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## Coram Nobis in Missouri

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public charity.<sup>55</sup> The shoe, it would seem, should be on the other foot.

The functional test places narrower limits to the number of corporations the personnel of which Congress could control than does the simpler test of mere corporate form. It is, however, precisely the commercially engaged government corporations which in the future may be in particular need of freedom from political dictation by the executive. It is to be hoped that in such an event the courts will be able to effect this liberation. The combined factors of corporate form and participation in commercial activities may assist the judicial process.

CHRISTIAN B. PEPPER '35.

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### CORAM NOBIS IN MISSOURI

It might seem advisable as a matter of logical procedure in a discussion concerning the nature and extent of the writ of error *coram nobis* that one's reasoning should start with the definition of a judgment, and a consideration of the nature of a judicial determination or sentence of a court in a cause within its jurisdiction. If we turn to that venerated authority Lord Coke, we find that the learned judge characterized judgments as "the very voyce of law and right."<sup>1</sup> It is true that every judgment directly enforces some right or suppresses some wrong, thereby producing the end sought by a humanely conceived law and that, in truth, may be the "voyce of law and right."<sup>1a</sup> The meaning of the word "judgment" as changed by the Missouri statute, is defined as "the final determination of the right of the parties in the action."<sup>2</sup> To start with the primary emphasis upon the nature of a judgment demands that we never lose sight of the fact that a judgment imports absolute verity, and is the highest form of obligation. This is supported by the celebrated maxim: It is to the interest of the state that litigation come to an end.<sup>3</sup> A consideration, however, of the writ of error *coram nobis* as one of the methods of vacating a judgment, seems to require that the definition, nature and extent of this remedy should be considered first, rather than that the nature of a judgment be placed to the forefront. To accord the main emphasis to the scope of the writ of error *coram nobis* does not mean that we

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<sup>55</sup> Supra page 236; and see examples of Congressional appointment cited page 234.

<sup>1</sup>Co. Litt. 39 a. 1 Freeman on Judgments, 2.

<sup>1a</sup> 1 Freeman on Judgments, 3.

<sup>2</sup> R. S. Mo. (1929), section 1070. *Kansas City v. Wourshoeffler* (1913) 249 Mo. 1, 155 S. W. 779; *Orchard v. Wright-Dalton-Bell Anchor Stone Co.* (1910) 225 Mo. 414, 125 S. W. 486.

<sup>3</sup> *Jeude v. Sims* (1914) 258 Mo. 26, 166 S. W. 1048.

can disregard the absolute verity of a judgment, but this latter line of thought does reverse any assumption in favor of the judgment as a psychological fact and requires that the judicial determination of the court run the gauntlet of the forms of relief existent for setting aside judgments, as expressly granted by statute or judicial decision.

It is an acknowledged power of a court to vacate its judgments.<sup>4</sup> This power to vacate judgments is entirely different from the power to reverse judgments. It is a power inherent in, and to be exercised by, the court which rendered the judgment, and to that court and no other the application to set aside the judgment should be made.<sup>5</sup> It may be appropriate to point out that many of the cases in this State are ambiguous and somewhat confuse the remedies which admittedly lie for the purpose of vacating a judgment.<sup>6</sup> The remedy by writ of error *coram*

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<sup>4</sup> Cross v. Gould (1908) 131 Mo. App. 585, 110 S. W. 672; Jude v. Sims, footnote 3, supra; Fisher v. Fisher (1905) 114 Mo. App. 627, 90 S. W. 413; Shuck v. Lawton (1913) 249 Mo. 168, 155 S. W. 20; Reid v. Moulton (Mo. 1919) 210 S. W. 34; Boegemann v. Bracey (1926) 315 Mo. 437, 285 S. W. 992.

<sup>5</sup> Calloway v. Nifong (1822) 1 Mo. 223 (writ of error brought assigning as error in fact that co-defendant died before judgment. The court dismissed the writ of error and *held* that, according to the established course of the common law, error in fact, could only be corrected in the court where it accrued, or in which the record was. In this case the remedy was said to be by writ of error *coram nobis*, in the circuit court, the record being in that court); Jeffrie v. Robideaux (1831) 3 Mo. 33; Ex parte Toney (1848) 11 Mo. 661 (*Habeas corpus* proceeding to release a slave sentenced as a free person. Writ denied. The court *held* that, for an error of fact in the proceedings of a court of record civil or criminal, a writ of error *coram nobis* would lie in that court to afford the complaining party relief); Ex parte Kaufman (1881) 73 Mo. 588 (*habeas corpus* proceeding. The court denied the writ and declared that as the fact did not appear in the record and was not made known in the *nisi prius* court, they knew of no law which would authorize them to try the question as to whether the fact asserted was true or false. The duty of trying the question was said to be in the court where the trial was had); Marble v. Vanhorn (1893) 53 Mo. App. 361 (motion in the nature of a writ of error *coram nobis* to set aside a judgment retaxing costs in a cause which had been tried on the ground a blank subpoena was issued and afterwards filled in. The court *held* that this writ, and the present day motion we have as a substitute for it, is only addressed to the court itself where the record lies); Baker v. Smith's Estate (Mo. App. 1929) 18 S. W. (2d.) 147 (motion to set aside a judgment on the ground that Smith was insane and a non-resident of the county in which the probate court acted. Granted. *Held*, the proceeding under the writ or the motion is at law, and not in equity, and lies only in the trial court assuming the necessary jurisdictional fact); Hecht-Bro's. Co. v. Walker (1931) 224 Mo. App. 1156, 35 S. W. (2d.) 372 (writ of error *coram nobis* is only granted by the court granting the judgment); G. M. A. C. v. Lyman (Mo. App. 1935) 78 S. W. (2d.) 109 (the writ of error *coram nobis* will lie only in the court when that court has proceeded in a case as though a fact material to its right to proceed existed when it did not exist).

<sup>6</sup> Craig v. Smith (1877) 65 Mo. 536 (In this case there was both a patent error of record, i. e., the sheriff's return, which showed a *non est*

*nobis* which today is pursued in a summary manner by motion, and the remedy by motion to vacate the judgment for fraud practiced in the very act of its procurement, in addition to the remedy by motion for irregularity, obtain in the jurisprudence of this State, and are evinced by a very large number of adjudicated cases which will be more particularly adverted to in the following discussion.<sup>7</sup> There has been an inclination on the part of some text-writers and jurists under the supposed and so-called substitute therefore, the summary motion, to relegate the com-

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as to the moving defendant, and an error of fact, in this, that the attorneys representing two of the defendants [there being three including the movant] had filed an answer for defendants without specifying for which defendants the answer was intended, when they had no authority to appear for but two and not for the party filing the motion to vacate the judgment. The court *held* that, the motion to vacate and set aside the judgment for the alleged irregularities or error in fact in the rendition of it, may be regarded as in the nature of a writ of error *coram nobis*, or as warranted under the provision of our statute authorizing a motion for that purpose to be filed within three years after such judgment was rendered); *State ex rel. v. Heinrich* (1883) 14 Mo. App. 146 (the motion in *State ex rel. v. Heinrich* the motion, while considered as in the nature of a writ of error *coram nobis*, was in fact filed within three years after the rendition of the judgment and a reopening of the case was authorized under the statute providing for a review of the judgment within three years after its rendition); *Graf v. Dougherty* (1909) 139 Mo. App. 56, 120 S. W. 661; *Fisher v. Fisher* (1905) 114 Mo. App. 627, 90 S. W. 413; *Jeude v. Sims* (1914) 258 Mo. 42, 166 S. W. 1048 *Stacker v. Cooper* Circuit Court (1857) 25 Mo. 401 (the writ of error *coram nobis* [referred to as *coram vobis*] was used to set aside a judgment for an irregularity patent of record. The court here said that a court rendering an irregular judgment, such as might be recalled by writ of error *coram vobis*, then the court may on motion correct the irregularity. After an order of reference has been made, until the order is disposed of no step can be taken in the cause towards obtaining a final judgment. As the judgment was irregularly entered in disregard of the outstanding order of reference, it was declared properly set aside); *Cross v. Gould*, footnote 4, *supra*.

<sup>7</sup> It is not within the purview of this note to comment on the other remedies made available by statute and judicial decision—time and space does not permit. In addition to the appeal prosecuted in due course and the several motions authorized by law and practice during the term, the modes of direct attack at a subsequent term on a prior judgment, for which authority may be found in our books, are writs of error *coram nobis*, the common-law writ *audita querela*, a motion to vacate for fraud in the act of procuring the judgment, the motion to vacate for irregularities patent of record, and the bill to review on equitable grounds. The common-law writ *audita querela* is one by which a proceeding may be had by a judgment defendant, in the court wherein the record lies, to review a judgment on account of some matter occurring after judgment amounting to a discharge of its obligation. This discussion must necessarily disregard the question as to equity jurisdiction to entertain a bill in equity to review and vacate a judgment. There is also another statutory proceeding very similar to the motion for irregularities which has for its purpose the setting aside or vacating final judgments, as where the defendant was not summoned as required by statute or did not appear to the suit. This is the proceeding for review provided for under R. S. Mo. (1929), section 1081.

mon-law writ of error *coram nobis* to the limbo of innocuous desuetude.<sup>8</sup> The writ of error *coram nobis* is certainly not obsolete in Missouri. When the need for the writ arises its importance looms large, for as a rule it involves matter that goes to the very foundation of the judgment. It is not as though the present day motion involves the redefinition of rights, the recognition of new interests, and the formation of new legal thought around new principles. It has been said that the Code is not sufficiently comprehensive to meet and deal with every varied phase which a case may assume in its vicissitudes through the courts, and therefore resorts must frequently be made to the ancient common law procedure.<sup>9</sup> To ignore the nature and office of the writ is to ignore the line of distinction so essential to a complete understanding of the remedies aforementioned.<sup>10</sup> As the authorities concede that a judgment may now be vacated on motion for any of the matters for which a writ of error *coram nobis* would formerly lie, the consideration of the matters to which this remedy was successfully applied is material. It will be more satisfactory to a clear understanding of the writ of error *coram nobis*, to consider separately three remedies for vacating a judgment at a subsequent term, as ascertained and settled in the law of Missouri, insofar as this procedure may tend to clarify and set out the proper confines of the writ of error *coram nobis*.<sup>11</sup> In view of the above, it is deemed advisable to advert, first, to the remedy by motion to vacate a judgment in the nature of a writ of error *coram nobis*.

#### INTRODUCTION

The writ of error *coram nobis* is a part of the common law to which we have fallen heir.<sup>12</sup> No statute in this State undertakes to define this power of a court of general jurisdiction, nor do our laws prescribe the procedure.<sup>13</sup> We must look therefore to the common law for the scope of the writ, as well as for the

<sup>8</sup> *Hartford Ins. Co. v. Stanfill* (Mo. App. 1924) 259 S. W. 867; *Baker v. Smith's Estate* (Mo. App. 1929) 18 S. W. (2d.) 147; *Jeude v. Sims*, supra footnote 3; 1 Black on Judgments, section 300; 1 Freeman on Judgments, 517.

<sup>9</sup> *Tucker v. Ins. Co.* (1876) 63 Mo. 594; *Neenan v. St. Joseph* (1894) 126 Mo. 89, 28 S. W. 963; *Cross v. Gould*, footnote 4, supra.

<sup>10</sup> *Jeude v. Sims*, footnote 3, supra; *Cross v. Gould*, footnote 4, supra.

<sup>11</sup> No attempt will be made to discuss the nature and scope of the relief which may be properly administered by the motion to vacate a judgment for irregularities patent on the record and a motion to vacate for fraud in the act of procuring the judgment. These remedies will be considered only to the extent that in their application they may clearly outline the scope of the writ of error *coram nobis*.

