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# Procedure

## PROCEDURE

*Introduction*—The 1947 General Assembly followed its predecessors in enacting several statutes in the field of judicial procedure.[1] Inasmuch as the validity of legislative activity in this field is still an open question in Indiana,[2] and since either judicial or legislative superiority in rule making may be rationally defended and supported by authority,[3] no opinion is expressed herein on the validity of the 1947 legislation in the field of procedure on the grounds that it invades the judicial function. The question of legislative power has been re-examined by the Indiana Supreme Court in two recent decisions.[4] It would seem that the present court has declared in its last pronouncement upon the subject that many so-

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32. Ind. Acts 1947, c. 277, §13-A(e).
33. See German, "Compulsory Unit Operation of Oil Pools," (1931), 17 A.B. A.J. 393.

1. For a collection of statutes passed since the rule-making act of 1937, see 1 Gavit, "Ind. Pleading & Practice" (1941-5) §§ 3, 4, 12, 13.
2. No case has been found in which a legislative rule adopted since 1937 and a rule by the court have presented the square issue of legislative or judicial superiority in this field.
3. See 1 Gavit, op. cit. supra n. 1, §§ 2-14 and cases cited; 1 Sutherland, "Statutory Construction" (3rd ed., 1943) § 226; Wigmore, "All Legislative Rules for Judiciary Procedure Are Void Constitutionally" (1928) 23 Ill. L. Rev. 276; Notes, 110 A.L.R. 22 (1937), 158 A.L.R. 705 (1945).
4. Kostas v. Johnson, 69 N.E. (2d) 592 (Ind. 1946), (1947) 22 Ind. L.J. 284; Square D. Co. v. O'Neal, 72 N.E. (2d) 654 (Ind. 1947).

called procedural enactments may be matters of substantive law and not within the judicial rule making power.[5]

*Restrictions on Criminal Remedies.* Chapter 189 places three restrictions on remedies available to criminal defendants in Indiana. First, a writ of habeas corpus arising out of a criminal proceeding is made subject to the common law rules of res judicata.[6] At common law[7] and in the federal courts[8] today a defendant in a criminal case can file successive writs of habeas corpus without regard to the rules of res judicata. Second, the rules of res judicata are made applicable to the writ of error coram nobis.[9] Third, five years *after conviction* in any criminal case a defendant is presumed to have waived his right to institute any proceeding for writ of error coram nobis.[10] In two instances this period of limitation is extended.[11] Any court assuming jurisdiction in violation of this provision may be restrained by a writ of prohibition.

The third provision is of considerable importance. The writ of error coram nobis does not lie where errors of law are alleged.[12] "Its use is limited to those cases where a judgment was procured by fraud or duress where the questions could not effectively have been raised at the time nor within the limits available under other procedures or because of newly discovered evidence which was not discovered within the time for an effective review under the other available procedures."[13] Since *Sanders v. State*[14] it has been generally assumed that coram nobis would lie when the facts alleged presented constitutional issues. There is considerable dicta

5. Square D. Co. v. O'Neal, supra n. 4, held rule requiring $50 deposit on transfer to Supreme Court was substantive.
6. Ind. Acts 1947, c. 189, §4.
7. State ex rel Shapiro v. Wall, 187 Minn. 246, 244 N.W. 811 (1932).
8. Waley v. Johnson, 316 U.S. 101 (1942); Salinger v. Loisel, 265 U.S. 224 (1924).
9. Ind. Acts 1947, c. 198, §2.
10. Id. §1.
11. Id. §5, (1) Where the defendant is prevented from instituting the proceeding by: (a) the state; or (b) by an officer or employee of the state where the defendant is confined; or (2) where the defendant is insane.
12. Berry v. State, 202 Ind. 294, 173 N.E. 705 (1930).
13. Gavit, "Indiana Pleading and Practice" (1941) §472.
14. 85 Ind. 318 (1882). "In the case under consideration, the fraud . . . is such a fraud as deprived the appellant of the constitutional right to a fair trial by an impartial jury." Id. at 331.

in recent decisions[15] which support this assumption, and in at least one case a petition for coram nobis was granted when the defendant alleged he was not provided with adequate counsel and was not advised of the nature of the charge against him.[16]

In *Woods* v. *Neirsthmeier*,[17] decided May 20, 1946, it was urged that a similar Illinois statute deprived the petitioner of his right to challenge a judgment rendered in violation of his constitutional guaranties. The United States Supreme Court refused to consider this argument until the statute had been interpreted by the state courts, and thus, has not passed upon the exact constitutional issue raised by the Indiana statute, but as pointed out below, the Court has decided analogous constitutional issues.

