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Destructibility of Terms for Years: Habeas Corpus and Coram Nobis

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INTRODUCTION

Underlying American criminal jurisprudence is an ever expanding principle which may formally be called justice, but which more accurately should be termed fairness to the individual defendant. As society and civilization have developed, more and more has it been recognized that the person charged with a crime should be protected in a real and substantial manner. However, until recently New York was without a method to guarantee due process and fair treatment to a person improperly imprisoned under a judgment. Many judgments were defective because constitutional rights had been denied or fraud had been practiced in the trial court. Habeas corpus could be used to release some persons "illegally" imprisoned, but in many cases it showed a fatal defect. From this dilemma, grew the New York coram nobis proceeding.

HABEAS CORPUS

The ancient writ of habeas corpus, forever enshrined in the Constitution[1] has been, is now and probably always shall be cherished as the "great Palladium of our liberty." This is because the writ has always offered a remedy to relieve a person from illegal imprisonment by testing the jurisdiction of the authority which presumes to imprison him. Thus a person confined under a commitment by a magistrate to await grand jury action is entitled to the writ to test a defect in that commitment;[2] so, too is a person held under a defective information[3] or indictment.[4] If the legality of the commitment is not questioned habeas corpus may be used to establish the right to release on bail[5] or to re-

1. "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." U. S. Const., Art. 1, §9. Also see N. Y. Const. §4 which reads: "The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require its suspension." Magna Charta contains the following clause which was interpreted to insure the writ; ". . . no free man shall be taken or imprisoned or disseised or exiled or in any way destroyed except by the lawful judgment of his peers by the law of the land." Thompson, Magna Charta, Its Role in the Making of the English Constitution, 1300-1629, 87 (1948).

2. *People ex rel. Calletti v. Morehead,* 50 N. Y. S. 2d 78 (Sup. Ct. 1944).

3. *People ex rel. Farley v. Crane,* 94 App. Div. 397, 88 N. Y. S. 2d 343 (1st Dept. 1904); *People v. Rapaport,* 261 App. Div. 484, 26 N. Y. S. 2d 110 (2nd Dept. 1941).

4. Habeas corpus attack on an indictment is extremely limited. *People ex rel. Childs v. Knott,* 228 N. Y. 608, 127 N. E. 329 (1920); see also Boudin, *Has the Writ of Habeas Corpus been Abolished in New York,* 35 Col. L. Rev. 850 (1935).

5. §1255 N. Y. C. P. A.

duce extreme bail.[6] In certain cases the writ will afford immediate relief on the claim of double jeopardy.[7] It may be invoked to test a detention in extradition proceedings[8] or secure a prisoner's release from the excessive part of his sentence.[9] Even when a person is imprisoned by authority of a judgment habeas corpus may be employed to collaterally inquire into the judgment's legality. However, in such a case the actual inquiry under the New York Habeas Corpus Act is limited to a narrow field.[10] The first portion of the comment will be devoted to the range of that inquiry.

The Jurisdictional Limit

The legislature has established certain procedures to maintain due process safeguards after trial and conviction and yet promote system and finality in criminal proceedings. They are the motion for a new trial,[11] the motion for arrest of judgment,[12] and appellate review.[13] The common law has given us

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6. *People ex rel. Deliz v. Warden,* 260 App. Div. 155, 21 N. Y. S. 2d 435 (1st Dept. 1946); *People ex rel. Gagliano v. Warden,* 188 Misc. 800, 67 N. Y. S. 2d 220 (Sup. Ct. 1947); *People ex rel. Nuccio v. Warden,* 182 Misc. 654, 45 N. Y. S. 2d 230 (Sup. Ct. 1943).

7. *People ex rel. Stabile v. Warden,* 202 N. Y. 138, 95 N. E. 729 (1911); *People ex rel. Ostwald v. Carver,* 272 App. Div. 181, 70 N. Y. S. 2d 513 (3rd Dept. 1947); cf. *People ex rel. Herbert v. Hauley,* 142 App. Div. 421, 126 N. Y. Supp. 840 (1st Dept. 1911); see also *People ex. rel Hunt v. Warden,* ———Misc.,———, 107 N. Y. S. 2d 136 (Sup. Ct. 1951).

8. *People ex rel. Woloshin v. Warden,* 197 Misc. 609, 95 N. Y. S. 2d 370 (Sup. Ct. 1950).

