

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. JOSEPH N. HEERY, DEFENDANT AND APPELLANT.

G.R. No. 8634. October 22, 1913

Ponente: TRENT, J.

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TRENT, J.:

This was a case of assault attended with lesiones graves. Upon the first appeal the sentence of the lower court condemning the appellant-defendant to one year and three months of prision correccional was affirmed. (U. S. vs. Heery, 10 Off. Gaz., 2102.) At the same time the appeal of the injured party against the ruling of the court refusing to allow him to submit evidence as to the damages suffered by him was sustained and the case was returned with the following instructions:

"It is therefore ordered that the record be returned to the court whence it came for the execution of the criminal judgment herein affirmed, and for the further purpose of completing the civil branch of the case."

The lower court duly proceeded to take evidence as to the civil damages sustained by the injured person and then entered the following judgment:

"I therefore restate the judgment heretofore entered herein and affirmed by the Supreme Court, by finding the defendant, Joseph N. Heery, not guilty of frustrated murder as alleged in the complaint, but find him guilty of a lesser offense included within the charge made in the complaint, that of maliciously inflicting serious injury upon Alex Sternberg, causing him an illness and disability from the performance of any kind of manual labor for more than thirty days, and sentence him to one year and three months of prision correccional at Bilibid Prison, and, having found the amount of the indemnity which the defendant should pay, in accordance with the instructions contained in the judgment of the Supreme Court made herein, sentence the defendant to indemnify the complainant, Alex Sternberg, in the sum of P50,500 and in case of insolvency to suffer subsidiary imprisonment, and to pay the costs of the action."

The defendant appealed from this judgment, and by his first, third, and fourth assignments of error, raises the question of double jeopardy.

It will be noted that the trial court, in its judgment for civil damages says that it restates the judgment by finding the defendant guilty. The judicial procedure involved in finding a defendant guilty by restating a final judgment is not well understood. No exercise of judicial discretion is involved in the mere repetition of a final judgment, whether it be restated once or a dozen times. From the ambiguity of the language used, it cannot be determined whether the lower court merely intended to restate the penalty imposed for the sake of convenience or clearness, or whether it actually reconsidered the guilt of the appellant and found that its previous decision was correct. Both were unnecessary and beyond the instructions contained in the judgment of this court, and as the only addition to the judgment was the civil damages which the accused should pay, no attempt being made to change in any manner the punishment imposed upon the defendant, the question does not arise as to the effect such action would have upon the defendant's constitutional rights. In passing, however, it may be remarked that such action would be entirely beyond the jurisdiction of the lower court and absolutely void.

The basis for the plea of double jeopardy must be the same, therefore, as though the lower court had strictly confined its judgment to the limits set by the instructions of this court, above quoted. The question is reduced to the determination of whether remanding the case for determination of civil damages and their assessment against the defendant are to be considered as a modification of the punishment, by increasing the penalty or otherwise, meted out to the defendant for the commission of the crime.

In this jurisdiction it is well settled that the civil liability of the accused must be determined in the criminal action, unless the injured party expressly waives such liability or reserves his right to have the civil damages determined in a separate action. Section 107 of General Orders No. 58 reads:

"The privileges now secured by law to the person claiming to be injured by the commission of an offense to take part in the prosecution of the offense and to recover damages for the injury sustained by reason of the same shall not be held to be abridged by the provisions of this order; but such person may appear and shall be heard either individually or by attorney at all stages of the case, and the court upon conviction of the accused may enter judgment against him for the damages occasioned by his wrongful act. It shall, however, be the duty of the promotor fiscal to direct the prosecution, subject to the right of the person injured to appeal from any decision of the court denying him a legal right."

The procedure under the Spanish Code of Criminal Procedure for determining the civil liability of persons accused of crime, referred to in the above quoted section, has been discussed by this court a number of times.

In *Springer vs. Odlin* (3 Phil. Rep., 344), it was said: "By General Orders, No. 58, section 107, the privileges secured by the Spanish law to persons claiming to be injured by the commission of an offense to take part in the prosecution of the offense and to recover damages for the injury sustained by reason of the same, are preserved and remain in force, and it is therein expressly provided that the court, upon conviction of the accused, may enter judgment in favor of the injured person, against the defendant in the criminal case for the damage occasioned by the wrongful act."

In *Finnick vs. Peterson* (6 Phil. Rep., 172), it was said:

"This provision (art. 120, Penal Code) makes it the duty of the court, when the right to personal property is in question in a criminal cause, to order its return to the proper person, after giving all persons interested a hearing, and the Code of Criminal Procedure provided a method for an examination into the question of the right of the property."

