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Master and Servant—Workmen's Compensation—Course of Employment; Property—Tax Lien Duration—Statutes of Limitations; Federal Rules of Criminal Procedure, Rule 33—Power of Trial Judge to Grant a New Trial After Appeal Taken; Jury—Special Venire—Excuse of Previous Panel—Prejudicial Effect; Evidence—Parole Evidence to Vary Writing—To Show Existence of Condition; Vendor and Purchaser—Condition Precedent—Vendor's Failure to Furnish Title Report; Criminal Law—Constitutional and Statutory Provisions—Information as to Right to

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Be Represented by Counsel; The Writ of Coram Nobis in Washington

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RECENT CASES

Master and Servant—Workmen's Compensation—Course of Employment. It had been the custom of *P* and many of his fellow-workers to bring their lunches from home and eat the noon meal in the employer's plant. During a lunch period, an airplane, being operated by *D*'s agent, crashed into the plant, injuring *P*. *P* sought to recover from *D* on a negligent injury claim. The trial court sustained *D*'s contention that *P*'s only remedy was under the Workmen's Compensation Act (REM. REV. STAT., § 7673 *et seq.*). *Held*. Reversed. Not having been injured in the course of his employment, *P* did not come within the compensation act and could maintain his common law action for negligence. *Mutti v. Boeing Aircraft Co.*, 125 Wash. Dec. 811, 172 P.(2d) 249 (1946).

In many jurisdictions, an injured workman is entitled to the benefits of the Workmen's Compensation Act for injuries received on the employer's premises, although the accident occurred during the lunch hour, where the eating of the lunch on the premises was with the employer's knowledge and consent, 6 A. L. R. 1151 (1920), particularly, under laws similar to the Washington act. See 15 WASH. L. REV. 120 (1940). This result is based on the view that the employee is performing services growing out of, and incidental to, his employment.

On its first occasion to pass on the noon hour problem, the Washington court recognized that a workman, injured at that time, might be allowed recovery, but denied the application of the compensation act because the particular injury resulted from an act of the employee's own conception, having nothing to do with his work or meal. *Young v. Dept. of Labor and Industries*, 200 Wash. 138, 93 P.(2d) 337, 123 A. L. R. 1171 (1939). The next time the problem arose, the rule announced under the peculiar facts of the *Young* case was understood to control the general situation. The court held that since during the noon hour the employee is not under the control of the employer, nor is he furthering any interest of the employer, *any* injury he sustained at that time is not within the course of his employment. *D'Amico v. Congusta*, 124 Wash. Dec. 640, 167 P.(2d) 157 (1946). The court defined the conditions under which an injured workman is entitled to the benefits of the compensation act. First, the relationship of employer and employee must exist between the injured person and his employer (except in some cases where the injured person is an independent contractor), second, the injured man must be in the course of his employment; third, the employee must be in the actual performance of the duties required by the contract of employment; and fourth, the work being done must be such as to require the payment of industrial insurance premiums or assessments. The facts of the *D'Amico* case

were found to have met none of the last three conditions, and in the instant case the court reached a similar finding.

The Washington Workmen's Compensation Act has been construed to cover injuries incurred while the employee is going to and coming from work in transportation furnished by the employer. *Pearson v. Aluminum Co. of America*, 23 Wn.(2d) 403, 161 P.(2d) 169 (1945). Such transportation was considered as "incidental to the employment." A similar approach to injuries during the noon rest period would be in accord with general holdings in other jurisdictions.

W.J.D.

Property—Tax Lien Duration—Statutes of Limitations. The State of Washington filed a tax warrant against *M* in 1936 for failure to pay taxes assessed under the Occupation and Sales Tax Act of 1935 and acquired a lien against all real and personal property held by him. REM. REV. STAT., § 8370-202. *M* acquired title to realty in 1941 and *P* derived his title to this land from him in 1945. *P* asks judgment that the State of Washington has lost its lien on the realty Judgment for *P* *D* appeals. *Held.* Affirmed. The state's lien expired six years after the entry of the warrant in the judgment docket since such warrant is the same as a judgment in a civil case. *Hutton v. State*, 126 Wash. Dec. 378, 171 P.(2d) 248 (1946).

