

# Criminal Law--Coram Nobis--Counsel Intelligently Waived Though Indictment Insufficient to Support Charge--Not Reviewable in Coram Nobis as Error of Law Apparent on the Record (People v. Fortson, 7 App. Div. 2d 139 (3d Dep't 1958))

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CRIMINAL LAW — CORAM NOBIS — COUNSEL INTELLIGENTLY WAIVED THOUGH INDICTMENT INSUFFICIENT TO SUPPORT CHARGE — NOT REVIEWABLE IN CORAM NOBIS AS ERROR OF LAW APPARENT ON THE RECORD. — Defendant, after being informed of his rights, waived counsel and pleaded guilty to a charge of first degree grand larceny. The indictment, however, was defective in that it could only have supported the charge in the second degree. In sustaining a writ of error coram nobis the lower court found that the defendant did not intelligently waive counsel since he was unaware of the indictment's insufficiency. In reversing, the Appellate Division, Third Department, declared that it was wholly speculative whether assigned counsel would have noticed the defect and *held* that since the defect was an error of law appearing on the record it was not reviewable in coram nobis. *People v. Fortson*, 7 App. Div. 2d 139, 180 N.Y.S.2d 945 (3d Dep't 1958).

The writ of error coram nobis was developed in 16th century England. Prior to that time appellate review was limited exclusively to examination of errors of law.<sup>1</sup> Coram nobis, literally "before ourselves, (. . . i.e., in the king's or queen's bench.),"<sup>2</sup> was contrived to permit the courts to take cognizance of errors in fact which were not apparent on the record.<sup>3</sup> It enabled courts to vacate judgments which might not have been rendered had the knowledge of certain facts been before the trial court.<sup>4</sup> In civil litigation, which first felt the impact of the writ, it has been held available where the defendant was underage,<sup>5</sup> a married woman,<sup>6</sup> or had died before judgment.<sup>7</sup> As early as 1667 it was established that coram nobis would lie in criminal cases as well.<sup>8</sup> In the latter it has been invoked where a plea of guilty has been induced by duress;<sup>9</sup> where perjured testimony has been knowingly used by the prosecution;<sup>10</sup> or where the defendant was insane at the time of the trial.<sup>11</sup>

<sup>1</sup> FRANK, CORAM NOBIS ¶ 1.02 (1953).

<sup>2</sup> BLACK, LAW DICTIONARY 406 (4th ed. 1951).

<sup>3</sup> See Orfield, *Writ of Error Coram Nobis in Civil Practice*, 20 VA. L. REV. 423, 424 (1934).

<sup>4</sup> Donoghue & Jacobson, *Coram Nobis and the Hoffner Case*, 28 ST. JOHN'S L. REV. 234, 235 (1954); Note, *Current Treatment of Coram Nobis in Federal and New York Courts*, 33 ST. JOHN'S L. REV. 98-99 (1958).

<sup>5</sup> Higbie v. Comstock, 1 Denio 652 (N.Y. Sup. Ct. 1845); Meredith v. Sanders, 5 Ky. (2 Bibb) 101, 102 (1810) (dictum); Kemp v. Cook, 18 Md. 130, 137 (1861) (dictum).

<sup>6</sup> Breckinridge v. Coleman, 46 Ky. (7 B. Mon.) 331 (1847); Latshaw v. McNees, 50 Mo. 381 (1872); Roughton v. Brown, 53 N.C. 300 (1861).

<sup>7</sup> Collins v. Mitchell, 5 Fla. 364 (1853); Mills v. Alexander, 21 Tex. 154 (1858).

<sup>8</sup> FRANK, CORAM NOBIS ¶ 1.02 (1953). See also Freedman, *The Writ of Error Coram Nobis*, 3 TEMP. L.Q. 365 (1929).

<sup>9</sup> Sanders v. State, 85 Ind. 318 (1882).

<sup>10</sup> Davis v. State, 200 Ind. 88, 161 N.E. 375 (1928); People v. Steele, 65 N.Y.S.2d 214 (Ct. Gen. Sess. 1946).

<sup>11</sup> Hydrick v. State, 104 Ark. 43, 148 S.W. 541 (1912); Howie v. State, 121 Miss. 197, 83 So. 158 (1919).

Recovering from a state of virtual disuse into which it had fallen during the 17th and 18th centuries,<sup>12</sup> the writ has undergone rapid expansion and revitalization in recent decades.<sup>13</sup>

The sixth amendment of the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . and to have the Assistance of Counsel for his defence." In *Johnson v. Zerbst*,<sup>14</sup> a habeas corpus case, the United States Supreme Court declared that the right to counsel is capable of being waived if it is done competently and intelligently. Whether there has been an intelligent waiver of counsel must depend in each case "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."<sup>15</sup>

In New York, the renaissance of *coram nobis* was accomplished by the celebrated decision of *Lyons v. Goldstein*.<sup>16</sup> With the ruling in that case veritable "floodgates of litigation" were opened, resulting in a deluge of similar motions to vacate judgments.<sup>17</sup> New York, however, has remained steadfast in its restriction of the applicability of the writ.<sup>18</sup> While the New York courts have recognized the efficacy of *coram nobis* in upholding the right of due process,<sup>19</sup> they have, with but one exception,<sup>20</sup> been adamant in their refusal to

<sup>12</sup> FRANK, *CORAM NOBIS* ¶ 1.02, at 3 (1953); Donoghue & Jacobson, *Coram Nobis and the Hoffner Case*, 28 ST. JOHN'S L. REV. 234, 235 (1954).

