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The Right of the State to Sue Out a Writ of Error in Criminal Cases

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THE RIGHT OF THE STATE TO SUE OUT A WRIT OF ERROR IN CRIMINAL CASES

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THE question of the right of the state to sue out a writ of error to reverse a judgment quashing an indictment has arisen often in recent years and is of vital importance to modern criminal practice. Today, the people's right to sue out a writ of error is largely controlled by statutes in the several states. Whether such right vests in the state by statute or by judicial interpretation of constitutional authority is immaterial, but it is a right that should be recognized. Its necessity and importance cannot be minimized.

To deny the state the right of a writ of error would be to hinder and in some instances thwart the people in the successful prosecution of crime. It would be possible for a judge motivated by friendship or political interests to free defendants without much personal censure. If the indictment was quashed, and if the statute of limitations ran against the crime or the state was unable to draft another indictment that would more fully meet with the desires of the presiding judge, the defendant would go free, thus depriving society of its prerogative of seeing that one of its members charged with crime, and rightfully so charged, was brought to trial. Crime would go unpunished, and the people would stand by without the adequate remedy of presenting the question to the supreme judicial tribunal of the state.

At no time does this discussion extend to cases where there has been a determination of the issues. We are heartily in accord with the principle which prohibits double jeopardy, as recognized in the various state constitutions similar to the Illinois Constitution of 1870, Sec-

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tion 10 of Article II of the Bill of Rights, which provides that "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offence." Only those instances where a writ of error is sought to reverse a judgment quashing an indictment are considered here.

States whose statutes authorize writs of error by the people have no difficulty. However, in states which have no such statutory provisions, it is a disputed question to what extent such power vests in the supreme courts under their respective state constitutions.

Constitutional language can be interpreted safely only by reference to the common law of England. If at common law the Crown as well as the convicted defendant had the right to sue out a writ of error, certainly the framers of our constitutions in authorizing the supreme courts to entertain writs of error must have intended those sued out by the people as well as those sued out by the defendants. The old English commentators of the common law all seem to be in accord with the theory that the Crown could sue out a writ of error to reverse a judgment of a nisi prius court quashing an indictment.

Lord Coke said:

It appeareth in Vantes case that if a man be erroneously acquitted of felony by verdict and judgment thereupon given, yet if the indictment be insufficient, he may be indicted again for the reasons and causes in that case reported, ... and in the case of an erroneous judgment of acquittal that no writ of error needeth to be brought by the King, but the offender may be newly indicted.

The lack of necessity on the part of the Crown to bring a writ of error in such a case would imply that it would have been permissible had the necessity arisen. Bacon,

2 People v. Board of Trade, 193 Ill. 577; People v. Bruner, 343 Ill. 146; Ex-Parte Grossman, 267 U. S. 87.
in his abridgement of the edition of 1846,⁴ states that the Crown may have new trials in certain cases. A writ of error would, of course, have been necessary to reverse the former decision.

In his work on criminal law, Chitty declares that where a verdict is obtained by the fraud of the defendant, or in consequence of irregularities in the proceedings, a new trial may be granted,⁵ and that a writ of error originally issued in any case only at the fiat of the Crown.⁶ That "writs of error seem allowable to the Crown in criminal cases" is stated by Bishop in his criminal law treatise.⁷

One of the greatest of the chief justices of England, Lord Hale, says in his celebrated Historia Placitorum Coronae,⁸ that in the case of a special verdict where an erroneous judgment of acquittal is given, yet it is conclusive against the Crown "till the judgment be reversed by error," and also that a prisoner could never be arraigned again after acquittal despite the insufficiency of the indictment "till the judgment of acquittal were reversed."⁹ He also says that if in Vaux’s case the judgment had been quod eat inde quietus the defendant could never have been indicted again for the same offense despite the defective indictment, "till that judgment reversed by writ of error."¹⁰

These statements of Lord Hale were quoted with approval by the Court of Appeals of Maryland in a case decided in 1804.¹¹ They alone were held to be sufficient authority for authorizing a writ of error at the suit of the state to review a judgment of a nisi prius court quashing an indictment.

