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## CORAM NOBIS ET CORAM VOBIS

W. W. THORNTON\*

These two ancient writs seem to be coming back in use. Notwithstanding our Civil and Criminal Codes provide for appeals these writs are still applicable to our practice in this State, and are not obsolete.<sup>1</sup>

"It is recognized in many states as forming a part of the law; it is so held in Alabama,<sup>2</sup> in Arkansas,<sup>3</sup> in Iowa,<sup>4</sup> in Kentucky,<sup>5</sup>

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\* See p. 622 for biographical note.

<sup>1</sup> *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29, 4 Criminal Law Magazine 359.

This case is cited on the question of *coram nobis* in *Hermmel v. State*, 90 Ind. 339, 46 Am. Rep. 224; *Myers v. State*, 115 Ind. 558, 18 N. E. 42; *Myers v. State*, 156 Ind. 389, 59 N. E. 1052; *Baker v. Kreatentain*, 185 Ind. 697, 114 N. E. 446; *Trattner v. State*, 185 Ind. 189, 113 N. E. 243; *Rhodes v. State* (Ind.), 186 N. E. 190; *Pittsburg C. C. & St. L. N. Co.* (Ind.), 162 N. E. 406; *Wheeler v. State*, 158 Ind. 694, 63 N. E. 975; *Pittsburg, etc., R. R. Co. v. Hayd*, 17 Ind. App. 278, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597; and in other states in *Curran v. State*, 53 Ore. 158; *Haward v. State*, 58 Ark. 232; *State v. Weldon*, 91 N. C. 38, 39 L. R. A. (N. S.) 667n, Ann. Cas. 1913 E 801n; *Domitski v. American Linseed Oil Co.*, 117 Ill. App. 296; *Ashbell v. State*, 62 Kan. 213, 37 S. W. 554; *Fugate v. State*, 85 Miss. 99, 107 Am. St. 268; *State v. Calhoun*, 50 Kan. 523, 36 Pac. 38, 18 L. R. A. 838, 34 Am. St. 745; *State v. Stanley*, 232 Mo. 411; *Alexander v. State*, 20 Wyo. 257, Ann. Cas. 1915 A 1282n; *Barrezo v. Territory*, 8 N. Mex. 460n; 97 Am. St. 372; *Bennett v. State*, 106 Miss. 108; *People v. Mooney*, 178 Calif. 529; *Hawle v. State*, 121 Miss. 221, 10 L. R. A. 205n.

<sup>2</sup> *Citiz Holford v. Alexander*, 12 Ala. 280.

<sup>3</sup> *Adeler v. State*, 35 Ark. 517.

<sup>4</sup> *McKinney v. Western, etc., Co.*, 4 Iowa 420.

<sup>5</sup> *Meredith v. Sanders*, 2 Bibb 101; *Ireff v. Combs*, 8 B. Mon 386; *Combs v. Harter*, 1 Dana 178.

in Maryland,<sup>6</sup> in Michigan,<sup>7</sup> in Mississippi,<sup>8</sup> in Missouri,<sup>9</sup> in New York,<sup>10</sup> in North Carolina,<sup>11</sup> in Ohio,<sup>12</sup> in Pennsylvania,<sup>13</sup> in Tennessee,<sup>14</sup> in Texas,<sup>15</sup> and in Virginia."<sup>16</sup> The Supreme Court of the United States has said: "The cases for error *coram nobis* are enumerated without any material variation in all books of practice, and rest on the authority of the fathers and sages of the law."<sup>17</sup> Judge Cowen of New York in answer to the claim that the writ of *coram nobis* was no longer a part of the jurisprudence of the state, said: "There is no statute expressly and in terms repealing its power, nor any which does so by necessary implication. Mere silence, or omission to regulate proceedings upon such a writ will not operate as a repeal. The power, therefore, remains as at common law, except as to the mere form *coram nobis resident*, because that fiction of the record remaining before the king himself is gone."<sup>18</sup> After quoting this language, Judge Byron K. Elliott says: "We, therefore, have lost the name of the writ, but nothing more."<sup>19</sup>

In Tidd's practice these two writs are described as follows: "If a judgment in the Kings Bench be erroneous in matter of *fact* only, and not in point of law, it may be reversed in the

<sup>6</sup> *Hawkins v. Bovie*, 9 Gill & J. 428; *Kempf v. Cook*, 18 Md. 130, 79 Am. Dec. 681.

