antitrust cases which will be coming before the courts in the future, the establishment of an administrative agency to enforce these laws might well provide a better means of enforcement than the courts. Such a board would be better equipped to gather and analyze economic data, would eventually develop economic and legal experts familiar with the problems arising out of antitrust prosecutions, and what is more important, would develop a uniform policy in the enforcement of the antitrust laws.[34]

CRIMINAL LAW—POWER OF A TRIAL COURT TO MODIFY A VERDICT

State v. Odom, 292 S.W.2d 23 (Tenn. 1956)

The jury found the defendant guilty of murder in the first degree. He moved for a new trial, and after a hearing on the motion, the trial judge found that the evidence was insufficient to support the verdict and entered judgment modifying the degree of the offense to murder in the second degree. On certiorari[1] the appellate court reversed and directed a new trial holding that where the evidence does not support the verdict the limit of the trial judge's authority, and his duty, is to order a new trial.[2]

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34. See 118 F. Supp. at 213 where Judge Leahy states that there is much argument as to the interpretation and enforcement of the antitrust laws and that "excellence of corporate function . . . calls for a critical re-examination by the Congress, after a half-a-century of the enforcement of the Sherman and allied Acts."

For judicial suggestions that courts and judges may not be capable of handling masses of economic data, see Standard Oil Co. v. United States, 337 U.S. 293, 310 n.13 (1948); United States v. United Shoe Mach. Co., 110 F. Supp. 295, 345 n.2 (D. Mass. 1953). In the principal case, the success of the defense may be attributed to the tremendous amount of evidence which defendant produced in proving the existence of competition, an approach which corporations in the future might very well take to heart. For a summary of the extent of defendant's evidence, see 118 F. Supp. at 198. The government, on the other hand, *failed* to offer any guides for determining degree of market control. *Id.* at 196.

It has been suggested that a panel of economic experts be provided for the judge. Clark, *The Orientation of Antitrust Policy*, 40 AM. ECON. REV. 93, 98 (1950); Newman, *The Place of Economic and Market Analysis in Antitrust Administration*, 1 ANTITRUST BULL. 743, 752 (1956). In United States v. United Shoe Mach. Co., *supra*, an economist, disguised as a law clerk, served as economic advisor to Judge Wyzanski. Newman, *supra* at 746.

See also Kansas City Star Co. v. United States, 25 U.S.L. WEEK 1117 (8th Cir. Jan. 23, 1957) (Citing the principal case, defendant argued for a broad interpretation of the relevant market. The court, however, concluded that broadcasting stations, newsreels, topical books, and other specialty items were not competing, in the true sense of the word, with defendant newspaper.).

1. The defendant sought dismissal of the state's petition on the ground that the state was precluded from an appeal in a criminal case. The court, citing TENN. CODE ANN. §§ 40-3401, 40-3404 (1955), held that the state was precluded from appeal in Tennessee only when the trial had resulted in an acquittal. State v. Odom, 292 S.W.2d 23, 24 (Tenn. 1956).

For a general discussion of the right of a state to appeal in criminal cases, see Miller, *Appeals by the State in Criminal Cases*, 36 YALE L.J. 486 (1927); Note, 47 YALE L.J. 489 (1938); Comment, 23 WASH. U.L.Q. 439 (1938).

2. State v. Odom, 292 S.W.2d 23 (Tenn. 1956).

Generally, the trial court has the duty to rule on the legal sufficiency of the evidence presented at the trial.[3] At any time after the state has presented its evidence and prior to submission of the case to the jury a motion for a directed verdict of acquittal is proper.[4] The court, acting either on its own motion or on a motion of the defendant, should direct a verdict of acquittal if the state has failed to present sufficient evidence to warrant a conviction.[5] Failure to direct a verdict when acting on the defendant's motion will be reversible error on appeal if there is insufficient evidence to support *any* conviction.[6] If, however, the state has presented sufficient evidence to support a conviction of any lesser included offense, the trial court should not direct a verdict but should instruct the jury as to any degree of the crime of which substantial evidence was presented.[7] Should an erroneous instruction result in a conviction of the defendant for an offense of which there is no substantial evidence, on appeal the conviction will be modified to conform to the evidence[8] or will be reversed and remanded.[9] On the other hand, if there is sufficient evidence of *any* crime to submit to the jury and the trial court nevertheless directs a verdict of acquittal, the

