# DOUBLE JEOPARDY REVISITED

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"The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued."—JUSTICE BLACK.

## I. INTRODUCTION

The purpose of this article is to present a brief exposition on the law of double jeopardy, the history and general principles, and the present status of that law in this jurisdiction. It is felt that a thorough knowledge on this aspect of criminal procedure and constitutional law is essential to the advocate and would-be-advocate of the law, because he may at some time face the solemn responsibility of protecting two of the most cherished rights of a person—his life and liberty. The life and liberty of the citizen are precious things—precious to the State as to the citizen, and concern for them is entirely consistent with a firm administration of criminal justice.

## I. DOUBLE JEOPARDY. ORIGIN AND SCOPE OF THE PRINCIPLE.

### A. *Origin and Scope.*

It is an established legal maxim in the administration of criminal justice, constantly recognized by writers and courts of judicature from a very early period down to the present time, "that a man shall not be brought into danger of his life or limb for one and the same offense more than once." [1] This principle is founded upon the law of reason, justice and conscience. It is embodied in the maxim of the civil law, *non bis in idem*, in the common law of England, and doubtless in every system of jurisprudence, and instead of having specific origin, it simply always existed.[2] According to Black, this privilege like many other valuable guaranties in criminal cases, is not the creature of the constitutions, but has its roots deeply imbedded in the universal principles of reason and justice, and derives its substance from the ancient and uninterrupted rules and practices of the common law.[3] And its purpose is to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense; the underlying idea is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense, and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[4]

The doctrine of double jeopardy in its constitutional and common-law sense has application to criminal prosecutions [5] only, and generally to misdemeanors as well as felonies.[6] It has also application to court-martial [7] and contempt [8] proceedings in certain instances. Formerly, the right was limited only to the highest grades of crimes, under the maxim *nemo debet bis puniri pro uno delicto*,[9]

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[1] Ex Parte Lange, 18 Wall. (U.S.) 163, 21 L. Ed. 872.
[2] II MORAN, COMMENTS ON THE RULES OF COURT, p. 745 (1950 Ed.)
[3] BLACK'S CONSTITUTIONAL LAW, p. 586, Vol. V (2 Ed.)
[4] Green v. United States, 355 U.S. 184, 2 L. Ed. 199 (1957).
[5] See WHARTON'S CRIMINAL EVIDENCE, Sec. 857, Vol. 2 (11th Ed.).
[6] U.S. v. Heery, 25 Phil. 600; Brown v. Swineford, 28 Am. Rep. 582.
[7] U.S. v. Tubig, 3 Phil. 244; Grafton v. U.S., 11 Phil. 776.
[8] People v. Adarayan et al. (CA) 50 O.G. 1125 (1953).
[9] *I.e.*, No man ought to be punished twice for one offense.

but numerous state constitutions have extended it to all grades of offenses, including misdemeanors.

It is said that the object of incorporating it in the fundamental law was to render it, as respects criminal cases, inviolable by any department of the government.[10]

But a former conviction or acquittal does not ordinarily preclude subsequent in rem proceedings, civil actions to recover statutory penalties or exemplary damages, or proceedings to abate a nuisance.[11]

B. Definitions.

Jeopardy means exposure to danger. It is the danger that an accused person is subjected to when duly put upon trial for a criminal offense. When a person is prosecuted before a court which has authority to decide the issue between the State and himself, he is then exposed to danger in that he is in peril of life or liberty.[12] The protection is not against the peril of second punishment, but against being tried for the same offense.[13] The terms "jeopardy of life or limb," "jeopardy for the same offense," "twice put in jeopardy of punishment," and other similar provisions used in various constitutions are to be construed as meaning substantially the same thing.[14]

C. Historical background and development in the Philippines.

Under the system of Spanish law a person was not regarded as being in jeopardy in the legal sense until there had been a final judgment in the court of last resort. The lower courts had preliminary jurisdiction and the accused was not finally convicted or acquitted until the case had been passed upon in the "Audencia", or Supreme Court of the Philippine Islands, whose judgment was subject to review in the Supreme Court at Madrid for errors of law, with power to grant a new trial. The trial was regarded as one continuous proceeding, and the protection given against double jeopardy provided for by the "Fuero Real, Las Siete Partidas," etc., was against a second conviction after this final trial had been concluded in due form of law.[15]

Under the American regime, General Orders No. 58 were promulgated on April 23, 1900 which then became the Code of Criminal Procedure of the Philippines. Under section 44 of said General Orders, the Government as well as the accused may appeal from a final judgment of the court. Later, the Philippine Bill of 1902 was passed and under section 5 thereof, it is provided that: "No person for the same offense shall be twice put in jeopardy of punishment." The provision in the Code of Criminal Procedure allowing the State to appeal was thereby repealed.[16]

The Double Jeopardy Clause is now enshrined in the fundamental law of the land: "No person shall be twice put in jeopardy of punishment for the same offense. 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."[17] This guarantee became a remedial statutory right when incorporated

[10] BLACK, p. 586; State v. Behmier, 20 Ohio St. 572.
[11] 22 Corpus Juris, Sec. 372
[12] Kepner v. U.S., 11 Phil. 669, 195 U.S. 100, 49 L. Ed. 114.
[13] *Ibid*
[14] 22 C.J.S. 386.
[15] Kepner v. U.S. 195 U.S. 100, 11 Phil. 669. "After a man, accused of any crime, has been acquitted by the court, no one can afterwards accuse him of the same offense . . ." (*Fuero Real, law 13, title 20, book 4*). "If a man is acquitted by a valid judgment of any offense of which he has been accused, no person can afterwards accuse him of the offense . " (*Siete Partida, law 12, title 1. partida 7*).
[16] V. J. FRANCISCO, RULES OF COURT, p. 121 (1958 Ed.).
[17] Article III, sec. 1 (20), Philippine Constitution.

in the Rules of Court.[18] And the Rules of Court is more liberal than the former Code of Criminal Procedure. Whereas by the latter, there was jeopardy when the offense charged in the second information or indictment is necessarily included in the first complaint or information, the Rules of Court operates both ways, barring a second indictment which charges an offense which "necessarily includes or is necessarily included in the offense charged in the former complaint or information." Penal statutes, substantive and remedial or procedural, are, by the consecrated rule, construed strictly against the state, or liberally in favor of the accused. The fact that the protection against being twice put in jeopardy for the same offense is not only a legislative creation but secured by the Constitution, impresses with a command such construction which would bring the statute into harmony with the spirit of the fundamental law.[19]

## II. THE RULE OF FORMER JEOPARDY

### A. Conditions for invoking principle. When defendant is in legal jeopardy.

Section 9, Rule 113, of the Rules of Court, enumerates the different cases when the defense of double jeopardy can be invoked by the accused in a criminal prosecution. They are the following: (1) former conviction (autrefois convict); (2) previous acquittal (autrefois acquit); (3) "the case against him dismissed or otherwise terminated without the express consent of the defendant;" provided that, in any of these cases, the following conditions are present: (a) by a court of competent jurisdiction, (b) upon a valid complaint or information or other formal charge sufficient in form and substance to sustain a conviction, and (c) after the defendant had pleaded to the charge. The presence of these circumstances is a "bar to another prosecution for the same offense charged, or for any attempt to commit the same or frustration thereof, or for any offense which necessarily includes or is necessarily included in the offense charged in the former complaint or information."

The former rule was that, aside from the four requisites above, it is essential for jeopardy to attach that the investigation of the charges has actually commenced by the calling of witnesses.[20] But after several years of continuous application of the said doctrine by our courts, the Supreme Court reexamined the aforesaid doctrine and found that it did not express the correct rule on jeopardy. Justice Abad Santos, speaking for the Court in *People v. Ylagan*,[21] said:

> "Such a view should be abandoned. There is no provision or principle of law reruiring such a condition for the existence of legal jeopardy. All that the law requires is that the accused has been brought to trial in a court of competent jurisdiction, upon a valid complaint or information or other formal charge sufficient in form an dsubstance to sustain a conviction, after issue is properly joined. Under our system of criminal procedure, issue is properly joined after the accused has entered a plea of not guilty. The mere calling of a witness would not add a particle to the danger annoyance, and vexation suffered by the accused, after going through the process of being arrested, subjected to a preliminary investigation, arraigned, and required to plead and stand trial."

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[18] Rule 113, Sec. 9: "When a defendant shall have been convicted or acquitted, or the case against him dismissed or otherwise terminated without the express consent of the defendant, by a court of competent jurisdiction, upon a valid complaint or information or other formal charge sufficient in form and substance to sustain a conviction, and after the defendant had pleaded to the charge, the conviction or acquittal of the defendant or the dismissal of the case shall be a bar to another prosecution for the offense charged, or for any attempt to commit the same or frustration thereof, or for any offense which necessarily includes or is necessarily included in the offense charged in the former complaint or information."

[19] People v. Elkanish, G.R. L-2666, Sept. 26, 1951.

[20] U.S. v. Ballentine, 4 Phil. 672 and subsequent cases.

[21] 58 Phil. 851, 853.

B. Former Conviction or Acquittal

1. *Plea of former Conviction or Acquittal.*—Whenever a man is once acquitted upon any information or complaint, before any court having jurisdiction of the offense, he may plead such acquittal in bar to any subsequent accusation of the same offense. This is called the plea of *autrefois acquit.* So if a person has, in like manner, once being tried and convicted, he may plead such conviction in bar of any subsequent accusation for the same offense. This is called the plea of *autrefois convict.* By the Constitution of the Philippines, it is declared that "no person shall be twice put in jeopardy of punishment for the same offense." [22]

But it is not sufficient that jeopardy has attached. Is must likewise terminate (i.e., that the proceedings on account of which the jeopardy exists have ended) before it is available as a bar to another prosecution for the same offense.[23] So that, where jeopardy begins to exist but the proceedings were not terminated because the judgment of the lower court was unauthorized and thereupon inefficious, it is not proper to invoke the constitutional right against double jeopardy.[24] It is also further held that the plea based on former conviction for the same offense cannot generally be sustained unless it appears that the former conviction was final. The matter relative to the time when jeopardy attaches, according to one writer, is largely statutory and is governed by the Rules of Court.[25] According to Section 7, Rule 116, of the Rules of Court, a judgment becomes final after the lapse of the period of perfecting the appeal, or after the sentence has been partially or totally satisfied by the defendant.[26] Under the second part of said provision, it should be noted that where the defendant has executed or entered upon the execution of a valid sentence, the court cannot, even during the fifteen-day period, set it aside and render a new sentence. To do so would be to put him in jeopardy twice.[27]