9. *People ex rel. Kondrk v. Foster,* 299 N. Y. 329, 87 N. E. 2d 281 (1949); *People ex rel. Thornwell v. Heacox,* 231 App. Div. 617, 247 N. Y. Supp. 464 (4th Dept. 1931).

10. The New York Habeas Corpus Act (now Art. 77 of the N. Y. C. P. A.) was passed shortly after the Revolution and embodied much the same limitation as provided in §1231(2) of the N. Y. C. P. A. which makes the writ of habeas corpus unavailable where the prisoner ". . . has been committed or is detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction." This statute is intended only to enforce the common law which reserves to the courts the inherent power to determine competency or "whether the court making the judgment or decree, or issuing the process, had legal and constitutional power to give such judgment or send forth such process." *People ex rel. Tweed v. Liscomb,* 60 N. Y. 550, 570 (1875). A general definition of competency was established in *Landers v. Staten Island RR. Co.,* 53 N. Y. 450, 124 A. L. R. 1080 (1873). "Thus competency in a court, within the meaning of the statute, is measured by its 'power' . . . *"People ex rel. Fisher v. Morhous,* 183 Misc. 51, 58, 49 N. Y. S. 2d 111, 116 (Sup. Ct. 1944). A petition under sec. 1234 of the N. Y. C. P. A. is fatally defective if a complete lack of competence is not alleged as required by sec. 1231(2) ob. cit. supra. 10 Carm. 96; see also *People ex rel. Bailey v. McCann,* 222 App. Div. 465, 226 N. Y. Supp. 449 (1st Dept. 1928).

11. §§462—466 N. Y. Code of Crim. Proc. Motion must be made before judgment, except (1) where there is newly discovered evidence; then a motion may be made within one year of judgment; (2) where the sentence is death the motion may be raised anytime before execution. *Ibid* at §466.

12. §§467—470 N. Y. Code of Crim. Proc. Motion must be made before defendant is called for judgment. *Ibid* at §469.

13. §§515—532 N. Y. Code of Crim. Proc. Appeal must be taken within thirty days of judgment entry. *Ibid* at §521.

the motion to vacate judgment[14] and the writ of habeas corpus in order to furnish additional due process insurance. Like the motion to vacate judgment, the writ of habeas corpus is an extraordinary remedy that was never intended to impede the use of direct channels of relief. Yet, because it is a civil proceeding[15] designed to inquire summarily into illegal detention[16] it cuts directly through appeal and the other remedial statutory provisions.[17] Therefore it is necessary to restrain habeas corpus so that it does not obstruct regular criminal procedure without going so far as to keep the writ beyond the reach of those illegally imprisoned.[18] The solution of this problem was found in the jurisdictional aspect inherent in the writ.[19] The courts restricted the writ by giving the word jurisdiction a very limited meaning, and in a habeas corpus proceeding will only inquire into the trial court's jurisdiction to pronounce the particular judgment. New York has accepted this historic limitation of habeas corpus when it is employed to collaterally attack a judgment.[20] But before the court will even examine into the jurisdiction of the trial court it must be convinced that other remedies are no longer available.[21] Thus the court will dismiss the

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14. This motion is more commonly referred to in New York as a coram nobis proceeding, discussed, *infra.*

15. "Habeas corpus is not a remedy in a criminal action or proceeding or in the nature thereof; but is a civil proceeding to inquire into the cause of restraint or detention and to enforce a civil right to be released from restraint, custody or confinement which is unlawful. . ." *People ex rel. Childs v. Knot,* 187 App. Div. 604, 176 N. Y. Supp. 321, 333 (1st Dept. 1919).

16. See §1230 N. Y. C. P. A.

17. At common law the writ of habeas corpus was considered to be in the nature of a writ of review. 1 Holdsworth, Some Lessons From Our Legal History, 63—75. An annotation in 3 Hill 649 (1883) indicates the same feeling in New York State: "It (habeas corpus) is a prerogative writ, not ministerally issuable, i.e. not issuable of course; and yet it is a writ of right, on a proper foundation being made out by proof . . . The proceedings on all prerogative writs are appellate in their character looking to the case as it stands upon the return. Hence the habeas corpus is said to be in the nature of a writ of error." See also Chancellor Kent's remarks in *Yates' Case,* 4 Johns. 317, 360 (N. Y. Sup. Ct. of Judic., 1809).