<sup>12</sup> *Reed v. Bright* (1911) 232 Mo. 399, 134 S. W. 653; *Kings Lake Drainage District v. Winkelmeier* (Mo. App. 1933) 62 S. W. (2d.) 1101; *Smith's Estate v. Baker*, footnote 6, supra; *Cross v. Gould*, footnote 4, supra.

<sup>13</sup> *Reed v. Bright*, supra footnote 12.

procedure. By statute, the common law of England, prior to the fourth year of the reign of James the First, was adopted in this respect, at least in this State, as the rule of decision, unless changed or modified by Constitution or Statute.<sup>14</sup>

The writ of error *coram nobis* and the writ of error *coram vobis* lie for the correction of errors of *fact*.<sup>15</sup> History shows

<sup>14</sup> R. S. Mo. (1825) 491, Chap. 1, also referred to as "Digest." Now R. S. Mo. (1929), section 645.

<sup>15</sup> Calloway v. Nifong (1822) 1 Mo. 223; Ex parte Toney (1848) 11 Mo. 661; Powell v. Gott (1850) 13 Mo. 458, 53 Am. Dec. 153; Randalls v. Wilson (1856) 24 Mo. 76; Stacker v. Cooper Circuit Court (1857) 25 Mo. 401; Nelson v. Brown (1856) 23 Mo. 13; State v. Gavner (1860) 30 Mo. 44; Downing v. Still (1869) 43 Mo. 309; Townsend v. Cox (1870) 45 Mo. 401; Stupp v. Holmes (1871) 48 Mo. 89; Groner v. Smith (1872) 49 Mo. 318; Ex Parte Page (1872) 49 Mo. 291; Latshaw v. McNees (1872) 50 Mo. 381; Craig v. Smith (1877) 65 Mo. 536; Weil v. Simmons (1877) 66 Mo. 617; Ex parte Kaufman (1881) 73 Mo. 588; Ex parte Gray (1882) 77 Mo. 160; Walker v. Deaver (1883) 79 Mo. 664; Hadley v. Bernero (1903) 103 Mo. App. 549, 78 S. W. 64; Neenan v. St. Joseph (1894) 126 Mo. 89, 28 S. W. 963; State ex rel. Ozark County v. Tate (1892) 109 Mo. 265, 18 S. W. 1088; State v. Stanley (1909) 225 Mo. 525, 125 S. W. 475; State ex rel. Potter v. Riley (1909) 219 Mo. 667, 118 S. W. 647; Hartman v. Hartman (1911) 154 Mo. App. 243, 133 S. W. 669; State v. Wallace (1908) 209 Mo. 359, 108 S. W. 542; Dugan v. Scott (1889) 37 Mo. App. 663; State ex rel. Hudson v. Heinrich (1883) 14 Mo. App. 146; Hirsh v. Weisberger (1891) 44 Mo. App. 507; Cross v. Gould, supra footnote 4; Jeude v. Sims, supra footnote 3; Norton v. Reed (1920) 281 Mo. 482, 221 S. W. 6; Simms v. Thompson (1922) 291 Mo. 493, 236 S. W. 876; Graves v. Graves (1914) 255 Mo. 468, 164 S. W. 496; Reed v. Bright, supra footnote 9; Davis v. Robinson (1907) 126 Mo. App. 293 102 S. W. 1048; State ex rel. v. Clarkson (1901) 88 Mo. App. 553; Marble v. Vanhorn (1893) 53 Mo. App. 361; Hartford Ins. Co. v. Stanfill (Mo. App. 1924) 259 S. W. 867; Karicofe v. Schwaner (1917) 196 Mo. App. 572, 196 S. W. 46; Callicotte v. C. R. I. R. R. (Mo. Sup. 1918) 204 S. W. 528; Schneider v. Schneider (Mo. App. 1925) 273 S. W. 1081; State ex rel. Orr v. Latshaw (1922) 291 Mo. 592, 237 S. W. 770; Graf v. Dougherty (1909) 139 Mo. App. 56, 120 S. W. 661; Warren v. Railway Conductors (1918) 199 Mo. App. 200, 201 S. W. 368; Estes v. Nell (1901) 163 Mo. 157, 63 S. W. 724; Fisher v. Fisher (1905) 114 Mo. App. 627, 90 S. W. 413; Ragland v. Ragland (Mo. App. 1924) 258 S. W. 728; Heard v. Sack (1884) 81 Mo. 610; Nave v. Todd (1884) 83 Mo. 601; State ex rel. Brown v. White (1898) 75 Mo. App. 256; State ex rel. Wheat v. Horine (1895) 63 Mo. App. 1; Smith v. Young (1909) 136 Mo. App. 65, 117 S. W. 628; Audsley v. Hale (1924) 303 Mo. 451, 261 S. W. 117; Fox-Miller Grain Co. v. Stephans (Mo. App. 1920) 217 S. W. 994; Bruner v. Ingersoll-Rand Co. (Mo. App. 1921) 233 S. W. 256; Degener v. Kelly (Mo. App. 1928) 6 S. W. (2d.) 998; Gibson v. Pollock (1914) 179 Mo. App. 188, 166 S. W. 874; Scott v. Rees (1923) 300 Mo. 123, 253 S. W. 998; Forest Lumber Co. v. Osceola Mining Co. (Mo. Sup. 1920) 222 S. W. 398; Le Bourgoise v. McNamara (1881) 10 Mo. App. 116, Aff. 82 Mo. 189; Metal Workers v. Mercantile Co. (1926) 218 Mo. App. 544, 280 S. W. 82; Robinson v. Henry (Mo. App. 1929) 14 S. W. (2d.) 693; Baker v. Smith's Estate (Mo. App. 1929) 18 S. W. (2d.) 147; Sowers-Taylor Co. v. Collins (Mo. App. 1929) 14 S. W. (2d.) 692; Mefford v. Mefford (Mo. App. 1930) 26 S. W. (2d.) 804; Moutier v. Moutier (Mo. App. 1930) 25 S. W. (2d.) 490; Kings Lake Drainage District v. Winkelmeyer (Mo. App. 1933) 62 S. W. (2d.) 1101; Hecht-Bro's Co. v. Walker (1931) 224 Mo. App. 1156, 35 S. W. (2d.) 372; G. M. A. C. v. Lyman (Mo. App. 1935) 78 S. W. (2d.) 109.

that it was called a writ of error *coram nobis* in King's Bench, because the record and proceedings were stated in the writ to remain "before us." It was a fiction of old English law that the King was supposed to preside in person in that court. In the court of Common Pleas, where the King was not supposed to preside, the writ was called a writ of error *coram vobis*, because the record and proceedings were stated in the writ to remain "before you," meaning the King's justices.<sup>16</sup> The difference referred only to the form appropriate to each court, neither of which exists in the United States, and as a result there is no difference between a writ of error *coram nobis* and a writ of error *coram vobis* in this country.<sup>17</sup> It is, of course, a matter of common knowledge that we had no king, to say nothing of a *cursitor*, that all writs need not be issued out of Chancery, and that our circuit courts combined many of the features of both the Common Pleas and Kings Bench. If we turn to early Missouri cases we find that the writ is called *coram nobis* or *coram vobis* indiscriminately.<sup>18</sup> With attention still focused on these cases, it is shown that in our practice a motion is considered as an application for a writ of error *coram nobis*.<sup>19</sup> The writ, being heard in the same court which issues it, is actually never issued at all, but the matter is determined upon a hearing of the matters raised in the application (in the form of a motion) as if a formal writ had been issued.<sup>20</sup> The proceeding under the writ or the motion is at law and not in equity.<sup>21</sup> It applies equally to civil or criminal proceedings.<sup>22</sup>

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<sup>16</sup> Baker v. Smith's Estate, *supra* footnote 5; Cross v. Gould, *supra* footnote 4; Tidd's Practice, 512.

<sup>17</sup> *Ibid.* Respectable authority has stated that the writ of error *coram nobis* is to be distinguished from the writ of error *coram vobis* in that, the latter is returnable before some superior tribunal, and required the record and proceedings to be certified to such tribunal for its revisory action. Freeman on Judgments, section 94; Camp v. Bennett 16 Wend. 48. See further 97 Am. St. Rep. 366 and cases cited therein.

<sup>18</sup> Ex parte Toney (1848) 11 Mo. 661 (*coram vobis*); Powell v. Gott (1850) 13 Mo. 458 (*coram nobis*); Stacker v. Cooper Circuit Court (1857) 25 Mo. 401 (*coram vobis*); Nelson v. Brown (1856) 23 Mo. 13 (*coram vobis*). As early as 1822 the Supreme Court referred to the writ as *coram nobis* in Calloway v. Nifong, *supra* footnote 5.

<sup>19</sup> *Ibid.*

<sup>20</sup> State ex rel. Potter v. Riley, *supra* footnote 15; Simms v. Thompson, *supra* footnote 15; Davis v. Robinson, *supra* footnote 15; Baker v. Smith's Estate, *supra* footnote 6; Sowers-Taylor Co. v. Collins, *supra* footnote 15; Jeude v. Sims, *supra* footnote 3; Ragland v. Ragland, *supra* footnote 15.

<sup>21</sup> Baker v. Smith's Estate, *supra* footnote 6; Jeude v. Sims, *supra* footnote 3; Cross v. Gould, *supra* footnote 4.

<sup>22</sup> Calloway v. Nifong, *supra* footnote 5; Ex parte Toney, *supra* footnote 15; Powell v. Gott, *supra* footnote 15; Randalls v. Wilson *supra* footnote 15; Ex parte Gray (1882) 77 Mo. 160; Ex parte Kaufman (1881) 73 Mo. 588; Stacker v. Cooper Circuit Court, *supra* footnote 15.

## SCOPE OF THE WRIT

If we then give our primary attention to the scope and meaning of the writ of error *coram nobis*, certain conclusions will inevitably force themselves upon us with regard to the scope of the writ. The writ of error *coram nobis*, and the present day motion, as a substitute, is addressed to the court in which the record is, and lies to correct some latent matter of fact unknown to the court, which, if known, would have prevented the rendition and entry of the judgment.<sup>23</sup> As the writer understands the authorities, the writ does not lie for some unknown fact going to the merits of the cause, but rather for some unknown fact relating to the right of the court to proceed which entirely defeats the power of the court to attain a valid result in the proceeding.<sup>24</sup> It is not the office nor within the purview of a motion of a writ of error *coram nobis* to give a new trial merely because certain facts in the nature of evidence going to the merits of the cause were undiscovered by a litigant in time for use at the original trial.<sup>25</sup> The matter of fact which is meant in this connection is such a character of fact as would, if known, disable

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<sup>23</sup> *G. M. A. C. v. Lyman* (1935), supra footnote 15 (the fact must be one going to the right of the court to proceed, and which entirely defeats the power of the court to obtain a valid result in the proceedings); *Hecht-Bro's. Co. v. Walker* (1931), supra footnote 15 (the fact must be such a fact, that, had it been known to the court at the time of the rendition of the judgment, such judgment would not have been entered); *Kings Lake Drainage District v. Winkelmeyer* (1933), supra footnote 15; *Sowers-Taylor Co. v. Collins* (1929), supra footnote 15; *Fox-Miller Grain Co. v. Stephans* (1920), supra footnote 15; *Smith v. Young* (1909), supra footnote 15. See further cases collated in footnote 15.

