Habeas Corpus–Federal Courts–Certiorari to United States
Supreme Court as a State Remedy

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race, and therefore violated the 14th Amendment. Although this case was referred to in the principal case, it was not followed because the court believed it to be based on a misinterpretation of recent Supreme Court decisions in *Oyama v. California*, 332 U.S. 633 (1948), and *Takahasi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

The decision in the principal case by the California district court is unique in that it is the first time a law in the United States has been declared unenforceable by virtue of the United Nations Charter. What the outcome of the case will be if it is appealed is, of course, a matter of conjecture. However, if the decision is carried to its logical conclusion, an interesting problem arises. Does the holding mean that upon ratification of the Charter all discriminatory practices in the United States became illegal? It could be argued that if the Charter is a self-executing treaty many of the provisions of the proposed Civil Rights legislation, aimed at preventing discrimination, became effective upon its ratification. It is unlikely that anything of this nature was contemplated by the Senate when it ratified the Charter. The necessity for legislation to provide machinery for enforcement and penalties for the violation of the Charter provision, would tend to show that it is not self-executing on this point.

A possible solution to this problem might be reached by holding the Charter to be self-executing in relation to the California statute since further legislation is unnecessary; but executory in relation to the Civil Rights program since enabling legislation is necessary. On the former point, no positive action is required, while in the latter case it is.

R. E. M.

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**HABEAS CORPUS—FEDERAL COURTS—CERTIORARI TO UNITED STATES SUPREME COURT AS A STATE REMEDY.**—Petitioner was denied a writ of habeas corpus by the district court because of his failure to apply for certiorari to the United States Supreme Court after the state supreme court had squarely passed on a federal constitutional question presented. *Held*, on certiorari, affirmed. Certiorari to the United States Supreme Court is a part of the state remedies under § 2254 of the Habeas Corpus Chapter of the Judicial Code, 62 Stat. 967 (1948), 28 U.S.C. § 2254 (1948). *Darr v. Burford*, 70 Sup. Ct. 587 (1950) (5-3 decision).
Section 2254 provides that one detained under the judgment of a state court will not be granted an application for a writ of habeas corpus unless such applicant has exhausted his state remedies or unless there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. This section further provides that the applicant shall not be deemed to have exhausted his state remedies if he has the right under the law of the state to raise, by any available procedure, the question presented. In the instant case no question of inadequate or ineffective remedies was presented, and the only question before the court was whether certiorari to the United States Supreme Court was to be considered as one of the state remedies within the meaning of the statute.

The majority opinion of the principal case merely reaffirmed Ex parte Hawk, 321 U.S. 114 (1944). That case held that ordinarily an application for habeas corpus in the federal court by one imprisoned under the judgment of a state court will not be entertained until all state remedies, including appellate remedies in the state court and in the United States Supreme Court by appeal or writ of certiorari, have been exhausted. The following cases are cited as authority for this proposition: Tinsley v. Anderson, 171 U.S. 101 (1898); Urquhart v. Brown, 205 U.S. 179 (1907); United States ex rel. Kennedy v. Tyler, 269 U.S. 13 (1925).

The last three mentioned cases merely hold that a lower court ought not to exercise its discretionary jurisdiction in habeas corpus in favor of one held under state custody unless he has availed himself of his remedy to review the state court's judgment by a writ of error from the United States Supreme Court. When those cases were decided a writ of error was a writ of right. However, as was pointed out by Justice Frankfurter in the dissent of the principal case, "this jurisdictional situation was drastically changed by the Act of September 6, 1916, 39 Stat. 726, and the Act of February 13, 1925, 43 Stat. 996. . . . After this shift from review as of right to review by grace, it could no longer be said that a litigant forwent his right to have this Court review and reverse a State court. The right was gone. Only an opportunity—and a slim one—remained. It completely misconceives the doctrine which required a case to be brought to this Court by writ of error, because it was the duty of this Court to adjudicate the claim on the merits, to apply it to the totally different factors involved in certiorari." At 606.
The majority in the principal case assumed that § 2254 was declaratory of existing case law as expressed by the Hawk case, supra. See Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171 (1949) (Judge Parker was the chairman of the Judicial Committee which proposed this legislation).

