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Notes and Comments

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Effect of the Writ of Habeas Corpus on Double Jeopardy

Despite the public demand for a reasonable administration of criminal law without reliance on subversive technicalities to defeat that end, the New York Court of Appeals recently decided that the writ of habeas corpus could be invoked to liberate a person who had been found guilty by a jury after an impartial trial because the trial judge had entered a void judgment, and, as a result thereof, denied the state the right to prosecute the defendant again.[1]

The case in question arose under the following circumstances: Meyer was charged with disorderly conduct and tried before a police magistrate and a jury. The trial commenced on Saturday and ended on Sunday at which time he was found guilty by the jury and sentenced on that same day to a term of thirty days in the county jail. Thereafter he applied for a writ of habeas corpus and was released. He was then ordered to stand trial for the second time charged with the same offense based upon the same information. Before the second trial commenced, however he applied for a second writ of habeas corpus and was released on the ground that such second trial, if held, would subject him to double jeopardy. The state appealed to the Appellate Division which reversed the order granting the second writ, and relator Meyer then appealed to the Court of Appeals which reversed the Appellate Division and affirmed the order of the Special Term discharging the relator.

In deciding that the second writ should be awarded, the majority of the court pointed out in its opinion that: (1) the first judgment, having been rendered on Sunday, was void; (2) that the defendant had been placed in jeopardy by the first trial through its lawful commencement despite its illegal outcome; and (3) therefore the second trial would have been in contravention of the defendant's constitutional rights had it been held, and the second writ was proper to prevent such second trial. A strong dissenting opinion was written by Finch, J., in which he criticized the action of the majority in extending habeas corpus into this new field and pointed out that the defendant could well have secured a writ of error against the first judgment, and, had

[1] People ex rel. Meyer v. Warden of Nassau County Jail et al., 269 N. Y. 426, 199 N. E. 647 (1936).

he done so, he would have been in no position to urge that the former judgment had placed him in jeopardy.[2]

The majority opinion cites several New York cases, but only one is germane to the issue—that of *People ex rel. Stabile* v. *Warden of City Prison of City of New York*,[3] where the first trial of the defendant came to a conclusion through the action of the trial judge in improperly discharging the jury before it had had time to agree or disagree upon a verdict.[4] It was there held, over the dissenting opinion of two judges, that the defendant could no longer be held in custody to await a second trial, since such second trial, as a matter of law, would have violated the defendant's constitutional guarantee. Expressions in the other cases relied upon by the majority of the court criticize the use of habeas corpus to secure the discharge of persons who have been found guilty by juries after having been accorded fair and impartial trials.[5]

Analyzing the opinion in the case in question, it is to be noted that two points are made. The first pertains to the invalidity of the original judgment and the defendant's right to secure relief against detention thereunder. This judgment was, in fact, void, since Sunday is generally treated as *dies non juridicus* and no judicial act may be performed thereon,[6] though this does not apply to merely ministerial acts such as receiving the verdict and discharging the jury,[7] or giving bond.[8] It is also correctly as-

[2] Gerard v. People, 4 Ill. 362 (1842); Bedel v. People, 73 Ill. 320 (1874); Phillips v. People, 88 Ill. 160 (1878).

[3] 202 N. Y. 138, 95 N. E. 729 (1911).

[4] This is one of the recognized grounds of asserting that defendant is entitled to claim his constitutional privilege on the theory that had the jury been permitted to deliberate they presumably would have acquitted the defendant. In this case the jury stood ten to two for acquittal at the time of its discharge.

[5] King v. People, 5 Hun 297 (N. Y. 1875); People ex rel. Brinkman v. Barr, Warden, 248 N. Y. 126, 161 N. E. 444 (1928).

[6] Baxter v. People, 8 Ill. 368 (1846). Defendant was tried and found guilty of murder by verdict of jury returned on Sunday. The trial court, on the same day, sentenced defendant to be executed. Held, judgment void and reversed with directions to enter judgment on legal day. The reporter appends this note: "The legislature, soon after this decision was pronounced, passed an act changing the punishment in this case from death to imprisonment in the Penitentiary for life, should the plaintiff in error at the next term of the Warren Circuit Court, after sentence was again passed upon him, assent to such change. His assent was given at the time stated." *Quaere* as to the validity of such legislative interference with the judicial branch of the government.