Thus, where a conviction has been appealed from and the appeal is still pending, the defendant may be again tried for the same offense, without violating his right as to jeopardy.[28] The above principles, however, has reference only to a judgment of conviction, because if it is one of acquittal, it becomes final immediately after promulgation and cannot thus be recalled thereafter for correction or amendment.[29]

It is further settled that former jeopardy does not attach until the judgment of conviction or acquittal be valid [30] or at least voidable [31] because jeopardy cannot be based upon a void judgment. Thus, even if the accused was acquitted of seduction upon an information filed by the fiscal and not upon complaint of the offended party, jeopardy has never attached and could not prevent subsequent prosecution for the same offense filed by the proper party. So, also, it was held in a case that since the offense charged in the complaint was, because of the extent of the penalty that could be imposed, beyond the jurisdiction of the Justice of the Peace Court, that court could not have lawfully acquitted the accused, even had it been his intention to do so.[32]

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[22] V. FRANCISCO, *op. cit.*, p. 134.
[23] U.S. v. Laguna, 17 Phil. 532; People v. Dagaton, G.R. No. L-4396, Oct. 30, 1951.
[24] People v. Clarin, 37 O.G. 1106; People v. Cabero, 37, O.G. 990.
[25] V. FRANCISCO, *op. cit.* p. 140.
[26] De Leon v. Rodriguez, G.R. L-14967, April 27, 1960; People v. Tamayo, G.R. L-2233, April 25, 1950.
[27] Gregorio v. Dir. of Prisons, 43 Phil. 650; De Leon v. Rodriguez, *supra.*
[28] 15 Am. Jur. sec. 378, p. 53.
[29] People v. Orfida, 69 Phil. 646; U.S. v. Yam Tung Way, 21 Phil. 67; U.S. v. Kilayko, 32 Phil. 619; People v. Sison, G.R. L-11669, Jan. 30, 1959.
[30] Eustaquio v. Liwag, 47 O.G. (Suppl. Dec. 1951) p. 172 (1950).
[31] 15 Am. Jur. section 376, p. 50-51
[32] Eustaquio v. Liwag, *supra.*

In this connection, a question may be asked: Does a former conviction under an unconstitutional law constitute former jeopardy? There are authorities which answer that question in the affirmative, provided that the accused has acquiesced to it.[33] The reason, based on the principle of estoppel, is stated by the case of *McGuinnis v. State* [34] thus:

> "Supposing the act to be utterly unconstitutional and void, to every intent and purpose, still, if the statute by whose sanction it was enacted has treated it, in this instance at least, as a valid and constitutional law, and has, under its forms and by its authority, caused the plaintiff in error to be tried, convicted, and punished, and the conviction has been acquiesced in and remains in force, upon what principle or authority is it, that the state shall be permitted to treat such trial and conviction as a nullity, and demand a second trial, conviction and punishment of an individual in another tribunal for the same identical offense? . . . And surely a second prosecution, at the instance of the state, would be as much putting the offender twice in jeopardy and twice inflicting punishment for the same offense, as if the first conviction and punishment had been under a constitutional and valid law. The State is estopped to demand such a second prosecution."

But there is authority for the opposite view.[35] The rule as to former conviction or acquittal of an offense punishable by law and an ordinance will be discussed later.

The discharge of a co-defendant for the purpose of using him as a state witness also amounts to an acquittal and bars another prosecution unless he thereafter refuses to comply with the agreement.[36] Any witting or unwitting error of the prosecution in asking for the discharge and of the court in granting the petition, no question of jurisdiction being involved, can not deprive the discharged accused of the acquittal provided by the Rules [37] and of the constitutional guarantee against double jeopardy. The only exception is where he fails to testify [38] or refuses to abide with his commitment. It must be noted, however, that his *failure* to testify be due to *his* own fault or will, and not to that of the prosecution. For if it was due to the prosecution's fault that he was not able to testify against his co-accused, he is still entitled to his acquittal.

1. *When dismissal of former case is a bar to another prosecution.*—The protection against a second jeopardy is not limited to a previous conviction or acquittal for the identical offense but is extended to every dismissal of the case or its termination "without the express consent" of the accused, where the four requisites mentioned before are all present.[39] Thus, if the case was dismissed, after the trial had started, by the court without a motion to quash on the part of the accused, he cannot be subsequently prosecuted for the same offense. But, where the case is dismissed with the express consent of the defendant, the dismissal will not be a bar to another prosecution for the same offense,[40] because his action in having the case dismissed constitutes a *waiver* of his constitutional right or privilege against double jeopardy, for the reason that he thereby prevent the court from proceeding to the trial on the merits and rendering a judgment of conviction against him.[41]

The law uses the word "express" to qualify the consent of the accused. Thus the mere silence of the defendant or his failure to object to the dismissal

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[33] See 15 Am. Jur. sec. 373, p. 49.
[34] 9 Humph. (Tenn) 43, 49 Am. Dec. 697
[35] People ex rel. Zuris v. Jennings, 234 N.Y.S. 489; 16 C.J. 239.
[36] People v. De Guzman, 30 Phil. 416.
[37] Rule 115, Section 11, Rules of Court.
[38] People v. Mendiola et al., G.R. No. L-1642-43-44, Jan. 29, 1949.
[39] II MORAN 759 (1950 Ed.); *See* title II-A.
[40] People v. Chang, G.R. L-5839, April 29, 1953; People v. Acierto, 49 O.G. 518 (1953); People v. Marapao, G.R. L-2600, March 30, 1950; Mendoza v. Almeda-Lopez, 64 Phil. 820; People v. Doniog, (CA) G.R. No. L-16993-R, Feb. 27, 1957; Marcelo v. Macadaeg, (CA) Nov. 29, 1956.
[41] V. FRANCISCO, *op. cit.* 142; People v. Salico, 47 O.G. 1765; Gandicela v. Lutero, G.R. L-4069, May 21, 1951.

of the case does not constitute a consent within the meaning of the rule. The right not to be put in jeopardy a second time for the same offense is as important as the other constitutional rights of the accused in a criminal case. Its waiver cannot and should not be predicated on mere silence.[42] The phrase "without the express consent", however, does not mean "over the objection of the accused" or "against the will of the accused."[43] But the notation "no objection" signed by counsel for the accused at the bottom of the prosecution's motion to quash constitutes an express consent within the meaning of the above provision. It is the same as saying "I agree" although it may not be as emphatic as the latter expression.[44] So, also, the words "with our conformity" signed by the accused also operate as a sufficient conveyance of express consent for they imply not merely passive assent but an active manifestation on the part of the accused of their express agreement to the provisional dismissal of the case.[45]

2. *Dismissal distinguished from Acquittal.*—There is in the courts sometimes great confusion between dismissal and acquittal. The term dismissal should not be used in cases where there has been a trial on the merits and the court finds that the evidence is insufficient, in which case the judgment that should be entered is one of acquittal, not merely dismissal. Where the fiscal fails to prosecute and the judge "dismisses" the case, the termination is not really dismissal but acquittal because the prosecution failed to prove the case when the time therefor came.[46]

What, then, is a dismissal with the express consent of the accused, which is not an acquittal? Such a dismissal in the first place, must not be one where the court has no jurisdiction, or where the information is not valid of sufficient to sustain a conviction, for in these cases no jeopardy attaches by express provision of the rule. Also, the dismissal must be *after the defendant has pleaded,* as expressly provided in the rule. The above underlined phrase did not exist in G.O. No. 58 because in that old Criminal Procedure, jeopardy did not attach until the actual trial or investigation of the offense had commenced by the calling of witnesses. However, the old rule was modified in the present rules by considering that the plea of the defendant, not the calling of the witnesses, is the precise moment when jeopardy attaches. We must also note that the dismissal is *before the judgment* (of acquittal or conviction) as stated in Sec. 28 of G.O. No. 58.[47]

"One case contemplated by the rule as a dismissal or termination of the case would be when the fiscal, upon the case being called for trial and after a plea has been entered, stated that he is not ready to proceed and the accused, who is not agreeable to the postponement, is willing to the provisional dismissal of the case. The dismissal is provisional and there would not be any jeopardy at all. Another is when after plea the accused asks for another investigation, or the fiscal asks for it, and the court which does not want to have a case pending because of the possibility that there may be no sufficient evidence ultimately, dismisses the case. Still another is where the accused is to be used as state witness, and is willing to act as such, so the case is dismissed. Of course, he will still be subject to prosecution if he fails to comply with this commitment. It is similar to dismissal without prejudice in civil cases.[48]

[42] People v. Salico, *supra;* People v. Ylagan, 58 Phil. 85; People v. Cosare, G.R. L-6544, August 25, 1954.
[43] People v. Ylagan, *supra;* People v. Cosare, *supra.*
[44] Pendatum v. Aragon et al, 49 O.G. 4372.
[45] People v. Hinaut, G.R. L-11315, March 18, 1959.
[46] People v. Labatete, G.R. L-12917, April 27, 1960; People v. Salico, *supra.*
[47] People v. Labatete, *supra.*
[48] *Ibid; See, however, note 36.*

A dismissal as above defined, if entered without the consent of the accused constitutes jeopardy, but if entered on motion of the accused himself and therefore with his express consent, will not be a bar to another prosecution for the same offense because his action in having the indictment quashed is, as we said, a waiver of his constitutional right or privilege.[49]

And the fact that the counsel for the defendant and not the defendant himself, personally moved for the dismissal of the case against him, had the same effect as if the defendant had personally moved for such dismissal, inasmuch as the act of the counsel in the prosecution of the defendant's case was the act of the defendant himself, for the only case the defendant cannot be represented by his counsel is in pleading guilty according to section 3, Rule 114 of the Rules of Court.[50]

3. *When dismissal is in reality acquittal and bars another prosecution.*— After setting forth the distinctions between dismissal and acquittal, we shall examine instances of "dismissals" which in realtiy are acquittals.

