THE NEED FOR A NEW APPROACH TO THE DOCTRINE OF DOUBLE JEOPARDY

It is one of the misfortunes of law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.[1] Into such a rut has fallen the doctrine of double jeopardy.

Double jeopardy simply means the danger of being punished twice for the same offense. It is given expression in the Constitution thus:

> "No person shall be twice put in jeopardy of punishment for the same offense."[2]

Although the above-quoted clause bears no mention of a prohibition against the state's appealing, in a criminal case, the acquittal of a defendant, time and the courts have conspired to put a meaning into it where there was clearly none before.

Thus, it has become a roadblock in the highway of legal ordering. Consider the following instances:

1) The deputy chief of police of Manila was accused of malversation of public property for having allegedly sold a pistol which had been turned over to the Philippine Government by the U.S. Army. The trial court, proceeding from the theory that the gun was loaned

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[1] Justice Holmes, diss. op., *Hyde v. U.S.*, 225 U.S. 347, 391 (1912).

[2] Art. III, Sec. 1 (20), first sentence. The clause traces its paternity to the Philippine Bill of 1902, President McKinley's Instructions to the First Philippine Commission, and the American Bill of Rights as contained in the Fifth Amendment to the Constitution of the United States. The second sentence of the same provisions states, "If an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act." The latter sentence is merely a reiteration, as well as an adaptation, of a doctrine long accepted in continental Europe, that a conviction or acquittal of one crime in one state constitutes a bar to the prosecution for the same crime in another state. GRANT, J. A. C., *The Lanza Rule of Successive Prosecutions*, 32 COL. L. REV. 1309 (1932). This doctrine was adopted in the United States in the case of *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820). The Supreme Court in that case rejected the double sovereignty theory by ruling that conviction or acquittal in a criminal case in a state court was a bar to prosecution for the same offense in a federal court, and, conversely, acquittal or conviction in the federal court constituted a bar to prosecution for the same crime in any of the 48 state courts. The rule was accepted that a person who commits a crime offends only one sovereignty and not two sovereignties. See Justice Story's view in 32 COL. L. REV. 1309 (1932) and Justice Trent's in *Ducte v. Dade*, 32 Phil. 36, 40 (1915). The *Houston* case was repudiated more than 100 years later in *U.S. v. Lanza*, 260 U.S. 377, 43 Sup. Ct. 141 (1922). That decision, however, has been deplored. See Grant, *supra*. At any rate, the second sentence of Article III, Sec. 1 (20) of the Constitution follows the *Houston* rule and ignores completely the *Lanza* rule. It cannot be said to have broadened the entire rule on double jeopardy. For an opposite view, see I TAÑADA and FERNANDO, CONSTITUTION OF THE PHILIPPINES (4th ed.) 623 (1952).

only by the U.S. Army, and finding that the prosecution failed to prove that the gun in question was property of the Philippine Government, acquitted the defendant.[3] The decision was as a bitter pill in the tastebuds of many a faithful student of law, but the prosecution was helpless to appeal. Double jeopardy, as the courts have interpreted it, stood in the way.

2) The mayor of Manila was accused of libel for having called the judge who penned the decision in the aforecited case an "ignoramus." The court acquitted the defendant,[4] and, although some members of both Bench and Bar were of the belief that the judge had not interpreted the libel law correctly, the prosecution could not appeal. Again double jeopardy, or, more truly, the judicial construction of it, shackled the hands of the State.

3) A radio announcer was accused of bigamy for having married three times, each of the previous marriages still subsisting. As the first wife of the defendant was missing and as the prosecution failed to seek postponement of the hearing to give it time to present the first wife, the defendant was acquitted.[5] The judge himself believed that the defendant was guilty of bigamy, and said so in a radio interview.[6] The prosecution prepared to appeal the order of acquittal, but ultimately the plan had to be abandoned. As usual, double jeopardy—how it is understood, that is—served as a block to the contemplated appeal.

4) A plane passenger hijacked an aircraft in an attempt to flee to alien territory and, when the pilot and the purser resisted, shot them both. He was sentenced to a penalty which, to the prosecution, seemed far lighter than that which he deserved. With this contention, the State appealed the case, but the Supreme Court refused to disturb the decision of the trial court.[7] Again double jeopardy reared its head to stop justice from taking its course.

All the above instances serve to provide a basis to warrant the thesis that the judicial construction heretofore given to the doctrine of double jeopardy, which has prevented the State from appealing a verdict of acquittal or dismissal in a criminal case, is not thoroughly satisfactory. A reexamination of that judicial theory seems to be imperative and in order.

I—THE KEPNER RULE

As has been stated above, the constitutional provision which touches on the matter of double jeopardy makes no mention at all of any prohibition against the state's appealing in a criminal case. The Rules of Court, however, states that

> "The People of the Philippines cannot appeal if the defendant would be placed thereby in double jeopardy." [8]

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[3] *People v. Juan*, Crim. Case No. 20177, CFI, Manila (1952).
[4] *People v. Lacson*, Crim. Case No. 21707, CFI, Manila (1953).
[5] *People v. Yabut*, Crim. Case No. 4397, CFI, Rizal (1953).
[6] Delivered over DZBB, Dec. 4, 1953.
[7] *People v. Ang Cho Kio*, G.R. Nos. L-6687 and L-6688, July 29, 1954.
[8] Rules of Court, Rule 118, Section 1.

Considering that the Rules of Court was promulgated by the Supreme Court in pursuance of a provision of the Constitution,[9] it is not improper to assume that the "double jeopardy" clause in the Rules of Court was drafted conformably with what has long been that tribunal's interpretation of the double jeopardy clause as found in the Constitution. It is meet then that we examine the leading case which dictated that, when the Constitution spoke of double jeopardy, it meant that the State could not appeal.

The present judicial construction of the double jeopardy doctrine traces its paternity to the case of *Kepner v. U.S.*[10]

Kepner, an American lawyer practising in Manila, was accused of *estafa* for illegally cashing a warrant drawn in favor of his client. He was acquitted by the Court of First Instance of Manila. The State appealed to the Philippine Supreme Court. In the high tribunal, the defendant challenged the right of the State to appeal, pleading in defense double jeopardy. He claimed that, although the Military Governor's General Orders No. 58 [11] allowed the State to appeal, the order must give way to the provision of the U.S. Constitution against double jeopardy, which, as interpreted by the United States Supreme Court,[12] prohibited the State from appealing. Defendant Kepner's motion to dismiss was denied. At about the same time, the U.S. Congress enacted the Philippine Bill of 1902,[13] incorporating therein the U.S. Constitution's provision against double jeopardy.[14] Kepner then presented his motion to set aside judgment of the Supreme Court, alleging that the incorporation of the double jeopardy clause, as contained in the U.S. Constitution, into the Philippine Bill of 1902 showed the intent of the U.S. Congress to repeal the provision in G. O. No. 58, which granted the State the right to appeal, and to have the double jeopardy clause, as interpreted by the U.S. Supreme Court, apply in the Philippines.

