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Articles, Reports, and Notes OF THE NATIONAL ASSOCIATION OF COUNTY AND PROSECUTING ATTORNEYS

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A COMPARATIVE STUDY OF CRIMINAL LAW ADMINISTRATION IN THE UNITED STATES AND GREAT BRITAIN

In preparation for the London, 1957 meeting of the American Bar Association, the Association's "Section of Criminal Law", under the chairmanship of Mr. Walter P. Armstrong, Jr., arranged for the preparation and publication of a booklet entitled "British Criminal Law." In it is presented a side-by-side comparison of the criminal court system and the criminal procedure generally prevailing in both Great Britain and the United States. Because of the special interest of this material to prosecuting attorneys, and in view of the limited distribution which the booklet received, it is here being reproduced, in part, and in slightly modified form, with the special permission of the Criminal Law Section of the American Bar Association.

The British are extremely and justly proud of their system of law and look back over its centuries of growth with pride in an institution which has been the foundation of English liberties.

1066, the year of the Norman Conquest, is, as it is with respect to many other British institutions, an important date in the history of English law. Prior to William the Conqueror's successful crosschannel operation, the purely local courts of the Shire (later "county") and the Hundred (a sub-division of the Shire) dispensed a fairly rough and ready type of justice. The "Witan", the Saxon King's Council, had practically no judicial power.

When the Norman kings began to consolidate their gains and develop centralized authority over Britain, itinerant justices were sent out into the countryside to perform judicial functions in the King's name. By the 13th century the Courts of Assize, presided over by these travelling judges, were an established institution. At the same time the King's Council (the Curia Regis) grew in prominence as a judicial forum and eventually became the Courts of Chancery. The Court of

King's Bench, too, saw its beginnings in the Curia Regis, but by the 14th Century had become an independent entity. The infamous Court of Star Chamber, finally abolished in 1641, had its beginning in the King's Council.

As the courts developed in response to the needs of a developing civilization, so, too, did the machinery and the manner of practicing law. In an account of this length, it is obviously impossible even to touch on the complicated methods, the various reforms—some subtle, some revolutionary—which brought English (and, consequently, American) criminal law to its present position. It is sufficient to note that England is the birthplace of most of the rights which we regard as bulwarks of our own freedom. Most famous is, perhaps, the writ of *habeas corpus*, "the great writ of liberty". It was originally issued to demonstrate to the King by what authority the liberty of his subjects was restrained. Since 1640 it has been issuable against the Crown itself.

It is our purpose here to explain, in short compass, the respects, if any, in which the criminal law of the United States and the United Kingdom,

despite their common roots, have come to differ. The pamphlet is divided into four sections: courts, procedure, rights of the accused and crimes. The discussion of these matters will indicate how closely parallel are the legal systems of the two countries. The common law of England has been supplemented by statutes, some of which have changed the existing criminal law, but more of which have merely codified and clarified the existing law. The criminal law of the United States has been codified to a greater extent than has the English law. The laws of the various states are not, of course, in every case parallel, and any comparison of the "law" of the United States with the law of another country must therefore be either incomplete or unwieldy. This comparison is brief and necessarily cursory.

Legal Profession. In the United Kingdom the legal profession, unlike that in the United States, is divided into two branches, solicitors and barristers. Solicitors normally have a college degree in either law, arts, or sciences and some specialized legal instruction. After service as "articled clerks", they qualify by passing certain examinations.

They deal directly with clients and may appear as counsel in certain of the lower courts. To become a barrister, a person (with the same pre-legal education as a solicitor) must join one of the four Inns of Court, serve an apprenticeship, and pass a required examination. He becomes a barrister by being called to the bar by the "Benchers" of his Inn of Court, after at least three years as a member of the Inn.

All of the Inns of Court are of great antiquity, boasting heritages of many centuries. Gray's Inn, for example, has extant records opening in 1569, with its beginnings buried in the mists of the early middle ages. Of the men of the Inns, Maifland has said of them:

"These lawyers are worldly men, not men of sterile caste—they marry and found families . . . they are in their way learned, cultivated men, linguists, logicians, tenacious disputants, true lovers of the nice case and the moot point. They are gregarious clubbable men . . ."