18. Lord Hardwicke enunciated the rather harsh principle behind the policy when he said: "But here you apply to have the defendant discharged on the very merits, but I think it would be a most dangerous consequence if we should allow such proceedings; for then, all the prisoners in England would lay their cases before us and we instead of the jury must try the truth of the fact for which they are committed." *Rex v. Parnam,* Cun. 96 (1735).

19. Authority indicates that habeas corpus review has always been limited to an examination of jurisdiction alone. "If commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter which by law no man ought be punished, the courts are to discharge." Bacon Abr., Hab. Corp., B. 10. See also 2 Kent's Comm. 25 (14th ed., 1901); see *Ex Parte Tobias Watkins,* 3 Pet. 197, 202 (U. S. 1829 per Marshall, C. J.).

20. *People ex rel. Tweed v. Liscomb, supra,* n. 10.

21. *People ex rel. Carr v. Martin,* 286 N. Y. 27, 35 N. E. 2d 636 (1941); *People v. Harrison,* 66 N. Y. S. 2d 31 (Co. Ct. 1946); a motion for new trial or executive pardon were open to defendant who claimed to be an imbecile and therefore habeas corpus was dismissed, *People ex rel. Cassidy v. Lawes,* 112 Misc. 257, 182 N. Y. Supp. 545 (Sup. Ct. 1920); motion for arrest of judgment was appropriate in *People ex rel. Heins v. Hunt,* 229 App. Div. 419, 242 N. Y. Supp. 105 (3rd Dept. 1930).

writ if it believes appeal is available to correct the alleged defects.[22] This rule applies regardless of how faulty the judgment that causes the relator's imprisonment seems to be.[23] The courts will by-pass appeal and grant immediate relief only in "rare cases" where the facts are incontrovertable and manifestly indicate the relator was improperly deprived of his liberty.[24] When the court does review the trial court's jurisdiction it determines only whether the trial court was *legally empowered to try the particular charge*[25] *against the particular person*[26] *before it.* This is all the word jurisdiction connotes when habeas corpus scrutinizes a judgment.[27] Defects bearing on other matters, including unconstitutional aspects of the trial itself, will not be considered because the court can not go further into the case after its jurisdictional test has been satisfied.[28] But since the judgment enjoys a presumption of jurisdiction, any fact may be proven by common law evidence in a habeas corpus proceeding to show the trial court was without jurisdiction and thus rebut the presumption.[29] If, however, a certain fact establishing jurisdiction in the trial court has already been found by the trial court the fact must stand until reversed upon direct review.[30] Erroneous and irregular conclusions of law or fact in the record must also be left to direct review[31] unless they clearly indicate that the trial court lost or never had jurisdiction over the crime or the person under any possible set of circumstances.[32]

Thus it can be seen that habeas corpus was confined to a narrow area. Because of the limits of the writ, New York was placed in the position of being without adequate due process safeguards.

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22. *People ex rel. Holt v. Lambert,* 237 App. Div. 39, 260 N. Y. S. 2d 678 (1st Dept. 1932) *aff'd. without opin.* 261 N. Y. 695, 185 N. E. 795 (1933). See also *People ex rel. Doyle v. Atwell,* 232 N. Y. 96, 133 N. E. 364 (1921), *writ of error den.,* 261 U. S. 590(1923).

23. *People ex rel. Scharff v. Frost,* 198 N. Y. 110, 91 N. E. 376 (1910).

24. *People ex rel. Perkins v. Moss,* 187 N. Y. 410, 80 N. E. 383 (1907); *People ex. rel Jannicky v. Warden,* 231 App. Div. 131, 246 N. Y. Supp. 194 (2d Dept. 1930); *aff'd.* 255 N. Y. 623, 175 N. E. 340 (1930); *People ex rel. Flinn v. Barr,* 140 Misc. 422, 251 N. Y. Supp 116 (Sup. Ct. 1931); *aff'd.* 234 App. Div. 682, 252 N. Y. Supp. 937 (1st Dept. 1931).

25. See *People v. Hislop,* 77 N. Y. 331 (1879), where there was no crime for the trial court to adjudicate.

26. See *People ex rel. Frey v. Warden,* 100 N. Y. 20 (1895), where a military tribunal was not allowed to imprison a civilian.

