JAMES WILLIAMS, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT, SINOE COUNTY.

Argued November 6, 1961. Decided December 15, 1961.

1. A motion to quash an indictment is deemed made on a plea in abatement before joinder of issue; a ruling thereon is an interlocutory order, not a final judgment; and no exceptions need be taken thereto.
2. The quashing of an indictment is not equivalent to an acquittal, and the same defendant may be reindicted and retried for the offense charged in the quashed indictment.
3. A motion by the defendant in a criminal prosecution to quash the indictment, or to set aside the verdict and grant a new trial, is deemed a waiver of the defendant's constitutional right not to be twice put in jeopardy of life or limb for the same offense.

Appellant was indicted, tried and convicted of malicious mischief. The court below granted a motion for a new trial. On retrial the court below granted a motion to quash the indictment. Appellant was reindicted and reconvicted of malicious mischief. On appeal from the second conviction, appellant contended that he had been put in double jeopardy. The Supreme Court *affirmed* the judgment of conviction.

T. E. Cess-Pelham for appellant. *Solicitor General J. Dossen Richards,* assisted by *Assistant Attorney General Nelson Broderick* and *County Attorney Alfred Raynes,* for appellee.

MR. JUSTICE MITCHELL delivered the opinion of the Court.

The records on appeal in this case show that one James Williams, defendant below, now appellant, was indicted by the grand jury attending at the May, 1959, term of the

Circuit Court of the Third Judicial Circuit, Sinoe County, for the crime of malicious mischief.

The case was called for trial at the August, 1959, term of the aforesaid court, and issue was then and there joined. A petty jury having been empanelled, evidence was heard, and thereafter the jury returned a verdict of Guilty against the defendant for the charge on which he stood trial. He excepted to this verdict and announced his intention to file his motion for new trial, which he did file on September 3, 1959, in the office of the clerk, according to the minutes of the said court which form a part of the records in this appeal. We quote the ruling of the court below on the said motion:

> "A verdict of Guilty having been returned against the defendant on September 1, 1959, by the empanelled petty jury, he excepted thereto and gave notice that he would in due time file a motion for new trial. In keeping with said announcement, defendant through his counsel, filed said motion on September 3, 1959. The said motion contains eight counts, and from a careful inspection, the court observes that, in each count, defendant attacks the evidence adduced at the trial, the law and the instructions of the court. This morning, when the case was resumed and the motion read, the Acting County Attorney placed on record his resistance which alleged, in substance, as follows:
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> "1. That the purported motion is misleading and not well founded.
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> "2. That the members of the petty jury possess average intelligence, and thoroughly understood the evidence adduced at the stand on behalf of the plaintiff, and they are judges of the facts and not the law.
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> "In the opinion of the court, the two grounds contained in the prosecution's resistance do not explain in what way the purported motion is misleading and not legally founded. From an inspection of the motion,

the court observes that the defendant has not attacked the intellectual ability of the petty jury; hence, a resistance explaining or setting forth that they possessed average intelligence would not apply. It should be remembered that courts do not raise issues; we only decide issues. Under no parity of reasoning, therefore, could the court legally and conscientiously deny the motion when the prosecution failed to offer or present a resistance sufficiently meritorious, cogent and legal. It matters not how desirous the court might be to expatiate on each count of defendant's motion; it cannot do so when the prosecution has failed to solicit it in his resistance. Therefore, and for the foregoing legal reasons, the motion is hereby granted and a new trial awarded, for the November, 1959, term of court."

