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FEDERAL JURISDICTION — IMMUNITY FROM STATE PROSECUTION.— [Federal] A troublesome problem of conflict of jurisdiction between the state and federal courts arises where an accused has been tried and convicted by one court and is then sought by the other to answer charges against him. The rule which attempts to prevent an actual conflict between the two systems is that the court to which jurisdiction first attaches, whether it involves a person or property, must be permitted to exhaust its action before the other court can attach its jurisdiction to the same matter. *Ableman* v. *Booth,* 62 U. S. 506 (1858); *Covell* v. *Heyman,* 111 U. S. 176 (1884).

The leading case in this field is *Ponzi* v. *Fessenden,* 258 U. S. 254 (1921), where the federal government waived its right of strict custody and a committed individual was allowed to be tried in a state court while under sentence to a federal penitentiary. In a fact situation like this it would be impossible for the state authorities to compel the federal government to relinquish its custody since the matter is one based entirely on comity. *Marsino* v. *Hogsett,* 37 F. (2d) 409 (E. D. Mass. 1930).

In a recent case, *In re Craig,* 4 L. Wk. 495 (S. D. Ill. 1936), the accused was convicted in a federal court and placed on probation without any commitment to a penal institution. It was there held that the accused was not subject to prosecution in a state court for a state offense, for this would be an interference with the probationary power of the federal court. This seems to be a considerable extension of immunity from prosecution but is in accord with the prior case of *Grant* v. *Guernsey,* 63 F. (2d) 163 (C. C. A. 10th, 1933). It was there said, on the same facts, that the second prosecution would be a direct interference with the jurisdiction of the federal court and a violation of the rule of comity between the federal and state courts. However, Circuit Judge Cotteral in his dissent argued that there would be no actual interference with the probationary power of the federal court and since the practice of subjecting prisoners to a second trial is well settled, probation should not prevent it. But if there were a commitment after the second trial there would undoubtedly be a direct interference with the federal court's probationary power. There would seem to be an immunity, though, where the accused is out on bail (*Taylor* v. *Taintor,* 83 U. S. 366, 373 (1872);

but see *Metcalf* v. *State*, 57 Okla. 64, 156 Pac. 305 (1916)); or where he is in custody of the federal court. *Ableman* v. *Booth, supra; Robb* v. *Connolly*, 111 U. S. 624 (1883).

Of course, the sovereignty having the exclusive jurisdiction may waive its right and thus subject the accused to another trial. The right of retention of jurisdiction or waiver thereof is one entirely within the discretion of the sovereignty and the accused may not raise the prior jurisdiction of one court as a defense in a second prosecution. *U. S.* v. *Marrin*, 227 Fed. 314 (E .D. Pa. 1915); *Ponzi* v. *Fessenden, supra.* If the federal court does waive the right to exclusive jurisdiction the accused must be given a full opportunity for defense and presence at the second trial, or there is a denial of due process. *Frank* v. *Mangum*, 237 U. S. 309 (1915); *Lewis* v. *United States*, 146 U. S. 370 (1892); *cf. Simmons* v. *State*, 165 Miss. 732, 141 So. 288 (1932).

By statute, 26 STAT. 839 (1891), amended by 46 STAT. 326 (1930), 18 U. S. C. A. §753f (1936 Supp.), the attorney general is given control and custody of all prisoners committed to federal penitentiaries and it was under this statute that the second prosecution was allowed by consent of the attorney general in *Ponzi* v. *Fessenden, supra.* However, the statute could hardly be invoked to enable a second prosecution in the *Craig* case since there the attorney general had no custody because of no commitment. Where the convicted person is put on probation he remains in the custody of the court and the only procedure by which the state court could secure custody would be by getting an order from the federal court having such control during the probationary period. *Cf. Ex parte Lamar*, 274 Fed. 160 (C. C. A. 2d, 1921).

WM. T. MORGAN, JR.