27. *People ex rel. Tweed v. Liscomb, supra,* n. 10; *People ex rel. Hubert v. Kaiser,* 206 N. Y. 46, 99 N. E. 195 (1912); *People ex rel. Carr v. Martin, supra,* n. 21; *People ex rel. Bailey v. McCann, supra,* n. 10.

28. *People ex rel. Carr v. Martin, supra,* n. 21; *People ex rel. Fisher v. Morhous, supra,* n. 10.

29. *People ex rel. Tweed v. Liscomb,* supra, n. 10;

30. *In People ex rel. Scharff v. Frost, supra,* n. 23 at 116, 91 N. E. at 378 this point was unchallenged in Judge Vann's dissent and established the rule in New York.

31. *People ex rel. Todak v. Hunt,* 153 Misc. 783, 275 N. Y. Supp. 115 (Co. Ct. 1934), *aff'd.* without opin 243 App. Div. 859, 279 N. Y. Supp. 720 (4th Dept. 1935); *Richardson ex rel. Farnum v. Collins,* 99 N. Y. S. 2d 583 (Sup. Ct. 1949).

32. *People ex rel. Carr v. Martin, supra,* n. 21.

CORAM NOBIS

The Supreme Court of the United States has indicated that a state is free under the due process clauses to change criminal procedure, but a fair trial in a court of competent jurisdiction must be had.[33] In *Mooney v. Holohan*,[34] however, the duty owed by a state under the Fourteenth Amendment to an accused prisoner was more sharply defined. Mooney alleged that his conviction was obtained by perjured testimony, knowingly used by the prosecution. He further alleged that the prosecuting attorney had suppressed evidence which would have tended to refute the evidence against him. The Supreme Court held that if these allegations were proved, petitioner had been denied due process by the state, and, further, the state was responsible for providing some sort of corrective procedure whereby a prisoner would be afforded a fair and adequate hearing on such allegations. Subsequently, the court ruled that due process was also denied by a state when a defendant was not advised of his right to counsel and was tricked into pleading guilty.[35] Thus the states were made to understand that the sanctity of a judgment rendered with jurisdiction was not per se complete. The other elements of due process had to be satisfied.

The New York Court of Appeals in *Matter of Lyons v. Goldstein*[36], recognizing that habeas corpus was inadequate, "created" the corrective procedure called for. A prisoner alleged that his plea of guilty, entered some years before, had been induced by fraud. He asked that the judgment of conviction be vacated and that he be allowed to withdraw his plea of guilty and enter a plea of not guilty. The Court held: 1 N. Y. Code of Crim. Proc. §337, which allows a withdrawal of a plea of guilty before judgment, should not be interpreted to prohibit a withdrawal after judgment; 2. it cannot be doubted that a court has the inherent power to set aside its own judgment if procured by fraud and misrepresentation; 3. such has been allowed in civil cases and no distinction should be made between the power in civil cases and in criminal cases; 4. such a proceeding would be analogous to or in the nature of the common law writ of error coram nobis, which was a post-judgment corrective procedure.[37]

Coram nobis has been used in America as a means of collateral attack upon judgments. It has been allowed where a plea of guilty was induced by fear of

33. Corwin, the Constitution and What It Means Today (10th ed. 1948).
34. 294 U. S. 103 (1934).
35. *Smith v. O'Grady*, 312 U. S. 329 (1941). Right to counsel in a state criminal proceeding is only demanded by the Supreme Court when "special circumstances" are shown. *Cf. Palmer v. Ashe*, 342 U. S. 134 (1951), noted 1 Bflo. L. Rev. (1952), this issue.
36. 290 N. Y. 219, 47 N. E. 2d 425 (1943).
37. The Writ of Error *Quae Coram Nobis Resident* (let the record and proceedings remain before us), arose in England because only errors of law were reviewable. See generally, 37 Harv. L. Rev. 744 (1924); 39 Mich. L. Rev. 963 (1941); 24 C. J. S. sec. 1606, 1607.

mob violence[38] and where such a plea was made in ignorance of the meaning of the plea.[39] It was found to lie where a confession was obtained by duress[40] and where the defendant was insane at the time of the trial.[41]