In *Rakes vs. Atlantic, Gulf & Pacific Co.* (7 Phil. Rep., 359, 364), it was said: "According to article 112 (of the Spanish Code of Criminal Procedure) the penal action once started, the civil remedy should be sought therewith, unless it had been waived by the party injured or been expressly reserved by him for civil proceedings for the future. If the civil action alone was prosecuted, arising out of a crime that could be enforced only on private complaint, the penal action thereunder should be extinguished."

Almeida vs. Abaroa (8 Phil. Rep., 175), was a civil action for damages brought by the plaintiff against a person who had been previously acquitted on a criminal charge. It was held that his acquittal in the criminal action was a complete bar to a civil action for damages based upon the alleged criminal act of which the defendant had been accused. In the course of this decision it was said:

"Instituting a criminal action only, it will be understood, brings the civil action as well, unless the damaged or prejudiced person waives the same or expressly reserves the right to institute the civil action after the termination of the criminal case, if there be any reason therefor. (Art. 112 of the said Law of Criminal Procedure.)

"The right to bring the civil action, as reserved by the person damaged or prejudiced, after the termination of

the criminal case, is only permitted, if there be any reason therefore, and so says the law, in the event that the judgment rendered in the criminal cause is a finding of guilt against the accused; but if the accused be acquitted, then the complaint in the civil action must be based on some fact and or cause distinct and separate from the criminal act itself."

The court then quotes from article 114 of the Spanish Code of Criminal Procedure which provides:

"When a criminal proceeding is instituted for the judicial investigation of a crime or misdemeanor, no civil action arising from the same act can be prosecuted; but the same shall be suspended, if there be one, in whatever stage or state it may be found, until final sentence in the criminal proceeding is pronounced,

"To prosecute a penal action it shall not be necessary that a civil action arising from the same crime or misdemeanor be previously instituted."

In *United States vs. Guy-Sayco* (13 Phil. Rep., 292), it was said:

"As to the penalty of indemnity contained in the judgment appealed from and impugned by the defense, article 17 of the Code reads: '* * *'; and according to the established rules of the courts, in order that an accused person may be declared to have incurred civil liability, it is sufficient that said liability shall proceed from, or be the consequence of the criminal liability, and in addition thereto, article 122 of said Code provides that the courts shall regulate the amount of indemnity for damages under said civil liability, upon the same terms as prescribed for the reparation of damage in article 121 of the Code, and a finding on the matter should be contained in the judgment"

As a further illustration of the procedure under the Spanish law for determining the civil liability of the accused person, it may not be out of place to revert to the decision of the supreme court of Spain of November 14, 1889. In this case the defendant was indicted for robbery. During the trial, his civil liability was raised by the state's prosecuting attorney, but in rendering judgment of conviction the trial court made no finding on this issue. The state appealed, and the supreme court of Spain held that the court's failure to resolve the civil liability of the defendant was reversible error, and remanded the case with instructions to determine this issue. It will be noted that this was precisely the procedure outlined by this court in the case at bar.

Under the Spanish criminal law, an injured person had the right to intervene in the prosecution of the accused for the purpose of having his damages ascertained. The trial court was required to include the amount of these damages in the judgment of conviction. The plain provisions of section 107 of our criminal procedure, quoted *supra*, expressly preserves this right to the injured person. The refusal of the trial court to allow the injured person to introduce evidence as to his damages is, therefore, clearly prejudicial error.

We will first determine the soundness of the plea of double jeopardy had the lower court not erred in the criminal proceedings by refusing to consider the civil liability of the defendant. Had a finding of civil liability been made upon relevant evidence duly taken, and stated in the judgment of conviction, would there have been double jeopardy?

