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CRIMINAL LAW AND PROCEDURE - REMEDIES AVAILABLE TO CONVICTED DEFENDANT WHEN NEW FACTS ARE FOUND

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COMMENTS

CRIMINAL LAW AND PROCEDURE — REMEDIES AVAILABLE TO CONVICTED DEFENDANT WHEN NEW FACTS ARE FOUND — Due to its haphazard growth and evolution, the Anglo-American system of jurisprudence occasionally left gaping defects in its general contours. Many of these defects have been and are being filled, both by statute and by the continuing development of the common law.[1] However, there is one case which re-occurs with distressing frequency where no satisfactory remedy has been developed and where this lack of remedy can have unjust or even barbaric results.[2] Briefly the situation is this:

John Doe is convicted of murder and placed in the penitentiary to serve his sentence or to await execution, as the case may be. The statutory time within which appeal or motion for a new trial is allowed has expired. Then it comes to light that beyond the shadow of a doubt Richard Roe committed the crime of which John Doe was convicted, or that no such crime was committed, or that John Doe's conviction was based on perjured testimony.[3] What relief can be afforded by judicial process?

For centuries it seems to have been assumed that there was no

[1] Examples of this, if they need be given at all, are Lord Campbell's Act and the recent common-law development of the right of privacy.

[2] Another instance of an inhuman rule of law was found in Ashford v. Thornton, 1 B. & Ald. 405, 106 Eng. Rep. 149 (1818), where the court held the right to trial by battle was still a part of the English law. Parliament immediately corrected this by statute. See Orfield, "History of Criminal Appeal in England," 1 Mo. L. REV. 326 (1936), where the author raises the question whether trial by battle exists in America.

[3] In State ex rel. Chafin v. Bailey, 106 W. Va. 32, 144 S. E. 574 (1928), mandamus was allowed to compel the trial court to sentence a man to hang, even though he had been convicted on perjured testimony.

method by which the verdict of a jury, having once become final, might be set aside.[4] Blackstone concurred in this opinion,[5] and more modern writers have taken the same position.[6] It is the purpose of the present discussion to re-examine this premise as it relates to the specific problem which was set forth above, and to consider the possible methods by which relief can be granted to a defendant unjustly convicted of a crime when his remedy by motion or appeal has become barred by statutory limitations.

I.

In many cases where an unjust conviction has taken place and where the state courts have refused or have been unable to grant relief, the federal courts have intervened by use of the writ of habeas corpus.[7] The federal courts are reluctant to interfere with the judicial process of a state and will do so only in cases of exceptional circumstances of peculiar urgency.[8] The most striking case to be found illustrative of this situation is that of *Jones v. Commonwealth.*[9] In this case the

[4] There did exist a process to impeach a verdict, viz., a writ of attaint. This was a process by which the jurors were convicted of perjury and subjected to drastic punishments. 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 306-307 (1883), says that the writ existed at the suit of the king but not at the suit of the party. The reason seems to have been that in the early days a jury was allowed only with the consent of the defendant and if attaint were allowed in favor of the defendant he would be blackening his own witnesses. Thus the writ of attaint was never used in criminal cases unless the defendant were acquitted. Orfield, "History of Criminal Appeal in England," 1 MO. L. REV.. 326 (1936).

[5] ". . . there being no method of reversing an error in the determination of *facts*, but by an attaint, or a new trial, to correct the mistakes of the former verdict." 3 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 406 (1768).

[6] "It is a much more important circumstance that no provision whatever is made for questioning the decision of a jury on matters of fact. However unsatisfactory such a verdict may be, whatever facts may be discovered after the trial, which if known at the trial would have altered the result, no means are at present provided by law by which a verdict can be reversed. All that can be done in such a case is to apply to the Queen through the Secretary of State for the Home Department for a pardon for the person supposed to have been wrongly convicted.

"This is one of the greatest defects in our whole system of criminal procedure. To pardon a man on the ground of innocence is in itself, to say the least, an exceedingly clumsy mode of procedure. . . ." 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 312-313 (1883).

[7] For an able discussion of the jurisdictional questions which arise, see 35 COL. L. REV. 404 (1935). In general, see: Williams, "Federal Habeas Corpus," 9 ST. LOUIS L. REV. 250 (1924); Dobie, "Habeas Corpus in the Federal Courts," 13 VA. L. REV. 433 (1927).

[8] Reed v. Madden, (C. C. A. 8th, 1937) 87 F. (2d) 846.

