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## Writ of Error Coram Nobis

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## COMMENT

### WRIT OF ERROR CORAM NOBIS\*

The Supreme Court of Nebraska in a recent decision states that the question whether or not the writ of error coram nobis exists in Nebraska "presents alluring opportunities for a display of learning and research, not often offered in these practical times, but we must decline to enter the attractive field of its discussion for the reason that it is not necessary for the proper disposition of the case before the court."<sup>1</sup> The issue of the applicability of the writ in Nebraska has been raised in two cases, but both cases were disposed of without deciding the question on the ground that, even though the writ did exist, the facts asserted by the applicant did not make out a case for granting the writ.<sup>2</sup> Both of the cases were criminal cases, the problem apparently never having been raised as to its existence in civil practice.

The writ of coram nobis was a common-law writ, the purpose of which was to correct a judgment in the same court in which it was rendered.<sup>3</sup> In the United States, the writ is usually called coram nobis, although a few cases use the terms "coram nobis" and "coram vobis" indiscriminately. In England the writ was called "coram nobis" or "coram vobis" depending upon whether the proceedings were in the King's Bench or the common Pleas, because the record was stated to remain before us (the King) if in the former, and before you (the

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<sup>1</sup> *State v. Boyd*, (1928) 117 Neb. 320, 220 N. W. 281, 58 A. L. R. 1286.

<sup>2</sup> *Cole v. State*, (1920) 104 Neb. 780, 178 N. W. 635; *State v. Boyd*, (1928) 117 Neb. 320, 220 N. W. 281, 58 A. L. R. 1286. The later case makes no reference to the earlier case.

<sup>3</sup> W. W. Thornton, *Coram Nobis et Coram Vobis*, (1930) 5 Ind. L. Jour. 603; (1920) 6 Iowa L. Bul. 119; (1930) 9 Tex. L. Rev. 110; (1931) 26 Ill. L. Rev. 249; (1931) 6 Ind. L. Jour. 576; (1883) 4 Crim. L. Mag. 371; 46 Am. Dec. 257; 18 L. R. A. 838; 97 Am. St. Rep. 362; 3 Ann. Cas. 328; Ann. Cas. 1915 A, 1287; L. R. A. 1918 A, 1178; 10 A. L. R. 214, 648; 30 A. L. R. 686, 1416; 33 A. L. R. 84; 36 A. L. R. 1443; 43 A. L. R. 1387; 58 A. L. R. 1286; 2 R. C. L. 305; 23 Cyc. 883; 16 C. J. 1326; Bishop, *New Criminal Procedure*, sec. 1368, p. 832; Shipman, *Common-Law Pleading*, 538.

judges) if in the latter. In the United States *coram nobis* has sometimes been distinguished from *coram vobis* in that the former is applied for in the same court in which the judgment was rendered, and the latter in a superior court.

Although the writ *coram nobis* is referred to as a writ of error, it is to be sharply differentiated from the ordinary writ of error. The ordinary writ of error is brought for an alleged error of law apparent on the record, and takes the case to an appellate court, which decides the question and affirms or reverses the judgment. The writ of *coram nobis* lies as to errors of fact not apparent on the record in the same court in which the judgment was rendered, in order that that court may correct the error, if there be such, and revoke the judgment, or affirm it if there be no error. At common law no motion for a new trial lay in felony cases, the only relief being a pardon as to error of law, and the writ *coram nobis* for errors of fact.

It has often been asserted that due to the development of statutory remedies, such as motion to set aside a judgment, motion for a new trial, and appeal, the writ *coram nobis* has become obsolete, or nearly so. If the legislature has adopted a criminal or civil code intended to be complete and exclusive as to procedure, and the writ is not mentioned, it is arguable that the writ no longer exists. It has also been asserted that its use in civil cases is quite common, but that it is seldom resorted to in criminal cases,<sup>4</sup> although exactly the contrary has occasionally been asserted.<sup>5</sup> Up to 1897 the overwhelming majority of supreme court cases involved its application in civil practice, there being only nine criminal cases.<sup>6</sup> Since that time, however, the number of criminal cases has increased, so that in recent years there has been a slight preponderance of criminal cases. A reading of these cases reveals that much the greater expansion in the scope of the writ has occurred in the criminal cases.

It is fundamental that *coram nobis* lies only in the same court which rendered the judgment, preferably to the same

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<sup>4</sup> 2 R. C. L. 305.

<sup>5</sup> Thornton, *Coram Nobis et Coram Vobis*, (1930) 5 Ind. L. Jour. 603, 608; 97 Am. St. Rep. 371.

