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MUNICIPAL MOTOR VEHICLE REGULATIONS IN THE PRESENCE OF GENERAL STATUTES [OHIO]

The recently released case of *Russo v. State** again poses the complex question of the extent of police power properly to be allowed to cities in the regulation of motor vehicles and their operation within the corporate limits of a city when the matter is also dealt with by general state law. Ignatius Russo was convicted of contributing to the delinquency of his 17-year-old stepson, in that he permitted him to operate an automobile in the city of Cleveland, contrary to an ordinance which prohibited any person under the age of 18 years from driving. The State Drivers' License Law permitting the licensing of persons under 18 after examination. The boy had secured such a state license, and the Cuyahoga County Court of Appeal declared the stricter ordinance was unconstitutional, as not authorized by Article 18, sec. 3, of the Ohio constitution, empowering charter cities to adopt such police regulations as are not in conflict with general laws of the state. Russo's conviction was reversed and he was discharged.

The importance of municipal regulation of motor vehicles is obvious, and it is proposed herein to examine the legal status of such regulation, with particular emphasis upon that type of regulation which is in conflict with state legislation.

The conception of municipal corporations as mere administrative areas of the states has been consistently maintained by the federal courts; but "state courts recognize a dual capacity in municipal corporations: (1) to act as agents of the state in carrying on state functions within their territorial jurisdiction, and (2) to act as an agency for the satisfaction of local needs."[1]

As to the appropriate scope of the ordinance-making power, Dillon's summary, first enunciated in 1872, is still the accepted delimitation: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others; first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the exercise of power is resolved by the courts against the corporation and the power is denied."[2]

As cities have grown, greater demands are laid upon the governmental authorities for affirmative action in the "accomplishment of the declared objects and purposes of the corporation," one of which, no state court would deny, is the protection of its populace from reckless, unsafe, or indiscreet use of the public ways by motor vehicles. In this direction, a more aggressively independent concept of the city's police powers might be preferred. As Freund wrote: "The principle of delegation seems to be to make the municipal police power co-extensive with local dan-

* (Ohio App., 1938), 31 N. E. (2d) 102; appeal dismissed, 134 Ohio St. 510, 17 N. E. (2d) 915 (1938).

[1] Walker, Federal Limitations upon Municipal Ordinance Making Power (1929) 6.

[2] 1 Dillon, Commentaries on the Law of Municipal Corporations (5th ed., 1911) 237.

gers arising from the close aggregation and contact of persons and property in a limited space or territory."[3]

Some writers, definitely in the minority, have maintained that such powers of local self-government are independent of the precise charter and legislative limits set up in each state; McQuillin contends that local self-government does not owe its existence to the constitution and laws of the state at all, but that it existed before them.[4] McBain further advocates the extension of the federal principle into the realm of state-city relations: "Mere congestion of people creates problems that are peculiar to the city itself. To a very considerable extent, therefore, it is a natural economic and sociological unit. As such it is a perfectly logical governmental unit."[5]

Some support to this approach is found in a few decisions which allow independent police powers to cities when there is no general legislation in force concerning the particular subject-matter. A local regulation in Ohio limiting the hours of work on public projects was allowed full force until the statute on the same subject became effective.[6] And in the field of motor vehicle regulation, an ordinance fixing a definite rate of speed where the statutory rate was indefinite was sustained, the Missouri Supreme Court remarking: "Before we hold that the police power has been withdrawn from these municipalities of the state, the legislative language will have to be . . . explicit."[7] Local speed regulations would naturally be of considerable moment in those states which have no statutory scale of *prima facie* unreasonable speeds, but rely on a generally-worded basic rule.[8]

With regard to drivers' licenses, the particular problem of the principal case, there is not the unanimity of decision which would seem to flow from the general rule that all municipal legislation must conform to the general statutes. This is particularly significant in the light of the problem involved—licensing is much more apparently a state-wide issue than is the speed and direction of traffic. When the state does not provide for a drivers' license, local authorities have been allowed to institute such a requirement, at least in Washington[9] and South Carolina.[10]

