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HABEAS CORPUS PROCEEDINGS IN THE SUPREME COURT OF TEXAS

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The purpose of this article is to assist counsel who find themselves required to prepare and present an application for writ of habeas corpus to the Supreme Court of Texas. It is unfortunate that so little has been written to this end. Most texts and form-books are not particularly helpful. The Court is repeatedly confronted with attorneys who have to act quickly to rescue their clients from jail, but who have little idea what to do or where to begin. The members of the Court are willing to assist counsel in informing them of the steps to take; but, unfortunately, the client may spend extra hours or days in jail while the proper groundwork is being prepared.

The statutes and case law will be discussed below. At the risk of being repetitious, the following is set out as general observations of a member of the Court in an effort to save counsel and his client valuable time.

The most important items which should be brought to the Court are:

1. A motion for leave to file the application.

2. The application for writ of habeas corpus, setting out the facts and clearly giving the reason or reasons why the Relator is being illegally restrained and should be released.

3. A brief in support of the application, setting out any relevant constitutional or statutory provisions and the cases which support the alleged grounds of illegal restraint.

4. A filing fee of ten dollars. An additional fifteen dollar fee will be required if motion for leave is granted. See Rule 485 of the Texas Rules of Civil Procedure. It is suggested that these matters be checked with the clerk of the Court before coming to Austin. If a pauper's oath is to be used, the proper procedure might also be checked with the clerk.

* Justice, The Supreme Court of Texas, 1957 to date.
† Editor-in-Chief, St. Mary's Law Journal.
The observations of a member of the Court are those of Justice Greenhill. The analysis of the Constitution, statutes and case law is largely that of Martin D. Beirne, Jr.

5. Proof that the Relator is illegally restrained.

6. A transcript of relevant orders, judgments and commitment.

7. A transcribed statement of facts or agreed statement of facts in cases in which one will be required.

8. Provision for an adequate bond in the event the writ is granted.

As stated above, there must be proof that the Relator is actually in jail. A letter, certificate or wire from the sheriff stating this is generally acceptable. In many instances, however, counsel will appear before the Court without this necessary first step; and time is lost while the necessary proof is obtained.

Most habeas corpus proceedings arise from the violation of court orders dealing with support payments or the production of documents or specific objects. The record brought to the Supreme Court in each of these cases is important to a speedy disposition of the matter. In each case, there must be the equivalent of a transcript; and in many cases, there must be the equivalent of a statement of facts. The "transcript" need not be prepared by the district clerk. Inclusion of the instruments and their authentication is important.

The transcript must include a verified or authenticated copy of the order of the court out of which the alleged contempt grew; *i.e.*, the order which has been violated. The transcript must also include the judgment or order of contempt. The contempt may have arisen out of a series of orders or judgments. The orders of support may have been modified from time to time, and various orders or judgments may have been entered which refer to other orders or judgments. In such a case, or in a similar case, a complete transcript of all relevant hearings, orders and judgments should be brought to the Supreme Court so that the matters may be reviewed fully and without the delay which may be required to send for and bring previous orders and judgments.

Counsel must also bring to the Court a copy of the order of commitment giving the directions of the trial court to the sheriff to incarcerate the Relator and definite instructions as to the time of his release. As will be discussed below, the absence of an order of commitment, lack of definiteness of the order of commitment, or an improperly prepared judgment or order of contempt is often reason for granting of habeas corpus. Those interested in the enforcement of the contempt order (such as counsel for the offended wife), might offer their assistance to the trial court to ensure that the orders, judgments and commitments are properly prepared.

A statement of facts is also required where the granting of the writ

of habeas corpus turns upon factual evidence, such as the inability to perform an order. Many people, particularly husbands or fathers, are held in contempt for failure to make support payments. They contend that they have no funds, no job, or are otherwise wholly unable to make the payments, now or in the future. It is therefore alleged that if they are to be put in jail and kept there until they produce a required amount of money, it will be, in effect, a life sentence. They of course will be unable to earn any substantial amount while they are in jail.

Inability to pay, lack of funds or a job, or any of the other reasons for inability to comply with the court order must be proved by evidence. Similarly, if the order of the court was to produce a specific object or group of objects, the inability to produce them must be proved by testimony. If the relevant testimony is disputed, and the court finds the facts in a particular manner, that usually determines the matter as far as the Supreme Court is concerned. On the other hand, if all the evidence is that the Relator was continuously ill, unemployed, destitute, bankrupt, or unable to produce the document or object, and the trial court still orders the Relator to jail until he pays or produces (in addition to the three days for criminal contempt), then the matter is ripe for an application for writ of habeas corpus.

It will greatly assist the Relator in procuring a writ of habeas corpus if careful groundwork is done at the contempt hearing in the trial court. The testimony of impossibility or other justifiable grounds for non-compliance with the order of the trial court must be brought to the Supreme Court in a statement of facts.