<sup>6</sup> The American Digest System lists 12 criminal and 18 civil cases from 1897 to 1906, 9 criminal and 14 civil cases from 1907 to 1916, 23 criminal and 23 civil cases from 1917 to 1926, and 31 criminal and 24 civil cases in the five subsequent years.

judge, who decided the case,<sup>7</sup> since he is the most familiar with the facts, and is most likely to know whether the allegedly new facts were in issue at the trial. The writ does not lie in an appellate court like the ordinary writ of error. Suppose, however, that there has been an appeal and the judgment has been affirmed. In that case it has generally been held that writ no longer issues in the trial court, since the judgment is now that of the appellate court.<sup>8</sup> Hence the writ will issue in the trial court only upon application to the appellate court for permission to apply to the trial court for such relief.<sup>9</sup> The application to the appellate court in such case must set out in detail the basis of the applicant's claim. An application merely stating the conclusions of the applicant is not sufficient. It has been held that the writ does not apply in equity cases.<sup>10</sup>

It has sometimes been asserted that the writ is not one of right, so that a ruling of the trial court refusing the writ will not be reviewed. This does not seem to be the correct view, however. What the courts mean when they say that the writ does not lie of right is that the writ will not be granted on a mere application for it. That is to say, the application must be supported by such affidavits or oral evidence as make it appear with reasonable certainty that there has been some error of fact, and that it is not merely sought for delay.<sup>11</sup> If the application is thus supported, and there is then a refusal of the writ, it would seem that the appellate court may reverse the denial as error.<sup>12</sup>

The correct practice in obtaining the writ in a criminal case is by a motion for the writ, and notice thereof served on the county attorney. It is a proceeding in the principal case and not an independent suit against the state. Hence the title of

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<sup>7</sup> *Ernst v. State*, (1923) 181 Wis. 155, 193 N. W. 978; note in 30 A. L. R. 1416.

<sup>8</sup> See cases collected in note in 30 A. L. R. 1416. *Contra*: *Johnson v. State*, (1911) 97 Ark. 131, 133 S. W. 596, on the theory that the Supreme Court, in affirming, passes only on proceedings of the trial court presented in the record; *Hydrick v. State*, (1912) 104 Ark. 43, 148 S. W. 544; *Hodges v. State*, (1914) 111 Ark. 22, 163 S. W. 506.

<sup>9</sup> *Lake v. State*, (Fla. 1931) 135 So. 123.

<sup>10</sup> Note in L. R. A. 1918 A 1178.

<sup>11</sup> Note in 97 Am. St. Rep. 362, 365.

<sup>12</sup> Where the appeal statute does not provide for appeals in such cases, certiorari has been held to be the proper remedy. *Hodges v. State*, (1914) 111 Ark. 22, 163 S. W. 506.

the principal case should be retained in moving for the writ, although this is not the universal practice.<sup>13</sup> The prosecuting attorney may attack the writ by demurrer, plea of nullo est erratum, pleading in confession and avoidance, making an issue of fact by traversing the declaration, or by motion to dismiss.<sup>14</sup> There is no right to a jury trial, the court usually hearing the evidence.<sup>15</sup> The applicant usually supports his motion by affidavits and the prosecuting attorney meets these with counter affidavits.

Doubtless the most difficult and at the same time the most important question in connection with the writ is that of its scope. The object of the writ is to bring before the court which rendered the judgment matters of fact which, if known at the time the judgment was rendered, would have prevented the judgment. It does not lie for an error of law, the remedy there obviously being that of the ordinary writ of error or appeal.<sup>16</sup> Hence no matter how significant the facts alleged are, if they were in issue, an erroneous application of the law to such facts is not a ground for the writ. The customary statement of the doctrine is that the writ lies in cases of the infancy of a defendant who appeared only by attorney without the appointment of a guardian, the coverture of a woman in states where she is not given the power by statute to sue or defend without her husband and the husband is not joined with her, the death of a party before the judgment was rendered, and, according to some cases, the insanity of a party at the trial.<sup>17</sup> The earlier cases enunciated the doctrine that error in the process was a ground.<sup>18</sup> Most of the cases laying down these rules have been civil cases, and analysis of their content shows their obvious applicability to civil practice. Other civil cases allow the writ to review a judgment rendered without notice,<sup>19</sup> or where, through fraud of the attorney of the plaintiff in the case, a default judgment has been taken as for a failure to keep a promise to file defendant's answer, or where

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<sup>13</sup> *Dobbs v. State*, (1900) 62 Kans. 108, 61 Pac. 408.

<sup>14</sup> *People v. Crooks*, (1927) 326 Ill. 266, 157 N. E. 218.

<sup>15</sup> *People v. Black*, (1928) 89 Cal. App. 219, 264 Pac. 343.

<sup>16</sup> *Cole v. State*, (1920), 104 Neb. 780, 178 N. W. 635.

<sup>17</sup> *U. S. v. Plumer*, (1859) 3 Cliff. 28, Fed. Cas. 16,056; *Lamb v. State*, (1926) 91 Fla. 396, 107 So. 535.

<sup>18</sup> As to clerical mistakes in judgments, see 10 A. L. R. 648.

<sup>19</sup> In *Holt v. State*, (1901) 78 Miss. 631, 29 So. 527, the court in a criminal case suggests that the writ lies when a defendant is tried in his absence without arrest or process, etc.

the clerk fails to file defendant's answer, or any vital jurisdictional defect not apparent on the record.

