difficulties, since municipal ordinances and state laws are uniformly enforced in the same courts;¹⁵⁵ although in particular instances, due to a difference in penalties, one may fall within the exclusive jurisdiction of an inferior, and the other of a superior, court.¹⁵⁶

Aside from the exceptional cases discussed below, the resulting situation is well illustrated by the ruling in *Olivieri v. Police Court of Bakersfield*.¹⁵⁷ Olivieri was charged, under a city ordinance, with the illegal possession of liquor on December 21, 1922, the day on which the Wright Act¹⁵⁸ became effective. His petition for a writ of prohibition was denied, the court saying: "When we compare the complaint with the provisions of the Volstead Act, which the Wright Act has made the law of this state, we are satisfied that it states an offense thereunder. In fact, the main contention of petitioner is that the offense set out in the complaint is prohibited both by the Wright Act and the ordinance. As hereinbefore indicated, we have agreed with him in this contention, and have held the ordinance void for the reason that it attempts to legislate upon the same matter covered by the statutes of the state. The complaint, however, still stands as a perfectly valid complaint under the Wright Act, and therefore the respondent, in whose court said complaint was made, has jurisdiction to proceed with the trial of the defendant for the offense charged."¹⁵⁹

Of course the situation is entirely different where an ordinance is drafted in more general terms than the statute or prohibits additional acts of a closely analogous nature, and the complaint is so framed as to include acts both within and without the scope of the statute.¹⁶⁰ If the evidence shows that the act constituted a violation of the state law, no conviction can be sustained under the ordinance; but doubtless the provision that "no judgment shall be set aside . . . for any error as to any matter of pleading . . . unless, after an examination of the entire cause, including the evidence, the court shall be of opinion that the error complained of has resulted in a miscarriage of justice"¹⁶¹ will go far in sustaining convictions under such complaints as charging statutory crimes. Thus the court of appeal, second district, has ventured the opinion that a complaint charging possession of liquor containing more

¹⁵⁵ See *supra* note 72.

¹⁵⁶ *Arfsten v. Superior Court*, *supra* note 113, is a case in point.

¹⁵⁷ (1923) 62 Cal. App. 91, 216 Pac. 44.

¹⁵⁸ *Supra* note 137.

¹⁵⁹ *Olivieri v. Police Court of Bakersfield*, *supra* note 157, at 95, 216 Pac. at 46.

¹⁶⁰ See *supra* note 146.

¹⁶¹ CAL. CONST. art. VI, §4½. And see CAL. PEN. CODE §960, quoted *supra* note 152.

than 1/3 of 1% alcohol is sufficient to sustain a conviction of the state offense of possessing liquor containing 1/2 of 1% alcohol.¹⁶²

Such a rule raises some very nice questions of constitutional law. It would seem that where such an interpretation can be placed upon the complaint, one placed in jeopardy under it could not be again tried for the state offense, even though the action was dismissed or the defendant acquitted on the ground that having violated the statute he had not violated the ordinance. In a doubtful case, the only safe procedure would seem to be to proceed to a verdict on the merits and, in case of conviction, to impose a sentence under the state law. If the defendant is then successful in contesting the sufficiency of the complaint, the new trial will be had under the statute. Even where the defendant enters a plea of guilty the question is not without difficulty. If the complaint will sustain *either* an ordinance or a statutory offense, to which of the two has the defendant pleaded? ¹⁶³ Yet the sentence to be imposed, or the disposition of the fine, may be directly dependent upon the answer to this question.¹⁶⁴

SUMMARY AND CONCLUSIONS

In defining offenses and providing penalties for their commission, California municipal corporations generally act under the powers conferred directly upon them in the constitution. Consequently it is improper to speak of them as agents of the state government, but rather as common agencies of the people of the state. Prosecutions for the violation of such ordinances are criminal cases in every sense of the term, and must be conducted in the name of the state with full recognition of the constitutional rights of persons accused of crime.

The California situation would seem to offer relatively fertile ground for the application of the "dual offense" theory, the constitutional relationship of our municipal and state governments being far more anala-

¹⁶² *In re Simmons* (Cal. App. 1925) 235 Pac. 1029, sustained, but on different grounds, in (1926) 199 Cal. 590, 250 Pac. 684.