Where ordinances are stricter in their terms than the general state law, as in the principal case, it is at once obvious that the "fundamental" requirement of conformity with general statutes or specific charter authority prevails to render void and of no effect most ordinances repugnant thereto. An ordinance in Virginia which did not grant the right to drive by special permit to persons under 16 years of age, as provided in the general statute, was held of no effect in a suit on an insurance policy;[11] a Florida statute providing that license fees stipulated therein should be in place of any county or local fees was held to render a municipal license fee invalid.[12] Previous municipal authority to tax motor vehicles may be withdrawn by a later statute, whether the power was derived from charter[13] or statute.[14]

However, in South Carolina, even after a general statute had been passed directing a state department to license drivers with a minimum age limit of 12 years, a Charleston city ordinance, restricting the issuance of licenses to persons over 16, was held valid as a proper exercise of municipal police power.[15] The Supreme Court of the United States allowed an ordinance similar to that of Cleveland in the principal case to be admitted in evi-

[3] Freund, The Police Power (1904) §140, at 131.

[4] 1 Municipal Corporations (2d ed., 1940) §268.

[5] The Law and Practice of Municipal Home Rule (1916) 110.

[6] Stange v. City of Cleveland, 94 Ohio St. 377, 114 N. E. 261 (1916).

[7] Roper v. Greenspon. 272 Mo. 288, 198 S. W. 1107 (1917).

[8] Conn. Gen. Stats. (1930) §1582; Mont. Rev. Codes (1935) §1742; Nev. Comp. Laws (1938 Supp.) §4350; Texas Penal Code (Vernon, 1936), art. 790.

[9] International Motor Transit Co. v. City of Seattle, 141 Wash. 194. 251 Pac. 120 (1926).

[10] State v. Perry. 138 S. C. 329. 136 S. E. 314 (1927).

[11] Hannabass v. Maryland Casualty Co., 169 Va. 559. 194 S. E. 808 (1938); cf. also Loewenberg v. Fidelity Union Casualty Co. (La. App.), 147 So. 81 (1933).

[12] Anderson v. Wentworth. 75 Fla. 300, 78 So. 265 (1918).

[13] Ex parte Shaw, 53 Okla. 654, 157 Pac. 900 (1916).

[14] City of Buffalo v. Lewis, 192 N. Y. 193, 84 N. E. 809 (1908).

[15] State (City of Charleston) v. Moseley, 174 S. C. 187, 177 S. E. 156 (1934).

dence in an action on an insurance policy, although it set a minimum driver's age of 18 years, while the Ohio statute set one of 16 years.[16]

With regard to the reasonable regulation of moving traffic, a vitally important problem in large cities and in small ones located on important traffic channels, the conflict of authorities is sharp and fairly evenly balanced. A long series of decisions follow the general rule, and hold that where the legislature has enacted a "state traffic code," any type of overlapping municipal regulation is ineffective.[17] The reasoning of the courts in these cases is typified by the California Supreme Court: "Whenever the State . . . sees fit to adopt a general scheme for the regulation and control of motor vehicles upon the highways of the state, the entire control over whatever phases of the subject are covered by state legislation ceases in so far as municipal or local legislation is concerned."[18] In one case a municipal regulation prescribing a full stop for vehicles approaching certain named streets was held inconsistent with a statute prescribing the speed with which vehicles should approach "intersecting highways";[19] thus was denied all power of the city to manage the type of hazardous situation which develops in all congested areas.

Although the Ohio case of *Schneiderman v. Sesanstein*[20] adheres to the usual rule, its dissenting opinion is a forceful exposition of the theory upon which the courts might hold such ordinances valid. A plaintiff in a personal-injury suit relied upon an ordinance of the city of Akron requiring automobile drivers to slow down to fifteen miles per hour in passing school buildings during certain hours of the day. The evidence thus proferred was excluded on trial, because the applicable statute allowed a speed of twenty miles per hour under like circumstances. In upholding the trial court, the majority of the Supreme Court relied on the California decisions, especially *Ex parte Daniels*,[21] to the effect that the general state law assures the driver that he may drive up to a certain speed with confidence that it is lawful, and that the law applies uniformly throughout the state; therefore, if a city makes more rigid requirements, it deprives the citizens of the state of their generally granted rights and privileges. Noting the decision in *City of Fremont v. Keating*[22] as still good law, the court distinguished the cases on the basis that the local ordinance is valid only so long as it does not conflict with "general law," and that the Akron ordinance did so conflict, while the Fremont ordinance, being largely repetitious of the statute, did not. This is also the reasoning followed in the principal case.