The criminal cases on the scope of the writ often merely recite the instances where the writ is appropriate in civil situations.<sup>20</sup> The writ has also been held to lie in certain other typical situations. In the days of slavery it was held to lie to release a slave imprisoned in the state penitentiary, slaves not being subject to such imprisonment.<sup>21</sup> It has also been allowed to release a person under eighteen years of age from the state prison, such persons not being subject to that kind of imprisonment.<sup>22</sup> A number of cases grant the writ where the defendant was insane at the time of judgment.<sup>23</sup> One of the most important cases of its application is that where the defendant was forced through well founded fear of mob violence to plead guilty. This rule was first laid down in an early Indiana case,<sup>24</sup> and has been followed in leading Kansas decisions.<sup>25</sup> It has been repeated as dictum by numerous other courts.<sup>26</sup> An interesting problem might arise if the defendant sought the writ on the

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<sup>20</sup> One of the few cases distinguishing the application of the writ in criminal cases with a list of the cases where it lies, is the excellent opinion of Whitfield, P. J., in *Lamb v. State*, (1926) 91 Fla. 396, 107 So. 535. See also, *People v. Reid*, (1924) 195 Cal. 249, 232 Pac. 457, 36 A. L. R. 1435, listing the cases indiscriminately; 16 C. J. 1326; notes in 97 Am. St. Rep. 362, 371; 3 Ann. Cas. 328.

<sup>21</sup> *Ex Parte Toney*, (1848) 11 Mo. 661.

<sup>22</sup> *Ex parte Gray*, (1882) 77 Mo. 160.

<sup>23</sup> *Adler v. State*, (1880) 37 Ark. 517, 37 Am. Rep. 48, 2 Crim. L. Mag. 198; *Linton v. State*, (1904) 72 Ark. 532, 81 S. W. 608; *Johnson v. State*, (1911) 97 Ark. 131, 133 S. W. 596; *Hydrick v. State*, (1912) 104 Ark. 43, 148 S. W. 541; *Hodges v. State*, (1914) 121 Miss. 197, 83 So. 158, 10 A. L. R. 205; see note in 10 A. L. R. 214.

<sup>24</sup> *Sanders v. State*, (1882) 85 Ind. 318, 44 Am. Rep. 29, 4 Crim. L. Mag. 359, and note at 371. *Trattner v. State*, (1916) 185 Ind. 188, 113 N. E. 243, improvement plea of guilty, the court saying that there was (in effect) no trial, hence no motion for a new trial necessary.

<sup>25</sup> *State v. Calhoun*, (1893) 50 Kans. 523, 32 Pac. 38, 34 Am. St. Rep. 141, 18 L. R. A. 838, and note.

<sup>26</sup> *Nickels v. State*, (1923) 86 Fla. 208, 98 So. 497, 99 So. 121; *People v. Crooks*, (1927) 326 Ill. 266, 157 N. E. 218; *Ernst v. State*, (1923) 179 Wis. 646, 192 N. W. 65, 30 A. L. R. 681, where ignorant foreigner induced to plead guilty by fraud. See note in 30 A. L. R. 686. The writ was held not to lie in *Beard v. State*, (1907) 81 Ark. 515, 99 S. W. 837, though defendant was prevented from obtaining witnesses because of fear of violence, since he had the remedy of a new trial at the same term. The Missouri court denies that fraud is a ground. *Dusenberg v. Rudolph, Warden*, (1930) 30 S. W. (2d) 194. Habeas corpus was held an improper remedy in *Darling v. Fenton*, (1931) 120 Neb. 829, 235 N. W. 582.

ground of duress on the part of officers of the law—would the writ lie on the ground of the use of the third degree?<sup>27</sup>

The great weight of authority is to the effect that the writ will not lie on the ground of newly discovered evidence.<sup>28</sup> One reason is that the remedy of motion for new trial is usually available, although it should be noted that the time in which such motion can be made is usually limited. But perhaps the more basic reasons are that litigation would never be terminated, and that there would be strong possibilities of perjury, since the defendant, having testified falsely at one time, is likely to testify falsely again at a later time. It is also fundamental that the writ does not lie as to an issue which was adjudicated at the trial. Hence, if the newly discovered evidence goes to such issue, it is no ground for the writ. On the other hand, if the new facts go to some issue that was not litigated, they may under some circumstances be a ground for the issuance of the writ.<sup>29</sup> If such new facts would have caused a different decision if known to the court, then the writ should lie. That is to say, the new facts must have to do with the actual guilt of the defendant and not some collateral matter.<sup>30</sup> They must not be such as would merely compel a reversal and new trial. Hence

<sup>27</sup> For a case allowing the writ because of duress by an officer of the law, see *Rhodes v. State*, (1927) 199 Ind. 183, 156 N. E. 389.