[7] Baxter v. People, 8 Ill. 368 (1846).

[8] Johnston v. People, 31 Ill. 469 (1863).

serted that detention under a void judgment is ground for discharge on habeas corpus,[9] although the cases so holding have generally been cases where the judgment was void because the court had no jurisdiction to try the offense,[10] or the sentence imposed was outside of the court's power.[11] Because the judgment was void we may assume that the court was technically right in granting the first writ, but it should be remembered that the writ of habeas corpus ought not be made to operate as a writ of error,[12] hence the defendant is generally compelled to utilize the latter method of correcting the illegal judgment and is then barred from claiming that double jeopardy exists as he has removed that jeopardy by his own acts and is therefore said to waive his constitutional right.[13] In fact, the Supreme Court of Illinois has decided that if the only error made was in the rendition of a void judgment after an impartial trial and verdict of guilty, then the only action to be taken by that court on writ of error would be to reverse the judgment of the trial court and to remand the case for the sole purpose of entering a valid judgment.[14]

Attempts, moreover, have been made to distinguish the right to the writ of habeas corpus on the ground that it should be granted only where the invalidity of the judgment arises from lack of jurisdiction,[15] and not where the court having jurisdiction had acted erroneously in its proceedings.[16] In the latter group of cases it is recognized that the petition for habeas corpus will not lie, but defendant may have recourse only to a writ of error with its attendant consequence and that, after reversal at defendant's request, the former jeopardy had disappeared; while in the former group, since the court never had jurisdiction of the defendant, he has never been in jeopardy and so he may clearly be tried by the proper tribunal. It must also be noted that the effect of the writ of habeas corpus is merely to discharge

[9] Ill. State Bar Stats. (1935), Ch. 65, sec. 22, clause 1.

[10] Campbell v. People, 109 Ill. 565 (1884); Paulsen v. People, 195 Ill. 507, 63 N. E. 144 (1902).

[11] People ex rel. Maglori v. Siman, 284 Ill. 28, 119 N. E. 940 (1918); People ex rel. Miller v. Denemark, 354 Ill. 34, 187 N. E. 809 (1933).

[12] People ex rel. Georgetown v. Murphy, 202 Ill. 493, 67 N. E. 226 (1903); People ex rel. Wayman v. Zimmer, 252 Ill. 9, 96 N. E. 529 (1911).

[13] See footnote 2.

[14] Baxter v. People, 8 Ill. 368 (1846); People v. Coleman, 251 Ill. 497, 96 N. E. 239 (1911).

[15] Campbell v. People, 109 Ill. 565 (1884); Paulsen v. People, 195 Ill. 507, 63 N. E. 144 (1902); People ex rel. Nagel v. Heider, 225 Ill. 347, 80 N. E. 291 (1907), jurisdiction lost by failure to prosecute in apt time.

[16] People ex rel. Wayman v. Zimmer, 252 Ill. 9, 96 N. E. 529 (1911).

the person detained from custody and not from the penalty, hence usually does not operate as an acquittal and is no bar to a subsequent indictment.[17] The mere fact of the granting of the first petition for habeas corpus in the case under consideration, therefore, should not in and of itself be a bar to further proceedings.

Some thought must also be given to the second point made by the decision, that is, that a second trial of this defendant upon the same charge would place him in double jeopardy in violation of his constitutional right. The earlier New York case relied upon has already been referred to,[18] and the language thereof does justify the present court's conclusion that, as a matter of law, by virtue of precedent in New York at least, double jeopardy existed in the instant case. The dissenting opinion suggests that this is extending the constitutional guarantee of the defendant beyond its proper scope, inasmuch as it had formerly been restricted to cases wherein either the jury had been improperly prevented by the trial judge from arriving at a verdict which might have been in favor of the defendant,[19] or where the defendant had been acquitted on the former trial.[20] Such a view is justified by the decisions of Illinois and by those of other states. It has even been carried by some states to the point where the defendant is denied the privilege of subsequently raising the question of former jeopardy where he has been released from custody on habeas corpus on the ground that the first judgment was void, such courts holding that the petition for habeas corpus and the decision thereon at defendant's request operates to waive the question of former jeopardy by showing its non-existence just as it would have had defendant sought a writ of error.[21] There is a possible limitation of this view where the convicted defendant has satisfied the legal part of an excessive, and therefore void, sentence.[22]

[17] 16 C. J. 257 and authorities there noted.