This is a case of first impression. It is a recognized rule of statutory construction that effect should be accorded to every part of the act and that that construction is favored which will render every word operative. 50 AM. JUR., Statutes, § 358. REM. REV. STAT., § 8370-202 provides:

"The amount of such warrant shall become a lien upon the title to real property of the taxpayer and shall be the same as a judgment in a civil case."

The legislature expressly adopted by reference the general law dealing with limitations upon civil judgments. *State v. Rasmussen*, 14 Wn.(2d) 397, 128 P.(2d) 318 (1942), 25 R. C. L. § 160. A judgment constitutes a lien against the real estate of the judgment debtor for six years from date of entry REM. REV. STAT., § 445. Therefore, it follows that after the expiration of six years, such tax warrant ceased to be a lien against the realty Normally, a state is immune from general statutes of limitations. REM. REV. STAT., § 167 However, such time durations as applied in the instant case are not mere statutes of limitations procedural in their nature but rather are positive limitations on substantive rights unknown at common law. *Smith v. Toman*, 368 Ill. 414, 14 N.E.(2d) 478 (1938), 2 FREEMAN, JUDGMENTS (5th ed. 1925) 2108, § 1013.

There is a seeming contrariety of opinion as to whether statutes limiting the life of judgment liens operate against the Federal and State Governments. Federal courts have repeatedly held that the rights of the United States can-

not be impaired by the lapse of time provided as a bar by the laws of the states. *United States v. Minor*, 235 F 101 (C. C. A. 4th, 1916). Kansas, Mississippi, Pennsylvania and Virginia follow this view as to state immunity with Arizona, Arkansas, Illinois, Indiana, Utah and West Virginia arrayed on the opposite side. 118 A. L. R. 929. The Washington court seems to have stepped into line with a slim majority

This problem is not presented by other Washington tax acts as each of the others provide for definite time durations without reference to judgment liens. Gift tax liens last expressly ten years. REM. REV. STAT. § 11218-20. Inheritance tax liens for six years. REM. REV. STAT., § 11202-1 j. The taxation lien statutes on forests and forest lands use no qualifying language. REM. REV. STAT., § 11219-29 Liens for payment of both real and personal property taxes continue "until the same are paid." REM. REV. STAT., § 11265. Finally, unemployment compensation tax liens, REM. REV. STAT. § 9998-231, and those for used fuel taxes, REM. REV. STAT., § 8327-38, are inextinguishable without payment.

P M. R.

Federal Rules of Criminal Procedure, Rule 33—Power of Trial Judge to Grant New Trial After Appeal Taken. Rule 33 provides that "the court may grant a new trial to a defendant if required in the interest of justice" *D* was found guilty by jury trial in a federal district court for evasion of federal income taxes and sentenced to a prison term. Three days later *D* moved for a new trial. Motion denied. *D* appealed, alleging *inter alia* that the district court abused its discretion in refusing to grant a new trial. The circuit court affirmed the district court's decision and refused to grant a new trial. *D* was then incarcerated. Three days after his imprisonment, the district court reconsidered its decision and granted *D*'s original motion for a new trial. Writ of mandamus is now sought by the United States to compel the district court to revoke its order for a new trial and to enforce the mandate of the circuit court requiring execution of the judgment and sentence. *Held*. That the trial court was acting within the provision of Rule 33, that in the interest of justice the trial court may in its discretion order a new trial, and such action is not inconsistent with or prohibited by the circuit court's decision and mandate. *United States v. Smith*, 156 F.(2d) 642 (1946). *Affirmed*.

Neither the federal statutes nor other rules relative to the granting of new trials cast any light upon the power of the trial judge to reconsider his action in denying or granting a motion for a new trial. The weight of authority favors the power of the trial court, in a criminal action, to reconsider its rulings upon a motion for a new trial. *Fine v. Commonwealth*, 312 Mass. 252, 44 N.E.(2d) 659 (1942), 145 A. L. R. 392 (1942), *People v. Beath*, 277 Mich. 473, 269 N.W 238 (1936). *Contra: State v. Duncan*, 101 Wash. 522,