<sup>28</sup> *Howard v. State*, (1893) 58 Ark. 229, 24 S. W. 8, defendant not allowed to show that another had committed the crime; *State v. Superior Court*, (1896) 15 Wash. 339, 46 Pac. 399, held not to lie on mere showing that prosecuting witness admitted falsity of testimony after trial; *Wilson v. State*, (1907) 46 Wash. 416, 90 Pac. 257, held not to lie on account of a mistaken statement made by defendant at trial based on statement of now deceased co-defendant, defendant not having disclosed co-defendant's misstatement until the latter's death; *People v. Mooney*, (1918) 178 Cal. 525, 174 Pac. 325, certiorari denied (1918), 244 U. S. 579, 39 S. Ct. 21, 63 L. ed. 430, perjured testimony not a ground, only extrinsic fraud justifying relief; *People v. Black*, (1928) 89 Cal. App. 219, 264 Pac. 343, defendant not allowed writ where he swore falsely to shield another party, who had promised to pay the fine; *Humphreys v. State*, (1924) 129 Wash. 309, 224 Pac. 937, 33 A. L. R. 78, and note, dictum that would not lie though alleged that murdered party not murdered, since that was in issue.

<sup>29</sup> (1931) 26 Ill. L. Rev. 249.

<sup>30</sup> In *People v. Mooney*, (1918) 178 Cal. 525, 174 Pac. 325, certiorari denied (1918) 244 U. S. 579, 39 S. Ct. 21, 63 L. ed. 430, it was held that the writ lies only where the defendant is deprived of a trial on the merits or where (in effect) there is no trial at all. In *Dusenberg v. Rudolph, Warden*, (Mo. 1930) 30 S. W. (2d) 194, it was held that questions of commission of the crime, time, and place were on a parity.

a mere irregularity occurring in the course of the trial, such as misconduct by a juror,<sup>31</sup> or the insanity of a witness, even though the prosecuting witness, are not proper grounds.<sup>32</sup> The writ does not lie as to facts or circumstances arising after judgment.<sup>33</sup> The Indiana court has opened up rather wide possibilities of the use of the writ in announcing the doctrine that the writ may lie on the ground of newly discovered evidence, if such evidence is of such a nature that not to permit its consideration would result in a substantial miscarriage of justice.<sup>34</sup> The court has been meticulous in later decisions in holding that it is not every case of newly discovered evidence that will warrant the writ, and that each case must be considered on its

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<sup>31</sup> *Hamlin v. State*, (1903) 67 Kans. 724, 74 Pac. 242, misstatement of qualifications on voir dire; *State v. Armstrong*, (1906) 41 Wash. 601, 84 Pac. 584, same; *State v. Choquette*, (1921) 109 Kans. 780, 202 Pac. 68, same; *Chesser v. State*, (1926) 92 Fla. 754, 109 So. 906, same; *People v. Reid*, (1924) 195 Cal. 249, 232 Pac. 457, 36 A. L. R. 1435, irregularity in obtaining by jury of information as to extent of punishment which would result from a certain verdict. See note in 36 A. L. R. 1443.

An insufficient presentation of the case by counsel was held to be ground for a new trial, not coram nobis, in *Mandell v. People*, (1924) 76 Colo. 296, 231 Pac. 199. Disqualification of judge to try the case is not a ground. *People v. Donahue*, (1922) 233 Ill. App. 277. Discrimination against negro jurors is not a ground when defendant did not at proper time object to the panel. *Washington v. State*, (1928) 95 Fla. 289, 116 So. 470, certiorari denied, (1928) 278 U. S. 599, 49 S. Ct. 8, 73 L. ed. 528. Bias of sheriff in summoning jury panel held not a ground. *People v. Black*, (Cal. App. 1931) 300 Pac. 43. Failure to pronounce sentence in presence of defendant is not a ground. *People v. Moran*, (1930) 342 Ill. 478, 174 N. E. 532. Refusal of counsel acting in good faith to move for new trial not a ground. *Cole v. State*, (1920) 104 Neb. 780, 178 N. W. 635. Introduction of perjured testimony and suppression of material evidence by prosecuting attorney held not a ground in *People v. Mooney*, (1918) 178 Cal. 525, 174 Pac. 325, certiorari denied (1918) 244 U. S. 579, 39 S. Ct. 21, 63 L. ed. 430.

<sup>32</sup> *Boyd v. Smith*, (1925) 200 Ia. 687, 205 N. W. 522, 43 A. L. R. 1381, certiorari denied (1926) 270 U. S. 635, 46 S. St. 470, 70 L. ed. 772.

<sup>33</sup> *Collins v. State*, (1903) 66 Kans. 201, 71 Pac. 251, 97 Am. St. Rep. 361, where defendant was prevented from appealing his case because of his inability to make up a record embodying his exceptions within the time allowed by law.