The Philippine Court, composed of four American and three Filipino justices, in a unanimous decision penned by Justice Smith, ruled that there was no double jeopardy involved, as the appeal by the State did not subject the accused to the peril of second punishment. Furthermore, the Court held, the incorporation of the double jeopardy clause into the Philippine Bill of 1902 could not be construed to mean an implied repeal of G. O. No. 58; rather, the double jeopardy clause should be applied in the light of criminal procedures peculiar to the Philippines.[15]

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[9] Art. VIII, Sec. 13, Constitution of the Philippines.

[10] See *Kepner v. U.S.*, 195 U.S. 100 (1904), 49 L. Ed. 114 (1904), repub. in 11 Phil. 669 (1908), reversing *U.S. v. Kepner*, 1 Phil. 397 (1902).

[11] Promulgated April 23, 1900.

[12] *U.S. v. Sanges*, 144 U.S. 310, 12 Sup. Ct. 609 (1892); *U.S. v. Ball*, 163 U.S. 662, 16 Sup. Ct. 1192 (1896).

[13] 32 Stat. 691, passed by the U.S. Congress on July 1, 1902.

[14] *Supra*, note 10.

[15] *U.S. v. Kepner*, 1 Phil. 397 (1902).

Defendant sought review of the Philippine decision by the U.S. Supreme Court. Divided 5 to 4, the U.S. Court reversed the Philippine decision.[16] Justice Day, who wrote the main opinion, said:

> "It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be rendered on the verdict, and it was founded upon a defective indictment. The protection is not, as the court below held, against the peril of second punishment but against being again tried for the same offense."

Thus was born in the Philippines the interpretation that double jeopardy meant that the State could not appeal in a criminal case.

From 1904, when the case was decided, until the Philippines became independent, several cases were presented before the Philippine Supreme Court, disputing the *Kepner* rule.[17] In all of them, the Court, without a moment's hesitation, refused to disturb the rule. This was understandable, for it was a colonial court. It was then still bound by the decision of the U.S. Supreme Court.

But even after the Philippines had obtained her independence and the U.S. Supreme Court had lost its power of review over decisions of the Philippine Supreme Court,[18] the rule is still adhered to. In 1949, an attempt was made to ask the Supreme Court to revise the judicial interpretation of the double jeopardy clause in the case of *People v. Tan*.[19] The attempt failed. In the recent case of *People v. Ang Chio Kio*,[20] the Court again refused to reexamine its own construction of the doctrine.

The Philippine Court has been content to accept the American Court's pronouncement as a doctrine *ex-cathedra* and has refused, so to speak, "to look under the rug." The Court seems to have forgotten that until 1904, when the *Kepner* case was decided, the Philippine Supreme Court, in interpreting the double jeopardy clause, had been allowing the State to appeal from a judgment acquitting a defendant in, or dismissing, a criminal case.[21] It seems to have

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[16] *Kepner v. U.S.*, *supra*, note 10.

[17] *U.S. v. Salvador*, 4 Phil. 509 (1905); *U.S. v. Yam Tung Way*, 21 Phil. 67, 71 (1911); *U.S. v. Romero*, 22 Phil. 565 (1912); *U.S. v. de la Cruz*, 28 Phil. 279 (1914); *U.S. v. Kilayko*, 32 Phil. 619 (1915); *People v. Borja*, 43 Phil. 618 (1922); *People v. Fajardo*, 49 Phil. 206 (1926); *Ramos v. Buyson Lampa*, 63 Phil. 215 (1936).

[18] As it stands now in this jurisdiction, decisions of the U.S. Supreme Court have only persuasive, but not controlling, force over decisions of the Philippine Supreme Court. Precedent is only evidence of law here and not the law itself. GAMBOA, M.J., AN INTRODUCTION TO PHILIPPINE LAW (1947, 5th ed.) 73.

[19] G.R. No. L-2705 (1949).

[20] *Supra*, note 7.

[21] *Kepner v. U.S.*, *supra*, note 10; *D. Juan Garcia v. D. Cesar Lopez Gascon*, Crim. Branch of the Supreme Court of Justice, Philippine Islands, Sept. 12, 1900 (unpub.); *U.S. v. Mateo Perez*, 1 Phil. 203 (1902); *U.S. v. Kepner*, 1 Phil. 519 (1902); *U.S. v. Mendezona*, 2 Phil. 363 (1902).

forgotten, too, that when the Kepner case was passed upon by the Philippine court, seven justices [22] unanimously were of the opinion that double jeopardy did not, and does not, prohibit the State from appealing; or that when the same case was brought to the U.S. Supreme Court, four justices [23] were of the same opinion as the seven justices of the Philippine Supreme Court, while only five justices held the opposite view. Surely, it is disturbing to think that eleven jurists were in error, while the other five, who believed in the *Kepner* rule, were in the right.

The Philippine Court seems to have closed its eyes to the fact that even in the United States, where the *Kepner* rule originated, attempts had been made to revise the judicial interpretation of the double jeopardy concept. After the decision in the *Kepner* case was handed down, President Theodore Roosevelt, in a message to the U.S. Congress, called attention to the need of an enactment altering the rule, and conferring upon the government the right of appeal in criminal cases on questions of law.[24] He deplored

> "the power at present possessed by a single district judge to set at naught a congressional enactment believed by the vast majority of his colleagues to be valid, the danger of frequent conflicts, real or apparent, in the decisions of the various district or circuit courts, and the unfortunate results thereof, and the impossibility of the government's obtaining final and uniform rulings by recourse to higher court."

Recognizing the evils flowing from the *Kepner* rule, as outlined by President Roosevelt, the U.S. House of Representatives accordingly passed a bill [25] allowing the U.S. "the same right of review by writ of error that is given to the defendant, including the right to a bill of exceptions, provided that . . . a verdict in favor of the defendant shall not be set aside." The bill, with slight alterations, was subsequently unanimously reported by the Senate Committee on Judiciary.[26] However, the lawmakers stopped there. Although little was said in opposition to the measure, it never reached a vote.[27]

The measure's failure, however, was not so much due to the objection to the State's right to appeal as it was to the proviso that "a verdict in favor of the defendant shall not be set aside." [28]

II—THE KEPNER RULE IS NOT SOUND LAW

The American decision in the *Kepner* case is shot through with defects.

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[22] Justices Smith, Arellano, Torres, Cooper, Hillard, Ladd and Mapa.

[23] Justices Holmes, White, McKenna and Brown.

[24] 20 HARV. L. REV. 219 (1907).

[25] U.S. Congressional Record, 1st Session, 59th Congress, 5408.

[26] *Ibid*, pp. 7589, 8695.

[27] *Supra*. note 24.

[28] The proviso permitted the State to appeal from the decision acquitting the accused, but the acquittal would remain unaffected by any decision of the appellate tribunal. Of what use, then, would the government appeal be if it could have no

Justice Day, who penned the majority decision, cited numerous American cases as convenient props for his opinion. Most outstanding of these cases were *U.S. v. Sanges* [29] and *U.S. v. Ball.*[30] An analysis of these cases, however, will show that his reliance on them is improper.

