THE CONSTITUTIONALITY OF THE GOVERNMENT'S RIGHT TO APPEAL IN CRIMINAL CASES OTHER THAN THOSE ALLOWED BY SECTION 44 OF GENERAL ORDERS, NO. 58, AS AMENDED BY ACT NO. 2886 [1]

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WHAT IS JEOPARDY?

A. *In Anglo-Saxon Countries.*

(*a*) Definition and Scope.

Jeopardy is used to designate the danger of conviction and punishment which the defendant in a criminal action incurs when a valid indictment has been found or a valid information or complaint and a petit jury has been impaneled and sworn to try the case and to give a verdict (16 Cyc. 232; Cooley, Const. Lim. 398). A person is considered to have been put in jeopardy when a valid and sufficient indictment or information has been legally found against him and duly presented to a court of competent jurisdiction over both the person and the offense, and thereupon he has been arraigned and has pleaded, and a lawful jury has been impaneled and sworn to try the case and rendered a valid verdict (Black, Const. Law, 799; 8 R. C. L. 138; Cooley, Const. Limitations, 6th ed., 399-40). This is based on the theory that a defendant in a criminal action is not in danger of being punished until all the above mentioned requisites are present. Without a valid information or indictment no person can be legally proceeded against. The absence of any one of these elements of jeopardy will render a judgment null and void and therefore the defendant is not placed in danger of being punished. In its constitutional or common law sense jeopardy has a strict application to criminal prosecutions only; however, in some jurisdictions the courts have applied the doctrine to both felonies and misdemeanors. The doctrine does not apply to proceedings for contempt, to proceedings for surety of the peace, and to civil proceedings to remove public officers for neglect or malfeasance in office (16 C. J. 235). In the administration of criminal justice as commonly understood by writers and courts of judicature in Anglo-Saxon countries the rule prohibiting double jeopardy not only prohibits a second punishment for the same offense, but it goes further

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and forbids a second trial for the same offense, whether the accused has suffered punishment or not and whether in the former trial he has been acquitted or convicted. The practical effect of this provision is not only to save a person from being twice tried for the same offense in distinct proceedings but also to deny to the prosecution in criminal cases the right to take an appeal or to move for a new trial, unless allowed by constitutional authority (Black, Const. Law, 804). In jurisdictions where this is the accepted doctrine a plea of former conviction or acquittal is good either under the constitution or the common law.

(*b*) When not Available as a Defense.

It must be understood, however, that the provision in the U. S. Constitution prohibiting double jeopardy applies only to proceedings in the federal tribunals, and does not in any way restrict or prescribe the limits of the constitutional provisions and statutory enactments of the severai states (8 R. C. L. 134). In the absence of express provisions extending the "jeopardy clause" of the Constitution to any state, territory, or possession of the United States this constitutional guaranty will not be available as a defense.

B. *In This Jurisdiction.*

(*a*) When Jeopardy Attaches.

In this jurisdiction it has been held that a defendant is not put in legal jeopardy until he has been arraigned on trial under the following conditions: (1) upon a good indictment; (2) before a competent court; (3) after the defendant has been arraigned; (4) after the defendant has pleaded to the indictment; and (5) after the investigation of the charges has been actually commenced by calling at least one witness. (U. S. vs. Ballentine 4 Phil. 672). It will be noted that the last requisite is not necessary to complete jeopardy in Anglo-Saxon jurisdictions.

If the plea is of *autrofois* acquit or *convict*. there must be a previous acquittal or conviction, as the case may be, in addition to the five requisites above named.

For the purpose of proper understanding of double jeopardy it seems to be necessary that distinction be made between the act and the offense. "One single act may constitute a violation of two or more penal laws; and the prohibition of the Philippine Organic Act and statutory law relating to double jeopardy is not against a second jeopardy for the same act, but a second jeopardy for the same *offense*. To entitle, therefore, a defendant to plead successfully a former jeopardy or former conviction, the offense charged in the two prosecution must be the

same in law and in fact. The test is not whether the defendant has already been put in jeopardy for the same offense. Thus when a statute requires proof of an additional fact which the other statute does not, an acquittal or conviction under one statute does not exempt the defendant from prosecution and punishment under the other. In other words a conviction or acquittal on one indictment is not a bar to a subsequent conviction and sentence upon another, unless the evidence required to support the conviction upon one of them would have been sufficient to warrant a conviction upon the other" (Guevara, Code of Criminal Procedure, 54 citing U. S. vs. Capuro et al., 7 Phil. 24; Gavieres vs. U. S. 220 U. S. 328; U. S. vs. Lim Tigdien, 30 Phil. 222; P. P. I. vs. Cabrera et al, XX O. G. 1138).

(*b*) When Jeopardy Does Not Attach.