<sup>34</sup> *Davis v. State*, (1928) 200 Ind. 88, 161 N. E. 375, "And we do not undertake to lay down a general rule of law that a writ of error coram nobis should be granted whenever a material witness recants and admits perjury, but in the sound discretion of the court, where, as here, it appears that the verdict most probably would have been rendered ex-

facts.<sup>35</sup> The Indiana doctrine has not as yet received support in other jurisdictions.

It does not always follow from the fact that there were errors of fact as to non-adjudicated issues, which would have altered the judgment had they been called to the attention of the court, that a case is made out for application of the writ. If it appears that the defendant knew of such facts, but failed to disclose them to the court, or that the defendant might, by the exercise of diligence have discovered such facts, the writ will be refused.<sup>36</sup> The writ is not confined to the same term of court as are the other available statutory remedies. The cases are in conflict as to the application of the statute of limitations to the writ.<sup>37</sup>

Whether the writ coram nobis lies in Nebraska is, as has been seen, still undecided, no petitioner having as yet made out a case on the facts which would warrant its issuance. Assistance in deciding the problem may best be gotten from comparing the results arrived at in other jurisdictions. Most states have adopted remedies, both in civil and in criminal practice, which in large part serve the same purpose as coram nobis. Nebraska has not been behind other states in these matters. The general view of other states seems to be that the adoption of statutory

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cept for such testimony and that there is a strong probability of a miscarriage of justice unless the writ is granted, it should be granted." Pemberton, J., dissenting in *Humphreys v. State*, (1924) 129 Wash. 309, 224 Pac. 937, 33 A. L. R. 78, would apparently allow the writ if there was evidence which if known would have released the defendant even though the issue was litigated. See note in 33 A. L. R. 84.

<sup>35</sup> *Shock v. State*, (1929) 200 Ind. 469, 164 N. E. 625, where no showing that alleged perjuring prosecuting witness, in statutory rape case, would testify so differently as to acquit the defendant. *Kleihege v. State*, (Ind. 1931) 177 N. E. 60, where the court said that it did not "undertake to lay down a general rule of law that a writ of error coram nobis should be granted whenever a material witness recants and admits perjury. There is no form of proof so unreliable as recanting testimony. The writ is issued to correct errors of fact where there is a strong probability of a miscarriage of justice, unless the writ is granted, and each case must necessarily be controlled by its particular facts."

<sup>36</sup> *State v. Boyd*, (1928) 117 Neb. 320, 220 N. W. 281, 58 A. L. R. 1286, and note; *People v. Black*, (Cal. App. 1931) 300 Pac. 43.

<sup>37</sup> See *State v. Calhoun*, (1893) 50 Kans. 523, 32 Pac. 38, 34 Am. St. Rep. 141, 18 L. R. A. 838, (duress); note in 97 Am. St. Rep. 362, 367; *Ernst v. State*, (1923) 179 Wis. 646, 192 N. W. 65, 30 A. L. R. 81, (fraud); *People v. Reid*, (1924) 195 Cal. 249, 232 Pac. 457, 36 A. L. R. 1435; 2 R. C. L. 309.

remedies results in the writ coram nobis to that extent being superseded, but that the writ is still applicable to cases where the new remedies do not go so far as the writ itself. The federal district courts and twenty states have decisions in criminal cases involving the existence of the writ.<sup>38</sup> The federal courts have never asserted outright that the writ lies in no criminal case, although their language has leaned in the direction of treating it as obsolete.<sup>39</sup> The Iowa,<sup>40</sup> Massachusetts,<sup>41</sup> Michigan,<sup>42</sup> Ohio,<sup>43</sup> and Oregon<sup>44</sup> courts are apparently the only courts that

<sup>38</sup> There are approximately 85 criminal cases involving the writ coram nobis listed in the American Digest System.

<sup>39</sup> *Strode v. Justices*, (1810) 1 Brock 162, Fed. Cas. 13,537, the writ allowed in a civil case; *U. S. v. Plumer*, (1859) 3 Cliff. 28, Fed. Cas. 16,056, stating that the writ has been used in civil, but not criminal cases in the federal courts since the Judiciary Act is silent on the subject; *Albree v. Johnson*, (1874) 1 Flipp. 341, Fed. Cas. 146, allowed in civil case; *U. S. v. Port Washington Brewing Co.*, (D. C. E. D. Wis. 1921) 277 Fed. 306, dictum that it does not lie; *U. S. v. Luvisch*, (D. C. E. D. Mich. 1927) 17 Fed. (2d) 200, held to be superseded by motion to set aside the judgment. See also *Pickett's Heirs v. Legerwood*, (1833) 7 Pet. 144, 8 L. ed. 638; *Bronson v. Schulten*, (1881) 104 U. S. 410, 26 L. ed. 797, rule of state courts held not binding on federal courts; *U. S. v. Mayer*, (1914) 234 U. S. 55, 67-69, 35 S. Ct. 16, 59 L. ed. 129, court declined to decide whether it lay in criminal cases, since no case for relief presented by facts.