In the *Sanges* case, defendants were accused of having conspired together in the commission of murder. On demurrer, the indictment was quashed on the ground that, "on the facts in said indictment, there is no crime or offense set out which the courts of the United States can take cognizance (*sic*)." The State sued out a writ of error which was allowed by the presiding justice. The defendants in error moved to dismiss the writ of error for want of jurisdiction. The Supreme Court sustained the defense, ruling, after citing a score of cases decided in different states of the U.S., that the State has no right to sue out a writ of error in a criminal case upon a judgment in favor of defendants, whether rendered upon a verdict of acquittal or upon a determination by the court of an issue of law.

In the *Ball* case, two of three defendants indicted for murder were found guilty. On writ of error, the indictment was quashed

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effect on the fate of the defendant? The defendant would have no interest in answering the appeal and defending his cause. Such proceedings would be productive of *ex parte* arguments and consequently poor decisions. See Senator SPOONER's remarks, CONGRESSIONAL RECORD, 1st Session, 59th Congress, 9033. Cf. WAMBAUGH, STUDY OF CASES, 2nd ed., Sec. 5, cited in 20 HARV. L. REV. 219, 210 (1907).

Statutes similar to the above bill were passed in Ohio [Ohio Revised Code, sections 2945, 67 *et seq.* See 22 U. OF CINCINNATI L. REV. 463 (1953)], allowing the prosecuting attorney or attorney general to apply to the court of appeals or supreme court for permission to file a bill of exceptions in cases in which the accused is acquitted. If permission was granted, the trial judge appointed an attorney to argue the bill of exceptions against the prosecuting attorney or attorney general and the case was heard. The decision of the appellate court, however, does not affect the judgment of the trial court but serves only to determine the law to govern in future cases.

This statute had been attacked. In *State v. Cox*, [87 Ohio St. 313, 101 N.E 135 (1913)], it was contended that the court's decision would only be advisory. The court held that a justiciable controversy was presented for determination even though the defendant could not be tried again on the ground that it concerned a question of great public interest as opposed to a question of a private character. In *State v. Orlinski*, [21 Ohio L. Abs. 429 (Ohio App. 1936)], the court refused to review a judgment appealed by the State on the ground that a decision would be nothing more than a decision of a moot question. Parenthetically, the court held that it had jurisdiction to hear the case anyway, because the constitutionality of a statute was involved and the penalty for violation of the statute was small. In *U.S. v. Evans* [213 U.S. 297 (1909); 29 Sup. Ct. 507 (1908)], the Supreme Court, construing a similar statute, held that the opinion of the court would be advisory only. It would be merely an expression of opinion and, therefore, not a judicial act.

For a similar objection to the introduction in the Philippines of the principle of declaratory judgments during the Constitutional Convention, see ARUEGO, J. M., THE FRAMING OF THE PHILIPPINE CONTITUTION, 192, 193 (1936).

[29] 144 U.S. 310, 12 Sup. Ct. 609 (1892).

[30] 163 U.S. 662, 16 Sup. Ct. 1192 (1896).

on the ground that the indictment did not support a charge of murder, but merely physical injuries. Remanded to the circuit court, the case was dismissed. The grand jury returned against all three defendants a new indictment which would support a charge of murder. All defendants pleaded double jeopardy. The circuit court decided against the pleas, because "this court had decided that the former indictment was insufficient as an indictment for murder." The jury forthwith returned a guilty verdict against all three defendants. On appeal by writ of error, the Supreme Court ruled that jeopardy would exist, even when the error is patent on the face of the record, as when he is tried on a defective indictment, if the judgment is not arrested. Justice Gray, who wrote the decision, said: [31]

> "That a party shall be deprived of the benefit of an acquittal by a jury on a suggestion of this kind (an allegation by the prosecutor of his inaccuracy or neglect as a reason for second trial), coming, too, from the officer who drew the indictment, seems not to comport with that universal and human principle of criminal law 'that no man shall be brought into danger for more than once for the same offense.' It is very like permitting a party to take advantage of his own wrong. If this practice be tolerated, when are trials of the accused to end?" (*Words in parenthesis supplied.*)

The common denominator in the rule in both cases is that first indictment in each case was defective. Justice Day, who wrote the *Kepner* rule, should not have then relied on the *Sanges* and *Ball* cases, because the *Kepner* case did not involve a defective first indictment but an error in law. The rule of the *Sanges* and *Ball* cases was really not applicable to the *Kepner* case. Moreover, the *Sanges* and *Ball* cases also held that double jeopardy would accrue even when the first indictment was defective.

If that was so in the United States, it did not apply in the Philippines. It has since become inconsistent with a Philippine decision in the case of *People v. Ylagan*,[32] where it was held that an accused in a criminal prosecution is once put in jeopardy when placed on trial under the following conditions: (a) *upon a valid complaint or information;* (b) before a court of competent jurisdiction; (c) after he has been arraigned; and (d) after he has pleaded to the complaint or information. There would be no initial jeopardy if the four elements were not all present. These four elements are concurrent. In the absence of one, initial jeopardy cannot at all be pleaded; much less can there be a second jeopardy. The claimed authority for the *Kepner* case (*Sanges* and *Ball* cases) being inconsistent with the rule laid down in the *Ylagan* case, it is quite logical to state that either the *Kepner* or the *Ylagan* case must go by the board if the Supreme Court desires consistency.

Again, the *Kepner* case should not have relied on the *Sanges* and *Ball* cases, because the judgments in these two cases were ren-

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[31] *Ibid*, p. 1194.

[32] 58 Phil. 851 (1933). *See also People v. Soo Po Kuat*, G.R. No. L-30131, prom. Oct. 15, 1929; *Mendoza v. Almeda-Lopez*, 64 Phil. 820 (1937). 2 MORAN, COMMENTS ON THE RULES OF COURT 800 (1952 ed.); 7 COL. L. REV. 52 (1907).

dered under jurisdictions where the jury system of trial is in force. In the Philippines, however, trial by jury is unknown.[83] The *Kepner* case, then, which originated in a non-jury jurisdiction, should not have been decided in the same way as the *Sanges* and *Ball* cases, which originated in a jurisdiction where the jury constitutes part and parcel of the judicial system. There is a very serious objection to applying a rule which is good under a jury system to a case under a non-jury system. It lies in the fact that the finality or non-finality of the judgment of a trial court depends on whether trial was had with a jury or not. For, under a jury system, the trial court's decision, based upon the finding of a jury, is final; it is not so in a non-jury system.[84]

A. *Why Judgment in a Jury System Is Final.*

At common law, finality is attributed to the verdict of a jury. No appeal, either from the accused or from the State, was permitted from the verdict or judgment entered upon it. Both verdict and judgment were final, and jeopardy became complete "not because there had been a conviction or acquittal, but because the question of

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[83] The system of jury trials, while not unknown in Spain, had never been an institution of Philippine Law. President McKinley, in his instructions to the First Philippine Commission, took care not to introduce the system of jury trials in the Philippines. He wrote:

> "The Commission should bear in mind that the government which they are establishing is designed not for our satisfaction, 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 the indispensable requisites of just and effective government." [See *People v. Perfecto*, 43 Phil. 887, 889 (1922)].

Bearing this in mind, the Commission did not impose the jury system upon the Philippines. The introduction of jury trials would have been an innovation for which there was no demand, and which would have made administration of justice extremely difficult.