It is true that the connotation of the "twice in jeopardy" clause in the Philippine Bill must be found in American jurisprudence. (*Kepner vs. U. S.*, 195 U. S., 100; 11 Phil. Rep., 669.) It is also true that this clause refers exclusively to punishment by the state and rendered to the state; that civil liability, as that term is used in the United States, attaches to most crimes and misdemeanors; that, as a general rule, the civil liability of a criminal can not be made an issue in the criminal proceedings, but must be adjudicated and determined in a separate, civil action; that civil liability is due to the person injured and criminal liability to the sovereign; that the criminal proceeding is not a bar to the civil action, or vice versa; and that the twice in jeopardy clause refers only to criminal prosecutions. We take these statements to be axiomatic, and therefore unnecessary of annotation. But we

quote from one well considered case, which practically covers all of these propositions:

"The cases generally hold that the rule in criminal cases, that one shall not twice be put in jeopardy, implies more than the bar of a judgment to an action for the same cause. But no case is known where a conviction upon an indictment has been held a bar to a civil action for damages growing out of the same act; a fortiori, none in which a recovery in a civil action has been held a bar to an indictment for the same act. And the whole purview of section 8 plainly shows that the putting in jeopardy prohibited is confined to criminal prosecutions. Indeed, this is manifest in the clause itself, which is confined to the same offense, used in the same sense as criminal offense in the first clause of the section. Of course the same act may be an offense (in the sense of crime) against the State, and an offense (in the sense of tort) against a private person. It is manifest that judgment for the one is not a bar to the other. And it might be difficult, in principle, to hold a criminal conviction as a bar to the recovery of punitive damages in a civil action, and not a bar to the recovery of compensatory damages; not a bar to any civil action. See *Jacks vs. Bell*, 3 C. & P., 316." (*Brown vs. Swineford*, 44 Wis., 282; 28 Am. Rep., 582, per Ryan, C. J.)

What is the nature of the civil liability imposed upon criminals by the provisions of the Penal Code? If it be the same as the civil liability known to American authorities, then it has nothing to do with criminal liability, and a fortiori, can the defense of "twice in jeopardy" ever be utilized to prevent its imposition?

By article 17 of the Penal Code it is provided that "Every person criminally liable for a felony or misdemeanor is also civilly liable."

If it be urged that this is not true under American law, it may be said with equal accuracy that it is not literally true under the Penal Code. As stated by both Groizard (vol. 1, p. 697) and Viada (vol. 1, p. 391), there are a number of crimes, such as contempt of court, attempts against the authorities, some of the offenses against religious cults, etc., which are not usually attended with damages to third persons. As stated by the first named commentator, this article must be understood to mean that there is civil liability in those cases where private persons have suffered damages. And this will be found to be substantially true in the United States.

Under the early common law, damages to a person injured by a crime were merged in the punishment thereof. Later, it was held that there was no merger except in cases of homicide, but that the remedy for the private wrong and injury must be suspended until public justice had been vindicated by the confession or acquittal of the wrongdoer in a criminal prosecution. (1 Cyc, 681.) But by statutory enactments in most jurisdictions, it is now held that the two actions are never merged. (See for instance, N. Y. Ann. Code, sec. 1899, and *Mairs vs. B. & O. R. Co.*, 175 N. Y., 409; La. Stat, 1904, sec. 985.) For. specific crimes where civil liability attaches, see 33 Cyc, 1520, rape; 19 Cyc, 980, arson; 30 Cyc, 1578, abortion; 24 Cyc, 802, kidnapping; 3 Cyc, 1066, assault and battery; 19 Cyc, 319, false imprisonment; 26 Cyc, 6, malicious prosecution. Although at common law there was no civil liability for seduction, it has been created by statute in most jurisdictions: 35 Cyc, 1294. Wrongful death, by statute, now carries with it civil liability: 13 Cyc, 310. Larceny and robbery: 25 Cyc, 55. Generally, in the United States, the owner of stolen property is entitled to have it back irrespective of the conviction of the thief. Identified stolen goods may be recovered even from a bona fide purchaser. Civil actions for debt, replevin, trover and conversion, etc., lie in this class of cases. Malicious prosecution, under the common law only a civil liability, is now, by statute, a criminal offense also: 26 Cyc, 120. But aside from these specific references, it would be sufficient to refer to the subject of torts, which occupies a large field in Anglo-Saxon jurisprudence. In this branch of law, pecuniary damages to the individual for injuries suffered by him are the controlling question, and one of its cardinal principles is that there is no wrong without a remedy. We may safely say, therefore, that civil liability coexists with criminal liability in the United States, the same as it does here.

Now, are the elements of civil liability the same in the two countries? Article 119 of the Penal Code reads:

"The civil liability established in Chapter II, Title II, of this book comprises:

"1. Restitution;

"2. Reparation of the damage caused;

"3. Indemnification for consequential damages."

