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ONE LIMITATION ON THE USE OF THE WRIT OF
HABEAS CORPUS

JACK J. LOBDELL

The Supreme Court of Washington has described the writ of habeas corpus as being the appropriate remedy for a person who has been illegally deprived of his liberty.¹ This description was made by way of preface to a holding that emphatically denied use of the writ by one who claimed such illegal deprivation. The reason for the denial was found by the court to lie in a settled rule at common law, which has been preserved by statute,² which is generally as follows: the writ will not lie where the petitioner is held on a final judgment of a court of competent jurisdiction where the judgment is fair on its face.³ The great number of cases in which this rule is stated and used to deny relief indicates that incarcerated persons continue to submit petitions with more optimism than appears warranted.

It is the purpose of this comment to discuss this limitation upon inquiry and to reveal what its actual effect is. The rule is perhaps more meaningfully stated as follows: the writ will lie only if the judgment by virtue of which the petitioner is committed is void. The judgment is void if (1) the court had no jurisdiction over the person; (2) the court had no jurisdiction over the subject matter; or (3) there was a lack of authority to pronounce the particular judgment or sentence involved.⁴ Moreover, those facts which render the judgment void must affirmatively appear on the face of the judgment pleaded.⁵ An examination of the cases shows that this last statement cannot be made without an expression of some qualifications which will be dealt with at length later. It is sufficient to say, now, that, as a general proposition, it is sound. It is the author's intention to discuss the three categories separately and in order.

¹ In re Grieve, 22 Wn. 2d 902, 158 P. 2d 73 (1945).
² RCW 7.36.130(1) [Rex. Supp. 1947 § 1075]. The reader will note that there is comprehensive statutory coverage of this writ in Washington. This comment is limited to a discussion of the rule embodied in this particular section cited. For a general discussion of the scope of the writ of habeas corpus see Larson, Administrative Determination and the Extraordinary Writs in the State of Washington, 20 Wash. L. Rev. 22.
³ In re Rafferty, 1 Wash. 382, 25 Pac. 465 (1890); In re Hannigan, 136 Wash. 60, 238 Pac. 913 (1925); In re Williams, 25 Wn. 2d 273, 171 P. 2d 197 (1946); In re Mustered, 26 Wn. 2d 171, 173 P. 2d 88 (1946); In re Thompson, 33 Wn. 2d 142, 204 P. 2d 525 (1949).
⁴ In re Horner, 19 Wn. 2d 51, 141 P. 2d 151 (1943).
⁵ Voight v. Mahoney, 10 Wn. 2d 157, 116 P. 2d 300 (1941).
In order to place a complete statement of the rule before the reader before launching into a detailed analysis, it must be added that there is a statutory exception which will be discussed subsequently. The exception is that the limitation upon inquiry does not apply if the petitioner asserts that a violation of his federal or state constitutional rights is involved. In order to keep the horse before the cart, the rule will be analyzed first and the exception later.

**Lack of Jurisdiction over the Person**

Certain it is that habeas corpus will lie to free a person who was sentenced to prison under a judgment rendered by a court which did not have jurisdiction over the person of the defendant. Yet this situation almost never arises in criminal prosecutions. The defendant has been in court, did stand trial, and regardless of what irregularities occurred he was there and therefore his person was subject to the jurisdiction of the court. In addition to this factual pattern there is the doctrine laid down in the Supreme Court of the United States in a civil action which permits a court to decide the question of whether it has jurisdiction over the person and which makes such decision *res judicata* on the issue and entitled to full faith and credit by the sister states. An example of this doctrine as applied to a criminal case is seen in a Washington case involving a prosecution against two Indians. After arrest, the defendants claimed via a petition for habeas corpus that the information showed that the offense was committed by Indians in the Indian country and that therefore the state court had neither jurisdiction over the persons of the defendants nor over the subject matter. The Supreme Court of Washington denied the petition on the grounds that the jurisdiction of the State court was a question for the original determination of the State court with a right to appeal therefrom and that, therefore, the writ would not lie. Presumably this same result would have been reached had the petition been submitted after trial and judgment. This doctrine and the factual pattern which exists in the typical habeas corpus action reduce the practical value of habeas corpus on the basis of lack of personal jurisdiction to a minimal point, particularly in view of the fact that where lack of personal jurisdiction actually exists there will undoubtedly also be a violation of state or federal constitutional rights which is a more certain basis for a petition.