<sup>40</sup> *Boyd v. Smith*, (1925) 200 Ia. 687, 205 N. W. 522, 43 A. L. R. 1381 and note, certiorari denied (1926) 270 U. S. 635, 46 S. Ct. 470, 70 L. ed. 772, in which the court said: "It follows that the legislature having provided a complete Criminal Code, and not having provided for any writ of error coram nobis, such writ is not available under the practice in this state."

See also *Coppock v. Reid*, (1920) 189 Ia. 581, 178 N. W. 382, 10 A. L. R. 1407, noted in (1920) 6 Iowa L. Bul. 119, holding that writ did not lie to expunge false testimony from record of trial at which plaintiff was convicted of cheating, and that writ would not lie at a later term.

<sup>41</sup> *Commonwealth v. Sacco*, (1927) 261 Mass. 12, 158 N. E. 167, certiorari denied, (1927) 275 U. S. 574, 48 S. Ct. 17, 72 L. ed. 434, holding obsolete in capital cases. "We are of the opinion that the writ of error coram nobis at common-law has become obsolete in view of the express purpose of the legislature as manifested by the statute." *Commonwealth v. Phelan*, (Mass. 1930) 171 N. E. 53, writ held not to lie in any criminal case.

<sup>42</sup> *Dewey v. Smith*, (1930) 230 Mich. 377, 230 N. W. 180, writ coram vobis held not to lie; *quaere*, may not coram nobis still lie? The court probably meant that neither writ lay since it cited an Iowa case denying that coram nobis lies. "The common-law writ of error coram vobis has never obtained in this state, having been rendered obsolete by statutory methods of correcting error. Upon this subject see *Boyd v. Smith* (1925), 200 Ia. 687, 205 N. W. 522, 43 A. L. R. 1381."

assert that it has been completely superseded by other remedies. Of the states, the cases of which appear in the Northwestern Reporter, Iowa denies the writ, Michigan does likewise, Nebraska has refused to decide,<sup>45</sup> and Wisconsin has twice held that it lies.<sup>46</sup> Of the other states near Nebraska, Colorado refused to decide,<sup>47</sup> Illinois denies it, but accomplishes the same thing by a statutory writ,<sup>48</sup> Indiana,<sup>49</sup> Kansas,<sup>50</sup> Missouri,<sup>51</sup> Okla-

<sup>43</sup> *State v. Hayslip*, (1914) 90 Ohio St. 199, 107 N. E. 335. "We find that in Ohio the common-law writs and pleas are designated by statute. The writs of coram nobis and coram vobis which are involved in behalf of the defendants in error are no part of the criminal jurisprudence of the State of Ohio."

<sup>44</sup> *State v. Rathie*, (1921) 101 Ore. 368, 200 Pac. 790, does not exist to review a case in appellate court, but, *quaere*, may it not still exist to set aside the decision in the trial court? The court said: "By section 1603, Or. L. (Olson's Comp.) all writs of error and of certiorari are abolished in criminal cases. Said section is as follows: 'Writs of error and of certiorari in criminal actions are abolished, and hereafter the only mode of reviewing a judgment or order in a criminal action is that prescribed by this chapter.'"

<sup>45</sup> *Cole v. State*, (1920) 104 Neb. 780, 178 N. W. 635; *State v. Boyd*, (1928) 117 Neb. 320, 220 N. W. 281, 58 A. L. R. 1286.

<sup>46</sup> *Ernst v. State*, (1923) 179 Wis. 646, 192 N. W. 65, 30 A. L. R. 681, and note; *Ernst v. State*, (1923) 181 Wis. 155, 193 N. W. 978, though it should be used with caution. In the former case the court said: "At the time of the adoption of the Constitution, the writs of error herein referred to had not been abolished, but were still in existence, and while the proceedings have been regulated and modified, such writs have not been abolished. It therefore becomes plain that the common-law writ of error coram nobis is still in force in this state, excepting only where other remedies have been substituted."

<sup>47</sup> *Mandell v. People*, (1924) 76 Colo. 296, 231 Pac. 199, but points out that many other jurisdictions allow the writ.

<sup>48</sup> *People v. Donahoe*, (1922) 223 Ill. App. 277; *People v. Drysch*, (1924) 311 Ill. 342, 143 N. E. 200, court refused to decide; *People v. Crooks*, (1927) 325 Ill. 266, 157 N. E. 218, held to lie even after term of court and after defendant had been sentenced and committed to the penitentiary; *People v. Schuedter*, (1929) 336 Ill. 244, 168 N. E. 323, held that coram nobis is abolished in Illinois by statute, and motion substituted therefor; *People v. Moran*, (1930) 342 Ill. 478, 174 N. E. 532, statutory substitute for coram nobis held to lie where latter lay formerly.