3. Questions of law are for the determination of the court and questions of fact are for the determination of the jury. Accordingly, it is for the court to determine if the state has presented evidence of facts sufficient to warrant a conviction. See State v. King, 66 Ariz. 42, 182 P.2d 915 (1947); State v. Schneiderman, 20 N.J. 422, 120 A.2d 89 (1956). See also ALI CODE OF CRIM. P. § 323, commentary at 962 (1930), listing the various types of statutes which prescribe the function of the trial court and the jury. *But see* Posey v. State, 131 N.E.2d 145, 147 (Ind. 1956), citing IND. CONST. art. 1, § 19, for the proposition that the jury determines questions of law as well as questions of fact.

4. ALI CODE OF CRIM. P. § 321, commentary at 960 (1930); ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 435 (1947).

5. See France v. United States, 164 U.S. 676, 681 (1897); ALI CODE OF CRIM. P. § 321, commentary at 960 (1930); ORFIELD, *op. cit. supra* note 4, at 435. However, all jurisdictions do not make the direction of a verdict the duty of the trial court. See State v. Thierfelder, 114 Mont. 104, 115-16, 132 P.2d 1035, 1040 (1943), where the court, relying on a state statute, held that the judge should only advise and not direct a verdict of acquittal. *Cf.* Posey v. State, 131 N.E.2d 145 (Ind. 1956), to the effect that the jury and not the judge determines questions of law. For an extensive annotation on the power of the trial judge to direct a verdict, see Annot., 17 A.L.R. 910 (1922).

6. Commonwealth v. Murphy, 33 Ky. 141, 109 S.W. 353 (1908). See also France v. United States, 164 U.S. 676 (1897).

Since the judgment *non obstante verdicto* is not generally recognized in criminal procedure (ORFIELD, *op. cit. supra* note 4, at 436-37), the trial court is without authority to correct its own errors in ruling on the legal sufficiency of the evidence in the absence of statute (see PA. STAT. ANN. tit. 19, § 871 (Supp. 1955) for an example of statutory authorization), but the power has been assumed by the appellate courts. France v. United States, *supra*; State v. Young, 237 Mo. 170, 140 S.W. 873 (1911).

7. Commonwealth v. Murphy, 33 Ky. 141, 109 S.W. 353 (1908); 4 WARREN, HOMICIDE § 344 (1938).

The jury is bound to return a verdict which corresponds to the instructions given them, and the trial court may refuse to accept a verdict which does not so conform. See State v. Miles, 199 Mo. 530, 98 S.W. 25 (1906); State v. Godwin, 138 N.C. 582, 50 S.E. 277 (1905); *cf.* Commonwealth v. Clifford, 254 Mass. 390, 150 N.E. 181 (1926).

8. Strawn v. State, 202 Ark. 744, 151 S.W.2d 988 (1941).

9. State v. Young, 237 Mo. 170, 140 S.W. 873 (1911).

error generally will not be reviewable, for in most jurisdictions the state may not appeal from an acquittal.[10] In essence, therefore, prior to submission of the case to the jury the trial judge is given broad powers of control over the degree of the offense for which the defendant may be convicted.