"This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the land and the judges in every state shall be bound thereby, *anything in the Constitution or laws of any state to the contrary notwithstanding.*"[18] (Italics added). In *Testa* v. *Katt*[19] this section of the Constitution was interpreted to impose an absolute duty upon state courts of general jurisdiction to enforce federal statutes when those statutes authorized suit in a state court. The opinion of the Court was unanimous. In this case the Court reaffirmed *Mondou* v. *New York & H.R.R.*[20] which held that state courts could not refuse to enforce federal statutes even though this duty imposed much burdensome litigation upon them.[21]

The *Mondou* case has recently been accepted with manifest approval by the Indiana Supreme Court.[22] This court also asserted that an Indiana statute[23] recognizes the Consti-

15. Fluty v. State, 71 N.E. (2d) 565, 568 (Ind. 1947); Kunkel v. La-Porte Circuit Court, 209 Ind. 682, 685, 687, 200 N.E. 614, 615, 616 (1936).
16. Rhodes v. State, 199 Ind. 183, 156 N.E. 389 (1927).
17. 66 S. Ct. 996 (1946).
18. U.S. Const. Art VI, §2.
19. 67 S. Ct. 810 (1947).
20. 223 U.S. 1 (1912).
21. "We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by an appreciable inconvenience or confusion; but, be that as it may, it affords no reason for declining a jurisdiction conferred by law." Id. at 58.
22. Bowles v. Heckman, 64 N.E. (2d) 660, (Ind. 1946).
23. 1 R.S. 1852, c. 61, §1, Ind. Stat. Ann. (Burns, 1933) §1-101.

tutional provision quoted above as the Supreme Law of the State, binding on all state judges.[24]

Since the state courts cannot refuse to enforce these federal statutes because they are the Supreme Law of the land, *a fortiori* they cannot refuse to enforce the guaranties of the Constitution, because it is also the Supreme Law of the land. This last duty was stressed by the United States Supreme Court when it said: "Nor can we lightly assume that Nebraska affords no corrective process for one who is imprisoned under a judgment rendered in violation of rights protected by the federal Constitution. That Constitution is the Supreme Law of the land, and 'upon the state courts equally with the courts of the Union rests the obligation to guard and enforce every right secured by that Constitution.' "[25] The Indiana Supreme Court has also recognized that the Constitution imposes a duty upon the states to provide *some* remedy whereby these guaranties may be enforced.[26]

In one situation, the application of this statute appears unconstitutional. As pointed out above, coram nobis will not lie unless other procedures are unavailable; e.g., the time for an appeal or a motion for a new trial has expired or the motion for new trial has been denied. It is also settled that habeas corpus is not an effective remedy in Indiana for a person who has been illegally convicted.[27] Thus, when the five year statute of limitations has run, a defendant in a criminal case, who might otherwise have used the writ of error coram nobis has no remedy by which he may enforce in the Indiana courts his Constitutional guaranties. In this situation, this statute, literally interpreted, extinguishes not just *a* remedy, but the *only remedy.*

The Constitution of the United States is as binding upon state legislatures as it is upon state courts. Therefore the legislature cannot deprive the courts of the power to enforce the Supreme Law of the land. A judge in a state court can-

24. Id. at 663.

25. Smith v. O'Grady, 312 U.S. 329, 352 (1941).

26. Kunkel v. LaPorte Circuit Court, 209 Ind., 682, 685, 200 N.E. 614, 615 (1936). Cf. Mooney v. Holohan, 294, U.S. 103, 113 (1935), In both of these cases, the courts conceived this duty to be imposed by the due process clause of the Fourteenth Amendment.

27. Williams v. Dowd, 153 F.(2d) 328 (C.C.A. 7th, 1946); Potter v. Dowd, 146 F.(2d) 244 (C.C.A. 7th, 1944); Note (1947) 22 Ind. L.J. 189.

not refuse to enforce the guaranties of the Constitution because of this statute.

There are four possible theories of construing this statute. First, in *Ex Parte Hawk*[28] the United States Supreme Court held that where a state remedy is inadequate or no remedy is provided the accused may file a petition for habeas corpus in an appropriate federal court. Thus, it might be asserted that since a remedy is provided the Indiana enactment is constitutional. Such reasoning is fatally defective. It overlooks the basic premise that the state equally with the federal government, has the duty to provide a remedy for enforcing[29] constitutional guaranties. The fact that the federal government is willing to assume this duty when the state fails to perform it by no means excuses or justifies the breach of duty by the state. Further, there is no indication that *Ex Parte Hawk* justifies the federal courts in assuming jurisdiction of such cases when there has been a wholesale shifting of burdensome litigation from the state to the federal courts. The *Mondou* case rejected the argument that a state court is excused from enforcing the Supreme Law of the land because this duty is burdensome.