When after the prosecution had presented all its evidence, the defendant moved for the dismissal and the court dismissed the case on the ground that the evidence failed to show beyond a reasonable doubt that the defendant is guilty of the crime charged, the dismissal is in reality an acquittal, because the case is decided on the merits. So, also, the dismissal, upon the motion of the provincial fiscal, by a Court of First Instance of a criminal case appealed from a justice of the peace, the latter having jurisdiction to try and decide it, is equivalent to an acquittal of the defendant, and therefore, an appeal from the order of dismissal constitutes double jeopardy. Likewise, when after the accused had pleaded not guilty, the fiscal asked for the dismissal of the case on the ground that after a reexamination of the case he found that he had no sufficient evidence to support the information, or that he could not proceed with the hearing of the case on the date fixed by the court, because he could not locate the complaining witness or other material witness; or where the case has been dismissed upon the initiative of the court because the fiscal refused to proceed with the trial on the ground that he was not prepared for it, and the court believed that in the interest of justice the disposition of the case should not be delayed, the dismissal in these instances, if decreed without the consent of the accused, is tantamount to an acquittal.[51] To the same effect, where the case was dismissed on the ground of lack of sufficient evidence and the respondent judge himself advised the accused in open court that he was a free man and could not be again prosecuted for the same offense, the reconsideration of the order of dismissal and the reinstatement of the case would place the defendant in double jeopardy.[52]

It was also held, that where the case was set for trial twice after the accused had pleaded not guilty, and on both occasions the fiscal, without asking for postponement failed to appear in court to prove the offense charged, the dismissal of the case even at the instance of the accused may be regarded as

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[49] See People v. Togle, G.R. L-13709, Jan. 30, 1959; People v. Hinaut, G.R. L-11315, March 18, 1959; People v. Reyes, G.R. L-7712, March 23, 1956; People v. Salico, 47 O.G. 1765; People v. Romero, G.R. L-4515-20, July 31, 1951; Gandicela v. Lutero, G.R. L-4069, May 21, 1951; 15 Am. Jur. 74; 22 C.J.S. 406. See criticism on overuse of term "waiver" in the law in Green v. U.S. 355 U.S. 184, 191 (1957).

[50] Co Te Hua v. Encarnacion, G.R. L-6415, Jan. 26, 1954; People v. Romero, G.R. L-4517-20, July 31, 1951.

[51] V. FRANCISCO, *op. cit.* 146; People v. Bangalao, G.R. L-3610, Feb. 17, 1954; People v. Ferrer, G.R. L-9072, Oct. 23, 1956; People v. Alvarez, 45 Phil. 472; People v. Perez, 2 O.G. No. 1, p. 44; People v. Cabarles, G.R. L-1072, Jan. 29, 1958; U.S. v. Regala, 28 Phil. 57; People v. Fajardo, 49 Phil. 206; People v. Daylo, 54 Phil. 862; People v. Diaz, G.R. L-6518, March 10, 1954.

[52] Castillo v. Abaya, 50 O.G. 2477

an acquittal, and is a bar to subsequent prosecution for the same offense.[53] Furthermore, when a co-defendant is discharged for the purpose of using him as a state witness, his discharge amounts to an acquittal and prevents another prosecution unless he thereafter refuses to comply with his commitment.[54]

In cases of several postponements on the part of the prosecution, and the accused by such delays suffers, should he, to terminate the case and also avoid future prosecutions for the same offense, outrightly move for the dismissal of the case? The Supreme Court in the case of *People v. Salico* [55] provides the answer: If the prosecution is not ready for trial, and asks for postponement, the defendant willing to exercise his constitutional right to a speedy trial, should ask, not for the dismissal, but for the trial of the case. And it is the duty of the court, if it believes that the trial cannot be postponed anymore without violating the right of the accused to a speedy trial, to deny the postponement and proceed with the trial and require the fiscal to present the witnesses for the prosecution; and if the fiscal does not or cannot produce his evidence and consequently fails to prove the defendant's guilt beyond reasonable doubt, the court, upon the defendant's motion will dismiss the case. Such dismissal is equivalent to an acquittal, because the prosecution's failure to prove the defendant's guilt, and it will be a bar to another prosecution for the same offense, although it was ordered on motion of the accused, in exactly the same way as a judgment of acquittal secured on motion of the defendant. This Salico doctrine was reiterated in *People v. Romero*.[56]

However, in the recent case of *People v. Tacneng* [57] and applied in *People v. Robles*,[58] the doctrine in the *Salico* case was "modified or abandoned, so that the theory of double jeopardy was sustained despite the fact that the dismissal was secured upon motion of the accused" in certain instances.[59]

In the case of *People v. Tacneng*, the accused was charged with homicide before the Court of First Instance of Ilocos Sur. The accused pleaded not guilty, and the case was set for hearing. When the hearing came, the Fiscal asked for postponement alleging that he was not able to contact his witnesses, which was granted. When the case was again called for hearing, the Fiscal moved for another postponement and the hearing was again postponed. But when the third hearing came and the Fiscal asked for another postponement, the accused vigorously objected to the postponement invoking his constitutional right to a speedy trial. Considering that the case had been postponed twice and the whereabouts of the witnesses for the prosecution would not be ascertained, while on the other hand the accused was entitled to a speedy trial, the court dismissed the case. However, one year and three months thereafter, the Provincial Fiscal filed another information for murder against the same defendant with the only difference that the mayor of the place was included as co-accused. When the case came up for hearing, the defendant moved to quash the information on the ground of double jeopardy. The court entertained the motion and on appeal the Supreme Court rendered a confirmatory decision. The prosecution invoked the ruling in the cases of *Salico* and *Romero*. The High Court brushed aside this contention thus:

> "We are fully aware that, pursuant to our ruling in the case of People v. Salico and later reiterated in People v. Romero, a dismissal upon defendant's motion will not be a

[53] People v. Diaz, G.R. No. L-6518, March 10, 1954.
[54] U.S. v. de Guzman, 30 Phil. 416; People v. Mendiola, *supra*.
[55] 47 O.G. 1765.
[56] G.R. No. L-4517-20, July 31, 1951.
[57] G.R. No. L-12082, April 30, 1959.
[58] G.R. No. L-12761, June 29, 1959.
[59] See people v. Bangalao, G.R. L-5610, Feb. 17, 1954; People v. Diaz, *supra;* People v. Bao, G.R. L-12102, Sept. 29, 1959.

> bar to another prosecution for the same offense as said dismissal was not without the express consent of the defendant. This ruling, however, has no application to the instant case, since the dismissal in those cases was not predicated as in this case, on the right of the defendant to a speedy trial, but on different grounds. In the Salico case, the dismissal was based on the ground that the evidence for the prosecution did not show that the crime was committed within the territorial jurisdiction of the court, which on apepal was found that it was, so the case was remanded for further proceedings and in the Romero case, the dismissal was due to the non-production of other important witnesses by the prosecution on the date fixed by the court and under the understanding that no further postponement at the instance of the government would be entertained. *In both cases, the right of a defendant to a speedy trial was never put in issue.*"

In the other case of *People v. Robles*, it appears that the case was originally instituted on May 12, 1950, but was provisionally dismissed on November 10, 1950, on motion of the prosecution; that it was revived on January 10, 1952, upon filing of another information for the same offense after a lapse of more than one year since its provisional dismissal; that when this case was set and called for trial on February 9, 1953, the trial was again postponed on petition of the prosecution on the ground that it was not prepared for trial and because some of the co-accused of appellee were still at large, which postponement was granted in order to afford the prosecution another opportunity to prepare for trial with the warning that the court will not entertain any other petition for postponement. It likewise appears that the defense vigoriously objected to further postponement when the case was called for trial on March 19, 1953 and the prosecution was not again ready for trial on the ground that this case has been pending for three years and that in the meantime the defendants, including appellee have undergone mental anguish because of the pendency of this case, and that the trial has been postponed time and again on petition of the prosecution, the opposition of counsel for accused being predicated on the right of the defendant to speedy trial guaranteed by the Constitution and on the basis of these facts and reason advanced by the defense, the court dismissed the case. The Supreme Court, on appeal by the prosecution, held that the dismissal was tantamount to acquittal. The case of Salico was again invoked, to which the Court remarked:

> In reaching the above conclusion (sustaining the claim of double jeopardy of the accused) we have not overlooked our ruling in the case of People v. Salico reiterated in People v. Romero to the effect that a dismissal upon defendant's motion will not be a bar to another prosecution for the same offense as said dismissal was not without the express consent of the defendant, which ruling the prosecution now invoke in support of its appeal; but said ruling is not now controlling having been modified or abandoned in subsequent cases wherein we sustained the theory of double jeopardy despite the fact that the dismissal was secured upon the motion of the accused." [60]

In resumé, the dismissal of the case even at the instance of the accused is tantamount to acquittal, where (a) invoking his constitutional right to a speedy trial, (b) after several postponements on the part of the prosecution, (c) the case was dismissed by the court.

However, the above principles do not apply where the case was dismissed provisionally.[61] In *People v. Togle* [62] the accused himself asked for the provisional dismissal of the case "until the fical will be ready for trial." It appearing that the dismissal of the previous case was made provisionally and upon the express of the counsel for the accused, the prosecution of the second case, even if it covers the same crime does not give rise to double jeopardy.

[60] *Citing* People v. Bangalao, G.R. L-5610, Feb. 17, 1954; People v. Diaz, G.R. L-6518, March 30, 1954; People v. Ferrer, G.R. L-9072, Oct. 23, 1956

[61] Co Te Hua v. Encarnacion, G.R. L-6415, Jan. 26, 1954.

[62] G.R. No. L-13709, Jan. 30, 1959; Pendatum v. Aragon, G.R. L-5469, Sept. 25, 1953.

In *People v. Hinaut* [63] accused and others were charged with the crime of theft before the justice of the peace court. After arraignment, wherein all of the defendants pleaded not guilty, the prosecution presented its evidence, both testimonial and documentary, and thereafter rested its case with reservation to introduce additional evidence which was stated to be unavailable at the time. The defense followed, and likewise offered its evidence, but before it had entirely closed, the provincial fiscal submitted a motion for the provisional dismissal of the case. Accused expressed their consent thereto by placing their thumbmarks (only Hinaut signed his name) at the end of the motion, after the words "with our conformity." The Justice of the Peace provisionally dismissed the case as prayed for. About six months later, the prosecution filed a motion to revive the case which was granted by the Justice of the Peace. The corresponding information was refiled by the Fiscal. The defense appealed to the Court of First Instance and after review of the above facts, the court reversed the ruling of the inferior court. The prosecution appealed to the Supreme Court, which overruled the trial court and held that the plea of double jeopardy was improperly sustained. Said the Court: "x x x it is important to note that what was sought by the Provincial Fiscal to which the accused expressed their agreement, was not a simple or unconditional dismissal of the case, but its provisional dismissal that prevented it from being finally disposed of. Certainly, the accused cannot now validly claim that the dismissal was in effect, on the merits and deny its provisional character. Even assuming, moreover, that there was double jeopardy, they should be considered as having waived the constitutional safeguard against the same. What could have been done by the accused in the case at bar was the action suggested by this Court in the case of *Gandicela v. Lutero* [64] by invoking their constitutional right to a speedy trial rather than consent to a provisional dismissal of the case that would allow a valid reinstating thereof." The dismissal contemplated in section 9, Rule 113 of the Rules of Court, therefore, is one which is definite or unconditional which terminate the case and not a dismissal without prejudice. In the absence of any statutory provision to the contrary, there is no reason why the court may not, in the interest of justice, dismiss the case provisionally, i.e., without prejudice to reinstating it before the order becomes final or to the subsequent filing of a new information for the same offense.[65]