As far as the requirement that the defect which renders the judg-

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7 *In re* Herman, 79 Wash. 149, 139 Pac. 1083 (1914).
ment nugatory must appear on the face of the record pleaded is concerned, it is mentioned here primarily for purposes of symmetrical analysis. The author has stated the conclusion that this ground for habeas corpus will rarely, if ever, be asserted. However, if such a defect as that being presently discussed does exist, it should appear on the face of an accurate record as a matter of course and therefore the rule would be satisfied.

LACK OF JURISDICTION OVER THE SUBJECT MATTER

Cases are also very limited in number under this category of defects which render a judgment void. The case involving the Indian defendants has already been discussed. It would seem from this case that a collateral attack upon the jurisdiction (of a court of general jurisdiction) over the subject matter cannot be made by a writ of habeas corpus.

An earlier case tends to strengthen this conclusion. In In re Russell, the petitioner had been convicted of a crime upon a plea of guilty. He petitioned for the writ on the grounds that the crime was committed upon a United States military reservation over which the superior court had no jurisdiction. The petition was denied on the grounds that, inter alia, the defendant should have put such defense in issue and taken an appeal from an adverse decision.

These two decisions seem to be the only ones in Washington wherein the petitioner claimed that a writ should lie due to a lack of jurisdiction over the subject matter by a court of general jurisdiction. They are both fairly old cases but in absence of other authority it would appear that the repeated rule that a judgment is void wherein the court had no jurisdiction over the subject matter becomes rather meaningless when the judgment is rendered by a court of general jurisdiction.

The rule under this category has more meaning when dealing with courts of limited jurisdiction. In Ex rel Wagner, the court held that habeas corpus would lie to release a prisoner convicted in a municipal court of an offense over which the justice had no jurisdiction because incompetent to impose the mandatory penalty prescribed for the offense stated.

In a much similar case involving a justice court, the court reached

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8 40 Wash. 244, 82 Pac. 290 (1905).
9 The court also held that the record appeared fair on its face and that therefore it was conclusive against an attack by habeas corpus. In addition, the court speaks of waiver by reason of a plea of guilty.
10 144 Wash. 71, 256 Pac. 784 (1927).
the same result because, although the justice court was not completely without jurisdiction in the premises, it was without authority to impose the penalty given. This latter case disapproves of the language in the Wagner case in so far as it declares no jurisdiction over the subject matter at all. As a result these two cases are perhaps more appropriately to be "pigeon-holed" in the third category of defects to be discussed subsequently, i.e. that there was no authority to render the particular judgment or sentence involved. They are introduced here because it is suggested that they tend to show that a writ of habeas corpus will lie to make a collateral attack upon the judgment of a court of limited jurisdiction based upon a lack of jurisdiction over the subject matter where such defect actually exists.

The requirement that the defect appear on the face of the record is satisfied because the fact that the judgment and sentence coming from a court of limited jurisdiction will be apparent and by consulting the statutes outlining the jurisdiction of such courts a decision can be made directly as to whether jurisdiction existed.

LACK OF AUTHORITY TO RENDER THE PARTICULAR JUDGMENT OR SENTENCE INVOLVED

It is within this category that most of the habeas corpus petitions successfully surmount the statutory limitation. It was not until fairly recently, in the case of In re Horner,\textsuperscript{12} that the Supreme Court enunciated the rule that to render judgment immune from an attack by the writ the court must have had jurisdiction of the person and subject matter and also authority to render the particular judgment and sentence involved. However, there were previous cases where the writ was granted in which the particular defect which voided the judgment would best fit under this category.\textsuperscript{13} In other words, the articulation of the rule was new but several previous consistent cases became better explained by the rule then adopted. The court declared that some pre-

