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HABEAS CORPUS-FEDERAL COURTS-MAY APPLICATION FOR HABEAS CORPUS ADDRESSED TO ONE FEDERAL JUDGE BE HEARD BY ANOTHER JUDGE OF THE SAME COURT?

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HABEAS CORPUS—FEDERAL COURTS—MAY APPLICATION FOR HABEAS CORPUS ADDRESSED TO ONE FEDERAL JUDGE BE HEARD BY ANOTHER JUDGE OF THE SAME COURT?—Petitioner applied to a specific district court judge for a writ of habeas corpus. Following the practice of the court [1] of which he was a member, this judge filed the petition with the clerk of the court, and it was assigned to a second judge, who denied the petition.[2] From this decision petitioner appealed. Two questions were raised (1) whether a writ of habas corpus should be granted; and (2) whether it is mandatory that a petition of habeas corpus addressed to a specific judge of the district court be heard and determined by that judge to the exclusion of any other judge of the same court. On the first question it was held that there was no merit to the petition since it was insufficient on its face. On the second question the court held that a petition addressed to one judge of the district court need not be heard by that particular judge but may be transferred to another judge of the same court.[3] *Burall v. Johnston*, (C.C.A. 9th, 1944) 146 F. (2d) 230.

[1] "Rule 1 of the Rules of Practice for the [particular] District Court reads: 'All actions and proceedings of whatsoever kind or nature . . . shall be assigned to the several judges in regular rotation by the Clerk.' " Burall v. Johnston, (C.C.A. 9th, 1944) 146 F. (2d) 230 at 231.

[2] Burall v. Johnston, (D.C. Cal. 1943) 53 F. Supp. 126.

[3] Remarking that "it may not be necessary" to decide the second question, the court justified doing so on the ground that the question continued to arise on appeal, and cited: Snow v. Roche, (C.C.A. 9th, 1944) 143 F. (2d) 718; Rutkowski v. St. Sure, (C.C.A. 9th, 1944) 143 F. (2d) 715; O'Keith v. Johnston, (C.C.A. 9th, 1944) 146 F. (2d) 231.

The precise point decided in the principal case seems to have arisen only in the ninth circuit. The decision arrived at involved construction of the federal statute empowering judges to grant writs of habeas corpus.[4] Judge Goodman, in *Wright v. Johnston*,[5] contends: "It is true that . . . the several Judges of this court are empowered to grant writs of habeas corpus. It does not follow, however, that it is mandatory upon the judge, to whom a petition for a writ of habeas corpus is addressed, to pass upon such petition; or that the petition may not be heard and determined by the court. . . . " Judge Denman favors a more literal interpretation of the statute.[6] He stresses the fact that section 454 of the Judicature Act provides for application to court *or* judge and that section 455 declares, "The court, or justice, or judge to whom such application is made shall forthwith award a writ. . . . " This he interprets to be mandatory upon the judge to whom application is made, and not upon some other judge, to award the writ.[7] The crux of the problem of statutory interpretation is whether an application addressed to a judge may be deemed to be addressed to the court of which he is a member—and so may be transferred to another judge of the same court. Judge Goodman marshals several arguments in defense of the practice of permitting an application to one judge to be filed in the court and assigned to a member of the court. These arguments seem also to support the view that an application addressed to a judge may be deemed to be addressed to the court of which he is a member: (1) "The history of the statute . . . indicates that the empowerment of the District Judges individually to receive and act upon such petitions was not for the purpose of enabling a petitioner to 'pick' his judge"; its predecessor [8] permitted an individual judge to award writs only during vacation, so that a prisoner would not be forced to await a regular session; the present statute extended the power and thus "made available to peti-

The decision on the second question was presented by declaring that the law had been incorrectly stated in Rutkowski v. Johnston, (D.C. Cal. 1943) 52 F. Supp. 430, and correctly stated in Wright v. Johnston, (D.C. Cal. 1943) 49 F. Supp. 748 at 749.

[4] See 28 U. S. C. (1940), §§ 452, 454, 455. § 452 provides: " . . . the several judges of the circuit courts of appeal and of the district courts . . . shall have power to grant writs of habeas corpus . . . . " § 454 provides: "Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same . . . . " § 455 provides: "The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus . . . . "

[5] (D.C. Cal. 1943) 49 F. Supp. 748 at 749.

[6] Rutkowski v. Johnston, (D.C. Cal. 1943) 52 F. Supp. 430.