A modern development in criminal procedure is the use of the deferred motion for judgment of acquittal.[11] Under this procedure the trial court, at its discretion, may reserve ruling on a motion for a directed verdict until after the close of the trial, thereby postponing any ruling on the legal sufficiency of the evidence until such time as a judicious review of the record has been made. By so doing the possibility of prejudicial error which might result from a hasty ruling is minimized while at the same time prospect of a speedy culmination of the trial is enhanced.[12]

The majority of jurisdictions, however, fail to recognize the use of deferred motions for judgment of acquittal. The power of the trial court in these jurisdictions to entertain motions after rendition of the verdict is normally limited by statute. These post-trial motions may be classified generally as motions in arrest of judgment[13] and motions for a new trial.[14]

At common law the use of motions in arrest of judgment was restricted to the situation where a demurrer would have been the proper method of attack prior to judgment,[15] *i.e.*, they would properly lie for matters apparent on the face of the record, but would not lie for purposes of reviewing the evidence.[16] Where statutorily altered in this country specific provisions define the grounds for which a motion

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10. ORFIELD, CRIMINAL APPEALS IN AMERICA 69-72 (1939). *But see* State v. Thierfelder, 114 Mont. 104, 132 P.2d 1035 (1943), which allowed the state to appeal from a directed verdict of acquittal.

11. FED. R. CRIM. P. 29(b). This power of the trial judge was recognized without statute in the federal jurisdiction as early as 1938. United States v. Standard Oil Co., 23 F. Supp. 937 (W.D. Wis. 1938), 87 U. PA. L. REV. 351 (1939), *aff'd sub nom. Ex parte* United States, 101 F.2d 870 (7th Cir.), *aff'd by equally divided Court sub nom.* United States v. Stone, 308 U.S. 519 (1939) (mandamus to lower court to set aside order dismissing the indictment).

12. See Orfield, *Judgment Notwithstanding the Verdict in Federal Criminal Cases*, 16 U. PITT. L. REV. 101, 107 (1955); 52 HARV. L. REV. 1358 (1939); 25 VA. L. REV. 987 (1939); 49 YALE L.J. 733 (1940).

13. See IOWA CODE ANN. § 788.1 (1950); OHIO REV. CODE ANN. § 2947.02 (Baldwin 1953). See also ORFIELD, *op. cit. supra*, note 4, c. 8.

14. See FED. R. CRIM. P. 33; MASS. ANN. LAWS c. 278, § 29 (1956); Mo. REV. STAT. §§ 547.020-.040 (1949). See also ORFIELD, *op. cit. supra* note 4, c. 8.

15. At common law . . . any objection which would have been fatal in demurrer was . . . equally fatal on . . . arrest of judgment. Judgment, however, can only be arrested for matter appearing on the record . . . not confined to the indictment alone, as it obtains if any part of the record is imperfect, repugnant or vicious.

3 WHARTON, CRIMINAL PROCEDURE § 1692, at 2127-28 (10th ed. 1918). See also CAL. PEN. CODE § 1185 (Supp. 1955).

16. *Ibid.*

in arrest of judgment may be made.[17] In the absence of statutory authority, they do not lie for the purpose of reviewing the evidence.[18] Therefore, unless the statute specifically provides, the trial court may not rule upon the sufficiency of the evidence when hearing a motion in arrest of judgment.

The purpose of the motion for a new trial is to provide an opportunity after verdict for the trial court to review the sufficiency of the evidence, to review the proceedings for error, and in the light of new evidence, or, if overruled, to lay a foundation for an appeal.[19] State statutes specify whether the motion must rest on specific grounds,[20] or may lie "when it shall appear to the court that justice has not been done. . . ."[21] In the majority of states a sustained motion for a new trial sets aside the verdict and provides for a re-examination of the issue by the court and another jury.[22] Some states make exceptions to this rule and provide in their "new trial" statute for modification of the judgment by the trial court when ruling upon a motion for a new trial.[23] Such an exception is commensurate to the lower court's action in the principal case which, however, was decided in a state without a modification statute.[24]

The few cases which have considered the problem of the trial judge's power to modify a verdict are not in harmony.[25] Jurisdictions holding that the power exists in the trial judge do so on the theory that a verdict of guilty of the greater offense necessarily includes a conviction

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17. See IOWA CODE ANN. § 788.1 (1950), 14 IOWA L. REV. 499 (1929); OHIO REV. CODE ANN. § 2947.02 (Baldwin 1953).

