The Ateneo Law Journal is published four times during the academic year by the student body of the Ateneo College of Law.

Unsigned and uninitialed writing are by members of the Editorial Board.

Subscription rates: ₱4.00 per issue; ₱14.00 per year. Foreign rates: $1.50 per issue; $5.00 per year.

VOLUME XI NOVEMBER 1961 NUMBER 2

ATENEO LAW JOURNAL

DOUBLE JEOPARDY: SALICO, LABATETE AND CASIANO *

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Preliminary

When the prosecution of the accused is attended by the following circumstances: (a) before 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, then the conviction or acquittal of the accused or the dismissal or any other termination of the case without the express consent of the accused, shall be a bar to another prosecution for the offense charged, or for any offense which necessarily includes or is included therein.[1]

What is the meaning of "conviction, acquittal or dismissal?" Conviction means a judgment declaring the accused guilty of the offense charged and imposing upon him the penalty provided by law. Acquittal is a judgment declaring the accused not guilty of the crime charged and ordering his release. It has been uninformly ruled that: "a former acquittal which may be pleaded in bar is an acquittal on the merits. Where accused has once been placed on trial in a court competent to try an offense of the character charged, and the jury has once rendered a verdict of not guilty as to said offense, the state can never place him on trial again for the same offense, no matter how irregular the proceeding have been. So, although the court may have prevented the state from entering a *nolle proseque*, or may have misdirected the jury or erred in admitting illegal or in rejecting legal evidence, or the verdict may have been against the evidence, the judgment and verdict of ac-

* It is our privilege to publish this last work of the eminent jurist who passed away last August 23, 1961.

** Chief Justice of the Supreme Court: 1945-1955.

[1] See Sec. 9, Rule 113, Rules of Court.

quittal, if fairly obtained, are conclusive and will bar a subsequent prosecution for the same offense. A judgment of acquittal on a trial for an offense is only conclusive that the offense was not committed, but not that each of its elements did not exist."[1]

And the third instance wherein jeopardy attaches is when the case "is dismissed or otherwise terminated without the express consent of the defendant." In other words, jeopardy is not limited to a previous conviction or acquittal but is extended to every dismissal or termination of the case provided it is without the express consent of the defendant. It must be noticed that the phrase "without the express consent of the defendant" does not apply in cases of conviction or acquittal. It applies only when the case is dismissed or otherwise terminated but not upon the merits of the case.

Consent means approval, acquiescence, conformity, agreement, etc. Mere silence of the defendant should not be construed as consent. For instance, after the defendant had pleaded to a charge of physical injuries, the prosecution moved for the dismissal of the case, which motion was granted. Defendant said nothing about the dismissal. Eleven days later, another information was filed charging the defendant with the same offense. To this information, defendant interposed the plea of double jeopardy, which was sustained. It was held that the phrase without the express consent of the accused" does not mean "over his objection" or "against his will." The right not to be put in jeopardy a second time is a fundamental constitutional right, the waiver of which cannot be predicated on mere silence of the accused.[2] However, 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.[3]

The Salico Doctrine

And what is the meaning of dismissal? In People v. Salico, 84 Phil. 722 (Oct. 3, 1949), after the prosecution had presented its evidence, upon motion of the defendant, the case was dismissed on the ground that there was no evidence showing that the crime charged had been committed within the territorial jurisdiction of the court. The Supreme Court on appeal of the fiscal found that there was such evidence and that therefore the dismissal was wrong. And to determine whether or not the accused was placed in double jeopardy by the fiscal's appeal, a distinction was made between dismissal and acquittal. There is dismissal

[1] 22 C.J.S. Sec. 268, p. 402.
[2] U.S. v. Ylagan, 58 Phil. 851 (1933); People v. Cosare, L-6544, August 25, 1954.
[3] Pendatum v. Aragon, 49 O.G. 4372 (1953).

— said the court — when the case is terminated otherwise than upon the merits thereof, as when the dismissal is based on the allegation that the Court has no jurisdiction, either upon the subject matter or upon the territory, or that the complaint or information is not valid or sufficient in form or substance, or upon any other ground that does not decide the merits of the issue as to whether the accused is or is not guilty of the offense charged. Whereas "acquittal" means a termination of the case based upon the merits of the issue, as when there is a pronouncement that the evidence does not show the guilt of the accused beyond a reasonable doubt. "The only case" — said the court — "in which the word 'dismissal' is commonly but not correctly used, instead of the proper term 'acquittal', is when, after the prosecution has presented all its evidence, the defendant moves for the dismissal and the court dismisses the case on the ground that the evidence fails to show beyond a reasonable doubt that the defendant is guilty; for in such case, the dismissal is in reality an acquittal because the case is decided on the merits."

The aforestated ruling in the Salico case, was reiterated and supplemented in three other cases. In one of them[4] it was held that where the prosecution asks for postponement of the trial because its witnesses are absent, the defendant who is desirous of exercising his sonstitutional right to a speedy trial, should ask, not for the dismissal, but for the trial of the case. If the court believes that the trial cannot further be postponed without violating the right of the accused to a speedy trial, it should deny the postponement and proceed with the trial and require the fiscal to present his witnesses. If the fiscal cannot produce his witnesses, which is equivalent to a failure to prove the defendant's guilt, the Court, upon defendant's motion, should dismiss the case. Such dismissal, in truth, is an acquittal, founded on lack of evidence as to the guilt of the accused.

It has been held further[5] that where a case was set for trial twice after the accused had pleaded not guilty, and on both occasions, the prosecution, without asking for postponement, failed to appear in Court to prove the offense charged, the dismissal of the case at the instance of the accused may be regarded as an acquittal founded on the prosecution's failure to prove his guilt.