⁴ Matthew Bacon, A New Abridgement of the Law, IX, 628.
⁵ A Practical Treatise on The Criminal Law, I, 657.
⁸ (1st American Ed.) II, 248.
⁹ Ibid., II, 394.
¹⁰ Ibid., II, 395.
It has been contended that the existence of this right in the Crown was merely for the purpose of bringing up a record for the review of errors appearing on the face of the record. This is the import of the language used by Lord Mansfield in the case of *Rex v. Wilkes*;\(^ {12}\)

Till the third of Queen Ann a writ of error in any criminal case was held to be merely ex gratia. . . . But in the third of Queen Ann ten of the judges were of opinion "that in all cases under treason and felony, a writ of error was not merely of grace; but ought to be granted." . . . It cannot issue now without a fiat from the Attorney General, who always examines whether it be sought merely for delay, or upon a probable error. . . . In a misdemeanor, if there be probable cause, it ought not to be denied: this Court would order the Attorney General to grant his fiat. But be the error ever so manifest in treason or felony, the King's pleasure to deny the writ is conclusive.

Again, in a case\(^ {13}\) decided in 1868, it was held:

The granting of a writ of error is part of the prerogative of the Crown. If, therefore, the Attorney General of England, or the Lord Lieutenant of Ireland refuse to grant it, the Lord Chancellor has no jurisdiction to review that decision.

This language would imply that the writ was used at common law by the Crown only for the purpose of showing favor to a subject convicted where the king was willing that the conviction be reversed.

However, such inference is contradicted by many common law cases which we have examined. The case of *Rex v. Walcott*\(^ {14}\) was decided in the seventh year of the reign of William and Mary. Here the Crown sought a writ of error from the House of Lords to reverse the judgment of the Court of King's Bench which had reversed a conviction for treason. A long and extended argument resulted in an affirmance of the judgment of the Court of King's Bench.

\(^{12}\) *4 Burr. 2527.*

\(^{13}\) *In re Piggott,* 11 Cox, Cr. Cas. 311.

\(^{14}\) *Shower P. C.* 127.
In another case,\textsuperscript{15} decided in the same year, the Crown sought a writ of error from the House of Lords to reverse the judgment of the Court of King’s Bench reversing a judgment of conviction of high treason entered at Oyer and Terminer. Here again, after considering the precedents of the law, the judgment of the Court of King’s Bench was affirmed.

In both these cases the writ of error was sought by the Crown to sustain a conviction had in the lower court, and not for the purpose of showing favor to a convicted defendant. The Court of King’s Bench sitting as an intermediary appellate court reversed these convictions for irregularities in imposing the sentences. In both instances the judgment questioned by writ of error was a judgment in favor of the defendants, and against the Crown.

Only one common law case have we found where the right of the attorney general to sue out a writ of error from the judgment of a trial court quashing an indictment was directly decided.\textsuperscript{16} Here a writ of certiorari was sued out by the Crown to reverse an order entered at quarter sessions quashing an indictment. The Court of Queen’s Bench discharged the rule, and Mr. Justice Coleridge stated that he was satisfied the trial court had authority to quash, that the question on certiorari was simply one of jurisdiction, and that he would not for one moment examine whether it exercised its power rightly or not. He then said, “If a writ of error be brought we shall inquire whether what the Sessions did was erroneous or not.”

In all other cases examined, the right of the Crown to sue out a writ of error to reverse the judgment of a \textit{nisi prius} court quashing an indictment was never questioned. This may be argued as authority for the proposition that such writs at common law issued as a matter of course. Such would be the inference of the Tucker and Walcott

\textsuperscript{15} Rex v. Tucker, Shower P.C. 186.

\textsuperscript{16} Regina v. Wilson, 6 Q. B. 620.
cases previously cited. These two cases, decided at a time when they created nation-wide interest, and participated in by the greatest jurists of the realm, never once questioned the right of the Crown to sue out a writ of error.

Likewise, in the case of Rex v. Davis,\textsuperscript{17} this right was not questioned. Here the Crown sought a writ of error from the Court of King's Bench to reverse a judgment below. The Court of King's Bench refused the writ and held that the verdict sought to be reversed was only against the evidence and was not sought to set aside the verdict because of fraud. The opinion cites two instances of reversals where the acquittals were obtained by fraud.

In the very celebrated case of Regina v. Millis,\textsuperscript{18} the record of which covers 373 pages, the right of a Presbyterian minister to perform a valid marriage in Ireland was questioned. Here the Crown sued out a writ of error from the House of Lords to reverse the judgment of the court of Queen's Bench in Ireland reversing a conviction of the defendant Millis had at the Spring Assizes of 1842 for the county of Antrim. The hearing of this writ was participated in by such famous English jurists and statesmen as Lord Coleridge, Lord Brougham, and Lord Ellenborough. Never once in the lengthy report is the slightest doubt raised as to the right of the Crown to sue out such a writ.

