

require the land, and in 1958 Wagland sold it at a profit. The Crown, not unnaturally, argued that at the time of the purchase Wagland had the secondary intention to realize a profit by sale of the land, if it was not leased by the company. The Crown relied for authority on Mr. Justice Thurlow's decisions in the two cases previously noted.²⁵ Wagland candidly admitted that if the company did not require the land he was prepared to sell it, but Mr. Snyder, Chairman of the Tax Appeal Board, nevertheless found his profit to be a capital gain. He found Wagland's course of conduct to be that of a true investor, and not that of a real estate speculator. He stated, in declining to apply the secondary intention theory (and it is interesting to contrast this with his previously noted comment²⁶):

It cannot be found that the appellant's admission that he hoped to realize a profit on the sale of the property if it could not be rented . . . stamps the transaction now considered with speculative imprint . . . the hope of realizing a profit is surely in the mind of all investors. Few investments would be made if the purchaser anticipated a loss on disposing of the asset . . .²⁷

So we are brought back to the realities of practical life by some eminently reasonable decisions. Since intention is always one of the factors determining taxability, the presence of a secondary profit-making motive may still be considered, but only as one (preferably a minor one) of the "badges" of trade. Courts in the future will not place nearly so much reliance on secondary intention as they have in the recent past. The taxpayer will still escape with his capital gain intact, notwithstanding the existence of a secondary profit-making intention, if he acted without commercial *animus*. It now appears that the practical investor whose mind considered more than one possibility, *ex abundanti cautela*, will no longer be penalized by the application of the secondary intention theory, with all its pitfalls and subjective probings.²⁸ It is certainly to be hoped that this harsh and unwieldy doctrine has been given a premanent burial.

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"THE ANCIENT BUT IMAGINARY RIGHT TO GO ROUND AND ROUND FROM JUDGE TO JUDGE"

The Criminal Law Section of the Canadian Bar Association, at the 1961 Annual Meeting in Winnipeg, considered a resolution recommending to the Parliament of Canada that the Criminal Code be amended to permit an appeal from the refusal of an application for a writ of *habeas corpus* in a criminal proceeding. The resolution was defeated because it was felt that the applicant has a sufficient remedy: the right to make successive applica-

25. *Supra*, note 8.

26. *Supra*, note 6.

27. P. 56.

28. *St. Aubin v. M.N.R.* (1962) C.T.C. 520, indicates that the doctrine may to some extent be rearing its ugly head once more.

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tions to every superior court judge in the province, each of whom must decide the application on the merits, unfettered in his decision by the decisions of his brother judges who have already heard the application. It is submitted that there is no right to go from judge to judge within a court in *habeas corpus* applications, and that the proposed amendment is therefore a desirable one.

At the present time there exists no right to appeal to the Court of Appeal from the refusal of an application for *habeas corpus* in a criminal proceeding.¹ Appeal was unknown to the common law, so if the right is to exist it must be created by statute.² An application for a writ of *habeas corpus* resulting from a criminal conviction is a step in a criminal proceeding, and therefore provisions with regard to appeal from a *habeas corpus* application lie within the exclusive jurisdiction of the federal Parliament under section 91(27) of the British North America Act.³ Since there is no provision in the Criminal Code or other federal statute permitting an appeal from the refusal of an application for *habeas corpus*, there is no right to appeal from a refusal.

The view that at common law there existed a right to go from judge to judge seeking a writ of *habeas corpus* can be traced to a *dictum* of Lord Halsbury, L.C. in *Cox v. Hakes*.⁴

If release was refused, a person detained might . . . make a fresh application to every judge or court in turn, and each court or judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge.

This view has been followed by a number of Canadian courts, both in Manitoba⁵ and elsewhere.⁶ In the case of *R. v. Iaci* Chief Justice Hunter went so far as to hold that not only does the right exist to go from judge