There is no jeopardy in placing the defendant in a new trial (1) when the judge dies before the end of the trial; (2) where the term of the court closes before the end of the trial; (3) where it appears after the trial that through the fraud or connivance of the defendant witnesses were induced not to appear at the trial; (4) where it appears after the trial that the defendant had bribed the court, and many other conditions which might be mentioned (U. S. vs. Ballentine, 4 Phil. 672; see also Story, On the Const. sec. 1787). It has also been held that a former acquittal of a person accused of a crime of theft is not a bar to a subsequent prosecution and conviction for the crime of estafa of the same goods which were the subject of the prosecution for theft, for the reason that the elements required for theft to exist are entirely different from those required for estafa. (U. S. vs. Bayona Vitug, 37 Phil. 42). Where in a trial for the crime of homicide the evidence brought clearly showed that the crime was murder, the court ordered the dismissal of the case, instructed the prosecution to file a complaint for murder, and convicted the accused for the latter crime, it was held that the defendant was not thereby placed in a second jeopardy (P. P. I. vs. Nargatan O. G. Aug. 3, 1926; see also U. S. vs. Trono, 199 U. S. 521).

C. *Appeal and New Trial.*

It has already been said that in Anglo-Saxon jurisdictions the double jeopardy injunction not only prohibits a second trial but denies to the prosecution the right to appeal. Under this theory an appeal is a new trial and consequently places the defendant in a second danger of being punished. (Black, Const. Law 799). If appeal and new trial are to be construed as synonymous in this jurisdiction, then an appeal by the Government against any judgment, except that provided for by section

44 of the Code of Criminal Procedure as amended by Act No. 2886, would be a violation of the Bill of Rights. Under the system obtaining in the Philippine Islands prior to the publication of General Orders, No. 58, that is, under the old Spanish Code of Criminal Procedure, all serious crimes were by operation of law reviewed by the Audiencia (Supreme Court of the Philippines) whether acquittal or conviction resulted below, and the case was not final, the trial did not end, and the jeopardy was not complete until the Audiencia had pronounced judgment. Under this system the original trial of a criminal case commenced in the Court of First Instance is a unitary and continous proceeding which is incomplete until finally decided by the highest Court of the Islands whether there was an appeal or not, (U. S. vs. Kepner, 1 Phil. 727). Construed in terms of the old Spanish Code of Criminal Procedure, an appeal is not a new trial, but a continuation of the trial commenced in the court of First Instance, and appeal by either party does not place the accused in a second jeopardy. This is contrary to the common law sense and to the meaning of jeopardy under the United States Constitution where appeal by the Government is held to be a violation of the Constitutional guaranty (Sutherland, Notes on the U. S. Const. 632). The Supreme Court of Connecticutt, however, in State vs. Lee (30 Atl. 1110; 65 Conn. 265), citing with approval State vs. Garvey (42 Conn. 233), held that "as to what constitutes a new trial, depends upon the course of proceedure of the particular jurisdiction in which it is had, and the construction of the courts with respect to it." As will be shown hereinafter the Spanish system of criminal procedure was not repealed, but only amended by General Orders, No. 58, preserving certain provisions of the old law that are not expressly abrogated; and since there is no provision in General Orders, No. 58, which expressly repeals so much of the Spanish Criminal procedure as allowed appeal by the Government "new trial" should be construed in terms of the old law.

Not all subsequent trials are considered new trials even in the United States (2 Story, On the Const. Secs. 18-77). Mr. Justice Holmes, with whom concurred Mr. Justice White and Mr. Justice McKenna, in his dissenting opinion in Kepner vs. U. S. (195 U. S. 100; 11 Phil. 702) said in part: "......... there is no rule that a man may not be tried twice in the same case. It has been decided by this court that he may be tried a second time even for his life, if the jury disagree (U. S. vs. Perez, 9 Wheat. 579; see Simmons vs. U. S. 142 U. S. 263; Thompson vs. U. S. 155 U. S. 271), or, notwithstanding their disagree-

ment and verdict, if the verdict is set aside on the prisoner's exception for error in the trial (Hopt vs. People 104 U. S. 430; 442; 110 U. S. vs. 574; 114 U. S. 488, 492; 120 U. S. 430, 442; U. S. vs. Ball 163 U. S. 662, 672). He even may be tried on a new indictment if the judgment on the first is arrested upon motion (Ex-parte Lange, 18 Wall. 163, 174; 1 Bishop, Crim. Law. (5th Ed.) see. 998)." This is the same ruling as that laid down by the Philippine Supreme Court in U. S. vs. Ballentine *supra.*

The doctrine that an appeal is not a new trial was well settled in the Philippine Islands until the Supreme Court of the United States laid down in Kepner vs. U. S. (195 U. S. 100; 11 Phil. 702) a contrary opinion that the right of the Government to appeal in criminal cases had been repealed by the Philippine Bill. The new doctrine, however, met a strong opposition in the federal Supreme Court and the decision was approved by a vote of five to four—two justices writing a separate dissenting opinion each.

CRIMINAL PROCEDURE IN THE PHILIPPINES

The history of the system of criminal procedure in the Philippine Islands would naturally be divided into two, to wit: The system in vogue during the Spanish regime and the one inaugurated by General Orders, No. 58.

A. *Spanish Law.*

(*a*) What Constitutes.