A writ of error in Regina v. Houston\textsuperscript{19} was sued out by the Crown from the Court of Queen's Bench to reverse the judgment of the Summer Assizes of 1840 for the county of Antrim in Ireland, at which Assize an indictment had been quashed on demurrer. The Court of Queen's Bench did reverse the judgment. Here again, the right of the Crown to sue out a writ of error was not questioned.

In the case of Regina v. Chadwick,\textsuperscript{20} a writ of error was sued out by the Crown to reverse a judgment of ac-

\textsuperscript{17} 12 Mod. 8.
\textsuperscript{18} 10 Cl. & Fin. 534.
\textsuperscript{19} 2 Craw. & D. 191.
\textsuperscript{20} 11 Q. B. 173 and 11 Q. B. 205.
quittal entered on a special verdict at Oyer and Terminer. Here the defendant was charged with bigamy, and he made the defense that his first wife was a sister of a deceased wife. This question excited considerable interest at the time, for the sole test of liberalism was believed to be the right to marry a sister of a deceased wife. The Court of Queen's Bench, after a full consideration, affirmed the judgment of the lower court. Nor was the right of the Court of Queen's Bench to entertain a writ of error sought by the Crown questioned.

Among the early records on this subject in the United States widely diverse opinions are found. The earlier—and apparently the better reasoned view—followed the Court of Appeals of Maryland which, in 1804, held that the state had the right to appeal from a judgment quashing an indictment.21 States that took a contrary position followed New York's stand, established in 1848, where the state was denied the right to sue out a writ of error after an indictment was quashed.22

The diversity of the two positions necessitates a further consideration of the cases themselves to determine whether the decisions are based on statutes or are interpretations of constitutional authority.

The Maryland case was the first decision in America dealing with this question. The Court of Appeals of Maryland was asked to issue a writ of error by the state to reverse the judgment of the Harford County Court sustaining a demurrer to an indictment for conspiracy. The Court of Appeals expressed itself so clearly and forcefully—both as to the common law and as to the reasons for its decision—that it seems worth while to quote a portion of the opinion:

This case was brought up by a writ of error directed to the Judges of Harford County Court; and it has been strongly urged that a writ of error will not lie at the instance of the state

22 People v. Corning, 2 N. Y. 9.
in a criminal prosecution, and therefore that the writ in this case was improvidently sued out and ought to be quashed. But it is said in [2] Hale’s P. C. 247, the authority of which it is difficult to question, and indeed we require none higher, "that if A. be indicted of murder or other felony, and plead non cul., and a special verdict found, and the Court do erroneously adjudge it to be no felony; yet so long as that judgment stands unreversed by writ of error, if the prisoner be indicted de novo, he may plead autrefois acquit, and shall be discharged; but if the judgment be reversed, the party may be indicted de novo." And this is not a loose dictum, but it is laid down and repeated as text law; for on page 248 it is stated that "in the case of the special verdict above, where an erroneous judgment of acquittal is given, yet it is conclusive to the King till it be reversed by error." Hence it is manifest that, in the opinion of Lord Hale, the King might have a writ of error in a criminal case, since it would be absurd to say that a man who had obtained a judgment of acquittal for a defect in the indictment, or on a special verdict, could never again be indicted for the same offense until that judgment was reversed by writ of error, if a writ of error would not lie. Fortified by such authority alone, in the absence of any legislative provision in this State on the subject, we think we might safely say, without further inquiry, that the writ of error in this case was properly sued out.

And there is no sufficient reason why the State should not be entitled to a writ of error in a criminal case. It is perhaps a right that should be seldom exercised, and never for the purpose of oppression, or without necessity; which can rarely, and it is supposed would never happen, and would not be tolerated by public feeling. But as the State has no interest in the punishment of an offender, except for the purpose of general justice connected with the public welfare, no such abuse is to be apprehended; and as the power of revision is calculated to produce a uniformity of decision, it is right and proper that the writ should lie for the State, in the same proportion as it is essential to the due administration of justice that the criminal law of the land should be certain and known, as well for the government of Courts and information to the people, as for a guide to juries; who though (by the laws and practice of the State) they have a right to judge both of the law and of the
fact, in criminal prosecutions, should, and usually do, respect the opinions and advice of Judges on questions of law, and would seldom be found to put themselves in opposition to the decisions of the supreme judicial tribunal of the State.\textsuperscript{23}

This decision was handed down at a time when there was no statute in Maryland authorizing such a practice. The first such statute was passed in 1872.\textsuperscript{24} The decision is therefore a clear interpretation of the authority granted by the constitution in using the words "writs of error."