[9] 267 Ky. 465, 102 S. W. (2d) 345 (1936); Id., 269 Ky. 772, 108 S. W. (2d) 812 (1937); Id., 269 Ky. 779, 108 S. W. (2d) 816 (1937); Id., (C. C. A. 6th, 1938) 97 F. (2d) 335. The complete history of the case is found in Miller, "State and Federal Administration of Criminal Justice—Tom Jones v. The Commonwealth of Kentucky," 2 KY. S. B. J., No. 4, p. 12 (1938).

defendant was indicted for murder. Counsel was appointed by the court on Friday and conviction took place on Monday. Appeal was taken to the highest court in the state on the ground that defendant was denied due process in that his counsel did not have enough time to prepare for trial. The conviction was affirmed.[10] Subsequently it developed that defendant was convicted on perjured testimony. The chief executive of the state refused a pardon at noon of the day set for execution. The same afternoon application was made to the federal district court for habeas corpus. That court granted a temporary stay of execution and directed defendant to exhaust his remedies in the state courts.[11] Pursuant to this order defendant filed separate petitions for habeas corpus in the Kentucky Court of Appeals, and for coram nobis in the trial court. The denial of the latter petition was appealed and the Court of Appeals denied both petitions.[12] The district court then certified the case to the circuit court of appeals. That court said that it was clear that no remedy existed in the state courts and ordered defendant discharged on the ground that the lack of time for his attorney to prepare for trial was a denial of "due process," and that as a result thereof defendant was being held contrary to the Constitution of the United States.[13] However, in its opinion the court laid great emphasis on the fact that perjured testimony convicted defendant.

This case illustrates all of the elements involved in an appeal to a federal court for habeas corpus to secure release from state custody. The doctrine of comity is enforced by the requirement that the remedies in the state courts must have been exhausted before the federal court will grant relief.[14] Thus the *Jones* case differs from the famous *Mooney* case[15] in that the writ of habeas corpus was denied in the *Mooney* case on grounds of comity because it was not shown that habeas corpus was not available in the state courts, while the petitioner in the *Jones* case showed that no remedy was available in the state courts.[16] In addition to the requirement of exhaustion of remedies, the federal courts refuse

[10] Jones v. Commonwealth, 267 Ky. 465, 102 S. W. (2d) 345 (1936).

[11] The opinion was not reported.

[12] Jones v. Commonwealth, 269 Ky. 772, 108 S. W. (2d) 812 (1937); Id., 269 Ky. 779, 108 S. W. (2d) 816 (1937).

[13] Jones v. Commonwealth of Kentucky, (C. C. A. 6th, 1938) 97 F. (2d) 335.

[14] Frank v. Mangum, 237 U. S. 309, 35 S. Ct. 582 (1915); Moore v. Dempsey, 261 U. S. 86, 43 S. Ct. 265 (1923); Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340 (1935); Stephenson v. Daly, (D. C. Ind. 1927) 21 F. (2d) 625; Hall v. People of State of California, (C. C. A. 9th, 1935) 79 F. (2d) 132.

[15] Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340 (1935).

[16] When the writ of habeas corpus is denied in the highest court in the state, the proper procedure is a petition for habeas corpus to the federal district court and not certiorari to the United States Supreme Court. Hale v. Crawford, (C. C. A. 1st, 1933) 65 F. (2d) 739.

to intervene unless it is necessary to do so in order to protect constitutional rights.[17] Instances of federal intervention on the ground that "due process" was violated in defendant's conviction are: where defendant's counsel did not have ample time to prepare for trial; [18] where defendant was convicted without benefit of counsel; [19] where the presiding judge had a pecuniary interest in the fine which defendant was sentenced to pay; [20] and where trial in the state court was a mere pretense, as where it was dominated by fear of mob violence.[21] Habeas corpus has been held not competent to raise the question of double jeopardy in the federal courts.[22] On the other hand the federal courts have intervened to prevent trial in the state court when such trial would be in violation of defendant's constitutional rights.[23]

Whether or not the federal courts will extend the scope of "due process" to cover all cases where defendant's conviction was based on perjured testimony and no state remedy is available remains to be seen. The *Jones* case contains some indication that such a result is entirely possible.[24] As yet there has been no indication that the "due process" concept will be broadened to include cases where another person confesses the crime after defendant's conviction.

In those cases where a constitutional issue can be raised, habeas corpus is an adequate remedy. Theoretically it is available in the state courts but, as the *Jones* case illustrates, the federal courts are more liberal than the state courts in granting the writ. At any rate the federal courts, by their intervention in these cases, have indicated that they will insist that the states formulate some remedial process to give relief in these situations.

2.

Where no federal questions can be raised, one possible escape for the convicted criminal is to apply in the state court for the common-law

[17] People of State of Illinois ex rel. Cusick v. Whipp, (C. C. A. 7th, 1934) 73 F. (2d) 254, cert. den. 293 U. S. 623, 55 S. Ct. 240 (1934).

[18] Jones v. Commonwealth of Kentucky, (C. C. A. 6th, 1938) 97 F. (2d) 335; Downer v. Dunaway, (D. C. Ga. 1932) 1 F. Supp. 1001; Downer v. Dunaway, (C. C. A. 5th, 1931) 53 F. (2d) 586.

[19] Johnson v. Zerbst, 303 U. S. 629, 58 S. Ct. 610 (1938); Howard v. Dowd, (D. C. Ind. 1938) 25 F. Supp. 844.

[20] Tumey v. Ohio, 273 U. S. 510, 47 S. Ct. 437 (1927); Ex parte Baer, (D. C. Ky. 1927) 20 F. (2d) 912.

[21] Ex parte Sharp, (D. C. Kan. 1940) 33 F. Supp. 464; Moore v. Dempsey, 261 U. S. 86, 43 S. Ct. 265 (1923).

