fense embracing a less extended period and prosecuted for it, in the language of the Supreme Court of Indiana, (Jackson v. State), such prosecution "bars any further prosecution based upon the whole or a part of the same crime."

The Texas court of appeals said in the case of Wright vs. State: "The accused cannot be convicted on separate indictments charging different parts of one transaction as in each a distinct offense. A conviction on one of the indictments bars prosecution on the other."

Mr. Chief Justice Waite said:

"I take it to be a sound rule of law, founded upon the plainest principles of natural justice, that where a criminal act has been committed, every part of which may be alleged in a single count of the indictment and proved under it, the act cannot be split into several distinct crimes, and a separate indictment sustained on each; and whenever there has been a conviction on one part, it will operate as a bar on any subsequent proceedings as to the residue."

And the numerous other authorities cited in our brief all go to this point and conclusively establish, as we maintain, that when two indictments are for matters arising out of the same transaction, there can be but one conviction, and a prosecution for the whole or any part of the transaction bars a conviction for any other part of the same transaction.

In support of his position that the petitioner has not been placed twice in jeopardy, the learned counsel for the government cited the case of Moore v. The People, 14 Howard 20, where it was held that a citizen of the United States being also a citizen of a State or Territory and owing "allegiance to two sovereigns, may be liable to punishment for an infraction of the laws of either," and "could not plead the punishment of one in bar to a conviction of the other." Conceding, for the purpose of this argument, what the court says in that case to be the law, it has no application to this case. Here there was but one sovereign. Both prosecutions were instituted in the name of the United States, and the principles of the Moore case can have no possible application.

But the case of Morey v. The Commonwealth, 108 Mass. 433, and other Massachusetts cases are also cited by the government on this point. The rule laid down in the Morey case is invoked, that "a conviction or acquittal upon one indictment is no bar to a subsequent conviction upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other."

Before attempting to distinguish the case at bar from the Morey case, I desire your honors' consideration for a moment of the rule there laid down. Mr. Bishop in his Criminal Law, Section 1052, gives substantially the same test, but in the following section he limits the test in these words: "Probably the test under consideration is always applicable when its effect is to bar proceedings, while still the proceedings may be barred by other principles when this one fails."

From this section it would seem that whenever the evidence required to support two indictments is the same, that fact, being in favor of the accused, is conclusive, and only one conviction can be had. But if the evidence required was not the same, that fact would not necessarily defeat the plea of former conviction because the prosecution might still be barred by other principles.

The whole doctrine, so far as it can have any application to this case, is summed up by Mr. Bishop in Section 1060, where he says: "There may be gleaned from the books passages which seem to indicate that one act may constitute any number of crimes, for each of which the doer may be prosecuted and a conviction of one will not bar a prosecution for another. And perhaps, in our complicated system of government, one act may be an offense against both the United States and a particular State, and both may punish it. But in principle, and according to the better authority, while one act may constitute as many distinct offenses as the legislature may choose to direct, for any one of which there may be a conviction without regard to the other, it is, in the language of Cockburn, C. J., 'a fundamental rule of law that out of the same facts a series of charges shall not be preferred.' To give our constitutional provisions the force evidently meant, and to render it effectual, 'the same offense' must be interpreted as equivalent to the same criminal act."

That the distinguished author understood the rule to cover just such a case as the one at the bar, is shown beyond doubt by his note to section 1061, where he says:

"Some courts maintain that, in the words of Gray, J., 'A single act may be an offense against two statutes; and, if each statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. (Morey vs. Commonwealth, 108 Mass., 433, 434. And see Commonwealth vs. Bakeman, 105 Mass., 53; Commonwealth vs. Shea, 14 Gray, 386; Commonwealth vs. McConnell, 11 Gray, 204.) But this question has been in effect, already considered in the text. (Ante, 1054 *et seq.*) By all the authorities, this would not be so if the conviction was for the larger crime. (Ante, 1054.) And on the better reason and better authorities it would not be so if the conviction was for the smaller. (Ante, 1057.) But the State could choose under which statute the one prosecution should be."

It is evident from the foregoing that if the rule laid down in the Morey case is correct, it is subject to many exceptions, modifications and limitations that would cover this case. Otherwise the Morey case belongs to that class which Mr. Bishop says "are founded on principles which, if adopted throughout, would render practically void the Constitutional inhibition," for certainly it is at variance with the current of authorities on this subject. It cannot be reconciled with many of the cases cited in our brief, particularly the arson case, for arson and murder are separate offenses; yet, when the party was convicted of arson, which was an act as well as a crime, it was held that he could not be convicted of a different offense, because he had been convicted of another offense committed by the same act which caused the offense of murder. The authorities cited in Morey's case, having relation to different degrees of homicide, support our contention, because in such cases the different degrees of homicide are involved; and the cases do not support the proposition stated by the court. For example, murder is the killing with malice aforethought, an element that must be proved in order to convict. In manslaughter, this element is not required, and is not necessary to be proved; therefore the proof in the one case is different from that required in the other. In murder, that fact must be proved; in manslaughter it is not necessary to prove it. The evidence to procure a conviction of manslaughter would not be sufficient to procure a conviction of murder; but the conviction for manslaughter is a bar to a conviction of murder, and, therefore, these cases do not support the proposition that "a conviction upon one indictment is no bar to a subsequent indictment unless the evidence required to support the one would have been sufficient to warrant a conviction upon the other." If that proposition were sound, then a party convicted of manslaughter might be subsequently convicted of murder, for the proof necessary to convict of the former would not be sufficient to convict of the latter. It is because the one offense is involved in the other that the conviction of the one bars the conviction of the other; and this supports the views we are urging in this case.

But we say there is a material difference between this case and the Morey case, in that, here we have the element of marriage entering into both prosecutions, while in that case it was no element of either charge. As has already been shown, the offense of unlawful cohabitation applies alone to cases where the plural marriage relation exists, "either actually or ostensibly" and where the parties live together as husband and wife. In prosecutions for this offense both the legal and the plural marriages are proven at the trial. The existence of the marriages constitutes a part of the case for the government, and evidence to establish them is always admissible.

This being so, and the fact of marriage being absolutely essential to sustain the charge of adultery, why is that element not common to both charges? Of course, it would not be so in an ordinary case of lascivious cohabitation, like the Morey case, where the law did not require nor presume marriage, and the indictment expressly negatived its existence, but in this case it was