Second, it may be contended that a remedy remains after the five year period because the Indiana enactment authorizes the Indiana Supreme Court to extend the time for taking an appeal from the original conviction.[30] This reasoning would be fallacious. Whether or not the time for an appeal is extended is entirely within the discretion of the Indiana Supreme Court. If, in a given case, this court refuses to extend the time for an appeal once again the accused would be without remedy. Further, this may be an ineffective remedy inasmuch as review on appeal is restricted to the record. At most, this provision only creates another recourse to which an accused must address himself and be denied before he may attack the constitutionality of this statute.

Third, the statute may be construed as a waiver of a constitutional right. The terms of the statute provide that the waiver operates five years from the time of conviction. This five year period may elapse and the accused still be un-

28. 321 U.S. 114, 118 (1944).
29. Having a duty to enforce the guaranties of the Constitution, ergo, a state must provide a means of enforcement.
30. Ind. Acts 1947, c. 189, §5.

aware that he was illegally convicted. It is fundamental that a constitutional right cannot be waived without knowledge of the right.[31] In order to construe the statute to be a waiver from the time the knowledge is obtained, a court would be presented with the manifest difficulty of delineating the words "from the time of conviction."

Fourth, by the terms of the statute it is presumed to be a waiver. There is no clear indication whether the presumption is conclusive or rebuttable. If the presumption is rebuttable by proof that the knowledge that the conviction was illegal was not obtained until after the period ran, then the accused would have a remedy; i.e., coram nobis. This is the most plausible argument in favor of the constitutionality of the statute.

No other important changes were made in the field of procedure,[32] although several of the acts are worthy of brief mention.

*Costs*—Chapter 255, provides additional fees for the collection of unpaid court costs. A clerk's charge of $1.50 and a sheriff's charge of the same amount are added to the fee bill. These charges become the personal property of the clerk and sheriff respectively, and become a lien on the real and personal property of the debtor. If the fee bill is not paid on demand, these additional charges become a part of the indebtedness of record. Upon subsequent voluntary payment by the debtor, the charges are credited to the clerk originally issuing the fee bill and the sheriff making the original demand for collection. The purported *raison d'etre* of the Act is to provide "an incentive for collection of court costs."[33] It is submitted that the regular salary paid an officer is enough "incentive" to carry out those duties imposed upon him by law.[34] Furthermore, since this amount

31. Walker v. Johnston, 312 U.S. 275 (1941); Johnson v. Zerbst, 304 U.S. 458 (1937); Miles v. State, 222 Ind. 312, 53 N.E. (2d) 779 (1944).

32. For a review of the recent Indiana cases on procedural aspects see Gavit, "Procedure and Property" (1946) 21 Ind. L.J. 76.

33. Digest, Engrossed Senate Bill 226.

34. Ind. Acts 1895, c. 145, §129, Ind. Stat. Ann. (Burns, 1933) §49-1405; Ind. Acts 1895, c. 145, §136, Ind. Stat. Ann. (Burns, 1933) §49-1412; Ind. Acts 1881 (Spec. Sess.), c. 38, §501, Ind. Stat. Ann. (Burns, Repl. 1946) §2-3303; Ind. Acts 1913, c. 148, §1, Ind. Stat. Ann. (Burns, 1933) §49-1402.

is credited to the original officers issuing and demanding such amount, regardless of when paid by the debtor, the collection incentive seems dubious.

*Venue*—The General Assembly has provided for a change of venue from the county after a case has been reversed and remanded to the trial court, notwithstanding any previous changes of venue taken.[35] A change of venue from the judge in such cases has existed.[36]

Another change of venue enactment[37] follows the previous statutes[38] making the county from whence the change was taken liable for the costs of the trial. However, the new legislation does enumerate what shall be included in such costs.[39]

*Parties*—In any case affecting the preservation or maintenance of lakes (meandering and unmeandering) and rivers (navigable and non-navigable) the Department of Conservation is a party in interest and neither non-benefit nor non-ownership may be pleaded as a bar to the Department's becoming a party plaintiff or defendant.[40]

*Interest on Judgment*—Chapter 105 resolves an apparent conflict[41] by allowing 6% interest forty-five days after the rendition of a judgment against the State of Indiana or its agencies (except the Gross Income Tax Division). The Act, however, does not apply to judgments brought in the "Court of Claims" for which no appropriation has been previously made. Presumably this is intended to refer to the United States Court of Claims.