<sup>7</sup> *Teller v. Wethrell*, 6 Mich. 46.

<sup>8</sup> *Keller v. Scott*, 2 Sm. & M. 82; *Land v. Williams*, 12 Sm. & M. 362.

<sup>9</sup> *Calway v. Nissong*, 1 Mo. 223; *Ex parte Fenny*, 11 Mo. 662; *Powell v. Scott*, 13 Mo. 458.

<sup>10</sup> *High v. Comstock*, 1 Den. 552; *Mathes v. Comstock*, 1 How. Pr. 176; *Smith v. Kelligsby*, 19 Wend. 62.

<sup>11</sup> *Broughton v. Brown*, 8 Jones Eq. (N. C.) 393.

<sup>12</sup> *Dews v. Harper*, 6 Ohio 518.

<sup>13</sup> *Wood v. Coldwell*, 34 Pa. St. 92.

<sup>14</sup> *Hillman v. Hunter*, 12 Heisk. 34; *Patterson v. Arnold*, 4 Coldw. 364; *Wynne v. Governor*, 1 Yerg 469; *Crawford v. Williams*, 1 Swan 341.

<sup>15</sup> *Hills v. Alexander*, 21 Tex. 154; *Moke v. Binkett*, 28 Tex. 446; *Giddings v. Steele*, 28 Tex. 755.

<sup>16</sup> *Reed v. Strides*, 7 Gratt. 82.

<sup>17</sup> *Pickett v. Sethgow*, 7 Pet. 144. See also *Strode v. Stafford*, 1 Brock (U. S.) 162; *United States v. Pleumner*, 3 Cliff. (U. S.) 1.

<sup>18</sup> *Smith v. Kingsly*, 19 Wend. 620; *Strode v. Stafford*, 1 Brock. 162; *Cooke's Petition*, 15 Pick. 234.

<sup>19</sup> *Sanders v. State*, *supra*, note 1.

The English cases are *Cornhill's Case*, 1 L. W. 149, 1 Sid. 208; *Evans v. Roberts*, 3 Salk 147; same case reported as *Gibbons v. Roberts*, 1 Salk 265; *Queen v. O'Connell*, 7 Irish L. R. 261, 357, note; on appeal 11 Cl. & F. 190, 225, 252, 405; *Jaques v. Caesar*, 2 Saund. 100.

same court by a writ of error *coram nobis*, or *quae coram nobis resident*; so called, from its being founded on the record and process, which are stated in the writ to remain in the court of the lord the king; before the king himself; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of the commencing of the suit, or died before the verdict, or interlocutory judgment; for error in fact is not the error of the judges and reversing it is not reversing their own judgment. So, upon a judgment in the Kings Bench, if there be error in the *process*, or through the default of the clerks, it may be reversed in the same court, by writ of error *coram nobis*; but if an erroneous judgment be given in the Kings Bench, and the error be in the judgment itself, and not in the process, a writ of error does not lie in the same court upon such judgment. In the Common Pleas, the record and process being stated to remain before the King's justices, the writ is called a writ of error *coram vobis*, or *quae coram vobis resident*."<sup>20</sup> From these statements it is seen that the writ of *coram nobis* is issued by the court in which the judgment assailed was rendered; while the writ of *coram vobis* is issued by a supervising court to a lower court in which the judgment was rendered.

These writs are not what is known as a writ of error. "When the object of the writ is to remove a judgment from an inferior to a superior court for review, and the correction of errors of law or fact, it is called a writ of error only—nothing more. But when the object of the writ is to correct an error of fact in the same court that rendered the judgment, it is called a writ of *coram nobis*, if it be the King's Bench, and a writ of error *coram vobis*, if it be in the Common Pleas. . . . The writs *coram nobis* and *coram vobis* differ from a writ of error in two particulars: first they contain no *certiorari* clause, for there is no record to be certified; second, they have no return day, as they are in the nature of a commission only to the court to correct error."<sup>21</sup>

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<sup>20</sup> 2 Tidd Practice 1190, 1191 (2d Am. Ed. from 8th English).

For other descriptions of these writs, see Stephen's Pleadings 117; Bouvier's Institutes Sec. 3316.