Surely, there had been objections made to the absence of jury trials in the country at that time. It was contended that, the Philippines having been acquired by the United States, the system of jury trials should have been introduced here, in order not to do violence to the requirement in Article III, Section 2 of the Constitution of the United States that "the trial of all crimes, except in cases of impeachment, shall be by jury." "The Constitution follows the flag," it was argued, and, therefore, the Constitution must be in force in every possession of the United States.

In *U.S. v. Dorr* [2 Phil. 270 (1903), 195 U.S. 138 (1904)], however, the U.S. Supreme Court held that defendants in a criminal case for libel in the Philippines were not entitled to trial by jury. The contention that the accused was entitled to jury trial was again raised in *U.S. v. Carrington* [5 Phil. 725 (1906), 208 U.S. 1 (1908)], but the same court decided that case on some other point and merely brushed aside the question touching on the jury trial. In *U.S. v. Grafton* [6 Phil. 55 (1906), 206 U.S. 333 (1907)], the ruling in the *Dorr* case was followed and the defendant was held not to be entitled to jury trial.

[84] *U.S. v. Kepner, supra*, note 15.

innocence or guilt . . . had been finally determined beyond all possibility of judicial change or alteration." [35]

From this theory arose the ruling that jeopardy accrued as soon as trial commenced before a competent court and jury, and, save in case of a mistrial, could be pleaded in bar of a subsequent prosecution.[36] Under this test, acquittal was final, but conviction was not. In some courts, the verdict of the jury was made the test of an accrued jeopardy. Here final determination was the main test. Under this test, the determination being final, neither State nor accused could appeal. The principle of double jeopardy, under this test, would be made to apply not only to appeals by the State after an acquittal, but to the defendant after conviction as well. The right of appeal in each case would be denied.[37]

B. *Why Judgment in Non-Jury System Like the Philippines Is Not Final.*

The reason for the finality of judgments in trial courts which is present in jury jurisdictions is absent in non-jury jurisdictions, such as the Philippines. On the contrary, the civil law system considers no decision of the trial court to be final. Under the Philippine system of penal procedure, as it had existed before the promulgation of G. O. No. 58, no decision of a trial court in felony cases was final. All were reviewed, with or without appeal, by higher courts, whether judgment of the trial court were one of conviction or one of acquittal. The system was changed by American authorities only to the extent of making judgments in trial courts final in felony cases—save when death penalty was imposed—unless an appeal was taken by the State or by the accused. Thus, before the appearance of G. O. No. 58 in our legal realm, all *delito* cases were automatically subject to review. After G. O. No. 58 was enforced, only when capital punishment was imposed could a conviction be automatically subject to review. In criminal cases where the lesser penalty was imposed, the appellate court could review only where there was an appeal. But such an appeal was accessible both to the State as well as to the defendant.[38]

In the *Kepner* case, however, Justice Day admitted that the lower courts in the Philippines under the Spanish system were merely examining tribunals and there was no final judgment of conviction or acquittal until the case had been passed upon by the *Audiencia* or Supreme Court, but that this system was changed by G. O. No. 58. Nevertheless, he was of the belief that, when the U.S. Congress, in drafting the Bill of Rights incorporated into the Philippine Bill of 1902, included the double jeopardy clause as found in the U.S. Con-

[35] *Ibid*, p. 399.

[36] 19 VA. L. REV. 33, 38 (1932).

[37] *U.S. v. Gilbert*, 2 Sumn. 19 (1834). cited in 4 COL. L. REV. 590 (1904).

[38] Sec. 44 of G. O. No. 58 states: "Either party may appeal from a final judgment affecting the substantial right of the appellant or in any case now permitted by law. The United States may also appeal from a judgment for the defendant rendered on a demurrer to an information or complaint, and from an order dismissing a complaint or information."

stitution, it did so with the intention of giving in the Philippines the same meaning theretofore given it by settled judicial opinion in the United States.

This opinion leaves much to be desired. There is no indication whatsoever that such was the intention of the U.S. Congress. The Philippine Bill of 1902 cannot be construed to have repealed by implication the judicial construction of a law then in force in the Philippines which was not inconsistent with the Act of the U.S. Congress.[39]

The doctrine of double jeopardy was not strange in the Philippines prior to the American occupation. It was contained in the *Fuero Real*[40] and the *Siete Partidas*,[41] both of which had been in force in the Philippines. Under either, appeals by the State were permitted in a criminal case. That was the doctrine obtaining in the islands when President McKinley's Instructions[42] became the organic act in the Philippines. Thus, it is more reasonable to believe that when the U.S. Congress incorporated the double jeopardy clause, as found in the U.S. Constitution, in McKinley's Instructions, in the *Fuero Real* and in the *Siete Partidas*, into the Philippine Bill of 1902, it did so in the light of existing insular laws and not "in the light of judicial construction applicable at best to jury trials, which have not now, never have had, and are not likely to have, in the immediate future any place in the jurisprudence of the (Philippine) Archipelago."[43] In like tenor was Justice Brown's dissent in the *Kepner* case:[44]

> "I think that in applying the principles (of double jeopardy) to the Philippine Islands, Congress intended to use the words in the sense in which they had theretofore been understood in those Islands. By that law, in which trial by jury was unknown, the jeopardy did not terminate, if appeal were taken to the Audiencia or Supreme Court, until that body had acted upon the case."

Another error in reasoning into which Justice Day had fallen when he wrote the majority decision in the *Kepner* case was in his insistence on the belief that the protection afforded by the doctrine

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[39] *Kepner v. U.S.*, *supra*, note 10.

[40] "After a man, accused of any crime, has been acquitted by the court, no one can afterwards accuse him of the same offense (except in certain specified cases)." Fuero Real, lib. iv, tit. xxi, 1, 13 (1255).

[41] "If a man is acquitted by a valid judgment of any offense of which he has been accused, no other person can afterwards accuse him of the offense (except in certain cases)." Siete Partidas, Part. vii, tit. i, l. xii (1263).

[42] Issued on April 17, 1900. See Public Laws and Resolutions of the Philippine Commission.

[43] *U.S. v. Kepner*, *supra*, note 15.

[44] *Kepner v. U.S.*, *supra*, note 10.

of double jeopardy was not against the peril of second punishment, but against being again tried for the same offense." [45]

All civilized peoples are substantially agreed that, when a person accused of crime has been once finally convicted or acquitted of the charge against him, he ought not to be vexed again by a prosecution for the same offense. The plea of once in jeopardy is the *res adjudicata* of the criminal case.[46] However, until a proper acquittal has been pronounced, the jeopardy of the defendant is not such as will avail him for a defense in a subsequent action.[47] An improper acquittal is not a bar to subsequent trial for the same offense.[48] An acquittal, in order to be proper, must be final. Under the Philippine law at the time the *Kepner* case was decided, a case decided in the trial court was not deemed final because, "once a criminal cause is before the court, whether on appeal or on review, the judgment may be changed, altered, or reversed as the appellate tribunal may seem proper." [49] Acquittal or conviction could not take place except when a prosecution had been carried through all its stages and a final judgment of conviction or acquittal rendered therein.[50] In the same proceeding, there can be no danger of second punishment until the first has been finally adjudged. The proceedings upon appeal then are but a continuation of those below and they involve no danger that the accused may be twice punished for the same offense.[51]

As pointed out by Justice Holmes, in his dissenting opinion,[52]

> "A man can not be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle in its original was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case."