[22] Phillips v. McCauley, (C. C. A. 9th, 1937) 92 F. (2d) 790.

[23] United States ex rel. Buchalter v. Lowenthal, (C. C. A. 2d, 1940) 108 F. (2d) 863; Ex parte Royall, 117 U. S. 241, 6 S. Ct. 734 (1886).

[24] Jones v. Commonwealth of Kentucky, (C. C. A. 6th, 1938) 97 F. (2d) 335.

writ of error coram nobis,[25] about which much has been written in recent years.[26] Despite the revived interest in the writ it is still a little-known process.[27] The writ of error coram nobis was an extraordinary common-law writ that lay to correct errors of fact not apparent in the record[28] which, had they been known, would have prevented judgment.[29] Though called a writ of error, the petition was always to the trial court.[30] The statutory limitations as to time within which appeals may

[25] In so far as the writer has been able to determine, Fitzherbert made no mention of this writ. FITZHERBERT, NATURA BREVIUM, 9th ed. (1794). Blackstone also omitted any reference to it, but his English annotator, Couch, included a discussion of the writ. There it is said that if the cause were in the King's Bench the writ was coram nobis, "before us," and if it were in the common pleas the writ was coram vobis, "before you." 3 BLACKSTONE, COMMENTARIES, Wendell ed., 407, note 3 (1854); 3 BLACKSTONE, COMMENTARIES, 4th ed. (Andrews-Cooley), 406, note 2 (1899). The terms are now used indiscriminately by the American cases. Johnson v. Straus Saddlery Co., 2 Ala. App. 300, 56 So. 755 (1911); Breckinridge v. Coleman, 7 B. Mon. (46 Ky.) 331 (1847); Thornton, "Coram Nobis et Coram Vobis," 5 IND. L. J. 603 (1930).

[26] Orfield, "The Writ of Error Coram Nobis in Civil Practice," 20 VA. L. REV. 423 (1933); Farley, "Coram Nobis—Another View," 6 MISS. L. J. 327 (1934); 20 ST. LOUIS L. REV. 241 (1935); 10 NEB. L. BULL. 314 (1932), reprinted in 8 IND. L. J. 247 (1933); 11 WIS. L. REV. 248 (1936); Thornton, "Coram Nobis et Coram Vobis," 5 IND. L. J. 603 (1930). These writers have ably classified the jurisdictions where the writ has been held to exist and those where its existence has been denied.

[27] In Jones v. Commonwealth, 269 Ky. 772, 108 S. W. (2d) 812 (1937), application for coram nobis was made. The venerable justice to whom the matter was referred is reputed to have remarked to another member of the Kentucky Court of Appeals: "Now here's some fool that's come at me for a writ of habus nobus; now what is a habus nobus?"

[28] When the error does appear on the face of the record, the writ will not lie even though the judgment would not have been rendered save for the error in fact. Howard v. State, 58 Ark. 229, 24 S. W. 8 (1893); Bronson v. Schulton, 104 U. S. 410 (1881); Pickett's Heirs v. Legerwood, 7 Pet. (32 U. S.) 144 (1833); Adler v. State, 35 Ark. 517 (1881); Crawford v. Williams, 1 Swan. (31 Tenn.) 341 (1851).

[29] As when the defendant was a minor and had not been represented by guardian, or where a party was under coveture and her husband was not a party to the proceedings, or where a party died before judgment. 2 BLACKSTONE, COMMENTARIES, 4th ed., (Andrews-Cooley), 406, note 2 (1899).

[30] 2 BLACKSTONE, COMMENTARIES, 4th ed. (Andrews-Cooley), 406, note 2 (1899). This is the modern American rule. But when the judgment has been affirmed on appeal, query, does the writ lie in the trial court or in the appellate court? Cases holding that in such circumstances the writ no longer lies in the trial court are: Latham v. Hodges, 35 N. C. 267 (1852); Partlow v. State, 194 Ind. 172, 141 N. E. 513 (1923); People v. Reid, 195 Cal. 249, 232 P. 457 (1924); Jones v. Commonwealth, 269 Ky. 772, 108 S. W. (2d) 812 (1937); Boyd v. Smyth, 200 Iowa 687, 205 N. W. 522 (1925); Lambell v. Pretty John, 2 Strange 690, 93 Eng. Rep. 786 (1726); Strang v. United States, (C. C. A. 5th, 1932) 53 F. (2d) 820. The opposite is held in Buckler v. State, 173 Miss. 350, 161 So. 683 (1935). The minority view

be taken or motions made do not apply to the writ of coram nobis.[31] The writ presently exists in all jurisdictions unless abolished by statute.[32] It is available in criminal cases.[33]

From this general sketch it would appear that coram nobis is an adequate means of affording relief to the unhappy John Doe in the hypothetical set of facts. Unfortunately this is not the case. The American courts have engrafted so many conditions upon the availability of the common-law writ that its usefulness is all but destroyed. First among these conditions is the requirement that the petitioner must have no other adequate remedy available.[34] Since the writ is an extraordinary common-law writ, this requisite is historically and theoretically sound. But its variations are not so sound. For example: the writ may not be available if petitioner first elects another proceeding, such as a motion or certiorari, and fails,[35] or if he negligently failed to avail himself of a remedy which once existed, such as motion for a new trial, and which existed after the "fact arising subsequent to judgment" was known to petitioner but which is now barred by statutory limitations.[36]

would seem to be the sounder, for it is difficult to see how an affirmance rises higher than the judgment affirmed, or how the writ can lie in an appellate court, which is ordinarily bound by the trial court's determination of facts. Occasionally the rule is stated to be that the writ does not lie in a court in which there is no record of the case. Roughton v. Brown, 8 Jones L. (53 N. C.) 393 (1861); United States v. Plumer, (C. C. Mass. 1859) 3 Cliff. 28.