GAMING—SLOT MACHINES—LOTTERIES—SLOT MACHINE STATUTES.—[Massachusetts] The defendant, convicted of operating a lottery, maintained a slot machine which worked on the same principle as commercial excavating cranes. Inside a glass compartment were prizes placed on a bed of red candy cinnamon drops, which the operator of the machine attempted to secure by setting the crane. After the machine started into motion the operator was powerless to control the course of the crane. The defendant contended that this was a game of skill and that he sought to create a market for the articles inside, which he manufactured. The jury found, however, that the element of skill was highly speculative and that the element of chance predominated. Therefore, since the defendant was attempting to dispose of his articles through a game of chance, he was properly convicted for running a lottery. *Commonwealth* v. *Plissner*, 4 N. E. (2d) 241 (Mass. 1936).

The history of lotteries dates back to the Romans. Some modern governments have run lottery schemes to raise revenue, but the original Roman lotteries were purely for amusement. Nero gave such prizes as a house or a slave. France and Italy used lotteries frequently before and after Louis XIV. The first English lottery was in 1569, but in the next century they became so frequent that they

were suppressed as public nuisances, and in 1826 they were finally prohibited. Early America looked upon lotteries with favor, and before 1820 numerous acts of Congress permitted lotteries to raise money for public purposes. (See Note, *Lotteries and the Law* (1924) 157 L. T. 480 for an outline of the history of lotteries.) Modern law, however, adopts the policy that lotteries are bad for public morals — they incite the gambling instinct and prey upon the poor. They are practically everywhere denounced and prohibited by statute. Pickett, *Contests and the Lottery Laws* (1932) 45 Harv. L. Rev. 1196; Note, *Contests of Skill and the Lottery Laws* (1937) 23 Va. L. Rev. 431.

Interesting though the study of lotteries may be, this note is primarily limited to a discussion of the status of the slot machine under the gaming and lottery laws. A slot machine which merely vends merchandise is not unlawful. Its illegality rests upon the element of chance that the player might receive something of greater value than the coin used. If skill is an essential element, then the machine may possibly escape condemnation. Which of the elements of chance, skill and possibility of greater reward predominates in a given case is the problem to determine.

In England slot machines have been held illegal under the general gaming statute, Section 4 of the Gaming Houses Act of 1854, 17 & 18 VICT., c. 38, where the penalty imposed is £500, costs and one year in prison. In *Fielding* v. *Turner,* [1903] 1 K. B. 867, the game in question consisted in putting a penny in a slot and releasing a spring which forced the penny upward toward seven compartments. Depending upon the compartment into which it fell the player got a ticket entitling him to twopennyworth of articles sold in the shop, a return of the coin, or its total loss. This device was declared illegal. *Cf. Thompson* v. *Mason,* 90 L. T. R. 649 (1904) (penny operated by hand). A similar device which shot balls into cups but which gave no right to merchandise was also declared illegal in *Roberts* v. *Harrison,* 101 L. T. R. 540 (1909). In each case the element of skill was said to be lacking. But although a person might develop skill in catching a ball in a sliding cup at the bottom of a device through which a ball passes among many pins, the probability was that few people could attain that skill and such was declared illegal, both in England and Ireland. *Bracchi Bros.* v. *Rees,* 113 L. T. R. 871 (1915); *Donaghy* v. *Walsh,* [1914] 2 Ir. R. 261. The Scotch saw nothing harmful in this game. *Di Carlo* v. *M'Intyre,* [1914] S. C. (J.) 60. "Diddler," much played in Ireland a few years ago, was declared unlawful in *Gordon* v. *Dunlevy,* [1928] Ir. R. 595. That machine consisted of inserting a small disc and pulling a lever, starting the reels revolving. The player could, by means of push-buttons, attempt to control the speed of the reels and make them stop on a winning combination. The amount of skill involved was held not sufficient; the test was whether skill entered into the game to such a substantial extent as to be the predominating element, and it was not to be tested by the standard of experts, though some might by practice insure

success. *Cf.* Paul, *Games of Chance* (1935) 9 Australian L. J. 43, 46. "Little Stockbroker" sought to test one's skill by showing elaborate instructions for operating, and if strictly followed the chance of winning was fair. The judge found, however, that few players ever read the instructions, but instead took their chances. The device was condemned. *Rex* v. *Brennard,* 22 Cr. App. Rep. 95, 74 S. J. 788 (1930). In Scotland a machine which gave discs of no value except for replaying the machine for amusement was legal where there was no showing that it was used for gambling. *Crolla* v. *Macpherson,* [1931] S. C. (J.) 4.

