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Successive Applications for the Writ of Habeas Corpus

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Until comparatively recently an application for a writ of habeas corpus was considered to be a civil matter in that it concerned personal freedom. It has now been decided in both England and Canada that this is not always true. Important constitutional implications were shown to result from the distinction between civil and criminal matters in the case of *in re Storgoff*,¹ where a British Columbia statute providing for appeals in habeas corpus proceedings was held to be unconstitutional insofar as it applied to convictions under the Criminal Code.

A "criminal matter" was defined by Viscount Cave L.C. in *re Clifford and O'Sullivan*,² where he said the case

must involve the consideration of some charge of crime, that is to say, of an offence against the public law; and that charge must have been preferred or be about to be preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence.³

In elaborating this, Viscount Simon L.C. said in *Amand v. Home Secretary*⁴

It is the nature and character of the proceeding in which habeas corpus is sought which provides the test. If the matter is one the direct outcome of which may be the trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal. This is the true effect of the two conditions formulated by Viscount Cave in *re Clifford and O'Sullivan*.

In *in re Storgoff* the applicant had been convicted and imprisoned under the Criminal Code, and six of the seven judges who heard the appeal in the Supreme Court of Canada held that this was a criminal matter and approved the definition given above. The argument before the court was that the right to liberty was a civil right, and therefore the Provincial Legislature was competent to pass such legislation,

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¹ [1945] S.C.R. 526.

² [1922] 2 A.C. 570.

³ *Id.* at 580.

⁴ [1943] A.C. 147, at p. 156.

but this was rejected by the court.⁵ However, Rand J.⁶ held that the Provincial Legislatures do have authority to legislate with regard to habeas corpus in connection with provincial offences, and there is also authority for this in the dissenting judgment of Rinfret C.J.

The right to successive applications appears superficially to be equivalent to an appeal, but apart from judicial dicta that each application must be heard *de novo*, there are two theoretical distinctions. First, the second and subsequent applications may be made to courts of a jurisdiction coordinate with that of the one to which the first application was made. Secondly, if a writ is granted, the person against whom it issues has no appeal, but must make a return to the writ as directed, and has no appeal if a discharge is ordered, whereas an applicant who has failed can try again elsewhere. It is inconsistent with the normal concept of a right of appeal that it should be available to only one of the parties to a case.

Since no right of appeal in a habeas corpus proceeding exists at common law and none has been provided by the Dominion Parliament the right to make successive applications is of great importance. There are two situations in which such a right might be exercised: when a writ has been refused on a previous application, and when a writ has issued but on the return the prisoner has been remanded.

The main controversy has centered on whether there is a right to apply successively to individual judges and, in England, to different courts; recent decisions have denied the existence of such a right at all.

The English authorities will be discussed first.

Originally the writ only issued from the Court of Queen's Bench in term, but in 1679 the Habeas Corpus Act⁷ was passed authorising any court, and any judge during vacation, to issue the writ.

An early judicial authority for a right to apply to each court in turn is found in *ex p. Partington*,⁸ where Parke B. said

the defendant has a right to the opinion of every court as to the propriety of his imprisonment.⁹

The issue was the interpretation of a statute relating to the attachment of debtors, and Partington was trying to obtain his release from prison under its provisions. The dictum just quoted was made in the Court of Exchequer; writs had already been issued by the Court of Queen's Bench and the Lord Chief Baron in chambers, but a discharge had in each case been refused. Only the Queen's

⁵ See D. M. Gordon, (1945) 23 Can. Bar Rev. 595, for a demonstration of the fallacies in this contention.

⁶ [1945] S.C.R. 526, at p. 583.

⁷ 31 Car. 2, c. 2.

⁸ (1845) 13 M. & W. 679, 153 E.R. 284.

⁹ *Id.* at 683, 286.

Bench hearing is reported,¹⁰ and it contains no reference to successive applications.

Successive applications to different courts were possible because the doctrine of *res judicata* did not apply. The explanation for this is in the nature of the writ itself; the only way of challenging a decision of a court in banc was by a writ of error, which could not apply to the prerogative writs as no formal judgment was ever issued in proceedings on them.¹¹

The first authority for the right to apply to each judge in turn is found in the speech of Lord Halsbury in *Cox v. Hakes*,¹² which commences with a statement of general principle:

My Lords, probably no more important or serious question has ever come before your Lordships' House. For a period extending as far back as our legal history the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made justifying detention the consequence was immediate release from custody. If release was refused, a person detained might — see *ex p. Partington* — make a fresh application to every judge or every 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.