Where a statement of facts will be required, counsel must be sure that a court reporter is present at the contempt hearing to take down and transcribe the evidence as to his client's inability to pay or perform. If no reporter is present, the Relator will be at a great disadvantage. If the hearing is held, testimony is given and taken by the reporter. If the court rules immediately that the client is in contempt and orders him to jail, it is imperative to the client that the court reporter transcribe the testimony with all deliberate speed. If the reporter is so busy that he cannot start on the transcription for several days, chances are good that the client will remain in jail for that period because the Supreme Court cannot, or generally will not, act until the transcribed testimony is presented to it. The presumption is that the trial court acted properly and within its power, and habeas corpus is a collateral attack on its order. If the court reporter is ill or for some other good reason cannot write up the testimony for an extended period, the

Supreme Court has the power to grant habeas corpus and release the Relator on bond while the record is being prepared. But such instances are quite rare in practice.

It has been observed that some trial courts will defer the judgment of contempt or order of commitment until the court reporter has transcribed the testimony. Under those circumstances, counsel can drive or fly to Austin and seek relief for the client without delay. If, on the other hand, the trial judge is not so inclined, the Relator must rest in jail until the reporter has finished his work.

In areas where court reporters are very busy and frequently behind with their transcriptions, an agreed statement of facts will be of great assistance in saving time. If the attorneys are able to agree upon the substance of the testimony and the trial court will certify it, the time for transcription will be saved. In other instances, trial judges have been helpful to the extent of preparing a statement of the facts.

Mechanics of Habeas Corpus

Habeas corpus cases are generally dealt with in the Texas Supreme Court in this manner: although the Texas Constitution authorizes any justice to grant a writ, the practice of the Court is to have three justices act as a committee to hear the matter; and these three report their actions as quickly as possible to the other justices. The reason for this is that some years ago, when the justices acted individually, it was found that some counsel would "shop around," hoping to find a "merciful" justice even though counsel had been turned down by other members of the Court.

Justices of the Court generally serve on habeas corpus committees in rotation, and there is no way to ascertain in advance which three are "up" for service. Two different committees may serve on the same day. If only three justices are present when the application is presented, they are "it." On some occasions, if the case is deemed to be of sufficient importance, the committee of three will call in other members of the Court.

At the hearing before the three justices, the attorney presents his case. Although technically the problem is whether the leave to file a motion will be granted, the real question before the committee is whether habeas corpus will be granted. The Relator is not generally released on bond unless a majority of the committee is of the tentative opinion that the Relator is being illegally restrained.

It is discovered from time to time in habeas corpus committees that counsel does not have the necessary papers or items of proof, and a justice will suggest to counsel exactly what he needs. The Administrative Assistant to the Court, Mrs. Margaret Bertram, often sits in the committee conferences; she will take down in shorthand the directions of the justice. Upon request of counsel, she will, without charge, type up the suggestions of the committee or justice and furnish counsel with a copy.

This point should be remembered: counsel cannot come to Austin and have his client released on bond while he prepares and assembles the necessary records and briefs the law or while it is being done for him. The hearing is thus roughly equivalent to the formal presentation of the case to the entire Court. At this hearing, counsel must have the certificate stating that the client is in jail, the copy of the orders violated, the judgment and order of commitment, and the statement of facts if the release depends upon testimony. At the hearing, counsel will generally be asked if he has authorities authorizing or requiring the release of his client under the circumstances. It is therefore highly desirable to bring a brief in support of the application, or at least to be prepared to cite and discuss relevant authorities.

Careful counsel might save additional time by calling the Clerk of the Supreme Court in advance, telling the Clerk that he (the attorney), is on his way to Austin with an application for writ of habeas corpus, and asking the Clerk to arrange to have a committee on hand at or about the time he will arrive to hear his application, or as soon thereafter as possible. The motion for leave to file, the application and other papers should first be presented to the Clerk, together with the filing fee. He will call the Administrative Assistant who will arrange for a committee to hear the matter as soon as possible. Counsel will then be invited to the chambers on the third floor to meet with the committee or a member of the Court.

If the committee is satisfied that the Relator is wrongfully confined, or if it has sufficient doubt about the matter and feels that the case should be heard by the entire Court, it will direct the Clerk to inform the sheriff that the Court has ordered the Relator released on bond. At this point, counsel must be prepared to arrange for adequate bond without delay.

Getting the sheriff to release the Relator immediately after the committee or justice has granted the writ sometimes presents a problem.

Some sheriffs require an authenticated copy of the order or writ. This means that the client will remain in jail even after his release has been directed, until the order is mailed to the sheriff and received by him, or is taken by the attorney to the sheriff. Some sheriffs will accept a telegram from the Clerk stating that the release has been ordered. Some more trusting sheriffs will release the Relator upon a telephone call from the Clerk, but others will not. The point is that it may be advisable for counsel to discuss the matter with the sheriff before leaving for Austin to see what he will require so that his client will be in jail the least possible amount of time.

Upon the order of the Court directing the release of the Relator upon bond, the case is set for argument before the Court on a Wednesday, usually four weeks later. Thereafter the Court will render an opinion, either remanding the Relator to the sheriff or ordering his unconditional release.

We come now to an examination of the authorities and to an in-depth look at the case law, as it has developed in habeas corpus proceedings in the Texas Supreme Court.

NATURE OF THE REMEDY—GENERAL

The writ of habeas corpus is a prerogative writ regarded as the bulwark of human liberty.[1] The writ is one of right,[2] designed to protect the individual against any character of restraint,[3] and to obtain a speedy adjudication of his right to release from an illegal imprisonment.[4]

The object of the writ is to release the party from custody and not to offer him a tribunal for correcting errors.[5] Habeas corpus proceedings are collateral rather than direct attacks on the proceedings under which the restraint complained of has been imposed,[6] and cannot be made to take the place of an appeal, certiorari, quo warranto, or writ of error.[7]

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1 *Ex parte* Calhoun, 127 Tex. 54, 91 S.W.2d 1047, 1048 (1936).