An application for the writ of error *coram nobis* may be directed to an appellate court. Note the language in *Hartford Ins. Co. v. Stanfill*: "At the outset we were struck with a doubt as to whether we possess the right to entertain this motion because of our limited jurisdiction. However, we may assume, because of our inherent power and control over our own judgments, that we may entertain a motion of this kind when predicated upon a proper circumstance and state of facts. While we are unable to find a direct expression in our reported cases touching the question of our power to entertain such motion, it appears, however, in the case of *State v. Stanley* (1909) 225 Mo. 525. 125 S. W. 475, that our Supreme Court entertained such a motion which sought to correct, after the lapse of the term, an adjudication of that high court because of an alleged erroneous holding of that court that a bill of exceptions was not filed in time in the particular case. The jurisdiction of the Supreme Court was not questioned in that case, but we must indulge in the presumption that the court concluded it had jurisdiction or it would not have assumed to pass on the motion."

<sup>24</sup> *Marble v. Vanhorn* (1893), supra footnote 15; *Simms v. Thompson*, supra footnote 15; *Hartford Ins. Co. v. Sranfill*, supra footnote 15; *Kings Lake Drainage District v. Winkelmeyer*, supra footnote 15.

<sup>25</sup> *Gibson v. Pollock* (1914) 179 Mo. App. 188, 166 S. W. 875; *Davis v. Robinson* (1907) 126 Mo. App. 293, 102 S. W. 1048; *Karicofe v. Schwaner* (1917) 196 Mo. App. 572, 196 S. W. 46; *G. M. A. C. v. Lyman*, supra footnote 5; *Kings Lake Drainage District v. Winkelmeyer*, supra footnote 15.



the court from rendering the judgment;<sup>26</sup> as when the party was dead,<sup>27</sup> an infant,<sup>28</sup> a *femme covert*<sup>29</sup> or a lunatic.<sup>30</sup> The discussion thus far may be taken to have established that the writ of error *coram nobis* will lie when the court has proceeded in a case as though a fact which was material to its *right to proceed*, existed, when it did not exist, and when the absence of the fact assumed to exist, entirely *defeats the power of the court* to obtain a valid result in its proceeding.<sup>31</sup>

The use of the expression, errors of fact, in connection with this writ is too well calculated to produce the impression that its office may be the correction of errors in conclusions drawn by the jury, or the court sitting as such, from evidence adduced at the trial.<sup>32</sup> The office of the writ of error *coram nobis* is to call attention of the court to, and obtain relief from, errors of fact, but it does not lie to correct errors of law.<sup>33</sup> It is the purpose

<sup>26</sup> Hecht-Bro's. Co. v. Walker, *supra* footnote 15; Norton v. Reed (1920) 281 Mo. 482, 221 S. W. 6; Baker v. Smith's Estate (Mo. App. 1929) 18 S. W. (2d.) 147; Degener v. Kelly (Mo. App. 1928) 6 S. W. (2d.) 998; Smith v. Young (1909) 136 Mo. App. 65, 117 S. W. 628.

<sup>27</sup> Calloway v. Nifong (1822) 1 Mo. 223; Harkness v. Austin (1865) 36 Mo. 47; State ex rel. Ozark County v. Tate, *supra* footnote 15; State ex rel. Potter v. Riley, *supra* footnote 15; State v. Wallace (1908) 209 Mo. 359, 108 S. W. 542; Dugan v. Scott (1889) 37 Mo. App. 663.

<sup>28</sup> Powell v. Gott (1850) 13 Mo. 458, 53 Am. Dec. 153; Randalls v. Wilson (1856) 24 Mo. 76; Stupp v. Holmes (1871) 48 Mo. 89; Townsend v. Cox (1870) 45 Mo. 401; State v. Gavner (1860) 30 Mo. 44; Karicofe v. Schwaner (1917) 196 Mo. App. 572, 196 S. W. 46; Smith v. Young (1909) 136 Mo. App. 65, 117 S. W. 628; Neenan v. St. Joseph (1894) 126 Mo. 89, 28 S. W. 963; Ex parte Kaufman (1881) 73 Mo. 588; Ex parte Gray (1882) 77 Mo. 160; Ex parte Page (1872) 49 Mo. 291.

<sup>29</sup> Latshaw v. McNeas (1872) 50 Mo. 381; Walker v. Deaver (1883) 79 Mo. 664; Weil v. Simmons (1877) 66 Mo. 617.

<sup>30</sup> Graves v. Graves (1914) 255 Mo. 468, 164 S. W. 496; Heard v. Sack (1884) 81 Mo. 610; Gibson v. Pollock (1914) 179 Mo. App. 188, 166 S. W. 874; Baker v. Smith's Estate (Mo. App. 1929) 18 S. W. (2d.) 147.

<sup>31</sup> G. M. A. C. v. Lyman (Mo. App. 1935) 78 S. W. (2d.) 109; Marble v. Vanhorn (1893) 53 Mo. App. 361; Kings Lake Drainage District v. Winkelmeier (Mo. App. 1933) 62 S. W. (2d.) 1101; Hecht Bro's. Co. v. Walker (1931) 224 Mo. App. 1156, 35 S. W. (2d.) 372; Simms v. Thompson (1922) 291 Mo. 493, 236 S. W. 876; Norton v. Reed (1920) 281 Mo. 482, 221 S. W. 6; Jeude v. Sims, *supra* footnote 3.

<sup>32</sup> Craig v. Smith (1877) 65 Mo. 536; Weil v. Simmons, *supra* footnote 29; Graves v. Graves, *supra* footnote 30; Reed v. Bright (1911) 232 Mo. 399, 134 S. W. 653; State v. Wallace (1908) 209 Mo. 359, 108 S. W. 542; Hadley v. Bernero (1903) 103 Mo. App. 549, 78 S. W. 64; Le Bourgeoise v. McNamara (1881) 10 Mo. App. 116, Aff. 82 Mo. 189; Kings Lake Drainage District v. Winkelmeier, *supra* footnote 31.

<sup>33</sup> Randalls v. Wilson (1856) 24 Mo. 76; State v. Wallace, *supra* footnote 32; Kings Lake Drainage District v. Winkelmeier, *supra* footnote 31; Hecht Bro's. Co. v. Walker (1931) 224 Mo. App. 1156, 35 S. W. (2d.) 372; Mefford v. Mefford (Mo. App. 1930) 26 S. W. (2d.) 804; Simms v. Thompson (1922) 291 Mo. 493, 236 S. W. 876; Reed v. Bright (1911) 232 Mo. 399, 134 S. W. 653; Audsley v. Hale (1924) 303 Mo. 451, 261 S. W. 117; Smith v. Young (1909) 136 Mo. App. 65, 117 S. W. 628.

of the ordinary common-law writ of error to have a judgment reversed for an erroneous decision on a point of law and runs from the court of review to the trial court, while the writ of error *coram nobis* lies only in the court where an erroneous judgment has been rendered in consequence of a mistake of fact of which the court was not informed.<sup>34</sup> In the exercise of appellate jurisdiction in legal actions superior courts do not try facts, and relief against an error of fact must necessarily be obtained in the court where it occurred.<sup>35</sup> Thus, it is apparent that the writ of error *coram nobis* is grounded solely upon latent errors of fact, which do not appear on the face of the record, but which must be brought to the attention of the court by evidence *aliunde*.<sup>36</sup> This latent fact authorizing the writ may consist in some matter of process or misprision or fault of the clerk.<sup>37</sup> It is obvious that if the record shows that the alleged fact was brought to the attention of the court before entry of judgment, the purpose of the writ of error *coram nobis* fails. When the existence of the fact which is necessary to the jurisdiction of the court has been investigated and determined, then the matter is *res judicata*, and a new trial upon that issue may not be obtained by the writ or motion in the nature of such writ.<sup>38</sup> Instead of it being a case reviewable by *coram nobis* at

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<sup>34</sup> Hirsh v. Weisberger (1891) 44 Mo. App. 507; Norton v. Reed (1920) 281 Mo. 482, 221 S. W. 6; State ex rel. Clarkson (1901) 88 Mo. App. 553; Marble v. Vanhorn (1893) 53 Mo. App. 361; Heard v. Sack (1884) 81 Mo. 610; Degener v. Kelly (Mo. App. 1928) 6 S. W. (2d.) 998; Fox-Miller Grain Co. v. Stephans (Mo. App. 1920) 217 S. W. 994; State ex rel. Brown v. White (1898) 75 Mo. App. 256; Gibson v. Pollock (1914) 179 Mo. App. 188, 166 S. W. 874; Forest Lumber Co. v. Osceola Mining Co. (Mo. 1920) 222 S. W. 398.

<sup>35</sup> Forest Lumber Co. v. Osceola Mining Co., supra footnote 34.

<sup>36</sup> Groner v. Smith (1872) 49 Mo. 318; Ex parte Page (1872) 49 Mo. 291; Gibson v. Pollock, supra footnote 34; Simms v. Thompson, supra footnote 33; Latshaw v. McNees (1872) 50 Mo. 381; Ex parte Kaufman (1881) 73 Mo. 588; Neenan v. St. Joseph, supra footnote 15; State v. Stanley (1909) 225 Mo. 525, 125 S. W. 475; State ex rel. v. Riley (1909) 219 Mo. 667, 118 S. W. 647; State ex rel. v. Heinrich (1883) 14 Mo. App. 146; Dugan v. Scott (1889) 37 Mo. App. 663; Hirsh v. Weisberger, supra footnote 34; Simms v. Thompson, supra footnote 33.

<sup>37</sup> G. M. A. C. v. Lyman (Mo. App. 1935) 78 S. W. (2d.) 109; Kings Lake Drainage District v. Winkelmeyer, supra footnote 31. Cf. Atkinson v. Atchison R. R. Co. (1883) 81 Mo. 50 (a judgment cannot be set aside at a term subsequent to that at which it was rendered, on the ground of clerical mistake or misprision, unless something appears in the record or the judge's docket, or the clerk's minutes, or papers on file, to show that such mistake exists, and in what it consists). If the judgment could be corrected by a *nunc pro tunc* (such as the inadvertence of the clerk) then the complainant has no standing in court on the basis of a writ *coram nobis*. It does not lie to correct matters of record. It would be absurd for a court to issue a writ of *coram nobis* to correct the recitations of its own records before it, showing wherein the entry was incorrect.

<sup>38</sup> Craig v. Smith, supra footnote 32; Weil v. Simmons, supra footnote 29; Hadley v. Bernero, supra footnote 32; Mefford v. Mefford, supra footnote

a subsequent term of the court in which the record lies, it is a case where the court, in the exercise of its jurisdiction, pronounced an erroneous conclusion of law on the facts, and is reviewable only as such.<sup>39</sup> To sum up the foregoing, these motions in the nature of a writ of error *coram nobis* only go to errors of judgment occasioned by the absence of some fatal facts, and not to errors committed with the facts known.

The rule, as usually declared, and in conformity with the above, is that on a writ of error *coram nobis*, only such errors of fact can be assigned as are consistent with the record before the court in which the case was tried.<sup>40</sup> The error of fact charged cannot be used to falsify the record, nor to put in issue adjudicated facts, nor to retry the case on the merits.<sup>41</sup> The court will not, under any circumstances, look into the cause of action on which the judgment was rendered.<sup>42</sup> An averment of fact which contradicts the recital of the record itself cannot be heard in a motion in the nature of a writ of error *coram nobis*.<sup>43</sup> Where

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33; Norton v. Reed, supra footnote K 31; Callicotte v. C. R. I. R. R. (Mo. Sup. 1918) 204 S. W. 523; Warren v. Railway Conductors (1918) 199 Mo. App. 200, 201 S. W. 368; Marble v. Vanhorn, supra footnote 34.