<sup>13</sup> Today much of the implementation of *coram nobis* has been in the field of deprivation of constitutional privilege, particularly where the defendant contends that his right to counsel has been abrogated. See, e.g., *People v. Koch*, 299 N.Y. 378, 87 N.E.2d 417 (1949); *People ex rel. Sedlak v. Foster*, 299 N.Y. 291, 86 N.E.2d 752 (1949).

<sup>14</sup> 304 U.S. 458, 465 (1938) (dictum).

<sup>15</sup> *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); see *Bojinoff v. People*, 299 N.Y. 145, 85 N.E.2d 145 (1949). See also *People v. Boehm*, 309 N.Y. 362, 130 N.E.2d 891 (1955) (dictum).

<sup>16</sup> 290 N.Y. 19, 47 N.E.2d 425 (1943). The court held that the Court of General Sessions has the power to grant the writ.

<sup>17</sup> Donoghue & Jacobson, *Coram Nobis and the Hoffner Case*, 28 ST. JOHN'S L. REV. 234, 238 (1954).

<sup>18</sup> See *People v. Caminito*, 3 N.Y.2d 596, 601, 148 N.E.2d 139, 143, 170 N.Y.S.2d 799, 804 (1958). The court declared that while the scope of *coram nobis* has been somewhat expanded beyond its original office, it still remains an emergency measure employed for the purpose for which it was initially designed, that of calling up facts unknown at the time of judgment.

<sup>19</sup> *People v. Koch*, 299 N.Y. 378, 87 N.E.2d 417 (1949); *People ex rel. Sedlak v. Foster*, 299 N.Y. 291, 86 N.E.2d 752 (1949).

<sup>20</sup> *People v. Silverman*, 3 N.Y.2d 200, 144 N.E.2d 10, 165 N.Y.S.2d 11 (1957). In ordering the trial court to grant a hearing where the trial court had improperly assigned counsel and refused to grant counsel of defendant's own choosing adequate time to prepare the defense, the court stated that "although the fundamental precept of *coram nobis* is that it may not be employed to raise errors appearing on the face of the record, there is an exception to this basic rule. Judicial interference with the right to counsel guaranteed . . . by law may warrant the extraordinary remedy of *coram nobis*, even though

vacate judgments where the error complained of was one of law apparent on the record.<sup>21</sup>

In the present case the Court states that even though the defendant was ignorant of the indictment's insufficiency it does not follow that he did not intelligently waive his right to counsel. The Court reasoned that since the prosecution and the lower court failed to notice the defect in the indictment, it must remain wholly in the field of speculation as to whether assigned counsel would have done so.<sup>22</sup> Nevertheless, even if such a presumption could be made in the defendant's favor relief could not be granted in this proceeding since the error was one of law apparent on the record.

While at first glance the decision may seem harsh, other remedies are available to the defendant.<sup>23</sup> The writ of error coram nobis was intended to provide a means of relief where formerly none had existed, *i.e.*, to relieve against errors of fact unknown at the trial. It is applicable only where no other remedy is available.<sup>24</sup>

It is difficult, perhaps impossible, to prescribe the exact limits of coram nobis. However, in determining whether the remedy may be invoked, it is well to remember the history and purpose of the writ lest it become merely a substitute for appeal and other available remedies.



EMINENT DOMAIN—ESTABLISHMENT OF BUS STOPS BY CITY HELD NOT A COMPENSABLE TAKING OF ABUTTING OWNER'S RIGHT OF ACCESS.—Plaintiffs, gas station owners, sought to enjoin the City of New York from establishing bus stops, terminals, and turn-around points fronting on their driveways, and asked damages for this allegedly serious impairment of their easements of access. The Court

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the error appears on the face of the record. . . ." *Id.* at 202, 144 N.E.2d at 11, 165 N.Y.S.2d at 13.

<sup>21</sup> *People v. Johnson*, 10 Misc. 2d 103, 172 N.Y.S.2d 457 (Dutchess County Ct. 1958); *People v. Waterman*, 5 App. Div. 2d 717, 168 N.Y.S.2d 819 (3d Dep't 1957) (memorandum decision) (dictum); *People v. Langford*, 4 App. Div. 2d 919, 166 N.Y.S.2d 933 (3d Dep't 1957) (memorandum decision) (dictum).

<sup>22</sup> It would appear that the court presumes a defense counsel may very well be negligent. *But cf.* *Berkey v. Third Ave. Ry.*, 244 N.Y. 84, 155 N.E. 88 (1926).

<sup>23</sup> Errors of law committed by a lower court are subject to attack by a motion for a new trial, an appeal or other statutory remedy for which coram nobis is not a substitute. See *Taylor v. United States*, 177 F.2d 194 (4th Cir. 1949); *People v. Reid*, 195 Cal. 249, 232 Pac. 457, 460 (1924).

<sup>24</sup> FRANK, *CORAM NOBIS* ¶ 3.02 (1953); Note, *Current Treatment of Coram Nobis in Federal and New York Courts*, 33 ST. JOHN'S L. REV. 98, 105 (1958).