2 TEX. CONST. art. I, 12 as follows:

The writ of habeas corpus is a writ of right and shall never be suspended. The legislature shall enact laws to render the remedy speedy and effectual.

3 Burckhalter v. Conyer, 9 S.W.2d 1029 (Tex. Comm'n App. 1928, jdgmt adopted).

4 *Ex parte* Ramzy, Jr., 424 S.W.2d 220 (Tex. Sup. 1968); Burckhalter v. Conyer, 9 S.W.2d 1029 (Tex. Comm'n App. 1928, jdgmt adopted).

5 *Ex parte* Beamer, 116 Tex. 39, 285 S.W. 255 (1926); *Ex parte* Coupland, 26 Tex. 387 (1862).

6 *Ex parte* Ramzy, Jr., 424 S.W.2d 220 (Tex. Sup. 1968).

7 *Ex parte* Duncan, 127 Tex. 507, 95 S.W.2d 675 (1936); *Ex parte* Kimberlin, 126 Tex. 60, 86 S.W.2d 717 (1935).

JURISDICTION: POWER TO ISSUE

Article V, Section 3 of the Texas Constitution provides:

> The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law . . . .

Under article 1737,[8] the jurisdiction of the Supreme Court in habeas corpus matters extends only to those causes where confinement is by virtue of a process or commitment issued on account of the violation of an order, judgment or decree in a civil cause.[9] The Supreme Court does not have the power to inquire into the legality of the restraint for some other reason.[10] Nor does the Court have the general original jurisdiction to grant writs of habeas corpus as does the Court of Criminal Appeals.[11]

PROCEEDINGS: APPLICATION FOR WRIT OF HABEAS CORPUS

Time

The application for the writ may commence as soon as the party is illegally restrained. The Relator must be actually restrained of his liberty or at least there must be some illegal restraint other than moral suasion.[12] A motion for habeas corpus is premature when the Relator may go and come as freely as he sees fit.[13]

In *Ex parte Calhoun*,[14] the Relator was adjudged in contempt of the district court. No commitment was ever issued, and the answer of the sheriff showed that the Relator was never arrested. The Relator voluntarily went to the sheriff's office and remained there of her own free will, free to go where she pleased and to do as she pleased after she left. In dismissing the application for habeas corpus without prejudice, the Court held:

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8 TEX. REV. CIV. STAT. ANN. art. 1737 (1905) as follows:
The Supreme Court or any of the Justices thereof, either in term time or in vacation, may issue writs of habeas corpus in any case where any person is restrained in his liberty by virtue of any order, process or commitment issued by any court or judge on account of the violation of any order, judgment or decree theretofore made, rendered or entered by such court or judge in any civil cause. Said Court or any Justice thereof, either in term time or in vacation, pending the hearing of application for such writ, may admit to bail any person to whom the writ of habeas corpus may be so granted.

9 *Ex parte* Morris, 162 Tex. 530, 349 S.W.2d 99 (1961); *Ex parte* Jackson, 113 Tex. 58, 252 S.W. 149 (1923).

10 *Ex parte* Hofmayer, 420 S.W.2d 137 (Tex. Sup. 1967) (per curiam).

11 *Id.*

12 *Ex parte* Beamer, 116 Tex. 39, 285 S.W. 255 (1926).

13 Deramus v. Thornton, 160 Tex. 494, 333 S.W.2d 824 (1960).

14 127 Tex. 54, 91 S.W.2d 1047 (1936).

> It is not required that the applicant for a writ of habeas corpus be actually confined in jail. Any character of restraint which precludes absolute and perfect freedom of action will justify the issuance of the writ.[15]

> A mere judgment of contempt will not justify the granting of a writ of habeas corpus. There must be some character of restraint.[16]

REQUISITES FOR RELEASE OF RELATOR

Insufficiency of Order

The Supreme Court in reviewing the actions of the lower court will base its judgment on the (written) record of the transaction. There are certain fixed procedures which must be followed in order to sustain the validity of the restraint, and if any of them are not followed, the incarceration is illegal.

For example, the arrest must be made on the basis of a written commitment. A commitment is a warrant, order or process through which the court or a magistrate orders a ministerial officer to take a person into custody and restrain him there.[17] An arrest without a written commitment for the purpose of enforcing a contempt judgment is illegal,[18] and a party may not be imprisoned for contempt without a written order of commitment.[19]

There is no particular form prescribed by law for a commitment.[20] It may take the form of a court's certified copy of a judgment commanding the sheriff to arrest the party and confine him in jail;[21] or it may be a separate written order signed by the judge or magistrate, or a written order issued and signed by the clerk of the court at the court's direction.[22]

Sufficiency

The order of the court must clearly state what is to be expected of the party to fully enable him to perform. In *Ex parte Slavin*,[23] the Relator was held in contempt for failure to pay child support. He al-