In vigorously dissenting, Judge Allen maintained that the ordinance did not necessarily conflict with the "general law," and that the decision of the majority ran counter to the weight of authority and better policy. "Long prior to the enactment of the home rule amendment, the right to regulate traffic on city streets was recognized as constituting a peculiar power of local self-government. That the power here in question is exercised only within the confines of the municipality is self-evident, and to that extent it is manifestly local. . . . The municipality knows the conditions and the needs of its own traffic better than any state legislature however intelligent. . . . Because of the very nature of the problem, recognized for

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[16] U. S. Fidelity & Guaranty Co. v. Guenther, 281 U. S. 34, 50 S. Ct. 165, 72 A.L.R. 1064 (1930).

[17] Ex parte Smith, 26 Cal. App. 116, 146 Pac. 82 (1914); Ex parte Daniels, 183 Cal. 636, 192 Pac. 442, 21 A. L. R. 1172 (1920); Chicago v. Kluever, 257 Ill. 317, 109 N. E. 917 (1913); Hoosier Mfg. Co. v. Berry, 197 Ind. 368, 149 N. E. 723 (1925); Town of Randolph v. Gee, 199 Iowa 181, 201 N. W. 567 (1925); Commonwealth v. Newhall, 205 Mass. 344, 91 N. E. 206 (1910); Kenney v. Hoerr, 324 Mo. 368, 23 S. W. (2d) 96 (1929); People v. Braun, 166 N. Y. S. 708 (1917); Ex parte Wright, 82 Tex. Crim. R. 247, 199 S. W. 486 (1917); State v. Charleston, 92 W. Va. 61, 114 S. E. 382 (1922); Oshkosh v. Campbell, 151 Wis. 567, 139 N. W. 316 (1913); Stewart v. Olson, 188 Wis. 487, 206 N. W. 909 (1926).

[18] Atlas Mixed Mortar Co. v. Burbank, 202 Cal. 660, 262 Pac. 334, at 336 (1927).

[19] State v. Stallings, 189 N. C. 104, 126 S. E. 187 (1925).

[20] 121 Ohio St. 80, 167 N. E. 158 (1929).

[21] 183 Cal. 636, 192 Pac. 442 (1920).

[22] 96 Ohio St. 468, 118 N. E. 114 (1917), holding unconstitutional a statute prohibiting cities from regulating the speed of motor vehicles, in that the statute violated the municipal police-power provision of the constitution.

generations as being a purely local question, in my judgment the regulation of traffic on the streets of a city comes within the power of local self-government. and is not, and cannot be, limited by general law."

As far as police power generally is concerned, the home rule cities of Ohio may be considered to stand on equal footing with other cities.[23] Under the reasoning of Judge Allen, therefore, can there be discerned a realm of municipal police power in respect to which a city may effectively set aside statutory regulations? In two cases[24] the Ohio Supreme Court had given some support to this view in upholding ordinances regarding traffic on the basis that the city's regulation of the streets is a purely local problem, and that state traffic laws are apparently not "general laws" in the meaning of the constitution, the term properly being restricted to police and sanitary regulations which affect all the people of the state in an inclusive sense. But in the later case of *Bucyrus v. State Department of Health*,[25] and in the *Sesanstein*[26] case, the court rather abandons this view, considering that the state's power to enact police legislation was as broad after the enactment of the police-power reservation in the constitution as it had been previously, the emphasis being "placed on 'general' in the sense of 'uniform'."[27]

