of junior equities.[40] Assuming this obstacle to have been overcome, it would seem that there should be no need of re-establishing the old hierarchy of priorities, i.e., again putting those who were formerly stockholders subordinate to those who were formerly bondholders, since the *Kansas City Terminal* case[41] held that absolute priority may be satisfied by quantitative differences in the same grade of security. The main objection to contingent participation is a practical one. Instead of emerging from reorganization with a simplified capital structure, the company is burdened by outstanding interests of an indefinite and unascertainable nature which may very well limit its ability to raise needed funds.

Absolute priority has long been advocated on principle as the standard by which the fairness of a plan should be measured. The Securities and Exchange Commission, under its power to criticize prospective plans under Chapter X[42] and in its administration of the Public Utilities Holding Company Act[43] has strongly urged its adoption.[44] The Interstate Commerce Commission has likewise indicated a preference for absolute priority.[45] The advantage of so definite a standard in simplifying the work of courts and commissions in investigating plans, is apparent. Adoption of this standard will facilitate one of the primary objects of reorganization: cleaning up the capital structure of the company in order to put it in a position to undertake successfully further equity or credit financing. Assuming the need for two types of investment, the rule of absolute priority should lessen any tendency to blur the line between "safe" and speculator investments. Furthermore, rigorous enforcement of absolute priority will remove that additional unfair advantage which relative priority gives to those who trade on the equity by compelling equity holders to bear the full burden of losses in return for their opportunity to secure greater profits.[46]

Criminal Procedure—Right of Prosecution to Writ of Error—Special Pleas in Bar— [Illinois].—The defendant, a criminal court judge, was indicted for conspiracy to

[40] If the contingent interests are of a nature which can be dealt with in the open market, conceivably, the market would determine the point at which their contingency is terminated by giving them value. But see the opinion of the SEC in In the Matter of Detroit Int'l Bridge Co., Reorg. Act Rel. 9 (1939), where it is suggested that transferability of such contingent interests be limited to protect ill-advised investors against their doubtful value.

[41] 271 U.S. 445 (1925). In answer to questions certified, the Court stated that priority might, where circumstances fairly required it, be satisfied by giving prior interests a greater amount of the same grade securities given junior interests.

[42] §§ 172, 173, 52 Stat. 890 (1938), 11 U.S.C.A. c. 10 (1939).

[43] 49 Stat. 803 (1935), 15 U.S.C.A. § 79 (Supp. 1937).

[44] Under Chapter X: In the Matter of Griess-Pfleger Tanning Co., Reorg. Act Rel. 13 (1939); In the Matter of Detroit Bridge Co., Reorg. Act Rel. 9 (1939); In the Matter of National Radiator Corp., Reorg. Act Rel. 10 (1939). Under the Public Utility Holding Company Act: Genesee Valley Gas Co., Hold. Co. Act Rel. 981 (1938); Utilities Power & Light Corp., Hold. Co. Act Rel. 1655 (1939). See Meck and Cary, Regulation of Finance and Management under the Public Utility Holding Company Act of 1935, 52 Harv. L. Rev. 216 (1938).

[45] See, e.g., the letter of Commissioner Eastman, printed in H.R. Hearings on H.R. 3704 and H.R. 5704, 76th Cong., 1st Sess. at 82 ff. (1939).

[46] See Buchanan, op. cit. supra note 35 at 378 ff.; Moore, Railroad Fixed Charges in Bankruptcy Proceedings, 47 J. Pol. Econ. 101, 123 (1939).

obstruct the administration of justice by certifying fraudulently acknowledged bail bonds. By a special plea in bar he contended that the Constitution of Illinois bars criminal prosecution of judges. The trial court sustained the plea and discharged the defendant. Under a statute providing for a review on behalf of the state of a judgment setting aside or quashing an indictment, the state's attorney has sued out a writ of error. *People v. McGarry*.[1]

In Illinois under the common law,[2] and later by statute,[3] the state had no right to a review in criminal proceedings. Subsequently, however, the legislature passed the present statute, providing for a writ of error from decisions quashing or setting aside an indictment or information.[4] Adopting a strict construction, the Illinois Supreme Court has held that this statute does not apply to decisions sustaining special pleas in bar.[5] The instant case, therefore, raises the following questions: First, may the appellate court determine for itself whether the indictment has been quashed within the terms of the statute, even though the pleading which the trial court sustained was labeled "plea in bar"? And secondly, assuming that the appellate court may look to the substance of the trial court's ruling, did the lower court uphold a plea in bar or quash the indictment?