\textsuperscript{12} In re Hulet, 159 Wash. 98, 292 Pac. 430 (1930).
\textsuperscript{13} In re Lombardi, 13 Wn. 2d 1, 123 P. 2d 764 (1942); In re Cress, 13 Wn. 2d 7, 123 P. 2d 767 (1942); In re Towne, 14 Wn. 2d 633, 129 P. 2d 230 (1942); In re McCauley, 16 Wn. 2d 707, 133 P. 2d 525 (1943); In re Collins, 16 Wn. 2d 708, 133 P. 2d 811 (1943); In re Richardson, 16 Wn. 2d 709, 133 P. 2d 810 (1943). It is well to note here that some of the cases cited herein reveal that a successful petition on the grounds that the court had no authority to render the particular judgment and sentence involved will not always result in freedom for the petitioner. If the prisoner has been improperly sentenced but is subject to another proper sentence, he will be remanded to the proper court for re-sentencing.
vious cases stated too harsh a rule in not providing for this third category of defects.\textsuperscript{14}

The knottiest problem comes in trying to evaluate what defects constitute a lack of authority to render the particular judgment or sentence involved. Prior to \textit{In re Horner}, there were numerous cases which decided that the particular defect was not sufficient to render the judgment void. The new statement of the rule immediately raises the question as to the validity of many older cases which were decided with at least a more rigid-sounding rule in mind. The Supreme Court has indicated no intention, however, to back down from these cases as is indicated by its willingness to cite them in decisions subsequent to \textit{Horner}.\textsuperscript{15}

The recent cases do not purport to lay out a general rule as to what defects constitute a lack of authority to render the particular type of judgment or sentence involved. A review of the successful petitions which lie within this category is perhaps useful: A writ will lie to determine whether or not a municipal court had authority to commit a child to a reform school;\textsuperscript{16} habeas corpus lies where a justice court is incompetent to impose a mandatory penalty;\textsuperscript{17} the writ will lie where the trial court entered judgment and sentence upon a plea of guilty of murder without impanelling a jury to determine the degree of the crime and the punishment therefore as required by statute;\textsuperscript{18} where defendant pleaded guilty to a gross misdemeanor but was sentenced as for a felony, the sentence is void and his status is that of a convicted criminal who has not been properly sentenced and therefore habeas corpus will lie but the petitioner will be remanded for proper sentencing;\textsuperscript{19} where defendant was convicted of the crime of being an habitual criminal which is not a crime but a status which calls for increased punishment for the latest crime of which the accused has been convicted, a judgment of conviction for the alleged crime and any sentence based thereon are void and a writ will lie to at least secure

\textsuperscript{14} \textit{In re Newcomb}, 56 Wash. 395, 105 Pac. 1042 (1900). \textit{In re Parent}, 112 Wash. 620, 192 Pac. 947 (1920).
\textsuperscript{15} \textit{In re Higdon}, 30 Wn. 2d 546, 192 P. 2d 744 (1948); \textit{In re Grieve}, 22 Wn. 2d 902, 158 P. 2d 73 (1945). In \textit{In re Grieve} the court cites, among others, \textit{In re Newcomb}, supra, which had been disapproved of in \textit{In re Horner}, supra.
\textsuperscript{16} \textit{In re Barbee}, 19 Wash. 306, 53 Pac. 155 (1898).
\textsuperscript{17} \textit{Ex Rel Wagner}, supra. \textit{In re Hulet}, supra.
\textsuperscript{18} \textit{In re Horner}, supra. An integral part of the holding is that the violation of the statutory procedure destroyed the authority to render the judgment and sentence involved.
\textsuperscript{19} \textit{In re Sorenson} v. Smith, 34 Wn. 2d 659, 209 P. 2d 479 (1949). See also \textit{In re Jeane} v. Smith, 34 Wn. 2d 826, 210 P. 2d 127 (1949).
re-sentencing if he has been charged with and convicted of a substantive crime.\textsuperscript{20}

**Exceptions**

There are two exceptions to the general rule. The court held in the *Sorenson* case that when it cannot be ascertained from the judgment pleaded the precise charge for which the petitioner was sentenced, it is permissible to examine the information, not to review its sufficiency, but to ascertain the precise charge.\textsuperscript{21} In this situation, therefore, the rule that the defect must affirmatively appear on the face of the record has given way. It should be emphasized, however, that the inquiry will be made only to determine the charge brought in order to decide whether a proper sentence has been rendered.