Having thus been taken to the November term of the court below for a new trial upon the express initiative of the defendant whose motion had been sustained, the case was docketed for that term. When the case was reached and called, the defendant, now appellant, through his counsel, Counsellor T. E. Cess-Pelham, moved the court to quash the indictment because of defects appearing thereon. The presiding judge, sustained the motion and the indictment was quashed. Thus the case never reached the point of the joinder of issue at that session of the court. It is also seen from the records that defendant's motion to quash was predicated upon the fact that the prosecution had failed to allege in the indictment on which he was charged that personal notice had not been served on the private prosecutor by the defendant concerning the damage that the private prosecutor's livestock had done to defendant's property, which, according to the defendant, was an essential requirement of law on an indictment for malicious mischief. But it is further observed that plaintiff, through counsel, conceded the legal efficacy of the motion to quash; hence he only availed himself of the

statutory provisions by requesting the court to retain the defendant's bond until such time as he was reindicted. His application was granted, and later, during the sitting of the same term of the court, defendant was reindicted and arrested for the same offense of malicious mischief.

Very peculiarly, at the sitting of the February, 1960, term of the aforesaid court, the identical defendant, who had moved the court to quash the previous indictment against him, filed another motion to dismiss, in which he alleged that, having been previously acquitted from further answering on a final judgment of the court—thereby meaning the ruling of the court on the motion to quash—his constitutional rights would be invaded by double jeopardy if he was brought to trial a second time for the same offense committed at the same time and in the same place.

Although this motion to dismiss was filed at the February, 1960, term of the court, yet the case was not called for hearing until the May term, when the motion was heard and denied. Defendant was arraigned and pleaded Not Guilty. His trial began; and after evidence had been taken, the empanelled jury returned a verdict of guilty against him, to which he noted exceptions. After exhausting all the prerequisites in law antecedent to a regular appeal, he brought his case for further adjudication by this appellate Court of last resort; and thus we have laid the genesis of the case now before us.

When the case was reached on our assignment bulletin and called for hearing, it was brought to the notice of the Court that the appellant had filed two motions to dismiss the appeal. The one filed on March 28, 1961, was entitled: "Motion to vacate the second, or illegal judgment in the unlawful action in the appeal." The second motion, filed on September 28, 1961, was entitled: "Motion to affirm the uncontested legal judgment of the court below and vacate the second indictment and its proceedings on the above-alleged action of malicious mischief on the

ground of jurisdiction." Both of these motions were strongly resisted by the appellee. Since the second motion attacks the jurisdiction of the trial court, we feel it legal and proper to give that motion our attention and consideration before dilating on the subject matter of the appeal.

We have not been able to understand this very strange inroad attempted to be made into the practice of our court procedure. The science of law runs where the memory of man runneth not to the contrary; yet with all of its expansions and ramifications, we are doubtful whether such a procedure has been known in any court, particularly in the courts of Liberia; nor has appellant's counsel in his argument before this bar been able to produce any authority of law in this regard. According to law writers, jurisdiction is not conferred upon constituted courts by the consent of parties—and this Court, being authorized by law to hear and determine all such matters on appeal, is at a loss to know what is the actual point appellant's counsel intends to score by the filing of such a motion. But taking another thought, it appears to us that such a motion only tends to expose the inepitude and pygmean ability of the counsel in law, notwithstanding he has assumed the status of a counsellor of this bar—the highest Court in the country.

It must be remembered that he is the very counsellor who represented the defendant, now appellant, in the court below, and the very counsellor who filed the motion for new trial. He is also the very counsellor who filed the motion upon which the indictment was quashed; and further, he is the same counsellor who prosecuted this appeal before this Court; yet he has come now and seeks to have his appeal dismissed on a strange motion that has no precedent in our courts, claiming that he is entitled to a discharge on the ground of *autrefois acquit* because, as he says, he was first discharged on a legal judgment in the court below—thus interpreting the interlocutory ruling on the motion to quash to be a final judgment.

In his argument before this court he stated, among other things, that it was the right of the plaintiff below, under the law, to have excepted to this interlocutory ruling of the court, and brought his appeal for review to this Court, and that having failed to do this, the plaintiff has waived all right to do so, and should not, under the law be allowed resistance to the said motion before this Court. He also presented a theory that, having been granted a new trial and the quashing of the indictment, he was entitled to a discharge from further answering, and therefore the appellate court is without jurisdiction over this appeal.