For an excellent exposition of these writs see *Teller v. Wetherell*, 6 Mich. 45, and *Comstock v. Van Schoonhoven*, 3 How. Pr. 258.

<sup>21</sup> *Teller v. Wetherell*, *supra*, note 20.

The writ of error *coram nobis* does not issue out of court of chancery. It is a common law writ. *Reid v. Strider*, 7 Gratt. 82.

Neither of these writs lies to correct an error of law. Relief from that must be sought by an appeal or writ of error. They only lie because of error of fact.<sup>22</sup> The writ of *coram nobis* "lies only to correct the record of the trial itself in matters of fact existing at the time of the pronouncement of the judgment, but in respect of which the court was unadvised, but of which, had it been advised, the judgment would not have been pronounced. The unvarying test of the writ of *coram nobis* is mistake or lack of knowledge of facts inhering in the judgment itself."<sup>23</sup> The office of the writ "is to bring to the attention of the court, for correction, an error of fact—one not appearing on the face of the record, unknown to the court or the party affected, and which, if known in season, would have prevented the rendition of the judgment challenged."<sup>24</sup>

"It will not lie to contradict or put in issue any fact that has been already adjudicated in the action. An issue of fact wrongly decided is not error, in the technical sense to which the writ refers. If the error lie in the judgment itself, it must be corrected by appeal or writ of error to the superior court."<sup>25</sup> Even though error appears on the face of the record, and without which the judgment would not have been rendered, yet the writ of error *coram nobis* will not lie; relief must be sought by a writ of error, even though the time for suing out such a writ be passed.<sup>26</sup>

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In this country there are only few cases concerning a writ of error *coram vobis*; nearly all cases concern writs of *coram nobis* on which appeals have been taken to a higher or supreme court.

<sup>22</sup> *Maple v. Haverhill*, 37 Ill. App. 311; *McKinney v. Western, etc., Co.*, 4 Clarke 420; *Hawkins v. Bowie*, 9 Gill & J. 428; *Binderdolph v. Teller*, 3 Md. 32, 50; *Fellows v. Griffin*, 9 Smedes & M. 362; *Higbee v. Comstock*, 1 Denio 652; *Patterson v. Arnold*, 4 Cold. 364; *Coltart v. Ham*, 2 Tenn. Ch. 357; *Brendon v. Diggs*, 1 Heisk (Tenn.) 472; *Devitt v. Post*, 11 Johns 460; *Teller v. Wetherall*, 6 Mich. 45.

<sup>23</sup> *Collins v. State*, 66 Kan. 201, 71 Pac. 251, 97 Am. St. 361; *State v. Calhoun*, 50 Kan. 823, 32 Pac. 38, 34 Am. St. 141.

<sup>24</sup> *Asbell v. State*, 62 Kan. 209, 61 Pac. 690; *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658.

<sup>25</sup> *Howard v. State*, 58 Ark. 229, citing Stephen on Pleading 142; *Tidds Practice* 1136, 1137; *Black on Judgments* sec. 300; *Freeman on Judgments* 394; *Bronson v. Schulton*, 104 U. S. 416; *Pickett's Heirs v. Livengood*, 7 Pet. 147; *Adler v. State*, 35 Ark. 53; *Crawford v. Williams*, 1 Swan (Tenn.) 341; *Williams v. Edwards*, 12 Tred. (N. C.) 118, and many more.

<sup>26</sup> *Hawkins v. Bowie*, 9 Gill & J. 428; *Patterson v. Arnold*, 4 Coldw. 364; *Upton v. Phillips*, 11 Heisk. 215; *Richardson v. Jones*, 12 Gratt. 53; *United*

The only ground for the writ of *coram nobis* is because of error of fact that had not been presented to the court before judgment was rendered.<sup>27</sup> The writ does not lie to correct erroneous conclusions drawn by the jury or court from the facts proven or admitted on the trial; but to prevent the carrying into effect of a judgment rendered without considering, and in ignorance of, some fact which, if known by the court, would have prevented its rendition.<sup>28</sup> Thus to proceed after the death of a party, in ignorance of the death, the writ of *coram nobis* lies to correct the error.<sup>29</sup> So where a judgment is taken against an infant in ignorance of his infancy,<sup>30</sup> or against a married woman without joining her husband when that is necessary,<sup>31</sup> or against a party without notice.<sup>32</sup> The failure of the clerk to file an answer of the garnishee showing all indebtedness or liability is ground for the writ in Tennessee.<sup>33</sup>

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*States v. Plummer*, 3 Cliff. 28, Fed. Cases No. 160566; *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658.