D. Jurisdiction of Former Court.

1. *Court of competent jurisdiction.*—The rule requires that the accused must have been convicted or acquitted by a court of competent jurisdiction.[66] The court must be one having jurisdiction not only of the offense but also of the defendant, which has been obtained by due process based upon legal proceedings.[67] A defendant cannot be considered as put in jeopardy by a proceeding in a court that has no jurisdiction in the premises because any judgment that might be rendered against him would be void. Hence, an acquittal in a court not having jurisdiction to hear and determine the charge against the defendant is no bar to a subsequent prosecution for the same offense in a court of competent jurisdiction.[68] The right of the government to prosecute subsists and

[63] G.R. No. L-11315, March 18, 1959.
[64] G.R. No. L-4069, May 21, 1951.
[65] Jaca v. Blanco,G.R. L-2792, May 23, 1950; People v. Jabajab, G.R. L-9238-39, Nov. 13, 1956.
[66] Grafton v. U.S. 206 US 333; U.S. v. Rubin, 28 Phil. 631; U.S. v. Diaz, 15 Phil. 123 aff'd in 223 U.S. 442; U.S. v. Parson, 6 Phil. 632; People v. Travers, 19 Pacif. 268; Crowley v. State, 113 N.E. 658; State v. Watson, 183 SE 286; People v. Connor, 36 NE 807. See also COOLEY, CONSTITUTIONAL LIMITATIONS, Vol. I, p. 688 (8th Ed) and authorities cited therein.
[67] 16 Corpus Juris 238.
[68] 15 Am. Jur. 48-49; Kepner v. U.S. *supra;* Cristobal v. People, G.R. No. L-1542, Aug. 30, 1949.

must be recognized by the court having jurisdiction of the offense which may subsequently be called upon to try the case all over again.[69] Thus, when an accused is convicted of seduction upon an information filed by the fical and not upon complaint of the offended party,[70] or where a case of bigamy [71] or of coercion [72] or of violation of section 67(d) of the Revised Motor Vehicle Law [73] is prosecuted in a justice of the peace court which has no jurisdiction of such offense, the proceedings therein being null and void, no jeopardy attaches to the accused and consequently, he may again be prosecuted for the same offense.[74]

In this connection, courts-martial are said to have jurisdiction for common crimes committed in the district where the said court sit, and this jurisdiction is not affected by the existence of civil courts created by the military authorities at the same time and place.[75] The civil courts and courts-martial have concurrent jurisdiction over offenses committed by a member of the Armed Forces in violations of military and the public law. The first court to take cognizance of the case does so to the exclusion of the other.[76] Thus, when accused appellant who is an officer of the Philippine Constabulary has been tried first and convicted of the crime of malversation of public funds by the Court of First Instance of Romblon, he cannot now claim that the criminal action should have been brought before a court-martial.[77] But one who has been tried and convicted by a court-martial under circumstances giving that tribunal jurisdiction of the defendant and of the offense has been once in jeopardy and can not be prosecuted again for the same offense in another court of the same sovereignty.[78] So that the judgment of a court-martial having jurisdiction to try an officer or a soldier for a crime is entitled to the same finality and conclusiveness as to the issues involved as the judgment of a civil court in crimes within its jurisdiction.[79] The reason for this is because a court-martial is a court, and the prosecution of an accused before it is a criminal and not an administrative case.[80] In *Crisologo v. People*,[80a] it appearing that the offense of treason charged in the military and in the civil court being the same; that the military court had jurisdiction to try the case; and that both courts derive their powers from one sovereignty, it was held that the sentence meted out by the military court to the petitioner should be a bar to petitioner's further prosecution for the same offense in the Court of First Instance of Zamboanga.

2. *Effect of errors and irregularities of former prosecution.*—Jurisdiction should be distinguished from the exercise of jurisdiction. The authority to decide a case at all and not the decision rendered therein is what makes up jurisdiction. Where there is jurisdiction over the person and the subject-mat-

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[69] U.S. v. Arceo, 11 Phil. 530; U.S. v. Jayme, 24 Phil. 90; Keanor v. U.S., 195 U.S. 100; U.S. v. Diaz, 15 Phil. 123; U.S. v. Ledesma, 29 Phil. 431.

[70] U.S. v. Jayme, 24 Phil. 90. *Cf.* People v. Manaba, 58 Phil. 665.

[71] U.S. v. Arceo, *supra*

[72] U.S. v. Almazan, 20 Phil. 225.

[73] Eustaquio v. Liwag, 47 O.G. (Suppl. 12) 172.

[74] II MORAN 783 (1957 Ed.).

[75] *Ibid*, 783-784

[76] Grafton v. U.S., *supra;* Valdez v. Lucero, 42 O.G. (11) p. 2835.

[77] People v. Livarra, G.R. L-6201, April 20, 1954.

[78] 15 Am. Jur. sec. 399, p. 72. However, when an act is punishable in the civil courts and also punishable, as a *distinct offense* in the court-martial, a conviction or acquittal in one of said offenses, is not a bar to trial for the other offense. For instance, an officer who commits the crime of rape, would be amenable for trial in the civil court for rape but since the same act has compromised his person as an officer and as a gentleman, there is a violation of the Articles of War 96 (conduct unbecoming an officer and a gentleman). Winthrop considers the offender as two distinct persons each of whom committed a distinct offense, under the theory of "Double amenability". (WINTHROP'S MILITARY LAW AND PRECEDENTS, p. 265).

[79] U.S. v. Tubig, 3 Phil. 244; Grafton v. U.S., 11 Phil. 776.

[80] Marcos v. Chief of Staff, G.R. L-4671, May 30, 1951.

[80a] 50 O.G. 1021 (1954)

[81] De la Cruz v. Moir, 36 Phil. 213; Herrera v. Barreto, 25 Phil. 245; Gala v. Cui, 25 Phil. 522; De Fiesta v. Llorente, 25 Phil. 554; Mapa v. Weissenghagan, 29 Phil. 18.

ter, the decision of all other questions arising in the case is but an exercise of that jurisdiction.[81] The power to hear and determine a case does not depend either upon the regularity of the exercise of that power or upon the rightfulness of the decisions made.

It has been held that though the court may have had jurisdiction of the former case, yet, if the proceedings were so illegally or irregularly conducted that a conviction could not have been sustained, as where there was no arraignment or no plea, the acquittal therein will not constitute a bar.[82] But errors or irregularities which do not render the proceedings a nullity will not defeat a plea of autrefois acquit.[83] Thus, where the information filed by the fiscal was valid, the case should not have been dismissed on the ground of prescription for prescription was interrupted by the filing of said information. Considering, however, that the defendant has been arraigned, tried, and convicted under a valid information filed by the fiscal, the court held that the bringing of the new action by the offended party constitutes double jeopardy, and on that ground, not on that of prescription, the case was dismissed.[84] It is also held that where the irregularities did not render the proceeding an absolute nullity but merely rendered it reversible on error, such fact would not defeat the plea of former conviction where the judgment has not been reversed.[85]

3. *Effect of dismissal of case by the court on the erroneous ground of lack of jurisdiction.*—If the court, after the trial had started, dismissed the case on the erroneous ground that it had not jurisdiction to try the case, when in fact it had, such dismissal will bar another prosecution for the same offense.[86]

In *People v. Ferrer, supra,* after the prosecution had presented its evidence, the trial court dismissed the case upon the wrong ground that the evidence did not establish the crime charged to have been committed within the jurisdiction of the court. The Supreme Court, after finding that the dismissal was a mistake, held that the appeal therefrom would place the accused in double jeopardy, and dismissed the appeal not without declaring that the case was a miscarriage of justice.

In *People v. Bangalao, supra,* the trial court, after trial had begun, dismissed the case upon the wrong ground that it had no jurisdiction to try the same because the complaint filed in the justice of the peace court by the mother of the offended girl, a minor, charged a rape commited not exactly in the same manner as the rape charged in the information field by the Fiscal. The Supreme Court finding that the trial court had jurisdiction and that the dismissal was wrong, dismissed the appeal because it puts the accused in double jeopardy.

In *People v. Flores,*[87] the defendant was acquitted by the Court of First Instance of Leyte from the charge of grave oral defamation, after the prosecution had introduced its evidence, on the ground that it had not been established that the action was instituted upon complaint filed by the offended party, erroneously believing that such complaint was necessary. Appeal to the high court was denied on the same ground of double jeopardy.

In *People v. Cabarles,*[88] the accused was prosecuted in the justice of the peace court for violation of municipal ordinance. After the prosecution had

[82] State v. Mead, 4 Black (Ind.) 309; Finley v. State, 61 Ala. 201; Commonwealth v. Bosworth, 113 Mass. 200.
[83] Commonwealth v. Goddard, 13 Mass. 458.
[84] People v. Onel, G.R. L-8393, April 27, 1956.
[85] Commonwealth v. Loud, 3 Metc. (Mass) 328
[86] People v. Ferrer, G.R. L-9072, Oct. 28, 1956; People v. Bangalao, G.R. L-5610, Feb. 17, 1954.
[87] G.R. No. L-11022, April 28, 1958.
[88] G.R. No. L-10702, Jan. 29, 1958.

rested its case, counsel for defendant verbally moved for the quashing of the "information for insufficiency of evidence," which motion was granted by the justice of the peace, saying, "The amended information is hereby dismissed" basing the dismissal on the finding that the facts alleged in the information and proved by the prosecution, to wit, the refusal and failure of the accused to pay the impounding fee, are not punished by the ordinance in question. This was tantamount to saying that the accused did not commit any violation of said municipal ordinance and therefore, should be discharged. Appeal by the prosecution was denied to avoid placing the accused twice in jeopardy.

In *People v. Duran, Jr.*,[88a] a complaint for serious slander was filed by the Chief of Police in the Justice of the Peace Court against the accused for having slapped one Ignacio Amarillo in public. The accused waived his right to a preliminary investigation and the case was elevated to the Court of First Instance, where an information for serious slander was also filed. After the prosecution had rested its case, the accused moved to dismiss the charge on the ground that the guilt of the accused had not been proved beyond a reasonable doubt. The court ordered the dismissal of the complaint, but on another ground, namely, that it did not acquire jurisdiction over the same because the serious slander by deed charged does not impute any crime and the complaint was not subscribed and sworn to by the offended party himself as required by Article 360 of the Rev. Penal Code. This dismissal was erroneous. As the grave slander by deed charged in this case does not impute any crime, public or private, to the offended party, his complaint was not necessary to confer jurisdiction upon the court. But the erroneous dismissal of the complaint notwithstanding, the court could not now remedy the error because the appeal by the government places the accused in double jeopardy.[88b] Such is the settled rule. And the only exception to this rule is where the dismissal was made with the consent of the accused.[88c] And it cannot be said that the accused herein consented to the dismissal of the case on the ground of lack of jurisdiction, because his motion to quash after the prosecution had presented its evidence was based on another ground, namely, that the prosecution had failed to establish his guilt beyond a reasonable doubt.[88d]

E. Valid Complaint or Information.

It is not enough that the defendant had previously been brought to trial before a competent court, but it is also necessary that the complaint or information filed against the dfeendant is a valid one in accordance with law.[89] The Rules require a "valid complaint or information or other formal charge sufficient in form and substance to sustain a conviction".[90] One cannot be placed in jeopardy if the information is void because there is no danger of his being convicted under it.