At the arrival of the Americans the system of procedure in criminal actions in vogue in these Islands was inquisitorial. Under that system a judgment rendered by a court of first instance in a criminal case did not become final until the Audiencia (Supreme Court of the Philippines) had approved it, as the law required every decision to be reviewed by the Audiencia whether the parties appealed or not. After a criminal case had been prosecuted through both instances the judgment of the Audiencia was final, and the Supreme Court of Spain could only take jurisdiction over it through a writ of error, with the exception of cases in which a writ of error was allowed by operation of law for the benefit of the accused (U. S. vs. Samio, 3 Phil. 691.)

The laws governing criminal procedure were the following:

Reglamento de Justicia de 1835.
La Real Cedula de 1855.
Ley Provisional de Enjuiciamiento Criminal de 1872.
Ley de 1878.

Compilacion General Reformada Sobre Enjuiciamiento Criminal de 1880.
Ley de 9 de Julio de 1882.
Ley de Enjuiciamiento Criminal de 1882.
Ley Provisional de 1886.

(*b*) Appeal by the Government.

Appeal by the Government in criminal cases was not prohibited, on the contrary it was expressly provided by law (see Reglamento de Justicia de 1835, Art. 51; La Real Cedula de 1855, cap. III, sec. 2, Art. 51, par. 8; Ley de 1878, tit. 1, cap. 1, Art. 16; Ley Prov. de Enj. Crim. de 1872, sec. VI Arts, 873-878; Ley Prov. de 1886 par. 78; Espinosa, Procedure Crim. 153-154; 165-167; Ruiz, Comp. de Enj. Crim. 21.)

B. *American Law.*

(*a*) Nature and Effect of N. O. No. 58.

By the promulgation of General Orders, No. 58, on April 23, 1900, the system of criminal procedure in vogue in the Philippines during the Spanish regime was amended. The intent of General Orders, No. 58, is expressed as follows:

> "In the interest of justice, and to safeguard the civil liberties of the inhabitants of these Islands, the criminal procedure now in force therein is hereby amended in certain of its important provisions as indicated in the following enumerated sections:
>
> "Sec. 1. The following provisions shall have the force and effect of law in criminal matters in the Philippine Islands from and after the 15th day of May, 1900, but existing laws on the same subjects shall remain valid except in so far as hereinafter modified or repealed expressly or by necessary implication."

There is no provision in General Orders, No. 58, which "repeals expressly or by necessary implication," the parts of the Spanish Code of Criminal Procedure granting to the prosecution the right to appeal, consequently that right was preserved by the law. This was decided by the Supreme Court of the Philippine Islands in the case of U. S. vs. Kepner, 1 Phil. 727. The defendant in that case was prosecuted for estafa. The Court of First Instance of Manila acquitted him. The Government appealed from the judgment of acquittal. The defendant moved that the appeal be dismissed on the ground that General Orders, No. 58, did not authorize an appeal by the Government against a judgment of acquittal. The Supreme Court overruled the motion and in its decision penned by Chief Justice Arellano held that under General Orders, No. 58, the Government has the right to appeal from judgment of acquittal rendered in criminal cases and that the letter and the spirit of the order are the most conclusive argument in support of this right on the part of the Government.

As originally enacted section 43 expressly declared: "From all final judgments of the Courts of First Instance or courts of similar jurisdiction, and in all cases in which the law now provides for appeals................ an appeal may be taken to the Supreme Court................" And section 64 reads as follows (before it was amended b. sec. 85, Act No. 1677): "In cases of appeal after judgment, the defendant may be admitted to bail pending action: (1) As a matter of right *if the appeal is from an acquittal*................" It can also be logically inferred from sections 50 and 107 that General Orders, No. 58, contemplates the allowance of the right to appeal from a judgment of acquittal. Section 50 as amended by Act No. 194, section 4, says: "It shall not be necessary to forward to the Supreme Court the record, or any part thereof, of any case in which there shall have been *an acquittal* or in which the sentence imposed is not death, unless such cases shall have been duly appealed; ...."; and section 107 provides in part "The privileges now secured by law to the person claiming to be injured by the commission of an offense to take part in the prosecution of the offense and to recover damages for the injury sustained by reason of the same shall not be held to be abridged by the provisions of this order................" This latter provision confers upon the party injured by the criminal act of the accused the right to appeal (in the name of the Government, of course) in case of a decision adverse to his interest.

(*b*) The Doctrine of the Kepner Case.

The doctrine laid down in the Kepner vs. U. S. 195 U. S. 100, is that so much of the provisions of General Orders, No. 58, as grant to the Government the right to appeal from a judgment of acquittal in criminal cases has been repealed by that part of the Philippine Bill which provides that no person shall for the same offense be twice put in jeopardy of punishment.

There are, I think, two propositions by which the soundness of this doctrine may be contended against, namely: (1) Admitting that the Bill of Rights forbids placing an accused twice in jeopardy of punishment, shall we also admit that by appeal the prosecution places the defendant in a second jeopardy? (2) Does the Philippine Bill contain a provision expressly prohibiting an appeal by the Government in criminal cases or does it in letter and spirit grant such right?