[31] Smith v. Kingsley, 19 Wend. (N. Y.) 620 (1838); Strode v. Stafford Justices, (C. C. Va. 1810) 1 Marsh. 162, 23 F. Cas. No. 13,537; Powell v. Gott, 13 Mo. 458 (1850); Parkinson & Sevier v. Waldron, Thomas & Co., 7 S. & M. (15 Miss.) 189 (1846); Scott v. Rees, 300 Mo. 123, 253 S. W. 998 (1923). There is slight authority contra, viz., Jeffery v. Fitch, 46 Conn. 601 (1879); Weaver v. Shaw, 5 Tex. 286 (1849).

[32] Orfield, "The Writ of Error Coram Nobis in Civil Practice," 20 VA. L. REV. 423 (1934). Even where abolished by statute the courts refer to the common-law practice with respect to the writ in applying the statutory remedy. Mitchell v. King, 187 Ill. 452, 55 N. E. 637, 58 N. E. 310 (1900).

[33] 10 NEB. L. BULL. 314 (1932). In 2 R. C. L. 305 (1914) it is stated that the writ of coram nobis is common in civil cases and rare in criminal cases. The exact opposite is sometimes asserted. Thornton, "Coram Nobis et Coram Vobis," 5 IND. L. J. 603 (1930). Neither statement seems accurate. A few cases flatly state that the writ is not available in criminal cases. Commonwealth v. Phelan, 271 Mass. 21, 171 N. E. 53 (1930); Hendricks v. State, 122 Tex. Cr. 429, 55 S. W. (2d) 839 (1933).

[34] Stephenson v. State, 205 Ind. 141, 179 N. E. 633, 186 N. E. 293 (1932); Asbell v. State, 62 Kan. 209, 61 P. 690 (1900); Dobbs v. State, 63 Kan. 321, 65 P. 658 (1901); Kuhn v. State, 98 Fla. 206, 123 So. 755 (1927).

[35] McKindley v. Buck, 43 Ill. 488 (1867); Second Ward Bank v. Upman, 14 Wis. 648 (1861); Welsh v. Harman, 8 Yerg. (16 Tenn.) 103 (1835).

[36] People v. Paysen, 123 Cal. App. 396, 11 P. (2d) 431 (1932); State ex rel. Mitchell v. Swindall, 33 Okla. Cr. 210, 241 P. 456 (1926); State ex rel. Attorney General v. Hurst, 59 Okla. Cr. 220, 57 P. (2d) 666 (1936); George v. State, 211 Ind. 429, 6 N. E. (2d) 336 (1937).

While this limitation may be necessary to prevent a deluge of petitions for coram nobis descending upon the court, still the result, which allows a man to hang because of his attorney's negligence, seems a bit drastic. A further limitation is that the writ will not lie for newly discovered evidence,[37] nor will it lie where the testimony upon which the conviction was based was perjured.[38] The latter holding may be justified because a court may be unable to determine whether testimony was perjured at the first trial or at the coram nobis hearing, but the limitation in regard to new evidence, if carried to its logical conclusion, would render the writ utterly worthless. Any error of factual determination must be proved by "new evidence" or it cannot be proved at all. And in view of the further limitation that the writ does not lie when the alleged fact that renders the judgment erroneous was or could have been litigated on the first trial,[39] the absurdity of the rule strikes home. The situation is: if the fact could have been litigated at the first trial, the writ does not lie; if it is new evidence, the writ does not lie. This logic would seem to take care of all the cases, ergo, the writ would never lie, which would be a near truth.

But the courts have avoided such logical extremes and there are specific instances where the writ has been held to lie.[40] Among these are

[37] Howard v. State, 58 Ark. 229, 24 S. W. 8 (1893); Wilson v. State, 46 Wash. 416, 90 P. 257 (1907); Carraway v. State, 163 Miss. 639, 141 So. 342 (1932); People v. Hanks, 35 Cal. App. (2d) 290, 95 P. (2d) 478 (1939); Jones v. Commonwealth, 269 Ky. 772, 108 S. W. (2d) 812 (1937); Robertson v. Commonwealth, 279 Ky. 762, 132 S. W. (2d) 69 (1939). The Indiana court takes a contrary position where the new evidence is clear and decisive. George v. State, 211 Ind. 429, 6 N. E. (2d) 336 (1937); Davis v. State, 200 Ind. 88, 161 N. E. 375 (1928); Shock v. State, 200 Ind. 469, 164 N. E. 625 (1929); Kleihege v. State, (Ind. 1931) 177 N. E. 60.