18. A recent Missouri case has pointed this up vividly. In State v. Pottinger, 287 S.W.2d 782 (Mo. 1956), the court, acting on its own motion, set aside the verdict on the ground of insufficiency of evidence, thereby acquitting the defendant. The state was not allowed to appeal from the acquittal. However, the Supreme Court of Missouri in dicta pointed out that if it had had to decide the point of the acquittal on the grounds stated, it would have ruled the trial court's action in setting aside the verdict error, on the basis that the only grounds for arrest of judgment in Missouri are clearly set out in MO. SUP. CT. RULE 27.22, and insufficiency of evidence is not an allowable ground. See also State v. Ferguson, 165 Tenn. 61, 52 S.W.2d 140 (1932); Berger v. State, 179 Md. 410, 20 A.2d 146 (1941).

In Commonwealth v. Heller, 147 Pa. Super. 68, 24 A.2d 460 (1942), it was held that the state statute did not allow arrest of judgment for insufficiency of evidence. Pennsylvania statutes have since been altered to allow arrest of judgment on this ground. PA. STAT. ANN. tit. 19, § 871 (Supp. 1956).

19. ORFIELD, *op. cit. supra* note 4, at 498.

20. See IOWA CODE ANN. § 787.3 (1950); MO. REV. STAT. § 547.020 (1949).

21. FED. R. CRIM. P. 33; MASS. ANN. LAWS c. 278, § 29 (Supp. 1954); MICH. STAT. ANN. § 28.1098 (1954).

22. See MO. REV. STAT. § 547.010 (1949); TEX. CODE CRIM. PROC. ANN. art. 751 (1950).

23. CAL. PEN. CODE § 1181 (1949); FLA. STAT. ANN. § 920.06 (1947); OHIO REV. STAT. ANN. tit. 29, § 2945.79 (Baldwin 1953).

24. State v. Odom, 292 S.W.2d 23 (Tenn. 1956).

25. PUTTKAMMER, ADMINISTRATION OF CRIMINAL LAW 214 n.2 (1953); 15 CAL. L. REV. 531 (1927).

of all the lesser included offenses.[26] Thus, in ruling on the sufficiency of the evidence the trial judge may find that the evidence fails to sustain the conviction of the greater offense, but is sufficient to support a conviction of a lesser crime. Since the jury necessarily found the elements of the lesser crime present by their finding that the elements of the greater offense were present, the modification is not thought to be an encroachment on the province of the jury in determining the facts. This view gives the trial judge power after verdict analogous to that which he exercises in ruling on the legal sufficiency of the evidence prior to submission of the case to the jury.[27] On the other hand, the cases in agreement with the principal case have denied the trial court this power by holding such to be an encroachment on the right of the jury to determine the degree of the crime committed.[28] It should be noted, however, that the trial judge and not the jury is to determine the sufficiency of the evidence.

The lack of appellate rulings on this point could stem from prosecutors' distaste for further trial after a conviction has been obtained, albeit lesser in degree, or from a failure of the trial judge to recognize such a power. Whatever the reason may be, the vast number of new trials granted hints to the need for reform in this area.[29] It is evident that generally the present practice is to allow the trial judge broader power in ruling on the sufficiency of the evidence prior to submitting the case to the jury than after rendition of the verdict. This is particularly evident in the area of verdict modification: prior to submission to the jury the court may direct the verdict or limit the scope of the jury's determination through instructions, but after verdict the only power of the trial judge on a finding of legal insufficiency of the evidence is to grant a new trial.[30] It is submitted that the power of the trial judge to modify the verdict on a finding of insufficiency of evidence should logically follow from his pre-submission control over

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26. United States v. Linnier, 125 Fed. 83 (C.C.D. Neb. 1903); Simpson v. State, 56 Ark. 8, 19 S.W. 99 (1892); People v. Sugarman, 80 Cal. App. 321, 251 Pac. 949 (1926); State v. Keasling, 74 Iowa 528, 38 N.W. 397 (1888); Commonwealth v. Clifford, 254 Mass. 390, 150 N.E. 181 (1926) (the jury returned a verdict for a greater crime than charged); Commonwealth v. Mahar, 74 Mass. (8 Gray) 469 (1857) (trial court modified on hearing of a motion for arrest of judgment). *Cf.* State v. Schele, 52 Iowa 608, 3 N.W. 632 (1879).