And again in another case,[6] on the date set for the trial and after the defendant had pleaded not guilty, the prosecution moved for the postponement on the ground that the complainant and his witnesses were not present. The Court waited until 10:30 a.m. The case was then dismissed

[4] Gandicela v. Lutero, G. R. No. L-4069, May 21, 1951.
[5] People v. Diaz, G. R. No. L-6518, March 10, 1954. To the same effect is People v. Abano, G. R. No. L-7862. *See also*, People v. Tacneng, G. R. No. L-12082, April 30, 1959.
[6] Lagunilla v. Reyes, G. R. No. L-17377, April 29, 1961.

because the complainant and his witnesses failed to show up. This dismissal is equivalent to an acquittal for it is founded on the prosecution's failure to prove the defendant's guilt. It being an acquittal it became final immediately after promulgation and it consequently bars another prosecution for the same offense.

The rule, therefore, as established in the Salico case, is that a dismissal, otherwise than upon the merits, if entered without the express consent of the accused, constitutes jeopardy, but if entered on motion of the accused and therefore with his express consent, it will not be a bar to another prosecution for the same offense, "because" — said the court — "his action in having the case dismissed constitutes a waiver of his constitutional right or privilege, for the reason that he thereby prevents the court from proceeding to the trial on the merits and rendering a judgment of conviction against him."

In establishing this ruling, our Supreme Court gave the assurance that "we have carefully examined the authorities on jeopardy in the United States wherefrom our law on the subject was imported or taken, and we have found that all of them *without exception* are in favor of our conclusion that the defendant in the present case has not been in jeopardy in the court below, or has waived his right not to be put again in jeopardy for the same offense."

The following is part of the authorities quoted by the Court:

"*Dismissal at Request of Defendant*: — It may be stated as a general rule that where an indictment is quashed at the instance of the defendant, though after jeopardy has attached, he cannot thereafter plead former jeopardy when placed on trial on another indictment for the same offense. His action in having the indictment quashed constitutes a waiver of his constitutional privilege. (Ruling Case Law, Vol. 8, pp. 152, 153.)

"It may be stated as a general rule that where an indictment is quashed at the instance of the defendant, though after jeopardy has attached, he cannot thereafter plead former jeopardy when placed on trial on another indictment for the same offense. His action in having the indictment quashed constitutes a waiver of his constitutional privilege." (American Jurisprudence, Vol. 15, p. 74.)

"Where judgment in a murder case was arrested, at the prisoner's instance, by the judge who presided at the trial, on the ground that he had no jurisdiction in that he held the court outside of his circuit, defendant could be tried again on the same indictment." (Small v. State, 63 Ga., 386.)

"A judgment quashing an indictment, on the ground of the unconstitutionality of the statute under which the charge is brought, when the accused has not been tried as to his guilt or innocence under the charge, will not he a bar to a subsequent prosecution of the accused for the same charge." (State v. Taylor, 34 La. Ann., 978).

"A discharge on formal objections to the jurisdiction, but not a trial on the merits, will not support a plea of former jeopardy." (Duffy v. Britton, 48 N.J. Law [19 Vroom], 371; 7 Atl., 679.)

In the case of Carrol v. State, 50 Tex. Crim. 485; 98 S.W., 859, the Supreme Court of Texas held the following:

"It is equally true that, where the accused has secured a decision that the indictment is void, or procured its being quashed, the accused is estopped, when he is subsequently indicted, to assert that the former indictment was valid. U.S. v. Jones (C.C.) 31 Fed., 725; Joy v. State, 14 Ind., 139; State v. Meekins, 41 La. Ann., 543, 6 South, 822. And it has been held that, if the accused on a prior trial maintains a variance was material, and the court directed an acquittal on that ground, he cannot subsequently on his plea of former acquittal allege or prove that it was not material. People v. Meakin, 61 Hun (N.Y.), 327, 15 N.Y. Supp., 917; State v. Goff, 66 Mo. App., 491. Nor can a defendant plead jeopardy where the jury before which he was first on trial was discharged on his motion or with his consent. Arcia v. State, 28 Tex. App., 198, 12 S.W., 599; State v. Coleman, 54 S.C. 282, 32 S.E., 406; Peiffer v. Com., 15 Pa., 868, 53 Am. Dec., 605; State v. Devis, 80 N.C., 384; People v. Gardner, 62 Mich., 307, 29 N.W., 19; Com. v. Sholes, 13 Allen (Mass.) 554; State v. Wamire, 16 Ind., 357; McCorkle v. Comm., 14 Ind., 39; Hughes v. State, 35 Ala., 351; Cobia v. State, 16 Ala., 781; Rex. v. Stokes, 6 C. & P. 151; Foster v. Crown L., 27; 2 Hawkins, P.C. c. 47, Sec. I. Under these authorities this quashal of the indictment and dismissal of the case, after the jury was impaneled, being at the instance of defendant and with his full and free consent, cannot be set up by him as a plea in bar of further prosecution." (98 South Western Reporter, Carroll v. State, pp. 860, 861.)

In the case of Craig v. United States, the Circuit Court of Appeals, Ninth Circuit (Feb. 10, 1939), an indictment was returned on Dec. 19, 1934, in the court below against the defendants. The accusation contained two counts. The first count alleged that the defendants had conspired to secure, by corrupt means, dismissal of an indictment and prosecution in which John McKeon and others were charged with a violation of the conspiracy statute. After the trial, after all the evidence had been introduced and both sides had rested, and before the arguments of counsel to the jury, the defense moved to require the government to elect upon which count it would proceed. The government elected to proceed on the second count, and the court dismissed the first count. Subsequently on March 14, 1935, the grand jury returned another indictment against the same defendants in the court below, the first count of which involves the same transaction charged as count 1 of the former indictment. Each of the defendants pleaded not guilty and entered a plea of former jeopardy to the first count. The trial court granted the appellee's motion to strike the plea in bar and of former jeopardy, and the jury returned a verdict of guilty severally as to the appellants therein.