We have already stated that according to the Spanish law a criminal case was not ended until reviewed by the Audiencia and that an appeal did not place the defendant in a second jeopardy according to that law. The law allows the defendant to appeal, yet by that appeal he is also placed in a second jeo-

pardy. It is argued that when a defendant in a criminal case appeals he waives this constitutional right. "Neither sound sense nor sound law can support the proposition that a person accused of a crime is entitled to have an illegal and improper judgment against him modified, corrected, and set aside and that the State can have no relief against a similar judgment in his favor. The defendant has no higher right to be protected against an improper conviction than has the body politic to be secured against an unlawful acquittal and a miscarriage of justice" (Mr. Justice Smith in U. S. vs. Kepner, 1 Phil. 397). To allow the accused to appeal from a judgment of conviction and to deny the same right to the Government does not tend to establish uniformity in the administration of justice. I believe that one of the objects of the Bill of Rights is to protect the individual from unjust prosecutions and not to endanger the State by being lenient to criminals and thus encouraging the commission of crimes. Under our present Government there is very little chance, if any, for unjust or malicious prosecutions to prosper. The machinery of justice, though not perfect, cannot be easily employed as a tool of tyrannical persecutions. "At the present time," says Mr. Justice Holmes in his dissenting opinion in the case of Kepner vs. U. S. (195 U. S. 100), "in this country there is more danger that criminals will escape justice than they will be subjected to tyranny." And Mr. Justice Brown in his dissenting opinion in the case says, "It seems to me impossible to suppose that Congress intended to place in the hands of a single judge the great and dangerous power to finally acquit the most notorious criminals." It is to be feared than an over-zealous protection given to the constitutional rights of an individual may defeat the very end of justice. It is held in State vs. Lee (30 Atl. 1110; 65 Conn. 265) that the rule of common law, that no one shall be put twice in jeopardy for the same offense, does not prevent the granting of a new trial, on appeal by the state, under statutory authority, from an acquittal, for error in the exclusion of evidence. And a similar ruling is laid down by the Supreme Court of the United States in U. S. vs. Sanges (144 U. S. 310) where it is held that the State may sue out a writ of error upon a judgment in favor of the defendant in a criminal case if a statute so expressly authorized, whether the judgment was rendered on a verdict of acquittal, or upon the determination by the court of a question of law. When Kepner was convicted by the Supreme Court on appeal by the prosecution the appeal was authorized by statute that is, by Geneal Orders, No. 58. Whether it was also authorized by the Organic Act is a question that we shall decide later. Suffice

it to say that the authorities so far cited are sufficient to support the contention that an appeal by the prosecuion from judgment of acquittal, as was the case of Kepner, does not place the defendant in a second jeopardy.

The next proposition is: Does the Philippine Bill contain a provisoin expressly prohibiting an appeal by the Government in criminal cases or does it in letter and spirit grant such right? If it expressly forbids the exercise of the right to appeal by the prosecution against a judgment of acquittal there would be no question as to the unconstitutionality of General Orders, No. 58. The Instructions to the Philippine Commission and the Philippine Bill both prohibit placing a person twice in jeopardy of punishment. A careful study of these two instruments would reveal that it was not the policy of Congress to make radical changes in our municipal law. The mere prohibition contained in the jeopardy clause does not necessarily imply that the Government has no right to appeal in criminal cases. What constitutes jeopardy or a new trial is a question that should be left to the courts in the respective jurisdictions to determine (State vs. Garvey 42 Conn. 233). All that has been hereinbefore said in the discussion of the system of criminal procedure and procedural law in these Islands clearly demonstrated that appeal and jeopardy as construed under the Common law and the United States Constitution differ from appeal and jeopardy in the contemplation of the procedural law in the Philippine Islands. If by an Act of Congress so much of the law of criminal procedure in force in these Islands prior to the Kepner case was sanctioned expressly or by necessary implication, the reasonable way of construing appeal and its relation to jeopardy would be in terms of and in the sense in which it is understood in the old Spanish system of criminal procedure, to wit: that appeal being but a continuation of the trial in the Court of First Instance does not place the defendant in a criminal case in a second jeopardy. In the absence of such sanction, the constitutional injunction would be conclusive, and the provisions of General Orders, No. 58, which permit the prosecution to appeal from a judgment of acquittal would be repugnant to the Philippine Bill. But I contend that neither the Instructions to the Philippine Commission nor the Philippine Bill denies to the Government the right to appeal in criminal cases; and that the Organic Act expressly ratified the continuance of the law in force during the Spanish time granting to the prosecution the right to appeal.

CONSTITUTIONALITY OF APPEAL BY THE PROSECUTION

A. *The President's Instructions to the Philippine Commission.*

(*a*) America's Policy.