<sup>27</sup> *Maple v. Havenhill*, 37 Ill. App. 311; *McKinney v. Western, etc., Co.*, 4 Clarke 420; *Hawkins v. Bowie*, 9 Gill & J. 428; *Brinderdolph v. Teller*, 3 Md. 325; *Fellows v. Griffin*, 9 Smedes & M. 362; *Higbie v. Comstock*, 1 Denio 652; *Patterson v. Arnold*, 4 Coldw. 364.

<sup>28</sup> "*Le Bourgeoise*, 10 Mo. App. 116; *Upton v. Phillips*, 11 Heisk. 215; *Brendon v. Diggs*, 1 Heisk. 472. All the decisions are to the effect that the writ lies only to correct errors of fact, in ignorance or disregard of which the judgment was pronounced, to relieve from which no other remedy exists." *Collins v. State*, 66 Kan. 201, 71 Pac. 251, 97 Am. St. 361; *State v. Calhoun*, 50 Kan. 523, 34 Am. St. 141, 32 Pac. 38; *Hawkins v. Bonie*, 8 Gill & J. 428.

<sup>29</sup> *Teller v. Wetherell*, 6 Mich. 46; *Neilson v. Holmes*, Walk. (Mich.) 261; *Calloway v. Nifong*, 1 Mo. 223; *Dugan v. Scott*, 37 Mo. App. 663; *Dows v. Harper*, 6 Ohio 518, 27 Am. Dec. 270.

<sup>30</sup> *Powell v. Gott*, 13 Mo. 458, 53 Am. Dec. 153; *Kemp v. Cook*, 18 Md. 170, 79 Am. Dec. 681.

<sup>31</sup> *Latshaw v. McNeese*, 50 Mo. 381.

<sup>32</sup> *Wynne v. Govend*, Yerg. (Tenn.) 150; *Goodwin v. Sanders*, 9 Yerg. (Tenn.) 90; *Merritt v. Parks*, 6 Hump. (Tenn.) 332; 1 Rol. Abr. 746; 7 N. B. 21; Poph. 181.

<sup>33</sup> *Jones v. Pearce*, 12 Heisk. (Tenn.) 281.

Where a judgment was improperly entered by a mistake of the clerk, and at the succeeding term amended *nunc pro tunc*, before which term a writ of error *coram nobis* was sued out and the judgment superseded, it was held that, although the writ of error *coram nobis* might be wholly irregular, it could not be assigned an error, on appeal, because there was no final action of the trial court upon it, and its influence was spent on a void judgment. *Coffey v. Wilson*, 2 Ala. 701.

It has been held that the writ of *coram nobis* lies where the defendant's

In criminal cases the writ of *coram nobis* is of much more importance than in civil cases. This was formerly the case in England where a new trial in a felony case could not be granted upon a motion, because of error committed at the trial, or even because of facts of controlling importance discovered after trial had.<sup>34</sup> The remedy of the accused, in that country, in cases where the court erred as a matter of law, was a recommendation to pardon, signed by the judges, and this was granted as a matter of course.<sup>35</sup>

In Arkansas an accused was sane when he committed the offense but was insane during the trial and judgment was rendered,—to which fact the attention of the court was not called until after the trial term had closed, when the power of the court over the case had ceased. It was held the writ was a proper proceeding.<sup>36</sup>

In Indiana a defendant was charged with having murdered his wife, which caused a tremendous excitement in the county of the trial. A mob gathered and there were violent threats of lynching. The judge, sheriffs and jailors were inspired with fear of violence. His counsel recommended and urged him to plead guilty, which he did, and was sent to prison for life. The accused, if not at the time absolutely insane and incapable of understanding what he did, was weak and enfeebled in mind, "lost and bewildered." Several years after he had reached the penitentiary he filed a petition setting up these facts and asked to have the judgment of conviction set aside. The trial court refused to do so; but upon appeal the Supreme Court reversed the case, with instructions to vacate the judgment upon the indictment against the appellant (defendant), permit him to withdraw his plea of guilt and to plead to the indictment, "and put him upon trial in due form of law upon the indictment preferred against him."<sup>37</sup> There are other instances where pleas

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attorney did not keep his word to file an answer; and, because of that, judgment was rendered against such defendant. *Tucker v. James*, 12 Heisk. (Tenn.) 333. \*

So where a case was continued for the term, whereupon the defendant left the court room, and after he left judgment against him was rendered by default. *Crouch v. Mullins*, 1 Heisk. 478.