The states also engrafted certain limitations on the writ. Thus, California found the writ not to lie where there might have been a motion for a new trial or an appeal, even though the time limit for these remedies had elapsed.[42] Nor would the writ be entertained if the prisoner had any other adequate remedy at law.[43]

The writ, therefore, provided relief in many and varied circumstances according to the law of the respective jurisdictions wherein it was used. Running throughout the majority of the cases and expressions of the doctrine is a tone indicating that competing interests are locked in mortal combat, viz. the interest of protecting the rights of an individual accused of a crime and the interest of having judgment become final at some point of time. Thus are explained hesitations and technical dismissals of the writ. The Court of Appeals, by terming the motion to vacate a criminal judgment a writ in the *nature* of a writ of error coram nobis, obtained a highly elastic tool to fill the gap in the field of due process left by limited habeas corpus, and obtained it free of bulky technicalities and confusing precedents.

CORAM NOBIS IN NEW YORK TODAY

Preliminary

The *Lyons* case, *supra,* held that a court has the inherent power to vacate *its own judgment.* Thus, a petitioner in New York may not challenge the validity of a judgment of a court of another jurisdiction.[44] Nor may he, within New York, challenge the judgment of a county court in supreme court.[45]

The court entertaining the writ need not be one of record, for if the writ was so limited, those denied due process in such courts would be without a

38. *Sanders v. State,* 85 Ind. 318, 44 Am. Rep. 29 (1882); *Nickels v. State,* 86 Fla. 208, 98 So. 497 (1923).
39. *Ernst v. State,* 179 Wisc. 646, 192 N. W. 651, 30 A. L. R. 681 (1923).
40. *State v. Ray,* 111 Kan. 350, 207 Pac. 192 (1922).
41. *Adler v. State,* 37 Ark. 517, 37 Am. Rep. 48 (1880). Missouri even allowed the writ where the court found that the defendant was sentenced too severely considering his minority. *Ex Parte Gray,* 77 Mo. 601 (1882).
42. *People v. Peyson,* 123 Calif. App. 346, 11 P. 2d 431 (1932).
43. *Stephenson v. State,* 205 Ind. 141, 179 N. E. 633 (1932).
44. *People v. McCollough,* 300 N. Y. 107, 89 N. E. 2d 335 (1949).
45. *People v. Wurzler,* 300 N. Y. 344, 90 N. E. 2d 886 (1950).

remedy.[46] For the same reason, a court becoming *functus officio* at the end of each case may entertain the writ.[47]

Substance

Generally, a coram nobis proceeding will lie in New York when the petitioner is confined under a judgment of a court of competent jurisdiction, and: 1. the judgment was obtained in violation of the due process clauses of the State or Federal Constitution;[48] or 2. the judgment was obtained upon a mistake of fact.[49] Exact lines of delimitation as to the scope of the writ are not apparent as yet, since the coram nobis proceeding is only nine years old in New York. However, relief has been granted in at least four types of cases and they afford the basis for the widest use of the writ today.

Fraud in Procurement: A judgment procured by the practice of fraud upon the court will be vacated. Consequently, where a plea of guilty was induced through a misrepresentation by the prosecution[50] or by the judge,[51] the judgment may be collaterally attacked.

Illegal Use or Suppression of Testimony: When the judgment has been procured by the use of testimony known by the prosecution to be perjured, or testimony favorable to the defendant has been suppressed, due process has been denied.[52] If the prosecution unwittingly uses perjured testimony it is not clear whether coram nobis would lie. It has been held that credibility of witnesses is for the jury and their credibility cannot be attacked collaterally.[53] However, if it could be shown that the star witness of the prosecution was lying and if the testimony of that witness was necessary for conviction, it seems a resulting judgment would be 1. tainted by fraud exercised upon the court by the *witness;* or 2. entered upon a mistake of fact unknown to the court at the time of entry. In either case, a coram nobis proceeding should be proper.