*Contempt*—Chapter 171 provides for citation orders in civil and criminal contempt. Attachment of the body of the contemner is accomplished by directing a writ to the sheriff of

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35. Ind. Acts 1947, c. 186, §§1-2.
36. Ind. Acts 1907, c. 59, §1, Ind. Stat. Ann. (Burns, Repl. 1946) §2-1404. For a general discussion of this problem see Crumpacker, "The Change of Venue Problem" (1945) 20 Ind. L.J. 283.
37. Ind. Acts 1947, c. 176, §1.
38. Ind. Acts 1943, c. 1, §1, Ind. Stat. Ann. (Burns, Repl, 1946) §2-1417; Ind. Acts 1905, c. 169, §214, Ind. Stat. Ann. (Burns, Repl. 1942) §9-1312.
39. Cf. Board of Comm'rs. v. Moore, 121 Ind. 116 (1889); Board of Comm'rs. v. Board of Comm'rs. 27 Ind. App. 378, (1901).
40. Ind. Act 1947, c. 76, §§1-6.
41. Compare Metropolitan Life Insurance Co. v. Indiana, 194 Ind. 657 (1924), with Indiana v. Scott Construction Co., 97 Ind. App. 652 (1933).

any county, or the sheriff of the county in which the proceeding arises may serve writ in any county in the state.[42]

*Acknowledgments*—Chapter 171 validates defective acknowlments[43] of notaries public, justices of the peace, and commissioned officers of the armed forces.

*Notice to State*—Another provision[44] was enacted pertaining to the giving of notice to the Attorney General. The Attorney General must be given notice of the trial date whenever a claim is filed for or on behalf of the State of Indiana or its agencies in any estate or guardianship cause which is not allowed but is transferred to the trial docket.[45]

*Public Records*—Photographic and photostatic copies of public records may be made, and the originals destroyed. However, the time for filing legal proceedings on the originals must have elapsed, and the Commission of Public Records must approve before the originals may be destroyed. If such copies are certified as to authenticity and accuracy they shall have the force and effect of law, and be received as evidence.[46]

*Probate*—A probate court having guardianship proceedings pending may transfer such proceedings to another county if it appears that the cause was commenced in the wrong county, or the residence of the ward has changed or if it appears that such transfer would serve the best interests of the ward and the estate.[47] Appointment of a guardian in the second county is made a condition precedent to the transfer,[48] although the Act does not enunciate which court shall appoint the second guardian. The general rule in such a case is that the appointment of the court acting first shall prevail.[49]

Chapter 150, section 1, permits judges of the probate court to carry on most of their probate powers during vaca-

42. Ind. Acts 1947, c. 52, §§1-3.

43. Ind. Acts 1941, c. 203, p. 620 validated defective acknowledgments of notaries public and justices of peace up to that date.

44. The previous notice provisions, which are reenacted by the instant Act, were Ind. Acts 1945, c. 3, §1, Ind. Stat. Ann. (Burns, Supp. 1945) §49-1937.

45. Ind. Acts 1947, c. 196, §§1-3.

46. Ind. Acts 1947, c. 195, §1.

47. Ind. Acts 1947, c. 242, §1.

48. Ind. Acts 1947, c. 242, §2.

49. Ind. Rev. Stat. 1852, c. 12, §1, Ind. Stat. Ann. (Burns, 1933) §8-101; Soules v. Robinson, 158 Ind. 97 (1901); Anderson v. Bruner, 76 Ind. App. 361 (1921).

tion. The Act specifically permits the clerk to continue[50] to allow wills to probate and to grant letters of administration and letters testamentary during vacation.

*Appeals from Corner Surveys*—In 1852 a provision was enacted[51] whereby landowners could have the county surveyor establish a corner between their adjoining lands. Such survey is prima facie correct, although provision was made for an appeal within three years. The appeal period has been changed and residents of the county, having personal notice of the proceeding, must now perfect an appeal within ninety days. Persons receiving notice by the publication must appeal within one year.[52]

*Lis Pendens Record*—In any action concerning land, commenced in any court in Indiana, including federal district courts sitting in this state, notice must be given the clerk of the circuit court where the land is situated.[53] Previously no provision was made for causes instituted in the federal courts in such instances.[54]

Whenever a suit on a bond payable to the State of Indiana is commenced in any court of this state, including federal district courts sitting in Indiana, notice of such suit must be given to "the clerk of the circuit court."[55] Quaere: Which "clerk of the circuit court" would be the proper recipient of notice of a suit commenced in the federal district court?

## PROPERTY

*Mechanics' Liens*—Chapter 23 of the Acts of 1947 provides a procedure by which a property owner may secure the formal release of a mechanics' lien which has been recorded (upon his property) for more than two years. The owner files a personal affidavit with the recorder of the county in which the property is situated, stating that no suit has been filed and no unsatisfied judgment rendered against the prop-

50. Ind. Acts 1881 (Spec. Sess.), c. 45, §2, Ind. Stat. Ann. (Burns, 1933) §6-102.
51. Ind. Rev. Stat. 1852, c. 103, §8, Ind. Stat. Ann. (Burns, 1933) §49-3313.
52. Ind. Acts 1947, c. 263, §1.
53. Ind. Acts 1947, c. 98, §1.
54. Ind. Acts 1889, c. 96, §1, Ind. Stat. Ann. (Burns, Repl. 1946) §2-814.
55. Ind. Acts 1947, c. 98, §1.