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1. *R. v. Barre* (1905) 11 C.C.C. 1, 15 M.R. 420, (Manitoba Court of Appeal). *Fischer v. The Queen*, September 28, 1960, unreported decision of Manitoba Court of Appeal. *R. v. McAdam* (1925) 44 C.C.C. 155, (British Columbia Court of Appeal). *Ex parte Johnston* (1959) O.R. 322. The draft bill of the present Criminal Code, S.C. 1953, c. 307, provided for an appeal, to be heard within seven days from the determination of the application. It was feared that the procedure for appeal would allow the Crown to detain a prisoner for another seven days, merely by filing a notice of appeal, so the provision was not included in the new Code. See Stambler, "Habeas Corpus—The Constitutional Problems of a Prerogative Writ," (1957) 15 *University of Toronto Faculty of Law Review* 42.
 2. *Attorney-General v. Sillem* (1864) 10 H.L.C. 704, at p. 720; *Brizard v. Brizard* (1914) 24 M.R. 113, at p. 117; *Northwest Mortgage & Finance Co. Ltd. v. Commissioner of Excise* (1945) 52 M.R. 360, at p. 375; *Prince Edward Island v. Egan* (1941) S.C.R. 396, at p. 399.
 3. *Re Storgoff* (1945) S.C.R. 526. This case decided that *habeas corpus* is a procedural writ, which takes on the character of the proceedings in which it is issued. It follows that if imprisonment results from civil proceedings, or from convictions under provincial statutes, provisions with regard to appeal from the refusal of a *habeas corpus* application lie within the jurisdiction of the provincial legislatures. In such a case there exists in Manitoba the right to appeal to the Court of Appeal from a refusal by virtue of section 99 of the Queen's Bench Act, R.S.M. 1954, c. 44.
 4. (1890) A.C. 506, at p. 514.
 5. *Re Royston* (1909) 18 M.R. 539, a decision of Mr. Justice (later Chief Justice) Mathers, and *Re Helik* (1939) 47 M.R. 179, a decision of Robson, J. A.
 6. *Re McKenzie* (1881) 14 N.S.R. 481 (Weatherbe, J.); *Ex parte Byrne* (1882) 22 N.B.R. 427, at p. 436 (Palmer, J.); *Re Bouack* (1892) 2 B.C.R. 216, at p. 222 (Walkem, J.); *R. v. Carter* (1902) 5 C.C.C. 401 (Townshend, J., in Nova Scotia); *R. v. Graves* (1910) 21 O.L.R. 329 (Riddell, J.); *Re Paul* (1912) 2 W.W.R. 927 (Beck, J., in Alberta); *R. v. Jackson* (1914) 5 W.W.R. 1286 (Walsh, J., in Alberta); *R. v. Therrien* (1915) 25 C.C.C. 275, at p. 278 (Cross, J., in Quebec); *R. v. Campbell* (1916) 26 C.C.C. 196 (Hunter, C. J., in British Columbia); *R. v. Gee Dew* (1924) 2 W.W.R. 773 (Hunter, C. J. B. C.), and the cases referred to therein; *R. v. Iaci* (1925) 2 W.W.R. 129 (Hunter, C. J. B. C.); *Re O'Connor* (1928) 1 W.W.R. 65 (Hunter, C. J. B. C.); *Eshugbayi Eleko v. Government of Nigeria* (1928) 3 W.W.R. 437, A.C. 459; *R. v. Ciminelli* (2) (1943) 2 W.W.R. 139 (Farris, C. J. S. C., in British Columbia); *Salayka and Hains v. Wilby* (1944) 2 W.W.R. 362, at p. 369 (O'Halloran, J. A., dissenting); *Re Munarish* (1958) 26 W.W.R. 175 (McInnes, J., in British Columbia).

to judge, but a man has the right to keep going back to the same judge, and the judge must decide the matter anew despite his earlier refusal of the application.

It is submitted, however, that stronger authority exists for the opposite view. Lord Halsbury was the only member of the court in *Cox v. Hakes* to state the rule as he did. Lord Herschell stated that the applicant has the right merely to go from *court to court*, not from *judge to judge* within a single court.⁷ Lord Herschell's words were adopted as the law of Canada by Sir Charles Fitzpatrick, C. J., on behalf of a unanimous Supreme Court of Canada in *R. v. Seeley*.⁸ The view was adopted in Manitoba in *R. v. Romanchuk*,⁹ where Galt, J. stated:

... there seems to be no pretext for the practice of going from judge to judge of the same court. Here in Manitoba, we have but the one court of original jurisdiction in questions of this kind, *viz.*, the King's Bench, and it appears to me that an application for a writ of *habeas corpus*, when disposed of by one of the judges on its merits, cannot be renewed before any other single judge.

It was also approved by the British Columbia Court of Appeal in *R. v. Loo Len*.¹⁰

In the recent English case of *Re Hastings (1)*,¹¹ an accused moved before a Divisional Court in the Queen's Bench division for a writ of *habeas corpus*, and his application was rejected by the Court, composed of Lord Goddard, C.J., Streatfeild, J. and Slade, J. Subsequently, in *Re Hastings (2)*¹² the accused made a motion to the same court differently constituted, for a writ of *habeas corpus*. Lord Parker, C.J., delivering the judgment of the court, dismissed the application on the ground that it had no jurisdiction to hear the case again. In *Re Hastings (3)*¹³ the accused again applied for a writ of *habeas corpus*, this time to a Divisional Court of the Chancery Division. The Court, composed of Vaisey, J. and Harman, J., again dismissed the application for lack of jurisdiction. Harman, J. referred to "the ancient but imaginary right to go round and round from judge to judge when the term is in progress."¹⁴

The *ratio decidendi* of the *Hastings* cases might be stated as follows: there does not exist, and has never existed, the right to go from judge to judge until either a writ is obtained or the whole judicial panel is exhausted. At one time there did exist the right to go from court to court, but only once to a court in term. While in term the courts sat *en banc*. At that time the courts were on vacation during a great portion of the year. During

7. Page 527. Lord Macnaghten agreed with Lord Herschell. Lord Bramwell, at p. 523, expressed a similar opinion. Lord Watson agreed with Lord Bramwell and Lord Herschell. Lord Field, at p. 543, agreed on this point, although he dissented. A similar view was expressed by Lord Esher, M.R. in the Court of Appeal (1887) 20 Q.B.D. 1, at p. 13 (*sub nom. Ex parte Cox Bell*).