North Carolina allowed a writ of error sought by the state. In the case of \textit{State v. Haddock},\textsuperscript{25} a writ of error sought by the state to reverse a judgment of the county court arresting a judgment was allowed. The court held that a writ of error would lie for the state as well as for the defendant. Likewise in the case of \textit{State v. Lane},\textsuperscript{26} decided in 1878, the right of the state to sue out a writ of error independent of any statute was found to exist in two instances—where judgment is on a special verdict, and where judgment is on a motion to quash, or on a demurrer.

The first statute in North Carolina granting this right to the state was passed in 1883.\textsuperscript{27} This statute provides that the state may appeal in four instances; where judgment is for the defendant on a special verdict, on demurrer, on motion to quash, or in arrest of judgment. Following the statute, the cases of \textit{State v. Ewing et al.}\textsuperscript{28} and \textit{State v. Robinson}\textsuperscript{29} declared the constitutionality of the statute and held that the state might appeal from a judgment of acquittal erroneously entered on a special verdict.

\textsuperscript{25} 3 N. C. 162.
\textsuperscript{26} 78 N. C. 547.
\textsuperscript{27} Code of March 2, 1883, sec. 1237, now contained in Statutes of North Carolina, Ch. 83, Art. XVI, sec. 4649.
\textsuperscript{28} 108 N. C. 755.
\textsuperscript{29} 116 N. C. 1046.
Pennsylvania likewise followed this rule. In *Commonwealth v. Taylor*,\(^\text{30}\) decided in 1812, a judgment was reversed and the cause remanded by the Supreme Court of Pennsylvania upon a writ of error brought by the commonwealth to reverse the judgment of a nisi prius court arresting a judgment. In *Commonwealth v. Capp*,\(^\text{31}\) decided in 1864, it was likewise held that the commonwealth had power to sue out a writ of error petitioned to reverse the judgment of the lower court sustaining a demurrer to an indictment. The first statute in Pennsylvania allowing the state to sue out a writ of error was passed in 1874,\(^\text{32}\) some sixty years after the decision in *Commonwealth v. Taylor*, and ten years after the decision in *Commonwealth v. Capp*. This statute could have had no effect on the decision of the Supreme Court of Pennsylvania in either of the above cases.

South Carolina, in the case of *State v. Young*,\(^\text{33}\) decided in 1889, followed this rule. The Supreme Court, in holding that the state might sue out a writ of error in a criminal case, said, ‘‘In such a case we do not see any satisfactory reason why the state’s attorney, in the discharge of his official duty, may not appeal in behalf of the state.’’ There appears to be no statute in South Carolina either granting or denying this right of appeal to the state.

New Jersey, in the case of *State v. Meyer*,\(^\text{34}\) allowed the state to sue out a writ of error. The Court of Appeals and Errors of New Jersey, after discussing the early authorities of the English common law, some of which have been previously discussed, and after citing a number of cases where a writ of error was issuable by

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\(^\text{30}\) 14 Pa. 277.

\(^\text{31}\) 48 Pa. St. 53.

\(^\text{32}\) Now Pennsylvania St., Law 1920, sec. 561, p. 53.

\(^\text{33}\) 30 S. C. 399.

\(^\text{34}\) 65 N. J. L. 233.
the higher court at the instance of the Crown in England to reverse a judgment in favor of the defendant in a criminal case, says:

In none of these cases was a doubt intimated as to the right of the Crown. In view of these matters, it seems almost incredible that by the English common law the crown was not entitled to a writ of error in criminal cases.

This issuance of a writ of error should not be confounded with the granting of a new trial, which always rests in the discretion of the court. The rule of the English judges was to refuse a new trial after the acquittal of the accused upon an indictment, and the principle underlying that rule is now imbedded in our constitution. But the acquittal there intended does not include the reversal of a conviction for error of law.

The first statute in New Jersey allowing a writ of error to the state was passed in 1911 many years after this decision.