This interpretation, prohibiting only a trial on a new and independent indictment for an offense for which defendants had already been tried, enables an appeal at the instance of either party.[53]

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[45] *Supra*, note 10, pp. 698-699.

The constitutional provision that "no person shall be twice put in jeopardy of punishment for the same offense" is a protection extended to an accused person against being tried anew for the same offense. (*Ex parte Lange*, 18 Wall. 163, cited in *Kepner v. U.S.*, *supra*, note 10).

[46] *U.S. v. Kepner*, *supra*, note 15, p. 398.

[47] COOLEY, CONSTITUTIONAL LIMITATIONS (1903, 7th ed.), 468.

[48] *State v. Lee*, 65 Conn. 265, 48 Am. St. Rep. 202 (1894). See also 4 COL. L. REV. 591 (1904); 5 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 222 (1948).

[49] *U.S. v. Kepner*, *supra*, note 15.

[50] *U.S. v. Perez*, 1 Phil. 203, 207-208 (1902).

[51] *U.S. v. Kepner*, *supra*, note 15, p. 402.

[52] *Supra*, note 10, p. 702, concurred in by Justices White and McKenna.

[53] 18 HARV. L. REV. 216 (1905).

By ruling that the protection of double jeopardy clause was against being again tried for the same offense, Justice Day and the majority of the U.S. Supreme Court in the *Kepner* case seemed to have indulged in judicial legislation. In fine, the American Court, by its approval of Justice Day's opinion, so enlarged the scope of the phrase "in jeopardy or punishment for the same offense" as found in the Philippine Bill of 1902 [54] as to make "punishment" mean "trial."

This construction of the word "punishment" seems a little too strained, for surely when one is tried, it can not be said that he is being punished. The purpose of double jeopardy was to eliminate the danger that "experiment after experiment be made on the lives of men." [55] In its origin, the defense of former jeopardy was a means of preventing persistent prosecution [56] which would amount to persecution. And persecution should not be confused with prosecution which gives rise to a trial. Viewed in this light, the Philippine Court's opinion in the Kepner case, that "what is prohibited is not peril of more than one trial but peril of more than one punishment," [57] commends itself.

III—A RULE CONTRARY TO THE KEPNER CASE IS NOT OFFENSIVE

Let us now examine the arguments of those who would oppose the return to the old interpretation of the doctrine of double jeopardy before the *Kepner* case made its unhealthy appearance. Proponents of the present judicial connotation of the double jeopardy clause contend that the rights of a defendant are better protected if the State were not granted the right to appeal than if it were. Their arguments may be summed up as follows:

1) It would be unfair to put a man to the trouble and expense of a second trial after he had been cleared in the first;
2) It is far better to set a guilty man free than to punish mistakenly an innocent man;
3) A return to the old rule would pave the way to abuses by prosecutors, as there would be no end to harassment of a defendant by subsequent prosecutions; and
4) The appeal by the State would be unconstitutional.

All these arguments are not tenable, as will be shown presently.

A. *State Appeal Would Not Cause Unnecessary Trouble.*

In a civil action, the prevailing party is often put to additional expense when the case is appealed.[58] Yet the appeal does not strike

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[54] Reenacted in the Constitution of the Philippines as "in jeopardy *of* punishment."

[55] Notes in *Comm. v. Cook* (Pa. 1822), 6 Serg. & R. 577, 598, as cited in 36 COL. L. REV. 450 (1948).

[56] 4 Hawkins, Pleas of the Crown (7th ed., 1795), c. 35, Sec. 1; c. 36, Sec. 10, cited in 43 HARV. L. REV. 657-658 (1930).

[57] *Kepner v. U.S.*, *supra*, note 10.

[58] 22 U. OF CINCINNATI L. REV. 463, 467 (1953).

anyone as being unjust. The desire of the losing party to obtain a trial free from prejudicial error in the first instance outweighs whatever objection may be interposed regarding additional expenses. It is quite difficult then to see why the same policy may not apply in a criminal case.

Defendants in criminal cases have often an added advantage to litigants in civil cases. If the former are without sufficient funds, the court will appoint competent attorneys to defend them.[59]

The objection to a second trial—if indeed an appeal could be called a second trial—is far-fetched. If the evidence taken at a trial was completely destroyed by fire, a new (or second) trial for the purpose of retaking the evidence which was lost is not double jeopardy.[60] If a new (or second) trial for the same offense is held in order to take evidence which may be missing, there is no double jeopardy.[61] A new trial to determine the civil liability of the accused in a criminal case is allowed under the double jeopardy clause.[62] If the accused is convicted, he could still appeal even if, by so doing, there is second trial for the same offense.[63] All these instances of new or second trial for the same offense are not considered offensive to those who worship the *Kepner* rule. Why then should there be an objection to a doctrine allowing the State to appeal, since the appeal is equivalent to a continuation merely of the first trial for only one offense?

It is difficult to justify any rule of law which would permit an accused to seek a correction of alleged errors committed by the lower court and yet would deny an equivalent right from the State or the offended party. Can it be that an error of the lower court remains an error when it is adverse to the defendant and ceases being so when it is adverse to the prosecution? Right reason dictates that an error of an inferior judicial tribunal, whether committed for or against an accused, must remain an error, vitiating the validity of the decision rendered. Precisely, an appeal to a higher tribunal has been provided for by law to free such decisions from the taint of imperfection and injustice. And an injustice to the people or State is no less an injustice. The rationale behind the appeal would be frustrated if an error committed in favor of the accused were left undisturbed.[64]

B. *Society Needs Protection from Criminals*

It is true that justice, if it is to err at all, must err on the side of the accused rather than on the side of the accuser. But while justice is due the accused, justice, as Mr. Justice Cardozo had pointed out, is due the accuser also.[65] Acceptance of the *Kepner* doctrine

[59] Rule 112, Sec. 3, and Rule 118, Sec. 13, Rules of Court.

[60] *U.S. v. Quilatan*, 4 Phil. 481 (1905); *U.S. v. Roque*, 11 Phil. 422 (1908).

[61] *U.S. v. Laguna*, 17 Phil. 532 (1910).

[62] *U.S. v. Query*, 25 Phil. 600 (1913).

[63] *Trono v. U.S.*, 11 Phil. 726 (1908), 199 U.S. 521 (1905); *U.S. v. Clemente*, 24 Phil. 178 (1913).

[64] See Counsel's Brief for Petitioner in *People v. Tan*, *supra*, note 19.

[65] *Snyder v. Massachusetts*, 291 U.S. 97 (1933).

would prevent the attainment of the ideal of justice for the accuser. Thus, because of the *Kepner* case, when a judge commits a mistake, wittingly or unwittingly, in the appreciation of the law and dismisses a criminal case or acquits a defendant, society is rendered helpless and the State is left without a remedy.[66] To deny the State the right to appeal would be to give the criminals more protection than the sense of justice, rightness and fairness demand.