But if the ordinances are regarded in the sense of additional or supplementary to the statute, there is less difficulty in holding them valid; "each may be directed against a different evil or danger. Thus a state license for peddling does not contemplate the occupation of a street for a temporary stand from which to sell goods, and this may be prohibited notwithstanding the state license."[28]

Even in Ohio this principle has been recognized, as where the city of Piqua required a full stop in certain situations —"the city had a right to adopt additional regulations, and the requirement to stop is not questioned as a valid exercise of the police power."[29] In Nebraska, a state traffic code designed to be "exclusive" did not prevent "further restrictions" by cities if reasonable and made necessary by special conditions plainly not considered by the legislature and which did not prohibit the free use of the streets.[30] And in Minnesota, even where the statute forbade local speed regulations, or any regulations relating to the "use or speed of motor vehicles," a city wheel tax was upheld.[31]

It thus appears that there is no insurmountable difficulty in upholding traffic ordinances even where they impose stricter duties than do the state laws, if the state courts assume a liberal interpretation of what constitutes a "general" law and what should be the appropriate scope of local police power. The justification of strict uniformity throughout the state is of course the divergent character of municipal regulations as to motor traffic, making it difficult for the motorist to know the law. But there is strong reason for greater liberality, as already indicated, and if sufficiently clear general provisions are laid down in the general traffic code, local problems may safely and better be left to the cities, with appropriate standards of legislation laid down.[32] It has been demonstrated that the reduction of traffic accidents is achieved by intelligent "selective enforcement" directed at the locus of the special hazards. Standards of conduct for the drivers of a state will best be determined by the law-making bodies most familiar with the local problems, aided by a modern state-wide code. The net result of the two co-operative lines of regulation will be the holding of motorists at all times to the standard of conduct most conducive to general safety on the highways.

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[23] McGoldrick, Law and Practice of Municipal Home Rule 1916-1930 (1933) 332.

[24] Froelich v. City of Cleveland, 99 Ohio St. 376, 124 N. E. 212 (1919); Lorain Street Railroad Co. v. Public Utilities Commission, 113 Ohio St. 68, 148 N. E. 577 (1925).

[25] 120 Ohio St. 426, 166 N. E. 370 (1929).

[26] 121 Ohio St. 80, 167 N. E. 158 (1929).

[27] McGoldrick, op. cit. *supra* note 23, at 221.

[28] Freund, op. cit. *supra* note 3, at 145.

[29] Heidle v. Baldwin, 118 Ohio St. 375, 161 N. E. 44, 58 A. L. R. 1186 (1928).

[30] Christensen v. Tate, 87 Neb. 848, 128 N. W. 622 (1910).

[31] Park v. City of Duluth, 134 Minn. 296, 159 N. W. 627 (1916).

[32] Cf. Uniform Act Regulating Traffic on Highways (1939), especially §58.

ADMISSION OF THE ACCUSED'S PRIOR CONSISTENT STATEMENTS INTO EVIDENCE [TEXAS]

In *Rains v. State*,[1] a murder case, the defendant testified that he shot the deceased in self defense. To substantiate this plea, he displayed a knife which he claimed belonged to the deceased and that he picked it up after the deceased had fallen. The State, then, offered the testimony of some of the grand jurors that the defendant was asked during the grand jury investigation whether he had seen any weapon near the deceased at the time of the killing and that the defendant answered that he had not. Thereupon the defendant offered to rebut this impeaching evidence by showing by one Orr that he, the defendant, stated the morning after the homicide that he had picked up a knife near the deceased and would show it to the witness sometime. The trial court refused to allow into evidence this proffered testimony and found the defendant guilty of murder.

The Texas Court of Criminal Appeals upheld the ruling of the trial court by affirming the judgment. It held that since the defendant had made the statement to the witness Orr subsequent to his being charged with the murder he had a "motive to fabricate"; that witnesses may not rebut impeaching evidence of contradictory statements by evidence of other consistent statements when such consistent statements were made after such a motive existed. There was, however, a vigorous dissent by Judge Graves who attacked the majority by contending, first, that the Texas court, in previous cases,[2] had allowed the introduction of testimony when there were similar "motives to fabricate"; and second, that a line of demarcation could not properly be made between the non-existence of a motive to fabricate before a person was charged with the crime, and the existence of such a motive after the charge. He argued that any motive arose immediately after the offense was committed.

