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Criminal Law - Coram Nobis - Availability for Review of Error Appearing on Record

Larry Kraft

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statute[14] are denied relief from the unsatisfied claim and judgment fund and only those who can be classified as "qualified" persons are allowed relief under the fund.[15] The deduction provisions of the statute are similar to North Dakota in that they allow deductions for the amounts paid in the satisfaction of the judgment, but they go further in that they allow deductions specifically for any amount of liability insurance afforded to the claimant.[16]

An unsatisfied judgment fund should be used only for the benefit of those who have no other means of being compensated for their personal injuries. Uninsured motorist insurance was created by insurance companies just for this purpose. The logical question that follows is whether an unsatisfied judgment fund should pay a judgment creditor after he has already been compensated by an insurance company? It is submitted that North Dakota's deduction provision is good, but the limitations determining those persons qualified to recover under the fund should be extended to overcome this problem of double compensation. The other three jurisdictions have done this successfully and without apparent difficulty.

PHILIP J. TEIGEN

CRIMINAL LAW—CORAM NOBIS—AVAILABILITY FOR REVIEW OF ERROR APPEARING ON RECORD—In 1943 the defendant was indicted and placed on trial for the crime of murder in the first degree. The original plea of not guilty was changed to guilty of murder in the second degree after a conference attended by the court in which the defendant was examined by four psychiatrists. One of these physicians expressed the opinion that the boy was not sane at the time of the alleged killing but was suffering a "psycho motor epileptic attack." The other three disputed the existence of epilepsy and agreed that the defendant was legally sane. Prison records showed a history of epileptic seizures. The asserted basis for relief was an allegation

14. N.Y. Insurance Law § 601 (i) (1961). "The 'insured,' a person defined as an insured under any policy of insurance issued by any member in connection with motor vehicles containing the provision required by (§ 167)." (§ 167 provides for liability insurance conditions).

15. N.Y. Insurance Law § 601 (b) (1961). "A 'qualified person,' means (1) a resident of this state, other than the insured or the owner of an insured motor vehicle and his spouse when a passenger in such a vehicle . . . or (2) a resident of another state . . . in which recourse is afforded to the residents of this state . . ."

16. N.Y. Insurance Law § 610 (1961).

that, because of his youth and epileptic condition, his guilty plea was not a voluntary or effective one and that acceptance of the plea and sentencing deprived him of due process of law. It was *held,* one justice dissenting, that it might be found as a fact that the defendant had a defense and that insufficient consideration was given to it, and therefore a hearing was required. *People v. Codarre,* 179 N.E.2d 475 (N.Y. 1961).

The ancient common law writ of coram nobis[1] dates back to the sixteenth century.[2] The writ was developed to permit the courts to take cognizance of errors of fact[3] which were not apparent on the record.[4] It also provided a tool with which a court could vacate its own erroneous judgment rendered when all of the facts were not before the court.[5]

Early applications of coram nobis were limited to instances in which the court's record did not show the defendant was an infant,[6] was a married woman,[7] had died before judgment,[8] was insane at the time of the trial,[9] or had entered a plea of guilty because of fraud, duress or mistake.[10]

The modern counterpart of this heretofore infrequently used writ retains most of its common law features, more particularly, it is addressed to the court in which the petitioner was tried and convicted,[11] it will lie only to correct errors of fact not apparent on the record,[12] and it is not available when the defendant is afforded other remedies.[13] An exception to these basic features occurs when the injury inflicted on the defendant would deprive him of due process. In such cases coram nobis has been held to lie even though the error appeared on the record.[14]