8. (1908) 41 S.C.R. 5. The court was also composed of Girouard, J., Davies, J., MacLennan J. and Duff, J.

9. (1924) 34 M.R. 371, at p. 379.

10. (1924) 1 W.W.R. 735. For a similar view see *The State (Dowling) v. Kingston (No. 2)* (1937) Ir. R. 699; R.F.V. Heuston, "Habeas Corpus Procedure", 66 L.Q.R. 79; D. M. Gordon, case comment (1945) 23 Can. Bar Rev. 595, at p. 598.

11. (1958) 1 All E.R. 707.

12. (1958) 3 All E.R. 625.

13. (1959) 1 All E.R. 698, affirmed on other grounds, (1959) 3 All E.R. 221.

14. *Ibid.*, at p. 702.

vacation one could not get the opinion of the entire court, and therefore could go from judge to judge within the court. The Judicature Act of 1873 united the Courts of Queen's Bench, Common Pleas, Exchequer, Chancery, Exchequer Chamber and others into the Supreme Court of Judicature. The Act also abolished the division of the legal year into terms, and an application can now be heard by the court at any time. Since the court (the Queen's Bench Division) had disposed of Hastings' application, it could neither be brought to the same division, differently constituted, nor to a different division of the same court (the Chancery Division).

In the case of *Goldhart v. The Queen (2)*,¹⁵ Kerwin, C.J. agreed. He said:

The judgments in connection with various applications by Edward Thomas Hastings show that whatever may have been the position at one time, there is now no justification for the idea that, if a person is refused a writ of *habeas corpus* by one judge, he may go to each judge in succession to renew his application.

In November, 1958, in Ontario, Mr. Justice Aylen dismissed applications by one Johnston and one Shane for discharge upon the return of writs of *habeas corpus*. In the case of *Ex parte Shane*,¹⁶ the applicant again applied for discharge on the return of a writ of *habeas corpus*. This time the application was heard by McRuer, C.J.H.C., who examined the *Hastings* cases and the prior conflicting Canadian cases, and agreed that there never was a right to make successive applications to each judge in turn for the issue of a writ of *habeas corpus*.¹⁷ He did, however, go on to consider the merits of the application, and refuse the discharge.

Of the cases that held that the right exists, some of the decisions were *obiter dicta*,¹⁸ in one the point was not contested,¹⁹ in one reasons were not given,²⁰ and others relied upon the *dictum* of Lord Halsbury in *Cox v. Hakes*.²¹ The decision in *Re Helik* is of little weight on this point, firstly because Robson, J. A. failed to deal with the earlier decision of Mr. Justice Galt in *R. v. Romanchuk*, and secondly because Crown counsel did not even question the right to go from judge to judge. The *Salayka* and *Ciminelli* cases are greatly weakened because the court in those cases held that the Privy Council in the *Eleko* case overruled the decision in *Regina v. Loo Len*. The Privy Council decision, however, did not involve an appeal from Canada; it was an appeal from Nigeria, and was not binding on Canadian courts.²²

15. (1960) S.C.R. 431, at p. 437.

16. (1959) O.R. 337.

17. But see *Ex parte Johnston* (1959) O.R. 322. However, in that case the court did not hear argument on the point, and did not decide the issue. See also A. E. Popple, "Habeas Corpus Applications made from Judge to Judge", 33 C.R. 81, and A. F. N. Poole, "Successive Applications for the Writ of Habeas Corpus", 2 O.H.L.J. 383. In the latter article Mr. Poole, without referring to *Goldhart v. The Queen (2)*, concludes that it is still arguable that there exists the right to make successive applications.

18. *Re McKenzie* (1881) 14 N.S.R. 481; *Ex parte Byrne* (1882) 22 N.B.R. 427; *R. v. Graves* (1910) 21 O.L.R. 329.

19. *R. v. Carter* (1902) 5 C.C.C. 401.

20. *R. v. Campbell* (1916) 26 C.C.C. 196.

21. *In Re Bowack* (1892) 2 B.C.R. 222; *Re Paul* (1912) 2 W.W.R. 927; *R. v. Therrien* (1915) 25 C.C.C. 275; *R. v. Iaci* (1925) 2 W.W.R. 129; *Re O'Connor* (1928) 1 W.W.R. 65.

22. *Negro v. Pietro's Bread Co.* (1933) O.R. 112; *Austin v Mascarini* (1942) O.R. 165.

In Manitoba, only the Court of Queen's Bench has jurisdiction over *habeas corpus* proceedings.²³ It is true that Court of Appeal judges have, by virtue of section 25 of the Court of Appeal Act,²⁴ 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.²⁵ 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.²⁶ 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.²⁷

It is anomalous that the ancient right of *habeas corpus* is one of the exceptions to the "glory and happiness" of our constitution.²⁸ 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.²⁹

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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.

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