Most American states have general gaming laws broad enough to cover gambling by slot machines and a few specifically make mention of the machine itself. A typical statute of the latter type provides fine and imprisonment for "whoever . . . keeps . . . any clock, joker, tape or slot machine or any other device upon which money is staked or hazarded or into which money is paid or played upon chance, or upon the result of the action of which money or other valuable thing is staked, bet, hazarded, won or lost. . . ." ILL. STATE BAR STATS. (1935) c. 38, §321. Such a statute is constitutional. *Bobel* v. *People,* 173 Ill. 19, 50 N. E. 322 (1898). Most courts agree that when the machine returns tokens exchangeable for merchandise it is a gambling device. *People* v. *Kopper,* 253 N. Y. 83, 170 N. E. 501 (1930); see Note, *Slot Machines* (1932) 66 U. S. L. Rev. 63 for a review of the cases. The fact that a card hung on the machine, if studied, will enable the player to meet measurable success will not conceal its gambling character—"the lure of the game" is still present. *Almy Mfg. Co.* v. *Chicago,* 202 Ill. App. 240 (1916). The apparently harmless "mint vending" machine, where the tokens may be used only for amusement in replaying the machine, has practically everywhere met a similar fate. *Jenner* v. *State,* 173 Ga. 86, 159 S. E. 564 (1931); *Milwaukee* v. *Johnson,* 192 Wis. 585, 213 N. W. 335 (1927); *contra: Oberly* v. *Oklahoma City,* 46 Okla. Cr. Rep. 42, 287 Pac. 796 (1930). The added amusement feature is considered a "thing of value." *State ex rel. Manchester* v. *Marvin,* 211 Iowa 462, 233 N. W. 486 (1930) noted (1931) 22 J. Crim. L. 282.

May these machines also be an infringement of the lottery laws? Three things are necessary to constitute a lottery—prize, chance and consideration. If skill is present there is no lottery, but in none of the machines considered has the element of skill been sufficient. There can be no doubt that chance is involved in each case. Consideration is present also — the money necessary to run the machine. How about prize? The machine in the present Massachusetts case clearly had that element, too, so it was condemned as a lottery. Surely the element of prize would be equally present when the tokens are exchangeable for merchandise. Such a scheme should come within the statutory definition "with intent to make the disposal of such real or personal property dependent upon or connected with any chance by . . . game, hazard or other gambling device, whereby such chance or

device is made an additional inducement to the disposal or sale of said property." ILL. STATE BAR STATS. (1935) c. 38, §401. *Cf. Loveland* v. *Bode,* 214 Ill. App. 399 (1919) (selling coupons contemplating redemption in merchandise held a lottery); *Commonwealth* v. *McClintock,* 257 Mass. 431, 154 N. E. 264 (1926) (redeemable tokens). In the *Almy Mfg. Co.* case, *supra,* the machine was so constituted as to pay from 5 cents to 25 cents for the nickel used. The Illinois court said: "The machine . . . is, we think, akin to a lottery, in its operation, coming within the definition of the lexicographers of a lottery, which is, 'a scheme for the distribution of prizes by lot or chance.'" The ordinary slot machine which gives something more than the equivalent in money or money's worth of the amount inserted seems to offend the lottery laws as well as the general gaming statutes. See Notes (1935) 80 L. J. 305, 306; (1933) 75 id. 130. *Cf. Jenner* v. *State, supra,* where the lottery clause was included in the general gaming statute. It is quite probable, though, that the suppression of slot machines will continue under the gaming laws or the special slot machine laws, except in unusual cases such as the present one where the lottery feature of the machine is quite evident.