A barrister, who may appear as counsel before any court in England, is retained only by solicitors and has no contact with his lay client.

Courts

A comparison of the court systems of the United Kingdom and the United States necessarily requires some generalization because the various state systems within the United States are not in all respects identical. Furthermore, the federal government has a separate system of courts. Most state systems, however, conform basically to a general pattern which is, in its major aspects, similar to the federal system. The discussion which follows compares United Kingdom courts with the state and federal courts which perform substantially similar functions. The state courts, which handle the great majority of criminal cases in the United States, are discussed first under each subsection with the corresponding federal courts listed second.

IN THE UNITED STATES

Inferior Courts

City or county police or magistrate courts hear minor offenses, including traffic offenses, either with or without a jury. There are certain federal courts which serve a similar function in the territories and the District of Columbia.

Superior Courts

Most states have a district or circuit court which can hear any criminal case triable under state law. It may also have jurisdiction over

IN THE UNITED KINGDOM

Courts of Summary Jurisdiction

Courts of Petty Sessions, Metropolitan Police Magistrates, and Stipendiary Magistrates hear ninety-five percent of the criminal charges in English courts. These inferior courts, which sit without a jury, may try misdemeanors and certain other offenses summarily with the consent of the accused. A court of summary jurisdiction may sit as a juvenile court for the trial of minor children under the age of 17 years.

Superior Courts

Quarter Sessions

These courts have original jurisdiction to hear misdemeanors and certain felonies excluding

United States

appeals from the inferior criminal courts, on questions of law raised at trial, or even to try a case over again from the beginning. Generally an appeal may be taken from a decision of the district or circuit court as a matter of right.

The United States District Courts have jurisdiction of all offenses against the laws of the United States. These courts, which generally sit with a jury, a single judge presiding, are the basic trial courts of the federal judicial system. There are from one to four districts in each state, but a district court may be composed of several judges, each of whom is empowered to sit separately.

Appellate Courts

The appellate court is usually composed of three or more judges who sit without a jury only for the review of questions of law raised at the trial court level. A further appeal may be permitted on questions of law to a court of last resort, generally the state supreme court. This second appeal may be a matter of right or may be permitted only after the permission of the court is obtained. In some cases the first appellate court will be the court of last resort.

There is a federal Court of Appeals for each of the eleven judicial circuits (including the District of Columbia Circuit), each composed of from three to nine judges. This court hears appeals on questions of law with not more than three judges sitting, unless a hearing before the court *en banc* is ordered in which case all judges of the circuit sit. The court has jurisdiction of appeals from final decisions of the district court. The Court of Appeals is the court of last resort except in those cases in which the Supreme Court grants *certiorari* or in which an appeal may be taken to that court as a matter of right.

Appeals by the prosecution from an acquittal are not allowed in federal courts and in most state courts, but the United States Constitution does not specifically prohibit an appeal by the

United Kingdom

serious offenses such as treason, murder, bigamy, forgery, incest and perjury. A Court of Quarter Sessions sits with a jury in the exercise of its original jurisdiction. It has appellate jurisdiction over cases appealed from courts of summary jurisdiction.

Courts of Assize

Judges of the High Court of Justice are assigned to sit as circuit judges of a Commission of Assize in seven prescribed areas outside London and Middlesex Counties. These courts have jurisdiction in criminal matters and are the usual tribunals for the trial of capital offenses and felonies.

The Central Criminal Court

This court acts as the Court of Assize in the counties of London and Middlesex and portions of other counties in the London metropolitan area, and has jurisdiction to try capital offenses, felonies, and misdemeanors. It is commonly known as the Old Bailey.

Appellate Courts

The Court of Criminal Appeal is composed of the Lord Chief Justice and at least three judges of the Queen's Bench Division. It has appellate jurisdiction over cases appealed from a Court of Quarter Sessions, a Court of Assize, or the Central Criminal Court. Appeals on questions of law are by right, and appeals on question of fact or mixed questions of law and fact may be heard by leave of the court. The court may quash the conviction if it believes the verdict was against the weight of the evidence or would otherwise result in a miscarriage of justice but cannot order a new trial. Appeals by the Crown from an acquittal are not allowed.

