

In Manitoba, only the Court of Queen's Bench has jurisdiction over *habeas corpus* proceedings.<sup>23</sup> It is true that Court of Appeal judges have, by virtue of section 25 of the Court of Appeal Act,<sup>24</sup> the jurisdiction to entertain *habeas corpus* applications. However, such jurisdiction is not bestowed on them *qua* Court of Appeal judges, but in their capacity as *ex officio* judges of the Court of Queen's Bench. Therefore, an applicant, refused a writ of *habeas corpus* by a regular Queen's Bench judge, could not then apply to a judge of the Court of Appeal. A second application does not lie to any other judge in Manitoba. The only remedy available is under section 57 of the Supreme Court Act.<sup>25</sup> By that Act an application can be made to a judge of the Supreme Court of Canada to issue the writ of *habeas corpus* to inquire into the cause of commitment in a criminal case.<sup>26</sup> Appeal therefrom lies to the full court. However, this remedy is usually not practical in view of the expense and inconvenience involved. It would be preferable to have an appeal to the provincial Court of Appeal.

It was once said that:

It is the glory and happiness of our excellent constitution that to prevent any injustice no man is to be concluded by the first judgment; but that if he apprehends himself to be aggrieved, he has another court to which he can resort for relief; for this purpose the law furnishes him with appeals.<sup>27</sup>

It is anomalous that the ancient right of *habeas corpus* is one of the exceptions to the "glory and happiness" of our constitution.<sup>28</sup> It is hoped that the Canadian Bar Association will see fit at a future Annual Meeting to pass a resolution recommending that the Criminal Code be amended to remedy the situation.<sup>29</sup>

PERRY W. SCHULMAN\*

## WHY TWENTY-ONE?

The age of majority for legal purposes is a flexible standard which varies from country to country. For example, the age of majority in Argentina is twenty-two, in Spain and Austria twenty-four, and in China twenty. In most parts of the British Commonwealth it is twenty-one.

23. Queen's Bench Act, R.S.M. 1954, c. 44., s. 49.

24. R.S.M. 1954, c. 40.

25. R.S.C. 1952, c. 259.

26. A very good example of such an application after the refusal of a similar application by a provincial court is *R. v. Seeley* (1908) 41 S.C.R. 5.

27. Pratt, L.C.J. in *Bentley's case* (1722) 1 Str. 557, quoted in *Boire v. Dondo* (1948) 1 W.W.R. 1047, and in *Benson v. Harrison (No. 2)* (1952) 5 W.W.R. (N.S.) 481, at p. 507, both decisions of the Manitoba Court of Appeal.

28. It is particularly so in view of the fact that there exists the right to appeal from the refusal of an application where the imprisonment results from a civil or quasi-criminal proceeding.

29. England has done so by the Administration of Justice Act, 1960, s. 14 (2), which provides an appeal and confirms that there is no right to make a new application except on new evidence. See *Re Shalom Schtraks* (2) (1962) 3 All E.R. 849, at p. 850.

\*Fourth year student, Manitoba Law School.

The question arises—why twenty-one? Is this figure an arbitrary number; is it merely a superstitious combination of three sevens,<sup>1</sup> or does it have some more rational basis?<sup>2</sup>

To discuss this question adequately it is necessary to turn to Roman Law, as embodied in the works of Justinian. In the time of Justinian, the Romans recognized three age groups prior to full adulthood, each of which carried with it certain incapacities: *infantia*, which lasted while a child was incapable of speech, *tutela impubes*, which extended from the close of infancy to puberty, (which was deemed to be the stage when a tutor was no longer needed), and *cura minoris*, which lasted from puberty to the age of twenty-five years. In about A.D. 407, *infantia* was fixed at below seven years of age, while in much later law, puberty was fixed at fourteen for males and twelve for females. However, these ages were subject to the doctrine of *venia aetatis*, which provided that full age could be conferred on a male child by imperial decree before it was actually attained chronologically, i.e., before the age of twenty-five was actually reached. By this doctrine, the age of majority was governed by a standardized test: whether the male pupil had the ability to understand and to pass judgment on his acts in law, particularly in so far as his property rights were concerned. Under the later rule of Constantine, this doctrine was modified in that only male minors who had attained the age of twenty might apply for *venia aetatis*. Gradually, under Roman Law, a child at puberty came to be considered as having attained the age of discretion, but not full capacity to manage his affairs. Thus, although the Romans fixed the age of majority at twenty-five, we can conclude there was a distinction between those who were above the age of puberty and those who were not.

Amongst the Barbarian tribes, and under the Riparian laws, it would seem that contingent upon the ability to bear arms, infancy could be terminated at fifteen. Fifteen also seems to have been established as the age of majority in most northern European societies between the ninth and eleventh centuries.

The adoption of fifteen as majority, rather than fourteen, as laid down by the Romans, raises an interesting point. It would seem unlikely that a European society, neighbouring on such an influential society as that of the Romans, would not be affected by the latter's laws and standards. And yet, if such a transmission of ideas did, in fact, take place, how are we to account for the additional year prerequisite to the attainment of majority in most Barbaric and European societies?