[18] Footnote 3.

[19] Writ of habeas corpus based on claim of double jeopardy will be denied where mistrial is declared for a legal cause, People v. Peplos, 340 Ill. 27, 117 N. E. 54 (1930); or by consent of defendant, People v. Simos, 259 Ill. App. 253 (1930).

[20] Stoltz v. People, 5 Ill. 168 (1843); Durham v. People, 5 Ill. 172 (1843); Ball v. United States, 163 U. S. 662, 16 S. Ct. 1192, 41 L. Ed. 300 (1895).

[21] State ex rel. Cacciatore v. Drumright, 116 Fla. 586, 156 So. 721 (1934). See also annotated cases on this point in 97 A. L. R. 154.

[22] Ill. State Bar Stats. (1935), Ch. 65, sec. 21, clause 2; People ex rel. Maglori v. Siman, 284 Ill. 28, 119 N. E. 940 (1918).

In deciding as it has, the New York Court of Appeals appears to have relied too strongly on the language of the text-writers that "jeopardy exists wherever a valid trial has commenced" without examining the precedents upon which such statements are grounded,[23] and as a consequence has placed itself in the legally correct (for that state) but fundamentally unsound position of according to the properly convicted, guilty defendant another way by which to thwart justice. To refuse the law enforcing agencies a new trial and to set free the defendant for the reason that his astute counsel has employed one form of procedure, namely, habeas corpus, rather than another, namely, writ of error, is to place form and technicality above substance.

W. F. ZACHARIAS

VALIDITY OF TRANSFER OF STOCK CERTIFICATES AS DETERMINED BY LAW AT THEIR SITUS

Will the capacity to make a valid conveyance of corporate stocks evidenced by stock certificates, be determined by the domicile of the owner or by the situs of the certificates at the time the attempted transfer takes place?

This question arose in *Hutchison* v. *Ross et al.*,[1] a case representing the modern trend of opinion. In Quebec, where community property law exists, John Ross, a resident of that province, made an antenuptial agreement by which he agreed to establish a trust fund of $125,000 for his prospective wife. By the law of Quebec, the provisions of such an agreement may not be abrogated, modified, or enlarged after the marriage. Subsequent to the marriage Ross inherited an estate of about $10,000,000. He desired then to make better provision for his wife, and so made a trust agreement with the Equitable Trust Company in New York to establish a fund of $1,000,000 for her. Securities were delivered in New York to the bank as trustee. Among the securities were certificates of stocks, which were assigned to the bank. Some ten years later, after Ross had lost his fortune, he brought suit to have the trust declared void *ab initio* on the ground, among others, that the transfer of property for his wife was prevented by the law of Quebec. It was his contention that the intangibles, such as stock, had their situs at his domicile, under the old maxim, *mobilia sequuntur personam,* and hence the validity of their transfer was governed by the law of

[23] Bishop on Criminal Law (9th ed.), I, 752, sec. 104, sub. 5.
[1] 262 N. Y. 381, 187 N. E. 65 (1933).

his domicile. The court rejected this view and held that the transfer was valid under the law of New York.

In *Schmidt* v. *Perkins*[2] the court said: "The title to tangible personal property is ordinarily governed by the law of its situs. The maxim, *mobilia personam sequuntur,* states a mere fiction of law which it is sometimes necessary to apply in order to do justice, but it ought not to be extended beyond that necessity."

Lees et al. v. *Harding Whitman and Company*[3] states the general rule to be that an assignment of a movable, giving a good title according to the law of the country where the movable is situated at the time of the assignment, is valid. This has been the general rule in England since 1860. In support of the rule stated the court said: "The rule which looks to the law of the situs has the merit of adopting the law of the jurisdiction which has the actual control of the goods, and the merit of certainty."

