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HABEAS CORPUS AS A METHOD OF REVIEW—PROHIBITION—MANDAMUS—It is a well-settled rule, sustained by innumerable cases, that errors and irregularities committed by a court within the sphere of its jurisdiction cannot be inquired into in habeas corpus proceedings.[1] The reason commonly given for this rule is that such a proceeding is a collateral attack on the judgment, and a collateral attack is necessarily limited to the inquiry whether the court has acted without jurisdiction or has exceeded its jurisdiction.[2]

Conceding the corerctness of the rule, the question may still be raised whether habeas corpus proceedings may be used to obtain a review of a judgment or sentence claimed to have been rendered without, or in excess of, the power of the court.

This question was considered by the Supreme Court of the United States in the recent case of *Adams v. United States ex rel. McCann.*[3] McCann had been convicted of using the mails to defraud, after a trial which he had conducted on his own behalf without a lawyer, and in which he had, without the advice of counsel, expressly waived a jury. After conviction he had taken an appeal, but no bill of exceptions had ever been prepared, for the reason that the stenographer's minutes had not been typed, the relator had no money, and for a considerable time after conviction he had no lawyer to represent him. In this state of the case McCann, on the suggestion of the circuit court of appeals, took out a writ of habeas corpus from that court, to raise the question whether the district court had jurisdiction to try him without a jury.

The propriety of the writ was sustained by the circuit court of appeals,[4] in reliance upon a dictum in *Whitney v. Dick*[5] where the Supreme Court had said that although the circuit court of appeals had no statutory power to issue a writ of habeas corpus as an original writ, it did have power to issue all writs necessary for the exercise of its

[1] See note citing many cases in 11 ANN. CAS. 1051 (1909).

[2] In re King, (C.C. Tenn. 1892) 51 F. 434 at 436; Nielsen, Petitioner, 131 U. S. 176, 9 S. Ct. 672 (1888).

[3] (U. S. 1942) 63 S. Ct. 236.

[4] United States ex rel. McCann v. Adams, (C.C.A. 2d, 1942) 126 F. (2d) 774. The constitutional aspects of this case were commented on in 41 MICH. L. REV. 495 (1942).

[5] 202 U. S. 132 at 136, 26 S. Ct. 584 (1905).

appellate jurisdiction, and "cases may arise in which the writ of habeas corpus is necessary to the complete exercise of the appellate jurisdiction vested in the Circuit Court of Appeals." It was held that the *McCann* case was of this character, because the case was already before it on appeal, but the appeal could not proceed because no bill of exceptions had been settled and it was probable that no adequate bill of exceptions, covering all appellant's points, could ever be settled, although it was admitted that a bill of exceptions could have been prepared which would properly cover the single point raised by the writ of habeas corpus.

The Supreme Court fully sustained the circuit court of appeals, but the availability of the writ was carefully limited to the exact case before the Court. The principle which was recognized might be stated as follows: Where an appeal has been taken by a defendant who has been sentenced to imprisonment for crime, but by reason of special circumstances such appeal cannot be effectively prosecuted, the power of the court to render the judgment may be questioned by a writ of habeas corpus issued out of the court in which the appeal is pending.

In order to conform to the rule that "the writ of habeas corpus should not do service for an appeal," which the Supreme Court said "must be strictly observed,"[6] it was held that appellate jurisdiction must first be obtained by going through the empty form of a futile appeal, whereupon the writ of habeas corpus could issue for the purpose of raising the real question for review.

This would seem to be quite an unnecessary complication. A simpler and more realistic rule, having the same effect, would permit a review of jurisdictional objections by habeas corpus alone, where special circumstances made an appeal unavailable or ineffective.

The true distinction between habeas corpus, on the one hand, and appeal or writ of error on the other, is not that the former is used in the exercise of original jurisdiction while the latter is employed for the purpose of review. All three of these proceedings are appellate in their nature. This has been often stated by the courts.