What are restitution, reparation, and indemnification under this article? Of restitution, there can be no doubt that it exists also in American law. Where property is taken from its rightful owner, it must be restored if found, even though in possession of a bona fide purchaser. Reparation is not so easily recognized. It is treated by both Groizard and Viada as referring to damage caused to property in the commission of crimes such as robbery, as opposed to damages suffered by injuries to the person, as in assaults and homicide. It would appear that Groizard's comment upon this provision is justified when he says that these two elements of civil liability could well have been expressed in a single term. (Vol. 2, 621.) Taken together they are both allowable under the American law of civil liability, and are usually designated without distinction as damages.

Does the fact that in this country civil liability is, as a rule, determined in the criminal action transform it into criminal liability and thus make it a part of the punishment for the crime? Certainly the mere form of a remedy should not affect its substance. And there are many indications in the Penal Code that the civil liability therein imposed for the commission of crimes was not intended to be merged into the punishment for the crime. Articles 17, 119-126, which provide for civil liability of offenders, are confined strictly to that subject. Article 23 sharply defines one distinction between the criminal and civil liability, in that the former can not be waived by a pardon of the party injured, while the latter may be waived. The chapters of the Penal Code dealing with the classification and duration of penalties (articles 25 to 62 inclusive), nowhere list the civil liability attached to a crime. And article 133 provides that "Civil liability arising out of crimes or misdemeanors shall be extinguished in the same manner as other obligations, in accordance with the rules of civil law."

In commenting upon this article, Groizard (vol. 2, p. 717), says:

"From crimes arise, as we know, two liabilities: criminal and civil. The first is extinguished by the methods to which we have just adverted. The method of terminating the second is not a subject of criminal law, but of civil law. * * *

"The character of this work does not permit us to tarry for further explanations. We would not be commenting upon subjects included within the Penal Code but laws of a purely civil character."

And, as a complement of this article, article 1813 of the Civil Code provides that civil liability attached to crimes may be compromised but that the criminal liability is not thereby extinguished. Other distinctions might be noticed which show that there is no merger of the two kinds of liability from the mere fact that they are tried together. But these are, we think, sufficient to sustain the point

There is, therefore, no new or foreign element in civil liability under the Penal Code of this country as compared with civil liability under the American law. We do not consider the practice in the United States of allowing punitive or exemplary damages as affecting the question we are discussing. Here as there, civil damages are no part of the punishment for the crime; here as there, they are rendered to the citizen and not to the State.

As the civil liability is no part of the punishment for the crime, there would have been no question of double jeopardy, and counsel for the defendant in effect so admits, had the lower court not erred in refusing to consider the question of civil damages during the course of the criminal proceedings. What was the effect of the action of this court in affirming that judgment as to the guilt and punishment of the accused and of reversing it as to the

question of civil damages, with instructions to execute the punishment imposed and to try the civil branch of the case? Bearing in mind the broad line of demarkation between the civil liability of the accused and his criminal liability, the bare fact that his civil liability was determined and fixed had nothing whatever to do with the punishment imposed. The latter was not thereby affected. This being true, by what reasoning could it be held that its determination prior or subsequent to the finding of guilt was merged into and became a part of the punishment? If two lines are parallel, they can not converge. This time intervening between the judgment of guilt and the judgment of civil damages could in no way give to the latter the character of the former.

It is urged that in such a case as the present, the defendant might serve the term of imprisonment fixed by the court as the punishment for his crime, and after the sentence for civil damages and in case of his insolvency, he would have to return to prison to serve the subsidiary imprisonment by reason of his insolvency, it being argued that this would constitute double jeopardy. Even so it is well settled that execution against the person will issue in civil actions in case of personal injuries, and that this is not imprisonment for debt or punishment for crime. It is in lieu of the payment of the indemnity and is considered as a discharge thereof. If the payment of the indemnity is not punishment for the crime, then imprisonment in lieu thereof is not punishment for the crime.

The practice, in civil cases, of partially affirming and partially reversing judgments appealed from, is well settled.

"Where a judgment appealed from consists of distinct and independent matters, so that an erroneous portion thereof can be segregated from the parts that are correct, the court will not set aside the entire judgment, but only so much as is erroneous, leaving the residue undisturbed." (3 Cyc, 447.)

This rule is often applied to cases of tortious wrongs, where the culpability of the tortfeasor is established but there has been error in the assessment of damages. (Smith vs. Whittlesey, 79 Conn., 189; George vs. Railroad, 214 Mo., 551; Austin & McCargar vs. Langlois, 83 Vt., 104.) In the present case, the civil liability of the defendant was established, and the sole question determined upon the second trial was the amount of civil damages. The plea of double jeopardy can not be allowed.

