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# TRIAL BY JURY AND "DOUBLE JEOPARDY" IN THE PHILIPPINES

# TRIAL BY JURY AND "DOUBLE JEOPARDY" IN THE PHILIPPINES.

There are three cases pending in the Supreme Court of the United States* on appeal from the Supreme Court of the Philippine Islands which have, not inappropriately, been designated as a "second instalment of the Insular Cases." They involve constitutional questions growing out of the administration of the Archipelago of far-reaching consequence to the people of the islands and of much interest to all who are following the development of the laws of our new possessions.

The two questions raised in these cases are: First,

Does the right of trial by jury exist in the Philippines? and, second,

Does the Philippine Government act which prohibits "double jeopardy," repeal the law of procedure in force in the Philippines, which gives the Government, as well as the accused, the right of appeal in criminal cases?

It is generally conceded that the principle involved in the first question comes within the purview of the decision of the court in the Insular Cases and the Hawaiian case.† In order to support the proposition that the right of trial by jury is in the Philippines, it must be held that the Constitution in its entirety has been in its full force and effect in the Philippines since the date of the ratification of the treaty of Paris, and hence the provision guaranteeing the right of trial by jury has existed in the islands since that date.

The Supreme Court held in the insular cases that exactly the

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* *Thomas E. Kepner v. United States; Fred L. Door and Edward F. O'Brien v. United States; Secundino Mendezona Y Mendezona v. United States.*

†*Hawaii v. Mankichi,* 190 U. S. 197.

contrary of the foregoing proposition is the law. It said in those cases that all of the provisions of the Constitution do not of their own force attach to newly acquired territory immediately upon the date of acquisition; that the power to extend the provisions of the Constitution to the territories rests with Congress. And, notwithstanding the fact that there are certain prohibitions contained in the Constitution relating to natural or fundamental rights which go to the very root of the power of Congress to act at all, at all times, in all places, and under all circumstances, yet there are other limitations contained in that instrument, not absolute in their nature, relating to artificial rights, such as methods of procedure, forms of judicial trial, and modes of taxation, which do not restrict Congress in the exercise of its power to create local government and make needful rules and regulations for the territory of the United States. In view of these decisions, the only practical question left for determination in cases coming from our insular possessions involving constitutional questions is, What are natural or fundamental rights, and what are artificial or remedial rights? The question here presented is, Is the right of trial by jury fundamental? The Supreme Court has answered this question in the case of *Hawaii v. Mankichi,* as follows:

> We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case* *are not fundamental in their nature, but concern merely a method of procedure* which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being.

In the light of this decision of the court it would appear that the answer to the first question involved in the Philippine cases will not be attended with much difficulty. This, however, cannot be said of the second question.

The second point raised is, Does the Philippine Government act, which provides that no person "for the same offense shall be twice put in jeopardy of punishment," repeal the Code of Criminal Pro-

* Common law trial by jury and indictment by grand jury.

cedure* of the Philippines, which gives the government, as well as the accused, the right of appeal from judgments of the trial court in criminal cases? At first blush it would appear that the law giving the Government the right of appeal in criminal cases is a clear violation of the act of Congress, but an investigation of the Spanish law on the subject of "double jeopardy" and the rules of statutory interpretation discloses the fact that there is much to be said on both sides of the question. The principle that a person shall not be twice put in jeopardy for the same offense is as firmly imbedded in the Spanish law as it is in the law of the United States. In the Roman law, upon which the Spanish law is based, the principle *non bis in idem,* is clearly laid down. Bouvier, in speaking of this phrase, says it signifies that no one shall be twice tried for the same offense—that is, when a party accused has been once tried by a tribunal of the last resort, and there convicted or acquitted, he shall not be tried again.

