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.

operates had the estate before the reservation was made, or words of conveyance are used, conveying the reserved estate to the beneficiary. At the death of his wife, any interest the husband had in the land was extinguished. *Saunders v. Saunders.*[3]

At common law a reservation was a withholding from the operative effect of a conveyance of some right "coming out of the thing granted,"[4] such as a right to rent or feudal service.[5] Since by definition the conveyance was inoperative as to the right reserved, it was on strict principle impossible to hold that the right reserved could be transferred by force of the reservation to a third party. Hence, the rule was that a reservation to be valid had to operate in favor of the person from whom title passed.[6] Where the reservation was expressed in favor of one other than the owner several methods of effecting the transfer to the third party were employed. For example, if the third party joined in the conveyance as a grantor, then some courts upheld the reservation by interpreting the rule to require simply that the reservation be to one of the grantors, and not to a stranger to the deed.[7] The authority relied on for this interpretation was the common law writers who had used these words in explaining the effect of the rule.[8] Conservative courts maintained that the only reservation to a grantor which could be upheld was one for the benefit of that grantor who had such interest in the thing granted that he might withhold from the operation of the conveyance a part of the estate granted.[9] Therefore, one who joined in a deed as a grantor possessing only rights of homestead and dower, as in the instant case, could not logically reserve a greater estate.

Other methods of giving effect to a reservation in favor of a third party were: to construe the reservation to the third party as a re-grant by the grantee; to construe the words of reservation as words of grant, thus effecting a conveyance from the grantor to the named beneficiary of the reservation; or to recognize special types of reservations as an exception to the common law rule.

The re-grant analysis was clearly applicable in the case of a reservation in a grant[10]

[3] 300 Ill. App. 368, 21 N.E. (2d) 34 (1939). Rev'd since writing, 373 Ill. 302 (1940).

[4] Shepphard, Touchstone *80. In contradistinction to an exception which was part of the thing granted, 1 Co. Litt. *47a. For a discussion of the relation between a reservation and an exception see Bigelow and Madden, Exception and Reservation of Easements, 38 Harv. L. Rev. 180 (1924).

[5] Shepphard, Touchstone *80.

[6] Co. Litt. *143a. Other reasons advanced for this rule were: one, that it obviated the danger of maintenance, and, two, that because a reservation, as of rent, was in the nature of compensation for the grant, such benefit should go to the grantor only, Gilbert, Rents 54 (1792). With the widely increasing recognition given to contracts for the benefit of third parties, and the absence of any danger of maintenance, it would seem that the reason for the old rule has disappeared and that a reservation for the benefit of any person should be operative.

[7] Hall v. Meade, 244 Ky. 718, 51 S.W. (2d) 974 (1932); see Boyer v. Murphy, 202 Cal. 23, 259 Pac. 38 (1927); Stone v. Stone, 141 Iowa 438, 119 N.W. 712 (1909); Borst v. Empie, 5 N.Y. 33, 38 (1851).

[8] Shepphard, Touchstone *80; 2 Bl. Comm. *300.

[9] Lemon v. Lemon, 273 Mo. 484, 201 S.W. 103 (1918); see White v. City of Marion, 139 Iowa 479, 117 N.W. 254 (1908).

[10] "If A be seised of certain lands, and A and B join in a feoffment in fee, reserving a rent to them both . . . . and the feoffee grant that it shall be lawful for them . . . . to distrain for the rent, this is a good grant of rent to them both, because he is a party to the deed. . . . . But if B

or lease[11] by an indenture. The grantee or lessee, having signed the deed, the necessary statutory formalities[12] for an effective conveyance from the grantee to the beneficiary of the reservation were satisfied. Moreover, it was said that the grantee by his act of signing was precluded from denying the validity of the reservation. This estoppel argument is, however, primarily a makeweight, for in the case of a deed poll where the execution, delivery, and acceptance of the deed could also be regarded as precluding the grantor and grantee from denying the reservation, it is held that the reservation is ineffective[13] and that the interest reserved remains in the grantor.[14] The lack of the statutory formality of a signing by the original grantee (alleged re-grantor) apparently forecloses any attempt to support a reservation in a deed poll on the theory of a re-grant.