By their second assignment of error, counsel for the defendant urge that the amount of damages, P50,500 awarded is excessive, and not supported by the evidence. There can be no objection to allowing the physicians fees of P500 and P1,300 for three months salary, being the time the injured party was incapacitated from performing the work in which he was then engaged. The remainder, P48,700, appears to have been allowed on account of the permanent diminution of Sternberg's ability to earn money. The evidence of record does not establish such disability with that degree of certainty which will justify an award for that purpose. We have reached this conclusion after a most careful examination of all the testimony upon this point.

The award of damages is therefore reduced to P1,800, the defendant to suffer subsidiary imprisonment, which in no event can exceed one-third of the principal penalty, in case of insolvency. Costs in this instance de officio. So ordered.

Arellano, C. J., Torres and Johnson, JJ., concur.

CONCURRING AND DISSENTING

MORELAND, J.,

The case was originally tried in the Court of First Instance, a judgment of conviction was had and an appeal taken by the accused from that judgment to this court. The complaining witness having been refused permission during the course of the trial to adduce evidence as to the damages which he had suffered by reason of the criminal act of

the accused, took exception to that refusal and also appealed to this court. In deciding the appeals this court in R. G. No. 7767 (10 Off. Gaz., 2102), rendered the following judgment in connection with the appeal of the accused:

"For the foregoing reasons, the judgment condemning the accused to 1 year and 3 months of prison correccional and to the payment of the costs of the cause, is hereby affirmed, and the accused is further sentenced to the accessory penalties provided by law, with costs. Let judgment be entered accordingly."

As to the appeal of the complaining witness, the court decided that it was well founded, rendering the following judgment: "It is therefore ordered that the record be returned to the court from whence it came for the execution of the criminal judgment herein affirmed, and for the further purpose of completing the civil branch of the case."

In pursuance of these judgments the cause was returned to the Court of First Instance, the criminal sentence was executed, and the civil branch of the case was continued as required by the judgment of the appellate court, terminating in a judgment in favor of the complaining witness. An appeal was taken by the accused from that judgment and that appeal is the one now before us.

In entering upon the consideration of this appeal it should be carefully noted that it is not an appeal from a judgment in an action. It is rather in the nature of an objection made to the execution by the trial court of a mandate of the Supreme Court. The trial court, in dealing with the civil as well as the criminal branch of the case, was simply obeying the judgment of the Supreme Court. Except as to the amount of the civil damages, the court had no discretion, power, or authority. It could do absolutely nothing except what was authorized by the mandate of the Supreme Court. But it had all power within the mandate—the power of the Supreme Court. So long as it kept within the terms of that mandate neither party could object or interfere in any way. Everything done under that judgment was done under the cover and protection of the mandate of the Supreme Court requiring the execution of its own judgment.

I, therefore, say that this is not an appeal from a judgment in an action, in which the usual and ordinary questions connected with such appeals can be raised. As I stated before, it partakes of the nature of an objection to the execution by the trial court of a judgment of the Supreme Court. Quite different results flow from an appeal in its ordinary sense and from the proceedings taken in the present case. I conceive it to be the general doctrine that an appeal from the acts of a trial court done in the execution of a mandate of the Supreme Court will not lie. If one is taken, and it appears to the appellate court on the consideration of that appeal that the trial court has kept within the mandate of the appellate court, the appeal will be dismissed. If it appears that the trial court did not keep within the mandate, the cause will be remanded for the correction of such proceedings as may have been erroneous or for the vacation of such as may have been outside of the terms of the mandate being executed.

In the case of *Stewart vs. Salamon* (97 U. S., 361), the court said:

"An appeal will not be entertained by this court from a decree entered in the circuit or other inferior court, in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is in effect our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will, upon the application of the appellee, examine the decree entered, and if it conforms to the mandate, dismiss the case with costs. If it does not, the case will be remanded with appropriate directions for the correction of the error. The same rule applies to writs of error. This is not intended to interfere with any remedy the parties may have by mandamus.

"This is an appeal from a decree entered upon our mandate. No complaint is made as to its form, and it seems to be in all respects according to our directions. The effort of the appellant was to open the case below, and to obtain leave to file new pleadings, introducing new defenses. This he could not do. The rights of the parties in the subject matter of the suit were finally determined upon the original appeal, and all that remained for the Circuit Court to do was to enter a decree in accordance with our instructions, and carry it into effect. If in the

progress of the execution of the decree, after its entry, either party is aggrieved, he may appeal from the final decree in that behalf; but such an appeal will bring up for reexamination only the proceedings subsequent to the mandate."