In more recent years there has appeared a trend toward applying the same rule to such intangibles as are evidenced by a writing which, in mercantile transactions, must itself be transferred in order to effect a transfer of the right it evidences. The share of stock represents the interest of the shareholder in the corporation and is personal property in the nature of a chose in action.[4] The certificate itself may be regarded as property apart from the corporate entity and the interest of the shareholder. This is the so-called "mercantile theory" which regards the stock certificate as property in itself with a situs at the place where it exists, and it represents the modern trend of policy.[5]

This theory is not only logical, but is also adaptible to modern conditions in which we find the reason for its present existence. This was well expressed in *Lockwood* v. *U. S. Steel Corporation.*[6] There the court said: "The maxim *mobilia sequuntur personam* is based upon a legal fiction and has proved most useful in determining the right of succession to personal property; but in modern times 'since the great increase in the amount and variety of personal property not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs,* the law of the place where the property is kept and used.' "

[2] 74 N. J. L. 785, 67 A. 77 (1907).

[3] Cooper v. Philadelphia Worsted Co., 68 N. J. Eq. 622, reported as Lees et al. v. Harding, Whitman & Co. in 60 A. 352 (1905).

[4] Vidal v. South American Securities Co. et al., 276 F. 855 (1922).

[5] See note in 24 Mich. L. Rev. 411 and cases there cited.

[6] 209 N. Y. 375, 103 N. E. 697 (1913).

That this rule is applicable to certificates of stock was decided in *Direction Der Disconto-Gesellschaft* v. *United States Steel Corporation.*[7] In that case the facts were that the defendants were the Public Trustee, an English corporation appointed to be custodian of enemy property, and the United States Steel Corporation. The plaintiff, a German corporation, held the certificates for a hundred shares of United States Steel Corporation stock. The English board lawfully authorized the Public Trustee to seize this enemy property and vested the rights of the plaintiff in the Public Trustee. Mr. Justice Holmes, speaking for the court, said: "Therefore New Jersey, having authorized this corporation, like others, to issue certificates that so far represent the stock that ordinarily, at least, no one can get the benefits of ownership except through and by means of the paper, it recognizes as owner anyone to whom the person declared by the paper to be owner has transferred it by the indorsement provided for, wherever it takes place . . . but the question who is the owner of the paper depends upon the law of the place where the paper is. . . . An execution locally valid is as effectual as an ordinary purchase."

In his book, *The Transfer of Stock,*[8] Francis T. Christy, approving the decision in the Disconto case, declares: "The rule was established that, as between the parties to a sale or transfer of stock the law of the place where the sale or transfer is made governs, but in respect of the validity of the transfer as against the corporation, the law of the domicile of the corporation governs."

The Disconto case has become the leading case on the question, and seems to settle decisively that certificates of stock have a situs of their own. That this is logical will be conceded if we stop to consider the important distinction between shares and certificates of stock. The shares of stock are not corporeal chattels, but are in the nature of choses in action, and are intangible, incorporeal personal property.[9] Being intangible and incorporeal, the shares could not be said to have a situs of their own. But the certificates are merely written evidence of the ownership of the stock, and are not the shares. The certificates are, of course, tangible. Being tangible, they may perceivably be deemed to have a situs of their own.

[7] 267 U. S. 22, 45 S. Ct. 207, 69 L. Ed. 495 (1925).

[8] (New York: Baker, Voorhis & Co., 1929), p. 118.

[9] Norrie et al. v. Kansas City Southern Ry. Co. et al., 7 F. (2d) 158 (1925).

There is another ground of justification for this doctrine. This was discussed in a note[10] dealing with the Disconto case. It was said that that case seemed to be supported by a sound line of reasoning which compares certificates of stock to promissory notes, which are treated as having a situs where they are found.

