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Criminal Law—Habeas Corpus for Irregularity in Proceedings: Presumption of Regularity

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first instance in this case concerns the effect of the 1945 amendments to Section 323 of the Code upon Section 518, not the relationship between Sections 279 and 518 of the Code, which had always been fairly clear.

The second method used by the Court, in dismissing the defendant's argument, was to say that the Legislature did not intend to create the awkward situation which would arise if the defendant's argument were allowed to prevail.⁵² Whether the Court here cloaked judicial policy with legislative intent is an interesting question.

The second question of first instance to be decided by the Court was whether the demurrer should be allowed, *i.e.*, was the first degree grand larceny count sufficiently pleaded? That count alleged that all nine takings were a part of one overall plan. The People sought to apply the rationale of *People v. Cox*.⁵³ Simply expressed, this case stated that if successive thefts were part of one integrated scheme, then successive thefts would constitute a single theft regardless of the amount of time which had elapsed between them. The defendant argued that the *Cox* holding did not apply here because the People alleged that Rossi's thefts were false pretense takings, and that under Section 1290⁵⁴ of the Code, this allegation requires a separate intent and a new venture in each instance. The court replied by saying that the grand larceny count alleged one taking and one intent. The Court also stated that whether this unity of intent did exist was a question for the jury.

HABEAS CORPUS FOR IRREGULARITY IN PROCEEDINGS: PRESUMPTION OF REGULARITY

Section 480 of the New York Code of Criminal Procedure requires that when a defendant appears for judgment, he must be asked by the clerk whether he has any legal cause to show why judgment should not be pronounced against him. Relators Sheehan and Williams applied for *habeas corpus* on the ground that this section was not complied with. Their applications were granted by Special Term, and resentencing was ordered. The Appellate Division affirmed.⁵⁵

The Court of Appeals held that the presumption of regularity of official proceedings would require the denial of the writs unless evidence was introduced to show an irregularity.⁵⁶ Evidence that Section 480 was not complied with, must be found in the stenographic minutes of the testimony and in the Clerk's minutes of what occurred when sentence was imposed.⁵⁷ In affirming the order in the instance of Sheehan, the Court felt that the stenographic

52. The "awkward situation" which would result would be that while individual counts of an indictment can be demurred to, these demurrers could not be appealed from until a judgment concerning the whole of the indictment had been reached.

53. 286 N.Y. 137, 36 N.E.2d 84 (1941).

54. N.Y. PEN. LAW § 1290.

55. *People v. Murphy*, 7 A.D.2d 889, 181 N.Y.S.2d 451 (4th Dep't 1959); *People v. Murphy*, 7 A.D.2d 893, 181 N.Y.S.2d 633 (4th Dep't 1959).

56. *People v. Smyth*, 3 N.Y.2d 184, 164 N.Y.S.2d 737 (1957).

57. *People v. Murphy*, 6 N.Y.2d 234, 236, 189 N.Y.S.2d 182, 184 (1959).

and Clerk's minutes created a question of fact as to compliance with Section 480.⁵⁸ The stenographic minutes in William's case, however, contained a notation that the defendant was asked "the usual formal question" and the Clerk's minutes stated that the defendant's, of whom relator was one, were duly arraigned for sentence, pursuant to Section 480, Code of Criminal Procedure. The Court held that this established, as a matter of law, that Section 480 was complied with, and reversed the order.⁵⁹

It is clear from these decisions that *habeas corpus* is the proper remedy under these circumstances. The rule of evidence announced by the Court makes the presumption of regularity irrebuttable if compliance appears in the stenographic or Clerk's minutes. The fact that the minutes do not show that the question was asked, however, is not conclusive upon the question of compliance with Section 480,⁶⁰ though it is sufficient evidence to overcome the presumption of regularity.

CORAM NOBIS: DEFENDANT MUST BE APPRISED OF RIGHTS

A writ of *coram nobis* will be granted dismissing a conviction of a criminal charge when the defendant was not adequately informed of his rights. The granting of such a writ was overruled in *People v. Freundenberg*⁶¹ for lack of proof that the Trial Court failed to advise the defendant of the charges against him and of his right to counsel. Petitioner brought proceedings for a writ of *coram nobis* in the Court of Special Sessions, Bronx County,⁶² twenty years after being convicted of driving while intoxicated, and the writ granted there was upheld by the Appellate Division.⁶³ A dissenting minority of the Court of Appeals differed with the majority as to the effect of the findings of the Court of Special Sessions, and felt that the defendant had not been sufficiently apprised of his rights.

On the original trial of this case there was a one week delay between the arraignment and the trial. At the trial the Magistrate informed the defendant of the charges against him and asked if he wanted a postponement, "to get a lawyer." Defendant replied, "I want it for today." After the trial and verdict, but prior to the sentencing, the Court denied defendant's request for an adjournment to get an attorney.

During the proceedings for this writ the minutes of the original trial were amended to include the Magistrate's question as to whether defendant desired an adjournment of the proceedings in order to obtain an attorney. This amendment during the hearing may have made the dissenting minority suspicious, as to whether the defendant was actually apprised of his rights.

Judicial interference with the defendant's right to counsel has been held

58. *People v. Murphy*, 6 N.Y.2d 238, 240, 189 N.Y.S.2d 185, 187 (1959).

59. *People v. Murphy*, 6 N.Y.2d 234, 189 N.Y.S.2d 182 (1959).

60. *People v. Sheehan*, 4 A.D.2d 143, 163 N.Y.S.2d 313 (1st Dep't 1957) (dictum).

61. 5 N.Y.2d 209, 182 N.Y.S.2d 814 (1959).

62. 10 Misc. 2d 1091, 172 N.Y.S.2d 585 (City Ct. 1958).

63. 6 A.D.2d 8, 174 N.Y.S.2d 319 (1st Dep't 1958).