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Habeas Corpus—Existence of Remedy by Appeal or Writ of Error—Jurisdiction

329. If the contract is one which the corporation could not adopt the promoters are personally liable. *Marshalltown First National Bank v. Church Federation of America* (1906), 129 Iowa 268, 105 N. W. 578. But see *Durgin v. Smith* (1903), 133 Mich. 331, 94 N. W. 1044, where it was held that even where the contract was not binding on the proposed corporation, the promoters are not liable. Where, in such cases, there is an absence of stipulation as to liability in the contract between promoters and third parties the promoters are usually held liable. *Kelner v. Baxter* (1866), L. R. 2 C. P. 174; *Martin v. Fewell* (1883), 79 Mo. 401; *Munson v. Syracuse G. and C. R. Co.* (1886), 103 N. Y. 58, 8 N. E. 355. M. E. C., '29.

HABEAS CORPUS—EXISTENCE OF REMEDY BY APPEAL OR WRIT OF ERROR—JURISDICTION.—Defendant was charged with having intoxicating liquor in his possession. He pleaded guilty, was sentenced to six months in jail, *Bell.* None of these courts has declared a sterilization statute to be in was insufficient in that it did not specify the date upon which the alleged crime was committed. His appeal bond seemed to have been disallowed. After the time allowed for appeal had expired, defendant sued out this writ of habeas corpus. The court issued the writ and on the hearing discharged the defendant from custody. *Ex parte Syndor* (Mo., 1928), 10 S. W. (2d) 63.

From the face of this decision, it seems that the court deviated from the ironclad rule that a writ of habeas corpus will be issued only to test the jurisdiction of the court which committed the prisoner. This rule is followed in nearly every state of the union. *Henry v. Henkel* (1914), 235 U. S. 219; *People v. Zimmer* (1911), 252 Ill. 9, 96 N. E. 529; *Ex parte Mason* (1884), 16 Mo. A. 41; *State v. Dobson* (1896), 135 Mo. 1, 36 S. W. 238; *People v. Hanley* (1921), 191 N. Y. S. 501; *Ex parte O'Connor* (1915), 29 Cal. A. 225, 155 P. 115. Nor will a writ of habeas corpus issue in lieu of an appeal or writ of error. *In re Lincoln* (1906), 202 U. S. 178; *People v. Murphy* (1904), 212 Ill. 584, 72 N. E. 902; *In re Lewis* (1900), 124 Mich. 199, 82 N. W. 816. The court justifies its opinion, however, by expressly holding that a faulty information is a nullity, and that the court acquires no jurisdiction thereunder; and that since the court had no jurisdiction, and an appeal could no longer be brought, the writ of habeas corpus was rightfully issued and the defendant rightfully discharged.

But is the mere omission of the date of the crime an essential defect? It seems not. *State v. Myrberg* (1909), 56 Wash. 384, 105 P. 622; *State v. Hurley* (1912), 242 Mo. 452, 146 S. W. 1154; *Walker v. State* (1912), 12 Ga. A. 91, 76 S. E. 762; *Colwell v. State* (1916), 17 Ga. A. 750, 88 S. E. 410; *Ex parte Mitchum* (1922), 91 Tex. Cr. R. 62, 237 S. W. 936. The above cases and many others agree that where time is not of the essence of crime charged, it is immaterial.

Since the omission of time in the indictment is a mere formal requisite, it may be waived, either by express or implied waiver. In the principal

case a waiver should have been implied from the defendant's failure to demur or file a motion to quash, *People v. England* (1912), 170 Ill. A. 587; *Green v. Commonwealth* (1915), 164 Ky. 396, 175 S. W. 665.

Hence it is seen that the court in the principal case stretched the law to disproportion in order to set the defendant free. S. M. W., '29.

MASTER AND SERVANT—CONTRACT OF EMPLOYMENT AT YEARLY SALARY DETERMINABLE AT WILL.—Defendant cabled plaintiff in Sweden to become superintendent of his veneer plant in the State of Washington at an annual salary of $6,000. Upon plaintiff's arrival in New York, he was informed that his services were not needed. *Held,* that this type of contract constitutes an employment for an indefinite period and may be abandoned at will by either party without resulting liability. *Davidson v. Mackall-Paine Veneer Co.* (Wash., 1928), 271 P. 878.

Although not in accord with decisions of early English cases, the principal case is clearly in line with the trend of modern authority. Wood, MASTER AND SERVANT, 2d ed., sec. 136, at p. 282, gives an accurate survey of and fined $200.00. He later appealed on the ground that the information held that a general hiring or a hiring by the terms of which no time is fixed is a hiring for a year and that rule applies to all contracts of hiring and service, *Lilly v. Elwin* (1848), 11 Q. B. 742; *Fawcett v. Cash* (1834), 5 B. & Ad. 904, except where there is some custom relating to the matter in reference to which the parties are presumed to have contracted, or where the terms of the contract or the nature of the service is such as to rebut the presumption that a yearly hiring was intended. But according to English decisions, such general hiring is merely presumed to be a hiring for a year and may be rebutted by proof or even by other presumptions raised by circumstances surrounding the transaction. *Williams v. Byrne* (1837), 7 Ad. & E. 177; *Baxter v. Nurse* (1844), 6 Man. & G. 935. So where either party reserves the right to put an end to the contract at any time, *Rex. v. Bowden* (1827), 7 B. & C. 249; or if the master does not have entire control over the servant during the specified period, *Queen v. Ravenstonedale* (1840), 12 Ad. & E. 73.

"In the United States the rule is inflexible that a general or indefinite hiring is prima facie a hiring at will. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring and no presumption arises that it was even for a day, but only at the rate fixed for the services actually rendered. It is competent for either party to show what their mutual understanding was concerning the contract in question."

Similar language may be found in Labatt, MASTER AND SERVANT, 2d ed., sec. 159, in which he states: "The doctrine applied by the great majority of courts which have so far [1913] expressed an opinion on the subject, consists essentially in a complete repudiation of the presumption that a general or indefinite hiring is the hiring for a year, and the substitution of another presumption, *viz.*, that such a hiring is one at will. Under this doctrine, the burden of proving that such hiring was obligatory for a year rests on the party who seeks to establish that the contract covered that period."