United States

prosecution in a state criminal proceeding on questions of law and a few states allow such an appeal.

Supreme Court

The Supreme Court of the United States, created by the Federal Constitution, is composed of a Chief Justice and eight associate justices who sit together as the court.

A convicted defendant, whose appeal to the state court of last resort has proved unsuccessful, can petition the Supreme Court of the United States for review of any federal question presented in the case. That court may, in its discretion, review the case to assure that no federal rights of the accused have been violated, but it cannot review pure questions of state criminal law, unless the state law deprives the accused of a specific right guaranteed to him by the Constitution.

Criminal cases are generally taken to the Supreme Court from inferior federal courts in two ways: 1) by writ of certiorari before or after judgment upon petition of a party to the case; 2) by certification by a court of appeals on any question of law. A hearing before the Supreme Court, which reviews only questions of law, is not a matter of right except in a few limited instances.

*United Kingdom***House of Lords**

The House of Lords, which is one of the two houses of the British Parliament, is also the "supreme court" of the United Kingdom. The House of Lords, however, does not sit as a legislative body with all members present when it acts in its judicial capacity. Judicial hearings are conducted instead by the Lord Chancellor and the Law Lords. The latter are paid professional judges, first appointed in 1876. Today there may be from seven to nine Law Lords as the state of business requires, but three constitute a quorum for a judicial hearing. Although the House of Lords sitting as a legislative body is quite distinct from the House of Lords sitting as a judicial body, the two cannot sit at the same time. Therefore, hearings are held by Law Lords sitting as a "committee", but decisions are given only when the legislative body is not sitting.

An appeal to the House of Lords, which is taken by petition on a particular point of law, is possible only if the Attorney-General certifies that the point of law is one of exceptional public importance and that the appeal is in the public interest. Few appeals are heard by the House of Lords.

Criminal Procedures

Although criminal procedure in the United States varies according to state rules, the procedure in most states is similar, in many respects, to that applied in the Federal courts. For this reason the federal rules are used hereinafter as the basis for the comparison of United States and United Kingdom criminal procedure.

IN THE UNITED STATES

A complaint, which is a written statement of the essential facts constituting the offense charged, is made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States. If it appears from the complaint that there is probable cause for belief that an offense has been committed by the accused, the commissioner or other qualified officer will in appropriate cases issue a warrant for the arrest of the defendant, or, upon the request of the government attorney, a summons to him to appear. The commissioner informs the defendant of the complaint and of his right

IN THE UNITED KINGDOM

For procedural purposes criminal offenses are classified as "petty offenses" and "indictable offenses." "Petty offenses" are punishable by summary conviction upon trial by a justice or magistrate without a jury. "Indictable offenses", which are those of a more serious nature, are generally tried by jury in the Courts of Quarter Sessions or of Assize.

Proceedings in petty offenses are instituted by the filing of an information against the accused. The magistrate may assume jurisdiction either by issuing a summons to the accused to appear or by issuing a warrant for his arrest. If the charge

United States

to retain counsel and to a preliminary examination. After preliminary hearings or after the defendant's waiver of hearing the commissioner discharges the defendant if there is not probable cause or refers the case to the District Court if probable cause exists. The District Court may proceed upon such an "information" in any case in which more than one year imprisonment or a sentence to hard labor cannot be assessed or where the defendant waives indictment, except that he may not waive prosecution by indictment in a capital case. In any other case a grand jury of not less than sixteen, nor more than twenty-three members considers the case for probable cause. An indictment may only be found by the concurrence of twelve or more jurors. Warrant or summons may be issued after information or indictment to assure the presence of the defendant at trial. The defendant is arraigned by the reading to him in open court of the indictment or information after which he is called upon to plead. The trial then proceeds in most cases with a jury of twelve men unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government. The case is prosecuted by the appropriate United States attorney.

United Kingdom

is one for which a summary trial is authorized the proceedings are held forthwith without a jury. If the charge is an indictable offense, the accused must be informed that he has a right to trial by jury and must be informed of the nature of a summary trial. Either the prosecutor or the accused can object to the summary trial of an indictable offense. If the parties consent to summary trial, the court proceeds in the same manner as in the trial of a petty offense. A person summarily convicted of an indictable offense can be sentenced to imprisonment not in excess of six months or a fine of not more than £100 or both.