<sup>34</sup> *Rex v. Bertsend*, 10 Cox C. C. 618; Harris Criminal Law 506.

<sup>35</sup> *Regina v. Murphy*, L. R. 2 P. C. 355; *Sanders v. State*, *supra*.

<sup>36</sup> *Adler v. State*, 35 Ark. 517, 37 Am. Rep. 48.

<sup>37</sup> *Sanders v. State*, *supra*, 4 Crim. L. Mag. 359.

Sanders was a captain in the Civil War, a prominent citizen of Brazil,

of guilty had been extorted by fear of violence; and writ of error *coram nobis* was granted.<sup>38</sup> In an early day in Missouri a slave was convicted and sent to the penitentiary, it not being disclosed he was a slave. His master secured his release on a writ of *coram nobis*.<sup>39</sup> So where a young man of eighteen was sent to the penitentiary when he should have been sent to jail, according to law, if his age had been disclosed, his sentence was vacated.<sup>40</sup>

The writ of *coram nobis* cannot be used to review the facts passed upon during the trial; in other words it cannot be used to take the place of a bill of review.<sup>41</sup> The falsity of a sheriff's return of the service of a writ or notice is not ground for the writ.<sup>42</sup>

The error of fact must be of such a nature as to destroy, if true, the plaintiff's right of action.<sup>43</sup> The writ does not lie because of something that occurred after the judgment rendered which would have been a good defense if it had occurred before

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Indiana. Without provocation, while in a fit of drunken rage, he shot and killed his wife, who belonged to one of the first families of that city, and whose brother was one of the leading members of the Clay County bar. The tragedy took place in 1878. He pleaded guilty shortly after the tragedy occurred, although he said he had no recollection that he killed his wife. In 1882 he applied for a writ of *coram nobis*, which on appeal was granted him by the Supreme Court. On a second trial he was sent to the penitentiary for life. His relatives and comrades in arms repeatedly tried to secure a parole and pardon for him, which was bitterly opposed by the murdered woman's relatives. Finally Governor Ira P. Chase paroled him and afterwards issued an absolute pardon. He was then an old man and without property, and lived upon a meager pension received from the government. He died fifteen or twenty years ago. (Letters of Hon. Thomas W. Hutchinson, of Brazil, to the author.)

The author briefed the case in the Supreme Court on behalf of the state, as Deputy Attorney General. However, his name does not appear in the official report of the case. He also prepared the note that is appended to the report of the case in the fourth Criminal Law Magazine.

<sup>38</sup> *State v. Calhoun*, 50 Kan. 523, 32 Pac. 38, 34 Am. St. 141; *Adler v. State*, 35 Ark. 517, 2 Crim. L. Mag. 198, 10 Cent. L. Jr. 484, 37 Am. Rep. 48; *Wheeler v. State*, 158 Ind. 687, 63 N. E. 975.

<sup>39</sup> *Ex parte Toney*, 11 Mo. 661.

<sup>40</sup> *Ex parte Gray*, 77 Mo. 160.

<sup>41</sup> *Memphis German Savings Institution*, 9 Heisk. 496.

<sup>42</sup> *Bolling v. Anderson*, 1 Tenn. Ch. 127. (In Tennessee a writ of *coram nobis* is a statutory writ.) *Shoffet v. Menipe*, 4 Dana (Ky.) 150.