Thus, in *Ex parte Mooney*[7] the Supreme Court of West Virginia said:

> "The writ of habeas corpus is applicable to two distinct classes of cases. First, Where the restraint or detention is by private authority; and second, when the detention is by committment under legal process. The latter class is all that need be considered in this case. In this class the jurisdiction is, in a general sense, appellate in its nature; because the decision that the individual shall be

[6] Adams v. United States ex rel. McCann, (U. S. 1942) 63 S. Ct. 236 at 239.
[7] 26 W. Va. 36 at 39 (1885).

imprisoned must always precede the application for a writ of habeas corpus; and the writ must always be for the purpose of revising that decision, and therefore is appellate in its nature."

This is in conformity with the decision of the United States Supreme Court in *Ex parte Bollman.*[8] In that case a writ of habeas corpus was sought from the Supreme Court of the United States by a defendant committed by a United States circuit court. The objection was made that the writ did not invoke the appellate jurisdiction of the court and therefore was not within its constitutional power. But the Court held that so far as original jurisdiction had been distinguished from appellate jurisdiction in *Marbury v. Madison,*[9] "that which the court is now asked to exercise is clearly appellate. It is the revision of a decision of an inferior court, by which a citizen has been committed to jail."[10]

Habeas corpus differs from an appeal or writ of error in its scope, not in its nature. The former brings up only the question of the jurisdiction of the court to order the commitment, while the latter proceedings bring up other errors as well.

This distinction has been accurately drawn by a number of courts. Thus the Oklahoma Court of Criminal Appeal said in *Johnson v. State,*[11] "It is elementary that the writ of habeas corpus cannot be used . . . to review errors that do not go to the jurisdiction of the court to issue the commitment." In *Asadoorian for Writ of Habeas Corpus,*[12] the Supreme Court of Rhode Island said: "It [habeas corpus] has not been allowed except for jurisdictional error as a substitute for an appeal or writ of error or other revisory remedy for the correction of errors either of law or of fact." So in *State ex rel. Poach v. Sly,*[13] the Supreme Court of South Dakota said: "it [habeas corpus] cannot be availed of to review claimed error where the action of the court alleged to be erroneous is not beyond or in excess of its jurisdiction."

And in Wisconsin the courts have frequently approved[14] an early statement made in *Petition of Semler.*[15] "The writ, then, cannot be

[8] 4 Cranch (8 U.S.) 75 (1807).

[9] 1 Cranch (5 U.S.) 137 at 175 (1803).

[10] Ex parte Bollman, 4 Cranch (8 U.S.) 75 at 101 (1807).

[11] 57 Okla. Cr. 220 at 224, 46 P. (2d) 964 (1935).

[12] 48 R.I. 50 at 54, 135 A. 322 (1926).

[13] 63 S.D. 162 at 165, 257 N.W. 113 (1934).

[14] Larson v. State ex rel. Bennett, 221 Wis. 188, 266 N.W. 170 (1936); State ex rel. Currie v. McReady, 238 Wis. 142, 297 N.W. 771 (1941). To the same effect, see In re Dawley, 99 Vt. 306 at 314, 131 A. 847 (1925); Commonwealth ex rel. v. Heston, 292 Pa. 63, 140 A. 533 (1928); Ryan v. Nygaard, 70 N. D. 687, 694, 297 N.W. 694 (1941); Anderson v. Chapman, 109 Fla. 54 at 58, 146 So. 675 (1933).

[15] 41 Wis. 517 at 523 (1877).

resorted to for the purpose of reviewing and correcting orders and judgments which are erroneous merely. It deals with more radical defects, which go to the jurisdiction of the court or officer, and which render the proceeding or judgment void."

There would seem to be no substantial reason why habeas corpus should not be freely employed as a substitute for an appeal if the relator is willing to confine himself to jurisdictional grounds. The effect of a discharge on habeas corpus is essentially the same as that of a reversal on error, and the same kind of further proceedings may be had, if jurisdictionally possible without involving double jeopardy. Thus, after discharge on habeas corpus because of an illegal sentence, where the defendant was remanded to the trial court for resentence, a federal court said:

> ". . . It is well settled that it is not double jeopardy to resentence a prisoner who had his first sentence vacated by writ of error . . . and we think it immaterial that his attack was collateral, as by habeas corpus, instead of direct, by appeal or writ of error."[16]

And a Texas court held that when a convicted defendant instituted proceedings by which the judgment was declared void, he precluded himself from relying on that judgment as a basis for a plea of double jeopardy.[17]

Bailey, in his work on *Habeas Corpus*, says that "The proceedings on all prerogative writs are appellate in their character, looking to the case as it stands upon the return."[18] They are original in form but appellate in effect.