Though a dictum from Lord Halsbury is entitled to the greatest respect, the authority of this is weakened by no other member of the House stating the same principle, and by some of them confirming the right to apply to separate courts only, making no mention of judges. In addition, the case itself concerned the right to appeal, not to make successive applications; the procedure was only considered in order to show the case did not come within the English Judicature Act.

The main authority for the right to go from judge to judge is *Eshugbayi Eleko v. Governor General of Nigeria*.¹³ Lord Hailsham, in delivering the opinion of the Judicial Committee, said¹⁴

if it be conceded that any judge has jurisdiction to order the writ to issue, then in the view of their Lordships each judge is a tribunal to which application can be made within the meaning of the rule, and every judge must hear the application on the merits. It follows that, although by the Judicature Acts the Courts have been combined in the one High Court of Justice, each judge of that court still has jurisdiction to entertain an application for the writ of habeas corpus in term time or vacation, and that he is bound to hear and determine such an application on its merits notwithstanding that some other judge has already refused a similar application.

The issue came squarely before the English courts as a result of the persistence of one Edward Thomas Hastings.¹⁵ After an unsuccessful appeal from conviction he applied to a Divisional Court of the Queen's Bench Division for a writ of habeas corpus, which

¹⁰ (1844) 6 Q.B. 649; 115 E.R. 244.

¹¹ See Lord Goddard, (1949) 65 L.Q.R. 30.

¹² (1890) 15 App. Cas. 506, at 514.

¹³ [1928] A.C. 459.

¹⁴ *Id.* at 468.

¹⁵ For a comment on the Hastings series of cases see S. A. de Smith, (1959) 22 M.L.R. 184.

was refused,¹⁶ and an appeal from this refusal was unsuccessful.¹⁷ Hastings then applied to another Divisional Court of the Queen's Bench Division, composed of three judges different from those who had heard his first application; he relied on the same grounds and produced the same evidence.¹⁸ The Solicitor-General intervened on two grounds, first, that an applicant has never had a right to go from judge to judge except when the court is not sitting (i.e. in vacation), secondly, in the alternative, that though an applicant has a right to go from Court to Court, the union of the Courts by the Judicature Act means that at most one application can be made to each Division.

Lord Parker C.J., after stating that the judgment represented the opinion of the whole court, pointed out that the old courts always sat in banc, and that no single judge could bind the whole Court. The Act of 1679, where it was concerned with single judges, merely gave them the power to hear applications in vacation, and even in the early nineteenth century it was laid down that a single judge only had power to issue the writ in vacation.¹⁹ Lord Parker went on to show that a second application could not be made to the same court on the same facts since there had already been an exercise of judicial discretion on the first application.²⁰ In considering *ex p. Partington* he noted an inconsistency in the reports of the judgement,²¹ but held that all versions were consistent with the right to apply from judge to judge only existing in vacation. In discussing the later authorities, the Lord Chief Justice commented that in *Cox v. Hakes* Lord Halsbury was alone in stating the right was to go from judge to judge, and held that he was not bound by the decision of the Privy Council in *Eleko v. Governor General*. He therefore decided that prior to the Judicature Act the right was to go from court to court. Since by that Act a Divisional Court could exercise the jurisdiction of the old Court sitting in banc, a subsequent application to the same division would be refused on the grounds that a judicial discretion had already been exercised.

This decision disposed of the application, but left open the question whether there was a right to go from Division to Division as distinct from Divisional Court to Divisional Court in the same Division.

Four months later Hastings applied to a Divisional Court of the Chancery Division.²² Vaisey J. held after the Judicature Acts the different Divisions no longer exist as separate courts; there is only

¹⁶ *Re Hastings*, [1958] 1 W.L.R. 372, 1 All E.R. 707.

¹⁷ The Times, 29 July 1958.

¹⁸ *Re Hastings (No. 2)*, [1958] 3 W.L.R. 768; [1959] 1 Q.B. 358. The W.L.R. does not contain the arguments of counsel.

¹⁹ *Hobhouse's Case* (1820), 3 B. & Ald. 420; 106 E.R. 716, per Abbott C.J., later Lord Tenterden, at 422, 717.

²⁰ Quoting Parke B. in *in re Cobbett* (1845), 5 L.T.O.S. 130.

²¹ See also R. F. V. Heuston, (1950) 66 L.Q.R. 79.