27. See text supported by notes 3-10 *supra*.

28. People v. Superior Court, 202 Cal. 165, 259 Pac. 943 (1927) (excess of jurisdiction); State v. Symes, 17 Wash. 596, 50 Pac. 487 (1897) (exceeded jurisdiction); State v. Odom, 292 S.W.2d 23 (Tenn. 1956) (excess of authority, court also held that the state had a right for the jury to determine the sentence); State v. Howard, 19 Kan. 507 (1878) (lower court had modified to a crime not included in the indictment, but court dictum to the effect that the trial court had no power to modify for insufficiency of evidence).

29. See ORFIELD, *op. cit. supra* note 4, at 510-13.

30. Commonwealth v. Heller, 147 Pa. Super. 68, 24 A.2d 460 (1942) (prior to statutory change, see note 14 *supra*); State v. Ferguson, 165 Tenn. 61, 52 S.W.2d 140 (1932). See also State v. Pottinger, 287 S.W.2d 782 (Mo. 1956).

the verdict. Such an extension of power would eliminate many costly new trials, lengthy appeals, and other injustices to the state and the defendant.[31] Thus, it is submitted that, rather than follow the procedure of the principal case, adoption by the courts and/or legislatures of any procedure which would obtain these advantages would be a step forward in the administration of criminal justice.

JURISDICTION—FEDERAL-STATE CONFLICT—RIGHT TO EXHAUST PRIOR JURISDICTION

Strand v. Schmittroth, 233 F.2d 598 (9th Cir. 1956)

Petitioner was arrested while he was on probation from a federal district court and was being held for prosecution by state authorities. He petitioned the district court from which he was on probation for a writ of habeas corpus, alleging that since he was a federal probationer the state had no authority to proceed against him. The writ was issued and petitioner released. The court of appeals affirmed, stating that the issuance of the writ by the district court constituted an objection to state invasion of federal jurisdiction.[1]

It is well established that in criminal prosecutions a court has jurisdiction over the accused when he is before the court regardless of how his presence was secured.[2] Equally well established is the principle that in granting bail, parole, or probation, a sovereignty does not lose legal custody of the person.[3] Thus, a conflict may arise, as in the principal case, where a court of one sovereignty acquires physical custody of an individual while he is in legal custody of another sovereignty. It is generally stated that such a conflict between sovereignties is to be resolved by an application of the rule of comity[4] which provides that the sovereignty first acquiring jurisdiction *(S-1)* over a person has the right to exhaust its jurisdiction before a second sovereignty *(S-2)* may proceed against that person.[5] In the leading case of

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31. For such a suggestion, see MODEL PENAL CODE § 6.11 and comment (Draft No. 2, 1954) (limiting reduction to cases of an unduly harsh character).

1. Strand v. Schmittroth, 233 F.2d 598 (9th Cir. 1956), *rehearing denied*, 235 F.2d 756, *denial of rehearing vacated*, Letter from Laughlin E. Waters to Harold L. Satz, October 9, 1956.

2. Frisbie v. Collins, 342 U.S. 519 (1952); Mahon v. Justice, 127 U.S. 700 (1888); Ker v. Illinois, 119 U.S. 436 (1886).

3. Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 373 (1872) (bail); United States *ex rel.* Lombardo v. McDonnell, 153 F.2d 919, 920 (7th Cir. 1946) (parole); Grant v. Guernsey, 63 F.2d 163 (10th Cir. 1933) (probation).

4. Ponzi v. Fessenden, 258 U.S. 254 (1922); United States v. Marrin, 227 Fed. 314, 318 (E.D. Pa. 1915).

5. Ponzi v. Fessenden, 258 U.S. 254 (1922); Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 370 (1872). The doctrine has been extended to jurisdiction over property. Covell v. Heyman, 111 U.S. 176, 180 (1884). This principle applies whether the *S-1* sovereign is a state or the federal government. Covell v. Heyman, *supra*;