<sup>39</sup> Forest Lumber Co. v. Osceola Mining Co. (Mo. 1920) 222 S. W. 398; Mefford v. Mefford, supra footnote 33; Audsley v. Hale, supra footnote (1924) 303 Mo. 451, 261 S. W. 117; Jeude v. Sims, supra footnote 3; Cross v. Gould, supra footnote 4; Smith v. Young (1909) 136 Mo. App. 65, 117 S. W. 628; Graves v. Graves, supra footnote 30; Simms v. Thompson, supra footnote 31.

<sup>40</sup> G. M. A. C. v. Lyman (Mo. App. 1935) 78 S. W. (2d.) 109 (the use of the writ of error *coram nobis* to show that the court assumed a fact essential to its right to proceed in assuming that notice appeal had been given to defendant through an alleged agent was allowed by the court. The recital that defendant was duly served was declared not essential to the validity of the judgment. The writ cannot be used to attack the verity of the recitals in the judgment essential to its validity); State ex rel. Brown v. White (1898) 75 Mo. App. 256; State ex rel. Wheat v. Horine (1895) 63 Mo. App. 1; Ragland v. Ragland (Mo. App. 1924) 258 S. W. 728; Schneider v. Schneider (Mo. App. 1925) 273 S. W. 1081; Reed v. Bright, supra footnote 15; Hirsh v. Weisberger (1891) 44 Mo. App. 507; Kings Lake Drainage District v. Winkelmeyer (Mo. App. 1933) 62 S. W. (2d.) 1101 (motion in the nature of a writ of error *coram nobis* charging that the court in assessing benefits against land was misled as to the number of acres of land. The court denied the relief on appeal and in so holding held that only such errors can be assigned as are consistent with the record before the court, and the court will not look into the cause of action on which the judgment was rendered); Hecht Bro's. Co. v. Walker, supra footnote 33; State v. Stanley (1909) 225 Mo. 525, 125 S. W. 475; State ex rel. v. Riley (1909) 219 Mo. 667, 118 S. W. 647.

<sup>41</sup> Hartman v. Hartman (1911) 154 Mo. App. 243, 133 S. W. 669; State v. Wallace (1908) 209 Mo. 359, 108 S. W. 542; Kings Lake Drainage District v. Winkelmeyer, supra footnote 40; Jeude v. Sims, supra footnote 3; Cross v. Gould, supra footnote 4.

<sup>42</sup> Supra, footnotes 40, 41.

<sup>43</sup> Ex parte Page (1872) 49 Mo. 291; Weil v. Simmons (1877) 66 Mo. 617; State ex rel. v. Riley, supra footnote 15.

an infant, for example, is sued, there is nothing to enable the court to see that he is an infant when the fact of his majority is assumed. The law considers that, as an infant, he has no discretion to choose an attorney, and therefore will not let him appear by attorney, but requires the court to appoint a fit person his guardian to make defense for him. If the plaintiff does not make known the fact of the defendant's infancy so as to allow the court to decide against a person under disability and allow the full defense which the law intends, the plaintiff's judgment may be reversed, so as to let in the other party to defend with all the advantages to which the law entitled him; and therefore the defendant may aver the fact of his disability, which in no way contradicts the record, in order that he may have the benefit of legal defense.<sup>44</sup> Similar reasons accounted for the decisions where a *femme covert* was sued without her husband.<sup>45</sup>

It is not to be understood that every error of fact warrants the setting aside of a judgment by a writ of error *coram nobis*. If it be true that error was committed, it nevertheless must appear that such error is one materially affecting the merits of the controversy<sup>46</sup> and not mere extraneous matters.<sup>47</sup> It should be an issue in the case, and an issue out of which an error of fact can arise, which would authorize a writ of error *coram nobis*.<sup>48</sup>

Proceedings by writ of error *coram nobis* are not exempt from the general rule that relief may be denied to a party because of his own negligence or laches.<sup>49</sup> It seems to be well settled that

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<sup>44</sup> Powell v. Gott, supra footnote 28; Randalls v. Wilson, supra footnote 33; State v. Govner, supra footnote 28; Townsend v. Cox, supra footnote 28; Smith v. Young, supra footnote 28; Karicofe v. Schwaner, supra footnote 28; Neenan v. St. Joseph, supra footnote 28; Ex parte Kaufman, supra footnote 28; Ex parte Gray, supra footnote 28; Ex parte Page, supra footnote 28.

<sup>45</sup> Latshaw v. McNees, supra footnote 29; Weil v. Simmons, supra footnote 29; Walker v. Deaver, supra footnote 29; Jeude v. Sims, supra footnote 3 (pointing out this to be true before the Married Womans Act).

<sup>46</sup> Simms v. Thompson, supra footnote 33 (whether unknown defendants are or are not residents of the state is, under the statute, wholly immaterial and a fact unnecessary to be stated as regards judgment for delinquent taxes against land. Their residence or non-residence was not a fact which was material to the right of the court to render the judgment, nor could it have any influence on the court's action in the premises); State ex rel. v. Clarkson, supra footnote (1901) 88 Mo. App. 553; G. M. A. C. v. Lyman, supra footnote 40; Hecht Bro's. Co. v. Walker, supra footnote 33.

<sup>47</sup> This oft asserted proposition becomes very important in the connection of fraud as a basis for the writ of error *coram nobis* and will be considered later. Schneider v. Schneider (Mo. App. 1925) 273 S. W. 1081; Fisher v. Fisher (1904) 114 Mo. App. 627, 90 S. W. 413; Ragland v. Ragland (Mo. App. 1924) 258 S. W. 728; Graf v. Dougherty (1909) 139 Mo. App. 56, 120 S. W. 661; Simms v. Thompson, supra footnote 31.

<sup>48</sup> Smith v. Young supra footnote 33; Sowers-Taylor Co. v. Collins (Mo. App. 1929) 14 S. W. (2d.) 692; See further footnote 46, supra.

<sup>49</sup> Hadley v. Bernero (1903) 103 Mo. App. 549, 78 S. W. 64; Hecht Bro's. Co. v. Walker, supra footnote 33; Jeude v. Sims, supra footnote 3; Cross v. Gould, supra footnote 4; Norton v. Reed, (1920) 281 Mo. 482, 221 S. W. 16;

the writ cannot reach matters of fact known by the complaining party at or before the time of trial, or which by reasonable diligence he should have known, or which he overlooked due to negligence.<sup>50</sup> Consequently, if he knew of the alleged error of fact at the time the judgment was entered and did not avail himself of it he may be precluded from subsequent proceeding for relief. Thus, when a complaining party seeks relief from a judgment on the ground that it was taken against him by default, and that he had a meritorious defense to the action, he may be met by the claim that it was his own negligence which caused the judgment to be entered against him, and that it was so inexcusable that he was not entitled to relief.<sup>51</sup>

#### LIMITATION

We now come to a phase of the problem concerned with the limitation upon the application for a writ of error *coram nobis*. It might legitimately be urged that the motion to set aside a judgment in the nature of a writ of error *coram nobis*, is subject to the same restrictions in point of time as a motion for irregularity, and must be made within three years from the rendition of the judgment.<sup>52</sup> It might also be urged that a court has no power to vacate a judgment on the grounds of a writ of error *coram nobis* after the term at which it was rendered;<sup>53</sup> or at least that the motion to vacate be made within a reasonable time after the entry of the judgment.<sup>54</sup> Nevertheless, it has been asserted many times that there is no limitation to be found in our statute book to a writ of error *coram nobis*. It has become well settled by constantly repeated statements that no statute of limitations applies to the writ of error *coram nobis*.<sup>55</sup>

Marble v. Vanhorn (1893) 53 Mo. App. 361; Bruner v. Ingersoll-Rand Co. (Mo. App. 1921) 233 S. W. 256.

<sup>50</sup> State ex rel. Orr v. Latshaw (1922) 291 Mo. 592, 237 S. W. 770; Reed v. Bright (1911) 232 Mo. 399, 134 S. W. 653; Hadley v. Bernero, supra footnote 49; Kings Lake Drainage District v. Winkelmeyer, supra footnote 40.

<sup>51</sup> Townsend v. Cox (1870) 45 Mo. 401; Degener v. Kelly (Mo. App. 1928) 6 S. W. (2d.) 998; State ex rel. Orr v. Latshaw, supra footnote 50; Davis v. Robinson (1907) 126 Mo. App. 293, 102 S. W. 1048; Marble v. Vanhorn, supra footnote 49; Reed v. Bright, supra footnote 50.

<sup>52</sup> Downing v. Still (1869) 43 Mo. 309 (In general, a court will not correct or set aside its judgment except at the term at which they were rendered, but under statute, a judgment may be set aside for irregularity at any subsequent term within three years after its rendition).

<sup>53</sup> Oriss v. Elliott (1896) 65 Mo. App. 96.

<sup>54</sup> Alexander v. Hadson (1830) 2 Mo. 228; Powell v. Gott (1850) 13 Mo. 458, 53 Am. Dec. 153.

<sup>55</sup> Powell v. Gott, supra footnote 54; Gibson v. Pollock (1914) 179 Mo. App. 183, 166 S. W. 874; Heard v. Sack (1884) 81 Mo. 610; Hirsh v. Weisberger (1891) 44 Mo. App. 507; State ex rel. Hudson v. Heinrich (1883) 14 Mo. App. 146; State v. Wallace (1908) 209 Mo. 359, 108 S. W. 542; Groner v. Smith (1872) 49 Mo. 318; Townsend v. Cox (1870) 45 Mo. 401.

## PROCEDURE

In light of the preceding discussion it is clear that in Missouri, a motion to vacate a judgment for error of fact, and not for patent errors of record, supported by evidence *dehors* the record, takes the place of the common-law writ of error *coram nobis*.<sup>56</sup> The motion is in the nature of an independent and direct attack upon the judgment of the court committing the error.<sup>57</sup> This motion which serves the purpose of the common-law writ of error *coram nobis*, is in the nature of a pleading<sup>58</sup> It need not appear in the bill of exceptions, but properly appears in the record proper.<sup>59</sup> Issues must be made up under the writ, and these must be tried, if necessary, by a jury;<sup>60</sup> but the writ does not open up the entire case, but only those points or questions raised by the application for it.<sup>61</sup>

Since the motion is considered an independent action, and need not be incorporated in a bill of exception so as to make it part of the record, it is asserted to be in the nature of a new action, analogous to the writ of error.<sup>62</sup> It depends necessarily upon the production of extrinsic evidence, for the error of fact does not appear on the record as in the case where the remedy is the ordinary writ of error.<sup>63</sup> There must be a trial of an issue of fact; and if this trial results in depriving the plaintiff of the judgment, which he has recovered and which appears to be regular on its face, he may at once prosecute an appeal or writ of error for a reversal.<sup>64</sup>

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<sup>56</sup> Walker v. Deaver (1883) 79 Mo. 664; Groner v. Smith, supra footnote 55; State ex rel. v. Riley, supra footnote 36; Gibson v. Pollock (1914) 179 Mo. App. 188, 166 S. W. 874; Norton v. Reed, supra footnote 49; Fox-Miller Grain Co. v. Stephans, supra footnote 34; Karicofe v. Schwaner (1917) 196 Mo. App. 572, 196 S. W. 46.

<sup>57</sup> Metal Workers v. Mercantile Co. (1926) 218 Mo. App. 544, 280 S. W. 82; Audsley v. Hale (1924) 303 Mo. 451, 261 S. W. 117; Scott v. Rees (1923) 300 Mo. 123, 253 S. W. 998; State ex rel. v. Riley, supra footnote 36.

<sup>58</sup> Sowers-Taylor Co. v. Collins, supra footnote 48; Scott v. Rees, supra footnote 57.

<sup>59</sup> Hirsh v. Weisberger, supra footnote 55; Jude v. Sims, supra footnote 3; Simms v. Thompson, supra footnote 33; Cross v. Gould, supra footnote 4.