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15 *Id.* at 1048.
16 *Id.* at 1048.
17 *Ex parte* Arapis, 157 Tex. 627, 306 S.W.2d 884 (1957).
18 *Ex parte* Arapis, 157 Tex. 627, 306 S.W.2d 884 (1957); *Ex parte* Smart, 152 Tex. 229, 256 S.W.2d 398 (1953).
19 *Ex parte* Martinez, 160 Tex. 328, 331 S.W.2d 209 (1960); *Ex parte* Puckitt, 159 Tex. 438, 322 S.W.2d 597 (1959).
20 *Ex parte* Palmateer, 150 Tex. 510, 243 S.W.2d 160 (1953).
21 *Ex parte* Coward, 110 Tex. 587, 222 S.W. 531 (1920).
22 *Ex parte* Arapis, 157 Tex. 627, 306 S.W.2d 884 (1957).
23 412 S.W.2d 43 (Tex. Sup. 1965).

leged that the support order of the court was too uncertain and indefinite to be enforced. The portion to which the Relator objected is:

> The defendant is further ORDERED to pay the sum of ONE HUNDRED FIFTY AND NO/100 DOLLARS ($150.00) per month for the care, support and maintenance of the three minor children until said minor children attain the age of eighteen years, that the defendant EUGENE L. SLAVIN, shall pay the sum of THIRTY-SEVEN AND 50/100 DOLLARS ($37.50) each week for the care, support and maintenance of his minor children beginning with the 7th day of February, 1963, and shall pay a like sum on the Thursday of each succeeding week thereafter, . . .[24]

The basis of the Relator's contention was that the decree was reasonable only so long as all the children were under age eighteen. The order became objectionable and subject to a different interpretation after one child reached eighteen.

Justice Pope, speaking for the Court in discharging the Relator, said:

> It is an accepted rule of law that for a person to be held in contempt for disobeying a court decree, the decree must spell out the details of compliance in clear, specific and unambiguous terms so that such person will readily know exactly what duties or obligations are imposed upon him.[25]

The opinion discussed the underlying reason for the rule:

> The rights of the parties under a mandatory judgment whereby they may be subjected to punishment as contemnors for a violation of its provisions, should not rest on implication or conjecture, but the language declaring such rights or imposing burdens should be clear, specific and unequivocal so that the parties may not be misled thereby.[26]

Void Orders, Decrees and Judgments

The Supreme Court is limited in habeas corpus proceedings to the question of whether or not the commitment is void.[27] Although the appellate processes may reverse causes because they are merely erroneous, habeas corpus proceedings can only attack void orders.[28] The

24 *Id.* at 44.
25 *Id.* at 44.
26 Plummer v. Superior Court, 20 Cal. 2d 158, 124 P.2d 5 (1942).
27 *Ex parte* Genecov, 143 Tex. 476, 186 S.W.2d 225 (1945); *Ex parte* Lee, 127 Tex. 256, 93 S.W.2d 720 (1936).
28 *Ex parte* Rhodes, 163 Tex. 31, 352 S.W.2d 249 (1962); *Ex parte* La Rocca, 154 Tex. 618, 282 S.W.2d 700 (1955); *Ex parte* Tyler, 152 Tex. 602, 261 S.W.2d 833 (1953); *Ex parte* Scott, Jr., 133 Tex. 1, 123 S.W.2d 306 (1939); *Ex parte* Hodges, 130 Tex. 280, 109 S.W.2d 964 (1937).

Relator is not entitled to discharge in a habeas corpus proceeding unless it affirmatively appears that the judgment ordering his confinement is void, thus depriving the court of jurisdiction and as a result thereof, he is restrained of his liberty without due process of law.[29]

A violation of a void decree is not contempt;[30] one cannot be punished for violating an order which the court had no authority to make.[31]

Improper wording in the order of the court will void the confinement of the Relator. In *Ex parte Prickett*,[32] the Relator was confined pursuant to a commitment issued by the district court for failure to *deliver to his divorced wife* or *pay her* the value of certain stock certificates. The Supreme Court discharged the Relator and stated:

> . . . [T]he court, however understandable its motive to expedite relief for the wife under the circumstances, was without authority to "award a special writ for the . . . delivery of such property to the plaintiff" or to "enforce its judgment by attachment, fine or imprisonment."[33]

Similar problems arose in the cases of *Ex parte Preston*,[34] and *Ex parte Yates*.[35] In *Preston*, the Relator was enjoined from disposing of community property in any manner, and was further ordered to pay into the registry of the court $21,000 which represented the proceeds from the sale of community property. Preston alleged that he flushed the entire $21,000 in $100 bills down a commode and into the sewer system of the City of Fort Worth. He contended that the contempt order issued by the court was "imprisonment for debt" in violation of Article 1, Section 18 of the Texas Constitution. The order to which Preston objected was:

> It Is Further Ordered, that the defendant be and he is hereby ordered committed to the Tarrant County Jail of Tarrant County, Texas, for his failure to comply with the order of this court heretofore entered that he produce the sum of $21,000.00 *before this court* . . . , and to be there held and confined for a period of three full days of twenty-four hours each, and thereafter to be held and confined until he shall have produced and delivered to the *Clerk of this Court*, for the use and benefit of the plaintiff, the sum of

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29 *Ex parte* Thetford, 369 S.W.2d 924 (Tex. Sup. 1963); *Ex parte* Davis, 161 Tex. 561, 344 S.W.2d 153 (1961); *Ex parte* Helms, 152 Tex. 480, 259 S.W.2d 184 (1953); *Ex parte* Dulaney, 146 Tex. 108, 203 S.W.2d 203 (1947) (per curiam).