[38] State ex rel. Davis v. Superior Court of Pierce County, 15 Wash. 339, 46 P. 399 (1896); People v. Mooney, 178 Cal. 525, 174 P. 325 (1918), certiorari denied, sub nom. Mooney v. California, 248 U. S. 579, 39 S. Ct. 21 (1918); People v. Black, 89 Cal. App. 219, 264 P. 343 (1928); Keane v. State, 164 Md. 685, 166 A. 410 (1933); Skipper v. State, 128 Fla. 362, 174 So. 863 (1937); Jones v. Commonwealth, 269 Ky. 772, 108 S. W. (2d) 812 (1937); Robertson v. Commonwealth, 279 Ky. 762, 132 S. W. (2d) 69 (1939). Dictum to the contrary is found in Skipper v. Schumacher, 124 Fla. 384, 169 So. 58 (1936).

[39] Humphreys v. State, 129 Wash. 309, 224 P. 937 (1924). See also cases cited in note 37, supra. In those cases a frequent reason given for denying the writ where the conviction was on perjured testimony is that that was in issue on the first trial. This limitation is often stated in dicta, but apparently no case denies relief on this ground alone. The denial of relief because petitioner failed to avail himself of a once-existing and adequate remedy (see cases cited in note 36, supra) is a very similar limitation.

[40] Many civil cases are found in which the court allowed the writ. These are collected by Orfield, "The Writ of Error Coram Nobis in Civil Practice," 20 VA. L. REV. 423 (1934). But before the courts are condemned for their greater liberality in

situations where a plea of guilty was entered under duress,[41] or where petitioner entered a plea of guilty because he feared mob violence.[42] On the other hand, the allegation that the crime of which petitioner was convicted was committed in another state was held not to be a basis for the writ.[43] Likewise the writ has been denied where another confessed the crime.[44]

It will be seen that these cases do not check with the technical requirements which are announced by the courts. The only rule stated by the courts which seems to be reasonably accurate is that the petition for coram nobis is addressed to the discretion of the court.[45] Under this rule it is possible to rationalize all of the limitations which have been imposed upon the writ. On the whole it is impossible satisfactorily to reconcile the criminal cases involving coram nobis. The courts seem to grant the writ when the petitioner convinces them of his innocence, or of the unjustness of his conviction, regardless of technicalities. They refuse the writ when not convinced of petitioner's innocence, but assign as reasons for their refusal the various technical limitations to which the writ has become subject. On the whole, however, coram nobis is too uncertain, and subject to too many technicalities to be a dependable and adequate remedy in the situation under consideration.

3.

Among the early writs of the common law was the writ of audita querela, "having heard the complaint." This was a writ in the nature

civil cases, where property and not life is at stake, it should be remembered that apparently at old English common law the writ lay only in civil cases. Blackstone's annotators [2 BLACKSTONE, COMMENTARIES, 4th ed. (Andrews-Cooley), 406, note 2 (1899)] in their specific examples of cases list only civil cases. And if the writ had existed, surely Stephen would not have written the passage quoted in note 6, supra.

So it appears that notwithstanding the arbitrary limitations which the American courts have imposed upon the writ, still on the whole its scope was broadened by allowing it at all in criminal cases.

[41] State v. Hudspeth, 191 Ark. 963, 88 S. W. (2d) 858 (1936); Chambers v. State, 123 Fla. 734, 167 So. 697 (1936); Rhodes v. State, 199 Ind. 183, 156 N. E. 389 (1927).

[42] Sanders v. State, 85 Ind. 318 (1882), followed in State v. Calhoun, 50 Kan. 523, 32 P. 38 (1893). As pointed out in the preceding section, mob domination of the trial is also a ground for habeas corpus.

[43] Bass v. State, 191 Ark. 860, 88 S. W. (2d) 74 (1936).

[44] George v. State, 211 Ind. 429, 6 N. E. (2d) 336 (1937); Smith v. State, 200 Ark. 767, 140 S. W. (2d) 675 (1940); Howard v. State, 58 Ark. 229, 24 S. W. 8 (1893); Robertson v. Commonwealth, 279 Ky. 762, 132 S. W. (2d) 69 (1939).

[45] State v. Wagner, 232 Wis. 138, 286 N. W. 544 (1940); Grandbouche v. People, 104 Colo. 175, 89 P. (2d) 577 (1939); McCall v. State, 136 Fla. 349, 186 So. 803 (1939); Higbie v. Comstock, 1 Denio (N. Y.) 652 (1845); Lupfer v. Carlton for use of Board of Public Instruction of Dade County, (C. C. A. 5th, 1933) 64 F. (2d) 272.

of a bill in equity.[46] Holdsworth indicates that application for this writ can be made either to the court of chancery for an injunction, or by motion to the court in which the judgment had been rendered.[47] The writ lay to relieve the defendant from the adverse judgment of a previous action where good matter of discharge arose subsequent to judgment.[48] It is interesting to note that in Blackstone's time the writ had become obsolete in England.[49]