Thus the writ of prohibition is widely used to review decisions made in excess of or without jurisdiction, such as the illegal appointment of a receiver,[19] the denial of a motion to set aside illegal service of process,[20] denial by a disqualified judge of a motion that another judge, be called,[20a] an order that a garnishee answer certain interroga-

[16] Bryant v. United States, (C.C.A. 8th, 1914) 214 F. 51 at 53. See also State ex rel. Attorney General v. Gunter, 11 Ala. App. 399, 66 So. 844 (1914); State v. Schierhoff, 103 Mo. 47, 15 S. W. 151 (1890); State v. Lee Lim, 79 Utah 68, 7 P. (2d) 825 (1932); In re Reinheimer, 97 Mich. 619, 55 N.W. 460 (1893); State ex rel. Cacciatore v. Drumbright, 116 Fla. 496, 156 So. 721 (1934).

[17] Marshall v. State, 73 Tex. Crim. 531, 166 S.W. 722 (1914). See also, Ogle v. State, 43 Tex. Crim. 219, 63 S.W. 1009 (1901).

[18] 1 BAILEY, HABEAS CORPUS 6-7 (1913).

[19] Havemeyer v. Superior Court, 84 Cal. 327, 24 P. 121 (1890).

[20] In re Inland Steel Co., 174 Wis. 140, 182 N.W. 917 (1921); State ex rel. Ellan v. District Court, 97 Mont. 160, 33 P. (2d) 526 (1934).

[20a] Ewing v. Haas, 132 Va. 215, 111 S.E. 255 (1922).

tories,[21] a premature order summoning bystanders for jury service,[22] an award for physical damage to property not acquired in a condemnation proceeding.[23]

The writ of prohibition "may be regarded," says High, "as one of the means by which appellate courts exercise their jurisdiction;"[24] but, like the writ of habeas corpus, it

> ". . . is never allowed to usurp the functions of a writ of error or certiorari. . . . And the courts will not permit the writ of prohibition, which proceeds upon the ground of an excess of jurisdiction, to take the place of or to be confounded with a writ of error, which proceeds upon the ground of error in the exercise of a jurisdiction which is conceded."[25]

Mandamus, when used to control the actions of inferior courts, is also, in essence, a method of review. As was said by Chief Justice Marshall in *Ex parte Crane*,[26] "a mandamus to an inferior court of the United States is in the nature of appellate jurisdiction." It is frequently said that the writ will go only to compel the lower court to act but not to compel any particular action.[27] But this is not always true, and where the ordinary remedy by appeal or writ of error is inadequate, inferior courts have frequently been directed to make or vacate orders by means of writs of mandamus. Thus, it was held by the Supreme Court of Missouri, in *State ex rel. v. Homer*,[28] that where service of a summons was quashed and the court thereafter overruled a motion to order defendants to plead to the petition, a writ of mandamus from the supreme court to compel the trial court to proceed with the case was proper. This, in the words of the supreme court,[29] "was based upon the principle that where an inferior judicial tribunal declines to hear a case upon what is termed a preliminary objection, and that objection is purely a matter of law, a mandamus will go, if the inferior court has misconstrued the law," citing a number of English common law cases.

So, a court of equity may be compelled by mandamus to vacate a

[21] State ex. rel. American Fire & Casualty Co. v. Barns, 121 Fla. 341, 163 So. 715 (1935).

[22] Stevens v. Burgevin, 221 Ky. 86, 295 S.W. 1050 (1927).

[23] Culver Contracting Corp. v. Humphrey, 268 N.Y. 26, 719, 196 N.E. 627, 198 N.E. 574 (1935).

[24] HIGH, EXTRAORDINARY LEGAL REMEDIES, 3d ed., 709 (1896).

[25] Id. 720.

[26] 5 Pet. (30 U.S.) 190 at 193 (1831).