¹⁶³ In the *Simmons* case the court of appeals, holding the ordinance invalid, held that he had pleaded guilty to the state offense. The supreme court, holding the ordinance valid, held that he had pleaded guilty to the municipal offense. It would seem that in such a case the trial court should hear sufficient evidence to determine which offense has been committed, or require an amendment of the complaint to clearly state only one of the two, unless—as here—the question is academic. See the following note.

¹⁶⁴ In the *Simons* case neither was involved, as the court chose to impose a sentence sustainable under both and as the fine, in either case, went to the city, Bakersfield coming within the exception noted in CAL. PEN CODE §1457. But had the court chosen to impose a sentence in excess of that authorized by the statute, or had the general provision that fines imposed under state laws shall be paid to the county and those under city ordinances to the city, been applicable, the issue would have been of controlling importance.

gous to the relationship existing between our state and federal governments than is the case in most states. But the doctrine has been consistently rejected in favor of the rule that an ordinance overlapping a criminal statute is void as to the extent of the duplication, even though the legislature has undertaken to authorize coördinate state and local laws. However, a conviction under a void ordinance will be sustained as a valid conviction under a state law if the complaint plainly informed the defendant of the nature of his offense, provided, of course, that the court had jurisdiction over the statutory crime.

The basic concept, that an ordinance punishing acts already criminal under a state law is void, was erected upon the conclusion that coördinate legislation would endanger the supremacy of the state government. This was based, in turn, upon the premise that one tried under an ordinance could not be again prosecuted for the same offense under the statute, from which it would follow, under a system of coördinate legislation, that a local government, by being the first to prosecute, would oust its superior of jurisdiction.

If limited to a mere canon of statutory interpretation, both the rule itself and the logical process by which it was reached would be of undoubted soundness. Certainly the contrary rule, that a municipal corporation has a constitutional right to punish acts even though they be criminal under a state law, might prove highly embarrassing. But to apply it so inflexibly as to prevent the state government, by express statutory provision, from authorizing coördinate state and local laws would appear to be somewhat unnecessary. If the state government *desires* to permit local governments to prosecute such offenses, it is difficult to see how local action would constitute an interference with the will of the state or endanger its supremacy. In this more extreme form, the rule would seem to require a new premise to sustain it.¹⁶⁵

Nor have the results of the rule in this broader form proved entirely happy ones. In the Wright Act, the legislature clearly intimated a desire to do two things: First, to enable any city prosecutor, with the consent of the legislative body of his municipality, to handle prohibition cases. Second, to enlist the active support of local governments by allowing

¹⁶⁵ Nor does such a premise seem available. Certainly reversing the major premise of *In re Sic*, *supra* note 112, to read that if both are valid the offender may be punished twice does not suffice, as some judges have assumed in considering the question of state and federal relationships. There is a fatal inconsistency in Judge Nott's reasoning in *State v. Antonio* (S. C. 1816) 3 Brevard 562, 578; "One must have the whole jurisdiction, or a person may be twice punished from the same act; . . . which is not only contrary to the express letter of the constitution, but contrary to the eternal and unerring principles of justice." The two halves of this sentence present the same premise in opposite forms, the first declaring that the constitution does not, the second that it does, bar successive prosecutions.

them to retain all fines imposed in cases prosecuted by them. The proposal had obvious advantages and warranted a trial. Prevented from taking direct advantage of these provisions, some cities proceeded to do so by the indirect and somewhat fanciful method of "new and additional regulations" in the form of a lower alcoholic content, thereby giving rise to a legal situation which introduced further complications of the very type which the law should seek to avoid.

But looking solely to the future, the rule is unimportant. Unlike most hard and fast principles of constitutional law, it prevents little. It merely requires a different technique. If the legislature desires to accomplish the same result tomorrow, it need merely authorize city attorneys to prosecute violations of the particular statute *as statutory offenses*,¹⁶⁶ and provide that all fines collected in such cases shall be retained by the city.¹⁶⁷ The sole difference from that contemplated in the Wright Act will then be that the local government, by ordinance, cannot vary the penalties provided in such act.