172 Pac. 915 (1918). However, the cases so holding refer to a reconsideration made *prior* to an appeal. Upon appeal, a trial court loses its jurisdiction until the case is returned. Then it is bound to execute the mandate of the appellate court. *Tinkhoff v. United States*, 86 F.(2d) 869 (1936), *Simmons v. United States*, 89 F.(2d) 591, (1937), *Flowers v. United States*, 86 F.(2d) 79 (1936), 28 U. S. C. A. § 25. An appellate court, upon appeal from an order overruling a motion for a new trial, is restricted, when no questions of law are involved, to inquiring whether the trial judge abused or failed to exercise his discretion. *Bratcher v. United States*, 149 F.(2d) 742 (1942), *Holgram v. United States*, 217 U. S. 509, 521, 30 Sup. Ct. 588 (1909), Trial courts are allowed a wide latitude of discretion in conducting a trial. *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 247, 60 Sup. Ct. 811 (1940), *United States v. Meyer*, 235 U. S. 55, 35 Sup. Ct. 16 (1914). The majority opinion in the instant case is that upon *D's* appeal, the Circuit Court decided *only* that the trial judge was within the bounds of his discretion in denying the motion. That decision did *not* determine that the trial judge could not, in the exercise of his discretion, have properly granted the motion for a new trial. Consequently, the decision and mandate of the circuit court did not prohibit the district court from reconsidering its decision and from granting a new trial, as prescribed by Rule 33.

The circuit court did not consider whether the lower court could have acted on *D's* motion had it been made more than 5 days after verdict. Rule 33 provides that " a motion for a new trial based on any other grounds (than newly discovered evidence) shall be made within 5 days after verdict or within such time as the court may fix during the 5-day period." Most similar state statutes have been strictly construed. *State v. Hecker*, 109 Ore. 520, 221 P 808 (1923), *State v. Scott*, 101 Wash. 199, 172 P 234 (1918). But to construe strictly the above time limitation would seem inconsistent with the section of the rule which states that "a court may grant a new trial to a defendant if required in the interest of justice." A decision on this point will vitally affect the scope of Rule 33. It will also determine whether the courts will follow the common law limitation that a trial court on granting a new trial on its own motion can do so only within the time defendant could properly have made his motion. As motion for a new trial was made within 5 days in the principal case, the question did not arise.

In the instant case, it would seem that the decision of the majority is a sound rule, as it is in the interest of justice and does not violate the mandate of the appellate court. Were the latter true, a contrary decision would seem in order.

J.C.B.

Jury—Special Venue—Excuse of Previous Panel—Prejudicial Effect. Prior to the prosecution of *D* for manslaughter and abortion the

judge, on his own motion, ordered a special venire to be summoned, and excused the regular panel for the forthcoming trial, because word of tampering with the regular panel in connection with that trial had come to his attention. As a result, the jury was selected exclusively from the special panel. Motions by *D* for a continuance and to quash the special venire were denied. Affirming a judgment of conviction, the Supreme Court *held*. In the absence of a showing of prejudice, the method used was "not inappropriate" to the end of securing a fair and impartial trial. *State v. Payne et al.*, 125 Wash. Dec. 383, 171 P.(2d) 277 (1946). Affirmed on rehearing, 126 Wash. Dec. 730 (1947).

Although Washington stands with the majority of jurisdictions in construing its jury statutes as directory only, lack of substantial compliance raises a conclusive presumption of prejudice. *Roche Fruit and Produce Co. v. N P R. Co.*, 18 Wn.(2d) 484, 139 P.(2d) 714, 92 A. L. R. 1109 (1943), *State v. Rholeder*, 82 Wash. 618, 144 Pac. 914 (1914). The court, in the principal case, deemed the trial court's action to be substantial compliance with our statutes, and seemed to base its holding upon the established principle that a litigant has no vested right in a particular panel member, and so a trial judge may excuse any member at his discretion and upon his own motion. REM. REV. STAT. §§ 97-1, 100; *State v. Guthrie*, 185 Wash. 464, 56 P.(2d) 160 (1936), *State v. Williams*, 132 Wash. 40, 231 Pac. 21 (1924), *State v. Phillips*, 65 Wash. 324, 118 Pac. 43 (1911). The calling of a special venire to replace the regular panel at the trial court's discretion is common in many states where such procedure is permitted by statute. *Amos v. Superior Court*, 196 Cal. 677, 239 Pac. 317 (1925), *State v. Lightfoot*, 118 Kan. 428, 235 Pac. 843 (1925), *People v. Rauzen*, 120 Misc. Rep. 182, 197 N. Y. S. 784 (1923), *Viley v. State*, 92 Tex. Cr. R. 395, 244 S.W. 538 (1922). Idaho permits the use of special venires in place of the regular panel, without the aid of statute; but the Idaho court is forced to that procedure by the infrequency of trials and the inconvenience of re-assembling the regular panel. *Ex Parte Rash*, 64 Ida. 521, 134 P.(2d) 420 (1943), *State v. Shelton*, 46 Ida. 423, 267 Pac. 950 (1928).