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1. "Qua coram nobis resident" (let the record remain before us) was the name of the writ in King's Bench.
2. FRANK, CORAM NOBIS § 1.01 (1953).
3. To be distinguished from errors of law for which there was redress in the form of appeal.
4. **Ex parte** Toney, 11 Mo. 661 (1848).
5. See Jaques v. Ceasar, 2 Wms. Saund. 100, 85 Eng. Rep. 776 (1671).
6. Higbie v. Comstock, 1 Denio 652 (N.Y. 1845).
7. Latshaw v. McNees, 50 Mo. 381 (1872); Roughton v. Brown, 53 N.C. 357 (1861).
8. Collins v. Mitchell, 5 Fla. 364 (1853); Mills v. Alexander, 21 Tex. 154 (1858).
9. Alder v. State, 35 Ark. 517 (1880); Linton v. State, 72 Ark. 532, 81 S.W. 608 (1904).
10. See Sanders v. State, 85 Ind. 318 (1882).
11. **In re** De La Roi, 28 Cal. 2d 264, 169 P.2d 363, 370 (1946); People v. McCullough, 300 N.Y. 107, 89 N.E.2d 335, 337 (1949).
12. People v. Fortson, 7 App. Div. 2d 139, 180 N.Y.S.2d 945, 847 (1958); Alexander v. State, 20 Wyo. 241, 123 Pac. 68 (1912).
13. People v. Price, 162 Cal. App. 2d 196, 328 P.2d 467, 468 (1958); Hendricks v. State, 297 P.2d 576, 578 (Okla. 1956).
14. People v. Silverman, 3 N.Y.2d 200, 165 N.Y.S.2d 11 (1957).

Some well recognized grounds for the writ involving due process are (1) denial of the right of counsel,[15] (2) insanity of the accused,[16] (3) perjured testimony within the knowledge of the prosecuting officer,[17] (4) plea of guilty induced by fraud or misrepresentation,[18] and (5) withholding of material testimony by the prosecuting officer.[19]

North Dakota has expressly abolished the writ of coram nobis in civil actions and has replaced it with a motion to set aside judgment.[20] Essentially a civil remedy, the motion has been recognized by North Dakota as a means of vacating a criminal conviction. Where so applied it has been said to be analogous to coram nobis.[21] The motion has been held to lie where the defendant was not properly advised to his right to counsel,[22] and where a plea of guilty was obtained by fraud, duress or coercion.[23]

It is submitted that each state should provide some adequate remedy whereby a post-trial procedure is available to test the legality of a conviction even though it appears proper on the surface. The instant case is an indication of the scope and flexibility of such a remedy. North Dakota's motion to set aside judgment, if liberally interpreted, should adequately provide a remedy to insure due process.

LARRY KRAFT

EMINENT DOMAIN—COMPENSATION—STATE ACQUISITION OF LAND PREVIOUSLY DEVOTED TO A PUBLIC USE—The State Road Commission filed an interlocutory appeal to determine whether they must compensate the defendant Board of Education for a public school condemned for freeway purposes. The Supreme Court of Utah *held,* two justices dissenting, that because the statutes of Utah did not differentiate between methods of taking public or

15. Hogan v. Court of General Sessions of New York County, 296 N.Y. 1, 68 N.E.2d 849, 852 (1946). See People v. Silverman, 3 N.Y.2d 200, 165 N.Y.S.2d 11 (1957).
16. People v. Hill, 9 App. Div. 2d 451, 195 N.Y.S.2d 295, 296 (1959); Lee v. State, 35 Ala. 38, 44 So. 2d 606 (1949).
17. Davis v. State, 200 Ind. 99, 161 N.E. 375, 381 (1928); People v. Steele, 65 N.Y.S.2d 214, 221 (1946).
18. People v. Docetti, 9 App. Div. 2d 740, 192 N.Y.S.2d 907, 908 (1959); People v. Farina, 2 App. Div. 2d 776, 154 N.Y.S.2d 501, 502 (1956).
19. People v. Anderson, 4 App. Div. 2d 886, 167 N.Y.S.2d 464 (1957); People v. Fisher, 9 App. Div. 2d 836, 192 N.Y.S.2d 741, 751 (1958).
20. See N.D. Rules Civ. Proc., Rule 60(b).
21. See Judge Burke's opinion in State v. Magrum, 76 N.D. 528, 530; 38 N.W.2d 358, 360 (1949).
22. State v. Magrum, 76 N.D. 528, 536; 38 N.W.2d 358, 366 (1949).
23. State v. Whiteman, 67 N.W.2d 599, 612 (N.D. 1954).