<sup>60</sup> G. M. A. C. v. Lyman (Mo. App. 1935) 78 S. W. (2d.) 109; Simms v. Thompson, supra footnote 33.

<sup>61</sup> Gibson v. Pollock, supra footnote 56; Reed v. Bright, supra footnote 32; Marble v. Vanhorn, supra footnote 34.

<sup>62</sup> Sowers-Taylor Co. v. Collins, supra footnote 48; Scott v. Rees, supra footnote 57; Hirsh v. Weisberger, supra footnote 55; Fox-Miller Grain Co. v. Stephans, supra footnote 34; Simms v. Thompson, supra footnote 33; Baker v. Smith's Estate (Mo. App. 1929) 18 S. W. (2d.) 147.

<sup>63</sup> State ex rel. v. Horine (1895) 63 Mo. App. 1; Hirsh v. Weisberger, supra footnote 55; Hartman v. Hartman (1911) 154 Mo. App. 243, 133 S. W. 669; Gibson v. Pollock, supra footnote 56.

<sup>64</sup> Metal Workers v. Mercantile Co. (1926) 218 Mo. App. 544, 280 S. W. 82; Audsley v. Hale 57; State ex rel. v. Riley, supra footnote 36; Scott v. Rees, supra footnote 57; Shuck v. Lawton (1913) 249 Mo. 168, 155 S. W. 20.

The writ of error *coram nobis* is not a writ of right in the sense that it will issue on a mere demand for it.<sup>65</sup> An affirmative showing must be made either by affidavit or verified petition, and from such showing, and not from a mere demand for the writ, the court will determine whether it shall issue.<sup>66</sup> The cases recognize that the court to which application is made for the writ has a discretion to deny it.<sup>67</sup> Where, in the application for such a motion, the evidence going to establish the error of fact is conflicting, an appellate court will not interfere with the discretion of the trial court in refusing to vacate the judgment.<sup>68</sup> But if the evidence is all on one side and uncontradicted, the appellate court will interfere, on the ground that such discretion has been abused.<sup>69</sup>

#### APPLICATION IN PRACTICE

The first case in the Missouri reports discussing the application of the writ of error *coram nobis* is that of *Calloway v. Nifong*.<sup>70</sup> Calloway brought writ of error to the Supreme Court to reverse a judgment and assigned as error in fact, that his co-defendant died after service but before the judgment was rendered. The court dismissed the writ of error and held that, according to the established course of the common law, error in fact could only be corrected in the court where it occurred, or in which the record was. In this case, the court said the remedy must be by writ of error *coram nobis* in the circuit court, the record being in that court. When a defendant dies after service upon him and before judgment, writ of error *coram nobis* is a proper remedy to set aside and vacate the judgment, for the reason that it is an error of fact not appearing on the record of the court which renders the judgment invalid.<sup>71</sup> Where a slave pleaded guilty to a charge of grand larceny as a free man and was sentenced to the penitentiary, which sentence was incompetent by reason of the fact of slavery, it was held that the court should set aside the judgment on writ of error *coram nobis* at a subsequent term.<sup>72</sup> And so, too, where an infant, upon a plea

<sup>65</sup> *Stupp v. Holmes* (1871) 48 Mo. 89; *State v. Wallace* (1908) 209 Mo. 359, 108 S. W. 542; *Latshaw v. McNees* (1872) 50 Mo. 381.

<sup>66</sup> *Ex parte Gray* (1882) 77 Mo. 160; *State ex rel. v. Riley*, supra footnote 36; *Estes v. Nell* (1901) 163 Mo. 157, 63 S. W. 724; *Neenan v. St. Joseph* (1894) 126 Mo. 89, S. W. 963. See footnote 65, supra.

<sup>67</sup> *State v. Wallace*, supra footnote 65.

<sup>68</sup> *Ibid.* *State ex rel. v. Heinrich* (1883) 14 Mo. App. 146; *Craig v. Smith* (1877) 65 Mo. 536.

<sup>69</sup> *Ibid.*

<sup>70</sup> (1822) 1 Mo. 223.

<sup>71</sup> *Harkness v. Austin* (1865) 36 Mo. 47; *State v. Wallace* (1908) 209 Mo. 359, 108 S. W. 542; *State ex rel. v. Riley* (1909) 219 Mo. 667, 118 S. W. 647; *Dugan v. Scott* (1889) 37 Mo. App. 663; *State ex rel. Ozark County v. Tate* (1892) 109 Mo. 265, 18 S. W. 1088.

<sup>72</sup> *Ex parte Toney* (1848) 11 Mo. 661.

of guilty, was sentenced to the penitentiary which was an incompetent judgment on account of the fact of his infancy, the court, at a subsequent term, set the judgment aside on a writ of error *coram nobis* and committed him to jail.<sup>73</sup> Where a judgment was rendered against an infant without a guardian *ad litem* as though he were *sui juris*, which judgment was incompetent because of the fact of infancy, it was adjudged proper to set the same aside at a subsequent term on writ of error *coram nobis*.<sup>74</sup> In cases where judgment had been given against an insane person, without the intervention of a guardian, as though sane, it was held to be such an error of fact not appearing on the record as essentially invalidating the proceeding, and the judgment was therefore set aside on writ of error *coram nobis*.<sup>75</sup> Where a married woman (before the Married Woman's Act) was sued without her husband being joined and judgment obtained against her, it was adjudged proper to set aside the judgment at a subsequent term on a motion in the nature of a writ of error *coram nobis*.<sup>76</sup> Where it appeared affirmatively by the sheriff's return that one defendant was not served, and, through error, counsel representing the other defendants answered as though they represented the one unserved with the others, it was held that a writ of error *coram nobis* (application for by motion) filed at a subsequent term was the proper remedy to set aside the judgment.<sup>77</sup>

A ground of quite frequent action by the courts is that the judgment has been given against a party because of the unauthorized appearance of an attorney claiming to represent him.<sup>78</sup> In *Norton v. Reed*,<sup>79</sup> the action was in ejectment, in which a stipulation had been filed that it should abide a decision of the Supreme Court in another case. After the decision of that court

<sup>73</sup> *State v. Gavner* (1860) 30 Mo. 44; *Ex parte Kaufman* (1881) 73 Mo. 588; *Ex parte Gray* (1882) 77 Mo. 160.

<sup>74</sup> *Powell v. Gott* (1850) 13 Mo. 458, 53 Am. Dec. 153; *Randalls v. Wilson* (1856) 24 Mo. 76; *Townsend v. Cox* (1870) 45 Mo. 401; *Stupp v. Holmes* (1871) 48 Mo. 89; *Ex parte Gray*, supra footnote 73; *Ex parte Kaufman*, supra footnote 73; *Ex parte Page* (1872) 49 Mo. 291; *State v. Gavner*, supra footnote 73; *Neenan v. St. Joseph*, supra footnote 66; *Karicofe v. Schwaner* (1917) 196 Mo. App. 572, 196 S. W. 46; *Smith v. Young* (1909) 136 Mo. App. 65, 117 S. W. 628.

<sup>75</sup> *Gaves v. Graves* (1914) 255 Mo. 468, 164 S. W. 496; *Heard v. Sack* (1884) 81 Mo. 610; *Gibson v. Pollock* (1914) 179 Mo. App. 183, 166 S. W. 874; *Baker v. Smith's Estate* (Mo. App. 1929) 18 S. W. (2d.) 147.

<sup>76</sup> *Latshaw v. McNees*, supra footnote 29; *Weil v. Simmons*, supra footnote 29; *Walker v. Deaver*, supra footnote 29.

<sup>77</sup> *Craig v. Smith* (1877) 65 Mo. 536.

<sup>78</sup> *Craig v. Smith*, supra footnote 77; *Bradley v. Welsh* (1890) 100 Mo. 258, 12 S. W. 911; *Norton v. Reed* (1920) 281 Mo. 482, 221 S. W. 6; *Hecht-Bros. Co. v. Walker* (1931) 224 Mo. App. 1156, 35 S. W. (2d.) 372; *G. M. A. C. v. Lyman* (Mo. App. 1935) 78 S. W. (2d.) 109.

<sup>79</sup> *Supra*, footnote 78.



in such other case, plaintiffs sold all of their interest in the subject-matter of the action to the defendant Reed, who, in turn, conveyed the same to Johnson. Thereafter, an order was entered of record in the case, reciting that it was dismissed by the plaintiffs. Johnson filed a motion in the nature of a writ of error *coram nobis* setting out the above facts, and averring that the order of dismissal was erroneously made, and praying that the same be set aside and judgment rendered upon the stipulation referred to. Johnson testified he was not represented by any attorney, was not consulted, and did not consent to, or participate in, the order of dismissal and did not authorize any one to dismiss it. The court said: "The motion before us contains all the facts necessary to constitute it a writ of error *coram nobis*. It points out a mistake made by the court, without the fault of the appellants, based upon a misapprehension of the actual facts, which, if known to the court at the time, would have precluded it from dismissing the cause." A recent case very much in point is that of *Hecht Bro's. Co. v. Walker*.<sup>80</sup> In this case a judgment had been rendered against a dissolved corporation on injunction bonds without notice to its successor or to the court of the fact of the succession. The corporation, which assumed the liabilities of the dissolved corporation, was allowed to set aside the judgment by writ of error *coram nobis*. A more recent case is one of the present year in which the Kansas City Court of Appeals allowed evidence under the writ to show that notice of an appeal had been given to an alleged agent, who was in fact unauthorized to act for the defendant at any time.<sup>81</sup> To the contention that the writ could not be used to attack the verity of recitals in the judgment essential to its validity, the court answered that the statement to the effect that the defendant had been duly notified was not essential to the validity of the judgment. The court then proceeded to establish that the lack of notice was an error of fact material to the *right of the court to proceed* and that the absence of the fact assumed to exist, entirely *defeated the power of the court* to attain a valid result in its proceeding.<sup>81a</sup> The above instances illustrate the doctrine. Its application was considered entirely appropriate in every case cited. It will be noted that in each case the judgment was incompetent for some error of fact when the fact about which the error was committed was one essential to the validity of the proceeding, and had been treated by the court as existing when in truth it did not.

Any discussion of a current laws topic which does not deplore a current "confusion of authority" is perhaps a rarity. It is not the purpose of the writer to attempt an exhaustive treatise or

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<sup>80</sup> (1931) 224 Mo. App. 1156, 35 S. W. (2d.) 372.

<sup>81</sup> *G. M. A. C. v. Lyman*, supra footnote 78.

<sup>81a</sup> *Ibid*.

to analyze or account for the origin or continuance of any instances of what might be termed "confusion of authority" except insofar as references may help to more clearly mark the separate office of the writ of error *coram nobis*. The wealth of cases cited may be consulted with profit in illustrating the guarded limits surrounding the motions in the nature of writs of error *coram nobis* and one based on the irregularities patent of record. At this point we come to a brief consideration of the latter motion.