The defect of the complaint or information may arise from its inherent nullity, which the defendant may not even waive. For instance, a charge for a private crime subscribed by one not authorized by law is a nullity and no valid judgment may be rendered on the basis thereof. Obviously, to emphasize the gravity of this defect, it has also been considered jurisdictional in character.[91] Another instance is when the complaint or information charges no offense

[88a] G.R. No. L-13334, April 29, 1960.
[88b] People v. Hernandez, 49 O.G. 5342; People v. Fajardo, 49 Phil. 206; People v. Borja, 43 Phil. 618.
[88c] *See* notes 39 *et seq.*; People v. Salico, 47 O.G. 1765.
[88d] People v. Salico, *supra*.
[89] Julia v. Sotto, 2 Phil. 247; U.S. v. Macalingag, 31 Phil. 316; U.S. v. Padilla, 4 Phil. 511.
[90] Rule 113, Sec. 9, Rules of Court.
[91] NAVARRO, CRIMINAL PROCEDURE, p. 250.

at all known to law,[92] or is radically defective as when it does not recite the essential requisites of the offense [93] that unless cured by the evidence at the trial it cannot support a judgment of conviction.[94]

Again, the defect of the charge may spring from a material variance with the proof presented in the trial. For instance, the proof showed *estafa* to have been committed while the charge was for falsification. It was held that there could be no conviction for either crime and the case should be dismissed so that the proper charge may be filed.[95] This holding is entirely justified, as long as it is granted that the one is not included in the other. For it is expressly enjoined "that the defendant shall be convicted of the offense proved included in that which is charged, or of the offense charged included in that which is proved." [96] The problem, is however, one of identity of offenses, which will be discussed later.

In *U.S. v. Ball*,[97] an attempt was made to prosecute for the second time one Millard Ball, who had been acquitted upon a *defective* indictment, which had been held upon the proceedings in error prosecuted by others, who had been convicted and who had been jointly prosecuted with Ball. Reversing the court below, the plea of autrefois acquit, relied on by Ball, was held good. It was pointed out that the acquittal of Ball upon the defective indictment was not void, and, therefore, the acquittal on such indictment was a bar. This case was approvingly cited in *Kepner v. U.S.*[98]

However, if an acquittal is secured under a decision of the court sustaining the defendant's objection to the indictment, such acquittal will not bar further proceedings, whether the indictment was as a matter of law sufficient to sustain a conviction or not, because the defendant having procured a decision that the indictment is insufficient, will not afterward be permitted to assert that it was sufficient.[99] Wharton gives two exceptions to the general rule that one is not put in jeopardy if the information under which he is tried is defective: (1) where the accused is convicted on a defective indictment and has served the sentence, such conviction can always be pleaded in bar to a subsequent prosecution for the same offense; (2) where there is a verdict of acquittal on an insufficient indictment which is not objected to before the verdict is entered, such acquittal is a bar to a second indictment for the same offense, even though such verdict is not followed by any judgment.[100]

F. Plea. Arraignment.

1. *Necessity of Pleading to the Charge.*—The law requires before jeopardy attaches, that the defendant must have "pleaded to the charge." This is because it is considered that a defendant is legally placed on trial only when issue upon the information has been joined by his plea of not guilty thereto. Accordingly, before arraignment, the accused can in no wise be said to have been exposed to any peril of conviction at all, as in this jurisdiction nobody can be

[92] 16 Corpus Juris, sec. 379.
[93] U.S. v. Montiel, 43 Phil. 800; People v. Reyes, G.R. L-7712, March 23, 1956; People v. Austria, G.R. L-6216, April 30, 1954; Hopt v. Utah, 104 U.S. 631; Murphy v. Mass. 177 U.S. 155; U.S. v. Openheimer, 24 U.S. 85; People v. Capistrano, L-1463, Aug. 31, 1960.
[94] II MORAN 747 (1950 Ed); See People v. Abad Santos, 76 Phil. 754; U.S. v. Estrana, 16 Phil. 520; Serra v. Mortiga, 11 Phil. 762; People v. Capistrano, *supra*.
[95] NAVARRO, *op. cit.*; U.S. v. Balmori, 1 Phil. 660 (1903).
[96] Rule 116, sec. 4, Rules of Court.
[97] 163 U.S. 662.
[98] 195 U.S. 100
[99] 15 Am. Jur. sec. 375, p. 50; II MORAN 748 (1950).
[100] II WHARTON'S CRIMINAL EVIDENCE, p. 1491 (11th Ed.).

legally convicted without having been first informed of the charge against him.[101]

In one case, the trial court ordered the fiscal to amend the information of a criminal case. As he failed to comply with the order, the court dismissed the case. No plea to the charge was entered and no witnesses were called. It was held that the defendant was not placed in jeopardy.[102] In another case, it was held that there was no jeopardy as against the petitioners for the reason that they were never placed in jeopardy in the first case for the accused therein were never arrested and arraigned.[103] Likewise, when a defendant, before arraignment, moves to quash the complaint on the ground that it charges two offenses and the motion was sustained, the prosecution for one of the offenses is not a bar to the prosecution for the others.[104] So, also, where the case, originating in the Justice of the Peace Court and brought on appeal, after the conviction of the accused, to the Court of First Instance, was dismissed before the accused had pleaded to the information, the reopening of the case cannot place him in double jeopardy.[105] The rule does not apply, also, where the case was merely remanded to the justice of the peace court for a new preliminary investigation.[106]

2. *Pleading and Proving Former Jeopardy.*—It is imperative that the former conviction or acquittal, to be available as a defense, must be pleaded [107] and proved [108] at the proper time.[109] A plea of not guilty is not sufficient for this purpose.[110] Nor the mere mention of criminal case numbers and alleged portions of both informations for which the accused has supposedly been tried and convicted.[111] The privilege is a personal one, which may be waived either expressly or impliedly,[112] and a waiver is always implied when the accused fails to assert his rights under the guaranty at his earliest opportunity.[113]

As a rule, it must be asserted at the time of arraignment.[114] It can no longer be entertained after judgment or on appeal.[115] The judgment meant here is not the judgment as rendered by the court of last resort in case of appeal, but judgment by the trial court.[116] But section 10 of Rule 113 allows the defendant, if he learns after he has pleaded or moved to quash on some other ground, that the offense for which he is now charged is an offense for which he has been pardoned, or which he has been convicted or acquitted or been in jeopardy, to move to quash the present charge on any of these grounds. However, this must be raised before the judgment, and its reception is a matter of discretion on the part of the court.

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[101] II MORAN 750 (1950); People v. Ylagan, 58 Phil. 851; Kalaw v. Prov. Fiscal of Samar, G.R. No. L-45591, Oct. 15, 1937. See also Dimalibot v. Salcedo, L-15012, April 28, 1960.

[102] People v. Turla, 50 Phil. 100.

[103] Conjurado v. Remolete, G.R. L-8874, May 18, 1956.

[104] U.S. v. Montiel, 7 Phil. 272; U.S. v. Ballentine, 4 Phil. 672.

[105] People v. Jaramilla, G.R. L-8030, Nov. 18, 1955.

[106] People v. Cosare, G.R. L-6544, Aug. 25, 1954.

[107] XI AM. AND ENG. ENCYCLOPEDIA OF LAW, p. 494. But in some states, the courts take notice of a former acquittal even if not presented by a former plea.

[108] People v. Mangampo, G.R. L-8818, Sept. 27, 1956: "In pleading a former jeopardy it is not sufficient that the defendant simply allege that he had been placed in jeopardy; he must both allege and prove specifically that the offense of which he has been formerly convicted or acquitted is the same offense (or necessarily included in or includes) for which it is proposed to try him again."

[109] U.S. v. Gavieres, 10 Phil. 694.

[110] II UNDERHILL, CRIMINAL EVIDENCE, p. 1182 (5th Ed.).

[111] People v. Ferrer, G.R. L-8818, Sept. 27, 1956.

[112] UNDERHILL, *op. cit.*, p. 1179.

[113] Nixon v. State, 2 Smedes & M (Miss.) 497, 41 Am. Dec. 601.

[114] People v. Carado (CA) No. 12778-R, Nov. 11, 1955; Quintos v. Dir. of Prisons, 55 Phil. 304; U.S. v. Ondoro, 39 Phil. 70.

[115] People v. Mangcol, 47 O.G. (Suppl. 12) p. 228; People v. Salico, 47 O.G. 1765; U.S. v. Cruz, 36 Phil. 727; U.S. v. Ondoro, *supra;* U.S. v. Perez, 1 Phil. 203.

[116] People v. Colman et al, G.R. L-6652 to 6654, Feb. 28, 1958.

G. Identity of Offenses

The Double Jeopardy clause in the Constitution reads: "No person shall be twice put in jeopardy of punishment for the same offense. If an act is punished by law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act."[117] There are two kinds of double jeopardy dealt with here. The first part prohibits double jeopardy of punishment for the same *offense* whereas the second contemplates double jeopardy for the same *act*. Under the first, a person may be twice put in jeopardy of punishment for the same act, provided that he is charged with different offenses, or the offense charged in one case does not include, or is not included in the offense charged in the other case. However, under the second, even if the two charges are not the same, if the two charges are based on the same act, conviction or acquittal under either charge will bar further prosecution for the other. But the latter case applies only when the same act is punishable both by law and in an ordinance. Under the first sentence, such conviction or acquittal is not indispensable to sustain the plea of double jeopardy. So long as jeopardy has attached in one case, the defense may be availed of in the other case,[118] because the test in such case is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. The rule not only prohibits a second punishment for the same offense, but it does further prohibit a second punishment for the same offense, whether the accused has suffered punishment or not or in the former trial has been acquitted or convicted.[119]

1. *What constitutes the "same offense". Tests.*—The application however, of this traditional safeguard to specific cases has caused the courts innumerable problems. One of the most serious problems is the determination of what constitutes the "same offense". One view construes it to mean not only that the second offense charged is exactly the same as the one alleged in the first information, but also that the two offenses are identical. There is identity between the two offenses when the evidence to support a conviction for one offense would be sufficient to warrant a conviction for the other.[120] This is the so-called "*same-evidence test.*" Thus, in *People v. Quedes*,[121] the dismissal of an information charging the accused with robbery in band was held not a bar to his subsequent prosecution as accessory after the fact, for the crime of theft of the same property, "as the evidence necessary to support a conviction for robbery in band is different from that which is required to sustain a conviction for theft as accessory after the fact."

