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Criminal Procedure -- Method of Raising Constitutional Issues -- Writ of Coram Nobis

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to achieve it were to vest the power of choice in the plaintiff or to confer power upon the courts to qualify his selection."[26] In the past, courts have considered this particular venue statute as conferring a special right because of its legislative history. Now Congress has manifested an intent to confer power upon the courts to qualify the selection of forum. Therefore, applying the test laid down by the Supreme Court, it is submitted that this is no longer an absolute right. Without this idea of an absolute right, the obstacle to using injunctions in the federal courts no longer exists; interference by injunction should be allowed if it is allowed by applying *forum non conveniens*. The rule that a federal court may not enjoin the proceeding in a state court will, of course, remain unchanged.[27] As for the state courts, the *Miles* case pointed out that the right to sue in state courts under the Act is of the same quality as such right in the federal courts. It would seem to follow that if venue is subject to interference in the federal courts, it may also be interfered with in the state courts. The state courts would again say that nothing in the FELA prevents their applying *forum non conveniens* or granting injunctions.

It is hoped that the courts will not hold the new provision of the Judicial Code applicable only in cases arising under the general venue provisions of the federal courts.[27a] If, instead, the courts do carry out the apparent intent of Congress and apply the doctrine of *forum non conveniens* in suits brought under the FELA, they would provide a solution fair to both employee and railroad in that the injured employee would still have a wide choice of forums but where this right was abused the courts could protect the defendant by refusing to exercise jurisdiction.

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Criminal Procedure—Method of Raising Constitutional Issues—Writ of Coram Nobis

The federal courts have become increasingly zealous of protecting the rights of those whose convictions have been obtained without due

[26] United States v. National City Lines, 68 Sup. Ct. 1169, 1182 (1948).

[27] Section 2283 of the revised Judicial Code incorporates some general exceptions which the old §265 did not have. One of these exceptions was put in to overrule *Toucey v. New York Life Ins. Co.*, 314 U. S. 118 (1941), which decision was followed by *Southern Ry. v. Painter*, 314 U. S. 155 (1941) (see note 5 *supra*). The exception will not apply in the *Painter* case, however, because in that case there was no federal decree to protect as in the *Toucey* case. *See* Southern Ry. v. Painter, *supra* at 160 (concurring opinion); Reviser's Notes to §2283, 28 U. S. C. C. S. at page 1910.

[27a] Since the preparation of this note three federal district courts have decided that §1404(a) of the revised Judicial Code applies to suits under the FELA. Hayes v. Chicago, R. I. & P. R. R., 79 F. Supp. 821 (D. Minn. 1948); White v. Thompson, 80 F. Supp. 411 (N. D. Ill. 1948); Nunn v. Chicago, M., St. P. & P. R. R., 80 F. Supp. 745 (S. D. N. Y. 1948).

process of law.[1] Whereas, at one time, it was necessary for a petitioner seeking relief from a state conviction by means of a writ of habeas corpus in federal district courts to show that he had exhausted *all* his available state remedies,[2] it now appears that a petitioner who has exhausted but *one* of several available state remedies, may petition the federal district court for a writ of habeas corpus.[3] Under this line of decisions, however, in default of any state procedure by which the question of due process can be raised, the federal courts will take jurisdiction.[4] In state procedure such questions can of course be raised by motion for a new trial made in apt time,[5] but if this remedy has been allowed to lapse without fault of the petitioner, he may find himself denied due process. In North Carolina no statutory procedure has been outlined and there is nothing more than a judicial intimation of the procedure whereby he may raise these questions and have the merits of his constitutional claim passed upon by the highest state court.

In a recent North Carolina case,[6] petitioner had been indicted on several capital charges involving first degree burglary. He tendered pleas of guilty of second degree burglary which were accepted and he was thereupon sentenced. The statutory period for appeal lapsed and the term of superior court in which he had been convicted expired, without an appeal having been perfected or a motion for a new trial made. A year and a half later petitioner applied to a judge of the superior court for a writ of habeas corpus, alleging that at his trial he had been denied due process of law in that he had been unable to employ counsel and had been denied benefit of counsel when he was required to plead to the capital charges. Upon a hearing the application was dismissed. Petitioner then applied to the supreme court for a