²² *Re Hastings (No. 3)*, [1959] Ch. 368, 2 W.L.R. 454.

one High Court to which judges are appointed, though they are assigned to different Divisions later. Harman J. held that an applicant has no right to go from judge to judge during term time. An appeal failed on the grounds that the Court of Appeal was not empowered to hear appeals in a criminal cause or matter.²³

The overall result of this *Hastings* series of cases is that the only right in an application for habeas corpus is to apply once to a Divisional Court in term time or to a single judge in vacation. Assuming the principle in these decisions applies to Canada, since there are no Divisions in Canadian Courts an application can only be made once, and it must be made to a single judge.

An authority much relied on by the courts in *in re Hastings* is the Irish case of *The State (Dowling) v. Kingston*.²⁴ An application for habeas corpus was made to the High Court, consisting of three judges, which by a majority refused to grant it. Another application was immediately made to the dissenting judge, who also refused. An appeal taken on the first refusal to the Supreme Court failed, Fitzgibbon J. submitting the judgments in *Cox v. Hakes* to a detailed analysis and deciding that Lord Halsbury had no authority for his statement. He also considered that the Judicature Acts, passed to simplify procedure, could not be considered to have allowed a succession of separate applications to each judge sitting as a separate tribunal.

In none of these cases was an attempt made to distinguish between making an application after a writ has been refused and making an application after a writ has been granted but a discharge refused. *The State (Dowling) v. Kingston* is the only case on the first situation, the others all involve the second. At first sight the two situations are quite different from each other, but it is possible that at common law they both fall under the same principle, that when an application has been made a judicial discretion has been exercised and no subsequent attempt can be made. The effect of the *Hastings* decisions is to apply this to individual judges.

Cases involving successive applications where a discharge has been refused greatly outnumber those where the writ itself has been refused. The reason may be that judges issue the writ almost as a matter of course, preferring to wait for the return, when both sides will be represented, to determine whether the applicant should be released. The writ cannot be obtained as of right, however, either at common law or under statute, since there must be a probable and reasonable ground of complaint.

In 1866 the Province of Canada passed "An Act for More Effectually Securing the Liberty of the Subject,"²⁵ section 6 of which provided:

²³ *Re Hastings (No. 3)*, [1959] 1 W.L.R. 807.

²⁴ [1937] I.R. 699.

²⁵ 29-30 Vict., c. 45.

In case any person confined or restrained of his or her liberty . . . shall be brought before the court in term time upon a writ of habeas corpus, and shall be remanded to custody again upon the original order or warrant of commitment . . . it shall and may be lawful for such person to appeal from the decision or judgment of the said court, to the Court of Error and Appeal . . .

Patterson J.A. in *in re Hall*,²⁶ decided before *Cox v. Hakes*, said that a decision on appeal under this section would bind all courts of first instance, and therefore the question of successive applications to different courts was precluded by this section. This reasoning would a fortiori apply to applications to different judges. He also pointed out that the union by the Judicature Act of the old Courts into a single Court made applications to different courts impossible.²⁷

Since the Dominion Parliament has passed no legislation concerning habeas corpus the 1866 Act still applies. However, in *ex parte Johnston*,²⁸ the Ontario Court of Appeal held that after the 1913 Judicature Act abolishing the Divisional Courts there was no court left to which an appeal in habeas corpus would lie.²⁹ This immediately removes one ratio for the decision in *in re Hall*, but does not affect its relevance to the organization of the courts. Morden J.A., who delivered the judgment of the Court of Appeal in *ex p. Johnston*, assumed the law of Ontario was the same as that laid down in *Eleko v. Governor-General*, and considered the appeals before him as if they were subsequent applications after a discharge had been refused made to him as an ex officio judge of the High Court.³⁰ He discussed the decision in *Re Hastings (No. 2)* but did not follow it, pointing out that Lord Parker C.J. did not consider himself bound by the decision in *Eleko v. Governor-General*.

About three weeks after the decision in *ex p. Johnston* one of the unsuccessful appellants obtained a second writ from Wilson J., and the return came before McRuer C.J.H.C. with the style of cause *ex parte Shane*.³¹ Before hearing the application on its merits the learned Chief Justice had to make a decision on the preliminary objection that this was a return to the second writ issued to the applicant, who only had a right to make one application. He held that he was not bound by the decision in *Eleko v. Governor-General*, and that, since under the provisions of section 12(2) of the Judicature Act³² each judge exercises the jurisdiction of the Supreme Court when making a decision, no order could be made which was inconsistent with that made by the judge to whom the first application was made.