30 *Ex parte* Henry, 147 Tex. 315, 215 S.W.2d 588 (1940).

31 *Ex parte* Castro, 115 Tex. 77, 273 S.W. 795 (1925).

32 159 Tex. 302, 320 S.W.2d 1 (1958).

33 *Id.* at 3.

34 162 Tex. 379, 347 S.W.2d 938 (1961).

35 387 S.W.2d 377 (Tex. Sup. 1965).

> $10,000.00, whereupon he shall have purged himself of contempt of this court . . . .[36]

The Relator relied principally upon the *Prickett* case,[37] and sought to have the Court declare the order of the district court an imprisonment for debt. A majority of the Court, however, distinguished the *Prickett* case because the divorced wife in *Prickett* proceeded under the wrong theory of law by invoking Rule 308 of the Texas Rules of Civil Procedure. The majority further noted that the trial court's order directed the payment not to Mrs. Preston, the plaintiff, but to the *Clerk*. The $10,000 was ordered not into the hands of the plaintiff, rather into the hands of the *court*. The order of the trial court was found to be valid and the Relator was remanded to the custody of the sheriff.

In *Ex parte Yates*,[38] the Relator was held in contempt for failure to comply with the trial court's judgment entered in a divorce suit:

> (3) The plaintiff shall have $67,920.75 of the debt of Gordon Yates Lumber Company to Gordon L. Yates. More than said sum is evident by a promissory note of said corporation to the defendant's order. He shall deliver said note to the plaintiff as security for payment, but may redeem the note by installment payments of $500 per month principal and one twelfth of four per cent interest per annum on the unpaid balance of $67,920.75. . . .[39]

The Supreme Court held that the order amounted to a payment of a debt to the wife:

> The record clearly shows that Yates is being imprisoned for debt in violation of the Texas Constitution. Therefore, that portion of the order which remands Yates to the custody of the Sheriff of Tarrant County, Texas, until he "purges himself by payment of all arrears of the judgment against him . . ." is void.[40]

The court discussed *Ex parte Preston*,[41] and denied that it ruled the present case:

> We cannot agree with respondent's argument that the case of *Ex parte Preston*, . . . rules the present case. In the Preston case the trial court found that Preston had in his possession the sum of $21,000.00 of community property, and that $10,000.00 thereof

36 *Ex parte* Preston, 162 Tex. 379, 347 S.W.2d 938, 939 (1961).
37 *Ex parte* Prickett, 159 Tex. 302, 320 S.W.2d 1 (1958).
38 387 S.W.2d 377 (Tex. Sup. 1965).
39 *Id.* at 379.
40 *Id.* at 380.
41 162 Tex. 379, 347 S.W.2d 938 (1961).

> had been awarded to Preston's wife. The trial court in the Preston case did not order that any sum be paid to Mrs. Preston, but ordered Preston to pay the money into the hands of the court.[42]

Justices Norvell and Steakley dissented, stating:

> There is no debt involved here. The relator has violated the provisions of a property settlement decree. He has not delivered the note to his former wife as he was ordered to do. He has not made the required monthly payments essential to his redemption of the note under the optional provisions of the decree. The trial court has found that he is able to perform and until inability to perform is demonstrated to this court, the relator should be held in custody.[43]

Recently the Supreme Court had the opportunity to discuss the interplay between the *Yates* and the *Preston* cases. *Ex parte Leonard Storm*, number B-971 (1969) on the Court's docket, presented some interesting questions.[44] Upon the granting of a divorce, Storm was directed to turn over to his former wife a specific sum of money, about $5,000, which Storm received from the sale of some community assets. The order of the court stated that Storm should deliver the sum *to the wife*, and added "for which let execution issue."

Storm testified that he put the $5,000 in cash in his deep freeze and that someone broke into his house and stole it. It was impossible for him, he said, to produce or deliver the $5,000. The circumstances were suspicious: the door was forced from the inside; the police doubted the robbery, for nothing else in the house was disturbed. The trial judge did not believe Storm, and ordered him to jail until he produced the $5,000 and delivered it to the wife. The Supreme Court granted habeas corpus and argument was heard. Before an opinion was delivered, however, Storm died, and the case became moot. An order was ultimately entered to that effect.

At least two lessons can be learned from the above case. First, attorney for the wife (who drew the judgment of contempt), would have been well advised to order Storm to produce the $5,000 into the registry of the court; to bring it to the *court* rather than order its delivery to the *wife* with provision that "execution should issue." The order of delivery to the *wife* gave Storm's counsel a good argument that he was being imprisoned for debt. In an ordinary suit, when the court orders

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42 *Ex parte* Yates, 387 S.W.2d 377, 379 (Tex. Sup. 1965).
43 *Id.* at 382.
44 The observations in *Ex parte* Storm are those of Justice Greenhill.

a defendant to pay a plaintiff a $5,000 note "for which let execution issue," the order cannot be enforced by contempt.

Second, if a relator dies, the Court considers it the duty of counsel, as officers of the Court, immediately to inform the Court of such fact, rather than have the Court labor on the matter. The Court has a heavy docket, and the fact that counsel let the matter continue until a member of the court happened to learn of Storm's death was a source of considerable irritation. Some consideration was given to having the attorneys show cause why *they* should not be held in contempt of Court. This was not done, but a strong suggestion was made to counsel that they file a notice or suggestion of mootness.