#### MOTION FOR IRREGULARITIES

It was pointed out earlier that Missouri, by statute, adopted the common law of England, prior to the fourth year of the reign of James the First, as the rule of decision.<sup>82</sup> The motion for irregularities was and is now a well-known common law remedy, by which system of jurisprudence it should usually, but not always, be filed at the term at which the judgment sought to be vacated was rendered.<sup>83</sup> There is a Missouri statute under which this relief has been granted in many cases reading: "Judgments in any court of record shall not be set aside for irregularity on motion, unless such motion be made within three years after the term at which such judgment was rendered."<sup>84</sup> The observation of Justice Nortoni is very apposite in relation to this point when he states that our statute on the subject does no more than recognize this as a pre-existing common-law remedy, and, by implication, authorizes its continuance, limiting its application, however, to cases where the motion is filed "within three years after the term at which such judgment was rendered."<sup>85</sup>

It may be urged legitimately that such section, in words, does not *grant* a power but puts a limitation on a power assumed to exist. This position seems very plausible and yet it has been ably asserted that the rule has been to allow it as a source of judicial power, and that it has uniformly been applied in that way.<sup>86</sup> It is important to observe that the statute employs the word "irregularity." The scope of the power of the court under that section would seem to turn on that word. What is an *irregularity* in the legal sense? A standard treatise defines it thus: "An *irregularity* may be defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists, either in

<sup>82</sup> *Supra*, footnote 14.

<sup>83</sup> *Tidd's Prac.*, 512.

<sup>84</sup> R. S. Mo. (1929), section 1101.

<sup>85</sup> *Cross v. Gould* (1908) 131 Mo. App. 535, 110 S. W. 672. The limitation of the time in which the motion might be filed was originally five years. R. S. Mo. (1835), p. 328, section 1; R. S. Mo. (1845), p. 831, section 8. The present three year period was embodied in the G. S. (1866), p. 686, section 26, and continued up to the present without change.

<sup>86</sup> *Jeude v. Sims* (1914) 258 Mo. 26, 166 S. W. 1048. See opinion of Lamm, C. J. (dissenting).

omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time or improper manner.”<sup>87</sup> Conceding the correctness and adequacy of the definition, it speaks the language of the Missouri courts and is to be found, in substance, in practically all of the cases.<sup>88</sup>

It has been ruled over and over again that the irregularity reached by the motion under the statute must be one patent on the record, and not resting in proof *dehors* the record.<sup>89</sup> The irregularity in the mind of the law-maker is distinguished by the courts from mere “error.”<sup>90</sup> And, while the irregularity need not be one which would render the judgment absolutely void, and therefore subject to be defeated by collateral attack, it must be one which indicates at least that the judgment was given contrary, in some material respect, to the established form and modes of procedure for the orderly administration of justice.<sup>91</sup> Illustrative of such irregularities as will authorize the vacation of a judgment, an instance appearing frequently in the books is where a judgment was rendered in service by publication based on an allegation of non-residence when none such exists.<sup>92</sup> Also, where a default judgment was taken prematurely as shown by the record.<sup>93</sup> So, too, where both final and interlocutory judgments by default taken at the same term in a suit not founded upon a bill, bond, or note for the direct payment of money were determined to be irregularities which authorized the court to set aside the judgment at a subsequent term.<sup>94</sup> In the case of *Stacker*

<sup>87</sup> 1 Tidd Prac. (3rd. Am. Ed.) 512.

<sup>88</sup> *Branstetter v. Rives* (1864) 34 Mo. 318; *Jeude v. Sims*, supra footnote 86; *Downing v. Still* (1869) 43 Mo. 309; *Scott v. Rees* (1923) 300 Mo. 123, 253 S. W. 998; *Le Bourgeoise v. McNamara* (1881) 10 Mo. App. 116, Aff. 82 Mo. 189; *Cross v. Gould*, supra footnote 4.

<sup>89</sup> *Shuck v. Lawton* (1913) 249 Mo. 168, 155 S. W. 20; *Nelson v. Brown* (1856) 23 Mo. 13; *Downing v. Still*, supra footnote 88; *Weil v. Simmons* (1877) 66 Mo. 617; *State v. Stanley* (1909) 225 Mo. 525, 125 S. W. 475; *Sowers-Taylor Co. v. Collins* (Mo. App. 1929) 14 S. W. (2d.) 692; *Hirsh v. Weisberger* (1891) 44 Mo. App. 507; *Marble v. Vanhorn* (1893) 53 Mo. App. 361; *State ex rel. v. Riley* (1909) 219 Mo. 667, 118 S. W. 647; *Cross v. Gould*, supra footnote 4.

<sup>90</sup> *Jeude v. Sims*, supra footnote 86; *Ex parte Toney* (1848) 11 Mo. 661; *State ex rel. v. Tate* (1892) 109 Mo. 265, 18 S. W. 1088; *Marble v. Vanhorn*, supra footnote 89; *Smith v. Young* (1909) 136 Mo. App. 65, 117 S. W. 628.

<sup>91</sup> *Cross v. Gould*, supra footnote 4; *Nave v. Todd* (1884) 83 Mo. 601; *Harbor v. Pac. R. R.* (1862) 32 Mo. 423; *Lawther v. Agee* (1864) 34 Mo. 372; *Branstetter v. Rives*, supra footnote 88; *Stacker v. Cooper Circuit Court* (1857) 25 Mo. 401.

<sup>92</sup> *Shuck v. Lawton*, supra footnote 89; *State ex rel. v. Heinrich* (1883) 14 Mo. App. 146; *Simms v. Thompson* (1922) 291 Mo. 493, 236 S. W. 876; *State ex rel. v. Clarkson* (1901) 88 Mo. App. 553.

<sup>93</sup> *Branstetter v. Rives*, supra footnote 88; *Reed Bro's. v. Nicholson* (1902) 93 Mo. App. 29; *Smith v. Best* (1868) 42 Mo. 185.

<sup>94</sup> *Lawther v. Agee*, supra footnote 91.

*v. Cooper Circuit Court*,<sup>95</sup> a cause was referred, the referee failed to report for a considerable time after the report was due. During the interim, the appellee induced the court to affirm the judgment of the justice. At a subsequent term the court set aside this judgment of affirmance for irregularity, and this action was affirmed by the Supreme Court. If a judgment be taken exceeding the amount prayed for in the petition, that would be an irregularity under the statute.<sup>96</sup> Similarly, the rendering of a judgment for an amount in excess of the penal provisions of a bond in suit is an irregularity for which the judgment may be set aside on motion at a subsequent term.<sup>97</sup> A judgment entered on the merits by default while a demurrer or answer were on file and not disposed of has been determined to be an irregularity for which the judgment should be set aside at a subsequent term.<sup>98</sup> It will be noted here that in all of these cases referred to above, the irregularity appeared on the face of the proceeding, and was not discoverable without evidence *aliunde* or *dehors* the record.

The distinctions between the proceeding by motion to vacate for irregularities and the motion in the nature of a writ of error *coram nobis* is marked but have not always been observed. The former is grounded solely on irregularities of procedure which appear on the face of the record;<sup>99</sup> the latter is grounded solely upon latent errors of fact, which do not appear on the face of the record, but which must be brought to the attention of the court by evidence *aliunde*.<sup>100</sup> The former is subject, by the terms of the statute, to a limitation of three years;<sup>101</sup> the latter is not subject to any distinct statute of limitations.<sup>102</sup>

Another basis for distinguishing the two has been advanced with the argument that the motion to vacate a judgment for irregularities is a motion in the original suit, and not a separate

<sup>95</sup> (1857) 25 Mo. 401.

<sup>96</sup> *Chambers v. Carthel* (1865) 35 Mo. 374.

<sup>97</sup> *Showles v. Freeman* (1884) 81 Mo. 540.

<sup>98</sup> *Norman v. Hooker* (1865) 35 Mo. 366.

<sup>99</sup> It has been determined in numerous cases, of which *Harbor v. Pac. R. R.* indicates that class that, however, erroneous a proceeding may be, if it be regular, after the manner of the prescribed methods and modes of procedure, the judgment will not be set aside at a subsequent term on motion as for irregularities. *Harbor v. Pac. R. R.* (1862) 32 Mo. 423. See also in this connection *Phillips v. Evans* (1876) 64 Mo. 17; *Hefferman v. Ragsdale* (1906) 199 Mo. 375, 97 S. W. 890, where it is pointed out the irregularity must appear on the face of the proceeding, and that it is not permissible to investigate from evidence *aliunde* or *dehors* the record.

<sup>100</sup> *Gibson v. Pollock* (1914) 179 Mo. App. 188, 166 S. W. 874; *Scott v. Rees* (1923) 300 Mo. 123, 253 S. W. 998; *Norton v. Reed* (1920) 281 Mo. 482, 221 S. W. 6; *Dugan v. Scott* (1889) 37 Mo. App. 663; *State v. Stanley* (1909) 225 Mo. 525, 125 S. W. 475; *Heard v. Sack* (1884) 81 Mo. 610; *Ex parte Toney* (1848) 11 Mo. 661.

<sup>101</sup> *Supra*, footnote 84.

<sup>102</sup> *Supra*, footnote 55.

action.<sup>103</sup> Accordingly, neither an appeal nor writ of error lie from an order sustaining the motion and reinstating the cause on the docket; but the remedy of the other party is to take a bill of exceptions, proceed no further in the cause, suffer final judgment to go against him, and then prosecute his appeal or writ of error.<sup>104</sup> The order of the court is thus not considered a final judgment or order from which an appeal lies.<sup>105</sup> It has been said, however, that the motion in the nature of a writ of error *coram nobis* is in the nature of a new action, analagous to a writ of error.<sup>106</sup> The motion is in the nature of a pleading and does not have to be preserved by a bill of exceptions, the proceeding being entirely independent of the original trial.<sup>107</sup> For this reason the Kansas City Court of Appeals in the case of *Robinson v. Henry*,<sup>108</sup> and *Sowers-Taylor Co. v. Collins*,<sup>109</sup> refused to review the action of a trial court in sustaining or overruling a motion for irregularities unless the motion was incorporated in a bill of exceptions. The court in the *Sowers-Taylor Co. v. Collins* case while refusing to review any action of the trial court in ruling upon the attacks upon the face of the record, went on to state that a motion to vacate a judgment for error of fact, which must be supported by evidence *dehors* the record, and which serves the purpose of the common-law writ of error *coram nobis*, is in the nature of a pleading and need not appear in the bill of exceptions.

On the other hand, the St. Louis Court of Appeals, in the case

<sup>103</sup> *Hirsh v. Weisberger* (1891) 44 Mo. App. 507.

<sup>104</sup> *Ibid.* *Robinson v. Henry* (Mo. App. 1929) 14 S. W. (2d.) 693; *Sowers-Taylor Co. v. Collins* (Mo. App. 1929) 14 S. W. (2d.) 692; *Daggs v. Smith* (1905) 193 Mo. 494, 91 S. W. 1043; *Clarkson v. Stanchfield* (1874) 57 Mo. 573; *Choteau v. Nuckols* (1862) 33 Mo. 148; *Loudon v. King* (1856) 22 Mo. 336.

<sup>105</sup> *Ibid.*

<sup>106</sup> *State ex rel. v. Riley* (1909) 225 Mo. 525, 125 S. W. 475 (In this state a motion to vacate a judgment for error of fact, and not for patent error of record, supported by evidence *dehors* the record, takes the place of the common-law writ of error *coram nobis* and is in the nature of an independent and direct attack upon the judgment in the court committing the error. A judgment upon such a motion is within itself a final judgment, from which an appeal will lie); *Hirsh v. Weisberger*, *supra* footnote 103 (the writ of error *coram nobis* is in the nature of a new action, analogous to the writ of error. It necessarily depends upon the production of extrinsic evidence, for the error does not appear on the record as in the case where the remedy is the ordinary writ of error. There must be a trial of an issue of fact; and if the trial results in depriving the plaintiff of the judgment, which he has recovered and which appears to be regular on its face, it may be assumed that he may at once prosecute an appeal or writ of error to reverse the order); *Baker v. Smith's Estate* (Mo. App. 1929) 18 S. W. (2d.) 147; *Jeude v. Sims*, *supra* footnote 3; *Cross v. Gould*, *supra* footnote 4.