In the case of *Humphrey vs. Baker* (103 U. S., 736), the court, speaking through Mr. Chief Justice Waite, said:

"In *Stewart vs. Salamon* (97 U. S., 361), we decided that we would not entertain an appeal from a decree entered in exact accordance with our mandate on a former appeal, and that when such an appeal was taken we would on application examine the decree, and if it conformed to the mandate, dismiss the case with costs. If it did not, we correction of the errors. The decree entered below, in the present case, followed the mandate in every particular and was, in legal effect, ours. It commanded Humphrey to convey, and the proceedings in which the order now appealed from was entered were, for the purpose of compelling him to do what we said must be done. Instead of carrying our decree into execution ourselves, we sent it below for that purpose. No discretion was given the Circuit Court as to requiring a conveyance. That was ordered here. The order appealed from was in furtherance of our express directions, and may with propriety be considered part of our decree. It was the appropriate way of getting the conveyance which we said must be made. If in the end it shall appear that Humphrey is entitled to the relief he asks, in what he denominates his 'bill of supplement and review,' the appropriate decree to that end will be made in that proceeding. The decree we directed is the final decree in the original suit, and the court below had nothing to do but to carry it into execution. Under the rule established in *Stewart vs. Salamon*, therefore, the appeal is dismissed with costs."

In the case of *Aspen Mining & Smelting Co. vs. Billings* (150 U. S., 31), the court said, page 37:

"Apart from these considerations, however, this is an appeal from a decree entered by the circuit court in conformity with the mandate from the circuit court of appeals for the eighth circuit. That court took jurisdiction, passed upon the case, and determined by its judgment that the appeal had been properly taken. If error was committed in so doing, it was not for the circuit court to pass upon that question. The circuit court could not do otherwise than carry out the mandate from the court of appeals, and could not refuse to do so on the ground of want of jurisdiction in itself or in the appellate court. (*Skillern's Executors vs. May's Executors*, 6 Cranch, 267; *In re Washington & Georgetown Railroad*, 140 U. S., 91; *Gaines vs. Rugg*, 148 U. S., 228, 241.) And no rule is better settled than that an appeal from a decree entered by the court below in accordance with the mandate of the appellate court, cannot be maintained. (*Stewart vs. Salamon*, 97 U. S., 361; *Humphrey vs. Baker*, 103 U. S., 736; *Texas & Pacific Railway vs. Anderson*, 149 U. S., 237,)"

In the case of *Texas & Pacific Railway vs. Anderson* (149 U. S., 237, 242), the court said:

"Inasmuch as its action conformed to the mandate, and there were no proceedings subsequent thereto not settled by the terms of the mandate itself, the case falls within the rule often heretofore laid down and a second writ of error cannot be maintained. (*Cook vs. Burnley*, 11 Wall., 672, 677; *Stewart vs. Salamon*, 97 U. S., 361; *Humphrey vs. Baker*, 103 U. S., 736.)"

From these decisions it is clear that no appeal can be taken from any action of the Court of First Instance in this case except such as the court took subsequent to the mandate.

"If in the progress of the execution of the decree, after its entry, either party is aggrieved, he may appeal from the" final decree in that behalf; but such an appeal will bring up for reexamination only the proceedings subsequent to the mandate." (97 U. S., 361.)

Every question settled by the original decree of this Court was finally settled and cannot be made the subject of a new adjudication in any action or proceeding. It is only those questions which are based upon some action of the trial court taken subsequent to the mandate which may be the subject of examination on this appeal.

It is clear that, under the Spanish law, the judgment of conviction affirmed by our original decree established the

civil liability of the accused conclusively and in a manner which permits of no questioning. There can be no doubting this as the same judgment established finally and unalterably the criminal responsibility of the accused, there having been no appeal therefrom; and it being conceded that when the criminal liability is fixed, the civil liability is thereby carried beyond the domain of doubt.

The first judgment of the Supreme Court not only settled the civil liability of the accused but it also settled the proposition that the two actions were, at least in part, severable and capable of being separately tried and executed.