<sup>49</sup> *Sanders v. State*, (1882) 85 Ind. 318, 49 Am. Rep. 29, 4 Crim. L. Mag. 359, and note at 371; *Trattner v. State*, (1916) 185 Ind. 188, 113 N. E. 243; *Partlow v. State*, (1922) 191 Ind. 657, 134 N. E. 483; *Partlow v. State*, (1923) 194 Ind. 172, 141 N. E. 513, 30 A. L. R. 1414 and note; *Rhodes v. State*, (1927) 199 Ind. 183, 156 N. E. 389; *Davis v. State*, (1928) 200 Ind. 88, 161 N. E. 375; *Shock v. State*, (1929) 200

homa,<sup>52</sup> allow the writ, and the Wyoming court refused to decide.<sup>53</sup> The writ has also been held to lie in Arkansas,<sup>54</sup> California,<sup>55</sup> Florida,<sup>56</sup> Mississippi,<sup>57</sup> Washington,<sup>58</sup> and Texas is in doubt.<sup>59</sup>

Ind. 469, 164 N. E. 469; *Berry v. State*, (Ind. 1930) 173 N. E. 705; *State ex rel. Lopez v. Killigrew*, (Ind. 1931) 174 N. E. 808, noted in (1931) 6 Ind. L. Jour. 576, even though defendant had served his sentence and paid his fine, on the theory that there is no double jeopardy since *coram nobis* is equivalent to a new trial; *Kleihege v. State*, (Ind. 1931) 177 N. E. 60.

<sup>50</sup> *State v. Calhoun*, (1893) 50 Kans. 523, 32 Pac. 38, 18 L. R. A. 838 and note, 34 Am. St. Rep. 141; *Dobbs v. State*, (1900) 62 Kans. 108, 61 Pac. 408; *State v. Asbell*, (1900) 62 Kans. 289, 61 Pac. 690; *Collins v. State*, (1903) 66 Kans. 201, 71 Pac. 251, 60 L. R. A. 572, 97 Am. St. Rep. 361 and note; *Hamlin v. State*, (1903) 67 Kans. 724, 74 Pac. 242; *State v. Choquette*, (1921) 109 Kans. 780, 202 Pac. 68; *State v. Ray*, (1922) 111 Kans. 350, 207 Pac. 192.

<sup>51</sup> *Ex parte Toney*, (1848) 11 Mo. 661; *Ex parte Gray*, (1882) 77 Mo. 160; *State v. Stanley*, (1910) 225 Mo. 525, 125 S. W. 475, but held not to lie after close of term; *State v. Richardson*, (1922) 291 Mo. 566, 237 S. W. 765, several of judges, however, narrowly confining it to cases of insanity, minors, and married women, and denying its application to cases of duress; *State ex rel. Orr v. Latshaw*, (1922) 291 Mo. 592, 237 S. W. 770; *Dusenberg v. Rudolph, Warden*, (Mo. 1930) 30 S. W. (2d) 194, denying its application to cases of fraud.

<sup>52</sup> *State v. Swindall*, (1926) 33 Okla. Cr. Rep. 210, 241 Pac. 456.

<sup>53</sup> *Alexander v. State*, (1912) 20 Wyo. 241, 123 Pac. Ann. Cas. 1915 A, 1282 and note.

<sup>54</sup> *Adler v. State*, (1880) 37 Ark. 577, 37 Am. Rep. 48, 2 Crim. L. Mag. 198; *Howard v. State*, (1893) 58 Ark. 229, 24 S. W. 8; *Linton v. State*, (1904) 72 Ark. 532, 81 S. W. 608; *Beard v. State*, (1906) 79 Ark. 293, 95 S. W. 995, 97 S. W. 667; *Beard v. State*, (1907) 81 Ark. 515, 99 S. W. 837; *Johnson v. State*, (1911) 97 Ark. 131, 133 S. W. 596; *Hydrick v. State*, (1912) 104 Ark. 43, 148 S. W. 541; *Hodges v. State*, (1914) 111 Ark. 22, 163 S. W. 506; *Kelley v. State*, (1923) 156 Ark. 188, 246 S. W. 4; *Sease v. State*, (1923) 157 Ark. 217, 247 S. W. 1036.

<sup>55</sup> *People v. Perez*, (1908) 9 Cal. App. 265, 98 Pac. 870, court declined to decide; *People v. Mooney*, (1918) 178 Cal. 525, 174 Pac. 325, certiorari denied in (1918) 244 U. S. 579, 39 S. Ct. 21, 63 L. ed. 430; *People v. Reid*, (1924) 195 Cal. 249, 232 Pac. 457, 36 A. L. R. 1435, and note; *People v. Sandoval*, (1927) 200 Cal. 730, 254 Pac. 893; *People v. Black*, (1928) 89 Cal. App. 219, 264 Pac. 343; *People v. Black*, (1928) 89 Cal. App. 225, 264 Pac. 346; *People v. Black*, (Cal. App. 1931) 300 Pac. 43.