However, the rule has been much criticized as not being an infallible test, and must be accepted with some qualifications and exceptions and as true only in a general sense.[122] This vague and deficient test was restated in the Rules of Court in a clearer and more accurate form. Under the Rules, there is identity between the two offenses not only when the second offense is exactly the same as the other or is an attempt to commit the same or a frustration thereof, but also when one is necessarily included in the other.[123] This is the "*included*

[117] Article III, sec. 1 (20), Philippine Constitution.
[118] People v. Diaz, G.R. L-6518, March 30, 1954; Yap v. Lutero, G.F. L-12669, April 30, 1959.
[119] State v. Barnes, 29 N.H. 164, 150 N.W. 557; Kepner v. U.S., 11 Phil. 669, 195 U.S. 100.
[120] People v. Berga, G.R. L-8901, Feb. 28, 1957; People v. Elkanish, G.R. L-2666, Sept. 26, 1951; People v. Samonte, (CA) No. 15021-R, July 18, 1956; Gavieres v. U.S., 41 Phil. 961; U.S. v. Lim Tigdien, 30 Phil. 222; U.S. v. Ching Po, 23 Phil. 578; People v. Cabrera, 43 Phil. 82, 100; People v. Alvarez, 45 Phil. 472, 478; People v. Martinez, 55 Phil. 6; Mendoza v. Almeda-Lopez, 64 Phil. 820.
[121] G.R. No. L-8809, December 29, 1956.
[122] 22 C.J.S. sec. 279, p. 418.
[123] Rule 113, Section 9; People v. Berga, *supra;* People v. Kho, G.R. L-7529, Oct. 31, 1955.

*offense test."* [124] And an offense may be said to be necessarily include another, when some of the essential elements or ingredients of the former constitutes or forms a part of those constituting the latter.[125] For instance, if the former charge is theft, the accused cannot be subjected to a subsequent charge for robbery, for the latter includes the former.[126] And *vice-versa*, if the former charge is for robbery, the accused cannot be subjected to a subsequent charge for theft, because the latter is necessarily included in the former.[127] This test was applied in the recent case of *People v. Rodriguez*,[128] where it was held that the crime of illegal possession of firearms is absorbed in the crime of rebellion, hence there could be only one prosecution, for rebellion.

In determining whether a former charge necessarily includes or is necessarily included in the other, recourse is had to the facts specifically alleged in the first complaint or information.[129] It is not sufficient that the one is included or includes the other as both are defined by law. Thus, if the first offense is physical injuries and the second is discharge of firearms, the latter is not necessarily included in the former complaint or information for physical injuries in the former according as these offenses are defined by law; but if in the former complaint or information for physical injuries there is also an allegation of discharge of firearms, the second charge would constitute double jeopardy.[130] In *People v. Narvas*,[130a] the accused, a passenger truck driver, driving at a high speed, bumped a carabao, swerved several times to hit a house and a store, which mishap also caused injuries to his passengers. He was tried, convicted and sentenced to fifteen days imprisonment for the crime of slight and serious physical injuries thru reckless imprudence. For the same vehicular incident, he was subsequently charged with damage to property thru reckless imprudence, to which accused pleaded the defense of double jeopardy. The prosecution appealed from the decision of the trial court sustaining the accused. The Supreme Court, after comparing the first information for physical injuries with the second information for damage to property, found that substantially all the elements of the second information constituted the offense described in the first information. The prosecution had proved all the material allegations of the first information and the accused could have been convicted (and therefore had been in danger of being convicted) of the offense for which he is being prosecuted now. Needless to say, the first information in reality described the two offenses: damage to property thru reckless negligence and physical injuries thru reckless negligence. The doctrine in the case of *People v. Estiponia* [130b] wherein it was held that a person prosecuted for, and convicted of, damage to property thru reckless imprudence, could again be prosecuted for physical injuries thru reckless imprudence produced on the same occasion, does not apply here because it does not appear therein that the information for damage to property also described the offense of physical injuries, both caused thru reckless imprudence. Chief Justice Moran deems it necessary, however, that the offenses charged in the two informations be the

[124] CORNELL LAW QUARTERLY, Vol. 38, p. 610 (1953).

[125] Rule 116, Section 15. This doctrine owes its origin to a basic point of criminal procedure. At common law, and now by statute, in many states, a defendant can not be convicted of any crime the commission of which is necessarily included in the offense charged in the indictment, provided that the indictment itself alleges the facts constituting the lesser crime. For a discussion of the rule see Didiess v. People, 22 N.Y. 179; People v. Burch, 281 Appel. Div. 348, 120 N.Y.S. 2d 82 (4th Dept.) 1953.

[126] People v. Villasis, 81 Phil. 881.

[127] People v. Besa, 74 Phil. 47.

[128] G.R. No. L-13981, April 25, 1960.

[129] People v. Yanga, G.R. L-7617, Nov. 28, 1956; People v. Balboa, G.R. L-3522, Sept. 12, 1951; People v. de Soriano, 50 O.G. 106 (1953).

[130] U.S. v. Buiser, 32 Phil. 439; U.S. v. Andrada, 5 Phil. 464 cited in MORAN, p. 787 (1957); *See also* People v. Bacolod, G.R. L-2578, July 31, 1951.

[130a] People v. Narvas, G.R. No. L-14191, April 27, 1960.

[130b] 70 Phil. 513

same in law and in fact. It is not necessarily decisive that the two offenses may have material facts in common, or that they are similar, where they are not in fact the same.

Another test is the "*one-act*" *doctrine*.[131] This test is predicated on the theory that where a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without putting him twice in jeopardy for the same offense. The converse of this principle is equally true. For it is certainly unjust both upon principle and upon reason that a man who has been convicted for instance, of homicide may again be comitted of murder of the same person. As the Government can not begin with the highest, and then go down step by step, bringing the man into jeopardy for every dereliction included therein, neither can it begin with the lowest and ascend to the highest with precisely the same result.[132]

While the rule against double jeopardy prohibits prosecution for the same offense, it seems elementary that an accused should be shielded against being prosecuted for several offenses made out from a single act. Otherwise, an unlawful act or omission may give rise to several prosecutions depending upon the ability of the prosecuting officer to imagine or concoct as many offenses as can be justified by said act or omission, by simply adding or subtracting essential elements. This was the rule enunciated in the case of *Del Carmen*.[133] In this case, the defendant was charge in the municipal court with malicious mischief for having removed the "media agua" of the house of the complainant. The case was dismissed for failure of the prosecution to prove that the removal was motivated by resentment or revenge. The same fiscal filed information in the Court of First Instance charging the same defendant of coercion, in that the defendant prevented the offended party from leaving intact the "media agua" of his house. The court held that there was double jeopardy. If the theory of the prosecution be sustained, "the crime of rape may be converted into a crime of coercion, by merely alleging that by force and intimidation the accused prevented the offended girl from remaining a virgin."

It has been held, even before the present Rules, that the effect of prosecuting first the lesser offense where a larger offense has been committed and could be prosecuted, would be to split the larger offense into its lesser parts, and the state in electing to prosecute the first one waives, in legal effect, all the others.[134] The rule folowed before 1943 was that where the court in which the acquittal or the conviction was had was without jurisdiction to try the accused for the greater offense, there could be no jeopardy to prosecute the accused for the lesser offense. This doctrine was expressly abandoned by our Supreme Court in *People v. Besa*[135] decided in 1943, wherein it was held that "whether or not the court had jurisdiction to try the greater offense is completely immaterial. The only test to determine the identity of the two offenses, was under the former procedure, whether or not the evidence which prove the one would also prove the other, or is, under the new Rules of Court, whether the second offense 'necessarily includes or is necessarily included in the offense charged in the former complaint or information x x x." The reason for this abandonment is that the said doctrine was predicated upon the theory that when the court has no jurisdiction to try the greater offense the accused

[131] *See* discussion in CORNELL LAW QUARTERLY, Vol. 38, p. 612 (1953).

[132] People v. Cox, 107 Mich. 435, quoted with approval in U.S. v. Lim Suco, 11 Phil. 484; see also U.S. v. Ledesma, 29 Phil. 431; People v. Martinez, 55 Phil. 6; Melo v. People, 47 O.G. 4631.

[133] G R. No. L-3459, Jan. 9, 1951.

[134] People v. Besa, 74 Phil. 57 citing 15 Am. Jur pp. 60-61; *See also* People v. Martinez, 55 Phil. 472; U.S. v. Ledesma, 29 Phil. 431.

[135] 74 Phil. 57.

could not have been placed in danger of a conviction therefor; but this theory applies with equal force even where the court has such jurisdiction because if the greater offense was not included in the former charge the court likewise could not have convicted the accused for such offense.[136]

The same general rule against double jeopardy for the same offense holds true in cases of the so-called "continuing crimes."[137] In such a case, where an offense charged consists of a series of acts extending over a period of time, a conviction or acquittal for a crime based on a portion of that period will bar a prosecution covering the whole period.[138] However, in the crime of adultery, each sexual intercourse constitutes a separate crime of adultery and is not a continuing offense.

2. *Rule of Identity of Offenses: When not applicable.*—

(a) The rules on identity of offenses do not apply, however, when the second offense was not in existence at the time the first offense was charged and tried, as where the accused was charged with assault and battery and after conviction the injured person dies, a charge for homicide against the same accused, without violating the rule against putting a man twice in jeopardy, may be made.[139] Accordingly, the rule is that an offense may be said to necessarily include or to be necessarily included in another offense, for the purpose of determining the existence of double jeopardy, when *both offenses were in existence* during the pendency of the first prosecution. Otherwise, where no supervening event has occurred which transformed the offense from less serious physical injuries to serious physical injuries, the nature and condition thereof having been the same, the prosecution and conviction of the accused for less serious physical injuries is a bar to a subsequent prosecution for serious physical injuries.[140] The reason for the exception is that the accused could not have been in danger of punishment for an offense then inexistent. But to do justice to the accused, in case of conviction for the second offense, he should be credited with the penalty already suffered by him under the conviction.[141] This is the rule now presently followed. The contrary ruling in *People* v. *Tarok*[142] reiterated in *People v. Villasis*[143] has been abandoned as "being contrary to the real meaning of double jeopardy as intended by the Constitution and by the Rules of Court" and is "also obnoxious to the administration of justice."[144]

Was there an irreconciliable inconsistency between the two cases which would justify the "repeal" of the Tarok doctrine?