<sup>107</sup> *Scott v. Rees* (1923) 300 Mo. 123, 253 S. W. 998; *Simms v. Thompson* (1922) 291 Mo. 493, 236 S. W. 876; *Norton v. Reed*, *supra* footnote 100.

<sup>108</sup> (Mo. App. 1929) 14 S. W. (2d.) 693.

<sup>109</sup> (Mo. App. 1929) 14 S. W. (2d.) 692.

of *Metal Workers v. Mercantile Company*<sup>110</sup> held that a motion to vacate a judgment filed after a term at which the judgment was rendered, whether for irregularities on the face of the record or for matters *dehors* the record, is in the nature of an independent proceeding, and that the order made by the court upon such motion is an order from which an appeal or writ of error lies. This ruling applies to motions filed under the statute and to motions which are in the nature of writs of error *coram nobis*.<sup>111</sup> This is the view taken by the Supreme Court of Missouri.<sup>112</sup>

To insist that the motion against irregularities should be preserved in a bill of exceptions would seem to be an idle argument. It matters not whether the motion is preserved in the bill of exceptions. The record proper is available. While the general rule is that a bill of exceptions is the proper receptacle for ordinary motions, there are exceptions to this rule.<sup>113</sup> One of them is that motions which, when served, have the office of due process of law, or are in the nature of original and independent proceedings, though grafted on the main stem of the original suit, are in effect pleadings, become part of the record proper, and come up without a bill.<sup>114</sup> There would seem to be no difference between the two motions in this respect. An appeal is a creature of statute only. Now, by R. S. Mo. (1929), section 1018, an appeal is allowed "from any final judgment in the case, or from any special order after final judgment in the cause." Either type of motion, in substance, is a new suit. From that standpoint, broadly speaking, the vacating judgment is a "final judgment" and an appeal lies by virtue of the statute. But, if the proceeding to vacate be held not to be a new suit, yet the statute still allows an appeal because, on such view, the vacating judgment or order may be allowed to fall into the class of any "special order after final judgment in the cause." The ruling on a motion for irregularities and the motion in the nature of a writ of error *coram nobis* is a special order made after final judgment in a

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<sup>110</sup> (1926) 218 Mo. App. 544, 280 S. W. 82.

<sup>111</sup> *Audsley v. Hale* (1924) 303 Mo. 451, 261 S. W. 117; *State ex rel. v. Riley*, supra footnote 107; *Scott v. Rees*, supra footnote 108; *Schuck v. Lawton*, supra footnote 89. See also *Osage Inv. Co. v. Siguist* (1922) 298 Mo. 139, 250 S. W. 39; *Bussiere's Adm'r. v. Sayman* (1913) 257 Mo. 303, 165 S. W. 796.

<sup>112</sup> *Audsley v. Hale*, supra footnote 111; *Scott v. Rees*, supra footnote 8 (both the motion for irregularities and the motion in the nature of a writ of error *coram nobis* are direct attacks upon the judgment rendered, and it would seem that the motion in each case performs the same function or office).

<sup>113</sup> *Jeude v. Sims* (1914) 258 Mo. 42, 166 S. W. 1048; *Simms v. Thompson* supra footnote 107; *Sowers-Taylor Co. v. Collins*, supra footnote 104; *Robinson v. Henry*, supra footnote 104.

<sup>114</sup> *Jeude v. Sims*, supra footnote 113.

case from which an appeal will lie and it is a final judgment or decision to which a writ of error will run.

We now come to the question of the form of remedy applicable when there has been judgment rendered against a defendant by publication when, in fact, he was within the jurisdiction of the court rendering the judgment or in fact a resident of the state. In *State ex rel. v. Heinrich*<sup>115</sup> a motion was filed to vacate a judgment rendered against the defendant for delinquent taxes on an order of publication as a non-resident when in fact he lived in the county in which the judgment was rendered. The motion while considered as in the nature of a writ of error *coram nobis*, was in fact filed within three years after the rendition of the judgment and a reopening of the case was authorized under the statute providing for a review of the judgment within three years after its rendition.<sup>116</sup> In *Neenan v. St. Joseph*,<sup>117</sup> the case was complicated by the additional fact that not only was the defendant not served with process but was a minor. The judgment for the sale of the land for the delinquent taxes was set aside, the court being firmly of the opinion that the case offered a proper instance for the application of the writ of error *coram nobis*. The case of *State ex rel. v. Horine*<sup>118</sup> was another instance where a tax judgment was vacated for the reason that service was had by publication when in fact the defendants were residents of the state. The proceeding was termed a motion in the nature of a writ of error *coram nobis* and, as such, it was permitted to set aside the judgment entered against a party in consequence of the error of fact which did not appear of record. Recitals of fact in an order of publication in tax suits were subject to contradiction by evidence *dehors* the record by the writ of error *coram nobis*. The jurisdiction to render the judgment depended upon constructive service had upon the erroneous finding of a fact necessary to sustain such service. Following this case was *State ex rel. Brown v. White*,<sup>119</sup> where the judgment for taxes was set aside on the ground that service was obtained by publication when the defendant was in fact a resident of the state. The court, in reversing the lower court, held that an error of fact had been committed and one, too, concerning a matter vital to its jurisdiction, and which error did not appear on the face of the record in the tax suit. The writ of error *coram nobis* was declared to be the proper proceeding to reach this error of

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<sup>115</sup> (1883) 14 Mo. App. 146.

<sup>116</sup> See footnote 7, *supra*. *Randolph v. Sloan* (1874) 58 Mo. 155 (motion to set aside a judgment on the ground there was no personal service upon the defendant. The court held that there was a three year period authorized by statute in which to file a petition for review).

<sup>117</sup> (1894) 126 Mo. 89, 28 S. W. 963.

<sup>118</sup> (1895) 63 Mo. App. 1.

<sup>119</sup> (1898) 75 Mo. App. 256.

fact, and being found according to the defendant's complaint it was manifestly the duty of the court where the suit was prosecuted to set aside the judgment rendered in consequence of such error of fact.

In *State ex rel. v. Clarkson*,<sup>120</sup> however, the collector of Howell county sued the defendant for delinquent taxes, by publication, alleging that he was a non-resident of the state. Clarkson's deed was on record in the recorder's office of Howell showing that he was a resident of Randolph county. The defendant filed a motion in the nature of a writ of error *coram nobis* to set aside the judgment on the ground that the court in rendering the judgment committed an error of fact and had no jurisdiction of the defendant. The Court of Appeals held that the proof that Clarkson was not a resident of the state did not prove that the court committed an error of fact in the rendition of the judgment fatal to its validity. The judgment of the trial court in overruling the motion was affirmed. It is well to contrast the language of the court in this case to that of the preceding cases. Here they reason by admitting the general proposition that the writ of error *coram nobis* will lie when the court has committed an error of fact vital to its jurisdiction, when said error does not appear upon the face of the proceedings, and recognizing such as well settled law. To continue, the court states that it sufficiently appears from the evidence that the appellant was a resident of the state when the suit was brought but refuses to see how this fact impeaches the jurisdiction of the court to render the judgment. Jurisdiction was acquired of the *res* by the making, publishing and proof of the order of publication, and it was against the *res* only that the judgment was rendered. To render the judgment against the land, the jurisdiction was as effectually conferred as if the appellant had been personally served with process. To conclude the argument, the proof that appellant was a resident of the state was not considered to prove or tend to prove that the court committed an error of fact in the rendition of the judgment, fatal to its validity. This case received the visé of the Supreme Court of Missouri in *Simms v. Thompson*.<sup>121</sup> The residence or non-residence of the defendant was stated to be not a fact which was material to the right of the court to enter the judgment. The action of the learned court in *State v. Heinrich* and the cases subsequently considered, in treating the motion as a writ of error *coram nobis*, was a misconception of the scope and function of that writ and not in harmony with the later rulings in view of what was said in *Simms v. Thompson*.<sup>122</sup> The later rulings revert back to the argument earlier advanced in this

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<sup>120</sup> (1901) 88 Mo. App. 553.

<sup>121</sup> (1922) 291 Mo. 493, 236 S. W. 876.

<sup>122</sup> *Ibid.*



discussion, wherein it was pointed out that the cases have now established that the writ of error *coram nobis* will lie only when the court has proceeded in a case as though a fact which was material to its *right to proceed*, existed, when it did not exist, and when the absence of the fact assumed to exist, entirely *defeats the power of the court* to obtain a valid result in its proceeding.<sup>123</sup>

#### FRAUD

In practice, the tendency of many of the decisions has been to point out that the traditional scope of the writ of error *coram nobis* must yield to the preponderant claims of equitable doctrines on the modern motion so as to include that of fraud.<sup>124</sup> Moreover, it has been intimated that, in addition to fraud, the grounds of surprise, accident, and mistake might be included within the motion in the nature of the writ.<sup>125</sup>

A line of Missouri authorities have affirmed that the remedy which was originally limited within the scope of the writ of error *coram nobis* is now so extended by the invocation of equitable doctrines on the modern motion as to include that of fraud as a legitimate and proper reason for vacating a judgment at a subsequent term.<sup>126</sup> The remedy obtains on the theory that there is an inherent power in the courts of common law to vacate judgments for fraud.<sup>127</sup> The line of reasoning seems to proceed on the basis that irrespective of the limitations of the common law upon the remedy afforded by writ of error *coram nobis*, it must be conceded that under the practice which now generally obtains in the Missouri courts, judgments are frequently set aside and vacated at terms of the court subsequent to their rendition upon motion, not only for reasons which would be valid on writ of error *coram nobis*, but for reasons entirely foreign to that remedy as it existed at common law, and chief among these is for fraud practiced in procuring the judgment. It seems the exigencies of hard cases have brought forth these motions, predicated, at least, upon the motion involved in the writ of error *coram nobis*, al-

<sup>123</sup> See footnote 31, *supra*.

<sup>124</sup> *Cross v. Gould* (1908) 131 Mo. App. 585, 110 S. W. 672; *Fisher v. Fisher* (1905) 114 Mo. App. 627, 90 S. W. 413; *Graf v. Dougherty* (1909) 139 Mo. App. 56, 120 S. W. 661.

<sup>125</sup> *Cross v. Gould*, *supra* footnote 124.

<sup>126</sup> *Spalding v. Meier* (1867) 40 Mo. 176; *Downing v. Still* (1869) 43 Mo. 309; *Estes v. Nell* (1901) 163 Mo. 157, 63 S. W. 724; *State ex rel. v. Riley* (1909) 219 Mo. 667, 118 S. W. 647; *Fisher v. Fisher* (1905) 114 Mo. App. 627, 90 S. W. 413; *Cross v. Gould* (1908) 131 Mo. App. 585, 110 S. W. 672; *Shuck v. Lawton* (1913) 249 Mo. 168, 155 S. W. 20; *Graf v. Dougherty* (1909) 139 Mo. App. 36, 120 S. W. 661.

<sup>127</sup> *Cross v. Gould*, *supra* footnote 126 (As to fraud, it is entirely immaterial whether the statute authorizes the proceeding by motion or not. Unless it is forbidden, the remedy obtains on the theory that there is an inherent power in the courts of common law to vacate judgments for fraud).

though the scope of the remedy administered thereon reaches far beyond the writ which they are said to supplant. It is said the practice of summarily administering equitable relief on motions of this character is certainly justified in Missouri, where, by the system adopted, the kinds of procedure which obtained separately at common law and in equity are amalgamated in one form of action and the different character of relief administered by the same tribunal.<sup>128</sup> At any rate, the practice of setting aside judgments at a subsequent term on motion in the nature of the old writ of error *coram nobis* for fraud practiced in the act of procuring the judgment has obtained in the courts of this state.