The defendant, in the present case, presented as an authority for the introduction of the disputed testimony, *State v. Hudson*[3] in which case the court allowed the defendant in a rape case to offer evidence that he had said at the grand jury investigation that he was fourteen after the arresting officers had testified he told them he was sixteen. The present court, non-commital as to whether or not the decision in the *Hudson* case was based upon the lack of motive to fabricate, dismissed its importance in summary fashion by showing that the court in *State v. Blackburn*[4] (where the defendant had relied on the *Hudson* case) and in other cases followed the rule used in the present case.[5] It must be assumed, therefore, that the present court is of the opinion, because of the decisions of these later cases supporting the motive rule, that the court in the *Hudson* case considered that no motive existed. In *State v. Campbell*,[6] an earlier analogous case, the court, after an attempt to impeach the defendant, allowed into evidence a consistent statement of the accused made after he had been arrested for the crime. There is nothing in the Texas decisions overruling this

[1] 146 S. W. (2d) 176 (Tex. Ct. of Crim. App. 1941).

[2] Hudson v. State, 49 Tex. Crim. 24, 90 S. W. 177 (1905); Campbell v. State, 35 Tex. Crim. 163, 32 S. W. 774 (1895).

[3] 49 Tex. Crim. 24, 90 S. W. 177 (1895).

[4] 78 Tex. Crim. 177, 180 S. W. 268 (1915). The court did not allow the defendant, after he was impeached, to introduce prior consistent statements when the statements were made after he was already charged with the crime. In discussing the Hudson case the court said, "It has always been the rule in this State that when the state seeks to impeach the witness by proof of contradictory statements, he may support his testimony by showng that he had made similar statements to that he testified on trial." The court further stated that, "it is not made to appear that it was after Hudson had been charged with an offense that he made the statement held to be admissible, and if it did so appear, it would not be in harmony with a long list of authorities in the state."

[5] Anderson v. State, 50 Tex. Crim. 136, 95 S. W. 1037 (1906); Ballow v. State, 42 Tex. Crim. 263, 58 S. W. 1023 (1900); Porter v. State, 50 S. W. 380 (1899); Conway v. State, 33 Tex. Crim. 330, 26 S. W. 401 (1894).

[6] 35 Tex. Crim. 163, 32 S. W. 774 (1895).

case. It is clear, however, from the later decisions, that it is now following the rule that one may not show substantiating statements made by the accused after he is charged with the crime.[7] Yet unless the prior inconsistent cases are expressly repudiated, needless appeals will be made at great expense to the parties involved.

Apart from the difficulty that has arisen on the application of the rule further difficulties exist which strike directly at the merits of the rule itself. The first, as pointed out by the dissent in the present case, is the arbitrary drawing of a line determining where the "motive to fabricate" exists. This arbitrariness is well exemplified by the Texas courts which now invariably hold that after being charged with the crime the defendant has a motive to fabricate. It is true that with the existence of a "motive to fabricate" rule in the law a line must be drawn as to when the motive begins. It seems questionable whether the line should be definitely set or made into an axiom when it is obvious that the criminal does not wait until he has been charged with the crime before he begins to cover up but does so as soon as the crime is committed or as soon as he first plans its commission.

To follow the consequences of the majority Texas holding—that the accused should not be allowed to show possible fabricated alibi statements—to its ultimate conclusion would result in denying the accused all opportunity to rebut the impeaching testimony of former contradictory statements by former consistent ones. By doing this, one rule of evidence would exist for the witnesses and a separate, more severe one, for the accused.[8] The State would be given a seemingly unfair advantage. Even if all accused persons were held to have a motive to fabricate from the very beginning the line would still be arbitrarily drawn for certainly all witnesses, except the casual bystanders, have such an interest in the outcome of a case, one way or the other, that they have a tendency to flavor, and in some instances perjure their testimony in line with their interests.