It has been said that a certificate of stock is merely the symbol or paper evidence of the ownership of shares of stock and is not in itself property, and has no extrinsic value disconnected from the stock it represents, but is frequently treated in commercial markets as having a value in itself as a transferable symbol of property, like a negotiable instrument. Commercial usage identifies the share of stock with the certificate to such an extent that the share is given a situs with the certificate. The certificate of stock as distinguished from the shares of stock it represents, has been held to be not only property but tangible personal property.[11]

In *Lohman* v. *Kansas City Southern Railway Company*[12] it became necessary for the court to decide where certificates of stock had their situs. The court overruled all prior contrary decisions in Missouri and followed the Disconto case. Judge Blair, who delivered the opinion, said: "The Disconto-Gesellshaft case seems conclusively to establish the rule that shares of stock in a corporation represented by appropriate certificates of stock, constitute property in themselves, and not merely evidence of ownership, and have a situs for some purposes elsewhere than in the state where the corporation is domiciled. That case announces the latest and the controlling rule of the United States Supreme Court."

In *DeGanay* v. *Lederer*[13] the question before the court was as to the situs of certificates of stocks and bonds. The court said: "It is insisted that the maxim, *mobilia sequuntur personam*, applies in this instance and that the situs of the property was at the domicile of the owner in France. But this court has frequently declared that the maxim, a fiction at most, must yield to the facts and circumstances of cases which require it; and that notes, bonds, and mortgages may acquire a situs at a place other than the domicile of the owner. . . ." The court cited with approval the New York doctrine treating bonds, bills, and notes

[10] 39 Harv. L. Rev. 485.

[11] Hook v. Hoffman, 16 Ariz. 540, 147 P. 722 (1915); Winslow v. Fletcher, 53 Conn. 300, 4 A. 250 (1866).

[12] 326 Mo. 819, 33 S. W. (2d) 112 (1930).

[13] 250 U. S. 376, 39 S. Ct. 524, 63 L. Ed. 1042 (1919).

as having a situs at the place where they are found like other visible tangible chattels.

Goodrich, in his text,[14] discussing the question of the situs of intangibles, states as a general rule: "The validity of an assignment of an intangible chose in action should . . . be determined by the rule prevailing at the place where it is made." Then, speaking of bills of exchange and promissory notes, he says, "The paper on which the promise in the one case or the order in the other is written may be only the evidence of the chose in action in which the holder has 'property,' but such paper is treated in the commercial world and by the law as having a significance not given to the ordinary written evidence of a contract of parties." He states the rule to be that the transfer of such an instrument is to be governed by the rule regulating the transfer of tangibles, the law of the situs of the instrument at the time of the transfer.[15]

This is also the rule in England, first stated in *Alcock* v. *Smith*.[16] It was there held that the rule that the assignment of a tangible movable, such as would give a good title thereto according to the law of the country where the movable is situated at the time of the assignment (*lex situs*) is valid, applies to a bill of exchange and to any negotiable instrument. This case was subsequently approved in *Embiricos* v. *Anglo-Austrian Bank*[17] and is now the settled law in England.

The foregoing view is adopted in the Uniform Stock Transfer Act.[18] By that act title to the certificate and to the shares represented thereby can be transferred only by delivery of the certificate indorsed or by delivery of the certificate and a separate written assignment of it. This is professedly an embodiment of the mercantile theory. New York adopted the rule without statute.

In *Klein* v. *Wilson & Company, Inc.*[19] the court said: "Under these provisions of the Uniform Stock Act, I conceive the stock certificates to be more than mere evidence of interest in property, and to be the concrete physical representation of such

[14] Herbert F. Goodrich, Handbook on the Conflict of Laws, (St. Paul, Minnesota: West Publishing Co., 1927), pp. 363-4.

[15] See Weissman v. Banque de Bruxelles, 254 N. Y. 488, 173 N. E. 835 (1930).

[16] [1892] 1 Ch. 238.

[17] [1905] 1 K. B. 677.

[18] Ill. State Bar Stats. (1935), Ch. 32, par. 229 et seq.

[19] 7 F. (2d) 769 (1924).

interest, possessed of such characteristics and qualities as necessitate an actual delivery thereof in order to transfer title to the certificates themselves and the shares represented by them."

Since under the provisions of this act stock certificates are made negotiable, the validity of any transfer of such certificates should be governed by the same rule as governs the transfer of other negotiable instruments, that is, the lex situs.

J. D. GANNON