America acquired the Philippine Islands at the time when the Filipino people were struggling for freedom. From the very beginning of the American occupation the United States announced it to be her avowed policy that she would hold the Philippine Islands to prepare its people for self-government. It was through a sense of duty to Civilization that she decided to embark into the new venture of colonial administration for altruistic motives. Before any attempt was made to legislate for these Islands and to establish the civil government Congress had made a careful study of our political situation and our history. Every step taken by the Washington Government and by Congress affecting Philippine affairs was done with a proper consideration for the welfare and respect for the traditions, habits, and customs of the Filipino people. The policy to be followed was declared by President McKinley in his Instructions to the Philippine Commission, a document characterized as "the most nearly perfect example of organic law, jurisprudence, guarding of rights, distribution of powers, administrative provisions, checks and balances, civilization ever beheld in a single document," (Malcolm, Phil. Const. Law, 218).

According to Mr. Justice Malcolm "the President's Instructions to the Commission, because issued by the President under his war powers and because section 1 of the Philippine Bill, providing that these Islands shall continue to be governed as thereby (in the Instructions) and herein (the Philippine Bill) provided is an organic law" (Malcolm, Phil. Const. Law, 217-218). Being an organic law its provisions have a constitutional force and effect. The Philippine Commission could not pass a law that was incompatible with it. The Instructions formulated in the most authoritative way the whole theory of the American people with respect to the government of these Islands when it says:

> "In all the forms of government and administrative provisions which they are authorized to prescribe the Commission should bear in mind that the government which they are establishing is designed not for our satisfaction or for the expression of our theoretical views, but for the happiness, peace, and prosperity of the people of the Philippine Islands, and the measures adopted should be made to conform to their customs, their habits, and even their prejudices, to the fullest extent consistent with the accomplishment of just and effective government."

This provision imports that no change was to be made in our legal system unless such change would redound to our benefit. The change of sovereignty carries with it the entire abolition of the political law of a country, but "it is a general rule of public law recognized and acted upon by the United States that wherever poli 'cal jurisdiction and political power over a territory are transferred from one nation or sovereignty to another, the municipal laws, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign" (Chicago Rock Id. & Pac. Ry Co. vs. McGlinn, 114 U. S. 542, 546). The continuance of certain of the important provisions of the Code of Criminal Procedure in force here during the Spanish sovereignty which were not amended or repealed by General Orders, No. 58, was done in perfect accord with this principle and with the policy enunciated in the Instructions to the Philippine Commission "that the government they are establishing is designed not for our satisfaction or for the expression of our theoretical views, but for the happiness, peace, and prosperity of the people of the Philippine Islands." There is nothing in the new system of criminal procedure inaugurated by the publication of General Orders, No. 58, which impairs the exercise of constitutional rights or in any way incompatible with the principles of just and effective government.

(b) Reservation; its Significance.

It is true that in formulating the theory of government and in enjoining the Commission that "the measures adopted should be made to conform to their customs, their habits, and even their prejudices......" the President added a reservation saying:

> "At the same time the Commission should bear in mind, and the people of the Islands should be made plainly to understand, that there are certain principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and maintenance of individual freedom, of which they have been, unfortunately, denied the experience possessed by us; that there are also certain practical rules of government which we have found to be essential to the preservation of thse great principles of liberty and law, and that these principles and these rules of government must be established and maintained in their Islands for the sake of their liberty and happiness, however much they may conflict with the customs or laws of procedure with which they are familiar."

It now remains to be shown whether this clause of the Instructions aims at repealing the provisions of the Spanish code of criminal procedure because they are in conflict with the English or American system. The theory of double jeopardy in its relation to the English system of trial by jury is entirely

distinct from the theory of jeopardy in its relation to the right of the Government to appeal in criminal cases under the Spanish procedural system in vogue in these Islands on and before the arrival of the American sovereignty. The right to plead jeopardy after an acquittal or conviction was the necessary adjunct, the indispensable auxiliary of the trial by jury in the early days of the struggles of the commons against the tyranny of the English monarchs. The jury system was found an effective remedy against the abuses of the corrupt administration of justice in the hands of judges who had to look to the powers and influences of whom they were the mere creatures. The administration of justice in the Philippines under the two sovereignties (Spanish and American) has a different history from that of England; and so are the history, customs, habits, traditions, and prejudices of the Filipino people different from those of the English. Nothing has been found to justify the implantation in this jurisdiction of the system of trial by jury. The judicial proceedings, the law by which they are governed, the structure of the judiciary, have proved to be well founded on law and justice so that no particular form of foreign procedure has been needed to improve it. The English theory of double jeopardy and the right of trial by jury were imported into the United States and made one of the Constitutional guaranties of individual freedom. The coming here of the new sovereignty does not, however, make the federal Constitution applicable to the Philippine Islands wholly or in part, unless and until Congress expressly provides otherwise. Mr. Justice Malcolm says, "While, up to the Spanish-American War the Constitution and the laws of Congress had been extended to the territories by law, the Constitution and acts of Congress did not *ex propio vigore* have force in the Philippines, and were not set there by Congress" (Malcolm, Phil. Const. Law 179). In the case of Dorr vs. U. S. (195 U. S. 138; 49 L. Ed., 128; 11 Phil. 706) it was held that Congress was not required "to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and the Constitution does not, without legislation and of its own force, carry such right to the territory so situated." All this shows that the right of trial by jury is not one of those principles and rules of government that must be established and maintained in these Islands for the sake of our "liberty and happiness, however much they may conflict with the customs or laws of procedure" with which we had been familiar. The reservation in the Instructions to the Philippine Commission certainly cannot be interpreted to mean that