Merlin and Bouvier cite the following provision of the Code of Justinian, which is also referred to by the court of cassation of France as the basis of the doctrine of jeopardy:†

> He who has been accused of a crime can not be complained of for the same offense by another person. But if more than one offense arise from the same act and the offender has been

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*The Code of Criminal Procedure in force in the Philippines at the present time is General Order 58, which was issued by the military governor during the military occupation of the islands. The clause with reference to appeals is substantially a continuation of the old practice under the Spanish Code of Procedure. Sections 43 and 44 are as follows:

> Sec. 43. From all final judgments of the courts of first instance of similar jurisdiction and in all cases in which the law now provides for appeals from said courts, an appeal may be taken to the supreme court, as hereinafter prescribed. Appeals shall also lie from final judgments of justices of the peace in criminal cases to the courts of the next superior grade, and the decisions of the latter thereon shall be final and conclusive, except in cases involving the validity or constitutionality of a statute, wherein appeal may be made to the supreme court.
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> Sec. 44. Either party may appeal from a final judgment or from an order made after judgment affecting the substantial rights of the appellant, or in any case now permitted by law. The United States may also appeal from a judgment for the defendant rendered on a demurrer to an information or complaint and from an order dismissing a complaint or information.

†See Devilleneuve and Gilbert's *Table générale alphabetique du Recueil général des lois et des arrets,* vol. 3, p. 399.

> accused of one offense, it is not prohibited that complaint be made against him by another person for the other offense.
>
> Code, lib. ix, tit. ii, l. 9.

This principle continued to be recognized in French law, was made a part of the constitution of 1791, of the constitution of the year III, of the code of 3 Brumaire, year IV, and, finally, of the Napoleonic *"code d'instruction criminalle,"* which declares:

> Art. 360. No person legally acquitted can be a second time arrested or accused by reason of the same act.

In Spanish law the doctrine found expression in the Fuero Real (A. D. 1255), and the Siete Partidas (A. D. 1263):

> After a man accused of any crime has been acquitted by the court, no one can afterwards accuse him of the same offense (except in certain specified cases). Fuero Real, lib. iv, tit. xxi, l. 13.
>
> If a man is acquitted by a valid judgment of any offense of which he has been accused, no other person can afterwards accuse him of that offense (except in certain cases). Siete Partidas, Part VII, tit. i, l. xii.

In the encyclopedia of Spanish law, published by Don Lorenzo Arrazola, in 1848, it is said, in considering the persons who may be accused of crime:

> It is another of the general exceptions that a person cannot be accused who has formerly been accused and adjudged of the said crime; since the most essential effect of all judicial decisions upon which execution can issue is to constitute unalterable law. Tomo I, pag. 511.

The difference in the rules of law relating to double jeopardy as they exist in the Roman system, and in the common law, is one of application merely, and arises out of the difference between the common law and the civil law conceptions of what constitutes a trial.

Broadly speaking, under the American law jeopardy ends with the conclusion of a trial by a jury. Under the Spanish system jeopardy ends when the case has been heard by the Supreme Court on appeal and the latter has rendered a final judgment. Under the Spanish system there is no jury trial and the judgment of the trial court is but little more than advisory. It may be modified, set aside, or reversed on appeal. It is not an uncommon occurrence for the supreme court to increase the punishment of persons who have been convicted by the lower court, and it often convicts persons who have

been acquitted by the trial court. But when this is done the jeopardy ends. There is no reviewing the case after the supreme court has passed upon it. Until recently, cases went to the supreme court as a matter of law, no appeal being necessary. But this has been modified to the extent of making the judgments of the court of first instance final, unless an appeal is taken by the attorney-general or the accused within twenty days. It is thus seen that, under the law, there is no real finality of judgment until both tribunals have passed upon the case. *The review of the case by the supreme court is a part of one continuous trial.*

It is contended, on the one hand, that the controlling guide in determining the intent with which Congress enacted the law in question must be found in the interpretation which the language, as used in the statute, has received at common law, and the meaning it has in the Constitution of the United States. The Government sets up as the guiding rule of interpretation in this case the fundamental presumption of law that the legislature is always presumed to have had former statutes before it, to have been acquainted with their judicial construction, and to have passed new statutes on the same subjects with reference thereto. All statutes *in pari materia* are to be considered together.