Lord Chief Baron Gilbert states in his book, *On Tenures*<sup>3</sup> that when the law imposed a one year time limit, it always added a day for better certainty, (as in cases of murder, where death must occur within a year and a

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1. "Twenty-one is the age of legal maturity. Why? Have physiologists and psychologists fixed this as the date, or is it merely the product of the magic numbers three and seven?" Bergen Evans, *The Natural History of Nonsense*, Vintage Books edition, 1958, p. 6.

2. See T. E. James, "The Age of Majority," (1960) 4 *American Journal of Legal History*, p. 22, on which this article relies quite heavily.

3. (1796), Preface.

day), and raises the possibility that this additional year was similarly introduced merely for better certainty. Other writers have explained this extra year on the grounds that a certain length of time was required to complete the handing over of property or livery of seisen, and have compared it to the executor's year.<sup>4</sup> However, it is not altogether inconceivable that these Barbarian peoples arrived at fifteen as the age of majority for their own reasons, and without being influenced by Roman Law.

The early English law relating to the age of majority shows one peculiarity not common to the early Roman or later Continental methods of determining capacity. In England, majority was closely linked with feudalism and its system of land tenure. One of the main effects of the Conquest of 1066 was the enforcement of a general principle of landholding from an overlord or the King, which came to be known as "Feudalism." It has been described as "a system of government, including the administration of justice, based upon landholding."<sup>5</sup> By the introduction of this system, William was able to compel all landholders to admit they held their land of him, either directly or through some intermediate lord. In respect of their landholding, landowners were compelled to undertake certain services for their lord. The term "tenure" denotes the service rendered, and describes the relation between the tenant and his lord. Tenants holding in freehold were subject to one of: (1) military tenure, (2) tenure by serjeanty, (3) tenure by religious service or, (4) tenure in socage. The two most important of these were socage tenure and military tenure. Under socage tenure, the tenant was compelled either to pay a certain sum of money to his lord, or to render to him services of an agricultural nature—this usually consisted of presenting the lord with gifts of grain, fowl, fish, or the like. Under military tenure, the tenant was obliged to pass a certain number of days each year serving as a bodyguard to his King, or acting as a general protector of the peace.

In socage tenure, which was essentially agricultural, the infant came of majority, and was thus liable to service, "as soon as he was capable of attaining to husbandry and 'of conducting this rustic employ.'"<sup>6</sup> Fifteen seems to have been the recognized age of majority for socage tenants. A tenant in socage attained full age early since, at this time, life was rough and crude, and there was not much for him to learn.

During the eleventh and twelfth centuries, fifteen was also the age of majority for the tenant in knight service. By the end of the thirteenth century, however, it had increased to twenty-one. There have been many theories advanced in an attempt to explain this raising of age in military tenure. Most writers do concur, however, in the belief that the increase in the weight of arms was a decisive factor. New, more elaborate, defensive armour was introduced during the eleventh and twelfth centuries, and was

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4. See James, *supra*, note 2, at p. 25.

5. H. Potter, *Outlines of English Legal History*, 5th ed. (1958), p. 9.

6. James, *supra*, note 2, at p. 30.

fairly widely utilized by the middle of the thirteenth century. It was during these times that the full-length mail shirt, which covered the extremities of the body and the mail coif, which guarded the neck and most of the face were developed. Another factor in raising the age of majority was probably the increasing use of horses in battle during the period, and the consequent need for more skill in combat. The result of these developments was that a young man could not possibly acquire the strength, maturity and training necessary to render military service until he was approximately twenty years of age.

Originally, twenty was selected as the age of emancipation, perhaps because it was a round number. However, by the thirteenth century, the title of knighthood was conferrable only upon those who had attained twenty-one years. Again we are faced with the problem of the additional year. The ultimate selection of twenty-one as the precise age of majority was probably connected with the laws of wardship. When the wardship was terminated, the guardian was bound to restore to the heir his inheritance, in good condition and free from all debts. And, as we have seen, the law often provided a period of grace in such situations. Hence, the age of twenty-one probably represented the age at which a young man was likely to be ready to undertake military service, plus a year in which to effect the transfer of property from guardian to heir.

Thus we may conclude that twenty-one is not an arbitrary age of majority founded on superstition, but rather is a curious development from the old system of holding land under military tenure.

Military tenure was abolished in 1660, but the idea that twenty-one denoted capacity remained. Gradually, this idea came to be generally accepted, and twenty-one was established as the age of majority for all purposes. The other rules lingered on as customs only. A development such as this exemplifies the way in which the law of the higher classes often became the law for all, or as Pollock and Maitland say: "again we have a good instance of the manner in which the law for the gentry becomes English common law."<sup>7</sup>

HEATHER L. HENDERSON\*



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7. *History of English Law*, 2nd. ed., vol. II, p. 438.

\*Second year student, Manitoba Law School.