An otherwise invalid reservation could also be given effect where the reservation clause contains sufficient words to spell out a conveyance of the estate reserved from the owner of the estate to the beneficiary.[15] The sufficiency of the language in a deed in this respect is said to depend on whether there can be inferred from the language an intent to convey presently,[16] as distinguished from an intention to convey at some future time.[17] Although through repeated use certain words which more satisfactorily express the intention of the grantor have been unquestioningly accepted as transferring rights in land,[18] nevertheless technical words have been held unnecessary.[19] In the instant case the grantor's intention presently to convey to her husband a life estate in the property was clearly manifested in the words of reservation. It is submitted, therefore, that the court might well have construed the words of reservation as words

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had been a stranger to the deed, then B had taken nothing," Co. Litt. *213a, b; Wickham v. Hawker, 7 M. & W. 63 (Ex. 1840), where the court held a reservation for the benefit of a stranger to the deed, in a grant by indenture, operative as a re-grant. See Durham S. R. Co. v. Walker, 2 Adol. & Ell. (N.S.) 940 (Q.B. 1842); Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290 (1871); Engel v. Ayer, 85 Me. 448, 27 Atl. 352 (1893).

[11] See Bland's Case, Godbolt 448 (1632). It was there suggested, however, that a reservation to a non-owning third party would be held operative as a re-grant only if the third party joined in the indenture. But see Oates v. Frith, Hobart[ ] *282 (C.P. 1615).

[12] In Illinois the conveyance must be in writing and signed by the grantor, Ill. Rev. Stat. (1939) c. 30, § 1. But see Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290, 322 (1871).

[13] Guaranty Loan & T. Co. v. Helena Improv. Dist., 148 Ark. 56, 228 S.W. 1045 (1921); Beardslee v. New Berlin Light & Power Co., 207 N.Y. 34, 100 N.E. 434 (1912); cf. Hodge v. Boothby, 48 Me. 68 (1861).

[14] Allen v. Henson, 186 Ky. 201, 217 S.W. 120 (1919); Freudenberger Oil Co. v. Simmons, 75 W.Va. 337, 83 S.E. 995 (1914).

[15] Legout v. Price, 318 Ill. 425, 149 N.E. 427 (1925); Lemon v. Lemon, 273 Mo. 484, 201 S.W. 103 (1918).

[16] 2 Bl. Comm. *298; 2 Tiffany, Real Property § 435 (2d ed. 1920); 1 Devlin, Deeds §§ 211, 212 (3d ed. 1911).

[17] McGarrigle v. Roman Catholic Orphan Asylum, 145 Cal. 694, 79 Pac. 447 (1904); Johnson v. Bantock, 38 Ill. 112 (1865).

[18] 1 Hayes, Conveyancing 126 (5th ed. 1840).

[19] Shave v. Pincke, 5 T. R. 124 (K.B. 1793); Horten v. Murden, 117 Ga. 72, 43 S.E. 786 (1903); Hunt v. Johnson, 44 N.Y. 27 (1870); Grieber v. Lindenmeier, 42 Minn. 99, 43 N.W. 964 (1889).

of conveyance in order to effectuate the grantor's intention.[20] Or failing this the court might have followed the precedents of those liberal courts which have enforced the intent of the parties by construing the reservation to a third party as a "covenant to stand seised,"[21] or simply as "not inconsistent with the passage to the grantee of an interest or title. . . . ."[22]

As a final alternative the reservation may be upheld by bringing it within the narrow class of cases which are excepted from the logical requirements of the common law rule. In Illinois, until the decision in the instant case, it was said that a grantor could reserve "to himself and wife an estate during their natural lives, which will continue during the life of the survivor."[23] According to this rule, a very limited exception was established in favor of husband and wife. The justice and good sense of this exception seems clear; the non-owning spouse could enter into the conveyance waiving his rights of dower and homestead in return for the security of a present life estate. Moreover, the intention of the parties, to give the non-owning spouse a life estate in the property, was effectuated. But the court, in the instant case, refused to follow this exception on the ground that it was stated "by way of dictum." It is submitted that the statement of the Illinois Supreme Court that gave rise to the rule that a reservation of a life estate to the non-owning spouse is valid, was not dictum. In *White v. Willard*,[24] where this rule was first announced, the court had to determine the competency of a wife to testify as to the delivery of a deed executed by her husband, conveying certain of his property to their two sons. In the deed a life estate was reserved to the grantor and his wife. In holding that the wife could not testify as to the delivery of the deed because "her interest under the deed is greater than under the statute" awarding dower, the court necessarily first held that the reservation[25] had the "effect . . . . to reserve a life estate in the grantor and his wife and the survivor of them."

Not only did the court, in the instant case, disregard this established exception that an express reservation to the grantor's spouse is operative, but cited, in support of its decision, *Bullard v. Suedmeier*,[26] a case which careful inspection discloses to be inconsistent with its position. That case involved the construction of a deed of conveyance containing a clause that "this conveyance shall not take effect during the lifetime of the grantors [the husband and wife]. . . . ." After the death of the husband, the owner of the property, his widow claimed a life estate. In affirming the trial

[20] 2 Tiffany, Real Property 1613–4 (2d ed. 1920). In Bullard v. Suedmeier, 291 Ill. 400, 126 N.E. 117 (1920) the court impliedly held words of reservation to be words of conveyance. See Freudenberger Oil Co. v. Simmons, 75 W.Va. 337, 83 S.E. 995 (1914).