a conflict of the usual, customary, and accepted construction of a certain principle of law in one jurisdiction with the construction sanctioned by customs and usage in another must be held to be a violation of what is essential to the preservation of the basis of good and effective governmental system. We would be guilty of irreverence to the glorious memory and preconceiving statesmanship of the framers of the United States Constitution should we attribute to them, even by the most polite insinuation, the legislative intent that this great instrument must be held so fanatically sacred and omnipotent that its principles must be forced upon the foreign peoples who, by the irony of fate or "in the course of human events," might come under the protecting influence of the American flag. The United States Constitution is imbued with the liberal ideas of democracy and the progressive spirit of republicanism, and these attributes were correctly expounded and conveyed to the Filipino people in what has been called the "Magna Charta of the Philippines," the Presidents' Instructions to the Philippine Commission (Malcolm, Phil. Const. Law, 218). The Constitution is not incapable of progressive functions and of suiting itself to the demands of the age. In this connection it is, I think, fitting to quote what the United States Supreme Court said, speaking through Mr. Justice Mathews in Hurtado vs. California (110 U. S. 516). It said: "The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history, but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and many tongues. And while we take it just in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the idea and process of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not ailen to that Code which survives the Roman Empire as the foundation of modern civilization in Europe and which has given us that fundamental maxim of distributive justice *suum cuique tribuire.* There is nothing in the Magna Charta, rightly construed as a broad charter of public right and law which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of common law to draw its inspiration from every fountain of justice we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that new and various experiences of our own situation will mold into new and no less useful form." Here is an authori-

tative exposition of the liberal spirit and progressive intent of the Constitution. In the light of this doctrine it cannot be contended that the concessions of the Bill of Rights which emanated to the inhabitants of these Islands from the Constitution through the Instructions to the Philippine Commission abolished all the ideas of individual right to life, liberty and property found in the system of Spanish jurisprudence obtaining in these Islands before the advent of American sovereignty. While there may be conflict in procedure as regards jeopardy between the American and the Spanish systems of jurisprudence the aim of both is the same, to wit: a correct judgment legally obtained; and so I think that when President McKinley said in the Instructions "...however much they may conflict with the customs and laws of procedure with which they are familiar," he did not mean conflict in the form but repugnancy in the substance.

(*c*) Idea of Individual Freedom Not Exclusively American.

Sacred as the individual rights to life, liberty, and property are, they cannot, with reason, be held above the right of society and the State to exist; yet, to set criminals free simply because, through errors of law or facts in the trial at the Courts of First Instance, they have been acquitted, would amount to clothing them with impunity and placing them beyond the reach of the law under the fetish of the constitutional prohibition against double jeopardy. Under the Spanish law (Fuero Real, lib. IV, tit. XX, ley XIII; Siete Partidas, Part VII, tit. I, ley XII) the right of the individual to be secured against double jeopardy was also provided, and inasmuch as the municipal law of these Islands was not abolisedh by the change of sovereignty, the presumption would be that even if protection against being put twice in jeopardy were not provided for in the Bill of Rights the provisions of the Fuero Real and the Siete Partidas (*Supra*) would be available as a defense against malicious prosecutions and vexations. Therefore the idea of double jeopardy is not new in this jurisdiction.

(*d*) Functions of Our Bill of Rights.

Our present law of criminal procedure under whose provisions Kepner was prosecuted is neither purely American nor purely Spanish but a mixture of the two systems (see U. S. vs. Kepner, 1 Phil. 727). Our idea of due process of law was not derived from the common law of England but from the Roman Law through the medium of Spain's jurisprudence. The source of the American Bill of Rights from which our organic Act was derived was the English Magna Charta whose concessions were wrung from the hands of an unwilling King

as guaranties against the oppressions and usurpations of his prerogatives. This was brought about as the culmination of the continuous conflict of the members of the trinity of England's national life, namely: the Crown, the barons, and the commons. Te barons succeeded in championing the cause of the commons and under the guise of the savior and protector of the latter drafted the Magna Charta, which was really a treaty between the King and the commons, and forced the King to sign it. The barons standing between the King and the commons and having gained the support and confidence of the latter, had the upper hand of the situation. They dictated the terms of the "treaty" and naturally were wise enough to guard their own interest. "It did not enter into the minds of the barons to provide security against their own body and in favor of the commons by limiting the powers of the Parliament; so that bills of attainder, ex-post facto laws, laws declaring forfeitures of estates, and other arbitrary Acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land, for............... the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty was the power of a free public opinion represented by the commons." (Hurtado vs. California, *supra*). In the United States in order to protect the rights and liberties of the people against the encroachments of power delegated their governments written Constitutions were found to be essential, and the provisions of the Magna Charta were incorporated into bills of rights of the federal Constitution and of the constitutions of the several States of the Union as limitations upon all the powers of government, legislative as well as executive and judicial, while in England they are guaranties against executive usurpations and tyranny. Congress incorporated into the Philippine Organic Act certain provisions of the American Bill of Rights. It naturally is to be presumed that in this jurisdiction they are to perform the same functions as in the United States, that is, that they are bulwarks againts arbitrary legislation, and limitations against executive and judicial powers, guaranteeing not particular form of procedure, but the very substance of individual rights to life, liberty and property.