This position seems very plausible and yet, upon analysis, it appears to be exposed to serious criticism. Praiseworthy, or at least defensible, as these reasons were, they nevertheless seem inapplicable to the allowing of the writ of error *coram nobis* as the corrective remedy inasmuch as relief lies in the proper channels. But even conceding fully the correctness of those decisions as far as the result reached, it seems clear that in view of the abrupt change in court decisions, the problem is no longer before us. The trial of the issue of fraud used in preventing a party from being present and making a defense, as found to be the case in many instances, is the trial of an issue outside of any issue involved in the case in which the judgment is rendered. It is not an issue, and not an issue out of which an error of fact can arise, which would authorize a writ of error *coram nobis*. The decisions constantly hold that the error of fact to be corrected by the writ of error *coram nobis* must be errors of fact pertinent to the issues in the case, and not mere extraneous matters.<sup>129</sup> The recent case of *Sowers-Taylor v. Collins*<sup>130</sup> points out that although it is sometimes said that it is not the office of a writ of error *coram nobis* to set aside a judgment on the ground of fraud, this only means that a judgment may not be set aside when attacked in this manner, on the ground that the court was induced by fraud to exercise its jurisdiction. If the court has been misled into supposing that it had jurisdiction over the person of the defendant, and this fact is not apparent from an inspection of the record, then the writ of error *coram nobis* will lie whether the court was misled by fraud or mistake.

A consideration of a few of the cases will, perhaps, clarify the present position of the courts. In *Spalding v. Meier*,<sup>131</sup> relief was granted after the term, on motion, by setting aside the judgment entered after an agreement to continue, which continuance, by

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<sup>128</sup> *Gross v. Gould*, supra footnote 126.

<sup>129</sup> *Schneider v. Schneider* (Mo. App. 1925) 273 S. W. 1081; *Simms v. Thompson* (1922) 291 Mo. 493, 236 S. W. 876. See footnote 126, supra.

<sup>130</sup> (Mo. App. 1929) 14 S. W. (2d.) 692.

<sup>131</sup> (1867) 40 Mo. 176.

inadvertence, had not been entered by the clerk. Bliss J., speaking for the Supreme Court in *Downing v. Still*<sup>132</sup> said: "The charge (conspiracy to defraud) is sustained by affidavits, except as to the conspiracy. The proceedings complained of were without the knowledge of those interested in seeing they were regular. This matter should have been considered below. The objection that it can only be inquired into upon petition in the nature of a bill in equity is not well taken. Though fraud and mistake are often grounds for relief, yet the proper proceeding in a matter of this kind is by motion." In *Estes v. Nell*<sup>133</sup> the court stated it in this way: "The motion or petition, it has been ruled, must show that the movent or petitioner was prevented from making the defense by surprise, accident, mistake, or fraud of the adversary without fault on his part." In *State ex rel. v. Riley*,<sup>134</sup> the following excerpt from 5 Ency. Pl. & Prac. 26, was quoted approvingly by the Supreme Court as descriptive of the scope and office of the writ *coram nobis*: "The office of the writ of *coram nobis* is to bring the attention of the court to, and obtain relief from, errors of fact, such as the death of either party pending suit and before judgment therein, or infancy, where the party was not properly represented by guardian, or coverture, where the common-law disability still exists, or insanity, it seems, at the time of trial, or a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant, was not made, either through duress or fraud or excusable mistake; these facts not appearing on the face of the record, and being such as, if known in season, would have prevented the rendition and entry of the judgment questioned."

The case of *Fisher v. Fisher*<sup>135</sup> was one where counsel for the respective parties agreed that if the cause was called for trial at the term it should be continued for certain reasons and the matter adjusted. Later, plaintiff appeared and took judgment by default without mention of the agreement; plaintiff's council telling the court that defendant did not desire to defend the suit. The words of the court through Johnson, J., are very apposite in this respect:

"The distinction sought to be drawn by plaintiff between cases arising from fraud in the procurement of the judgment and those based upon other mistakes of fact, both of which require proof *dehors* the record, is not founded in good reason. The principle upon which relief is afforded in any case, is that the court has been misled, without the injured party being negligent, into pronouncing the judg-

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<sup>132</sup> (1869) 43 Mo. 309.

<sup>133</sup> (1901) 163 Mo. 157, 63 S. W. 724.

<sup>134</sup> (1909) 219 Mo. 667, 118 S. W. 647.

<sup>135</sup> (1905) 114 Mo. App. 627, 90 S. W. 413.

ment; a thing that he would not have done had he known the real facts. The judgment so obtained, when the court's attention has been called to his mistake by proper and timely motion, should be treated as a nullity, devoid of any sanctity, and should not be hedged in by the safeguards surrounding judgments properly obtained."

Next in line is the case of *Cross v. Gould*.<sup>136</sup> The fraud in the *Cross* case was that the attorney for the plaintiff wrote the attorney for defendant, who lived in a distant state, telling him that he would be notified when the suit would be tried, and that nothing would be done until he should be notified, but thereafter when the case was called stated to the court, "Defendants did not further appear to the action for the reason they recognized the justice of the plaintiff's claim, and did not intend to contest it, and were willing to have judgment rendered against them," whereupon the court rendered judgment by default. The St. Louis Court of Appeals followed the doctrine of the Kansas City Court of Appeals in *Fisher v. Fisher* and reversed the lower court and directed to reinstate the motion to set aside the judgment. Shortly after *Cross v. Gould*, the St. Louis Court of Appeals handed down the decision in *Graf v. Dougherty*.<sup>137</sup> The ground alleged in support of the motion was that the plaintiff fraudulently represented to the court that the defendant was a non-resident of the state and secured notice by publication. The court stated that it was true that the motion predicated in part upon equitable grounds which would have no doubt have supported a bill in equity on the grounds of fraud perpetrated in the act of procuring the judgment. Nevertheless, the relief sought was declared to be within the purview of such motions; the modern motion superseding the ancient writ of error *coram nobis*. The latter case received the full sanction of the Supreme Court in the case of *Shuck v. Lawton*,<sup>138</sup> as an able and acceptable exposition of the law in this regard.

Finally, in the case of *Jeude v. Sims*,<sup>139</sup> the majority of the Supreme Court rejected the opinion offered by Lamm, C. J., and reasoned on entirely different lines in the following manner:

"The motion in this case simply sets up that the plaintiff's fraudulently misled counsel for the defendants as to the time of the trial of the cause. Whilst such conduct, if shown upon a trial by bill in equity to set aside the judgment for fraud, would perhaps be good, yet we fail to find any case wherein such fact is a ground for the common-law

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<sup>136</sup> (1908) 131 Mo. App. 585, 110 S. W. 672.

<sup>137</sup> (1900) 139 Mo. App. 56, 120 S. W. 661.

<sup>138</sup> (1913) 249 Mo. 168, 155 S. W. 20.

<sup>139</sup> (1914) 258 Mo. 26, 166 S. W. 1048.

writ of error *coram nobis*. \* \* \* The errors of fact to be corrected by the writ of error *coram nobis* must be errors of fact pertinent to the issues in the case, and not mere extraneous matters."

Then came *Simms v. Thompson*.<sup>140</sup> *Cross v. Gould*, insofar as it held that fraud appearing in that case was sufficient upon which to base a writ of error *coram nobis*, was expressly disapproved by *Simms v. Thompson*. It was said that relief was not granted in Missouri on the grounds of fraud, and doubtless would not be on the ground of mistake or accident, those being distinct grounds of relief in equity. The *Fisher* case was not mentioned in *Simms v. Thompson* and was not overruled in so many words, but the Kansas City Court of Appeals in *Ragland v. Ragland*,<sup>141</sup> relied upon *Simms v. Thompson* as a proper exposition of the law and overruled its former decision in *Fisher v. Fisher*. In the *Ragland* case it was said that relief would not be granted in a motion in the nature of a writ of error *coram nobis* where there was fraud in the procurement of a judgment.

This position was again taken by the case of *Hartford Ins. Co. v. Stanfill*<sup>142</sup> where the court was of the opinion that it was now definitely settled that relief was not granted by writ of error *coram nobis* in Missouri on the ground of fraud. Here the appellant sought to set aside an order of dismissal for the reason that appellant's attorney fraudulently procured the dismissal. The appellant was denied the application for the writ of error *coram nobis* and was relegated to his proper remedy. The St. Louis Court of Appeals again affirmed the proposition of the aforementioned cases and the case of *Schneider v. Schneider*,<sup>143</sup> ruling that the common-law writ of error *coram nobis* is not available to obtain relief from fraud. It remained for the court to modify this general attitude which they did in *Sowers-Taylor Co. v. Collins*.<sup>144</sup> The court here held that although it is sometimes said that it is not the office of the writ of error *coram nobis* to set aside the judgment on the ground of fraud; this only means that a judgment may not be set aside when attacked in this manner, on the ground that the court was induced by fraud to exercise its jurisdiction. If the court has been misled into supposing that it had jurisdiction over the person of the defendant, and this fact is not apparent from an inspection of

<sup>140</sup> (1922) 291 Mo. 493, 236 S. W. 876.

<sup>141</sup> (Mo. App. 1924) 253 S. W. 728.

<sup>142</sup> (Mo. App. 124) 259 S. W. 867.

<sup>143</sup> (Mo. App. 1925) 273 S. W. 1081 (motion to set aside a judgment for alimony on the ground that plaintiff fraudulently concealed a property settlement from the court. The court held that the writ of error is no longer available, in this state, for relief on the ground of fraud).

<sup>144</sup> (Mo. App. 1929) 14 S. W. (2d.) 692.

the record, then the writ of *coram nobis* will lie whether the court has been misled through mistake or fraud.

#### CONCLUSION

This article is not intended as an attack on any of the decisions of the courts, nor on the use of *coram nobis*. It is simply an effort to call attention to the fact that the so-called law of *coram nobis* still persists as a necessary part of the practice and procedure in Missouri. For our own purposes if it were felt that the present day motion completely supplanted the old writ of error *coram nobis*, it would seem that the rational procedure would be to cease speaking in terms of *coram nobis*, but its language has been carried through the books from *Calloway v. Nifong*<sup>145</sup> to *G. M. A. C. v. Lyman*,<sup>146</sup> of the present year. However, once convinced of the propriety of the relief, there need be no worry as to the mode of attaining it through the function of writ of error *coram nobis* via the motion route. For this reason, the granting of the motion should be exercised with the utmost caution and the grounds for the motion must be certain and definite, and restricted to such cases as where the facts to be presented are such that if those facts had been presented to the court at the original trial, the judgment rendered would not have been rendered.

J. CHARLES CRAWLEY '35.

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## IMPLIED POWERS OF LICENSE REVOCATION BY ADMINISTRATIVE AGENCIES

### I.

American legislatures in many instances have provided for the licensing of business, trades and acts to be performed by individuals.<sup>1</sup> Express legislative provisions for the revocation of licenses are, however, "meager and haphazard."<sup>2</sup> "There is no consistent legislative policy in any one jurisdiction concerning revocability or non-revocability, grounds of revocation, character of the revoking body, or appeal. . . . There are few fields in which there is more room and need for doing constructive work in the way of building up correct principles of legislation."<sup>3</sup> Freund says that the work would involve, among others, this question,

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<sup>145</sup> (1822) 1 Mo. 223.

<sup>146</sup> (Mo. App. 1935) 78 S. W. (2d.) 109.

<sup>1</sup> Freund, *Police Power*, sec. 493; "Current Legislation", 22 *Col. L. Rev.* 269.

<sup>2</sup> Freund, *Legislative Regulation*, p. 294.

<sup>3</sup> *Ibid.* See also Freund, *Administrative Powers Over Persons and Property*, sec. 64.