Failure to Advise of Right to Counsel: New York statutory and constitutional law provide that a defendant *must* be advised of his right to counsel when brought be-

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46. *Matter of Hogan v. Supreme Court,* 295 N. Y. 92, 65 N. E. 2d 181 (1946).
47. *Ibid.*
48. *Matter of Hogan v. Court of General Sessions,* 296 N. Y. 1, 68 N. E. 2d 849 (1946).
49. *Matter of Lyons v. Ward,* 272 App. Div. 120, 69 N. Y. S. 2d 715 (4th Dept. 1947); *aff'd. without opinion,* 297 N. Y. 617, 75 N. E. 2d 630 (1947); *aff'd.,* 334 U. S. 314 (1948).
50. *Matter of Lyons v. Goldstein, supra,* n. 36. *People ex rel. Rose v. Addition,* 189 Misc. 102, 73 N. Y. S. 2d 561 (Sup. Ct. 1947). In this case the insanity of the accused was fraudulently concealed from the court at the time of the plea of guilty.
51. *People v. Sullivan,* 276 App. Div. 1087, 96 N. Y. S. 2d 266 (2d Dept. 1950).
52. *Mooney v. Holohan,* 294 U. S. 103 (1934); *Matter of Morhaus v. Supreme Court,* 293 N. Y. 131, 56 N. E. 2d 79 (1944).
53. *People v. Fanning,* 73 N. Y. S. 2d 65 (Co. Ct. 1947).

fore a magistrate and counsel must be appointed for a prisoner if he has none and desires the assistance of counsel.[54] Due process is satisfied if the accused had counsel on the day of sentencing, though he had none when he pleaded guilty.[55] The indigent prisoner does not, however, have the right to choose his own counsel.[56] But he is entitled to the conscientious service of adequate and competent counsel. The alleged incompetency can only be attacked successfully if it was such as to deprive the defendant of "adequate legal representation" so as to make his conviction a mockery of justice.[57]

Illegal Sentencing of Recidivist Felons: The New York Penal Law provides for increased punishment of recidivist felons.[58] Where a court has mistakenly sentenced a prisoner as a recidivist, coram nobis will lie.[59] Usually this situation will arise when a defendant has been previously convicted of a crime in a foreign jurisdiction. The question then becomes, whether that crime is a felony under New York law. In *People v. Olah*[60] it was held that the statute upon which the indictment or information was drawn defines and measures the crime. Only those facts necessary to be alleged to bring the indictment or information within the foreign statute may be considered. If the foreign crime so measured is a felony in New York, the recidivist statute applies.

Habeas corpus may also be used where the prisoner was incorrectly sentenced as a recidivist.[61] The Court of Appeals has not stated which of the two remedies

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54. N. Y. Code Crim. Proc. §188, 308; N. Y. Const. art. 1, sec. 6. It may be noted that habeas corpus was used to attack this defect in 1939, *People ex rel. Moore v. Hunt,* 258 App. Div. 24, 16 N. Y. S. 2d 19, 25 (4th Dept. 1939). The theory was that the court was without jurisdiction because defendant was not advised of this right. The Supreme Court of the United States has said that a state court could lose jurisdiction during the course of a trial (for purposes of the federal writ of habeas corpus), by actions offending due process. If that doctrine would be true in New York today, habeas corpus could be used in many situations where coram nobis is appropriate. However, the Court of Appeals in a memorandum denying a motion to appeal said that habeas corpus is not the proper remedy to attack the defect of non-advisement of counsel, *People ex rel. Martine v. Hunt,* 294 N. Y. 651, 60 N. E. 2d 384 (1945).

55. *Canizio v. New York,* 327 U. S. 82 (1946). But see *People v. Guariglia,* 303 N. Y. 338, 102 N. E. 2d 580 (1951). Defendant was first represented by counsel on the day of sentencing. The appointed attorney seemingly did nothing for the defendant. The Court of Appeals sent the case back for a hearing on the merits, apparently feeling that the prisoner was not represented by competent counsel and was not even consciously aware that he was being represented. See also *People v. Balestrieri,* 278 App. Div. 782, 103 N. Y. S. 2d 899 (1951).

56. *People v. Fanning, supra,* n. 53.

57. *People v. De Bernardo,* 199 Misc. 563, 106 N. Y. S. 2d 515 (Co. Ct. 1951); *People v. Smith,* ———Misc.———, 108 N. Y. S. 2d 703 (Co. Ct. 1951).

58. Penal Law §§1941-1944.

59. *People v. McCollough, supra,* n. 44; *People v. Turpin,* 277 App. Div. 1059 100 N. Y. S. 2d 878 (2d Dept. 1950); *People v. Mcdowell,* 200 Misc. 46, 105 N. Y. S. 2d 971 (Gen. Sess. Co.Ct.1951); *People v. Huber,* 194 Misc 586, 87 N. Y. S. 2d 239 (Sup. Ct. 1949).