The Canadian Provinces have been divided as to just what sort of machine fell within the general gaming laws. The devices which gave redeemable tokens and didn't require skill in operation were generally held illegal. *Rex* v. *O'Meara,* 25 Can. Cr. Cas. 208 (Ont. 1915), is the leading case and was followed in *Bareham* v. *The King,* 26 Can. Cr. Cas. 211 (K. B. Que. 1916); *Rex* v. *Arnold,* 48 id. 101 (Ont. 1927); *Rex* v. *Richards,* 57 id. 208 (B. C. 1931). The ordinary mint vending machine with non-redeemable tokens was held legal by the Supreme Court of Canada in *Rex* v. *Wilkes,* [1931] 1 D. L. R. 995. Manitoba held that a machine which could be partially controlled by push-buttons was not a lottery *Rex.* v. *Liptrot,* 50 Can. Cr. Cas. 244 (1928), but the weight of authority is against this case. *Rex* v. *Wolfe,* 50 id. 189 (Alb. 1928); *Rex* v. *Athonas,* 56 id. 146 (Ont. 1931). Where skill alone is determinative, as in shooting a dime from a gun into a target, releasing a pot of dimes, there is no violation of the statute. *Rex* v. *Geffler,* [1923] 3 D. L. R. 1205 (B. C.).

In the last two years several of the provinces have gone the whole way in outlawing slot machines. Alberta had a Slot Machine Act in 1924, but it was never enforced, so she enacted a much broader statute in 1935. Stats. of Alberta 1935, 25 GEO. V, c. 14. Manitoba enacted a similar statute. Stats. of Manitoba 1935, 25 GEO. V, c. 43. See Legis., *The Slot Machine Acts* (1936) 14 Can. B. Rev. 549, 553. The Alberta statute was upheld in *Rex* v. *Stanley,* [1936] 1 D. L. R. 100 (S. Ct. Alb.). In 1936 New Brunswick, Nova Scotia and Saskatchewan enacted even broader statutes: New Brunswick 1936, 1 EDW. VIII, c. 48; Nova Scotia 1936, 1 EDW. VIII, c. 2; Saskatchewan 1936, 1 EDW. VIII, c. 110, repealed by c. 111. The statutes seemingly are intended to cover every conceivable type of slot machine, which is defined as "any . . . device which [is operated by]

. . . money, coin, token . . . or other substance [with or without] . . . any handle, lever, plunger or other attachment [and which] . . . delivers or returns or purports to deliver or return . . . with or without any article of merchandise . . . any money, premium, prize, reward, token, counter, disc, slug, or any thing which is intended to be or capable of being exchanged for money or money's worth or which may be replayed or re-inserted in such . . . device to again set it in operation." Section 2 (b) of the Manitoba Act, similar to all. This definition would include all machines that returned tokens for whatever purpose; the only machines exempted would be vending machines where nothing was returned except the article worth exactly the amount inserted—the pure automatic vending machine. To effectuate these Acts, property rights are forbidden in the machines and they are subject to seizure and forfeiture without warrant when discovered. Saskatchewan even made them government property outright. Such drastic Acts are not likely to find favor in the United States, nor would they be adequately enforced.

CHARLES B. ROBISON.

JURORS — CONSTITUTIONALITY OF STATUTE MAKING FEDERAL EMPLOYES ELIGIBLE.—[Federal] At common law challenges were made either to the array or to the polls. Challenges to the polls were either in principal, which worked an absolute disqualification, or challenges to favor, which disqualified for actual bias. That there was no settled practice at common law absolutely disqualifying Crown servants as jurors is disclosed by early commentators. FITZHERBERT, ABRIDGEMENT, *Challenge*, §§17, 63, 65, *folios* 172, 173 (1577 Ed.); STAUNFORDE, PLEAS OF THE CROWN, 162; 2 HAWKINS, PLEAS OF THE CROWN, c. 43, §§32, 33; 5 BACON, ABRIDGEMENT, *Juries* 355. This is supported by the early cases. *Rex* v. *Genney*, Keilw. 102a (1508); *Rex* v. *Parkyns*, 13 St. Tr. 163 (1695); *The King* v. *Edmonds*, 4 B. & Ald. 471 (1821); *Reg.* v. *Lacey*, 3 Cox Cr. C. 517, 519 (1848).