Let us review some of the facts, and see if they harmonize with the point of argument of counsel for appellant. It was the defendant's right under the law to have moved for a new trial, which he did; and the same was granted. The moment the new trial was granted by the court below, there was no necessity for the rendition of a final judgment because the case obviously returned to the court's docket for trial anew. Moreover, it was the defendant who sought the new trial, and under no parity of legal reasoning could he seek to recover against his adversary upon his own acts. In *Yancy* v. *Republic,* 4 L.L.R. 3 (1938), this Court expatiated comprehensively on the right to a new trial and what the law regards it to be when the necessity therefor arises. Also in title 8, chapter 14 of the 1956 Code, the question of how and when a new trial may be granted is properly defined. But we have only made these citations for the benefit of this opinion with the mind to show that, whereas the law does confer on the defendant the right to move for new trial, in no instance should that right be construed to mean that it authorizes a defendant's acquittal on the second trial, unless the verdict of a jury based upon the evidence dictates it.

On his other point of argument, the law is patent that a ruling made on a motion to quash, is an interlocutory one and is only made on a plea in abatement, which is a plea

to be raised in any given case before issue therein is joined, and is not interpreted to be a final judgment; nor is a plaintiff in a criminal matter compelled to note exceptions thereto, especially when the ground upon which the quashing is granted, is conceded. It is unlike a ruling on a motion made to the jurisdiction, which is a plea in bar and, when well taken, bars further action on the particular suit. This plea can be raised at any stage of the proceedings before final judgment; but with the former, it must be entered before the joining of issue.

> "Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial.
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> "A motion to quash the indictment shall be made before the plea is entered." 1956 Code, tit. 8, § 184.
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> "If the court grants a motion based on a defect in the institution of the prosecution, or in the indictment or information, it may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment or information." 1956 Code, tit. 8, § 186.

Closely observed, appellant's motion to dismiss, as well as his bill of exceptions in the case, upon which the case has been brought before this Court for review, appear to us to be one and the same in principle and substance. The motion to dismiss is just the reproduction of the bill of exceptions, except that the latter seeks to have us review the grounds that the former would have us dismiss for the want of jurisdiction. Hence, we feel it to be good legal reason to quote the motion to dismiss herein word for word for the benefit of this opinion, as follows:

> "James Williams, appellant, by and through his counsel, moves that this Court confirm the uncontested

judgment of the court below and vacate the second indictment and its proceedings on the above alleged action of malicious mischief on the grounds of jurisdiction, for the following legal reasons:

"1. Because the alleged crime of malicious mischief appearing on the second indictment, dated December 11, 1959, and its proceedings in the court, subject matter of this appeal, is the selfsame charge upon which he, James Williams, defendant below, now appellant, was previously arrested and indicted upon, and a trial of the said charge was duly, regularly and legally disposed of in the law division of the Circuit Court of the Third Judicial Circuit, Sinoe County, during its May and November terms in 1959, at which time the said action was ordered finally vacated by a ruling of the said court without exceptions, and/or notice of appeal to this Honorable Court by the plaintiff below, now appellee. Evidence of these facts appearing in the records of the court below is herein presented, namely: (a) a copy each of the said original indictments, dated June 3, 1959; (b) court's ruling on the motion for new trial, dated September 4, 1959; and (c) court ruling on motion to quash indictment, dated December 7, 1959, respectively marked as Exhibits 'M,' 'N' and 'O' are attached and are made to form a part of this motion. The appellant contends that, by virtue of the said final judgment, Exhibit 'O,' also appearing on the records of the appeal, dated December 7, 1959, the said court below had/has further original jurisdiction over the alleged selfsame action or crime against the very aforesaid defendant below, now appellant without an express order from this Court.