"Arguing in support of their plea in bar and their plea of once in jeopardy, under which they urged the cognate defense or res judicata, the appellants contend that the action of the trial judge in the first case, in entering a judgment in their favor on the first count of the first indictment, was, in effect, an instruction for a verdict in favor of the appellant; that 'the mere abandonment of the charge was equivalent to an acquittal'; that the abandonment of count 1 was without the appellants'

consent; and finally, that since count 1 of the first indictment was the same as count 1 of the present indictment, on which the appellants were convicted, the above-mentioned pleas should have been sustained.

The appellants, however, are in error when they state that count 1 of the first indictment was dismissed or abandoned without their consent. The very portion of the record quoted by the appellants, and set out above, shows that their counsel renewed 'the motion made to compel the Government to elect to further proceed upon one or the other count of the indictment, rather than upon both counts.' x x x The appellants now contend that, since counts 1 and 2 of the first indictment charged the same offense as that charged by the first count of the present indictment, a dismissal of count 1 of the first indictment is a bar to a prosecution under count 1 of the present indictment, even though the first jury was unable to agree on the count that was in fact submitted to it. If this rule were adopted, a defendant confronted by an indictment containing similar counts could wait until the taking of testimony had begun, could then insist upon an election, and, in the event of the jury's disagreement on the count elected, could block a second trial on a similar count on the ground that the former count had been abandoned after jeopardy had commenced. We do not think that such an application of the rule as to former jeopardy is a reasonable one, and we decline to adopt it."

In 8 R.C.L. sec. 141, *supra.* the following language is used:

"It may be stated as a general rule that where an indictment is quashed at the instance of the defendant, though after jeopardy has attached, he cannot thereafter plead former jeopardy when placed on trial on another indictment for the same offense. His action in having the indictment quashed constitutes a waiver of his constitutional privilege.

"We believe that the court below was correct in granting the appellee's motion to strike the plea in bar and the plea of once in jeopardy." (Federal Reporter, 2d series, Vol. 81, pp. 819, 820)."

It should be observed, after a perusal of the preceding authorities, that in cases of dismissal, jeopardy does not attach when there is express consent or waiver on the part of the defendant of his constitutional right, and also when the defendant is in estoppel. But the Supreme Court in its pronouncements in the Salico case, mentioned only *waiver.*

The Acierto Case

The Salico doctrine has been ratified in several cases,[7] particularly in People v. Acierto,[8] wherein the facts briefly are as follows: Acierto was accused before a U.S. Court Martial of having defrauded the Government of the United States, through falsification of documents within a military base of the U.S. in the Philippines. Despite his objection to the jurisdiction of said court, which it overruled, he was, after trial, convicted therein. On review, the verdict was reversed by the Commanding General, who sustained Acierto's objection. Subsequently, accused of estafa and falsification of said documents before one of our courts of first instance, Acierto was convicted therein. On appeal to the Supreme Court, he raised, among other questions, the following: former jeopardy and want of jurisdiction of the court *a quo.* In support of his theory that he had been in jeopardy before the Court Martial, the appellant had to maintain that the Court Martial had jurisdiction to try him. But the Justices, said:

"This is the exact reverse of the position defendant took at the military trial. As stated, he there attacked the court martial's jurisdiction with the same vigor that he now says the court martial did have jurisdiction; and thanks to his objection, so we incline to believe, the Commanding General, upon consultation with, and the recommendation of, the Judge Advocate General in Washington, disapproved the court martial proceedings.

x x x

"Irrespective of the correctness of the views of the Military authorities, *the defendant was estopped from demurring to the Philippine Court's jurisdiction and pleading double jeopardy on the strength of his trial by the court martial. A party will not be allowed to make a mockery of justice by taking inconsistent positions which if allowed would result in brazen deception. It is trifling with the courts contrary to the elementary principles of right dealing and good faith, for an accused to tell one court that it lacks authority to try him and, after he has succeeded in his effort, to tell the court to which he has been turned over that the first has committed error in yielding to his plea.*

x x x

"Partly for the reasons already shown, the plea of double jeopardy is without merit. If the court martial had no jurisdiction, jeopardy could not have attached. This proposition is too well established and too well known to need citation of authorities.

"*Even if it be granted that the court martial did have jurisdiction,* the military trial in the instant cases has not placed the appellant in jeopardy such as would bar his prosecution for violation of the Philippine penal laws or, for that matter, a second trial under the Articles of War. Although under Rev. Stat. Sec. 1342, Art. 2, it has been held that a former trial may be pleaded when there has been a trial for the offense, whether or not there has been sentence adjudged or the sentence has been disapproved (Dig. JAG (1912) 167), *the rule is and should be otherwise when the disapproval was made in response to the defendant's plea based on lack of jurisdiction.* (Ex parte Castello, 8 F.

[7] People v. Romero, G.R. No. L-4517-20, July 31, 1951; Go Te Hua v. Encarnacion, 50 O.G. 599 (1954); Gandicela v. Lutero, G. R. No. L-4069, May 21, 1951.

[8] G.R. No. L-2078 & L-3355-60, January 30, 1953.

2d. 283, 286). *In such case the former trial may not* be pleaded in bar in the second trial."

In other words, in the Acierto case, the rule established unanimously is that when a defendant is charged before a competent court, upon a valid and sufficient complaint or information, and after his plea the cause is dismissed upon his own motion upon the ground of lack of jurisdiction, the defendant in a subsequent case for the same offense cannot invoke double jeopardy, (a) because he is estopped from maintaining therein that the court had jurisdicion in the former case, contrary to what he had claimed successfully when he asked for dismissal of the former case, and (b) because the dismissal "was made in response to the defendant's plea based on lack of jurisdiction," (borrowing the words of the Acierto case) or in the language of the Salico doctrine, because the dismissal was with the express consent of the accused. .

The main effect of these rulings (in the Salico and Acierto cases) has been the repeal of the doctrines laid down in previous cases[9] which were sources for miscarriages of justice.