The trial court's method of meeting suspected corruption of the jury panel has little basis in statute or precedent in Washington. Washington has provided for calling of a special venire to supplement deficiencies which may occur in the regular panel. REM. REV. STAT. § 99. Decisions construing and applying this statute have indicated strict adherence in permitting the use of special venires only for the supplying of additional jurors after the regular panel has been exhausted. *State v. Lasswell*, 133 Wash. 428, 233 Pac. 928 (1925), *State v. Mayo*, 42 Wash. 540, 85 Pac. 251 (1906), *Blanton v. State*, 1 Wash. 265, 24 Pac. 239 (1890). One Washington case, cited by neither court nor counsel, has upheld the use of a special venire

instead of the regular panel. However, there was no regular panel in attendance, and the court expressly weakened its holding by stating that because the proceeding was a summary one (mandamus), and the trial court's verdict had been directed, there could be no prejudice *State ex rel. King v. Trumbell*, 12 Wash. 440, 41 Pac. 183 (1895).

It is submitted that this decision will have greater effect than the court may have anticipated when it dealt so briefly with appellant's contentions. Not only is the holding an extremely liberal view of what constitutes substantial compliance, but it permits the trial judge to take an even more active hand in the impaneling of the jury, with power to act *ex mero motu* upon his own knowledge, suspicions, or fears. It may well be a step toward special panels for all important trials.

C.J.N.

Evidence—Parol Evidence to Vary Writing—To Show Existence of Condition. *D*, in an action for the balance due on a sale of strawberries, set up an executed written contract as a defense. *P* testified that *D*'s agent had said at the time the contract was made: "If the OPA limits us to twelve cents, that is what we will pay. *If not, this contract will not go into effect and we will pay whatever other companies pay*" (Italics added). Other witnesses for *P* testified to the same effect. Verdict for *D*; *P* appeals. The Supreme Court affirmed and further held that the trial court should have sustained *D*'s challenge to the sufficiency of the evidence and dismissed *P*'s suit. *Mapes v. Santa Cruz Fruit Packing Corporation*, 126 Wash. Dec. 114, 173 P.(2d) 182 (1946)

The court reasoned that the testimony as to price was inadmissible under the parol evidence rule. *McDonald v. Wyant*, 167 Wash. 49, 8 P.(2d) 428 (1932), *Whitman Realty & Inv. Co. v. Day*, 161 Wash. 72, 296 Pac. 171 (1931), *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961 (1916). *P* maintained that this case is within the "conditional delivery" exception to the parol evidence rule: that parol evidence is admissible to show that a written contract was not to be operative until the happening of an event. *Walker v. Copeland*, 193 Wash. 1, 74 P.(2d) 469 (1937), *Harrop v. Coffman-Dobson Bank & Trust Company*, 160 Wash. 449, 295 Pac. 165 (1931), *Remer v. Crawford*, 23 Wash. 669, 63 Pac. 516, 83 Am. St. Rep. 848 (1901).

The court recognized this exception to the parol evidence rule but denied its applicability to this case. It stated that *P*'s testimony was an attempt to vary the terms of the written contract. A careful study of the offered testimony, including the language quoted above, reveals no such attempt. *P* simply testified that the contract was subject to a condition precedent: the retention of the twelve-cent OPA price ceiling on strawberries. It would seem therefore that *P*'s testimony was clearly admissible under the "conditional delivery"

exception to the parol evidence rule. RESTATEMENT, CONTRACTS (1932) § 241, 5 WIGMORE, EVIDENCE § 2408 (2d ed. 1923). S. G. O.