Apparently both the majority and the dissent in the present case have not appreciated the distinction being made between the accused and other witnesses for they speak of a "motive to fabricate" and then give supporting cases concerning the impeachment of witnesses because of prior inconsistent statements.[9] No distinction has been made between cases where a defendant is a witness for himself or where he is trying to introduce his own statements through another witness and cases where a witness gives testimony as a bystander.

Finally, it is difficult to see how there can be any reconciliation between the rule that presumes a man is guilty and has a motive to fabricate and the time-honored theory of our democratic government that a man is not guilty of a crime unless he is convicted thereof. In discussing this difficulty, Professor Wigmore pointedly remarks that "we maintain with sentimental excess the privilege against self-crimination; in short, we exhaust the resources of reasoning and strain the common sense to protect an accused person against an assumption until the proof is

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[7] Cf. 7 Ency. of Evidence 286.

[8] The rule followed by most states is narrower than that followed in Texas. It is that, generally, evidence of prior consistent statements cannot be shown to rebut evidence of contradictory statements; but that prior consistent statements, clearly made before there was any "motive to fabricate," may be allowed when it is contended that the statements made on the stand have been fabricated. Underhill, Criminal Evidence (4th. ed. 1935) §429; 22 C. J. S. 1288 §752; 70 Corp. Jur. 1185 §1369. This rule seemingly does not discriminate against the accused as does the Texas rule.

[9] Although both the majority and dissent opinions cite several Texas cases for the general proposition that a witness may show prior consistent statements to rebut impeaching contradictory ones attributed to him, only Hudson v. State, 49 Tex. Crim. 24, 90 S. W. 177 (1905); Streight v. State, 62 Tex. Crim. 453, 138 S. W. 742 (1911); Ballow v. State, 42 Tex. Crim. 263, 58 S. W. 1023 (1900); and, Campbell v. State, 35 Tex. Crim. 163, 32 S. W. 774 (1895) deal with statements of the accused. The only Texas cases cited, other than those dealing with statements of accused persons, holding that prior consistent statements will not be allowed because of a "motive to fabricate" are those where the prior consistent statements are those of accomplices made after they have turned State's witness. See Anderson v. State, 50 Tex. Crim. 136, 95 S. W. 1037 (1906); Conway v. State, 33 Tex. Crim. 330, 26 S. W. 401 (1894).

irresistible, and yet, at the present point we throw these fixed principles to the winds."[10]

There can be only one remedy to alleviate these difficulties of the rule, and that is, of course, the obvious—do away with the rule. Dispensing with the rule and allowing the introduction of all prior consistent statements will by no means lead to chaos in our judicial system. It will be a relatively easy matter to allow every statement of the accused into evidence, whether tainted or not with the "motive to fabricate," and let the jury decide just how much weight to give the statement. By giving the testimony to the jury with the necessary instructions to guide them as to its weight, courts will be relieved of (1) the confusion that has arisen because of the failure to distinguish between the impeachment of a defendant because of a self-serving statement and the impeachment of a witness because of prior inconsistent statements; (2) the difficulty of drawing a line as to when the "motive to fabricate" exists, and (3) the evil of indirectly destroying a cherished right of our democratic government—the presumption of innocence.

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[10] Wigmore, Evidence (3rd ed. 1940) §1732.

RIGHT TO APPEAL BY THE STATE [ILLINOIS]*

In a recent Illinois case, a judge of the Criminal Court of Cook County was indicted for conspiracy. The indictment charged that he had certified that certain bail bonds containing schedules of personal property had been sworn to before him, as judge, when in fact no such acknowledgement or proof was made by the person who was surety in the bail bonds, either before him or any other judge. The defendant entered a plea in bar in which he alleged that the constitution of Illinois[1] prohibits criminal prosecution of judges except by action of the legislature. The plea was upheld by the trial court and the cause was dismissed.[2] The State's Attorney, on behalf of the State, sued out a writ of error, based on a Statute providing for a review on behalf of the state from "any order or judgment quashing or setting aside an indictment or information."[3] The Appellate Court, in effect, sustained the decision of the trial court by saying that the State does not have the right to appeal by writ of error where a plea in bar has been sustained but only in those cases setting aside or quashing an indictment as provided in the statute.[4] The Court refused to pass upon the merits of the plea in bar but dismissed the writ of error for want of jurisdiction.