Upon careful examination of § 2254 it will be seen that it refers nowhere to certiorari to the United States Supreme Court as a state remedy, but is more declaratory of the law as stated in Ex parte Royall, 117 U.S. 241 (1886), which is the original case establishing this doctrine of exhaustion of state remedies and which neither refers to certiorari to the Supreme Court as a state remedy, nor implies such.

Wade v. Mayo, 334 U.S. 672 (1948), decided after the enactment of § 2254, while recognizing that failure to apply for certiorari might be relevant in determining whether a district court should exercise its discretion and entertain an application for habeas corpus, held that certiorari to the United States Supreme Court is not a state remedy. Prior to the principal case this was the latest case in point and because of its great appeal to reason it is hard to see why the court overruled it.

It seems that the court has bent over backwards in applying the doctrine of comity. This doctrine teaches that one court should defer action on causes properly within its jurisdiction until courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter. The thought is that it is better that the United States Supreme Court should have the first opportunity to overrule the highest state court because of the delicate nature of this state-federal coordinate jurisdiction. Covell v. Heyman, 111 U.S. 176 (1884). This is better referred to as the Supreme Court's "first crack" policy. Here is overlooked the fact that it will be even more harmful to this delicate situation if the district court overrules the state court after the United States Supreme Court has refused to hear the case.

It should be noted that the majority of the court also failed to recognize that this situation falls within the rule of wisdom, often applied by the Supreme Court, whereby questions of local law and local practice will not be decided in the Supreme Court but will be submitted to the knowledgeable views of federal judges in the various localities. Gardner v. New Jersey, 329 U.S. 565 (1947).

The principal case failed to state what weight should be given to a previous denial of certiorari by the United States Supreme
Court by the district courts when hearing the habeas corpus application of a person detained under state custody. While this point was not squarely before the court, it would have been well for it to take a stand on that issue in view of the recent holding in *Stonebreaker v. Smyth*, 163 F.2d 498 (4th Cir. 1947). This court held that although a denial of certiorari by the United States Supreme Court is not res judicata upon one subsequently filing for habeas corpus in the district court, yet it is a matter to be taken into consideration by the district court and in the absence of some unusual situation is sufficient reason for that court to deny the writ of habeas corpus. In this case the court in effect gave a denial of certiorari substantially the same weight as if the case had been heard by the Supreme Court on its merits. Thus the clear right of the prisoner to the great writ of freedom was lost and the result of the case unjustified as the court failed to apply, although it considered, the settled rule that a denial of certiorari has no legal significance. *House v. Mayo*, 324 U.S. 42 (1945).

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**MINES AND MINERALS—STRIP-MINING RIGHTS—CONSTRUCTION OF LEASE.**—*P* purchased for $5,615 the surface of 265 acres of land and leased to *D*, owner of an underlying twelve-acre tract of coal, the strip-mining rights for $3,000. The lease gave *D* the right "to do any and all acts which are necessary or convenient for the mining and removal of all said coal, and by way of enlargement . . . the further right to mine, remove, and market all of said coal . . . without any liability whatsoever from damages that may arise from the removal of any or all of said coal, or the surface or subsurface or other strata overlying the same, or such additional parts of said surface as may be necessary or convenient in connection therewith . . . ." (Italics supplied.) In a suit by *P* for an injunction and damages for the conversion of ten truck loads (fifty tons) of soil, stone and shale which *D* took from the premises to construct a roadway or ramp to his tipple which was located off the leased premises, the lower court rejected *D*'s contention that the taking was authorized by the contract. *Held*, that the money payment evidences consideration for very broad mining rights. Thus the materials removed from the premises for the purpose of constructing a road or ramp