<sup>43</sup> *Birch v. Trist*, 8 East 415; *Bigham v. Brewer*, 2 Sneed (Tenn.) 432; *Donnivent v. Miller*, 1 Baxt. (Tenn.) 228; *Maholowitch v. Vaughan*, 1



the trial. The writ "has never been granted to relieve from consequences arising subsequently to the judgment."<sup>44</sup>

The petitioner for the writ of *coram nobis* must not have been guilty of negligence in presenting his defense. If by the ordinary use of care he could or would have discovered the fact by which he is now seeking to overturn or defeat the judgment, his petition will be denied. Relief will not be granted upon facts on which the application is predicated if they were known by the petitioner during the progress of the trial.<sup>45</sup> The petition must show that the petitioner was not guilty of negligence in presenting his defense.<sup>46</sup>

If the petitioner seeks relief from a judgment on the ground that it was taken against him on default, when he had a meritorious defense, he may be met, as in other cases of application to vacate judgments, by the assertion that it was his own negligence which brought about the judgment entered against him, and that his negligence was so inexcusable as to bar him from relief.<sup>47</sup> Not only must the petition show he has not been guilty of negligence, but he must show he has no other remedy.<sup>48</sup>

The writ will not be granted because of newly discovered evidence that is merely cumulative to that which had been given at the trial, however convincing the new evidence may be.<sup>49</sup>

Baxt. (Tenn.) 328; *Paterson v. Arnold*, 4 Coldw. (Tenn.) 364; *Jones v. Pearce*, 12 Heisk. (Tenn.) 281.

<sup>44</sup> *Collins v. State*, 66 Kan. 201, 71 Pac. 251, 97 Am. St. Rep. 361. In this case it was held that the writ cannot be granted on the ground that the 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>45</sup> *Collins v. State*, *supra*, note 44; *Bigham v. Brewer*, 4 Sneed (Tenn.) 432; *Tibbs v. Anderson*, Thomp. (Tenn.) cases 270; *Thurston v. Belote*, 12 Heisk. 249.

<sup>46</sup> *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658; *Marble v. VanHorn*, 53 Mo. App. 561; *Jackson v. Wilson*, 6 Lea (Tenn.) 514; *Carney v. McDonald*, 10 Heisk. 232; *Memphis, etc., Inst. v. Harger*, 9 Heisk. 496; *Crawford v. Williams*, 1 Swan (Tenn.) 341; *Bigham v. Brewer*, 4 Sneed (Tenn.) 432; *Tibbs v. Anderson*, Thomp. (Tenn.) Cases 270; *Bollins v. Anderson*, 1 Tenn. Ch. 127; *Panesi v. Boswell*, 12 Heisk. (Tenn.) 323.

<sup>47</sup> *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658; *Carney v. McDonald*, 10 Heisk. 232; *Memphis, etc., Inst. v. Hargen*, 9 Heisk. 496; *Jackson v. Wilson*, 6 Lea (Tenn.) 514; *Marble v. Vanhorn*, 53 Mo. App. 561.

<sup>48</sup> *Asbell v. State*, 62 Kan. 209, 61 Pac. 690; *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658.

<sup>49</sup> *Howard v. State*, 58 Ark. 229, 24 S. W. 8; *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658; *Bigham v. Brewer*, 4 Sneed (Tenn.) 432.

The proceedings for a writ of *coram nobis* must be brought in the court where the record is located or the judgment rendered, and should be sought, or the petition be filed in the case where the judgment was rendered.<sup>50</sup> It does not lie in a court where there is no record of the case, nor from a higher to a lower court.<sup>51</sup> It does not lie in the Supreme Court,<sup>52</sup> nor in the King's Bench after the case is affirmed,<sup>53</sup> nor in the House of Lords, for it is beneath the dignity of that court to try a matter of fact.<sup>54</sup>

Only a party to the judgment or one in privity to him can prosecute the writ.<sup>55</sup>

While some cases speak of a writ of *coram nobis* as not a writ of right,<sup>56</sup> and others say that the court has a discretion to deny it,<sup>57</sup> there is no doubt in Indiana, upon a proper showing, that it is a writ of right.<sup>58</sup>

As we have said the petition for a writ of *coram nobis* must be filed in the original case, so that a certified transcript of the proceedings of the case is unnecessary. But upon a writ of

<sup>50</sup> *Phillips v. Russell*, 1 Hempst. (U. S.) 62; *Kemp v. Cook*, 18 Md. 130; *McKinney v. Western Stage Co.*, 4 Iowa 420; *Briedendolph v. Zeiler*, 3 Md. 325; *Laud v. Williams*, 12 Sm. & M. (Miss.) 362.

<sup>51</sup> *Broughton v. Brown*, 8 Jones (N. C.) L. 393; *United States v. Plummer*, 3 Cliff. (U. S.) 29.