²⁶ (1882), 8 O.A.R. 135, at p. 149.

²⁷ On this point see also *Taylor v. Scott* (1898), 30 O.R. 475; *Re Loo Len (No. 2)*, [1924] 1 D.L.R. 910, (B.C.).

²⁸ [1959] O.R. 322.

²⁹ This decision avoids the awkward possibility of there being a right of appeal in Ontario and Quebec but not in the other provinces, to which the 1866 Act did not apply.

³⁰ This is impossible in England: see *ex p. LeGros* (1914), 30 T.L.R. 249.

³¹ [1959] O.R. 337.

³² R.S.O. 1960, c. 197.

It is submitted that these two recent cases have still left some doubt in the law. *Ex p. Shane* held that successive applications could not be made, but Morden J.A. in *ex p. Johnston* assumed the law was that laid down in *Eleko v. Governor-General* and allowed a successive application. The point was decided in *ex p. Shane*, and not specifically decided in *ex p. Johnston*, but the latter case was in the Court of Appeal and the Court acted on a successive application. The hearing of the application on its merits made no difference to the final result, but the action of the Court of Appeal in hearing it is inconsistent with the decision of McRuer C.J.H.C. that it does not exist. To sum up, the Ontario authority in favour of the right to make successive applications when a discharge has been refused is *ex p. Johnston* in the Court of Appeal; the authorities against are *ex p. Hall* and *ex p. Shane*, both in courts of first instance.

The three cases so far considered have dealt with applications made after a writ has been granted and a discharge refused. The distinction between this situation and one where the issue of the writ has been refused was commented on in *R. v. Graves*,³³ Riddell J. pointing out³⁴ that the 1866 Act only dealt with cases where a writ had been issued but a discharge had been refused, and that

the case of a refusal to grant a writ was not touched or affected by the statute or the cases, and I think that the common law right of going from Judge to Judge until either a writ is obtained or every judge has refused still remains.

This was disregarded in *ex p. Shane* as being obiter.

Even if *ex p. Shane* is taken as refusing to allow successive applications, a writ had been granted in that case, and it is therefore of only persuasive authority, equal with that of the dictum of Riddell J. quoted above, in connection with applications after a refusal to issue the writ. The authorities on this situation, both from other jurisdictions, are *The State (Dowling) v. Kingston*, and the general principle that there has already been an exercise of a judicial discretion.

It is therefore arguable that there still is a right to make successive applications for habeas corpus, whether the writ itself has been refused, or whether it has been issued but a discharge has been refused. However, on the balance of authority, it is unlikely to succeed.

If in the future such an argument is rejected by the courts, an applicant still has a chance to obtain the writ after being refused by the Provincial Courts. In *in re Seeley*³⁵ the applicant failed to obtain a writ in the New Brunswick courts and applied to Girouard J. in chambers in the Supreme Court of Canada under what is now section 57(1) of the Supreme Court Act.³⁶ The writ was refused

³³ (1910), 21 O.L.R. 329.

³⁴ *Id.* at 359.

³⁵ (1908), 41 S.C.R. 5.

³⁶ R.S.C. 1952, c. 259.

and he appealed unsuccessfully to the full court under section 57(2), which allows an appeal whether a writ is refused or the prisoner remanded. This practice was not mentioned in *ex p. Shane*.

Leaving aside matters of strict law, the right to successive applications has been criticised on practical grounds. McRuer C.J.H.C. in *ex p. Shane* pointed out that it allows 31 separate applications, one to each judge, to be made in Ontario. The Supreme Court of Canada would add 9 to this total. The solution advocated by the judges themselves is a right to make a single application with a right to appeal to the highest court. In contrast with the dictum of Lord Halsbury in *Cox v. Hakes*, Mr. D. M. Gordon has written:³⁷

the power of prisoners to canvass the whole bench of Supreme Court judges is an indefensible survival of archaic ideas that seem to have been based on a misapprehension from the first; and that the favourable views of any judge shall outweigh the contrary views of all the rest without any right of appeal by the Crown, is even more indefensible. The obvious course is for the legislature to limit application to one judge, and to give both the prisoner and the Crown an appeal. Talk of such a change infringing the liberty of the subject is only too obviously nonsense.

³⁷ (1945), 23 Can. Bar Rev. 595.