The other exception was created by the legislature in 1947. Following the statutory prohibition on inquiry these words were added: "... except where it is alleged in the petition that rights guaranteed the petitioner by the Constitution of the State of Washington or of the United States have been violated."\textsuperscript{22} In addition, the legislature added a provision that imposed a duty upon the court to decide whether a federal constitutional right of the petitioner had been violated if a federal question was presented by the pleadings in habeas corpus.\textsuperscript{23} The former section compels the court to go behind a final judgment and sentence when allegations are made that federal or state constitutional rights were violated. The latter section appears to have been designed to insure a decision of basic federal constitutional questions.

The first case which bears on this exception was *In re Payne v. Smith*.\textsuperscript{24} In that case the petitioner was imprisoned by virtue of a judgment and sentence issued out of a superior court. He brought a petition alleging that his federal constitutional rights had been violated. The court did not refer to RCW 7.36.130 (1). Instead, RCW 7.36.130 (1) was cited and construed to require an examination of the proceedings to determine the constitutional issue even though the judgment was fair and regular on its face. It is submitted that a reference to the present RCW 7.36.130 (1) would...

\textsuperscript{20} Cases cited in footnote 13.
\textsuperscript{21} *In re Sorenson v. Smith*, supra. See also *In re Clark*, 24 Wn. 2d 105, 163 P. 2d 577 (1945); and *In re Moon v. Cranor*, 35 Wn. 2d 230, 212 P. 2d 775 (1949).
\textsuperscript{22} RCW 7.36.130 (1) [REM. SUPP. 1947 § 1075].
\textsuperscript{23} RCW 7.36.140 (1) [REM. SUPP. 1947 § 1085 (2)].
\textsuperscript{24} 30 Wn. 2d 646, 192 P. 2d 964 (1948).
have provided a more complete analysis of the status of the limiting rule following the 1947 amendment. The conclusion would appear obvious however, that the limitation does not exist when this type of question is raised.

In In re Thompson v. Smith, the petitioner made allegations of several defects which he claimed rendered the judgment void. He also claimed that his federal and state constitutional rights were violated. The court summarily disposed of the first contention by saying that a collateral attack on a judgment and sentence can only be made if the judgment and sentence is void on its face and that where the judgment and sentence is not a part of the record it will be presumed to be regular and valid. The court referred to neither of the 1947 statutes but did go into the merits of constitutional issues. Therefore it appears definitely that when such violations of constitutional rights are claimed the limitation upon inquiry is removed.

Three recent cases follow the same pattern and pretty well nail down the conclusion that the words of the statutory exception are being literally followed although the statute itself has yet to be cited. In these three cases the petitioner asserted a violation of constitutional rights. In all of them the court went into the issue even though a judgment and sentence valid on its face had to be invaded.

Two decisions of the United States Court of Appeals for the Ninth Circuit which denied habeas corpus on the grounds that the applicant had not exhausted his remedies in the state courts spell out more fully the change that occurred in Washington by virtue of the 1947 enactments. In denying the petitions the court stated that the state courts of Washington had to go into the merits, in habeas corpus, of a contention that federal constitutional rights were violated.

**Conclusion**

The author purposely makes no attempt to review, in factual form, the numerous decisions wherein the petition has been denied. The ingenuity and faith of those who devise petitions appears fairly in-
exhaustible and an attempted outlining of unsuccessful petitions would only serve the purpose of warning that the particular grounds should not be urged again. The most helpful suggestion would seem to be that the court remains rigid in applying the general rule, i.e. that the writ will not lie where petitioner is held on a final judgment of a court of competent jurisdiction where the judgment is fair on its face. The validity of the judgment is determined by the record alone and all presumptions will be used where necessary to support the validity of the judgment.\textsuperscript{29}

There exists one judicially created retreat from the rule. The court will go behind the record to examine the information to determine what crime was charged. Also, the case will be reviewed where the petitioner claims a violation of Federal or State constitutional rights in order to decide the question. It is suggested that this exception could prove to be the inducement for many petitions since it might prompt arguments that alleged defects in the criminal procedure were of such substance and nature as to deprive the defendant of constitutional rights. When this argument is made it appears that the court is compelled to review the case to decide the question regardless how fair and regular the judgment and sentence appear on its face.

It would appear that the common law rule as preserved by the statute remains rigid and vital in Washington. It has well withstood the repetitive battering by hopeful petitioners.

\textsuperscript{29} See cases cited in footnote 15.