The Illinois Supreme Court has held that a trial court's ruling which merely purports to quash an indictment will not support a review at the prosecution's behest. In *People v. Vitale*,[6] after the trial court sustained a plea of former jeopardy as well as a motion to quash, it was decided that because the plea had been sustained, the ruling on the motion was surplusage and therefore could not be the basis of a writ of error. In *People v. Finklestein*,[7] the record contained a plea of immunity followed by a motion to quash. The trial court, stating that it was not ruling on the plea, sustained the motion, but a review was denied and the cause remanded on the ground that the motion could not properly be ruled upon until the plea was withdrawn. Although these cases may indicate that the determination of whether the trial court has quashed the indictment is wholly within the discretion of the appellate court, it is possible that such power is restricted to those situations in which it may be used *against* the prosecution.[8] Thus if, as in the instant case, the ruling does not purport to quash

[1] Criminal Court of Cook County, Ill., Nov. 21, 1939.

[2] People v. Dill, 1 Scam. (Ill.) 257 (1836); People v. Royal, 1 Scam. (Ill.) 557 (1839).

[3] Ill. Rev. Stat. (Hurd, 1874) c. 38, § 437, held constitutional in People v. Barber, 348 Ill. 40, 180 N.E. 633 (1932), amended, Ill. L. 1933, p. 465.

[4] Ill. Rev. Stat. (1939) c. 38, § 747. See Miller, Appeals by the State in Criminal Cases, 36 Yale L. J. 486 (1927). For a general compilation of statutory provisions see American Law Inst., Code of Criminal Procedure 1191 (1931).

[5] People v. White, 364 Ill. 574, 5 N.E. (2d) 472 (1936); People v. Vitale, 364 Ill. 589, 5 N.E. (2d) 474 (1936). It is generally accepted that statutes providing for a limited review on behalf of the prosecution extend only to the enumerated instances. State v. Adams, 193 Mo. 196, 91 S.W. 946 (1906); State v. Heisserer, 83 Mo. 692 (1884); State v. Minnick, 33 Ore. 158, 54 Pac. 223 (1898); State v. Kemp, 5 Wash. 212, 31 Pac. 711 (1892). But cf. State v. Manning, 14 Tex. 402 (1855) (plea in abatement reviewable as the equivalent of a motion to quash); see State v. Bowman, 145 N.C. 452, 455, 59 S.E. 74, 75 (1907).

[6] 364 Ill. 589, 5 N.E. (2d) 474 (1936). [7] 372 Ill. 186, 23 N.E. (2d) 34 (1939).

[8] See People v. White, 364 Ill. 574, 576, 5 N.E. (2d) 472, 473 (1936): "We have held that a writ of error would not lie . . . . at the instance of the People without a statute conferring

the indictment, an appeal by the state may be precluded. It should be noted that such a construction of the statute gives the trial court power to thwart a review of any decision in the defendant's favor.

It is submitted that to require that the trial court's ruling formally satisfy the statute would be an unwarranted interpretation of the legislature's intention. The appellate court should distinguish between cases in which a defendant may at his option present a certain defense either in a reviewable or in a non-reviewable category, and those in which the defense relied upon does not properly fit into a non-reviewable classification. Thus where a defense may be made by informal motion as well as by demurrer, and only rulings on the latter are reviewable, if the defendant chooses to rely upon the informal motion, the defendant's choice should govern.[9] It must be assumed that the legislature, aware of the choice available to the defendant, contemplated, by attaching reviewability to one pleading, that the defendant might avoid review by pleading in the non-reviewable form. On the other hand, as the state contends in the instant case, if the nature of the defense presented does not fit the non-reviewable pleading, it would seem to be in accord with the legislature's intention to ignore the title of the pleading and to determine the proper mode of procedure. Thus the Supreme Court of the United States has held that a defense which should have been raised by a special plea in bar was reviewable as such, although the defendant and the trial court had treated it as a non-reviewable plea in abatement.[10] If common-law or statutory rules exist as to what pleadings are suitable for certain defenses, these rules are implicit in a statute which attaches the substantive right of appeal to a certain pleading.[11]

The second problem is whether the trial court upheld a plea in bar or quashed the indictment. Traditionally the special plea in bar was available in four instances: former acquittal, former conviction, former attainder, and pardon.[12] It thus comprehends defenses which, because they prevent a prosecution without a determination of the defendant's guilt or innocence, could not be proved under the general plea of