<sup>52</sup> *Lamb v. Sneed*, 4 Baxt. (Tenn.) 349; *Reid v. Strides*, 7 Gratt. (Va.) 16.

<sup>53</sup> *Horne v. Bushel*, 2 Str. 949; *Burleigh v. Harris*, 2 Str. 975; *Lambell v. Pettyjohn*, 1 Str. 690.

<sup>54</sup> *Knoll's Case*, 3 Salk 146. In the House of Lords and in the Exchequer Chamber the record is not removed into either court, but only a transcript thereof, and therefore no trial there can be had. *Finch v. Ranew*, 3 Salk 145; 1 Ld. Raym. 610; 1 Sid. 208; 2 Tidd Practice 1137.

In Mississippi it is held that a Circuit Court cannot correct an error in the Supreme Court, nor in any other court. *Land v. Williams*, 12 Sm. & M. 362; *Calloway v. Niffong*, 1 Mo. 223.

In Michigan, under a constitutional provision, the Supreme Court can issue a writ of *coram nobis*. *Teller v. Witherell*, 6 Mich. 46.

<sup>55</sup> *Holford v. Alexander*, 12 Ala. 280, 46 Am. Dec. 253; *Brown v. Davenport*, 4 Wend. (N. Y.) 205. Where there is more than one defendant, see *Cook v. Conway*, 3 Dana 454.

<sup>56</sup> *Smith v. Kingsley*, 19 Wend. 620; *Birch v. Triste*, 8 East 414; *Crawford v. Williams*, 1 Swan 341; *Tyler v. Morris*, 2 Dev. & B. 483, 34 Am. Dec. 395; *Comstock v. Van Schoonhoven*, 3 How. Pr. 258; *Ferris v. Douglass*, 20 Wend. 626; *Higbie v. Comstock*, 1 Dana 652.

<sup>57</sup> *Tyler v. Morris*, *supra*; *Wood v. Colwell*, 34 Pa. St. 92.

<sup>58</sup> The Sanders case shows this.

*coram vobis* a complete transcript of the case, certified to, should accompany the petition. The petition should be sworn to, and disclose the grounds upon which the writ is sought, stating the error of fact on account of which the right of the writ is claimed.<sup>59</sup> The petition must specify some matter of fact which, had it been known to the court, would have prevented the rendition of the judgment sought to be set aside.<sup>60</sup> It must show that the petitioner was not aware of the facts upon which he relies, at the time of the trial and before judgment rendered.<sup>61</sup> In a criminal case the petition must be clear of and free from all vagueness and show clearly, but for the facts presented as a reason for the writ, the conviction would not have occurred.<sup>62</sup>

The party to be affected by the granting of the writ must be notified by the petitioner of the application for the writ.<sup>63</sup> There is no statute in this state limiting the time within which application for the writ must be made;<sup>64</sup> and the statutes limiting the time within which the usual applications must be made do not apply to an application for a writ of *coram nobis* or *coram vobis*.<sup>65</sup>

In some jurisdictions issues are formed and a formal trial is had, even with a jury.<sup>66</sup> In Indiana trial is by the court, either

<sup>59</sup> *Smith v. Kingsley*, 19 Wend. 620; *Sanders v. State*, *supra*; *Ferris v. Douglass*, 20 Wend. 626; *Maher v. Comstock*, 1 How. Pr. 1755; *Williams v. Clay*, 5 Litt. (Ky.) 56; *Elliott v. McNairy*, 1 Baxt. 342; *Gallena v. Sudheines*, 9 Heisk. 189; *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658.

<sup>60</sup> *Dobbs v. State*, *supra*; *Deennivant v. Milles*, 1 Baxt. 227; *Hicks v. Haywood*, 4 Heisk. 598.

<sup>61</sup> *Thurston v. Belote*, 12 Heisk. 249; *Collins v. State*, 66 Kan. 201, 71 Pac. 251, 97 Am. St. 361.

<sup>62</sup> *Wheeler v. State*, 158 Ind. 687, 63 N. E. 975; *Holt v. State*, 78 Miss. 631, 29 So. 527.

<sup>63</sup> *Mears v. Garretson*, 2 G. Greene 316; *Maher v. Comstock*, 1 How. Pr. 175; *Hicks v. Haywood*, 4 Heisk. 598; *Comstock v. Van Schoonhoover*, 3 How. Pr. 258; *Ferris v. Douglass*, 20 Wend. 626; *Crawford v. Williams*, 1 Swan 341.