Although the authorities do not expressly exclude the writ from criminal cases, yet both Blackstone[50] and Fitzherbert[51] seem to have assumed that it lay only in civil cases. Despite Blackstone's statement to the effect that the writ was obsolete, many American cases involving it are found in the books,[52] but no American criminal case is found in which the writ was allowed. It has been said that the writ does not lie against the United States[53] nor against a state.[54] These barriers would seem to eliminate the writ of audita querela as a remedy in the hypothetical situation, nor does it seem that it would be of any practical value even if allowed, for the reason that it is difficult to conceive of matter arising subsequent to judgment which would operate as a complete discharge from a criminal conviction.[55]

The distinction between the old common-law writs of coram nobis and audita querela were that the former lay to correct errors of fact existing but unknown to the court when judgment was rendered and

[46] 3 BLACKSTONE, COMMENTARIES, 406 (1768); 1 FITZHERBERT, NATURA BREVIUM, 9th ed., 102 (1794).

[47] 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW, 3d ed., 224-225 (1922).

[48] 3 BLACKSTONE, COMMENTARIES 406 (1768); 1 FITZHERBERT, NATURA BREVIUM, 9th ed., 102 (1794).

[49] 3 BLACKSTONE, COMMENTARIES 406 (1768).

[50] Id.

[51] 1 FITZHERBERT, NATURA BREVIUM, 9th ed., 102 (1794).

[52] Eureka Casualty Co. v. Municipal Court of City of Los Angeles, 136 Cal. App. 195, 261, 28 P. (2d) 708, 709 (1934); Baker v. Penecost, 171 Tenn. 529, 106 S. W. (2d) 220 (1937); Handley v. Moberg, 266 Ill. App. 356 (1932); State ex rel. Gary Realty Co. v. Hall, 322 Mo. 1118, 17 S. W. (2d) 935 (1929); Luparrelli v. United States Fire Ins. Co., 117 N. J. L. 342, 188 A. 451 (1937); Louis E. Bower, Inc. v. Silverstein, 298 Ill. App. 145, 18 N. E. (2d) 385 (1939).

[53] Avery v. United States, 12 Wall. (79 U. S.) 304 (1870).

[54] Commonwealth v. Berger, 8 Phil. (Pa.) 237 (1871).

[55] An executive pardon would probably fill the bill, but it is not likely that it will be necessary to resort to this writ to enforce a pardon. A subsequent confession of the commission of the crime by a third party is a fact arising subsequent to judgment only if the confession itself is regarded as the fact and not as evidence of a fact, viz., the commission of the crime by a third party. Even if the former position is taken, query, does the confession operate as a complete discharge? Proof that no crime had been committed would not be such a fact, for the reason that the nonexistence of a crime would be a fact existing when judgment was rendered and was even in issue at the trial.

lay only at law,[56] while the latter writ lay to bring before the court good matter of discharge arising subsequent to the judgment and existed both at law and in equity.[57] It is doubtful, however, if this distinction will be followed. A recent Kentucky case, *Robertson v. Commonwealth*,[58] refuses to make any distinction. In that case petitioner had been convicted of a crime to which another person subsequently made a full confession which completely exonerated petitioner. The petition was to the chancellor for coram nobis or audita querela. The petition was denied on the merits but no objection was made to the procedure. This case has many implications. Among them are: audita querela lies in criminal cases and it lies before the chancellor as well as at law. If the case is followed to the extent of allowing audita querela in criminal cases, it may be that audita querela will prove to be a valuable remedy for the reason that it lies in equity and thus would probably be given a more liberal application than is now given by the courts to coram nobis.

Despite the technical criticism to which the Kentucky decision exposes itself, its result does not seem to be unreasonable. In effect the court has said that there exists a process by which the courts will, in a proper case, grant relief to one unjustly convicted of any crime,[59] and that the name with which the proceeding is entitled is immaterial.

In the light of the *Robertson* case, however, a brief outline of the limitations on audita querela is pertinent to this discussion. In general, these limitations are very similar to those imposed upon the writ of coram nobis. Audita querela is directed to the court which rendered the judgment;[60] if the matter relied upon should have been presented previously the court will not consider it,[61] but if there was no opportunity to raise such a defense the writ lies.[62] The common-law limitations on audita querela apply in the summary process of motion under modern practice,[63] although the older cases held it to be a regular

[56] 3 BLACKSTONE, COMMENTARIES, Wendell ed., 407, note 3 (1854).

[57] Supra, at notes 46 and 47.

[58] 279 Ky. 762, 132 S. W. (2d) 69 (1939).

[59] After reading the statement of facts one cannot help reaching the conclusion that in all probability the petitioner was actually guilty of the crime of which he was convicted.

[60] Eureka Casualty Co. v. Municipal Court of City of Los Angeles, 136 Cal. App. 195, 261, 28 P. (2d) 708, 709 (1934). This case says that grounds for the writ are "mistake, inadvertence, surprise, or excusable neglect."

[61] State ex rel. Gary Realty Co. v. Hall, 322 Mo. 1118, 17 S. W. (2d) 935 (1929).

[62] Louis E. Bower, Inc. v. Silverstein, 298 Ill. App. 145, 18 N. E. (2d) 385 (1939); Thatcher v. Gammond, 12 Mass. 268 (1815).