[21] Jackson v. Swart, 20 Johns. (N.Y.) 85 (1822); Sergeant v. Ford, 2 Watts & S. (Pa.) 122 (1841). For other cases where similar reservations have been upheld see Boyer v. Murphy, 202 Cal. 23, 259 Pac. 38 (1927); Ahnert v. Ahnert, 98 Kan. 773, 160 Pac. 203 (1916); Engel v. Laedwig, 153 Mich. 8, 116 N.W. 550 (1908).

[22] Cable v. Cable, 146 Pa. 451, 23 Atl. 223 (1892).

[23] Bullard v. Suedmeier, 291 Ill. 400, 404, 126 N.E. 117, 119 (1920); White v. Willard, 232 Ill. 464, 471, 83 N.E. 954, 957 (1903); Abel v. Schuett, 329 Ill. 323 (1928) (semble).

[24] 232 Ill. 464, 83 N.E. 954 (1903).

[25] "But the grantors herein expressly reserve the use and absolute control of said premises for and during the period of their natural lives. . . . ."

[26] 291 Ill. 400, 404, 126 N.E. 117, 119 (1920).

court's finding that the widow did not have a life estate, the Illinois Supreme Court was careful, however, not to overrule the *White* case, saying that the rule there enunciated would have controlled if the reservation to the spouse had been made by *express* words. The deed in the instant case provided: "The .... grantors hereby expressly reserve unto themselves the use of the above conveyed premises...."

Procedure—Use of Class Actions in Restrictive Covenant Cases—[Illinois].—An instrument embodying a restrictive covenant against Negro occupation of property in the Washington Park subdivision in Chicago[1] contained a provision that it should not be effective unless the owners of ninety-five percent of the foot-frontage in the proposed restricted area should sign. In a prior suit, *Burke v. Kleiman*,[2] brought against a signing property owner by another signer on behalf of herself and all others who would be injured by breach of the covenant, it had been stipulated that the requisite ninety-five percent had signed the agreement, and an injunction had been obtained against the breach. In the instant suit to enforce the covenant, the defendants[3] proved at the trial that owners of only fifty-four percent of the frontage had signed; but the trial court held that, the defendants having been represented by the plaintiff in the previous class suit, the prior adjudication was res judicata.[4] On appeal to the Illinois Supreme Court, *held*, affirmed. *Lee v. Hansberry*.[5]

The first of several arguments indicating that the decision in the *Lee* case[6] is an improper application of the doctrine of res judicata, is based on a criticism of the court's view that *Burke v. Kleiman*[7] was a representative action. Since the instant case is apparently the first adjudication as to the applicability of the representative device to the enforcement of a restrictive covenant, the propriety of using the representative device, even where there is a validly created restrictive covenant, may well be questioned. Abrogating as it does the individual's right to his day in court, the class action can usually be justified only on the ground that joinder of the parties would otherwise have been necessary.[8] But it has been expressly held that the joinder of all parties to a covenant is not required; each individual may bring suit in his own name.[9] Conse-

[1] The agreement covered property in practically all of the area between 60th and 63d Streets, and South Park and Cottage Grove Avenues.

[2] Burke v. Kleiman, 277 Ill. App. 519 (1934).

[3] One of the defendants was the husband of the plaintiff in Burke v. Kleiman. He had been an officer in the property owners' association at the time the first suit was brought, but was no longer an officer at the time of the second suit. There was evidence that at the time he ceased to be an officer of the association, he said he would "put Negroes in every block."

[4] Following Burke v. Kleiman, the covenant had also been enforced in two other suits in the Superior Court of Cook County in Cook v. Yondorf, 34 Sup. Ct., Cook County 1261 (1936) and Penoyer v. Cohn, 34 Sup. Ct., Cook County 16816 (1936).

[5] 372 Ill. 369, 24 N.E. (2d) 37 (1939).

[6] Ibid. [7] Burke v. Kleiman, 277 Ill. App. 519 (1934).

[8] Moore and Cohn, Federal Class Actions, 32 Ill. L. Rev. 307, 314 (1937): "The 'true class suit' is one wherein, but for the class action device, the joinder of all interested persons would be essential;" Blume, The "Common Questions" Principle in the Code Provisions for Representative Suits, 30 Mich. L. Rev. 878, 897 (1932).

[9] Linzee v. Mixer, 101 Mass. 512 (1869); Western v. MacDermott, L.R. 2 Ch. App. 72 (1867).