[1] Wade v. Mayo, 68 Sup. Ct. 1270 (1947); Loftus v. Illinois, 68 Sup. Ct. 1212 (1947); Hedgebeth v. North Carolina, 68 Sup. Ct. 1185 (1947); Foster v. Illinois, 332 U. S. 134 (1946); De Meerleer v. Michigan, 329 U. S. 663 (1946); Hawk v. Olsen, 326 U. S. 271 (1945); White v. Ragen, 324 U. S. 760 (1944); House v. Mayo, 324 U. S. 42 (1944); Tomkins v. Missouri, 323 U. S. 485 (1944); *Ex parte* Hawk, 321 U. S. 114 (1943); *Ex parte* Davis, 318 U. S. 412 (1943); Mooney v. Holohan, 294 U. S. 103 (1935); Urquhart v. Brown, 205 U. S. 179 (1907); Note, 26 N. C. L. REV. 217 (1948).

[2] White v. Ragen, 324 U. S. 760 (1944); House v. Mayo, 324 U. S. 42 (1944); *Ex parte* Hawk, 321 U. S. 114 (1943); *Ex parte* Davis, 318 U. S. 412 (1943); Mooney v. Holohan, 294 U. S. 103 (1935).

[3] Wade v. Mayo, 68 Sup. Ct. 1270 (1947).

[4] Hedgebeth v. North Carolina, 68 Sup. Ct. 1185 (1947); Foster v. Illinois, 332 U. S. 134 (1946); Hawk v. Olsen, 326 U. S. 271 (1945); *see* Mooney v. Holohan, 294 U. S. 103, 115 (1935).

[5] N. C. GEN. STAT. §§15-174, 1-207, 7-11 (1943); State v. Dunheen, 224 N. C. 738, 32 S. E. 2d 322 (1944); State v. Edwards, 205 N. C. 661, 172 S. E. 399 (1933); State v. Lea, 203 N. C. 316, 166 S. E. 292 (1932), *cert. denied*, 287 U. S. 668 (1932); State v. Cox, 202 N. C. 378, 162 S. E. 907 (1932); State v. Casey, 201 N. C. 620, 161 S. E. 81 (1931) (motion may be made at trial term only if no appeal; if appeal, motion can be made the next succeeding term following affirmance of judgment on appeal).

[6] *In re* Taylor, 229 N. C. 297, 49 S. E. 2d 749 (1948).

writ of certiorari to review the judgment in the habeas corpus proceeding. *Held:* The writ of habeas corpus is not a proper remedy to raise the constitutional question the petitioner seeks to present for review. Certiorari was denied. The court, however, intimated that an appropriate procedure would have been to petition the supreme court for permission to file in the superior court a petition for a writ of error *coram nobis.*

The writ of error *coram nobis,* or *coram vobis,*[7] is of ancient common law origin. The writ was devised to allow a court which rendered a judgment to review it for an error of fact, existing at the time of the judgment, but unknown to the court; which fact, if it had been known, would have led to a different result.[8] The writ did not lie for an error of law,[9] but was limited exclusively to errors of fact, and has been used to set aside a previous judgment when plaintiff or defendant was a married woman;[10] an infant had appeared by attorney instead of by next friend or guardian *ad litem;*[11] a party was insane at time of trial;[12] a party died before judgment;[13] there was error in the service of process or notice to the other party;[14] or clerical mistakes were made in entering the judgment.[15]

Such a writ has been used as a part of North Carolina procedure[16] and has been regulated by statute,[17] but the use of the writ in civil cases seems to have been replaced by statutory remedies, either by motion for a new trial or other appropriate motions.[18]

[7] 2 TIDD, PRACTICE OF THE COURTS OF KINGS BENCH 1136 (3d Am. ed. 1840); III BL. COMM. 1158 (4th ed., Cooley, 1899); *see* Massie v. Hainey, 165 N. C. 174, 177, 81 S. E. 135, 136 (1914); Roberts v. Pratt, 152 N. C. 731, 736, 68 S. E. 240, 242 (1910).

[8] *See* Roughton v. Brown, 53 N. C. 393, 394 (1861); cases collected in 49 C. J. S., JUDGMENTS §312(c).

[9] 2 TIDD, *op. cit. supra* note 7, at 1136.

[10] Roughton v. Brown, 53 N. C. 393 (1861); *see* Lassiter v. Harper, 32 N. C. 392, 394 (1849); 1 STEPHEN, PLEADING 119 (3d Am. ed. 1837); 2 TIDD, *op. cit. supra* note 7, at 1136.