Blackstone's *Commentaries* were doubtless familiar to the framers of the Constitution, being accepted as the most satisfactory exposition of the common law of England. *Schick* v. *United States*, 195 U. S. 65, 69 (1903). Blackstone's statement as to the grounds of a principal challenge has relation to master and servants between private parties; there is no mention made of the practice in Crown cases where Crown servants are jurors. 3 Bl. Com. 363. This omission is not a sufficient basis for denying the existence of an exception in Crown cases, nor that the colonies followed a rule different from that of England.

The question of government employes acting as jurors was first presented to the Supreme Court of the United States in *Crawford* v. *United States*, 212 U. S. 183 (1908). That was a prosecution in the District of Columbia by the federal government for conspiracy to defraud relative to a contract with the postal department. One of the jurors challenged was a druggist who received $300 a year as compensation for maintaining a subpostal station. The Court, con-

sidering the section of the Code of Laws of the District (D. C. Code 1929, T. 18, §§357, 360) which exempted salaried officers of the government from jury service, expressed the opinion that the provisions therein did not embrace the entire subject of disqualifications, that by the common law all servants of the government would be disqualified and that this was required by the use of the phrase "an impartial jury" in the Sixth Amendment. In 1935 Congress sought to change the result of the *Crawford* case by making government employes available for jury service. 49 STAT. 682. The constitutionality of this statute was attacked in *Wood* v. *United States,* 83 F. (2d) 587 (1936). Defendant was convicted in the Police Court of the District for petit larceny from a private corporation. After defendant's peremptory challenges were exhausted, there remained on the jury the recipient of a Civil War pension and two clerks employed in the Treasury Department and the Navy Yard. Each of the challenges against these persons upon the ground of interest in the government was disallowed. The court of appeals reversed the judgment, one judge dissenting. The majority opinion, following the *Crawford* case, stated that all doubt had been foreclosed on the subject. Robb, dissenting, distinguished the *Crawford* case, saying that there was no statutory provision present in that case inconsistent with the common law rule which he believed was correctly stated by Blackstone. He concluded that the amendment was constitutional. Both the majority and dissent recognized that the statute if valid removed the disqualification of more than 100,000 employes. On *certiorari,* the Supreme Court, reviewing the common law authorities, denied that an absolute disqualification of government servants existed. On the basis of this research and in the absence of a different practice in the colonies, the Court refused to follow the *Crawford* case, and reversed. *Wood* v. *United States,* 57 S. Ct. 177 (1936). The *Crawford* case could have been distinguished on its facts, since there the employe was in the very department where the alleged conspiracy took place, but the Court admits that that decision rested on a broader ground. Thus, for all practical purposes the *Crawford* case is overruled.

As an alternative ground for its decision the Court stated that even if it could be said that at common law an absolute disqualification existed, Congress had the power to remove it. The question thus arises whether an absolute disqualification of government employes is essential to the impartiality of the jury. In *Patton* v. *United States,* 281 U. S. 276, 288 (1930), the essential elements of trial by jury were set forth: "(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial by jury should be in the presence . . . of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous." In a leading case it was held that the command of the Seventh Amendment that the right of jury trial shall be preserved does not require that old forms of practice and procedure be retained. *Ex parte Peterson,* 253 U. S. 300, 309

(1920). The principle there enunciated that "new devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice" is apparent in *Stilson* v. *United States*, 250 U. S. 583 (1919) where the number of peremptory challenges was limited. In *Tynan* v. *United States*, 297 Fed. 177 (C. C. A. 9th, 1924) and *Hoxie* v. *United States*, 15 F. (2d) 762 (C. C. A. 9th, 1926), it was decided that women were qualified to serve as jurors though not so permitted at common law. Also, the wife of a defendant in a federal criminal case may act as a competent witness in his behalf. *Funk* v. *United States*, 290 U. S. 371 (1933); Note (1935) 47 Harv. L. Rev. 853. The reasoning of those cases arising under the Seventh Amendment is applicable under the Sixth Amendment. *Springfield* v. *Thomas*, 166 U. S. 707 (1896).