Implied Abandonment of Salico and Acierto

However, on February 17, 1954, in People v. Bangalao et al., L-5610, the defendant, after trial had started, filed a motion to dismiss, upon the ground that the trial court had no jurisdiction to try the offense of rape charged by the fiscal, since that rape was distinct from the rape charged in the complaint filed by the offended person. The trial court dismissed the case, and, the Supreme Court on appeal found the dismissal to be wrong, the rape charged by the fiscal being the same rape charged by the offended person; but it dismissed the appeal just the same upon the ground that it placed the accused in double jeopardy. This was a miscarriage of justice, because the accused was set free not because he was found innocent but because he succeeded in inducing the trial court to a mistake.

In the case mentioned in the preceding paragraph, the Supreme Court refused to apply and did not even mention the rulings laid down in the Salico and Acierto cases. Had those rulings been applied, there would have been no miscarriage of justice. And there was no reason why they were not applied. In the said case (Bangalao case) the dismissal after the defendant's plea was urged by the defendant himself upon the ground of lack of jurisdiction. Therefore, it was a dismissal not only with the express consent of the accused but at his own instance. According to Rule 113, Sec. 9, when a case is dismissed or otherwise

[9] U. S. v. Regala, 28 Phil. 57 (1914); U.S. v. Tan Tung Way, 21 Phil. 67 (1911) and others.

terminated without the express consent of the accused there is jeopardy, and that *a sensu contrario* when the case is dismissed or otherwise terminated with the express consent of the defendant there is no jeopardy. This is the Salico doctrine.

Neither was the Acierto doctrine on estoppel applied when it was perfectly applicable. The accused in the Bangalao case, in claiming that he was being placed in double jeopardy by the appeal taken by the prosecution, necessarily had to claim that the court which dismissed the case had jurisdiction to try the same. But he was estopped from maintaining such theory, because it was exactly the reverse of the theory invoked by him when he asked for the dismissal of the former case.

On the other hand, on March 23, 1956, another case was decided[10] wherein "after the first prosecution witness had began to testify, the defendant moved for the dismissal of the case, on the ground that the information does not allege facts sufficient to constitute a public offense.[11] The municipal court sustained the motion and dismissed the case. The fiscal's appeal to the court of first instance having been dismissed, the case was elevated by the prosecution to the Supreme Court, wherein it was held that the information was sufficient and the dismissal of the case, wrong. In denying the allegation of double jeopardy, the Supreme Court said that "where the complaint or information is in truth valid and sufficient but the case is dismissed upon petition of the accused on the ground that the complaint or information is invalid and insufficient, such dismissal will not bar another prosecution for the same offense and the defendant is estopped from alleging in the second prosecution that the former dismissal was wrong because the complaint or information was valid." In other words, the Salico and Acierto doctrines were applied in this case.

However, in a subsequent case[12] promulgated on October 23, 1956 or scarcely seven months after the case mentioned in the preceding paragraph was decided, the Supreme Court changed its ruling on the bases of the following circumstances: After the prosecution had presented all its evidence, the accused filed a motion to dismiss on the ground that there was no evidence that the crime charged had been committed within the jurisdiction of the court. The trial court granted the motion and dismissed the case. On appeal, the Supreme Court found that the jurisdiction of the trial court had been established by sufficient evidence and that, therefore, the dismissal was wrong; but it dismissed the appeal because the accused was thereby placed in double jeopardy. Thus, the Salico and Acierto doctrines were again disregarded

[10] People vs. Reyes, C. R. No. L-7712, March 23, 1956.
[11] These words are quoted from appellee's brief there being nothing in the decision showing at what stage the defendants pleaded to the information.
[12] People v. Ferrer, G. R. No. L-9072, Oct. 23, 1956.

after they were impliedly restored in the case mentioned in the preceding paragraph. The result was another miscarriage of justice, the accused having been released not because he was found innocent but because he succeeded in inducing the court to a mistake.

But on June 39, 1959, came the decision in People v. Robles.[13] This was a criminal case pending in the trial court for several years the trial of the same having been postponed time and again on petition of the prosecution and despite the vigorous objections of the defendant predicated on his constitutional right to a speedy trial. The last petition for postponement filed by the prosecution because of the absence of its witnesses, was opposed by the defense and denied by the court which dismissed the case on defendant's motion. The Supreme Court held that the dismissal was correct and it bars another prosecution against the accused for the same offense, notwithstanding the circumstance that the dismissal was at the instance of the accused because the ruling laid down in the Salico case "had been modified or abandoned in subsequent cases."

This seems to be the first case where a formal statement is made that the Salico ruling was no longer controlling because it had been modified or abadoned. And yet, it was simply another aspect of the Salico doctrine that was applied in said case. It must be recalled that according to such doctrine, when a case is dismissed upon the insufficiency of the evidence of the prosecution, such dismissal is really an acquittal for it decides the merits of the case regarding the guilt or innocence of the accused, and bars another prosecution for the same offense even if it has been on petition of the accused. This ruling was reiterated in Gandicela v. Lutero, G. R. No. L-4069 and amplified in People v. Diaz, G. R. No. L-6518 and People v. Abano, G. R. No. L-7862 to the effect that when the trial of a case has been postponed several times upon petition of the prosecution because of the absence of its witnesses, and another postponement would be violative of the defendant's constitutional right to a speedy trial, the court instead of postponing the trial may dismiss the case and such dismissal is really an acquittal founded on failure of the prosecution to prove the defendant's guilt, and bars another prosecution for the same offense even if it was at the instance of the accused.