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the right 'in the most plain and unequivocal terms, such as cannot be turned by construction to any other meaning.' "

[9] People v. Reed, 276 N.Y. 5, 11 N.E. (2d) 330 (1937). (The defense was that another statute provided the exclusive remedy, and that the indictment therefore did not charge a crime. Note the similarity to the defense in the principal case.) Contra, People v. Ellis, 204 Cal. 39, 266 Pac. 518 (1928). The Ellis case may be explained on the theory that the court did not consider the informal motion to be properly available, although neither the trial court nor the prosecution had objected to its use. Thus the case is consistent with the general theory.

[10] United States v. Barber, 219 U.S. 72 (1911); United States v. Oppenheimer, 242 U.S. 85 (1916) ("motion to quash" held to be in substance a special plea in bar). In United States v. Goldman, 277 U.S. 229 (1928) it was held that the Statute of Limitations could be raised only by special plea even though apparent on the face of the indictment. See note 21 infra.

[11] Although this interpretation appears to have the undesirable effect of perpetuating procedural technicalities, it is submitted that this danger is minimized by the fact that the rules of pleading are so flexible as generally to permit a legitimate avoidance of a reviewable category, especially where, as in Illinois, the defendant may prove any defense under the general issue. Although because of this latter factor a limited right to review on the behalf of the prosecution is thus largely ineffective, it may be commended as a step in the right direction. For a general discussion see Miller, op. cit. supra note 4.

[12] 4 Bl. Comm. *335.

not guilty.[13] It appeared for a time that special pleas in bar were abolished by the Illinois statute providing that a defendant might present *any* defense under the general issue.[14] In *People v. Bain*,[15] however, it was held that special pleas in bar which "tender an issue of law" are admissible. It is submitted that, like a civil-law plea by way of confession and avoidance,[16] a special plea in bar does not tender issue at all; it may result in either an issue of law or of fact, depending upon whether the prosecution demurs or traverses some allegation. In any case, although when it is properly admissible is not clear, the plea in bar apparently still exists as a pleading device.[17]

The essential parts of the defendant's "plea in bar" are as follows: (1) that the defendant is a judge and, as such, immune from indictment and trial; (2) that the court has no jurisdiction of the person or of the subject matter set forth in the indictment; (3) that the defendant can be prosecuted only under Article 6, Section 30 of the state constitution, and that because the indictment refers exclusively to judicial acts, this article is a bar to the present prosecution. There are two approaches which lead to the conclusion that the matter presented in the defendant's pleading did not constitute a special plea in bar. In the first place, it fits none of the common-law categories: former conviction, former acquittal, former attainder, or pardon. The Illinois statutes provide that unless otherwise stipulated, proceedings in criminal actions shall be as at common law.[18] Consequently, in view of the fact that the special plea in bar was abolished, and then in the *Bain* case ostensibly only partially reinstated, the court may well hold that the plea is available only in the traditional situations.[19]

A second possible approach would require only that the pleading be similar to the common-law special plea in bar.[20] But it is submitted that this requirement may not be satisfied by an allegation of immunity, because such an allegation is not the essence

[13] See State v. Karagavoorian, 32 R.I. 477, 79 Atl. 1111 (1911); State v. Sine, 91 W.Va. 608, 114 S.E. 150 (1922); State v. Linden, 154 La. 65, 97 So. 299 (1923) (self-defense is not a special plea); Hirn v. State, 1 Ohio St. 15, 23 (1852); 2 Bishop, New Criminal Procedure § 743 (2d ed. 1913).

[14] Ill. Rev. Stat. (1939) c. 38, § 731; People v. Hankins, 106 Ill. 628 (1883); see People v. Simos, 345 Ill. 226, 230, 178 N.E. 188, 190 (1931); People v. Brown, 354 Ill. 480, 482, 188 N.E. 529, 530 (1933).

[15] 358 Ill. 177, 193 N.E. 137 (1934).

[16] Shipman, Common Law Pleading § 12 (1923). See Neaderhouser v. State, 28 Ind. 257 (1867); State v. Quigley, 135 Me. 435, 438, 199 Atl. 269, 271 (1938) (discussing a plea of insanity); Sorrells v. United States, 287 U.S. 435, 452 (1932).