Vendor and Purchaser—Condition Precedent—Vendor's Failure to Furnish Title Report. An earnest money receipt for purchase of real estate provided that vendor was to *furnish* a title report to purchaser within 30 days of the acceptance of the offer. Vendor's agent notified purchaser within 30-day period that he (agent) had the title report, but he neglected to make actual delivery to the purchaser. *Held.* the furnishing of the title report was a condition precedent to the purchaser's liability on the contract; *furnish* in this instance means actual delivery or tender of delivery to the purchaser; the purchaser may cancel or withdraw from the contract and recover the earnest money paid. *Kolosoff v. Turri*, 127 Wash. Dec. 76, — P.(2d) — (1947).

This case was an *en banc* rehearing reversing a departmental opinion reported in 125 Wash. Dec. 423, 171 P.(2d) 234 (1946), in which the court held that making the title report *available* to the purchaser was a sufficient furnishing; that consequently there had been no breach of contract and the purchaser could not recover his earnest money

Whether or not "furnishing" title report requires actual delivery to the purchaser is a question of first impression in this state. However, the court relied for authority upon cases from a number of other jurisdictions holding that a contract to furnish abstract of title to purchaser meant an actual delivery of the abstract to the purchaser, the failure so to deliver justifying the purchaser in terminating the contract. See note in 52 A. L. R. 1465, 1470. It should be noted that under the business practice in this state, the title report serves much the same purpose for the purchaser as does an abstract of title, thus making those cases concerning abstracts in other jurisdictions good authority in the instant case.

Even under the general rule noted above, it is still possible to mention the procurement of abstract of title or title report and yet not have the delivery of the document be a condition of the contract—thus a failure to deliver would not constitute a breach of the contract. *Papm v. Goodrich*, 103 Ill. 86 (1882). L.R.B.

Criminal Law—Constitutional and Statutory Provisions—Information as to Right to Be Represented by Counsel. Upon arraignment for a charge of attempted robbery, the judge asked defendant, a young sailor, if he wished the court to appoint an attorney, to which defendant replied, " I guess it wouldn't hurt to have one." The next question brought out the fact that he had no funds to pay an attorney, and upon being asked if he

wished to delay pleading "until an attorney has been appointed" he said, "No, I'll plead guilty." Judgment was rendered and he was committed to the state reformatory. Subsequently, through efforts of his father, counsel was consulted, and a motion was made upon his behalf to withdraw the plea of guilty, upon grounds that he had not been properly advised of his rights to counsel and that there was a valid defense which would have been apparent to a lawyer. Upon hearing, defendant testified he didn't know what the judge meant by "until an attorney has been appointed" (that the state would appoint one) and since he didn't want to be a burden upon his folks, he had pleaded guilty. The motion was denied. Appeal. *Held*. On the basis of the record, the court had complied with the constitutional and statutory requirements. *State v. Cowan*, 125 Wash. Dec. 322, — P (2d) — (1946).

In reaching its decision, the court in the principal case apparently followed previous Washington interpretations of the rights of an accused to counsel. *State v. Scofield*, 129 Wash. 295, 24 Pac. 941 (1924), *State v. Baforo*, 146 Wash. 312, 262 Pac. 964 (1928). Although the result may have been correct, the reasoning is not clear. In Washington a motion to withdraw a plea upon the grounds of lack of advice as to rights to counsel would appear to involve three separate and distinct rights of accused: (1) "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel." WASH. CONST. Art. 1, § 22. The purpose of this provision is usually considered to be an abrogation of the old English rule which denied a person charged with a felony the right to counsel, and thereby permits an accused the benefit of counsel of his own choosing if he can provide the same. (2) " And if it appear that he is unable to employ counsel, by reason of poverty, counsel shall be assigned to him by the court." REM. REV STAT., § 2095. This provision is for the purpose of providing counsel without cost for those accused of crime, who do not have financial means to secure counsel for themselves, in order to eliminate any practice which subjects men to increased dangers of conviction of crime merely because of poverty. (3) The right to withdraw a plea at the discretion of the trial court is provided in REM. REV. STAT. §§ 2111 and 464 *et. seq.* See *State v. McKee*, 186 Wash. 127, 56 P.(2d) 1026 (1936). Application and discussion of the doctrine of discretion appears proper only where accused has not been denied any constitutional or statutory right. *Tipton v. State*, 30 Okla. Crim. Rep. 56, 235 Pac. 259 (1925), 149 A. L. R. 1413 (1944).