[11] 1 STEPHEN, *op. cit. supra* note 10, at 119; 2 TIDD, *op. cit. supra* note 7, at 1136; *see* cases collected, 49 C. J. S., JUDGMENTS, p. 566 n. 86.

[12] *See* note, 121 A. L. R. 267 (1939).

[13] *See* Tyler v. Morris, 20 N. C. 625 (1839); 1 TIDD, *op. cit. supra* note 7, at 1136; cases collected, 49 C. J. S., JUDGMENTS, p. 567 n. 91.

[14] *See* Massie v. Hainey, 165 N. C. 174, 178, 81 S. E. 135, 136 (1914); cases collected, 49 C. J. S., JUDGMENTS, p. 566 n. 76.

[15] Haiwassee Lumber Co. v. United States, 64 F. 2d 417 (C. C. A. 4th 1933); see Note, 126 A. L. R. 956 (1940).

[16] Roughton v. Brown, 53 N. C. 393 (1861); Latham v. Hodges, 35 N. C. 267 (1852); Williams v. Edwards, 34 N. C. 118 (1851); Lassiter v. Harper, 32 N. C. 392 (1849); Tyler v. Morris, 20 N. C. 625 (1839); *see* Massie v. Hainey, 165 N. C. 174, 81 S. E. 135 (1914).

[17] N. C. REV. STAT., c. 4, §20 (1836-37). *But see* Roberts v. Pratt, 152 N. C. 731, 68 S. E. 240 (1910).

[18] Simms v. Sampson, 221 N. C. 379, 20 S. E. 2d 554 (1942); Welch v. Welch, 194 N. C. 633, 140 S. E. 436 (1927) (infant improperly represented); Cox v. Cox, 221 N. C. 19, 18 S. E. 2d 713 (1942); Hood v. Holding, 205 N. C. 451, 171 S. E. 633 (1933) (party insane at time of trial); Taylor v. Caudle, 208 N. C.

Under the civil procedure of North Carolina, a superior court retains jurisdiction of a judgment for a limited time after the close of the term,[19] but may entertain a motion in the original cause to set aside a judgment for irregularity at any time.[20] Therefore, since statutory remedies are available for the same relief which could be obtained at common law only by writ of error *coram nobis,* these remedies seem to have superseded the writ in practice.[21]

In criminal actions, unlike civil, a superior court does not retain jurisdiction to set aside a judgment on motion after the term has expired[22] unless there has been an appeal.[23] After the term expires at which judgment was rendered in a criminal proceeding, and no appeal is taken, the jurisdiction of the superior court ends insofar as the terms of the judgment are concerned.[24] Therefore, the superior court is without jurisdiction to entertain any motion by defendant based on a denial of a constitutional right at such trial.

The Supreme Court of North Carolina by the constitution[25] and statutory provision pursuant thereto,[26] is given general supervisory jurisdiction, and under this power it can grant any remedial writs necessary to insure the proper administration of justice in the lower courts. As has been pointed out, the writ of error *coram nobis* has been a part of North Carolina procedure and will remain so unless specifically abrogated by statute.[27] And while it seems no longer to be used in civil

298, 180 S. E. 699 (1935); Wood v. Watson, 107 N. C. 52, 12 S. E. 49 (1890); Knott v. Taylor, 99 N. C. 511, 6 S. E. 788 (1888); Lynn v. Lowe, 88 N. C. 478 (1883) (death of a party before judgment); Monroe v. Niven, 221 N. C. 362, 20 S. E. 2d 311 (1942); Groce v. Groce, 214 N. C. 398, 199 S. E. 388 (1938); Fowler v. Fowler, 190 N. C. 536, 130 S. E. 315 (1925) (error in service of process); Everett v. Johnson, 219 N. C. 540, 14 S. E. 2d 520 (1941); Massie v. Hainey, 165 N. C. 174, 81 S. E. 348 (1914) (inadequate notice to other party); N. C. Joint Stock Bank v. Cherry, 227 N. C. 105, 40 S. E. 2d 799 (1946); Ragen v. Ragen, 202 N. C. 753, 194 S. E. 458 (1937) (clerical mistakes in entering judgment); see generally Roberts v. Pratt, 152 N. C. 731, 736, 68 S. E. 240, 242 (1910); McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE §656 (1929).