The Labatete Case

The formal abandonment of the Salico doctrine (not including the Acierto ruling) was explained in People v. Labatete, G. R. No. L-12917,

[13] 57 O.G. 61 (1959).

promulgated on April 27, 1960. The accused in that case was charged with having mortgaged the fruits and improvements of a property under original certificate of title No. 484 in favor of the complainant Genoveva Malinao as a security of a certain amount of loan, and that without paying the mortgage debt the accused mortgaged again in favor of the Rehabilitation Finance Corporation the real property under the certificate of title No. 484 including its fruits and improvements that were then mortgaged in favor of Genoveva Malinao. The accused pleaded not guilty and the trial was begun immediately with the testimony of the complainant which was suspended because the accused presented a motion to dismiss upon the ground that the properies mortgaged to Genoveva Malinao were only the fruits and improvements of a parcel of land not the land itself, and further, since the mortgage was not recorded it was not valid. The motion to dismiss was granted upon the ground that the facts alleged in the information did not constitute the crime of estafa. Since his motion for reconsideration was denied, the fiscal asked leave to file an amended information, wherein it is alleged that the properties mortgaged by the accused to Genoveva Malinao were not only the fruits and improvements but the land itself. The amended information was admitted but upon reconsideration asked by the accused it was ultimately rejected. The Fiscal appealed and the Supreme Court held that the amended information could not be allowed because "this is a substantial amendment changing the acts imputed to the accused as constituting an offense." Aside from this ruling which we believe to be correct and sufficient, the Supreme Court added another in deciding the appeal against the prosecution. It said: "if the amended information were to be admitted, the accused will be deprived of his defense of double jeopardy because by the amended information he is sought to be made responsible for the same act of borrowing on a mortgage for which he had already begun to be tried and acquitted by the dismissal of the original information."

With due respects, the correctness of this reasoning is not clear. A person cannot be put in jeopardy by an indictment under which he could not have been convicted. If no offense was alleged in the original information no danger of defendant's conviction was present. This is similar to a case[14] in which the defendants, charged with theft as accessories after the fact, were brothers and sisters of the owner of the jewels stolen, as alleged in the information. The defendants moved to dismiss, which was granted, under Art. 20 of the Revised Penal Code. The prosecution moved to amend the information by alleging that the defendants profited from the effects of the crime. The motion was denied, the amendment being substantial. In a subsequent prosecution of the same

[14] People v. Reyes, G. R. No. L-7390, April 30, 1955.

defendants for the same theft but with allegations that they profited from the effects of the crime, the plea of double jeopardy was sustained by the trial court, but on appeal, the Supreme Court reversed the ruling and held that there is no jeopardy where the information is not sufficient in form and substance to sustain a conviction.

In the case under consideration (Labatete case), the Supreme Court rejected the amended information not alone because it alleged new substantial matters but because, as above stated, it placed the accused in double jeopardy. The Solicitor General in anticipation of the theory of double jeopardy, invoked the Salico doctrine to the effect that no jeojardy attaches where dismissal is upon motion of the accused. Then the High Court took occasion to state formally that the Salico doctrine had been already abandoned and proceeded to explain the reasons for the abandonment. After quoting Section 9 of Rule 113, the Court started to explain that the words "without the express consent of the accused" cannot refer to conviction or acquittal, but only to a dismissal or other termination of the case which we believe also to be correct and is not in conflict with the Salico doctrine. Then the Court asks: "What, then, is a dismissal with the express consent of the accused, which is not an acquittal? Such dismissal, in the first place, must not be one where the court has no jurisdicion, or where the information is not valid or 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 also provided expressly in the rule."

This statement of the court is not contrary to the Salico doctrine. It fails to mention, however, other questions connected therewith the answer to which must be given in order to explain why the Salico doctrine is being abandoned. There is no question that when the dismissal is made "where the court has no jurisdiction, or where the information is not valid or sufficient to sustain a conviction," no jeopardy attaches. On the other hand, when the court has jurisdiction, or where the information is valid and sufficient to sustain a conviction, but after the defendant has pleaded, he moves the court to dismiss the case on the erroneous ground that the court has no jurisdiction or that the information is not valid or is not sufficient to sustain a conviction, and the court erroneously dismisses the case, is this a "dismissal with the express consent of the accused?" Has the accused expressly consented to the dismissal? To move the court to dismiss is more than merely consenting to the dismissal, for it stirs up the court to do something. And thus, there being more than express consent of the accused to the dismissal, no jeopardy attaches, according to the clear language of Rule 113, Sec. 9. The only question remaining is whether the dismissal of the case is the dismissal referred to in said provision of the rules.

In the Labatete case, the Supreme Court does not define what is a dismissal as distinguished from an acquittal. In one passage of said decision, it is said that when the case is dismissed after trial has begun upon the ground of insufficiency of the original information, the accused may be said to have been "acquitted by the dismissal of the original information." Thus "acquittal can not be the acquittal contemplated by Sec. 9 of Rule 113, for it bars no subsequent prosecution for the same offense, since the original information is insufficient to sustain a conviction.[15]

In the Labatete case, it is said further that "the judgment of the trial court (in the Salico case) was in fact an *acquittal* because of failure on the part of the fiscal to prove that the crime was committed within the jurisdiction of the court. The judgment was in fact a final judgment of acquittal". But there can be no possible doubt that such supposed acquittal did not decide the merits of the issue as to the guilt or innocence of the defendant. The case was merely dropped by the court for lack of jurisdiction which evidence failed to establish. Supposing that the Fiscal had filed another information for the same offense against the same accused before the court of another province, could the defendant have invoked the supposed acquittal as a plea of double jeopardy? There being no jurisdiction in the former case as alleged by the defendant and adjudged by the former court, there could have been no danger of conviction or acquittal therein, and no jeopardy could have attached. Hence the so-called acquittal was no acquittal at all for it barred no subsequent prosecution against the accused for the same offense. Had the accused desired to allege double jeopardy in the second case he would have had to assert that there was jurisdiction in the first case, and this he could not have done because it was precisely the reverse of the position he had taken when he succeeded in having that case dismissed by the former court. Mockery of justice should not be permitted by allowing the defendant to take inconsistent positions on the same issue.

The Court then proceeds to give illustrations of a dismissal or termination of the case. It says: "one case contemplated by the rule as a dismissal or termination of the case would be where the fiscal, upon the case being called for trial and after a plea has been entered, states that he is not ready to proceed and the accused, who is not agreeable to a postponement, is willing to have the case dismissed provisionally. 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 or it, and the court which does not want to have a case pending because of the possibility that there may be no sufficient evidence

[15] People v. Reyes, G. R. No. L-7390, April 30, 1955

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 his commitment. For the moment we cannot think of any other instance, but similar instances may happen when the dismissal is no bar to another prosecution. It is similar to a dismissal without prejudice in civil cases."