The proposition that a person accused of 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 its favor, has neither sound sense nor sound law to support it. The ultimate purpose of the science of law is a correct judgment, legally obtained. To permit the right of appeal to the accused and deny it to the State is in derogation of the public policy concerning the uniformity in the administration of justice, which is one of the several public policies denotive or expressive of the great social interest in the maintenance of the general security.[67] The defendant has no higher right to be protected against an improper conviction than has the body politic to be secure against an unlawful acquittal and a miscarriage of justice.[68] The object of criminal laws is to purge the community of persons who violate the laws to the great prejudice of their fellow men.[69]

That it is far better to set a guilty man free than to punish mistakenly an innocent man cannot be doubted. That argument, however, springs from a presumption that when an appeal is made by the State the innocent man would be found guilty. The error of that presumption is so patent that it needs no further elucidation.

C. *The Possibility of Harassment Is Remote.*

Under a doctrine opposed to *Kepner's* the State might be tempted to be unduly harsh to the accused. But "we should not permit our knowledge that abuses sometimes occur to give sinister coloration to procedure which are basically reasonable." [70] Abuses are possible under any rule.

Innocent men, nevertheless, have nothing to fear if the State were allowed to appeal. When new trial is granted, as when trial was attended by fraud or mistake, innocent men do not fear. With more reason then should innocent men have nothing to fear in an appeal by the State, for the appeal would not affect the merits of the case of the defendant. The State would still have the burden of proving that the accused was guilty beyond reasonable doubt.[71]

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[66] FISHER, F. C., *Some Peculiarities of Philippine Criminal Law and Procedure*, 19 VA. L. REV. 33, 40 (1932). "Society is now without remedy against an erroneous acquittal, however palpable. This is to be deplored, for all must agree that under our system there is much more danger that criminals will escape justice than that they will be subjected to tyranny."

[67] PASCUAL, C., THE NATURE AND ELEMENTS OF THE LAW, 1954 ed., 105-106.

[68] Smith's opinion, *supra*, note 15.

[69] *Villaflor v. Summers*, 41 Phil. 62 (1920).

[70] *Harris v. U.S.*, 331 U.S. 145 (1946).

[71] *Supra*, note 58.

If judges were still supine tools of tyrannical power there might be good reason for not permitting either side to appeal from a verdict, but when courts have become good enough to pass upon the validity of a verdict of conviction, it would seem that they might safely be trusted to pass upon a verdict of acquittal. When the reason for the rule ceased, the rule should have ceased also with it. At the present time, there is more danger that criminals will escape justice than that they will be subjected to tyranny.[72]

The doctrine of double jeopardy was utilitarian in its inception. In the days when few trials, civil or criminal, were resolved solely on their merits, the rich and powerful litigants were frequently the successful ones. Especially was this true of criminal proceedings where the prosecutor was the almighty sovereign himself. Because acquittal of a felony was difficult to win and conviction meant death or dismemberment, the courts soon became reluctant to re-try anyone for the same crime a prior acquittal or conviction. This inhibition against two prosecutions for a single offense took root in the English common law and eventually was expressly incorporated in the United States Constitution. Today, improved trial procedure and diminished danger of governmental tyranny have obviated the danger of repeated prosecutions for the same crime.[73] Dangers of abuse or endless harrassment of the accused are now remote. Today, all doubts are resolved in favor of the accused. He is presumed innocent until proven guilty beyond a reasonable doubt.[74] He cannot be compelled to testify against himself.[75] He is given the right to confront his accusers.[76] And, of course, he has a right to have his case reviewed by the appellate courts.[77]

D. *An Appeal by the State Is Not Unconstitutional*

If the *Kepner* rule is not desirable, would an alternative rule be constitutional?

The Supreme Court, in *People v. Tan*,[78] refused to entertain the defendant's attempt to seek a re-examination or reversal of the *Kepner* rule, on the flimsy ground that a similar attempt had "failed to prosper in the constitutional convention." The Court concluded that it was, therefore, the sense of the Constitutional Convention to concur in the doctrine.

There seems to be no clear and positive showing, however, that such an intent was present in the minds of the framers of the Constitution.

During the Constitutional Convention, Delegate Barrion proposed that the meaning of the word *jeopardy*, as then judicially

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[72] Holmes's dissenting opinion, *Kepner v. U.S.*, *supra*, note 10.
[73] 57 Yale L. J. 132-133.
[74] Art. III, Sec. 1 (17), Constitution of the Philippines.
[75] Constitution of the Philippines, Art. III, Sec. 1 (18).
[76] *Ibid*, Sec. 1 (17).
[77] *Supra*, note 58.
[78] *Supra*, note 19.

construed in accordance with the *Kepner* case, be modified in such a way that, before the judgment of the lower court becomes final, an appeal to the higher court could be permitted. He delivered a speech espousing such an amendment. There was no speech against it; neither was there any discussion on it. But the amendment was defeated when put to a vote.[79]

The defeat of Delegate Barrion's proposal, however, does not *conclusively* show that it was the intention of the framers of the Constitution to follow the interpretation attached to the double jeopardy clause by the American court. Rather it would give support to the belief that the framers of the Constitution never bothered to examine the question seriously, probably because they knew that such an action would be futile.

It is also probable that the delegates to the Constitutional Convention know that such an action would be futile because the Constitutional Convention was a creation not so much of the will of the Filipino people as it was of the will of the U.S. Congress.[80] The delegates could not have deviated or departed from the prevailing doctrines in the United States, unless they were willing to incur the risk of having the Charter disapproved by the U.S. President. The delegates were not at that time ready to incur such risk. Section II of the Philippine Independence Act,[81] which authorized the Constitutional Convention, provided that the Constitution "shall contain a Bill of Rights." As a result, the Constitution, as drafted, especially in Article III on the Bill of Rights, borrowed heavily from, if it is not entirely identical with, equivalent provisions in the U.S. Constitution. There was pressure, impalpable and subtle, but very real indeed, on the framers of the Constitution to conform to the words and interpretation of identical provisions found in the Constitution of the United States.

The double jeopardy clause in the Constitution of the Philippines does not contain a provision that the State is prohibited from appealing in a criminal case. The prohibition against the State appealing came about only as a result of an erroneous judicial notion. A rule that would allow the State to appeal, therefore, is not *per se* unconstitutional.

Is appeal by the State a denial of due process? Does it subject the defendant to a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? To all these questions, Justice Cardozo in the celebrated case of *Palko v. State of Connecticut*,[82] answered in the

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[79] I ARUEGO, J. M., THE FRAMING OF THE PHILIPPINE CONSTITUTION, 191 (1936).

[80] The Constitution of the Philippines is "unique in that it derives its binding force not only on the will of the Filipino people but on the authority of the United States." *People v. Linsangan*, 62 Phil. 646, 648 (1935).

[81] Popularly known as Tydings-McDuffie Act of March 24, 1934, c. 84, 48 Stat. 456.