It is further pointed out that Congress was here dealing with a new and unique subject matter. It knew that the Philippine Islands were at the time of the passage of the act governed by a system of laws separate and distinct from our own; that the principles of the civil law prevailed in all Spanish countries and under that system of jurisprudence the right of trial by jury did not exist. It knew also that the Spanish law on the subject of jury trial and jeopardy had been re-enacted by the military governor of the Philippines. Congress is also presumed to have known that the Supreme Court of the Philippine Islands has uniformly held, since American occupation, that jeopardy, according to the Spanish law in force in the islands, does not end until the case has been reviewed by the Supreme Court, and final judgment rendered by that tribunal. The foregoing proposition was supplemented by the following contention, upon which counsel for the government laid much emphasis. The conception of double jeopardy as it exists in England and the United States is indissolubly connected with the system of jury trial, and Congress, in withholding the jury system from the Philippines, also meant to change the application of the auxiliary principle of jeopardy. If Congress had extended the

system of trial by jury to the Philippines, then the contention of the plaintiffs in error in the cases would have been unassailable. The whole Anglo-Saxon rule of procedure, criminal and civil, is based upon the provision for trial by jury. The omission of the provision for jury trial renders other principles of common law procedure incident thereto, inappropriate. Common law proceedings without jury trial would be like the play of Hamlet with Hamlet left out. Under the common law the jury is the supreme authority, and when they have completed their work one jeopardy is over, viz., the jeopardy of conviction by that particular jury. A second jury would involve a second jeopardy, for one jury might convict where another would acquit. This position is sound—otherwise the State might go on experimenting until it found a jury ready and willing to convict. Under the Spanish law, as it exists in the Philippines, however, all of this is inapplicable. No person or body has a right to render a verdict, except the courts.

There is no judgment or verdict rendered by a body which then forever passes out of existence. The inferior and superior courts of the Philippine Islands are merely parts of one general judicial system. The connection between these courts is far closer than it possibly can be under a jury system. The proceedings in the upper and lower courts are merely parts of the same judicial trial. The proceeding in the lower court is but one step in the case; the rights of the accused cannot be determined therein, either favorably or adversely. *There is but one trial, which can not be terminated until the decision of the supreme court is finally given, and there is but one putting in jeopardy.* In the Philippine Islands the Supreme Court itself renders the verdict; under the common law procedure all the court can do is to order a new trial by a new jury, and in this connection it is to be noted that the Supreme Court in the Philippine Islands has no original or concurrent jurisdiction to hear and try criminal cases in the first instance; its jurisdiction is only appellate; hence there can be no new trial in any proper sense of the term.

A comparison of the common law and Spanish law rules with reference to "double jeopardy" discloses, first, that the principle embodied in the doctrine against "double jeopardy" is identical in both systems; the difference being one of application only; second, that the Spanish law application of the principle is supported by reason and justice, as well as the one found in the common law,

and is well calculated to conserve the rights and well being of the citizens of the Philippine Islands.

The Spanish law application of the principle is based upon the theory that the state has just as much right and just as much interest in having the errors of the trial court corrected by the appellate court as has the accused, and the further proposition that, under the judicial system as it exists in the Philippines, such a procedure results in no injury to the accused.

The common law application of the principle of jeopardy grew out of a state of affairs in England which has had no parallel in the history of this country. The application of the principle as it is found in the common law was a natural and necessary auxiliary of the system of trial by jury and was designed to defeat the corrupt administration of the sovereign, who had come to use the courts for the accomplishment of his own personal ends, rather than for the purposes of justice. The system of trial by jury was of no avail to defeat the aggressions and usurpations of the crown, if the verdict of the twelve men had been committed to the judgment of a pliant judiciary appointed to execute the sovereign will. In this state of things it became necessary to make jeopardy end with the verdict of the jury, and so it was incorporated into the law. From this fact, and from the *dicta* of certain judges, the idea has grown up that a trial ends because the accused has once been placed in jeopardy. The truth is, the trial was declared to be at an end in order to defeat the purposes of a tyrannical sovereign.