"We can see that none of the above possibilities existed in the case of Salico. The judgment was not a provisional dismissal of the case entered with a possibility of filing of a subsequent one."

It is to be noticed that no authority is cited in support of these illustrations given by the Court.

Aside from the discharge of a defendant to be utilized as a state witness, the other illustrations given by the Court seems to be foreign to the language of Sec. 9, Rule 113. This provision, aside from conviction or acquittal, speaks of a dismissal or any other termination of the case "without the express consent of the defendant," nothing more, nothing less. It does not speak of a provisional dismissal of any kind or nature. Nowhere in the provision can that word "provisional" be found and nothing therein can be found suggesting that only provisional dismissal is intended thereby. As qualifying the words "dismissal or otherwise terminated" appearing in Sec. 9 of Rule 113, we find, not the term "provisional" but the phrase "without the express consent of the defendant", the meaning of which is completely different from that of "provisional." For instance, the court may dismiss a case provisionally and yet if the dismissal is without the express consent of the defendant, there is jeopardy, according to the language of the provision. Of course, if the defendant asks for or consents to the provisional dismissal, no jeopardy attaches because of the defendant's express consent, and for no other reason. In other words, it is the existence or non-existence of the express consent of the accused, not the discretion of the court in making the dismissal final or provisional, that determines whether or not jeopardy attaches. The court is vested with no discretion to dismiss a case provisionally or finally, when the accused gives no consent.[16] Of course we are referring to a dismissal after defendant's plea, upon a sufficient information before a competent court.

The possibility of the idea as to provisional dismissal may arise only as a mere consequence of a dismissal with or without the express consent of the accused. For, if the dismissal is without the express consent of the accused it becomes final, because jeopardy attaches. But if the dismissal is with the express consent of the accused, it is provisional since

[16] Gandicela v. Lutero, G. R. No. L-4069, May 21, 1951; Esguerra v. De la Costa, 66 Phil. 134 (1938).

no jeopardy attaches and another criminal action may be brought. But it is not the provisionality or finality of the dismissal that generates the factor leading to the solution as to whether or not jeopardy attaches. The determinative idea is the existence or non-existence of an express consent of the accused for that is the only element that may evince the existence or non-existence of a waiver by the accused of his constitutional right which in turn is the only means by which jeopardy may or may not attach in cases of dismissal.

The rule imports, in our view, that after the defendant has pleaded to the charge, before a competent court under an information or complaint sufficient in form and substance to sustain conviction, any form of dismissal of the case or any mode of termination thereof shall constitute jeopardy unless the same is waived by the defendant, by giving his express consent thereto. In other words, the form of termination of the case is immaterial. What is material is the existence or non-existence of waiver on the part of the defendant.

With due respects, it may be stated in conclusion that there are more powerful reasons to uphold the Salico doctrine, which is fully supported by all the authorities in the United States from which the doctrine of double jeopardy is taken. On the other hand, no authority is shown to support the Labatete doctrine. Experience has shown that the Salico doctrine prevents miscarriage of justice while the contrary doctrine is the cause of many. And there is the moral question as to whether an accused at whose instigation the court has dismissed a case on an erroneous ground should be allowed, when prosecuted again for the same offense, "to make a mockery of justice by taking inconsistent positions alleging in the first case that the court had no jurisdiction and the case should be dismissed and alleging in the second that the court had jurisdiction but committed error in yielding to his plea."

The Casiano Case

We come now to the recent case of People v. Casiano.[17] In that case, a complaint was filed with the Justice of the Peace Court charging the accused with "estafa". After conducting the first stage of the preliminary investigation, a warrant of arrest was issued, whereupon the defendant posted a bail bond for her temporary release. When the case was called for the second stage of the preliminary investigation, defendant waived her right thereto and, accordingly, the record was forwarded to the Court of First Instance wherein the provincial fiscal filed an information for "illegal possession and use of false treasury or bank notes." Upon arraignment defendant pleaded not guilty, whereupon the prosecu-

[17] G. R. No. L-15309, Feb. 16, 1961.

tion began to present its evidence by introducing the testimony of a witness, who was cross-examined by the defense counsel. After several postponements of the trial, defendant appeared, through her counsel, and filed a motion to dismiss, upon the ground that there had been no preliminary investigation of the charge of illegal possession and use of a false treasury or bank notes, and that the absence of such preliminary investigation affected the jurisdiction of the court. The motion to dismiss was granted, and after denial of the motion for reconsideration, the prosecution interposed an appeal to the Supreme Court.

The High Court after holding that the allegations of the information filed in the Court of First Instance were included in those of the complaint filed in the Justice of the Peace Court, declared, that the accused was not entitled to a preliminary investigation which she had already waived in the Justice of the Peace Court. So, the dismissal ordered by the Court of First Instance was found erroneous, not only upon the ground mentioned above, but upon other grounds which are unnecessary to mention for the purpose of the present discussion. And on the question of whether the fiscal may or may not appeal because the accused may be placed thereby twice in jeopardy, the Supreme Court through one of its most talented members [18] made a luminous study of all the posisible angles of the question, and after considering thoroughly and extensively whether or not there had been on the part of the defendant a waiver of her right to invoke double jeopardy, said that regardless of whether or not the appellant had made such waiver:

"Could she have properly made use of it (double jeopardy) in this instance? For her to do so it would be necessary for her to assert that the lower court had jurisdiction to hear and decide this case — which is exactly the opposite of the theory sustained by her in her motion to dismiss. Her situation then would be substantially identical to that of the accused in People v. Acierto"[19] duly examined elsewhere.