As is stated by the court in the *Wood* case, the Constitution lays down no particular tests, and procedure is not confined to any ancient and artificial formula. "The common law is not immutable but flexible and by its own principle adapts itself to varying conditions." *Funk* v. *United States*, *supra;* see also von Moschzisker, *The Common Law and Our Federal Jurisprudence* (1925) 74 U. of Pa. L. Rev. 109, 388. It is true that statutes in derogation of the common law have been generally strictly construed and the courts have been hesitant to utilize them as authority for overthrowing principles of long standing, but the common law system must oftentimes give way to legislative policy. In fact, it has been submitted that our course of legal development will lead courts to ultimately deal with a statutory innovation by holding it of superior authority to judge-made rules on the same general subject. Pound, *Common Law and Legislation* (1908) 21 Harv. L. Rev. 383. The Supreme Court is cognizant of this principle: "And what courts can thus do to assure the appropriate growth and adaptation of the law *a fortiori* can be achieved by the action of a competent Legislature." 57 S. Ct. at 184.

State courts enforcing requirements of state constitutions as to trial by jury have allowed legislatures considerable freedom in establishing qualifications for jury service, though these involve departure from common law rules. *Privitt* v. *St. Louis-San Francisco Ry. Co.*, 300 S. W. 726 (Mo. 1927); *Ex Parte Mana*, 178 Cal. 213, 172 Pac. 986 (1918); *Brown* v. *State*, 62 N. J. 666, 42 Atl. 811 (1899); *Coughlin* v. *People*, 144 Ill. 140, 33 N. E. 1 (1893); *Spies* v. *Ill.*, 123 U. S. 131, 167, 169 (1887); *Stokes* v. *People*, 53 N. Y. 164 (1873). The court in the *Wood* case, in its refutation of the argument that a government employe would be a biased juror against the accused, admits that bias is an elusive condition of the mind but states that such a juror probably would be no more biased than an ordinary citizen. The only test as to the competency of a juror should be whether he is under such an influence as to prevent an unbiased weighing of the evidence. *Tuggle* v. *State*, 22 Okla. Cr. Rep. 1 209 Pac. 184 (1922). The influence ought not be imputed on any extreme or fanciful tests. There is no doubt but that the Act of 1935 was passed

to meet a public need and that no interference with the actual impartiality of the jury was contemplated. H. R. Rep. No. 1421; Sen. Rep. 1297, 74 Cong., 1st Sess. The court recognizes that certain crimes may be of peculiar interest to employes of certain governmental departments. In such a case, the law permits full inquiry as to actual bias. 57 S. Ct. at 187; *Priestly* v. *State,* 19 Ariz. 371, 374 (1918); *Tuggle* v. *State, supra.*

EUGENE A. BUSCH.

PROCEDURE—RIGHT OF STATE TO AN APPEAL OR WRIT OF ERROR UNDER STATUTE.—[Illinois] Ten separate indictments were returned against defendant for the murder of ten persons by burning a dwelling. He was found guilty by jury and sentenced on one of the indictments. Thereafter he was called to trial on the remaining nine indictments, and to each he filed a plea of *autrefois convict.* Overruling the People's demurrer, the court entered judgment discharging defendant and ordered that the indictments be "set aside and dismissed." The People sued out a writ of error under the 1933 amendment to the Criminal Code which provides that "The people may sue out writs of error to review any order or judgment quashing or setting aside an indictment or information." ILL. STATE BAR STATS. (1935) c. 38, §770. Appeal dismissed. *Held:* The statute is limited to those cases in which the trial court has quashed or set aside the indictment. Here the ruling of the court was, in legal effect, that prosecution was barred under the indictments, not an adjudication that the indictments were bad. The words "set aside and dismissed" were mere surplusage. *People* v. *Vitale,* 5 N. E. (2d) 474 (Ill. 1936).