It would also seem obvious that the refinement that a conviction under a void ordinance may constitute a conviction under a state law has seriously undermined the rule of *In re Sic*. Certainly it is inconsistent with the doctrine that a prosecution under an ordinance cannot be permitted to prevent a prosecution under the statute; for that is the very thing which is permitted, by the simple expedient of switching names after the accomplishment of the fact. It was no mere accident that this rule was first laid down in a case which rejected the rule of *In re Sic* for the doctrine of coördinate jurisdiction plus the rule that a prosecution under either is a bar to a prosecution under the other; for the present situation, to the full extent to which this rule is applicable, is virtually identical with an acceptance of coördinate laws but a denial of successive prosecutions.¹⁶⁸

In conclusion, it may be said that the California experience demon-

¹⁶⁶ This would be nothing new. In many California cities all misdemeanor actions, whether arising under state laws or city ordinances, are handled by the city prosecutor. CAL. GEN. LAWS, act 5233, §695; act 5238, §§ 24, 24½.

¹⁶⁷ This would merely be a somewhat less liberal application of the same principle applied in CAL. PEN. CODE §1463, providing that where an arrest was made by a city officer the fine should go to the city.

¹⁶⁸ The identity is not complete. Under the present rule, *whenever the invalidity of the ordinance comes to light during the trial*, it is impossible for the local government, by providing a lighter penalty than that demanded in the state law, to prevent the judge from imposing sentence under the latter, or to divert funds from other uses to the coffers of the city. But as normally neither counsel for the prosecution nor the defense stand to gain by bringing these facts to light, too much importance must not be placed upon these differences. And, of course, under a rule permitting coordinate legislation the same results, wherever the legislature felt them desirable, could be accomplished by a special statutory provision forbidding overlapping ordinances in this field.

strates that a system of municipal corporations with extensive legislative powers and authority to impose severe penalties can be integrated into the state's legal system without sacrificing the immunity from a second jeopardy for the same offense or the other guarantees which we have felt it proper to provide for persons accused of crime. Not only does it show—and here we have the substantiating experience, on a broader scale, of our northern federal neighbor¹⁶⁹—the practicability of the rule that an ordinance is void which undertakes to punish what is criminal under the statutes, but it would seem to indicate most clearly that fear lest acceptance of coordinate legislation without an accompanying rule sustaining successive prosecutions would endanger state supremacy is unjustified. Only depriving the state government of power to prohibit coordinate legislation in whatever fields it chose to reserve to itself could do this. And it would seem to indicate that much of what has been written on behalf of the “dual offense” theory is mere rhetorical nonsense cloaked in thin legal raiment. Cut off from its metaphysical background, it is clear that the contention that “there is more safety to the community in two conservators of peace than one, . . .”¹⁷⁰ is not, as the court seemed to imply, an explanation of the validity of that doctrine so much as it is a bald statement that a guarantee against a second jeopardy for the same offense is out of place in this modern world. Such a conclusion would necessitate substantiating argument, particularly when we are dealing with a rule which is common alike to civil and common law countries, and which has been said to belong “to the universal law of nations”,¹⁷¹ and the problems which it will raise can only be solved by making reason our guide rather than our accomplice.

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¹⁶⁹ In Canada, a provincial statute supersedes duplicating municipal ordinances while either is superseded by a Dominion law. The cases are legion. See Winslow v. Gallagher (1888) 27 N. B. 25; R. v. Shaw (1891) 7 Man. 518; Dallaire v. La Cité et la Province de Quebec (1907) 32 R. J. Q. Supér. 118; Dufresno v. R. (1912) 99 Can. Crim. Cas. 414; R. v. Laughton (1912) 22 Man. 520; R. v. Chapman (1922) 66 Dom. L. R. 72; R. v. Hanel (1925) 45 Can. Crim. Cas. 381; R. v. Ottenson (1931) 40 Man. 95. In the Shaw case, *supra* at 528, Chief Justice Taylor wrote that the American doctrine of coordinate laws and successive prosecutions is “contrary to all principles of justice.”

¹⁷⁰ State v. Clifford (1893) 45 La. Ann. 980, 982, 13 So. 281.

¹⁷¹ Pradier-Fodéré, *Droit International Public, Européen et Américain* (1887) tom. III, 1073-1074, quoting Hélie, *Traité de l'Instruction Criminelle* (2d ed. 1866) tom. II, 656, No. 1042.