<sup>56</sup> *Nickels v. State*, (1923) 86 Fla. 208, 98 So. 497, 99 So. 121; *Lamb v. State*, (1926) 91 Fla. 396, 107 So. 535; *Lamb v. Harrison*, (Fla. 1926) 108 So. 671; *Chesser v. State*, (1926) 92 Fla. 754, 109 So. 906. In the latter case the court said: "The application of the writ for the purpose of obtaining redress in those cases where it was and is in-

In view of the extensive and liberal provisions in Nebraska with respect to new trials,<sup>60</sup> and for vacation or modification of judgments at a subsequent time,<sup>61</sup> it is doubtful whether the writ of coram nobis lies in civil cases in Nebraska. There have been no supreme court cases involving civil cases. It is arguable, however, that possibly the writ still exists under the following provisions of the Civil Code of Civil procedure: "If a case ever

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tended to apply is wise and salutary, but its scope cannot be extended without grave danger of its becoming a menace to the enforcement of the law, an ever ready barrier for the obstruction of justice and the vehicle for the escape of the guilty. The courts and the lawmakers of the country should therefore carefully guard the extent of its application, and confine it to those well fixed purposes for which it was originally intended, and beyond which the courts and lawmakers in the past have not allowed its use." See also, *Washington v. State*, (1926) 92 Fla. 740, 110 So. 740; *Reid v. State*, (1927) 94 Fla. 32, 113 So. 630; *Washington v. State*, (1928) 95 Fla. 289, 116 So. 470, certiorari denied, (1928) 278 U. S. 599, 49 S. Ct. 8, 73 L. ed. 528; *Kuhn v. State*, (1929) 98 Fla. 206, 123 So. 775; *Lake v. State*, (Fla. 1931) 135 So. 123.

<sup>57</sup> *Holt v. State*, (1901) 78 Miss. 631, 29 So. 527, court declined to decide; *Fugate v. State*, (1904) 85 Miss. 94, 37 So. 554, 107 Am. St. Rep. 268, 3 Ann. Cas. 326 and note; *Bennett v. State*, (1913) 106 Miss. 103, So. 339; *Howie v. State*, (1919) 121 Miss. 197, 83 So. 158, 10 A. L. R. 205 and note, Ethridge, J., dissenting; *White v. State*, (Miss. 1930) 131 So. 96.

<sup>58</sup> *State v. Superior Court*, (1896) 15 Wash. 339, 46 Pac. 399, court refused to decide; *State v. Armstrong*, (1906) 41 Wash. 601, 84 Pac. 584, perhaps lies in exceptional cases; *Wilson v. State*, (1907) 46 Wash. 416, 90 Pac. 257. "It is contended by the respondent that the writ of coram nobis is obsolete in this state. While it is true that our Code has made many provisions for appeal which did not exist at the common-law, we are not prepared to say that the statutes have abrogated all the rights which the common law bestowed upon defendants in criminal actions." The court also pointed out in the case just cited that the writ still exists in many code states. *Humphreys v. State*, (1924) 129 Wash. 309, 224 Pac. 937, 33 A. L. R. 78 and note.

<sup>59</sup> *Ex parte Minor* (1930) 115 Tex. Cr. App. 634, 27 S. W. (2d) 805; *Ex parte McKenzie*, (1930) 115 Tex. Cr. App. 315, 29 S. W. (2d) 771; noted in (1930) 9 Tex. L. Rev. 110. In the second case the court said: "We are not aware of any criminal case in this state in which the writ has been applied. We do not concede that the writ can be applied in criminal cases in this state. A decision of the question is unnecessary." The Tex. L. Rev. comment suggests that under a Texas statute providing for resort to the common law where there is a defect in procedure, perhaps coram nobis lies in some criminal cases.

<sup>60</sup> Neb. Comp. Stat. 1920, Secs. 20-1142 to 20-1145.

<sup>61</sup> Neb. Comp. Stat. 1929, Secs. 20-2001 to 20-2009.

arises in which an action for the enforcement of a right, or the redress or prevention of a wrong, can not be had under this code, the practice heretofore in use may be adopted, so far as may be necessary to prevent a failure of justice."<sup>62</sup>

The existence of a writ in criminal cases is more problematic. The Nebraska statutes make provision for new trial on broad grounds, such as accident or surprise and newly discovered evidence.<sup>63</sup> It has been held, however, that a motion for a new trial, even on the ground of newly discovered evidence, must be made within the term at which the verdict was rendered.<sup>64</sup> Likewise a writ of error must be applied for within the term.<sup>65</sup> Because the other remedies are limited as to time and possibly may not be so broad in scope, because our statutes do not expressly abolish the writ, nor does the criminal code assume to be a complete one, it seems that our court might well find that the writ of error coram nobis still exists in Nebraska in criminal cases.

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<sup>62</sup> Neb. Comp. Stat. 1929, Sec. 20-2225.

<sup>63</sup> Neb. Comp. Stat. 1929, Secs. 29-2101 to 29-2103, especially 29-2101.

<sup>64</sup> *Bradshaw v. State*, (1886) 19 Neb. 644, 28 N. W. 323.

<sup>65</sup> Neb. Comp. Stat. 1929, Secs. 29-2301, 29-2304.