The right of the Government to appeal in criminal cases granted by the Spanish law and continued under the sanction of General Orders, No. 58, is neither an arbitrary legislative act nor an abuse of judicial or executive powers. It is just as due process of law as the trial by jury. It is a procedural for-

mality enforced by public authority and sanctioned by law and usage, designed in the discretion of legislative power, in the furtherance of public good, which regards and preserves the principles of liberty and justice; and according to the doctrine laid down by the Supreme Court of the United States in Hurtado vs. California (*supra*) any legal proceeding complying with these requirements "must be held to be due process of law."

While we look to the federal Constitution and its counterpart, our Organic Law, for the proper construction and application of the constitutional guaranties to civil and individual rights, we must not forget that the Magna Charta and the American Bill of Rights are not the exclusive sources of our ideas of civil liberties. The Roman Law which for three centuries was the basis of government of these Islands had left an impress in our national being which has greatly influenced our civil and family life. And inasmuch as the American people have spoken through their most authoritative agency, the President and Congress, that the government which the Commission was establishing was designed not for their theoretical views, but for the happiness, peace, and prosperity of the people of the Philippine Islands, we are not prohibited from construing the provisions of the Bill of Rights against the theoretical views of the American jurists.

B. *The Philippine Bill.*

(*a*) Retroactive Effect.

The Philippine Bill as an Organic Act has retroactive effect in that it "approved, ratified and confirmed" the action of the President in creating the Philippine Commission under the provisions of the Instructions. It was provided that these Islands "shall continue to be governed" under both the Instructions and the Philippine Bill "until otherwise provided by law."

How does this affect the law of criminal procedure in these Islands? It has been repeatedly said that under the Spanish law of criminal procedure the statute expressly provided for appeal by the government in criminal cases. The following are some of the legal provisions relating to appeals in criminal cases:

> "Procederá el recurso de casación por infracción de ley o quebrantamiento de forma en todos los juicios criminales." (An appeal may be taken on the ground of errors of law or mistake of procedure against all judgments in all criminal cases) (Ley Prov. de Enj. Crim. (1872) Art. 796; Ruiz, Enj. Crim. 170; Espinosa Proc. Crim. 167).
>
> "Procederá el recurso de casación por infracción de ley o por quebrantamiento de forma, en todos los juicios criminales, a ex-

cepción de los de faltas." (An appeal may be taken on the ground of errors of law or mistake of procedure against all judgments in criminal cases except those in misdemeanor) (Ley Prov. 1886 par. 54; Guevara, Code of Crim. Proc. 140).

The above and other provisions relating to appeals by the prosecution found in "Ley Provisional de Enjuiciamiento Criminal (1872) and "Ley Provisional (1886)" were not repealed by General Orders, No. 58. It is provided in section 1 of the latter law that "... existing laws on the same subjects shall remain valid except in so far as hereinafter modified or repealed expressly or by necessary implication," and in section 43 it says "From all final judgments of the Court of First Instance or courts of similar jurisdiction, and in all cases in which the law provides for appeals from said courts, and appeal may be taken to the Supreme Court as hereinafter prescribed." These and the other provisions already referred to in Chapter III prove that General Orders, No. 58, did not repeal the above quoted provisions of the Spanish law of criminal procedure.

(*c*) On the Appellate Jurisdiction of the Supreme Court.

Closely connected with the present issue is the appellate jurisdiction of the Supreme Court or Audiencia. The specific laws on this subject (besides the sporadic provisions of general procedural nature) are as follows:

"Corresponde a las Audiencias de Ultramar: Conocer en segunda instancia: De los asuntos civiles y criminales que los Juzgados de Primera Instancia ordinarios y especiales deban remitirse en apelación o en consulta." (It is incumbent upon the Supreme Courts of the colonies to take cognizance in the second instance of all cases civil and criminal which the Courts of First Instance, regular or especial, may send on appeal or *en consulta)* (Real Cedula de 1855, Cap. II, sec. 2, Art. 51, par. 8).

"Corresponde a las Salas de lo Criminal de las Audiencias: Conocer en segunda instancia de las causas que los Jueces de Primera Instancia les remitan en apleación o en consulta." (It is incumbent upon the criminal branches of the Supreme Courts to take cognizance of the cases which the Judges of the Courts of First Instance may send to them on appeal or *en consulta)* (Comp. Gen. Refda., Sec. III, Art. 13, par. 2; Espinosa, Proc. Crim. 167).