And applying the Acierto doctrine, the Court proceeded further that "*granting that the Court Martial had jurisdiction* over the crime or crimes with which he (Acierto) had been charged, and was permitted by the Treaty to exercise it, the Philippine Government did not thereby divest itself of its own jurisdiction to try and punish Acierto therefor, and that, *even if he had, therefore, been placed on jeopardy* of punishment before said Court Martial, *he was estopped* from pleading it before the Philippine Courts, for "a party will not be allowed to make a mockery of justice by taking inconsistent positions, which, if allowed, will result in brazen deception", and "it is trifling with the courts, contrary to the elementary principles of right dealing and good faith, for an accused to tell one court, that it lacks authority to try him, and, after he has succeeded in his effort, to tell the court to which he has been turned over that the first has committed error in yielding to his plea."

"This would exactly be the position of defendant herein (Casiano) were she to plead double jeopardy in this case, for such plea would require the assertion of jurisdiction of the court of first instance to try her and that the same erred in yielding to her plea therein of lack of authority therefor. In the language of our decision in the Acierto case, it is *immaterial* whether or not the court *a quo* had said authority. It, likewise, makes no difference whether or not the issue raised by defendant in the lower court affected its jurisdiction. The fact is that she contested such jurisdiction and that, although such pretense was erroneous, she led the court to believe that it was correct and to act in accordance with such belief. The elementary principles of fair dealing and good faith demand, accordingly, that she be estopped now from taking the opposite stand in order to pave the way for a plea of double jeopardy, unless the rule of estoppel laid down in the Acierto case is revoked. As a matter of fact, said rule applies with greater force to the case at bar than to the Acierto case, because the same involved two (2) *separate proceedings* before courts deriving their authoritiy from *different sovereignties*, whereas the appeal in the case at bar is a *continuation* of the proceedings in the lower court, which like this Supreme Court, is a creature of the *same sovereignty*. In short, the inconsistency and impropriety would be more patent and glaring in this case than in that of Acierto, if appellant herein pleaded double jeopardy in her instance.

"The issue eventually boils down, therefore, to whether the rule of estoppel applied in the Acierto case should be confirmed or revoked. Upon mature consideration, we are of the opinion that said rule should be maintained, because:

1. It is basically and fundamentally sound and just.

2. It is in conformity with the principles of legal ethics, which demand good faith of the highest order in the practice of law.

3. It is well settled that parties to a judicial proceeding may not, on appeal, adopt a theory inconsistent with that which they sustained in the lower court.

4. *The operation of the principle of estoppel on the question of jurisdiction seemingly depends upon whether the lower court actually had jurisdiction or not.* If it had *no* jurisdiction, but the case was tried and decided upon the theory that it *had* jurisdiction, the parties are not

[18] Mr. Justice Roberto Concepcion.

[19] Acierto was charged with an offense before a Military Tribunal. He moved to dismiss upon the ground that the Military Court had no jurisdiction to try him. The motion was sustained by the Commanding General. Charged before a Philippine Court, the defendant invoked double jeopardy. *Held*, there is no double jeopardy.

barred on appeal, from assailing such jurisdiction, for the same "must exist *as a matter of law*, and *may not be conferred by consent of the parties or by estoppel* (5 C. J. S., 861-963). However, if the lower court *had* jurisdiction, and the case was heard and decided upon a given theory, such, for instance, as that the court had *no* jurisdiction, the party who induced it to adopt such theory will not be permitted, on appeal, to assume an inconsistent position — that the lower court *had* jurisdiction. Here, the principle of estoppel applies. The rule that jurisdiction is conferred by law, and does not depend upon the will of the parties, has *no* bearing thereon."

It is clear from the persuasive reasoning of the Supreme Court in the Casiano case that the ruling in the Acierto case is reaffirmed vigorously and unanimously "after a mature consideration", it being "basically and fundamentally sound and just" and it "is in conformity with the principles of legal ethics which demand good faith of the highest order in the practice of law." Compare now the Salico case with the Acierto and Casiano cases, and it will be found that the question raised in these three cases are similar. The question in all of them is: "after the defendant has pleaded to a charge before a competent court, under a valid information or complaint sufficient to sustain a conviction, and then the case is dismissed on motion of the defendant upon the *erroneous* ground that the court has no jurisdiction either upon the subject matter or upon the territory or that the complaint or information is invalid or insufficient, or upon any other irregularity such as that there has been no preliminary investigation, does the dismissal bar a subsequent prosecution of the same accused for the same offense?" The answer or ruling in the three cases is the same: No jeopardy attaches, and therefore the defendant may be prosecuted again for the same offense. As to the grounds for the ruling, the authorities quoted in the Salico decision speak of both grounds of waiver by defendant of his constitutional right against double jeopardy and also of estoppel, but the Court in its pronouncement invoked waiver only. The authorities cited in the Acierto and Casiano cases speak also of the two grounds but the Court in its reasoning laid more emphasis on estoppel. In the Casiano case, authorities are quoted extensively invoking as ground the theory of waiver, thus giving strength to the Salico reasoning. Said authorities are as follows:

"Where accused has secured a decision that the indictment is void, or has been granted an instruction based on its defective character directing the jury to acquit, he is estopped, when subsequently indicted, to assert that the former indictment was valid. In such case, *there may be a new prosecution whether the indictment in the former prosecution was good or bad.* Similarly, where, after *the jury was impaneled and sworn, the court on accused's motion quashed the information on the erroneous assumption that the court had no jurisdiction, accused cannot successfully plead former jeopardy to a new information*". x x x (22 C.J.S., sec. 252, pp. 388-389; underscoring ours.)

The following is quoted from the Annotated Cases:

"Where accused procured a prior conviction to be set aside on the ground that the court was *without* jurisdiction, *he is estopped* subsequently to assert, in support of a defense of previous jeopardy, that such court had jurisdiction." (22 C.J.S. p. 378).