It also settled beyond possibility of doubt the question of former conviction and former jeopardy. When the Supreme Court, in its judgment, declared that the action could be divided and ordered the judgment as to the criminal part executed and the civil part returned for completion, that was an unequivocal declaration that the completion of the civil part would not be a second conviction or a second jeopardy, that the civil judgment would not be a second punishment, and that it was not a part of the criminal penalty. In other words, that decree must be conclusively presumed, unless we now propose to reverse or at least reexamine it, to be a legal and constitutional act of the court—that it did not violate that provision of the Constitution of the United States incorporated in the Philippine Bill which provides that no person shall be twice placed in jeopardy of punishment for the same offense. That decree was never reversed and is not now open to question. That decree is final and is the law.

I regard it as evident, therefore, that the only questions that could have been raised below or that can be raised on this appeal are those which relate purely to the civil branch of the case and which were not settled by the judgment of the Supreme Court. Such are the measure and amount of damage and those arising on such exceptions as were taken on the trial to the rulings of the court on the admissibility of evidence and the like. All other questions are conclusively settled.

In spite of all this, however, the court states the questions before it for decision as follows:

"The defendant appealed from this judgment, and by his first, third and fourth assignments of error, raises the question of double jeopardy."

And—"We will first determine the soundness of the plea of double jeopardy. Had the lower court not erred in the criminal proceeding by refusing to consider the civil liability of the defendant; had the finding of civil liability been made upon relevant evidence duly taken, and stated in the judgment of conviction, would there have been double jeopardy?"

And—"Does the fact that in this country civil liability is, as a rule, determined in the criminal action, transform it into a criminal liability, and thus make it a part of the punishment for the crime?"

As will be seen from these quotations and from the whole opinion, these are the only questions, apart from the amount of damages, discussed or considered by the court on this appeal. But it is clear from what has already been said that these questions were improperly discussed and decided, as they are questions which were finally determined by the previous judgment of this court and are not now open even to discussion, much less decision. In order to demonstrate the unsoundness of the court's position in holding that these questions are open questions now pending for consideration and decision, let us see what might be the result of it. It is clear that the fact that the court considers these questions open for discussion and decision is an admission that they are open to decision either way. In other words, if the question is an open one it is certain that it must be decided as law and justice require. That being the case, let us suppose that the court hold the plea of former jeopardy to be well founded and accordingly reverse the judgment before us and discharge the defendant from civil liability, What would be the situation? In our former judgment we have already held that the trial court could do exactly what it has done. Not only that, we ordered it to do it. We sent the former case back to it with the order that it determine the amount of

civil damages and that it enter a judgment therefor against the defendant. If we should now hold that it had no right to do so, that to do so would be to violate constitutional rights, what is the result? Necessarily it is a complete reversal of our former judgment and an unequivocal declaration that we had absolutely no authority to order the Court of First Instance to do what we actually ordered it to do, and that we were violating the Constitution of the United States when we made the order. This shows how impossible it is, legally speaking, for this court to consider any of the questions which the court has considered, except the amount of damages.

It cannot be too often asserted that this is an appeal from the acts of a court performed in the execution of a mandate of the Supreme Court. This being so, the defendant could not have raised in the court below and cannot raise here any question which was settled by that judgment. As a necessary result the only questions that it was possible to raise in the court below were those which were pertinent to the issues involved in the civil proceeding, namely, those relating to the measure and amount of damages and the introduction of evidence in relation thereto. Even the liability of the accused to pay damages was settled by the original decree and could not have been questioned in these proceedings either below or here. The amount was the only question open to the court.

Even though it be admitted for the sake of argument that the defendant could have raised the question of former jeopardy in the court below, he did not do so, and, therefore, it is doubtful if he can raise it here for the first time. In making this statement I do not forget the claim made by some authorities that even though the question of former conviction or acquittal, or former jeopardy, is not pleaded in or otherwise brought to the attention of the court below, it can nevertheless be raised in the appellate court provided the record upon which that defense is based is a record of the appellate court. The theory is that such court will take judicial notice of its own records as evidence sustaining the plea and will take up and pass upon the question in the same manner as if the plea had been made and evidence presented in relation thereto in the court below. I do not at this moment express an opinion contrary to that theory. I simply say that, in spite of the advantages which it has, it has many dangers and should be applied with care and caution. Orderly procedure, as established by General Orders No. 58, requires that the plea of former conviction or acquittal, or former jeopardy, shall be specially made on the trial. It should be with great hesitation that a court hold those provisions for naught and, to the great surprise of the government, permit the accused suddenly to raise the question for the first time in the appellate court. The right of a court to act upon what is, in point of fact, known to it, should, in some degree at least, be subordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court and of stating and conducting them.