When arraigned in a federal court upon a criminal charge, it is mandatory that an accused be provided or have counsel, even though he pleads guilty, unless the following provision of the Sixth Amendment to the U. S. Constitution is waived: "In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense." *Walker v. Johnston*, 312 U. S. 275 (1941). The federal rule applicable to the waiver of this

right has been laid down by the U. S. Supreme Court in the much-cited case of *Johnson v. Zerbst*, 304 U. S. 458 (1937) Every reasonable presumption is made against such a waiver, and whether there is a proper waiver should be clearly determined by the trial court, and it is fitting and appropriate for that determination to appear upon the record. The jurisdiction of a court may be lost at the beginning of a trial due to failure to complete the court by providing counsel for an accused who is unable to obtain counsel, and one thereafter imprisoned through the void judgment of such court may obtain release by *habeas corpus*. Failure to request, or indicate in any manner a desire that counsel be assigned, does not necessarily constitute a waiver of the right, for the accused may not know of his constitutional right, and a waiver is ordinarily an intentional relinquishment of a *known* right. *Johnson v. Zerbst, supra, Robnson v. Johnston*, 50 F Supp. 774 (1943), *Evans v. Rives*, 126 F.(2d) 633 (1942). A plea of guilty entered under a misapprehension of a material fact, such as the right to assistance of counsel *without cost to himself*, cannot be considered a free and voluntary admission of guilt and a waiver of all defenses. *Dictum* in *Parker v. Johnston*, 29 F Supp. 829 (1939) Such a plea does not waive the constitutional guaranty of right to have counsel appointed. *Walker v. Johnston, supra, Evans v. Rives, supra*. See *Glasser v. U S.*, 315 U. S. 60 (1942) and annotations in 149 A. L. R. 1403 and 84 L. ed. 383.

Regardless of the soundness of the reasoning behind it, the federal rule cannot be enforced upon state courts since it has been held that the Sixth Amendment is not binding upon state courts. *Games v. State of Washington*, 277 U. S. 81 (1928). However, the right to assistance of counsel is so fundamental that the failure by a state court to make an effective appointment of counsel may amount to a denial of due process of law contrary to the following provision of § 1 of the Fourteenth Amendment: "Nor shall any state deprive any person of life, liberty, or property, without due process of law." *Powell v. Alabama*, 297 U. S. 45 (1932). A plea of guilty is not necessarily a waiver of right to counsel under the due process clause. *Rice v. Olson*, 324 U. S. 786 (1945), *House v. Mayo*, 324 U. S. 42 (1945), *Williams v. Kaiser*, 323 U. S. 471 (1944), *Smith v. O'Grady*, 312 U. S. 329 (1941). That the due process clause does not require a state court to appoint counsel in every instance is indicated by a case wherein denial of a state court to appoint counsel for one accused of robbery, but who had experience in criminal court, was upheld. *Betts v. Brady*, 316 U. S. 455 (1941). (A note in this case contains a useful tabulation of the pertinent statutes of each state.) A recent case finding no lack of due process in failure to appoint counsel where one accused of murder pleaded guilty, is *Carter v. Illinois*, 67 Sup. Ct. 216, decided in December, 1946. Although a 5-4 decision, based on rather technical grounds, this case appears to strengthen the holding in *Betts v. Brady, supra*, which had

been looked upon with some question in view of the broad language in the subsequent case of *Williams v. Kaiser*, *supra*, and changes in the personnel of the court.

Since the decision in *Johnson v. Zerbst*, *supra*, the federal courts and several state courts have revised their procedures and requirements in accordance with the holding to provide a full and very complete statement to accused (1) as to his right to counsel of his own choosing if he can so provide, and (2) if financially unable, his right to have counsel appointed by the court without cost, and to cause this information, together with the accused's decision or action thereon to appear clearly in the record. *Hawk v. Olson*, 66 Sup. Ct. 116 (1945) (Nebraska case), *White v. Ragen*, 324 U. S. 760 (1945) (Illinois case), *U. S. v. Steese*, 144 F.(2d) 439 (1944), C. 448 of Wisconsin Laws of 1945, 357.26; *State v. Murphy*, 248 Wis. 433, 22 N. W (2d) 540 (1946), *People v. Foster*, 59 N. Y. S.(2d) 477 (1945) REM. REV. STAT. § 2095 apparently contemplates a similar rule in Washington but the principal case indicates that trial courts do not always follow such procedures and the supreme court has not in this opinion taken any clear-cut position to discourage the use of varied and indefinite practices which may tend to endanger or put in question the constitutional and statutory rights of an accused. It appears that the voluntary adoption by trial and appellate courts of the rule suggested above would be commendable. H. H.