In its decision the Appellate Court reviewed the decisions of the Illinois Supreme Court in *People v. Vitale*,[5] *People v. White*,[6] and *People v. Finkelstein*,[7] all decided under this statute which allows review on behalf of the State from the quashing or setting aside of an indictment. In the *Vitale* case the Court held that the discharge of defendants on the sustaining of a plea of autrefois convict did not give the State a right to review under the statute. In *People v. White*, where the trial court sustained a plea of autrefois acquit and further ordered the indictment quashed although there was no motion to quash, the Supreme Court held that the State had no right to review and the additional sentence quashing the indictment after the plea had been sustained should be rejected as surplusage. In *People v. Finkelstein* the Court held that the State had a right to appeal where a motion to quash was sustained but not where a plea of immunity was sustained and that the trial court could not give the State the right of review by sustaining a motion to quash which had been superseded, and so waived, by a plea of immunity.

* State v. McGarry, 306 Ill. App. 542, 29 N. E. (2d) 303 (1940).

[1] Art. 6, Sec. 30—Ill. Const. (1870).

[2] People v. McGarry, Criminal Ct., Cook Cty., Ill., Nov. 21, 1940.

[3] Smith-Hurd Ann. St. (1939), Ch. 38, Sec. 747.

[4] 306 Ill. App. 542, 29 N. E. (2d) 303 (1940).

[5] 364 Ill. 589, 5 N. E. (2d) 474 (1936).

[6] 364 Ill. 574, 5 N. E. (2d) 472 (1936).

[7] 372 Ill. 186, 23 N. E. (2d) 34 (1939).

At common law, a special plea in bar set up facts extrinsic to the indictment; traditionally it was available in only four instances—former acquittal, former conviction, former attainder, and pardon.[8] On the other hand, the motion to quash has always been the proper way of objecting to the indictment for insufficiency on its face or on the face of the record, in point of law, from whatever cause the insufficiency arose.[9] It is submitted that the plea in the instant case did not satisfy the requirements of a special plea in bar but merely questions the sufficiency of the indictment, which should be raised by a motion to quash.

What a party calls his pleading is not essential. It is the substance that matters. Here it is plain that the answer, to be proper had to be a motion to quash the indictment or set it aside, as has been shown. Therefore, although the defendant called it a plea in bar, it actually more closely resembled a motion to quash. As stated in the *McGarry* case, the right to appeal by writ of error will lie only if conferred by statute expressly and is limited to the specific wording. Under the interpretation here given, the writ of error would lie in this case and it could be reviewed on the merits. But, on the basis of the prior decisions, it is very unlikely that a writ of error will be allowed by the Supreme Court of Illinois in this case.[10]

In Illinois, at common law, the State had no right to any review in criminal proceedings.[11] When the legislature saw fit to enact legislation on this problem, it followed the general practice of the time and, in 1845, enacted a statute allowing no appeal of any kind from any order, decision, or judgment.[12] While the legislature may have enacted a statute agreeing with the general practice in other states in 1845, it has taken a long time to break from the theory. In the meantime many states have adopted legislation enabling the State in criminal cases to appeal from any decision, order, or judgment of the lower court; other states have adopted legislation similar to that of Illinois as it now stands.[13]

The present provision was enacted in 1933 and the Illinois courts have construed this attempt to give the State a chance to appeal very strictly against the State.[14] And the Illinois Supreme Court, apparently keeping in mind the double jeopardy provision in the state constitution,[15] has limited the statute to its exact wording;[16] thus while many states have liberalized similar provisions, Illinois has shifted back toward the common law.