"2. And also because ten days and sixty days thereafter, namely, respectively from December 7,

1959, after the aforesaid judgment, Exhibit 'O' was entered in the records of the court below without any exceptions and/or notice of appeal, so as to perfect an appeal to the said charge by the plaintiff below, now appellee, said failure on the part of the plaintiff below was/is a waiver of legal right not only to a further prosecution of the aforesaid charge in the court below, but also precluding legally this Honorable Court to review the records of the said action of the court below.

"3. And also because the procedure adopted by the plaintiff below to reindict the said defendant, now appellant, after the entering on the records of the court below, the said final judgment, Exhibit 'O,' in the very selfsame court below, is contrary to the existing statutory laws of the Republic of Liberia governing criminal procedure law.

"4. And also because the aforesaid indictment for the crime of malicious mischief having been vacated by order of the court in the said court below by virtue of the said aforesaid judgment, and he, the defendant below, set at liberty by due process of law in accordance with the obligation entered into between the defendant below, now appellant, and the plaintiff below, now appellee, in an original bond approved by the judge of the said court below, dated June 4, 1959, apparent on the records of the said court below, a copy of which is herein attached and marked Exhibit 'P,' and made to form a part of this motion, the appellant contends he was/is no longer liable legally to answer further any issue to the above crime in the court below, nor is the said action reviewable at such stage in this Court on the ground of jurisdiction."

We have heretofore said in this opinion that the grounds of this confused and unmeritorious motion to dismiss are the same grounds embodied in appellant's bill

of exceptions—the basis of this appeal; hence, we feel ourselves justified under the law to combine them into one and finalize our review of the case.

In this argument, appellant's counsel further contended that the plaintiff below should have excepted to the interlocutory ruling of the court below on the motion to quash, and should have brought an appeal for review by this Court; that his having failed to do so deprived the plaintiff below, now appellee, from any further legal right to have had him reindicted and tried for the same offense; and, therefore, the judgment upon which he was sentenced for the crime of malicious mischief is void and should be vacated and he discharged without delay. That is the principle ground laid in his bill of exceptions. Further, he argued that the ruling of the court below on the motion to quash was a final judgment; and since the defendant below had been discharged upon that ruling, his further trial upon another indictment for the same offense was an invasion of his constitutional right, and constituted double jeopardy. That is, in substance, the second major point raised in his bill of exceptions. He contended, further, that the appellee in this case is barred from defending against him in this appeal because he waived his right to do so by refusing to except to the ruling on the motion to quash in the court below, and that this Court is without jurisdiction over the subject matter because, the prosecution being void *ab initio,* this Court is without any legal right to review this appeal. In fine, he displayed very little skill in the understanding of the law whilst he belabored the Court with unfounded theories; and the Court was taken with great concern over his inconsistent points of argument; however, since we feel that this opinion already reflects our evaluation of appellant's counsel, we hesitate to make further comments.

Before finalizing this opinion, we will quote the following authorities on the points so strenuously argued before us:

"If, however, an acquittal is secured under the decision of the court sustaining the defendant's objection to the indictment, such acquittal will not bar further proceedings, whether the indictment was as a matter of law sufficient to sustain a conviction or not, because the defendant, having procured a decision that the indictment is insufficient, will not afterward be permitted to assert that it was sufficient." 15 AM. JUR. 50 *Criminal Law* § 375.

"It may be stated as a general rule that where an indictment is quashed at the instance of the defendant, though afterward jeopardy has attached, he cannot thereafter plead former jeopardy when placed on trial on another indictment for the same offense. His action in having the indictment quashed constitutes a waiver of his constitutional privilege." 15 AM. JUR. 74 *Criminal Law* § 403.

Therefore, in the light of the law as laid in this opinion, and considering the grounds of the motion to dismiss, as well as the grounds of the appellant's bill of exceptions, both having the same trend and bearing that has no precedent in our procedure and practice, we are of the opinion that the motion to dismiss should be denied, and the judgment of the court below sentencing the defendant be and the same is hereby affirmed. And it is hereby so ordered.

Affirmed.