In a prosecution for an indictable offense the accused appears before a magistrate's court which, sitting as a court of examining justices, holds a preliminary hearing to determine whether there is sufficient evidence to establish a case against him. The court may discharge the accused, commit him for trial at the Quarter Sessions or the Assize by delivery to the proper officer of the court (generally the Clerk of Assize) of a bill of indictment, or remand him to be held pending further investigation. An accused may be admitted to bail, except in a capital case. Trial at Quarter Sessions or Assize is before a jury of twelve, whose verdict must be unanimous. The prosecution is conducted by a barrister assigned for that purpose or in cases of public importance or concern to the government by the office of the Director of Public Prosecution.

Rights of the Accused

Set forth below are the basic rights which are guaranteed the accused by the United States Constitution in a federal criminal trial. Although the Federal Constitution does not guarantee an accused all these rights when he is tried in a State criminal court, he is assured of many of them before a State court by the Fourteenth Amendment and by Article I Section 10, of the Federal Constitution. Those rights which are not so assured are generally guaranteed by State constitutions.

The constitution of the United Kingdom is not contained in a single document as it is in the United States, but is composed of many rules which have evolved during the long history of the English law. The rights granted an accused in a criminal case are found not in one document but in numerous charters and acts and in the common law rules which have been established by court decisions. Rights granted the accused are not in all cases readily comparable to rights guaranteed an accused in the United States. To facilitate a comparison of those rights with rights provided in the United States, however, they are hereafter set forth in the terminology of United States Constitutional law. It must be remembered that this is a somewhat arbitrary classification which does not in all cases permit the consideration of the English law in its most favorable light.

The rights guaranteed under the Federal Constitution and the procedures for the enforcement of those rights are substantially similar in many respects to the corresponding rights in the United Kingdom. A detailed discussion of the rights which are listed as guaranteed under the Federal Constitution and of the

procedures for their enforcement has not been undertaken. Accordingly, in most instances only the basic United States Constitutional provisions are set forth. In the discussion of the corresponding rights and procedures under the laws of the United Kingdom, the United States law can be considered to be similar to British law except where the discussion indicates otherwise.

IN THE UNITED STATES

Due Process

No person is to be deprived of life, liberty, or property without due process of law. A penal statute of the United States or of any State must set forth specific and definite standards of guilt, and if it fails to do so, it can be declared unconstitutional by the courts as being repugnant to the requirements of Due Process. Also within the scope of due process are requirements that the prosecution assume the burden of proving the elements of the crime charged, that the accused be present at trial and that he not be convicted by the use of involuntary confessions. Under federal procedure, although the defendant is entitled to be present at trial, the trial of a non-capital offense may proceed in his absence if he voluntarily absents himself after the trial has commenced in his presence.

Ex Post Facto Law

The Federal Constitution specifically prohibits the passage of an *ex post facto* law, which includes

IN THE UNITED KINGDOM

Due Process

Although there is no specific provision guaranteeing "due process of law" in the documents which comprise the English constitution, many of the rights which are considered to inhere in due process are guaranteed by custom as deeply entrenched as though expressed in documentary form.

The courts of England have no power to review acts of Parliament or to strike down penal statutes as being repugnant to due process; but it is the general rule that penal enactments are to be construed strictly and that no man is to incur a penalty unless the act to be punished is within the spirit as well as the letter of the statute imposing the penalty.

Although certain criminal offenses are punishable under non-statutory common law definitions, the requirement of strict construction of penal statutes approximates in practice the safeguard against indefinite standards of guilt.

As in the United States, the burden of proof is upon the prosecution. Where the accused pleads "not guilty" the prosecution must prove at the trial every fact or circumstance stated in the indictment which is material and necessary to constitute the offense charged. No trial for felony can be had except in the presence of the prisoner. A misdemeanor may be tried in his absence if he has previously pleaded. In practice he is always present. In a magistrate's court the defendant is entitled to be present, but in the United Kingdom, unlike the United States, the trial may proceed in his absence if he has been summoned and fails to appear. Confessions made by an accused before trial are only admissible if made freely and voluntarily and not as a result of either fear or inducements, and a constable must notify a person to be charged that whatever he says may be used in evidence. Unlike the law in the United States, a conviction may be had upon an uncorroborated confession under British law.