[7] Ibid. at 432. This emphasis upon a literal construction of the statute making it mandatory for the particular judge to whom application is made to award the writ seems somewhat inconsistent with the view that a circuit judge may deny a writ on the ground that the petitioner has not made application to a district judge or court. Sweetney v. Johnston, (C.C.A. 9th, 1941) 121 F. (2d) 445; U. S. ex rel. Bernstein v. Hill, (C.C.A. 3d, 1934) 71 F. (2d) 159; O'Brien v. Swope, (C.C.A. 9th, 1939) 106 F. (2d) 471. Judge Denman himself adopts this latter position in Bowen v. Johnston, (D.C. Cal. 1944) 55 F. Supp. 340. He seems on more solid ground when he asserts, "I can find no statutory warrant for a judge to whom an application . . . is not addressed assuming jurisdiction." Rutkowski v. Johnston, (D.C. Cal. 1943) 52 F. Supp. 430 at 430.

[8] U.S. Rev. Stat., tit. 13, § 752 (1878).

tioners broad opportunity to be heard." [9] (2) "No harm or injury can be done to the petitioner by having his petition assigned according to the rules and heard and determined by one of the judges of the court." [10] (3) The propriety of such action has been recognized in previous decisions.[11] Apart from authority and statutory construction, the decision (or dictum) in the principal case would appear to be a good one. Little can be said in support of a right to "pick" the particular judge before whom a petition for habeas corpus shall be heard. The crucial question is whether any injustice will be done to a petitioner by assigning his petition to a member of a district court according to the rules of the court. It seems clear that none will. A petitioner for a writ of habeas corpus is by statute expressly granted the right of appeal to the circuit court of appeals from the final order of a district court or a district or circuit judge.[12] Moreover, a petitioner has the right to challenge a judge for bias by

[9] Wright v. Johnston, (D.C. Cal. 1943) 49 F. Supp. 748 at 749-50. Is there adequate basis for interpreting U.S. Rev. Stat., tit. 13, § 752 (1878), to permit an individual judge to grant a writ *only during vacation?* The statute itself is silent on the point. Judge Goodman cites State v. Sullivan, (C.C. N.C. 1892) 50 F. 593; Ex parte Everts, (C.C. Ohio 1858) F. Cas. No. 4,581. These cases do not seem adequate support for the proposition.

[10] Wright v. Johnston, id. at 750.

[11] Id. at 750.

Ex parte Clarke, 10 Otto (100 U.S.) 399 at 403 (1879): In deciding that the Court has jurisdiction where the petition for habeas corpus has been presented to a single justice and a writ issued by him and made returnable to the Court, the Court says: " . . . we see no good reason why he should not have taken this course, as he did. It had merely the effect of making the application for a discharge one addressed to the court, instead of one addressed to a single justice. This has always been the practice of English judges in cases of great consequence and difficulty, and we do not see why it may not be done here." Commenting on this decision, in Bowen v. Johnston, (D.C. Cal. 1944) 55 F. Supp. 340 at 341, Judge Denman interprets it as applying to a case where an individual judge feels that the problem involved is too difficult to be decided by a single judge and so makes the writ returnable to a court in plenary session. Further, he contends the statements of the Court are to be considered "dicta," because the petition was addressed to the judges of the Supreme Court, citing Ex parte Clarke, supra this note, at 400. The force of this latter contention is weakened by the fact that the Court treats the petition as one presented to a single justice and expressly declares, "The justice who issued it could undobutedly have disposed of the case himself . . . "; Ex parte Clarke, supra this note, at 403. At the time of this decision the applicable statute, U.S. Rev. Stat., tit. 13, §§ 751-766 (1878), gave both courts and judges power to grant writs of habeas corpus. On the authority of Ex parte Clarke, In re Fitton, (C.C. Vt. 1891) 45 F. 471 at 472, declares it proper for a judge to take an application made to him personally into the court of which he is judge. In Blagiach v. Tope, (C.C.A. D.C. 1935) 76 F. (2d) 995 at 996, the court declares, "it was perfectly proper that on return of the writ the cause should be heard by another judge" than the judge of the same court who issued the writ; but it is not clear whether this case is in point, because it is not stated to whom the application was made, and the petitioner raised the question of jurisdiction for the first time on appeal.

[12] By 28 U.S.C. (1940), § 463. See Webb v. York, (C.C.A. 8th, 1896) 74 F. 753; Craig v. Hecht, 263 U.S. 255 at 274, 44 S.Ct. 103 (1923).

filing an affidavit and stating the facts and reasons supporting his belief.[13] The rule permitting the assignment of a petition to a judge of the same court other than the judge to whom the petition was addressed would seem to permit more expeditious handling of a court's business,[14] to protect a petitioner from delay when the judge addressed is incapacitated,[15] and to avoid the necessity for filing a new application in cases where for some reason it is improper for the judge to whom the petition is addressed to hear the petition.[16]

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[13] See 28 U.S.C. (1940), § 25.
[14] Burall v. Johnston, (C.C.A. 9th, 1944) 146 F. (2d) 230 at 231.
[15] Ibid.
[16] Blagiach v. Tope, (C.C.A. D.C. 1935) 76 F. (2d) 995.