The Writ of Coram Nobis in Washington. In 1941 *P*, a prisoner in the state penitentiary, applied to the Superior Court of King County for a writ of *coram nobis*. The application was denied on the basis of insufficient facts to warrant the issuance of the writ. In 1945 *P* again applied for a writ of *coram nobis* and was again denied relief. The trial court found that substantially the same questions were involved as in the previous application and the matter was therefore *res judicata*. On appeal, *held*. It is not necessary to decide if the trial court had the power to issue a writ of *coram nobis*; if it did not, then the result reached was correct. If, on the other hand, it did have the power, then it made a proper disposition of the application as the rule of *res judicata* applies to an order denying an application for a writ of *coram nobis*. *State v. Mason*, 125 Wash. Dec. 699, 172 P.(2d) 6— (1946).

This unusual writ has been defined by one writer substantially as follows: The writ of *coram nobis* is a common law writ issuing out of a court of record to review and correct a judgment of its own, relating to an error of fact which does not appear on the record, and which, through no fault of the petitioner, was not known by the court or by the petitioner at the time the judgment was entered. Freedman, "The Writ of Coram Nobis" (1929), 3 *Temple Law Quarterly*, 365. The writ had fallen into disuse in Blackstone's

time and is not mentioned in his *Commentaries*, but it still exists in the United States and is used more and more frequently *Mitchell v. State*, 179 Miss. 814, 176 So. 743 (1937), *Anderson v. Buchanan*, 292 Kan. 810, 168 S. W (2d) 48 (1943). The writ has been held to lie on a showing that a plea of guilty was entered for fear of mob violence. *State v. Calhoun*, 50 Kan. 523, 32 Pac. 38 (1893). The writ was issued to revoke a sentence confining a person under eighteen to the penitentiary in violation of statute. *Ex parte Gray*, 77 Mo. 169 (1882). It was issued to revoke a sentence where the defendant was insane at the time of trial and this fact was not known by the court. *Adler v. State*, 35 Ark. 517 (1880), *contra: Withrow v. Smithson*, 37 W Va. 757, 17 S. E. 316 (1893). The writ will not lie for newly discovered evidence. *Fugate v. State*, 85 Miss. 94, 37 So. 554 (1904). It will not lie for reexamination of an issue determined in the original proceedings. *Coppock v. Reed*, 189 Iowa 581, 178 N. W 382 (1920) For a comprehensive discussion of the use of the writ throughout the United States see Freedman's article, *supra*.

§ 1

Cases involving the writ of *coram nobis* have been before our supreme court four times prior to the instant case: *State ex rel. Davis v. Superior Court*, 15 Wash. 339, 46 Pac. 399 (1896), *State v. Armstrong*, 41 Wash. 601, 84 Pac. 584 (1906), *Wilson v. State*, 87 Wash. 410, 90 Pac. 257 (1907), *Humphrey v. State*, 129 Wash. 309, 224 Pac. 937 (1924) In every case the trial court denied the writ on the ground that the facts did not warrant its issuance and its action was affirmed on appeal. In *State ex rel. Davis v. Superior Court, supra*, the court, as in the present case, expressly refused to decide whether the trial court had the power to issue the writ. The language used in the three other cited cases implied that the writ exists. Whether the writ of *coram nobis* actually is available in Washington is therefore an open question. The power to grant such a writ is not expressly given by the constitution in defining the jurisdiction of the superior court, WASH. CONST. Art. IV, § 6. The inference arising from these cases is that it is probable that the writ will be recognized, though, as in other jurisdictions, its use is very narrowly limited. The probable position of the Washington court is expressed by a dictum in *State v. Armstrong, supra* at page 584 "Under our statutes and practice, it may be that occasion might arise where the writ of *coram nobis* could be properly granted; but such occasions must be very rare, as provision is made to afford relief by other means in most cases." B. McV