Ex Post Facto Law

Although there is no statutory prohibition in English law against the enactment of an *ex post*

United States

making an act criminal which was innocent when done, aggravating a crime, increasing the authorized punishment, or altering the rules of evidence to the detriment of the accused.

Bill of Attainder

The Federal Constitution specifically prohibits the passage of a bill of attainder, a legislative act which imposes punishment without a judicial trial.

Indictment by Grand Jury

In the United States the Federal Constitution provides that no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. The guarantee is simply that one shall not be put to trial unless a jury of his peers have found that there is probable cause for trying him. [Since the Federal Constitutional provision regarding grand juries is a limitation on the federal government alone, the states may abolish the grand system, and some states have done so.]

Speedy and Public Trial

In all criminal prosecutions, the accused is entitled to a speedy and public trial. The right to a speedy trial applies after a formal complaint has been lodged against the defendant. It is a right which can be waived by the accused either specifically or by acquiescence in the delay. No specific time limits are set for trial, but the question whether the right has been violated depends on all the factors affecting the delay, including the practical administration of justice.

United Kingdom

facto law, the requirement of strict construction of a penal statute precludes the retroactive (called retrospective in English law) application of a statute unless it affirmatively appears that Parliament so intended. The English courts have shown disapproval of a statute which is *ex post facto* in effect. Retrospective legislation is possible but not common; it is usually for the protection of the individual and does not generally operate to his detriment.

Bill of Attainder

Parliament can enact a bill of attainder, a legislative act which imposes punishment, or a bill of pains and penalties, another exercise of judicial power in legislative form. The procedure in Parliament on a bill of attainder or bill of pains and penalties involves the same readings and debates as an ordinary public bill, but since the procedure is of a judicial nature, the accused is entitled to call witnesses and employ counsel for his defense. The bill of attainder was formerly confined to periods of rebellion or extreme political reaction. It has now fallen into disuse.

Indictment by Grand Jury

Grand juries were abolished in England in 1933. A bill of indictment which is required in cases of treason, capital offenses, felonies, and certain indictable misdemeanors, may be preferred after a hearing before Justices of the Peace sitting in petty sessions or before a Metropolitan Police or Stipendiary Magistrate.

The finding of a coroner's inquest accusing any person of murder, manslaughter, or infanticide is equivalent to preferment of a bill of indictment, and a prosecution may be had upon such finding.

Speedy and Public Trial

Indictable offenses are usually tried at the same assize or session at which they are preferred in accordance with statutory requirements. The court can in its discretion grant a continuance. If the continuance is at the request of the defense, the accused will remain in custody; if at the request of the prosecution, the court has discretion to release the defendant on bail or on his own recognizance. The Habeas Corpus Act provides for the release of persons charged with treason or a felony if not indicted by the end of the assize or sessions after their committal.

*United States***Trial by Jury**

In criminal prosecutions, the accused is entitled to a trial by an impartial jury whose members reside in the State and district wherein the crime was committed.

The right to trial by jury does not apply in cases of petty offenses, and can be waived by the accused even in serious offenses.

The accused is permitted in a capital case twenty peremptory challenges of prospective jurors, that is, challenges for which no reason need be given, ten in any other felony case and three in a misdemeanor. Challenges for cause are also permitted. The number of peremptory challenges allowed in criminal trials varies from state to state.

Notification

The accused is entitled to be informed of the nature and cause of the accusation against him.

Counsel

In all criminal prosecutions the accused is entitled to have the assistance of counsel for his defense. If an accused appears in court without counsel, the court advises him of his right to counsel and assigns counsel to represent him unless he specifically elects to proceed without counsel or is able to obtain counsel otherwise.

Compulsory Process

(Documents by which the State requires witnesses to appear in court) The accused is entitled to have compulsory process for obtaining the attendance in court of witnesses in his favor.