*A trial does not end because one has been in jeopardy, but jeopardy ends because there has been a legal and valid trial. The whole proposition turns upon what constitutes a trial, and that is a matter of statute and of judicial interpretation. The conditions out of which the common-law rule sprang having passed away, there is no good reason why the rule itself should not yield to modification.*

The maxim that no one shall be twice put in jeopardy for the same offense is universal, and is based upon the principle found in all systems of jurisprudence, viz., the necessity for finality of judicial proceedings.

The principle of finality is an essential, but it is not more essential than the principle of justice. A *final* settlement is not more vital than a *right* settlement. The accused has a natural right to be exempt from a second trial after the first has been wholly concluded, but he has no right to determine what shall constitute a trial; this is determined by considerations of public policy in each

jurisdiction and is not a fundamental principle found in any system of jurisprudence.

> It needs no argument to . . . demonstrate that the natural rights of the individual, as well as the interests of public order, are best served, and the essential principles of jurisprudence are most accurately followed, when the proceedings in a criminal prosecution include such protection against injustice that the final disposition of the cause will not only settle the controversy but settle it in accordance with law. Judicious legislation for securing a full, fair, legal trial of each criminal cause is not in derogation, but in protection of individual right, and is in full accord with the principle that no man shall twice be put in jeopardy for the same offense. That maxim, as we have seen, is based on the truth that a judicial proceeding lawfully carried on to its conclusion by a final judgment puts the seal of finality on the controversies determined by that judgment, and is not based on a theory that a person accused of crime has any natural right of exemption from those regulations of a judicial proceeding which the state deems necessary to make sure that the conduct and final result of that proceeding shall be in accordance with law. And so the "putting in jeopardy" means a jeopardy which is real, and has continued through every stage of one prosecution, as fixed by existing laws relating to procedure. (*State v. Lee,* 27 L. R. A., 499.)

If the accused has been erroneously acquitted by a trial court he has never been in real jeopardy. If there has been no vital error at *nisi prius,* an appeal from such a judgment of acquittal must needs be unsuccessful and the prisoner can not suffer thereby. If, on the other hand, the judgment is reversible, and the defendant is likely to be prejudiced by the appeal, it must necessarily be because of some error at first instance which made his trial abortive and made his jeopardy an apparent instead of a real one.

When the state sees proper to provide that the cause shall not necessarily be ended with the judgment of the trial court, but that further proceedings, on motion of the accused, may be had, an unjust verdict resumes its normal position of a legal nullity, and when the state provides for like proceedings on the motion of the prosecutor a similar result must follow.

The proposition was clearly stated in the case of *State v. Garvey,* 42 Conn., 243, when the court said:

> The principle which protects an individual from the jeopardy involved in a second trial for the same offense is well established and fully recognized. The question, however, as to what constitutes a trial depends upon the course of procedure of the particular jurisdiction in which it is had, and the construction of the courts there with respect to it.

It is thus seen that a law permitting an appeal on the part of the state from a judgment of acquittal in the trial court and requiring the final verdict of the court to be reached in accordance with the settled principles of law and justice before it can support a valid judgment is not in derogation of any fundamental doctrine of the common law, or inconsistent with the principle found in all systems of jurisprudence, or of the Constitution, or in violation of any principle of original justice that supports and enforces the conclusiveness of a valid, final judgment.

The above-mentioned Philippine cases in which these questions are involved will likely be decided during the present term of the Supreme Court of the United States. The announcement will be watched with interest by the Philippine people and all who are responsible for the administration of the Archipelago.

*Lebbeus R. Wilfley,*

Washington, D. C., May 4, 1904.