In Kentucky notice is required only when the writ is intended to operate as a *supersedeas*. *Combs v. Crates*, 1 Dana 178.

<sup>64</sup> This is true in Kansas. See *State v. Calhoun*, 50 Kan. 523, 34 Am. St. 141, 32 Pac. 38; *Dobbs v. State*, 62 Kan. 108, 61 Pac. 408.

<sup>65</sup> *Strode v. Stafford*, 1 Brock 162, Fed. Case No. 13537.

In Tennessee at an early date a statute required the application to be made within a year after judgment rendered. *Elliott v. McNairy*, 1 Baxt. 342. See *Crawford v. Williams*, 1 Swan 341.

<sup>66</sup> *Crawford v. Williams*, 1 Swan (Tenn.) 341; *Walker v. Stokie*, Cartn. 307; *Sheepshanks v. Lucas*, 1 Burr 410; *Wynne v. Govend*, 1 Yerg (Tenn.)

upon affidavits, or upon both affidavits and oral evidence, as upon application for a new trial because of evidence discovered after judgment rendered and after the term is passed.<sup>67</sup> As the record in the case cannot be contradicted, evidence that it is false cannot be received.<sup>68</sup> It cannot be shown that the sheriff's return on the summons is false.<sup>69</sup> Evidence is not admissible to try the issues involved in the original trial.<sup>70</sup> Thus it cannot be shown that another person, in a criminal case, committed the crime.<sup>71</sup> Nor can it be shown that the prosecuting witness has admitted, since the rendering of the judgment, his testimony in a material fact, however potent, was false.<sup>72</sup> Nor can newly discovered evidence establishing the accused's innocence be introduced.<sup>73</sup> The judgment is, upon application for the writ of *coram nobis*, "that the judgment complained of be affirmed, or recalled, or revoked according as it may be for the defendant or plaintiff," and if for the latter then the suit is placed in the same situation as it was before the judgment was entered.<sup>74</sup>

Only the proceedings complained of as erroneous are recalled, and all prior proceedings remain unimpeached, from whence the plaintiff may again continue the original action without being obliged to commence anew.<sup>75</sup>

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150; *Bolling v. Anderson*, 1 Tenn. Ch. 127; *Fellows v. Griffin*, 9 Sm. & M. 362. A statute in Tennessee gives the right of trial by jury.

<sup>67</sup> *Sanders v. State*, *supra* (upon affidavits alone); *Consolidated, etc., Co. v. Oeltjen*, 189 Ill. 85, 59 N. E. 600. See *Adler v. State*, 35 Ark. 517, 37 Am. Rep. 48; *Cook v. Conway*, 3 Dana 454.

<sup>68</sup> *Holford v. Alexander*, 12 Ala. 280, 46 Am. Dec. 253; *Williams v. Edwards*, 12 Ired. 118.

<sup>69</sup> *Shaffet v. Meniffee*, 4 Dana 150; *Bollings v. Anderson*, 1 Tenn. Ch. 127.

<sup>70</sup> *Breckenridge v. Coleman*, 7 T. B. Mon 331; *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658; *Memphis, etc., Inst. v. Hargan*, 9 Heisk. 496.

<sup>71</sup> *Howard v. State*, 58 Ark. 229, 24 S. W. 8.

<sup>72</sup> *State v. Superior Court*, 15 Wash. 339, 46 Pac. 399.

<sup>73</sup> *Howard v. State*, 58 Ark. 229, 24 S. W. 8; *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658; *Bingham v. Brewes*, 4 Sneed 432.

<sup>74</sup> *Holford v. Alexander*, 12 Ala. 280, 46 Am. Dec. 253; *Fellows v. Griffin*, 9 Smedes & M. 362; *Camp v. Bennett*, 16 Wend. 48; *Dewitt v. Post*, 11 Johns 460; 2 Tidd. Pr. 1178; Stephen on Pleading 118; Bouvier's Institutes Sec. 3316.

<sup>75</sup> *Dewitt v. Post*, 11 Johns. 460; *Arnold v. Sanford*, 15 Johns. 534; *Cook v. Carnway*, 3 Dana 454; *Connelly v. Magowen*, 3 T. B. Mon 152.