It appears in the Tarok case, decided in 1941, that the accused, for having hacked his wife with a bolo, was charged with, and upon plea of guilty, *convicted* of, the crime of serious physical injuries. While he was *serving his sentence*, the victim died of the same wounds inflicted upon her, and to the subsequent indictment for parricide presented against him, he interposed the plea of double jeopardy. The lower court convicted him for the graver offense, but on appeal

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[136] II MORAN 754.
[137] U.S. v. Walsh, 6 Phil. 349; U.S. v. Arcos, 11 Phil. 555.
[138] Crisologo v People, 50 O.G. 1021 (1954).
[139] People v. Patilla, G.R. L-5070, Dec. 29, 1952; Diaz v. U.S. 223 U.S. 442; People v. Manolong, G.G. L-2228, March 30, 1950; People v. Espino, 40 O.G. (6th Suppl.) 168.
[140] People v. Buling, G.R. L-13315, April 27, 1960.
[141] People v. Manolong, *supra*.
[142] 40 O.G. 3488, 73 Phil. 260.
[143] 46 O.G. (Suppl. 1) 268.
[144] Melo v. People, 47 O.G. 4631.

said decision was reversed on the ground that the accused was placed in double jeopardy.

In the Melo case, decided in 1950, the accused was formerly charged with frustrated homicide. He pleaded not guilty. While the *prosecution was pending*, the victim died of the same wounds, and an amended information was filed charging the accused with consummated homicide. He was convicted under said amended information, by the lower court. The Supreme Court, turning a deaf ear to accused's plea of double jeopardy, affirmed the decision.

A careful analysis of the two cases will show that the supervening event of death occurred at different times. In the Melo case, such death took place while the case was in the *process of judicial trial*. Chief Justice Moran who penned the majority opinion in this case (who delivered a dissenting opinion in the Tarok case) invoked the same reasons he gave in his dissent in the Tarok case and stated that the "amended information was rightly allowed to stand." He based his statement on Rule 106, section 13, 2d paragraph of the Rules of Court.[145] And it is true that the amendment of the information would not place the accused in double jeopardy because, applying the new doctrine in the Melo case, as the offense of consummated homicide was not yet in existence during the prosecution for that of frustrated homicide. Therefore, his conviction for the latter offense did not place him in double jeopardy.

However, in the Tarok case, the offense of parricide came into view only after the judgment of conviction and while the accused had already commenced serving his sentence, i.e., the judgment of conviction had already became final.[146] When a judgment has become final, by total or partial service of the penalty imposed by the court, the court rendering it loses power to alter, amend or modify it, unless for clerical errors.[147] An alteration or amendment of the judgment under the situation would amount to punishing the defendant twice for the same offense. Furthermore, section 13 of Rule 106 of the Rules of Court only allows the amendment to be done at any time *before* judgment; it does not say that such can be done *after* the judgment, much more when said judgment has already become final.

The Court in the Melo case cited authorities, among them *Diaz v. United States*, 223 U.S. 442, and *People v. Espino*, 69 Phil. 471 (1940), but the death of the victim in those cases occurred *after* the conviction, and not during the trial as in the case at bar. Besides, said cases were repudiated and disregarded by the Supreme Court in the later case of Tarok. There was absolutely no reason to preclude the Court from repealing the doctrines in said cases, for as a mere doctrine it could be repealed at any time in the decision of any case where it is invoked.

It is submitted that the Melo case only *conditionally modified* the Tarok case in the sense that if during the prosecution for the lesser offense or before the judgment of conviction has become final, a new fact supervenes for which the accused is responsible and which changes said offense into a graver offense, there would be no jeopardy. In this instance, the Melo case applies. There could be an amendment applying said doctrine, without placing the accused in double jeopardy. However, if the judgment of conviction had already become

[145] "If it appears at any time before judgment that a mistake has been made in charging the proper offense, the court may dismiss the original complaint or information and order the filing of a new one charging the proper offense, provided the defendant would not be placed thereby in double jeopardy, x x x".

[146] Rule 116, Section 7: "A judgment in criminal case becomes final after the lapse of the period for perfecting an appeal, *or when the sentence has been partially or totally satisfied or served*, or the defendant has expressly waived in writing his right to appeal."

[147] U.S. v. Hart, 24 Phil. 578; Gregorio v. Dir. of Prisons, 43 Phil. 650.

final, as for instance, the accused had entered into the service of the sentence, the filing of a new information for an offense which necessarily includes the former charge, there would be double jeopardy. There could be no amendment of the information after the judgment had become final, unlike the first instance. The Tarok doctrine applies.

The reasoning in the Melo case that the Tarok doctrine would create cases where, through connivance with the prosecution, the accused would be given opportunity to evade justice is sound but not very convincing. "A fundamental principle (nay, even constitutional right), should not be brushed aside even at the expense of the possibility that in a particular case a guilty person may be allowed to avoid punishment."[148] And according to Justice Laurel: "* * there is as much injustice in subjecting a person to double prosecution with all its concomittant and consequent annoyance and difficulties as there may be in barring a subsequent prosecution for the same offense.'[149]

It seems, however, that the tendency of the court is to adhere unconditionally to the Melo doctrine. For instance, in the case of *People v. Manolong*, *supra*, the basis for the opinion was "the recent decision in the case of Conrado Melo v. People, et al., * * *" A work on Constitutional Law noted the distinction between the facts of this and the *Melo* case, thus: "As distinguished from the Melo case, there was here a plea of guilty to the offense and the accused had thus been sentenced when the fiscal filed the information for the more serious offense of serious physical injuries. To the plea, however, that the second information would place him twice in jeopardy, the Supreme Court was equally unimpressed as in the *Melo* case."[150]

(b) The second exception is where a single act constitutes an offense against two statutes, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statutes does not exempt the defendant from prosecution or conviction under the other.[151] So, also, the same acts may violate two or more provisions of the Revised Penal Code.[152] Thus, in a case, the defendant C was previously prosecuted for the crime of robbery for taking, with violence and intimidation, certain postal articles from S, a postal clerk, while in the discharge of his duties as such. C was acquitted and thereafter was again prosecuted for assault upon the same person of S as agent of authority. It was held that there was no double jeopardy.[153] Illegal fishing with explosives is a distinct offense from that of illegal possession of explosives. The former is a violation of Com. Act 471, while the latter is in violation of Act No. 3023. The violation of the first does not necessarily include and is not necessarily included in the other.[154] When an accused after trial in separate cases for homicide and for illegal possession of firearm was convicted only of the former offense, the latter having been dismissed because the information did not charge an offense under Rep. Act 482, the dismissal is not a bar to subsequent prosecution for the same offense.[155] So, also, conviction of acts of lasciviousness is held not to bar a conviction for forcible abduction.[156] Since there can be theft without illegal possession of firearms, and vice-versa, conviction of one offense will not bar prosecution for the other.[157]

[148] State v. King, 267 Wisc. 193. 54 N.W. 2d 181, 184.
[149] People v. Tarok, 73 Phil. 260.
[150] I TAÑADA AND FERNANDO, CONSTITUTION OF THE PHILIPPINES, p. 615 (4th Ed.)
[151] People v. Bacolod, G.R. L-2578, July 31, 1951; People v. Tinamisan, G.R. L-4081, Jan. 29, 1952; U.S. v. De los Santos, 7 Phil. 580; U.S. v. Infante, 36 Phil. 146; Gavieres v U.S., 220 U.S. 338, 55 L. Ed. 489 aff'g 10 Phil. 694; People v. Alvarez, 45 Phil. 472.
[152] V. FRANCISCO 189 (1958 Ed.).
[153] U.S. v. Capurro and Weems, 7 Phil. 24.
[154] People v. Anito, G.R. L-686, Sept. 28, 1954.
[155] People v. Austria, G.R. L-62161, April 30, 1954.
[156] People v. Franco, 53 O.G. 410 (1957).
[157] People v. Remerata, G.R. L-6971, Feb. 17, 1956.

In this connection, the Supreme Court once said that the killing of a person with a firearm may mean homicide or illegal possession of firearms, or both, or no crime at all. No crime at all, explained the court, if killing was done in self-defense and the killer had a permit to possess the firearm. Both offenses, if the killing was not justified and the offender had no permit. The first (and not the second) if there was permit to possess the weapon but no justification for the violence. The second (and not the first) if the offender had no permit to keep the gun, but acted in self-defence. Prosecution for one offense, does not prevent trial for the other. Conviction for both may legally be had.[158] However, as we said before, this ruling does not apply in cases of certain crimes like rebellion.

(c) Still another exception is when the same act constitute offenses against different sovereignties. Thus, where an act transgresses both civil and military laws and subjects the offender to punishment by both civil and military authorities, a conviction or acquittal in a civil court cannot be pleaded, and vice-versa, where both courts *do not* derive their powers from the same sovereignty.[159]

Under the Constitution, however, *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. So that where a single act violates both a general and a local law, prosecution under the former will bar another charge for the same act under the latter, if the accused had been convicted or acquitted formerly in the first instance.

In this connection, one who is punished for contempt may be again punished for a violation of the general law where the facts show a violation of a different penal law even though both offenses grow out of one or the same transaction. The main reason for this rule is that punishment for contempt is quasi-criminal, its object and purpose being not to punish a public offense but to compel obedience and respect for the orders of the court.[160] Hence, a contempt proceeding in one case and prosecution for grave coercion in another case will not violate the constitutional provision against placing a person twice in jeopardy.[161]

H. When Appeal Places the Accused in Double Jeopardy and When Not.

The practical effect of the provision against double jeopardy is not only to save a person from being tried for the same offense in distinct proceedings, but also to deny to the prosecution, in criminal cases, the right to take an appeal[162] or to move for a new trial, unless, in the particular state, the constitutional rule has been relaxed so far as to allow this. And except in cases where the prisoner himself appeals and a new trial is thereupon ordered, there is no redress for errors or mistake made in the course of the trial which tell in favor of the defendant, nor any opportunity to correct them.[163] Under the Rules of Court, the state can appeal only if the defendant would not be placed thereby in double jeopardy.[164] This provision should be given force and effect even though the accused failed to file any brief on appeal raising the question of double jeopardy occasioned by the appeal of the prosecution from a judg-

[158] People v. Tinamisan, G.R. L-4081, Jan. 29, 1952; People v. Maalihan, 53 Phil. 295; *Cf.* People v. Labsi, 17 Phil. 240.
[159] Crisologo v. People, *supra*.
[160] Same is true of legislative contempt. Lopez v. de los Reyes, 55 Phil. 170 citing U.S. v. Houston, 26 Fed. 379 and Marshall v. Gordon, 243 U.S. 521.
[161] People v. Simpre (CA) G.R. No. L-5037-R, Feb. 26, 1954.
[162] *See* People v. Ang Cho Kio, 50 O.G. 3563 (1954); People v. Revil, G.R. L-11061, Dec. 29, 1958
[163] BLACK'S CONSTITUTIONAL LAW, p. 589.
[164] Rule 118, sec. 2.