[17] See People v. Martorano, 359 Ill. 258, 260, 194 N.E. 505, 506 (1935): ". . . . there are instances, particularly when an issue of law is tendered, which will justify the filing of a special plea, and . . . . such a rule will often promote prompt disposal of cases and save the time of the courts and litigants."

[18] Ill. Rev. Stat. (1939) c. 38, § 736.

[19] Davis v. State, 152 Ind. 145, 52 N.E. 754 (1899); see United States v. Murdock, 284 U.S. 141, 151 (1931) (defense of privilege against self-incrimination in a prosecution for wilful failure to supply information for income tax purposes): "A special plea in bar is appropriate where defendant claims former acquittal, former conviction, or pardon, ... but there is no warrant for its use to single out for determination in advance of trial matters of defense either on questions of law or fact." Cf. note 16 supra.

[20] Frayser, Barret, & Shippers v. State, 16 Lea (Tenn.) 671 (1886) (where the court admitted "special pleas" of justification under a state charter and contracts with city officials).

of the special plea. A special plea in bar, in its broadest aspect, should set up facts extrinsic to the indictment.[21] Otherwise it merely questions the sufficiency of the indictment and should be raised by motion to quash. It may be seen that the defendant's pleading states nothing that would be considered a "fact" except that the defendant is a judge—which already has been stated in the indictment. The remaining allegations appear to be conclusions of law: that judges are immune from prosecution, that the court lacks jurisdiction over judges and crimes imputed to them, and that a section of the constitution provides the sole punishment for judges and acts as a bar to the present action. Furthermore, each of the traditional common-law special pleas in bar presents a defense consisting of facts which have arisen subsequently to the commission of the crime. Obviously no bar was alleged to have arisen *after* the crime with which the defendant was charged in the principal case. It would seem that the ruling of the trial judge could have decided no more than that the statute which purports to make judges amenable to criminal prosecution[22] was unconstitutional or that it did not extend to "judicial acts," and that the indictment must therefore be quashed because it did not charge a crime.[23] Thus it appears that the trial court's ruling in substance satisfies the statute providing for writs of error at the state's suit.

Deeds—Reservations of Life Estates—Words of Conveyance and Intention—[Illinois].—The sole owner of real property conveyed the title in fee to her two sons. Her husband joined in the deed as a "grantor," releasing his statutory rights of homestead[1] and dower.[2] The deed contained a clause providing that "The aforesaid Grantors hereby expressly reserve unto themselves the use of the above conveyed premises for and during the time of their natural lives." After the death of the wife, judgment creditors of the husband levied on his life estate in the property. In a suit by the grantees to quiet title to the land, the trial court held that the husband had received a life estate. On appeal, *held*, where an estate is reserved to a party to a deed, the reservation is inoperative unless either the party in whose favor the reservation

[21] 2 Bishop, New Criminal Procedure § 742 (2d ed. 1913); 1 Chitty, Criminal Law *452; Clark, Criminal Procedure c. 11 (1895); People v. Harding, 53 Mich. 481, 19 N.W. 155 (1884) (special pleas of former jeopardy, *puis darrein continuance*, held improper because the facts involved appeared in the record); see Sorrells v. United States, 287 U.S. 435, 452 (1932); Jackson v. State, 11 Okla. Cr. 523, 148 Pac. 1058 (1915). In Neaderhouser v. State, 28 Ind. 257 (1867) a statute was set up by way of a special plea in bar, but note that this was a special law, which the court considered to be a "fact." An exception to the general rule is the Statute of Limitations, United States v. Goldman, 277 U.S. 229 (1928). This may be traced perhaps to the common-law rule that the statute must be pleaded and cannot be raised by demurrer. See Atkinson, Pleading the Statute of Limitations, 36 Yale L. J. 914 (1927).

[22] Ill. Rev. Stat. (1939) c. 13, § 9.

[23] The allegation that the court has no jurisdiction of the subject matter or persons is merely an indirect way of asserting that the indictment does not set forth a criminal offense, because no claim is made that the acts charged did not take place within the county. The Criminal Court of Cook County has general jurisdiction of criminal offenses committed within the county. Ill. Rev. Stat. (1939) c. 38, § 701. Thus the objection to the court's jurisdiction raises only the issue of whether the indictment sets forth a crime.

[1] Ill. Rev. Stat. (1939) c. 30, § 26. [2] Ill. Rev. Stat. (1939) c. 3, § 175.