Since General Orders, No. 58, provides that in all cases in which the previous laws provided an appeal from the final judgments of the Courts of First Instance or courts of similar jurisdiction an appeal may be taken to the Supreme Court, the criminal jurisdiction of the latter remained as it was at the time of the Audiencia. This jurisdiction included the power to review all criminal cases decided in the courts of First Instance sent to the Audiencia either *en consulta* or on appeal by either

party. The Judiciary Act (Act No. 136 of the Phil. Com.) provides for the appellate jurisdiction of the Supreme Court thus:

> "Sec. 18. Its Appellate Jurisdiction. The Supreme Court shall have appellate jurisdiction of all actions and special proceedings properly brought to it from Courts of First Instance, and from other tribunals from whose judgments the law shall provide an appeal to the Supreme Court."

This provision says "... all actions and special proceedings properly brought to it..." which simply means appeals brought to it in accordance with law. It is clear that neither the Code of Criminal Procedure nor the Judiciary Act abolished or even diminished the jurisdiction formerly possessed and exercised by the Audiencia. Therefore the power of the Supreme Court to review all criminal cases and to take cognizance of appeal by either party is authorized by General Orders, No. 58, and Act No. 136. Congress expressly "approved, ratified, and confirmed" both of these laws when it enacted the Philippine Bill providing in

> "Sec. 9. That the supreme court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided and such additional jurisdiction as shall hereafter be prescribed by the government of said Islands, subject to the power of said government to change the method of procedure."

Had Congress meant to abolish the power of the Supreme Court of the Philippine Islands to exercise appelate jurisdiction over criminal cases brought to it on appeal by either party or *en consulta* it would not have said "That the supreme court... of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided..." for such a provision is capable of only one logical construction, namely, that the jurisdiction of the Supreme Court before the Philippine Bill was enacted remained unaltered after the passage of that Act.

(*c*) Conflict Between Sections 5 and 9.

The question that might be asked is: Why should Congress provide in section 5 "... that no person for the same offense shall be put twice in jeopardy of punishment..." if it had intended in section 9 of the same Act that the Government had a right to appeal in criminal cases, an appeal being a second jeopardy? It is necessary to dig out the proper solution of this problem in order to reconcile these two sections which are apparently in conflict. If we adhere to the proposition that in incorporating the jeopardy clause into the Philippine Bill, Congress intended that it should be construed in the sense prevailing in common law jurisdictions, a difficulty will result and the attempt to harmonize the legislative intent in the jeopardy

clause with that which relates to the jurisdiction of the Supreme Court will fail. The only feasible method then, is to take the opposite course restricting the meaning of "jeopardy" in the sense that an appeal does not constitute a violation of the constitutional injunction against placing a person in a second jeopardy; and expanding the meaning of "jurisdiction" of the Supreme Court as used in section 9 so as to include in it the power to take cognizance of appeal by either party to a criminal action as exercised by the Audiencia. This is in accordance with the rule in statutory construction which says: "Not only may the meaning of the words be restricted... to avoid repugnance with other parts, but for like reasons they may be expanded. The application of the words of a single provision may be enlarged or restricted to bring the operation of the Act within the intention of the legislature, when violence will not be done by such interpretation. The propriety and necessity of thus construing words are most obvious and imperative when the purpose is to harmonize one part of the act with another in accord with its general intent" (II Lewis' Sutherland Statutory Construction (2d Ed.) Sec. 348). Another principle of constrution applicable to the present discussion is that which has reference to the position of each provision in the statute. The jeopardy clause is in section 5 and the provision relating to the jurisdiction of the Supreme Court is in section 9. It is a rule in statutory construction that where one part of a statute is in conflict with another the one later in position prevails over the other because "being later in position, the prevailing provision is deemed a later expression of the legislative will" (II Lewis' Sutherland St. Const. (2 Ed.) sec. 349). Applying either of these two rules of statutory construction, we find that each result will force us to the conclusion that the provision of section 9 prevails over that of section 5, that is, that since the Philippine Bill provides that the jurisdiction of the Supreme Court shall be the same as heretofore, the Organic Act reserves to the Supreme Court the power possessed and exercised by the Audiencia to take cognizance of appeals brought to it by either party to a criminal action.

CONCLUSION AND RECOMMENDATION.

A. *Conclusion.*

Having now discussed the premises of the present study we come to the following conclusion:

1. That the right of the Government to appeal in criminal

cases granted by the Spanish law of criminal procedure has not been abolished by General Orders, No. 58.

2. That the constitutional prohibition against double jeopardy should be interpreted to mean that an appeal by either party to a criminal action is not a new trial and therefore does not place the defendant in a second jeopardy.

3. That section 9 of the Philippine Bill authorizes the Supreme Court of the Philippine Islands to take cognizance of appeals by the Government in criminal cases on the ground of errors of law or of facts, against a judgment of acquittal, or an order sustaining a demurrer or dismissing a complaint or information.

4. That the right of the prosecution to appeal being granted by necessary implication by section 9 of the Philippine Bill is constitutional.

B. *Recommendation.*

It is recommended that another appeal in a criminal action be taken by the Government against a judgment of acquittal or on the ground of errors of law or facts so as to test the constitutionality of such right and to overrule the doctrine laid down in the Kepner case.