60. 300 N. Y. 96, 89 N E. 2d 329 (1949). Prior to this case, the New York courts looked to the definition of the offense under the foreign statute and to any recital of facts in the indictment or information. See notes, 50 Col. L. Rev. 247 (1950), 63 Harv. L. Rev. 1448 (1950).

61. *People ex rel. Newman v. Foster,* 297 N. Y. 27, 74 N. E. 2d 224 (1947).

is proper.[62] However, it seems that a coram nobis proceeding could be brought at anytime after judgment, while habeas corpus would not lie until the prisoner had commenced serving the illegal portion of the sentence. Until that time the prisoner would be "confined under a judgment of a court of competent jurisdiction." But since the court had no jurisdiction whatever to mete out the recidivist portion, the prisoner could then commence his collateral attack.

Limits

Undoubtedly, when fraud has been practiced upon the court the judgment may be vacated at any time. But in other areas where coram nobis applies, limits have been effected. Thus, the motion only will be entertained when no other corrective statutory process is or was available.[63] If the alleged error was not outside the record, the remedy is appeal, not coram nobis.[64] Hence, errors of law are not reviewable under the writ.[65] Where the issue was decided against the defendant on appeal, coram nobis could not raise the same issue again.[66]

There is no statutory time limit on the writ. The Court of Appeals has held that the writ can be brought at any time,[67] and, probably, laches would not apply.[68]

If a motion to vacate a judgment has been brought and dismissed, ordinarily the motion cannot be renewed on the same grounds without permission of the court.[69]

A motion to dismiss an indictment on the grounds of insufficient evidence must be made before conviction. Therefore, coram nobis is not available.[70] Again, the writ cannot be used to attack an indictment on the basis of mere typographical errors.[71]

Burden of Proof

When a judgment of a court is attacked as invalid, the attacker is first met

62. Compare *ibid* with *People v. Olah, supra,* n. 60.
63. *Matter of Hogan v. Court of General Sessions, supra,* n. 48.
64. *People ex rel. Jackson v. Harrison,* 298 N. Y. 219, 227, 82 N. E. 2d 14, 18 (1948); *People v. Gorney,* ———Misc.———, 103 N. Y. S. 2d 75 (Sup. Ct. 1951).
65. *People v. Smith, supra,* n. 57.
66. *People v. Lemmons,* 277 App. Div. 783, 97 N. Y. S. 2d 70 (2nd Dept. 1950).
67. *People v. Richetti,* 302 N. Y. 290, 298, 97 N. E. 2d 908, 912 (1951); *Bojinoff v. People,* 299 N. Y. 145, 85 N. E. 2d 909 (1949).
68. *People v. Richetti, supra,* n. 67 at 912.
69. *Bojinoff v. People, supra,* n. 67.
70. *People v. Wurzler,* 278 App. Div. 783, 101 N. Y. S. 2d 818 (3rd Dept. 1951).
71. *People v. Erhart,* 197 Misc. 380, 95 N. Y. S. 2d 176 (Co. Ct. 1950), incorrect dates.

with the presumption of regularity of a judicial proceeding.[72] It has been held that the burden is on the petitioner in a coram nobis proceeding to sustain his allegations by a fair preponderance of the credible evidence.[73] Recently, however, in *People v. Richetti,* [74] the Court of Appeals pointed out that a presumption of regularity exists only until contrary substantial evidence appears. The petitioner must go forward with the proof, but once he does go forward with *sufficient proof,* the presumption is out of the case. A bald assertion by a prisoner that he was denied his constitutional rights will not overcome the presumption.[75] Nor is the presumption to be dissipated "in an area of conjecture or expedient answers"[76] and the evaluation of the evidence is for the court.[77] When an inference of non-conformity *is* raised, the presumption of regularity disappears and the burden is on the People to establish compliance.[78] Unless the opposing papers of the People conclusively show that the sworn allegations of the petitioner are false, there must be a trial, for due process is only satisfied when a person is given a hearing upon the merits before a competent tribunal where he may appear and assert and protect his rights.[79]

Appeals, Res Judicata, Waiver

New York now provides that both the prisoner and the People may appeal of right to the Appellate Division.[80] Appeals to the Court of Appeals are only allowed by certification of a judge thereof or of a justice of the Appellate Division.[81] A petitioner whose application was denied when no appeal was available may now renew his motion and take advantage of his right to appeal.[82]

Whether or not the doctrine of res judicata will apply to coram nobis pro-

72. *People v. Richetti, supra,* n. 67; *People v. Erhart, supra,* n. 71.