The first decided case in Tennessee on this point is the case of *State v. Reynolds*. Here a writ of error was refused to review an acquittal, but a number of years later, in the case of *State v. Tolls*, the attorney general sued out a writ of error to reverse a judgment of the Circuit Court which refused an appeal sued out by the state to reverse the judgment of a county court quashing presentment. The Supreme Court reversed the Circuit Court and held that it had jurisdiction to entertain an appeal in such a case. This case was decided before any statute had been passed allowing the state a writ of error.

*State v. Daily* discusses the history of the practice. This case rose on a writ of error to reverse a judgment overruling a demurrer to a special plea filed by the de-

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35 Comp. St. of N. J., p. 2208, sec. 4, errors.
36 5 Tenn. 110.
37 13 Tenn. 363.
38 6 Ind. 9.
fendant. The Supreme Court of Indiana there points out that the doctrine that the state might not sue out a writ of error was a new one and was first announced in New York in 1848. The court held that only when the defendant has had a verdict and judgment of acquittal, or at least been put on trial before the court or jury is the state denied a writ of error. If the trial court sustained a motion to quash an indictment the state is entitled to a writ of error, for the defendant has not answered to the merits, and to reverse and remand the cause did not put him in jeopardy a second time.

In *State v. Hood,* the Supreme Court of Louisiana held that, in criminal proceedings, the state has a right to appeal from a judgment of the district court quashing an indictment, but where the defendant has been put upon his trial and acquitted by a jury he cannot be again tried for the same offense. The court in *State v. French* held that the Supreme Court of Louisiana had authority to entertain an appeal by the state from a ruling of a trial court sustaining a motion in arrest of judgment and setting aside the verdict. This case was decided in 1898. Some thirty years later the first statute allowing the state to appeal was passed.

Arkansas, in the case of *State v. Graham,* held that the state might sue out a writ of error in a criminal case, but that no person might be placed in jeopardy twice for the same offense. This decision, rendered in 1839, was the rule in Arkansas seven years before the first statute gave the right of a writ of error to the state.

Michigan allowed a writ of error to the state. In the case of *People v. Swift,* decided in 1886, a petition of

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42 1 Ark. 428.
43 Crawford & Moses Digest of the Laws of Arkansas, Ch. 42, sec. 2142, p. 714.
44 59 Mich. 529, reported as Prosecuting Attorney v. Judge of Recorder's Court in 26 N. W. 694.
mandamus was asked to compel a lower court to expunge an erroneous order quashing an indictment, and to proceed to trial on the issues. The defendant in error contended that the writ of mandamus was not the proper remedy as a writ of error was not allowable to the state. The court, after holding that the writ of error was the correct remedy proceeded to decide the case on the merits, and in issuing the writ of mandamus said:

Under the common law and under our constitution no writ of error or other proceeding lies on behalf of the public to review a judgment of acquittal in a criminal case, as no one can be twice put in jeopardy; but there is no rule of law to prevent the review of proceedings which have not gone to trial. It is very well settled that a decision quashing an indictment may be reviewed. The only question has been, what is the better form of review?

At the time this case was decided the State of Michigan was operating under the Constitution of 1850, Section 3, Article VI of which provided that, "The Supreme Court shall have a general superintending control over all inferior courts and shall have power to issue writs of error, habeas corpus, mandamus, quo warranto, procedendo, and other original and remedial writs and to hear and determine the same. In all other cases it shall have appellate jurisdiction only." The Supreme Court interpreted this language of the constitution to allow writs of error to the people. The first statute on this point in Michigan, not passed until 1917, gave to the state the right of a writ of error to question the quashing of an indictment.

The Court of Appeals of Ohio in the case of State v. Blair held that where an indictment was erroneously quashed, the state was entitled to an opportunity to try out the facts in issue and vindicate its laws, and that to prevent the arbitrary denial to the state of its right to prosecute one properly charged with crime by the grand

46 24 Ohio App. 413.
jury the state might sue out a writ of error. The only statute in Ohio bearing on the question provides only for a writ of error from a reversing appellate court to a superior court. In this case the court relied on Section 6, Article IV of the Ohio Constitution which provides that the Court of Appeals of Ohio shall have authority to "review, affirm, modify, or reverse the judgments of the Court of Common Pleas, Superior Court, and other courts of record within the district as may be provided by law." It was by interpreting this constitutional provision that the Court of Appeals of Ohio granted the state the right to a writ of error.