[82] 302 U.S. 319 (1937).

negative. "There is here no seismic innovation," he said. "The edifice of justice stands," he continued, "in its symmetry, to many, greater than before."[83]

Thus, the power of the State to appeal would not be repugnant to the Bill of Rights because "it is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited." [84]

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[83] In view of the relevance of Justice Cardozo's opinion to the matter under discussion, we are quoting hereunder the pertinent portion of his opinion in the case:

"We do not find it profitable to mark the precise limits of the prohibition of double jeopardy in federal prosecutions. The subject was much considered in *Kepner v. United States*, 195 U.S. 100, 49 L. ed. 114, 24 S. Ct. 797, 1 Ann. Cas. 655, decided in 1904 by a closely divided court. The view was there expressed for a majority of the court that the prohibition was not confined to jeopardy in a new and independent case. It forbade jeopardy in the same case if the new trial was at the instance of the government and not upon defendant's motion. Cf. *Troño v. United States*, 199 U.S. 521, 50 L. ed. 292, 26 S. Ct. 121, 4 Ann. Cas. 773. All this may be assumed for the purpose of the case at hand, though the dissenting opinions (195 U.S. 100, 134, 137, 49 L. ed. 114, 126, 127, 24 S. Ct. 797, 1 Ann. Cas. 655) show how much was to be said in favor of a different ruling. Right-minded men, as we learn from those opinions, could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case. Even more plainly, right-minded men could reasonably believe that in espousing that conclusion they were not favoring a practice repugnant to the conscience of mankind. Is double jeopardy in such circumstances, if double jeopardy it must be called, a denial of due process forbidden to the states? The tyranny of labels (Snyder v. Massachusetts, 291 U.S. 97, 114, 78 L. ed. 674, 682, 54 S. Ct. 330, 90 A.L.R. 575) must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other." (pp. 322-323).

"* * * Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our policy will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions? *Herbert v. Louisiana*, 272 U.S. 312, 71 L. ed. 270, 47 S. Ct. 103, 48 A.L.R. 1102, *supra*. The answer surely must be 'no'. What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. *State v. Felch*, 92 Vt. 477, 105 A. 23; *State v. Lee*, 65 Conn., 265, 30 A. 1110, 27 L.R. A. 498, 48 Am. St. Rep. 202, *supra*. This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge (State v. Carabetta, 106 Conn. 114, 137 A. 394), has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, in its symmetry, to many, greater than before." (p. 328)

[84] *Beazell v. State of Ohio*, 26 U.S. 167, 46 S. Ct. 68, 70 L. Ed. 216; cited in ROTTSCHAFFER, CASES ON CONSTITUTIONAL LAW, 829, 830-1.

The defendant "no more would be put in jeopardy for a second time when retried because of a mistake of law in his favor, than he would when retried for a mistake that did him harm."[85] In other words, when a defendant appeals from a judgment of conviction, he would be in as much jeopardy of second punishment as when it is the State appealing from a judgment of acquittal. It may be said that, by appealing, the prisoner is deemed to waive that protection against second jeopardy. But this claim of waiver is without force, if it is borne in mind that "a man can not waive, and certainly will not be taken to waive without meaning it, fundamental constitutional rights." [86]

IV—A HISTORICAL APPROACH TO THE QUESTION

Examined from the historical point of view, the present judicial construction of double jeopardy which allows the defendant to appeal but denies the State the same right is unsound.

Up to 1904, the Supreme Court of the Philippines had consistently adhered to the correct view that an appeal by the State from a judgment of acquittal does not violate the constitutional protection against double jeopardy. As already stated, the Court in *U.S. v. Kepner*,[87] decided October 11, 1902, composed of seven justices, unanimously accepted that rule. In *U.S. v. Kepner*,[88] decided February 14, 1903, the same Court again unanimously reiterated the same view. Unanimity in the endorsement of the same rule was likewise the striking characteristic of the same Court's decision in *U.S. v. Mendezona*,[89] decided July 25, 1903.

Unfortunately, the U.S. Supreme Court chose to repudiate the judgment of the Philippine Supreme Court.[90] That repudiation of the Philippine interpretation of the double jeopardy clause as applicable to legal practice peculiar to this country, however, can not be held as a safe authority. The fact that four out of the nine justices of the U.S. Supreme Court dissented from the majority view, bolstered by the unanimous views of the justices in the Philippine Supreme Court, in two cases, is a fact and a condition not to be dismissed lightly.

The U.S. decision can not be held as an indication that the Supreme Court of the Philippines had adopted the principle that the State could not appeal from a judgment of acquittal because thereby the constitutional protection against double jeopardy would be violated. Even if the Philippine Court had wanted to ignore the U.S. decision, it could not have done so. It was bound by the doctrine as dictated by the higher tribunal. It had no alternate but to submit to a superior order. Hence, since the U.S. Supreme Court enunciated the *Kepner* doctrine, all the subsequent cases involving

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[85] Holmes's dissent in *Kepner v. U.S.*, *supra*, note 10, p. 703.

[86] *Ibid.* See also *Hopt v. People*, 104 U.S. 621 (1882); *Thompson v. Utah*, 170 U.S. 343, 354 (1898).

[87] *Supra*, note 15.

[88] 1 Phil. 519 (1902).

[89] 2 Phil. 353 (1902).

[90] *Kepner v. U.S.*, *supra*, note 10.

double jeopardy had to be decided in conformity with the U.S. decision.

It is safe to assert, then, that, until the Philippines obtained her independence, the Philippine Court's acceptance of the U.S. doctrine was, at most, passive. Acceptance of an opinion that has the force of a command from a superior court is less forceful than acceptance of an opinion purged of any taint of compulsion outside of the superior force of reason and principle. It is surprising, then, that the Philippine Supreme Court, now an adjudicative organ of an independent State, has not reexamined the doctrine which overthrew that which was previously adhered to unanimously in the Philippines.

In *Trono v. U.S.*[91] decided by the Supreme Court of the United States after the *Kepner* case, it was held that when a defendant charged with homicide is found guilty by the lower court of the crime of physical injuries, the appellate court may, on appeal by the said defendant, reverse or modify the decision of the lower court and still find him guilty of homicide. There was no double jeopardy because the appeal was taken by the defendant in the case and, therefore, had waived his right to the protection under the double jeopardy clause. That ruling, indeed, was a recognition that the double jeopardy rule, as at present construed, is not absolute.

The U.S. Supreme Court which enunciated the *Kepner* doctrine has of late doubted the wisdom of Justice Day's opinion. In the *Palko* case,[92] that Court, through Justice Cardozo, implied that Justice Holmes's dissent in the *Kepner* case was sounder in law as well as in logic than the majority opinion. It is true that, in the *Palko* case, the doctrine of double jeopardy was not squarely put in issue, but two things stand out to show that the Court had the *Kepner* case in mind. Firstly, it was the prosecution which had appealed from the judgment convicting the accused of a crime less serious than that charged against him in the complaint. Secondly, Justice Cardozo, although deciding the case on some other point, took care to reenforce his arguments by discussing double jeopardy in consonance with Justice Holmes's dissent.

According to Justice Cardozo,

> "The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from corrosion of substantial legal error. This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge, has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, in its symmetry, to many, greater than before."

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[91] 11 Phil. 726 (1908), 199 U.S. 521 (1905).

[92] *Supra*, note 82.