Under the common law the state has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal action, whether rendered upon a verdict of acquittal or upon the determination of the court on a preliminary question of law or fact. *United States* v. *Sanges,* 144 U. S. 310 (1892); *People* v. *Bork,* 78 N. Y. 346 (1879). Prior to 1700, the decision of a trial court in a criminal case was final. See Miller, *Appeals by the State in Criminal Cases* (1926) 36 Yale L. J. 486. In the absence of a statute, no appeal was permitted either to defendant (*cf. State* v. *Googins,* 115 Me. 373, 374, 98 Atl. 1032 (1916)); or to the state (*United States* v. *Evans,* 213 U. S. 297 (1909); *People* v. *Royal,* 2 Ill. 557 (1839); *St. Paul* v. *Stamm,* 106 Minn. 81, 118 N. W. 154 (1908); *State* v. *Davidson,* 124 N. C. 839, 32 S. E. 957 (1899)), whether after conviction or acquittal. In England, however, an appeal was often granted to the defendant as a matter of grace. *Rex* v. *Wilkes,* 4 Burr. 2527, 2550 (K. B. 1770). Subsequently, a writ of error came to be regarded as a matter of right when there was a possibility of an error of law in the rulings of the trial court. See Miller, *supra.* The passage of the English Criminal Appeal Act of 1907, 7 EDW. VII, c. 23, §3, made clear the right of the defendant to an appeal from a conviction and sentence. The laws of England do not, however, provide for appeal or writs of error on the part of the prosecution, except that appeals on points of law may be taken in exceptional cases from decisions of the Court of Criminal

Appeal to the House of Lords. CRIMINAL APPEAL ACT §1 (6). See also Miller, *supra,* at 491. The only case in which the Crown may be permitted a new trial is where fraud has been practised by the accused, such as keeping witnesses for the Crown in seclusion.

The common law of this country, however, never recognized the early English practice, and granted the defendant the right to a new trial or a writ of error in a criminal case. *United States* v. *Sanges, supra.* It is now generally held that upon judgment for the defendant on demurrer the writ will not lie (*United States* v. *Sanges, supra; Commonwealth* v. *Cummings,* 3 Cush. 212 (Mass. 1849); *People* v. *Corning,* 2 N. Y. 9 (1884)) unless granted by statute. *People* v. *Apple,* 57 Cal. App. 110, 206 Pac. 487 (1913); *People* v. *Zobel,* 54 Colo. 284, 130 Pac. 837 (1913); *State* v. *Robertson,* 28 Okla. Cr. Rep. 234, 230 Pac. 932 (1924); *State* v. *Spencer,* 37 S. D. 219, 157 N. W. 662 (1916). Even when a stautory provision exists, it is construed strictly against the state. *State* v. *Raymond,* 18 Colo. 242, 32 Pac. 429 (1893); *State* v. *Northrup,* 13 Mont. 522, 35 Pac. 228 (1893); *State* v. *Weathers,* 13 Okla. Cr. Rep. 92, 162 Pac. 239 (1917).

The practice of issuing a writ of error on behalf of the state is not a common one. See Note (1935) 4 Fordham L. Rev. 130. A Maryland case is the first reported decision on this subject in this country. In that case a writ of error by the state was allowed though no statute permitted it, after the county court had sustained a demurrer to the indictment. *State* v. *Buchanan,* 5 H. & J. 317 (Md. 1821). The court said, "the right should be seldom exercised, and never for oppression or without necessity." *Id.* at 330. There have been decisions to the same effect in a few other jurisdictions. Thus the contention has been made that the state has a common law right to appeal both in England and in the United States. See Johnson, *The Right of the State to Sue Out a Writ of Error in Criminal Cases* (1933) 11 Chi-Kent L. Rev. 85.