The Supreme Court of Utah has decided the question in the same manner, holding an appeal by the state allowable. In *State v. Booth*, the Supreme Court of Utah interpreted Section 9, Article VIII of the Constitution of Utah which reads, "From all final judgments of the District Courts there shall be a right of appeal to the Supreme Court," to mean that the state as well as the defendant could appeal. The question was presented on an alternative writ of mandamus to compel the district court judge to expunge an order dismissing a criminal case and discharging the prisoner and his bail. The defendant demurred to the petition and moved to quash the alternative writ, contending that under the wording of that section the state had a speedy and adequate remedy at law, in that it had a right to appeal from the order, it being a final one. In sustaining the demurrer the Supreme Court of Utah said:

Here [referring to the constitutional provision cited above] is a plain and express provision of the fundamental law, which grants the right of appeal "from all final judgments of the district courts." It is mandatory and applies alike to criminal prosecutions and civil actions. It is a limitation alike upon the legislative and judicial powers of the government. Neither the legislature by legislation nor the judiciary by interpretation

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48 21 Utah 88.
can lawfully deprive any person, natural or artificial, from this sovereign right. The state is not made an exception, and therefore is included within the provision, which, in terms, is general, the only condition imposed being that the judgment or decision from which the appeal is taken be final. This condition existing in any case, any aggrieved party may exercise the right.

In summation, the supreme courts of twelve states, in the opinions quoted from and the decisions cited, have held that the state has a right to sue out a writ of error as a matter of prerogative under the constitutions of those states; that such right should vest in the state under the constitution unless it is expressly withheld; and that the correct interpretation of the common law meaning of a writ of error is a writ of error sued out by either a convicted defendant or the state.

Turning the discussion to those cases that deny the state a right to a writ of error, the notable New York decision of People v. Corning\(^49\) will first be considered. Mr. Justice Bronson, in expressing the opinion of the court to be that the state has no right to bring a writ of error in a criminal case, whether the judgment reached by the lower court was based on matters of law or on an acquittal based on evidence, cites three cases in support of the position taken—People v. Dill,\(^50\) State v. Reynolds,\(^51\) and Commonwealth v. Harrison.\(^52\)

People v. Dill and State v. Reynolds are not authority, for in those cases a writ of error was sought to reverse a judgment of acquittal. Commonwealth v. Harrison was decided by the Supreme Court of Virginia in 1820. The entire opinion in that case was: "Per Curiam. The Court is unanimously of the opinion that the writ of error improvidently issued on the part of the Commonwealth, because no writ of error lies in a criminal case for the Commonwealth." Virginia was then functioning under 2 N. Y. 9.

50 1 Scam. 257.

51 5 Tenn. 110.

the Constitution of June 29, 1776, and under the statutes contained in Leigh's Revised Code of Virginia, 1819, Volumes 1 and 2. By the constitution, the jurisdiction of the courts was in the control of the legislature. Practice and jurisdiction were controlled by Chapter 67, Revised Code. The court was one of original and appellate jurisdiction, and the right to issue a writ of error in criminal cases was limited by the wording of the statute. Section 26, page 224, 225, Volume 2, Revised Code, stated that a writ of error might be sued out from any judgment convicting any person. The decision in this case, then, was based on the provision of the constitution that made the Supreme Court of Virginia subject to the legislative authority, and on the statute that limited writs of error to convicted defendants.

These three cases are the total authority cited in People v. Corning in support of the court's departure from the then universal rule that the state might sue a writ of error to reverse a judgment quashing an indictment. In criticizing this decision, the Supreme Court of New Jersey in the case of State v. Meyer, said:

With regard to the case of People v. Corning, I think that anyone reading the opinion of Judge Bronson will perceive that his conclusion was induced more by the supposed danger arising from the exercise of such a power by the state than by the legal authorities for and against the possession of the power. That his apprehensions were not shared in by the people generally was soon shown by the statute passed to confer on the state the power denied by the court. Moreover, the decision rendered in that case was rendered in the teeth of the previous practice in New York and of a former decision by the same court, given after full discussion and consideration, in People v. De Bow, 2 N. Y. 9, note a. . . . These decisions are not satisfactory as to the common law of England, and should not be followed in this state, where we are accustomed to adhere closely to common law rules that were not obsolete before the Revolution, and are not out of harmony with our institutions.