Requisites of Order Which Will Justify Confinement

In *Ex parte Proctor*,[45] the Relator was held in contempt for failure to make support payments. The judgment, on a printed form, charged Proctor with contempt but it did not recite the amount in which Proctor was in arrears. The form is as follows:

> . . . and his punishment for such contempt is hereby fixed by assessing against him a fine of $—— and committing him to the County Jail of Harris County, Texas, for 3 days, and it is further ordered that the said Charles Edward Proctor should pay the sum of $550.00 as child support to Sidonia Ruth Proctor [the wife] and also by paying all costs incurred herein, and upon such payments, the said Charles Edward Proctor shall be released from custody.[46]

The Supreme Court, noting that this printed form was the same as that used in *Ex parte Savelle, Jr.*,[47] released the Relator, stating:

> This holding does not disturb the recognized power to confine a party for contempt until he obeys the order for which he has been held in contempt for disobeying . . . . However, where this remedy is followed, the order should clearly state in what respect the court's order has been violated and that the party is committed to jail until the court's order is complied with to the extent required by the court.[48]

The Court went on to discuss what findings would have been necessary in order to hold the party:

> In the instant case, if the court had found that the relator was

[45] 398 S.W.2d 917 (Tex. Sup. 1966).
[46] *Id.* at 917.
[47] 392 S.W.2d 113 (Tex. Sup. 1965).
[48] *Ex parte* Proctor, 398 S.W.2d 917 (Tex. Sup. 1966).

> delinquent in the amount of $550 in support payments ordered in its judgment of December 22, 1964, and if the court had further found him in contempt and had committed him to jail three days and until he had paid the $550 and court costs, the relator could have been held until he made such payments. In the instant case there was no finding that the relator's delinquent payments amounted to $550.[49]

Inability To Perform as a Defense

The inability of the Relator to comply with the order of the court requiring him to pay a certain amount of money because of poverty, insolvency or some other cause not attributable to his own neglect is, under ordinary circumstances, a valid defense to an order of contempt.[50] If it is not within the power of the person to perform the act which will purge him of contempt, the court cannot impose a coercive sentence.[51]

The Court is often faced with a party confined in jail for failure to make support payments because of numerous other obligations which he has incurred. In *Ex parte Heard*[52] the Relator was held in contempt for failure to make payments for support, temporary alimony, house, automobile and the television. He claimed that he was unable to comply with the order of the court because of his monthly obligations to banks, finance companies and insurance companies. He testified that if he paid the court's judgment, it would preclude payment on his other obligations and jeopardize his good credit rating. The Supreme Court in overruling his contentions and in remanding the Relator to the custody of the sheriff stated:

> (The) Relator's determination to meet his other obligations promptly is commendable. However, his wish to preserve his credit rating and to make certain that his position was not jeopardized cannot be made to override his obligations under a valid judgment of a court. His remedy for a difficult and onerous financial situation was to seek from the trial court a reduction in the amounts he was required to pay; and, failing there, to seek final disposition of the divorce suit, thus terminating his obligations under the January 9th judgment.[53]

In order to use the defense of "inability to perform," the petitioner

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49 *Id.* at 918.
50 *Ex parte* Gonzales, 414 S.W.2d 656 (Tex. Sup. 1967).
51 *Ex parte* DeWees, 146 Tex. 564, 210 S.W.2d 145 (1948).
52 372 S.W.2d 942 (Tex. Sup. 1963).
53 *Id.* at 943.

must conclusively show his inability to perform the judgment of the court.[54] The inability of the Relator to show in a clear and positive way that he was unable to produce certain coins sold in violation of a restraining order resulted in the continued confinement of the Relator in *Ex parte Ramzy*.[55] Doctor Ramzy was charged with violating a restraining order enjoining him from disposing of any community property. He was ordered confined in jail for 72 hours and fined $100 as a result of selling three coin collections. He was further ordered to remain in custody *until* he purged himself of his contempt by delivering to the District Clerk all portions of the missing coin collections. The burden was on Ramzy to conclusively show that the coins, no longer in his possession, could not be produced. The Court found that he failed to meet this burden.

The Court cited with approval language contained in a New Jersey case,[56] wherein it was said:

> In a "civil contempt" the proceeding is remedial, it is a step in the cause the object of which is to coerce one party for the benefit of the other party to do or to refrain from doing some act specified in the order of the court. Hence, if imprisonment be ordered, it is remedial in purpose and coercive in character, and to that end must relate to something to be done by the defendant by the doing of which he may discharge himself. As quaintly expressed, the imprisoned man "carries the keys to his prison in his own pocket."

Justice Norvell, concurring in the result of the majority, had grave doubts as to the advisability of the Supreme Court to consider the evidence adduced at the Relator's hearing:

> In my opinion, a district court is a more suitable forum than this court to decide issues arising in cases similar to the present one. By cases similar to this one, I mean those in which it appears beyond peradventure that a restraining order or injunction issued in a civil case has been violated and as a result a contempt order has been rendered containing both punitive and coercive sanctions. . . .
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> . . . Whether a person can or cannot perform as ordered by a court becomes a question of law in those instances (inability to perform) only when from an examination of the evidence, reasonable minds cannot differ as to the conclusion, either that he can or cannot perform as ordered.