[19] N. C. GEN. STAT. §1-220 (1943) (jurisdiction to set aside for mistake, surprise, excusable neglect within one year); Federal Land Bank v. Davis, 215 N. C. 100, 1 S. E. 2d 350 (1939); Abernethy Finance Co. v. First Security Trust Co., 213 N. C. 369, 196 S. E. 340 (1938) (judgment pending until satisfied, open to motion for execution, recall of execution, determination of proper credits); McINTOSH, *op. cit. supra* note 18, §§649 *et seq.*

[20] Federal Land Bank v. Davis, 215 N. C. 100, 1 S. E. 2d 350 (1939); Hood v. Stewart, 209 N. C. 424, 184 S. E. 36 (1936); McINTOSH, *op. cit. supra* note 18, §653.

[21] See note 18 *supra.*

[22] State v. Edwards, 205 N. C. 661, 172 S. E. 399 (1933); State v. Casey, 201 N. C. 620, 161 S. E. 81 (1931); Lancaster v. Bland, 168 N. C. 377, 84 S. E. 529 (1915).

[23] State v. Edwards, 205 N. C. 661, 172 S. E. 399 (1933); State v. Lea, 203 N. C. 316, 166 S. E. 292 (1932); State v. Cox, 202 N. C. 378, 162 S. E. 907 (1932); State v. Casey, 201 N. C. 620, 161 S. E. 81 (1931).

[24] Cases cited note 5 *supra.*

[25] N. C. CONST. Art. IV, §8.

[26] N. C. GEN. STAT. §7-10 (1943).

[27] N. C. GEN. STAT. §4-1 (1943).

actions, there is no reason why it should not be used in criminal actions where there is no other adequate remedy.[28] From the nature and purpose of the writ it could not be used by the supreme court, because the writ does not lie from a higher to a lower court,[29] but the supreme court under its supervisory powers could direct and empower the superior court to assume jurisdiction of the prior cause and to hear the petition for the writ. Such action on the part of the supreme court would be discretionary. Even so, if the court in its discretion declined to exercise its power to direct the superior court to hear the petition for the writ on the grounds that the application did not show substantial merit, the applicant would have had his constitutional claim passed upon by the highest state court.[30] On the other hand, if the supreme court should grant the application, the superior court would then be empowered to hear the petition for the writ of error *coram nobis,* and to pass upon the constitutional questions presented. From an adverse judgment on the petition, an appeal would lie to the supreme court. But in view of the opinion In re *Taylor,*[31] undoubtedly this procedure must be followed hereafter before the federal courts will entertain a petition for a writ of habeas corpus to review questions arising in North Carolina involving the denial of due process.[32]

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Criminal Procedure—Present Insanity—Determination of the Issue When Raised Before Trial

When the case of *State v. Sullivan*[1] was called for trial, the attorney for the defendant (charged with breaking and entering with intent to commit a felony) desired to enter the plea of incapacity to plead to the bill of indictment and submitted the issue of defendant's mental capacity as the only issue at that time. The court announced, however, that both that issue and the issue of guilt or innocence would be submitted to the jury at the same time. Defendant, through his counsel, objected to this ruling, excepted, and appealed. The Supreme Court held that the submission to the same jury of both issues at the same time was a matter

[28] N. C. GEN. STAT. §4-1 (1943); *cf.* Jones v. Commonwealth, 269 Ky. 779, 108 S. W. 2d 816 (1937) (*overruled* on another point, Smith v. Buchanan, 291 Ky. 44, 163 S. W. 2d 5 [1942], *modified* on other points, Day v. Commonwealth, 296 Ky. 483, 177 S. W. 2d 391 [1944]); Carlsen v. State, 129 Neb. 84, 261 N. W. 339 (1935).

[29] Roughton v. Brown, 53 N. C. 393 (1861).

[30] Taylor v. Alabama, 68 Sup. Ct. 1415 (1947); Hysler v. Florida, 315 U. S. 411 (1941).

[31] 229 N. C. 297, 49 S. E. 2d 749 (1948).

[32] Taylor v. Alabama, 68 Sup. Ct. 1415 (1947); Hedgebeth v. North Carolina, 68 Sup. Ct. 1185 (1947); Foster v. Illinois, 332 U. S. 134 (1946); Hysler v. Florida, 315 U. S. 411 (1941).

[1] 229 N. C. 251, 49 S. E. 2d 458 (1948).