73. *People v. Shapiro,* 67 N. Y. S. 2d 774 (Gen. Sess. 1947).

74. *Supra,* n. 67.

75. *People v. Coger,* 277 App. Div. 786, 97 N. Y. S. 2d 105 (2nd Dept. 1950); *app. dismissed,* 302 N. Y. 599, 96 N. E. 2d 895 (1951).

76. *People v. Lake,* 190 Misc. 794, 796, 76 N. Y. S. 2d 352, 355 (Gen. Sess. 1948).

77. *People v. Shapiro, supra,* n. 73.

78. *People v. De Bernardo, supra,* n. 57.

79. *People v. Richetti, supra,* n. 67. The *Richetti* case was sent back to the trial court and the petitioner convinced the court that the judgment was illegal, *People v. Richetti,* ———Misc.———, 109 N. Y. S. 2d 29 (Co. Ct. 1951). Where the judge who rendered the judgment and the court stenographer are dead, the courts have allowed public voluntary defenders serving in the court at that time to testify that the invariable practice was that prisoners would be asked if they desired counsel. If they did, counsel would be appointed. See *People v. Shapiro, supra,* n. 73, and *People v. Lake, supra,* n. 76.

80. N. Y. Code Crim. Proc. §§517-519. Before the right was given, the appellate courts heard coram nobis cases on proceedings under Art. 78, N. Y. C. P. A.

81. *People v. Hatzis,* 297 N. Y. 163, 77 N. E. 2d 385 (1948).

82. *People ex rel. Sedlak v. Foster,* 299 N. Y. 291, 86 N. E. 2d 752 (1949).

ceedings is not clear.[83] Defendant will, however, be given only one day in court, but that day must be complete and adequate.[84]

The Supreme Court has held that a defendant has not been denied federal due process if he had an opportunity to raise a defect upon a subsequent conviction (e. g. when being sentenced as a recidivist).[85] But if the federal right is gone, the state constitutional right may still remain.[86] To waive a constitutional right under state law, the defendant must act understandingly, competently and intelligently.[87] Courts will not presume acquiesence in the loss of fundamental rights and all reasonable presumptions against a waiver will be applied.[88]

CONCLUSION

In the nine years since the *Lyons* case, there has been much speculation concerning the scope of this new writ. For the most part, it will be used when no other corrective procedure is available and when due process, justice or fairness demands that the petitioner have a remedy. By approaching each fact situation with an analytical attempt to determine whether the prisoner was at any time given a full and adequate day in court as to the issues, intermixed with an eye to fairness and justice, it will be seen that most cases reach a good result. Almost without exception, the coram nobis rules boil down to the judgment of particular fact situations, thereby leaving decision in the sound discretion of the courts. Substance, not technicalities, will destroy an equipoise.

As in the past, the content of due process will be determined largely on the basis of reasonableness. The courts in the future must take care in criminal proceedings to see that prisoners are treated with fairness and justice. Habeas corpus, however still has a job to do, but where it is blocked, coram nobis will bridge the gap and the judgment will be vacated. Thus the field of due process will be adequately protected.

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83. See *Bojinoff v. People, supra,* n. 67 (res judicata did not apply when the defendant moved and was defeated before appeal was given, and thereafter moved again on the same grounds). Also see *People v. Gorney, supra,* n. 64.

84. See *People v. Martine,* 278 App. Div. 966, 105 N. Y. S. 2d 673 (2nd Dept. 1951). The petitioner moved three times on the same facts. After the second motion was denied, he filed an appeal, but failed to prosecute it. On the third motion the court felt that Martine had had his day in court.

85. *Gayes v. New York,* 332 U. S. 145 (1947).

86. *Bojinoff v. People, supra,* n. 67.

87. *ibid; People v. Guariglia, supra,* n. 55.

88. *People v. Richetti,* ———Misc.———, 109 N. Y. S. 2d, 29, 44 (Co. Ct. 1951).