ment amounting to acquittal.[165] It has been held that the right of appeal by the Government in criminal actions is limited to cases in which errors have occurred before legal jeopardy has attached.[166]

The rule that the prosecution cannot, on grounds of double jeopardy, appeal from a judgment of conviction or acquittal, is a mere corollary of the practice established in the Philippines and in the United States, for so long a time as to form part and parcel, not merely of the settled jurisprudence but also of the constitutional law, in both jurisdictions.[167] Thus it has been held as early as the case of *Kepner v. U.S.*[168] decided in 1904 that appeal by the government from a judgment acquitting the accused places the latter twice in jeopardy.[169] This must be so, even if the acquittal appears to be erroneous.[170] Appeal by the government from an order of the court dismissing the case on the ground that the evidence of the prosecution failed to prove the guilt of the accused, or on the ground that it had no jurisdiction, places the latter in double jeopardy for such dismissal is an adjudication on the merits and operates as an acquittal, and this is true even if the order of the court is erroneous.[171] So, also, the appeal of the prosecution with a view to increasing the penalty imposed places the accused twice in jeopardy of punishment for the same offense.[172] And the more reason should appeal be denied to the government when, after the conviction, the accused has already commenced serving sentence or paid the fine.[173]

However, the rule is not absolute for it admits of certain exceptions. Thus, the rule does not apply when the former jeopardy did not attach in the other case.[174] For instance, if the accused, after his conviction for rebellion, did not enter a plea to the information for kidnapping with murder, the appeal by the state from the order quashing the information and the trial to determine whether the crime committed by him was in connection with or in furtherance of the rebellion movement, will not and cannot constitute double jeopardy.[175]

It is also held that when it is the defendant himself who appeals in a criminal case, he waives his defense of jeopardy. He must then take the burden with the benefit and stand for a new trial of the whole case.[176] There is a vital difference between an attempt of the Government to review a verdict of acquittal in the Court of First Instance and the action of the accused in himself appealing from a judgment which convicts him of one offense while acquitting from the higher one charged in the indictment.[177] At common law, a convicted person could not obtain a new trial by appeal, except in certain narrow instances. As this harsh rule was discarded, courts and legislatures provided that if the defendant obtained the reversal of a conviction by his own appeal, he could be tried again for the same offense. According to Stephen,[178] under English Law the appellate court has no power to order a new trial after any appeal except in certain cases where the first trial was a com-

[165] People v. Bao, G.R. L-12102, Sept. 29, 1959.
[166] U.S. v. Ballentine, 4 Phil. 672.
[167] People s. Pomeroy, G.R. L-8229, Nov. 28, 1955.
[168] 195 U.S. 109, 11 Phil. 669.
[169] Kepner v. U.S., *supra*. *See dissenting opinions, however.*
[170] U.S. v. Ball, 163 U.S. 662, 41 L. Ed. 300, 303; Peters v. Hobby, 349 U.S. 331, 344, 345, 99 L. E. 1129, 1140; Green v. U.S., 355 U.S. 184, 2 L. Ed. 2d 199 (1957).
[171] People v. Cabarles, G.R. L-10702, Jan. 29, 1958; People v. Bangalao, *supra; See also* People v. Arinso, G.R. L-6990, July 20, 1956; People v. Paet, G.R. L-9551, Nov. 26, 1956; People v. Flores, *supra*, People v. Ferrer, *supra*, People v. Salico, *supra*, notes 86 to 88.
[172] People v. Arinso, G.R. L-6990, July 20, 1956.
[173] People v. Revil, G.R. L-11061, Dec. 29, 1958.
[174] See Notes 23 to 27
[175] People v. Yuzon, G.R. L-9462, July 11, 1957.
[176] U.S. v. Flemister, 5 Phil. 650, aff'd in 207 U.S. 372, 52 L.Ed. 252, 28 Sup. Ct. Rep. 129; U.S. v. Sunga, 11 Phil. 601; Trono v. U.S., 199 U.S. 521, 50 L.Ed. 292, 26 Supt. Ct. Rep. 121.
[177] Kepner v. U.S. *supra*.
[178] COMMENTARIES ON THE LAWS OF ENGLAND, 21st Ed., p. 284.

plete "nullity", as for example when the trial court was without jurisdiction over the person or subject matter.

There are different views as to this new trial. Most courts regard the new trial as a second jeopardy but justified this on the ground that the appellant had "waived" his plea of former jeopardy by asking that the conviction be set aside.[179] Other courts view the second trial as continuing the same jeopardy which had attached at the first trial by reasoning that jeopardy did not come to an end until the accused was acquitted or his conviction became final.[180] But whatever the rationalization, it has been held in *United States v. Ball*[181] that a defendant can be tried a second time for an offense when his prior conviction for that same offense has been set aside on appeal. The same ruling was applied in the recent case of *People v. Segovia*.[182] In this case, the accused appealed from the judgment of the Municipal Court convicting him of malicious mischief, and reiterated his motion to quash the information before arraignment in the Court of First Instance, on the ground that it did not allege the necessary elements to constitute the crime charged in the information. The Court of First Instance sustained him and dismissed the case. The government appealed. The defendant contended that the government could not appeal from the judgment of dismissal without placing him in double jeopardy since he had previously been convicted in the municipal court. The Supreme Court held that the accused was not thereby placed in double jeopardy, advancing the following argument:

> "This claim (of double jeopardy) ignores the fact that he appealed from the judgment of conviction by the Municipal Court of Legaspi. The rule is that when an appeal has been perfected, the judgment of the justice of the peace or municipal court is vacated and the case is tried *de novo* in the court of first instance *as if it were originally instituted therein*. (Rule 119, sec. 8, Rules of Court). No new information need be filed in the latter court in order that it may acquire jurisdiction to try the case. (People v. Cu Hiok, 62 Phil. 501 [1935]; Crisostomo v. Director of Prisons, 41 Phil. 368 [1921]). If the case, on appeal by the accused, is as originally instituted, and the motion was filed *before arraignment* or plea, it is obvious that the dismissal of the case was no bar to appeal because it does not place the accused in jeopardy under Section 9, Rule 113, of the Rules of Court. The claim is therefore without merit." [183]

Another interesting question is to what extent the accused waives his right as to jeopardy, in these cases of appeal. This question was raised as early as 1905 in the case of *Trono v. U.S.*[184] The majority opinion declared that the better doctrine is that which does not limit the court upon a new trial, to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been. The minority view essays to limit the waiver only to the precise thing concerning which the relief is sought. His (accused) application for a correction of the verdict is not to be taken as more extensive than his needs. He asks a correction of so much of the judgment as convicted him to guilt. He is not to be supposed to ask correction or reversal of so much

[179] Brewster v. Swope (CA 9th Cal) 180 F 2d 984; State v. McCord, 8 Kans. 232, 12 Am. Rep. 469; Cross v. Comm. 195 Va. 62, 77 S.E. 2d 447; Smith v. State, 190 Wisc. 102, 219 N.W. 270.

[180] State v. Aus. 105 Mont 82, 69 P. 2d 584. Cf. Griffin v. Illinois, 351 U.S. 121, 100 L.Ed. 891, 898.

[181] 163 U.S. 662, 41 L.Ed. 300; See also Trono v. U.S., 199 U.S. 521, 11 Phil. 726; U.S. v. Gimenez, 34 Phil. 72; U.S. v. Padilla, 4 Phil. 511.

[182] G.R. No. L-1174, May 28, 1958

[183] Mr. Justice Felix with whom Chief Justice Paras concurred, dissented on the ground that a trial *de novo* does not wipe out the proceedings in the Municipal Court, hence the defendant's previous conviction cannot be disregarded.

[184] 199 U.S. 521; 11 Phil. 726.

of it as acquitted him of offense. He thereof, according to the minority, waives his privilege as to one, and keeps it as to the other.[185]

## III. CONCLUSION.

It is said that in the trial of a criminal case, there are two contending forces: the state and the accused. That the pendulum either swings one way or the other: for or against the accused.

In our jurisdiction, after an examination of the history and present status of the law of double jeopardy, we see that the "path of that law" leads to a more liberal concern for the accused. If and when the Government is in a position to avoid or forestall unnecessary harrassment and humiliation—placed in having to select between two alternatives—the court readily inclines to shelter the individual and exact fairness and a high degree of vigilance from the State. Thus, the right to appeal is withheld from the state where it would place the accused in double jeopardy, although this same right was allowed under the former Code of Criminal Procedure. This new rule has withstood various tirades against it. A fundamental principle should not be brushed aside even at the expense of the possibility that in a particular case a guilty person may be allowed to avoid punishment.

Whereas, formerly, it was considered legal to convict a person separately for a violation of an ordinance and for a violation of a general law although both were the result of one and the same act,[186] the Constitution forbids such practice. While in the former cases, the rule was that a dismissal of the case upon the motion of the accused does not place the latter in jeopardy because said dismissal was upon the express consent of the accused, recent decisions have sustained the theory of double jeopardy despite the fact that the dismissal was secured upon the motion of the accused, in certain instances. Regard for the right of the accused to a speedy trial is recognized.

Under the present Rules of Court, the accused is deemed to be in double jeopardy not only when the offense is exactly the same as the other or is an attempt to commit the same or a frustration thereof, but also when one necessarily includes or is necessarily included in the other. Errors of the court in dismissing the case, which in reality amounts to acquittal, is resolved in favor of the accused.

These few instances, among the many others, are evidence of the present tendency of the law and of the courts to give higher value to the right of the accused to be protected against double jeopardy. As was once aptly said: "Let it be remembered that we are dealing with a great right, . . . a constitutional right." It should not be put in balance with other ordinary rights. If such great constitutional protections are given a narrow, grudging application, they are deprived of much of their significance. And this should not particularly be the case, since it involves such a fundamental matter as freedom and civil rights, things which democracies pride themselves upon guarding with jealous care, in contradistinction, as they correctly affirm, to other current forms of government which do not so highly regard or so carefully preserve them.

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[185] Justices Harlan, McKenna, White, and the Chief Justice, dissenting in Trono v. U.S. *supra*.

[186] *See* U.S. v. Gavieres, 10 Phil. 472; U.S. v. Chan-Cun-Chay, 5 Phil. 385; U.S. v. Flemister, 5 Phil. 650; v. Ching Po, 23 Phil. 578; People v. Alvarez, 45 Phil. Cf. With Article III, Sec. 1(20), Philippine Constitution.