[63] Luparrelli v. United States Fire Ins. Co., 117 N. J. L. 342, 188 A. 451 (1937).

suit in which the parties appear and plead.[64] Like coram nobis the writ is not subject to statutory time limits.[65]

As pointed out above, the *Robertson* case indicates that relief can be granted by an equity court through either audita querela or coram nobis. The full significance of this can be better understood after a consideration of the attitude which courts of equity have taken in regard to the granting of relief in criminal cases.

4.

The use of the equitable injunction is another possible remedy.[66] As a case of first impression it would seem that this should be a most useful remedy. Unfortunately, the traditional doctrines of equity are to the contrary and the general rule is that equity will not enjoin criminal proceedings.[67] The reason commonly given is that equity can take jurisdiction only where property rights are involved, although occasionally the courts base the rule on the ground that equity cannot restrain the sovereign.[68] The latter ground is unsound when considered in the light of the fact that equity restrains criminal prosecutions in granting injunctions to protect property interests.[69] The

[64] Brooks v. Hunt, 17 Johns. (N. Y.) 484 (1820); Gleson v. Peck, 12 Vt. 56 (1840); Clark v. National Hydraulic Co., 12 Vt. 435 (1840); Avery v. United States, 12 Wall. (79 U. S.) 304 (1870).

[65] See cases collected in 7 C. J. S. 1278 (1937). *Contra:* Johnson v. Finn, 294 Ill. App. 616, 14 N. E. (2d) 240 (1938).

[66] See 40 HARV. L. REV. 781 (1927).

[67] The leading case is Ferguson v. Martineau, 115 Ark. 317, 171 S. W. 472 (1914), where the court refused to enjoin execution of one proved to have been insane at the time of his trial and conviction. Accord: State ex rel. Shafer v. Lowe, 54 N. D. 637, 210 N. W. 501 (1926); People v. Superior Court of City and County of San Francisco, 190 Cal. 624, 213 P. 945 (1923); Kelley & Co. v. Conner, 122 Tenn. 339, 123 S. W. 622 (1909); Littleton v. Burgess, 14 Wyo. 173, 82 P. 864 (1905); State v. Southern Ry., 145 N. C. 495, 59 S. E. 570 (1907); Pope v. Blanton, 299 U. S. 521, 57 S. Ct. 321 (1935).

[68] Hall v. Dunn, 52 Ore. 475, 97 P. 811 (1908).

[69] Standard Oil Co. of New Jersey v. Charlottesville, (C. C. A. 4th, 1930) 42 F. (2d) 88; Missouri Pacific R. R. v. Norwood, (D. C. Ark. 1930) 42 F. (2d) 765, affd. 283 U. S. 249, 51 S. Ct. 458 (1930); Stuart v. Utility Investing Corp., (C. C. A. 3d, 1935) 78 F. (2d) 279; Davidson v. Phelps, 214 Ala. 236, 107 So. 86 (1926); City of Douglas v. South Georgia Grocery Co., 178 Ga. 657, 174 S. E. 127 (1934); State ex rel. Fry v. Superior Court of Lake County, 205 Ind. 355, 186 N. E. 310 (1933); Knight v. Johns, 161 Miss. 519, 137 So. 509 (1931); Wellston Kennel Club v. Castlen, 331 Mo. 798, 55 S. W. (2d) 288 (1933); Woolf v. Fuller, 87 N. H. 64, 174 A. 193 (1934); Mills Novelty Co. v. Sunderman, 266 N. Y. 32, 193 N. E. 541 (1935); Henderson v. Henderson, 156 Tenn. 430, 1 S. W. (2d) 526 (1928); Ex parte Sterling, 122 Tex. 108, 53 S. W. (2d) 294 (1932); Sentinel-News Co. v. City of Milwaukee, 212 Wis. 618, 250 N. W. 511 (1933); Moresh v. O'Regan, 120 N. J. Eq. 534, 187 A. 619 (1936); Slome v. Godley, (Mass. 1939) 23 N. E. (2d) 133; Stephens v. McCreary County, 258 Ky. 516, 80 S. W. (2d) 592 (1935).

courts have attempted to explain the distinction made between personal rights and property rights[70] by saying that the protection of property by injunctions against criminal proceedings is an exception to the general rule of noninterference with criminal proceedings;[71] or by saying that in cases involving property rights criminal prosecutions are only incidentally restrained;[72] or simply by saying that "exceptional circumstances" justify the issuance of an injunction.[73]

There are specific instances, however, where equitable relief was allowed to protect purely personal rights from criminal or quasi-criminal proceedings. Thus a mandatory injunction was issued to stay criminal execution until the condemned man had been allowed the statutory time within which to perfect his appeal;[74] an injunction was allowed to prevent the execution of a person under a death sentence when a statute required that he be resentenced;[75] an injunction was issued to prevent a court's ordering plaintiff to a pest house;[76] and to prevent the health authorities' innoculating plaintiff for bubonic plague;[77] an injunction was issued to prevent the performance of the operation of vasectomy on plaintiff as a part of a criminal punishment pursuant to a statute;[78] and an injunction was held proper to prevent