Section 24 of the Code of Criminal Procedure says:

"Should the demurrer be disallowed, the court must require the defendant to plead. If he refuses, a plea of not guilty shall be entered for him.

"There are four kinds of pleas to an information or complaint: (1) Guilty; (2) not guilty; (3) a former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty; (4) once in jeopardy, which may be pleaded with or without the plea of not guilty.

"The plea must be oral, and a minute thereof in writing filed with the papers in the case."

If pleas numbered 3 and 4 are not specifically made they are waived. (U. S. vs. Junio, 1 Phil. Rep., 50.)

Moreover, the plea should not only be expressly made, but the facts upon which it is based should be clearly proved on the trial. Not only was the plea not made but no evidence whatever was offered or received to substantiate it. Therefore, apart from the results of judicial notice, we have before us upon this appeal neither the plea nor the evidence upon which such plea could be based or by which it could be sustained. The plea of a previous conviction or acquittal or of once in jeopardy is a plea in bar, and, as such, to be available on the trial or

elsewhere, should not only be specially pleaded but should be fully proved.

Not only was the plea not made and not only was there no effort to prove it, but no question was raised and no suggestion made at the trial which in any manner informed the court or the government that the accused was relying upon the defense of former conviction or once in jeopardy. The trial was begun and continued to the end without objection of any kind and particularly without objection or plea based on former conviction or jeopardy. The court found against the defendant; still nothing was offered or intimated with respect to former conviction or jeopardy. On the contrary, counsel moved for a new trial upon these grounds only :

"(1) That the decision is contrary to law, and (2) that the decision is contrary to the evidence."

This motion was denied, and the accused filed a notice of appeal. From beginning to end no plea, no evidence, no objection, no suggestion, no thought of former conviction or once in jeopardy.

The record being in this condition, I am inclined to believe that this court should not take up and discuss, much less decide, the question of former jeopardy. To do so it must not only hold, in violation of the provisions of section 24 of the Code of Criminal Procedure, that it is unnecessary to plead the defence in the trial court but must also hold that it is unnecessary to introduce evidence in that court to substantiate the plea. The plea of former conviction or once in jeopardy should, according to established rules and the provisions of the Code of Criminal Procedure, be substantiated by the production of the record of the former trial and the introduction of the same in evidence. That was not done in this case. While the evidence taken in the former trial was introduced in the present case for the purpose of establishing the extent of defendant's civil liability, the remaining part of the record was not introduced as evidence and was not, therefore, considered by that court. If it had been introduced as evidence, the government would have had the right to meet it and be heard upon it in that court. To permit the question to be raised here for the first time, and, in the resolution thereof, to consider evidence that was never introduced in the trial court and which the government has never had an opportunity to meet in an orderly way, is not only to take the prosecution by surprise but is to establish a precedent which may be dangerous in practice and subversive of orderly procedure.

It would seem, therefore, that, under all the facts and circumstances of this case, this court should not permit the appellant to raise here the question of former jeopardy even though it be, for the moment, conceded that he had the right to raise it in the court below.

I do not agree with the majority conclusion that any part of the proceedings of the trial court was "entirely beyond the jurisdiction" and "absolutely void," and especially not when it restated its former judgment and relaid the foundation of the civil liability of the accused. The trial court changed nothing. It proceeded in precise accordance with the mandate of this court and determined nothing but the amount of damages caused by the criminal acts of the accused. While it may have done some things, strictly speaking, unnecessary to that end, they were not illegal, or unlawful, or void. They disturbed nothing settled by the judgment the court was then executing, and all of those acts tended toward the same result, namely, the execution of the mandate of the Supreme Court. It should be noted that there is no contention anywhere that the court below retried the criminal case. The evidence of guilt was reintroduced, not for the purpose of reconvicting the accused of the crime of which he had already been convicted and sentenced, or of resentencing him therefor, but simply to have appear in the record of that proceeding the foundation of his civil responsibility. The restatement of the judgment was for precisely the same purpose and not to reconvict or resentence the accused. It was simply that there might appear in the record of that proceeding, by formal declaration, the civil liability of the accused. While these acts may have been, strictly speaking, unnecessary, because the civil responsibility had already been established by a final judgment of this court, nevertheless, no prejudice resulted therefrom and they made the proceedings and judgment of the trial court in the

civil instance orderly, symmetrical and clear.

I do not deem it necessary to consider the question of the amount of damages, as I agree with the court upon the subject; nor the error assigned as No. 4.

The cause should be remanded with instructions to enter a judgment against the accused for the sum established by this court with costs.

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