*United Kingdom***Trial by Jury**

The common law right to trial by jury has been confirmed by statute and applies in England to all except minor offenses. When a person is charged before a court of summary jurisdiction with an offense, other than assault, for which he could be imprisoned in excess of three months, he may demand a trial by jury but the demand must be made before plea or the right is waived. In the Courts of Assize and Quarter Sessions, if the accused pleads not guilty or refuses to plead, he must be tried by a jury.

Seven peremptory challenges are permitted a person arraigned on indictment for any felony or misdemeanor, and challenges for cause of the entire panel or of individual jurors are likewise authorized.

Notification

A police constable who makes an arrest without a warrant must inform the person arrested of the ground for arrest unless it is obvious from the circumstances. Where an arrest is by warrant the offense charged is set forth in the body of the warrant. In an indictable offense, the indictment or an abstract of it is read to the accused at the time of arraignment. In summary proceedings without a jury the substance of the information or complaint is stated to the accused at the outset of the hearing. In either case, the court in its discretion may grant a continuance to permit the accused additional time to prepare his defense.

Counsel

A defendant is entitled to counsel of his own choice in all criminal trials in the United Kingdom. An accused must be assigned counsel if charged with murder and may be provided with counsel in other cases where he has insufficient means if the court decides that it is desirable in the interests of justice. An English court will not hear a criminal case without a defense counsel if the defendant desires one.

Compulsory Process

An accused has a statutory right to have his witnesses brought before the court by compulsory process in all criminal cases. The magistrate is required both in the case of a preliminary hearing of an indictable offense and in the case of a summary proceeding to advise the accused of his right to call witnesses and to ask the accused if he desires to exercise this right.

*United States***Confrontation**

The accused is entitled to be confronted at his time of trial with the witnesses against him.

Unreasonable Search and Seizure

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by an Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized". Although evidence obtained by illegal search and seizure is not admissible in a Federal criminal trial, it is admissible in criminal trials under the rules of some states.

Self-Incrimination

No person may be compelled in any criminal case to be a witness against himself. The accused in a criminal prosecution may take the stand in his own defense, but he cannot be compelled to take the stand, and the prosecution cannot comment upon the failure of the accused to testify. (Such comment is permissible in some states.)

Double Jeopardy

"No person shall be subject for the same offense to be twice put in jeopardy of life or limb." An accused thus cannot be twice tried in the Federal court for the same offense, and the prosecution cannot appeal from the acquittal of the accused with a view to retrial. Appeals by the prosecution are permitted in some states, in certain limited situations, and a trial in a state court does not bar trial in a Federal court for the same act, or vice versa.

*United Kingdom***Confrontation**

An accused or his counsel has the right to "interrogate the witnesses upon all legal and pertinent questions." A deposition may be introduced in a criminal case upon a showing that the deponent is dead, insane, unable to appear because of illness, or kept away by the connivance of the accused. Depositions taken before magistrates must be taken in the presence of the accused, and he or his counsel must have an opportunity to cross examine the witness.

Unreasonable Search and Seizure

At common law, a Justice of the Peace may issue a search warrant authorizing a search for stolen goods upon a sworn information alleging that larceny has been committed. By statute a search warrant may be issued in the case of stolen goods and certain other specified cases including counterfeiting, obscene publications, public health violations, gambling offenses, and disorderly houses. No search warrant may issue except upon information on oath. There is no statutory requirement as there is in the United States that the person or thing to be seized must be described with particularity. [Editor note: In England, and throughout the British Commonwealth generally, the common law rule is still followed of admitting illegally seized evidence.]

Self-Incrimination

By statute a defendant in a criminal proceeding, although a competent witness, cannot be compelled to take the stand, and a witness other than the accused may refuse to answer any questions which might tend to incriminate him, i.e., to expose him to any punishment, penalty, or forfeiture. The prosecution may not comment on the failure of the accused to take the stand. Contrary to United States federal procedure, the judge may in his discretion make such comment if he thinks it proper.

Double Jeopardy

There is a common law prohibition against a person being twice put in peril for the same offense, and it is provided by statute that an offender shall not be liable to be punished twice for the same offense. Similar statutory prohibitions against double jeopardy pertain to summary proceedings in the magistrates' courts. The Crown has no right of appeal in the case of an acquittal or where the trial court has sustained a demurrer or motion to quash or to arrest judgment.