[70] Apparently the distinction made by courts of equity between personal rights and property rights stemmed from a statement made by Lord Eldon in Gee v. Pritchard, 2 Swans. 402, 36 Eng. Rep. 670 (1818). At any rate, with the exception of occasional dicta to the contrary [Huntworth v. Tanner, 87 Wash. 670 at 685, 152 P. 523 (1915)], the rule is well established in equity. In other fields cases are found where equity will protect purely personal rights. This is particularly true of actions to protect privacy. Walter v. Ashton, [1902] 2 Ch. 282, 71 L. J. (N. S.) (Ch.) 839; Edison v. Edison Polyform & Mfg. Co., 73 N. J. Eq. 136, 67 A. 392 (1907); Burns v. Stevens, 236 Mich. 443, 210 N. W. 482 (1926).

The rule has been followed in the face of statutes that purport to outlaw equity jurisdiction to interfere in any criminal case. See Great Atlantic & Pacific Tea Co. v. City of Columbus, 189 Ga. 458, 6 S. E. (2d) 320 (1939), where the court avoided such a statute by blandly stating that the injunction issued to prevent injury to property and not to enjoin criminal prosecution.

[71] Beatrice Creamery Co. v. Cline, (D. C. Colo. 1925) 9 F. (2d) 176.

[72] State ex rel. Fry v. Superior Court of Lake County, 205 Ind. 855, 186 N. E. 310 (1933).

[73] Carolene Products Co. v. Wallace, (D. C. D. C. 1939) 30 F. Supp. 266, aff'd. 308 U. S. 506, 60 S. Ct. 113 (1940); Rebhuhn v. Cahill, (D. C. N. Y. 1939) 31 F. Supp. 47.

[74] Davis v. Stoll, 213 Ky. 499, 281 S. W. 512 (1926).

[75] Gore v. Humphries, 162 Ga. 653, 134 S. E. 479 (1926). The court said that injunction might not be a proper remedy but that the facts justified relief of some kind.

[76] Kirk v. Board of Health of City of Aiken, 83 S. C. 372, 65 S. E. 387 (1909). The court failed to mention the question of equitable jurisdiction of purely personal rights.

[77] Wong Wai v. Williamson, (C. C. Cal. 1900) 103 F. 1.

[78] Mickle v. Henrichs, (D. C. Nev. 1918) 262 F. 687. The court found the statute to be unconstitutional.

repeated prosecutions for repeated violations of an invalid ordinance, after defendant had procured his discharge by habeas corpus from imprisonment under a sentence pronounced in a previous and similar prosecution.[79] These are anomalous cases which fit into no specific categories. The courts looked to the practical aspects of the facts before them without worrying about the historical doctrines of equity jurisdiction.

But the survey of the cases indicates that except in rare and isolated instances the equitable injunction is not available to obtain relief from criminal proceedings. Thus this remedy is too uncertain to be depended upon in the hypothetical situation under consideration.[80]

5.

It can be seen from the foregoing discussion that there is unknown to our legal system any sure and certain remedy to relieve a defendant unjustly convicted where the time allowed for appeal or motion has expired. The conflict lies between the deep-seated desire to insure fair play and the protection of personal rights on the one hand, and the necessity that at some point judgments must become final. The courts must resolve conflicting doubts in each case by deciding whether there was a miscarriage of justice in the first instance or whether the court is being hoodwinked in the present proceeding. To complicate the issue, the courts find a lack of any adequate machinery through which they can act with confidence. Consequently, modern courts struggle manfully with ancient and outworn writs of the old common law. This has led to hopeless confusion on the part of members of the legal profession. Such confusion is reflected in a petition filed in a California court for "writ of *coram nobis*, writ of *audita querela*, writ of *habeas corpus*, writ of *certiorari*, recall of *remittitur*, revocation and annulment of judgment, *subpoena duces tecum*, production of documents, permission to appear and testify, and other and further relief." [81]

This situation should be remedied. A possible solution would be a statute expressly giving the trial court discretion to intervene in criminal proceedings subsequent to conviction when the circumstances warrant intervention, any statutory time limitations to the contrary notwithstanding. Such a statute would abolish the procedural difficulties presently encountered.

It is evident from a review of the cases that, unless the states do

[79] Tuchman v. Welch, (C. C. Kan. 1890) 42 F. 548.

[80] In view of the well-settled doctrines of equity jurisprudence, it is doubtful if the Robertson case (supra, note 58) will be followed to the extent of overruling these doctrines by the backhanded method of allowing audita querela in criminal cases or by allowing coram nobis in equity.

[81] In re Rothrock, 14 Cal. (2d) 34 at 35, 92 P. (2d) 634 (1939).

perfect some remedial processes to take care of these situations, the federal courts will continue to intervene in the judicial processes of the states. This tendency of the federal courts should eventually result in corrective legislation of some sort by the states.

As a final observation it is to be noted that even under the present limitations and barriers to relief, the unjustly convicted defendant is usually relieved if he can convince the court of the unjustness of such conviction. This is the chief thing that he must accomplish. If the court is convinced that there was a miscarriage of justice, the tendency is to grant relief regardless of the manner or form in which application is made to the court.

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