"*Waiver of Objection to Second Jeopardy by Procuring Quashal of First Indictment.* — It may be stated as a general rule that where a person *after being put in jeopardy* procures a quashal of the indictment upon which he is being prosecuted, *he cannot thereafter* plead former jeopardy when placed on trial upon another indictment for the same offense. His action in procuring a quashal of the indictment constitutes a waiver of his constitutional privilege. Brown v. State, 109 Ga. 570, 34 S.E. 1031; Joy v. State, Ind. 139; State v. Scott, 99 Ia. 36, 68 N.W. 451. See also Miller v. State, 33 Ind. App. 509, 71 N.E. 248; Jones v. Com. 124 Ky. 26, 97 S.W. 1118; Com.. v. Could, 12 Gray (Mass.) 171; State v. Priebnow, 16 Neb. 131, 19 N.W. 628; Van Ruedan v. State, 96 Wis. 671, 71 N.W. 1048.

"In Brown v. State, 109 Ga. 570, 34 S.E. 1031, in effect overruling Black v. State, 36 Ga. 447, 91 Am. Dec. it appeared that the court, though at first it overruled the demurrer, reversed its former ruling after the admission of evidence and quashed the accusation. At a subsequent trial the defendant pleaded *former jeopardy.* The court said: 'Although the demurrer filed by the accused was at first overruled by the judge, the subsequent ruling sustaining the same was the one that the accused himself invoked, and it does not distinctly appear that he objected at the time to the judge sustaining the demurrer at that stage of the case and ordering the accusation to be quashed. *It therefore does not lie in his mouth on a subsequent trial to say that the accusation was good, and to reason that he was in jeopardy on the former trial. The accused obtained a ruling that it was bad, accepted the benefit of that ruling, and he will not be allowed to bring in question the propriety of a ruling which he himself invoked.*' In Joy v. State, 14 Ind. 139, it appeared that after the jury had been selected and sworn the defendant moved to quash the count in the indictment on which the district attorney had elected to go to trial. The motion to quash was sustained. On a subsequent trial the plea of former jeopardy was interposed. The court said: 'It (the quashal of the count) was for his benefit, and he is presumed to waive any future peril he may incur, in view of the advantage he derives by getting rid of the present pressing jeopardy. So in the case at bar, the defendant was charged in two counts with having produced the death of a human being — first, by fire; second, by blows. The counts were properly joined; but by his own motion, and therefore certainly with his consent, he procured an order of the court which operated to withdraw the second count from the consideration of the jury as fully as if it had charged a separate offense. To that count no evidence could have been directed, if the trial had progressed. By that act, it appears to us, for these reasons and those heretofore advanced, he consented to waive any constitutional rights which might have apparently attached, just as he would have waived those rights if he had consented to the discharge of the jury, or after verdict moved for a new trial or in arrest.'

"In the reported case it appears that after the jury had been impaneled and sworn and the defendant placed on the stand in the first trial, the defendant moved to quash the indictment on account of a material variance therein. The indictment was quashed. The defendant pleaded former jeopardy on the second trial. The court held that *inasmuch as the former indictment was quashed at the instance of the defendant, he was not in a position to urge that he was placed in jeopardy*

thereunder, and that having once urged the invalidity of the indictment he was estopped from thereafter claiming it to have been valid." (14 Ann. Cas. 426; underscoring ours.)

"*Although under Rev. Stat. sec.* 1342, *art.* 2, *it has been held that a former trial may be pleaded when there has been a trial for the offense, whether or not there has been a sentence adjudged or the sentence has been disapproved* (*Dig. JAG* /1912/ *p.* 167,) *the rule is and should be otherwise when the disapproval was made in response to the defendant's plea based on lack of jurisdiction.* (Ex parte Castello, 8 F. 2nd, 283, 286). In such case the former trial may not be pleaded in bar in the second trial." (Underscoring ours.)

Postscript

Now all the rulings in all those cases[20] attempting to overrule the Salico doctrine, can not stand and do not apply under the strength of the theory of estoppel established in the Acierto case, and finally ratified, after mature deliberation, in the Casiano case, which lastly was reiterated in People v. Archilla et al., G. R. No. L-15632, February 28, 1961.

[20] People v. Bangalao, G. R. No. L-5610, Feb. 17, 1954; People v. Ferrer, G. R. No. L-9072, Oct. 23, 1956; People v. Labatete, G. R. No. L-12917. April 27, 1960.

ABDUCTION*

Section 1. Statutory origin. — Article 342 of the Revised Penal Code, which defines and penalizes the crime of forcible abduction, is identical to article 445 of the old Penal Code which, in turn, was taken from article 460 of the Spanish Penal Code of 1870.[1] Article 343 of the Revised Penal Code, which defines and penalizes the crime of abduction with consent, is, with minor modifications as to the age of the offended party, identical to article 446 of the old Penal Code which, in turn, was taken from article 461 of the Spanish Penal Code of 1870.[2]

* This is the first topic of the projected *Philippine Corpus Juris* undertaken by a research staff of the College of Law under a grant by the Ateneo de Manila University, with Prof. Federico B. Moreno as Research Director and Atty. Antonio F. Navarrete as Assistant Research Director.

[1] People v. Rabadan, 53 Phil. 694 (1927).

Article 342 of the Revised Penal Code provides: "The abduction of any woman against her will and with lewd designs shall be punished by *reclusion temporal*. The same penalty shall be imposed in every case, if the female abducted be under twelve years of age."

Article 445 of the old Penal Code provides: "El rapto de una mujer, ejecutado contra su voluntad y con miras dishonestas, sera castigado con la pena de reclusion temporal. En todo caso se impondra la misma pena si la robada fuere menor de doce años."

[2] United States v. Reyes, 20 Phil. 510 (1911); United States v. Santiago, 29 Phil. 374 (1915).

Article 343 of the Revised Penal Code provides: "The abduction of a virgin over twelve and under eighteen years of age, carried out with her consent and with lewd designs, shall be punished by the penalty of *prision correccional* in its minimum and medium periods.

Article 446 of the old Penal Code provides: "El rapto de una doncella menor de veintetres años y mayor de doce, ejecutado con su anuencia, sera castigado con la pena de prision cor-