The Court of Appeals of the Philippines seems to have gone further ahead of the Supreme Court in recognizing the lack of soundness in the *Kepner* rule. In the case of *People v. Lindaya and Tolentino,*[93] the Court had occasion to read carefully and consider the question. It did not dismiss it with just a peremptory wave of the hand.

In that case, after the prosecution had closed its evidence, the attorneys for the defendants filed a motion to dismiss. The motion was denied at first. Subsequently, the lower court *motu propio* set aside the previous order and issued another one disimssing the case. The prosecution filed a notice of appeal which the lower court granted. In the Court of Appeals, counsel for defendant Tolentino moved for the dismissal of the appeal on the ground that there was a violation of the provision against double jeopardy.

The majority being of the opinion that a constitutional question was involved, the Court of Appeals handed down a resolution certifying the case to the Supreme Court. In that resolution, penned for the majority by the then Justice (now Supreme Court Chief Justice) Ricardo Paras, the appellate court reached the opinion that the prosecution's appeal was not frivolous in view of the ruling in the *Palko* case and in the light of the fact that, in the *Kepner* case, the members of the Supreme Court of the Philippines unanimously sustained the right of the Government to appeal and that four of the nine members of the Supreme Court of the United States held the same opinion, Appellate Justice (now Supreme Court Justice) Montemayor wrote a concurring opinion in which he stated:

> "On the Bench and in the legal profession, here and in the United States, there are many who believe that at least in the Philippines where the jury system and the reason for its institution are unknown, and where the Spanish Criminal Procedural Law permitting appeal by the Government and the review of decisions of inferior courts by appellate tribunal has been applied and enforced with success for many generations, General Orders No. 58 which sanctions said appeal by the Government should stand. In this very Court of Appeals, there are justices who believe that an appeal by the Government from a judgment of acquittal does not place an accused person twice in jeopardy of punishment."

Justice Albert filed a concurring and dissenting opinion at the same time in which he discussed the same question but from a different viewpoint. His opinion was concurred in by Justices Sison and Briones. Four dissenting Justices—Bengzon, Moran, Padilla and Reyes—believed that the matter need not be elevated to the Supreme Court, the Court of Appeals having jurisdiction to determine the question at issue.

In the two *Kepner* cases and the *Mendezona* case, eight Justices were unanimous in their conviction that an appeal by the State was not violative of the right against double jeopardy. In the *Kepner* case, as the U.S. Supreme Court decided it, four of the nine Justices

[93] G.R. No. L-3298, prom. Sept. 20, 1938.

adhered to the Philippine view. In the majority decision of Justice Cardozo in the *Palko* case, the Philippine view received great support. In the *Lindaya* case, there was a unanimous view that the prevailing judicial construction of the double jeopardy clause needed re-examination.

Reason and the times are behind the move to repudiate the American rule as enunciated in the *Kepner* case.

V—ARBITRARY POWER OF LOWER COURTS MUST BE CURBED

If uniformity in the application of the laws and the maintenance of the social interests involved are the ideals desired in the administration of justice, such objective cannot be attained if the State is not allowed to appeal.

The great and withal dangerous power of finally acquitting the most notorious criminals ought not to be placed in the hands of a single judge.[94] The greatest restraint against arbitrary power by inferior courts is the exposure of their errors on appeal.[95]

There is a need for an adjustment or reconciliation of the power of the State to punish criminals and of the right of the accused to be free from unfounded or unjust persecutions. While the principle of finality in decisions is essential, it is not more essential than the principle of justice. The adjustment of these principles is determined in each jurisdiction by considerations of the social interest and the public policy,[96] which have been identified earlier. In the Philippines, this interest and policy demand a rejection of the present judicial construction of double jeopardy in respect to the State's right to appeal in a criminal case, and a return to the construction that was accepted in this jurisdiction before the U.S. Supreme Court overthrew it in the *Kepner* case. The latter interpretation, as already stated, is more in consonance with a non-jury system such as the Philippines' and, as such, affords greater opportunity for social engineering, *i.e.*, the weighing and balancing of the interest of the individual with the interest of the community.

VI—CONCLUSION

There is a great need for abandonment of the present judicial construction of the double jeopardy doctrine and the adoption of a rule which would allow the State to appeal. The American decision in the *Kepner* case was based on a misapprehension of the principle of law applicable in the Philippines. Reason, history and policy—the managerial function of the law—combine together to show that the rule is unsound. A rule of law which decrees that the verdict of a lower court which is favorable to the defendant is final holds true only in a jurisdiction which demands jury trial. It is not applicable in a jurisdiction, as in the Philippines, where the jury system is a

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[94] Brown's dissenting opinion, *Kepner v. U.S.*, *supra*, note 10.

[95] See PADILLA, A., An Appraisal of the Proposed Code of Crimes, 28 Phil. L. J. 895, 905-906 (1953), speech delivered during the Second National Convention of Lawyers, held at the Manila Hotel, Manila, on Dec. 29, 1953.

[96] *State v. Lee*, *supra*, note 48.

strange institution. An appeal from an acquittal of a defendant does not constitute new and second trial which would subject the accused to second jeopardy. An appeal is merely a continuation of the case.

While stare decisis has its advantage, an error committed by a trial court need not remain an error, whether such error favored the defendant or the prosecution. A rule which sanctions an appeal by a defendant to have an error which is adverse to his interests corrected should also sanction an appeal by the prosecution to have an error which is adverse to the interests of society corrected. The people have as much right as the defendant to expect justice.

An appeal by the State is not unconstitutional, because the defendant is not exposed to double jeopardy for the same offense. The defendant is as much in danger of second jeopardy of punishment when he appeals as when it is the State that appeals.

It can not be said that the delegates to the Constitutional Convention intended posivitely to adopt the *Kepner* rule. At most the attitude of the framers of the Constitution in regard to the double jeopardy clause was passive. They had to adhere to the interpretation of the United States Supreme Court whether they wanted it or not. They had no choice.

It is time for the Philippine Supreme Court to depart from the doctrine enunciated by the American Court. That doctrine should be repudiated at once, if only to secure better adjustment of the interests of the State and of the individual. After all, the law is a means to social ends and not an end in itself.[97]

The time is now for the high tribunal to cut the fetters that bound its decisions to those of the U.S. Supreme Court and declare its independence from the tyranny of doctrines which are unhealthy for the Filipino legal temper. The rule should be modified so that trial judges would no longer be free to trample on the state's case without fear of reversal and reprimand; so that defense attorneys would no longer be free to take liberties with the rules of evidence and procedure with impunity; so that society would no longer have to fear the criminal loosed upon it as the result of an archaic and outmoded approach to a principle of law.[98]

If the courts are reluctant to depart from the American view, Congress ought to take the initiative.

LUIS R. MAURICIO

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[97] LLEWELLYN, *Some Realism about Realism*, 44 Harv. L. Rev., 1222, reproduced in FERNANDO, E. M., READINGS IN JURISPRUDENCE 396 (1949).

[98] 22 U. OF CINCINNATI L. REV. 463, 467 (1953).

THE PHILIPPINE LAW JOURNAL

Published by the College of Law, University of the Philippines
Diliman, Quezon City

VOLUME 29 | SEPT. 1954 | NUMBER 4

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