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54 *Ex parte* Rohleder, 424 S.W.2d 891 (Tex. Sup. 1967).
55 424 S.W.2d 220 (Tex. Sup. 1968).
56 Stanley v. South Jersey Realty Co., 90 A. 1042, 1043 (N.J. 1914).

> The habeas corpus power of this court does not extend to the determination of fact issues. . . . It is only when the proof adduced at the hearing establishes the controlling issue—in this case, the relator's inability to comply with the court's order, as a matter of law, that this court can regard the order of commitment as being invalid for the reason that a court may not deprive a person of his liberty for failure to comply with a coercive order when performance is impossible.[57]

CONTINUING CONTEMPT

Ex parte Hooks[58] discusses the application of continuing contempt for failure to pay child support. Hooks and his wife divorced in 1946. The Relator, Hooks, did not comply with the court's orders for child support and was found in contempt in 1961 and imprisoned. He was released after two months; however, the court's judgment ordered him to be held in "continuing contempt" for the arrears in child support. He was further ordered to make child support payments until the youngest of his two children reached age eighteen. He made monthly payments until the youngest child became eighteen, but he refused to comply with that portion of the judgment ordering him to pay the delinquent payments. The sole contention of the Relator was that by virtue of article 4639a,[59] the district court did not have the power to enforce its order after the youngest child became eighteen.

The article is divided into two sections. The first section gives the court the power to order support payments until the child reaches age eighteen; the second part of the article contains the power of the court to enforce the judgment of support.

The Supreme Court in a 5-4 decision remanded Hooks to the custody of the sheriff, stating:

> In our opinion Hooks has confused the power of the court to order support during the pre-eighteen period with the court's power to enforce an order.[60]

A dissenting opinion by Justice Smith questioned the "so called

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[57] *Ex parte* Ramzy, Jr., 424 S.W.2d 220, 226, 227 (Tex. Sup. 1968).
[58] 415 S.W.2d 166 (Tex. Sup. 1967).
[59] TEX. REV. CIV. STAT. ANN. art. 4639a as follows:
. . . The court may by judgment order either parent to make periodic payments for the benefit of such child or children, until same have reached the age of eighteen (18) years, or, said court may enter a judgment in a fixed amount for the support of such child or children, and such court shall have full power and authority to enforce said judgments by civil contempt proceedings after ten (10) days notice to such parent of his or her failure or refusal to carry out the terms thereof, . . .
[60] *Ex parte* Hooks, 415 S.W.2d 166 (Tex. Sup. 1967).

judgment of 1961." He considered that the contempt judgment was in reality an agreed judgment:

> The judgment of May 9, 1961, is only a recitation of an agreement between the parties. The agreement merely recognizes an indebtedness. The former Mrs. Hooks had recourse to the courts upon breach of the agreement to enforce the same, but at no time did she have the right to substitute contempt proceedings for the legal remedy open to her.[61]

Chief Justice Calvert, joined by Justices Greenhill and Steakley, also dissented from the majority holding. The Chief Justice, relying on *Ex parte Slavin*,[62] suggested that the order directing Hooks to pay the arrearage in support was too indefinite to require him to make payments; that at best the order of the court fixing the time for payment was only by inference.

The second reason offered by the Chief Justice was that the trial court had lost jurisdiction of the subject matter at the time the contempt judgment was entered. Attention was drawn to a case decided by the Supreme Court of Oklahoma,[63] dealing with a suit by a former wife to compel by contempt proceedings the payment of support payments that had accrued during the child's minority. The Court stated the issue to be resolved:

> The question involved is one of jurisdiction. Does the court retain its jurisdiction to enforce those payments, or did its jurisdiction terminate by operation of law when the minor reached the age of majority?[64]

The Oklahoma Court answered the jurisdictional question with this comment on the Oklahoma Custody and Support Statute:[65]

> . . . [I]t is obvious from the language of the statute that the jurisdiction of the court to punish for contempt terminated with the child's attainment of majority.[66]

The same question was again presented to the Oklahoma Supreme Court in *Lowry v. Lowry*.[67] The Court was confronted with an attempt to enforce by contempt accrued unpaid child support. The Court held:

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61 *Id.* at 168, dissent.
62 412 S.W.2d 43 (Tex. Sup. 1967).
63 McCartney v. Superior Court, 187 Okl. 63, 101 P.2d 245 (1940).
64 *Id.* at 245.
65 Title 12, sec. 1277, OKLAHOMA STATUTES ANNOTATED:
When a divorce is granted, the court shall make provision for guardianship custody, support and education of the MINOR children of the marriage. . . . (Emphasis mine.)
66 McCartney v. Superior Court, 187 Okl. 63, 101 P.2d 245 (1940).
67 189 Okl. 650, 118 P.2d 1015 (1941).