In reality such a provision does not violate the "double jeopardy" clause if an analogy is drawn between *double jeopardy* and *res judicata* and it is assumed that the first jeopardy is not ended until a trial free of all errors, on behalf of either side, is had.[17] Justice Holmes, in a dissenting opinion in *Kepner v. United States*[18] said, "There is but one continuing jeopardy from the beginning to the end of the cause which is not limited by any 'rule that a man cannot be tried twice in the same case'." In *State v. Lee*[19] it was argued that double jeopardy should not bar appeals by the State since logically and rationally there is but one

[8] 4 Blackstone's Commentaries *335.

[9] Clark, Criminal Procedure (1895), Chap. 11.

[10] Although the statute includes the words "or setting aside," the Illinois courts have not given them any added significance. It would appear that the legislature had a definite purpose in adding those words. It could be validly argued that these words apply in just such a situation as in the instant case, but in *People v. Vitale*, 364 Ill. 589, 5 N. E. (2d) 474 (1936), the Illinois Supreme Court held that the words "quashed" and "setting aside" are synonomous in this statute.

[11] People v. Dill, 2 Ill. 257; People v. Royal, 2 Ill. 557.

[12] Smith-Hurd Ann. St. (1931), Ch. 38, Sec. 747.

[13] See compilation of statutes in Amer. Law Inst. Code of Crim. Procedure—Official Draft (1931), 1191-3; Miller, Appeals by the State in Criminal Cases (1927), 36 Yale Law Journal 486.

[14] People v. White, 364 Ill. 574, 5 N. E. (2d) 472 (1936).

[15] Ill. Const. (1870), Art. II, Sec. 10.

[16] People v. Vitale, 364 Ill. 589, 5 N. E. (2d) 474 (1936).

[17] In Palko v. Connecticut, 302 U. S. 319 (1937), the Supreme Court of the United States said that although Congress cannot pass an act allowing the United States a general appeal, because of the Fifth Amendment, many states can, and that "due process" of the Fourteenth Amendment is not thereby affected or violated.

[18] 195 U. S. 100, 134 (1904).

[19] 65 Conn. 265 (1894).

jeopardy and one cause and the second trial after appeal by the State is not a new case but is a legal disposition of the same original case tried in the first instance. And so the court there held. It is suggested that the Illinois Supreme Court might adopt this same theory and when the problem is again raised it would be well for the court to become more liberal.[20]

We recommend that the legislature should go the whole way and allow an "appeal" by the State in all criminal cases. Double jeopardy can be avoided on the theory above expounded. If the decision of the lower court is affirmed, no harm is done and a better standard of justice will be obtained; if it is reversed the defendant is held by a tribunal generally better qualified to determine the law applicable. Without sufficient convictions, which follows from allowing no appeals, the effective administration of criminal law bogs down. "Bad" law is created by improper treatment of cases in trial courts and a safeguard against the creation of "bad" law is to allow an appeal so that the supreme court may correct these mistakes. Criminal law has become a one sided subject; in fact, it tends to become "defense law" because defense errors cannot be raised in appellate courts. Realizing that reversals come only through defense initiative, the judge shows a tendency to lean toward the defendant. In order to prevent reversal, the judge sometimes grants about everything that the defendant requests. He is apt to become one-sided by excitement, newspaper criticism, personal interest and prejudice, etc. Of course, in other cases, honest mistakes may be made and it is better that such mistakes be corrected by a high court than to turn criminals loose. If the defendant may appeal, to which he has no absolute constitutional right since one hearing will satisfy "due process,"[21] there is no logical reason why the State should not also have the full right of appeal.

One of the main arguments against the right of appeal by the State is that the avenging State could otherwise appeal until the defendant was convicted.[22] Justice Holmes has answered this argument saying, "there is more danger that criminals will escape justice than that they will be subjected to tyranny."[23] Another argument that has been offered but which seemingly has little merit is that there is psychological coercion of the second jury to find a defendant guilty because of the reversal by the upper court. Because much new work and administrative difficulties may arise is hardly a valid argument for refusing an appeal to be granted to the State.

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[20] Note (1938), 27 Ill. Bar Journal 104, 106.
[21] McKane v. Durston, 153 U. S. 684 (1894).
[22] State v. Jones, 7 Ga. 422 (1849).
[23] Kepner v. United States, 195 U. S. 100 (1904).