65 65 N. J. L. 233.
The first case in Georgia denying a writ of error to the state is *State of Georgia v. Jones.* From reading this case we find that it was decided on the particular wording of the statute in that state. The Supreme Court of Georgia was a legislative court. In construing the statute that gave the court authority to issue writs of error, the peculiar language of that statute necessitated the decision. Writs of error might be sued out by any "party" by "his" counsel. The court held that the word "party," coupled with the pronoun "his," excluded anyone but a natural person, and hence the state had not the right.

The first case in Massachusetts denying this right was the case of *Commonwealth v. Cummings.* Here a writ of error was sought to reverse an acquittal. This case clearly has no application to our question, but it formed the basis for later decisions in that state. The court here held itself to be a legislative court, made so by the constitution of 1780, and while the statute was broad enough to allow writs of error brought by convicted defendants, the right of the state to sue out such a writ was limited by other statutes.

Tennessee's contribution to this group is the case of *State v. Reynolds,* where a writ of error was sued out from an acquittal. In discussing this case, the Supreme Court of New Jersey in the case of *State v. Meyer,* said that the Supreme Court of Tennessee confounded this question "with the very different one of granting a new trial after acquittal."

Wisconsin refused to allow the state to sue out a writ of error in *State v. Kemp and others,* which was decided on the authority of *People v. Corning* and *Commonwealth v. Cummings,* which have already been dis-

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54 7 Ga. 422.
55 57 Mass. 212.
56 5 Tenn. 110.
57 65 N. J. L. 233.
58 17 Wis. 690.
cussed. In the opinion, the court says that the jurisdiction of the Supreme Court depended on the legislature, and since no statutory authorization had been given to entertain writs of error, except those by convicted defendants, the writ sought here would not lie. This case, based on authority which has been distinguished, should carry little weight.

In 1881, the Supreme Court of Florida, in the case of *State v. Burns*, \(^59\) denied the state's right to a writ of error to reverse the judgment of the Circuit Court quashing an indictment. In giving this decision the court said:

The weight of authority is overwhelming, not only in this country but in England, that the writ will not lie at the instance of the State, and it is evident from the character of the legislation on the subject in this State that it has never been contemplated that the State could further pursue parties who had obtained judgment in their favor in prosecutions by indictment, whether by the judgment of the court or verdict of a jury.

Upon examination of this case we find it was decided entirely on construction of the statute. The constitutionality of the statute was not raised, and the decision is based under that statute\(^60\) which limited the issuance of writs of error to instances where "they shall issue upon the application of the defendant."

Missouri has denied the right of the state to sue out a writ of error in *State v. Copeland*.\(^61\) At the time the Copeland case was decided, Missouri was operating under the constitution of 1875, which, together with the constitution of 1820, gave the Supreme Court general jurisdiction. Limitations on this authority could be made by the legislature, which right the legislature exercised in 1845 by Sections 13 and 14 of Article VIII, Chapter 135 of the Revised Statutes of Missouri, limiting the right of the state to an appeal only.

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\(^59\) 18 Fla. 185.
\(^60\) Digest of the Laws of Florida, Ch. 89, secs. 3, 4.
\(^61\) 65 Mo. 497.
Colorado likewise has denied the right of the state to sue out a writ of error. In the case of *People v. Raymond*, the Supreme Court of Colorado refused a writ of error to review the judgment of the Court of Appeals reversing a conviction had in the district court. This decision was rendered by a divided court of two to one, and there was filed a strong dissenting brief by Mr. Justice Elliott. The majority opinion was decided on the authority of the cases already discussed.

We are not unmindful of three early Illinois cases, *People v. Dill*, *People v. Royal*, and *People v. Miner et al.*, that deny the right of the state to sue out a writ of error after an acquittal. They of course have no place in our present discussion, for the point here under consideration was not raised.

The Supreme Court of the United States has considered this question in *United States v. Moore*. Here the District Court for the District of Columbia had sustained a demurrer to an indictment. A writ of error was sued out from the Supreme Court of the United States at the instance of the attorney general to reverse that judgment. The defendant questioned the right of the Supreme Court to issue such a writ in a criminal case at the request of the government. The attorney general contended that, since the Supreme Court had appellate jurisdiction to act in “all cases in law and equity arising under the laws of the United States,” and though the specific right to issue writs of error at the instance of the government was not granted, still it should follow as being necessary for the correct exercise of appellate jurisdiction. Mr. Chief Justice Marshall in denying the writ said:

If Congress had erected inferior courts, without saying in what cases writ of error or appeal should lie upon such courts to this.