[27] HIGH, EXTRAORDINARY LEGAL REMEDIES, 3d ed., c. 3 (1896).

[28] 249 Mo. 58, 155 S.W. 405 (1912).

[29] Costello v. St. Louis Circuit Court, 28 Mo. 259 at 274 (1859), quoted in the Homer case, 249 Mo. at 66.

provisional injunction by which possession of a parcel of land has been taken away from the relator;[30] a trial judge may be ordered by mandamus to vacate an order for a new trial on the ground of newly discovered evidence where it was made in violation of the established rule that there should be no laches;[31] and the vacation of an erroneous order for change of venue may be compelled by mandamus.[32]

In commenting on *Merced Mining Co. v. Fremont*,[33] where the writ was issued to compel a judge to issue an attachment for contempt, the court said, in *Wood v. Strother*:[34]

> ". . . A motion had been made to the judge to commit the offender, but the judge had decided that he could not do so. Here the matter was certainly to be determined by the judge in the first instance. He erred in his conclusion. And to say that a correction of such error by mandamus is not revising judicial action, or not compelling a judge to act in a particular way, is a misuse of language."

As rapid and inexpensive methods of review, these various common-law writs may be exceedingly useful. Habeas corpus and prohibition are excellently adapted to limited reviews on jurisdictional points, often raised at a preliminary stage, which require no printed records and may be brought on without the delays incident to proceedings by appeal and error. Mandamus is capable of invaluable use as a quick and convenient method of reviewing interlocutory orders—a use which has been highly developed in some states, such as Michigan[35] and Alabama.[36]

The chief obstacle to a wider use of these desirable remedies for the purpose of review is the common-law taboo that they must not be employed if the remedy by appeal or error is available and adequate.

[30] State ex rel. Reynolds v. Graves, 66 Neb. 17, 92 N.W. 144 (1902).

[31] People ex rel. Oelrichs v. Superior Court, 10 Wend. (N.Y.) 285 (1833).

[32] State ex rel. Nash v. Superior Court, 82 Wash. 614, 144 P. 898 (1914).

[33] 7 Cal. 130 (1857).

[34] 76 Cal. 545 at 550, 18 P. 766 (1888).

[35] Chamberlain v. Durfee, 264 Mich. 194, 249 N.W. 486 (1933); McBride v. Wayne Circuit Judge, 250 Mich. 1, 229 N.W. 493 (1930); Preferred Automobile Ins. Co. v. Oakland Circuit Judge, 247 Mich. 67, 225 N. W. 618 (1929); Townsend v. Jackson Circuit Judge, 157 Mich. 231, 121 N.W. 483 (1909); Gardiner v. Wayne Circuit Judge, 155 Mich. 414, 119 N.W. 432 (1909); Ayres v. Gartner, 90 Mich. 380, 51 N.W. 461 (1892); Van Vranken v. Circuit Judge, 85 Mich. 140, 48 N.W. 499 (1891); People v. Circuit Judge, 38 Mich. 351 (1878).

[36] State ex rel. Denson v. Miller, 204 Ala. 232, 85 So. 698 (1920); Ingram v. Alabama Power Co., 201 Ala. 13, 75 So. 304 (1917); Ex parte Watters, 180 Ala. 523, 61 So. 904 (1913); Ex parte Jones, 133 Ala. 212, 32 So. 643 (1901); Ex parte Hill, 165 Ala. 365, 51 So. 786 (1910); State ex rel. Brinkman v. Wilson, 123 Ala. 259, 26 So. 482 (1899); Wilson v. Duncan, 114 Ala. 659, 21 So. 1017 (1896).

It would seem to be a mere survival of an ancient common-law tradition: "The law is economical; the fact that a man has one action is a reason for not giving him another."[87] This is wholly contrary to modern principles of procedure, which makes usefulness rather than historical regularity the test of merit. Our procedure by appeal and error is slow, cumbersome and expensive. Where a simpler, more rapid and more limited review, by the use of one of the so-called extraordinary writs, will satisfy the aggrieved party, he should be encouraged to employ that method.

E. R. S.

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[87] 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, 2d ed., 219 (1911).