Jurisdictions which permit an appeal by the state vary as to the scope and as to when the right may be exercised. In some jurisdictions the state may have as broad a right to appeal as the defendant. Connecticut, under a statute giving the state the same right as the accused to appeal on all questions of law arising in a criminal case, adopts the view that even after an acquittal the state may appeal, or in case of a reversal, may bring the defendant into court again for a new trial. CONN. GEN. STAT. (1930) §6494; *State* v. *Lee,* 65 Conn. 265, 30 Atl. 1110 (1894). At the other extreme are those states which allow no right of appeal whatsoever. Such is the rule in Florida, Georgia, Massachusetts, Minnesota, and Texas. See Curran and Sunderland, *The Organization and Operation of Courts of Review,* Third Report of the Judicial Council of Michigan (1933) 51, 211. See also Orfield, *Appeal by the State in Criminal Cases* (1935) 15 Ore. L. Rev. 306. In Minnesota, the state is not permitted to appeal or seek a review in a criminal case at any time or under any circumstances even on a point of law arising prior to trial. See Miller, *supra,* at 486. Between these two extremes, the state may

be entitled to appeal from various rulings of the court, not however in such a way as to effect an acquittal. Curran and Sunderland refer to twenty such states. Twenty-one are listed in Note (1933) 10 N. Y. U. L. Q. Rev. 373. Usually such appeal is from an order setting aside or quashing an indictment or information, from an order sustaining a demurrer, from an order in arrest of judgment, or from an order granting a new trial. See Orfield, *supra.* Many state statutes provide that the state may appeal from an order granting a new trial. See Note (1933) 81 U. of Pa. L. Rev. 340, 341, n. 4. The Federal Criminal Appeal Act permits the government to appeal by writ of error from a decision or judgment quashing, setting aside or sustaining a demurrer to any indictment where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded; from an arrest of judgment of conviction for insufficiency of the indictment when the validity or construction of the statute is in issue; and from a decision sustaining a special plea in bar, when defendant is not put in jeopardy. 34 STAT. 1246 (1907), 18 U. S. C. A. 682 (1927).

The reason most frequently given by the courts for refusing the state the right to appeal is that to do so would result in placing the defendant in double jeopardy. *Kepner* v. *United States,* 195 U. S. 100 (1904). This objection, however, is only applicable to appeals from verdicts of acquittal. It does not apply to appeals from an order of the court quashing an indictment or sustaining a demurrer to it. The defendant has not been put in jeopardy, since no jury has been sworn. The objection does not apply even after acquittal, if the decision on appeal is simply to determine the law in future cases. It does not apply from an order granting a new trial, nor from an order in arrest of judgment, nor from a ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment, nor from the sentence. See Orfield, *supra.* It should be noted that five states, Connecticut, Maryland, Massachusetts, North Carolina and Vermont, do not have a double jeopardy provision in their constitutions.

In Illinois prior to 1933 a writ of error did not lie on behalf of the state in criminal cases. *People* v. *Glodo,* 12 Ill. App. 348 (1883); *People* v. *Dill,* 2 Ill. 257 (1836). It was held in *People* v. *Royal,* 2 Ill. 557 (1839), that the double jeopardy provision in the Constitution prohibits the state from bringing a writ of error where a person accused of a crime is acquitted in the court below. In *People* v. *Barber,* 348 Ill. 40 (1932) noted (1933) 23 J. Crim. L. 1039, the court held that the People could not have a writ of error to review a judgment quashing an indictment even though there was no contention that the defendant was put in jeopardy prior to the judgment. In *People* v. *Kopman,* 358 Ill. 479, 193 N. E. 516 (1934), the court, in allowing an appeal from an order quashing the indictment, said, "The legislation in 1933 was remedial and intended to supply those defects in the law which prevented a review of an order quashing an indictment." *Cf. People* v. *Williamson,* 290 Ill. App. 93

(1935), where an appeal was taken from a judgment quashing an indictment.

There may be valid reasons why the People in criminal prosecutions should not be debarred from the benefits given defendants. But in the instant case, since the demurrer put in issue only the validity of the plea in bar, the sustaining of the plea, while to all practical effects amounting to a quashing of the indictment, did not clearly fall within the language of the statute. The statute being in derogation of the strict common law rules, it is for the legislature rather than for the court to broaden the right of the People to appeal.

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