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62 18 Colo. 242.
63 1 Scam. 257.
64 1 Scam. 557.
65 144 Ill. 308.
66 3 Cranch 159.
your argument would be irresistible; but when the constitution has given Congress power to limit the exercise of our jurisdiction, and to make regulations respecting its exercise; and Congress, under that power, has proceeded to erect inferior courts, and has said in what cases a writ of error or appeal shall lie, an exception of all other cases is implied. And this court is as much bound by an implied as an express exception.

In his opinion, Chief Justice Marshall said that the argument that the Supreme Court of the United States had authority to issue writs at the instance of the government would have been irresistible were it not for the fact that Congress was given power to limit that jurisdiction and had exercised its power to the exclusion of writs of error sought by the government. His opinion is authority for the doctrine that where a supreme court is created by constitutional authority and its powers are not limited by the constitution or made subject to the legislature, or, being made subject to the legislature, the latter has not exercised its power to the exclusion of writs of error, then that supreme court has as part of its powers the right to issue writs of error to the state to reverse the judgment of an inferior court quashing an indictment.

This exact question has very recently been presented to the Supreme Court of Illinois in the case of People v. Barber. The state here sued out a writ of error to reverse the judgment of the Criminal Court of Cook County, which sustained a motion to quash an indictment for bigamy against the defendant in error. In quashing the indictment, the trial court held that it did not describe the parties or the subject matter with sufficient certainty. It was not contended by either party that the defendant had at any time been placed in jeopardy.

In suing out this writ of error the state contended that the statute was unconstitutional. The portion applicable is as follows:

67 348 Ill. 40.
Exceptions may be taken in criminal cases, and bills of exceptions shall be signed and sealed by the judge, and entered of record, and error may be assigned thereon by the defendant, the same as in civil cases: Provided, that in no criminal case shall the people be allowed an appeal, writ of error or new trial.

The state based its contention on the argument that Section 2 and Section 11 of Article VI of the Constitution of 1870, which the Supreme Court has held must be construed together, made the Supreme Court a constitutional court in so far as criminal cases, and cases involving a freehold, a franchise, or the validity of a statute were concerned; that as a constitutional court in these instances the legislature was without power to limit the jurisdiction granted by the constitution; that Section 17 was unconstitutional in that it attempted to limit the jurisdiction of the Supreme Court in the issuance of writs of error to those sought by defendants only.

In a lengthy and very learned opinion Mr. Justice Orr denied the right of the state to sue out a writ of error in a criminal case, holding that the legislature was given power by the constitution to limit the authority of the Supreme Court, and that Section 17 did not conflict with the constitution and was valid. The Supreme Court in this decision cited with approval the New York case of People v. Corning, and expressed itself in accord with the doctrine there laid down.

In this paper we have discussed common law authorities, all of which are generally in accord, allowing the right of the Crown to sue out a writ of error. We have considered the decision of the Supreme Court of the United States, the import of which is that such a right does exist as a part of the common law authority of a supreme court unless it is made subject to the legislature and the legislature has exercised its power to the

69 Chicago and Alton R. R. Co. v. Fisher, 141 Ill. 614.
exclusion of writ of error by the state. Among the states, we have discussed decisions of twelve states in which this principle of the common law is unconditionally adopted as a true one, and further, is incorporated as a part of the laws in these states, granting the people the right to present a ruling of a trial court quashing an indictment to the supreme court for a final determination.

The authorities denying the right of the state to sue out a writ of error may be summarized as follows: twelve states have held that the state cannot sue out a writ of error; of these, the decisions in four states concerned the right of the state to sue out a writ of error to reverse an acquittal; the courts of another four states based their decision on their own peculiar statutory construction; and the other four states, New York, Colorado, Missouri, and Illinois, hold that the state cannot sue out a writ of error, citing as authority cases coming under either of the two previous groups. It would appear that the courts deciding in favor of this right did so on better reasoning and authority.

The right to sue out a writ of error is a right the state should have in order to insure the full protection of our laws to society, and to guarantee the people against further miscarriage of justice. Whether this right is recognized by the courts through interpretation of the intent of the framers of our constitutions, recognizing it as part of the common law authority of the respective supreme courts, or whether the right is granted by the legislature through the passage of laws allowing the state to present to the supreme courts questions of the validity of indictments, is immaterial, as long as it is recognized. The right of the state to sue out a writ of error from a judgment quashing an indictment should be made a part of the sovereign law of every state in the Union.