> . . . We hold therefore, that the trial court does not have the jurisdiction to enforce its order to pay child support by contempt proceedings on accrued unpaid installments commenced after the child has reached majority.[68]

Chief Justice Calvert summed up his position by posing the following questions:

> In this case the defaulting father is adjudged in contempt more than three years after the younger child reached age eighteen. Will the next contempt judgment requiring the payment of arrearages as a condition of purging be delayed five years? And the next, ten years and after the child's earnings are more than the father's. Where is the end?[69]

Requirement of Notice

In order that due process be fulfilled, a party must be given notice of proceedings instituted against him. In the case of an alleged contempt outside of the presence of the court, the party is entitled to some character of notice which will inform him of the charge. He is also entitled to a trial in open court on the issue of contempt.[70]

A party may not be committed for contempt without the issuance of a "show cause" order by the trial court and without a hearing. To do so is a violation of due process.[71] In determining whether due process has been accorded a party, the Supreme Court will consider the entire record including the evidence presented at the contempt hearing.[72] The Court does not consider the evidence in the sense that they act as a court of review; rather, the Court will consider the entire record.[73]

The notice requirement of rule 308-A, Texas Rules of Civil Procedure,[74] provided the basis for the release of the Relator in *Ex parte*

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[68] *Id.* at 1016.

[69] *Ex parte* Hooks, 415 S.W.2d 166 (Tex. Sup. 1967).

[70] *Ex parte* Hardin, 161 Tex. 567, 344 S.W.2d 152 (1961); *Ex parte* White, 149 Tex. 155, 229 S.W.2d 1002 (1950); *Ex parte* Hill, 122 Tex. 80, 52 S.W.2d 367 (1932).

[71] *Ex parte* Hodge, 389 S.W.2d 463 (Tex. Sup. 1965).

[72] *Ex parte* Elmore, 161 Tex. 585, 342 S.W.2d 558 (1961).

[73] *Ex parte* Morris, 147 Tex. 140, 215 S.W.2d 598 (1948); *Ex parte* Henry, 147 Tex. 315, 215 S.W.2d 588 (1948).

[74] Tex. R. Civ. P. 308-A as follows:

> In cases where the court has ordered periodical payments for the support of a child or children, as provided in the statutes relating to divorce, and it is claimed that such order has been disobeyed, the person claiming that such disobedience has occurred shall make same known to the judge of the court ordering such payments. Such judge may thereupon appoint a member of the bar of his court to advise with and represent said claimant. It shall be the duty of said attorney, if he shall in good faith believe that said order has been contemptuously disobeyed, to file with the clerk of said court a written statement, verified by the affidavit of said claimant,

Davis.[75] Davis was confined under a written commitment for failure to comply with a support order. On September 3, 1960, the district judge directed the issuance of a "show cause" order. The order commanded Davis to appear on September 10th. Davis was served on September 8th and appeared as commanded.

The Supreme Court held the direction of ten days' notice in rule 308-A to be mandatory. The Relator was given only two days' notice of the hearing, which fell short of the time required to insure due process. In discharging the Relator, the Court stated:

> . . . [T]he ten day notice provisions of the statute and the rule are in mandatory language. Due process can usually be avoided by fixing the date of hearing at a time which will permit service of the show cause order more than 10 days prior thereto. If the date of service does not afford the prescribed 10 days notice and the relator appears without counsel, such questions may be avoided by advising the relator of his rights and postponing the hearing.[76]

The application of rule 308-A was again brought to focus in *Ex parte Cardwell.*[77] Cardwell instituted an original habeas corpus proceeding, seeking release from the custody of the Harris County Sheriff. Cardwell was picked up and jailed upon a writ of attachment for failure to obey a court order for child support. It affirmatively appeared from the record that he had not been served with citation or a copy of the "show cause" order prior to his arrest and his trial for contempt. The commitment order however recited that Cardwell had been "duly cited." The Supreme Court, in holding that the Relator had not been afforded due process, stated:

> The statutes and our rules require ten days' notice upon service of process; and it would be unconscionable for us to establish a precedent in contempt cases that a trial court could order the seizure and incarceration of a citizen with no notice and then deprive him of a right to relief in a habeas corpus proceeding by reciting in its judgment that the person had been duly served. . . . (a) contempt proceeding is unlike a civil suit, it has some of the incidents of a trial for a crime, and is quasi-criminal in nature.

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describing such claimed disobedience. Upon the filing of such statement, or upon his own motion, the court may issue a show cause order to the person alleged to have disobeyed such support order, commanding him to appear and show cause why he should not be held in contempt of court. Notice of such order shall be served on the respondent in such proceedings in the manner provided in Rule 21a, not less than ten days prior to the hearing on such order to show cause. . . .

[75] 161 Tex. 561, 344 S.W.2d 153 (1961).

[76] *Id.* at 157.

[77] 416 S.W.2d 382 (Tex. Sup. 1967).

> Under such circumstances, this Court will consider the entire record to determine whether due process has been accorded to the relator.[78]

Although the Court determined that Cardwell had been denied due process of law, it reserved the right to make a case-by-case analysis of due process:

> We have held that while the *language* of the statute and the rule is mandatory, trials for contempt conducted upon less than 10 days notice will not constitute a denial of constitutional due process in all instances; and contempt judgments based on such trials may, therefore, be valid. Where there is less than ten days notice, the relator may be entitled to be discharged because of lack of due process. Ex parte Davis, 161 Tex. 561, 344 S.W.2d 153 (1961). As we said in *Davis*, each case must be evaluated on its own facts.[79]

Ex parte Herring[80] represents the Supreme Court's latest discussion on the requirement of notice prior to commitment for contempt. Herring was imprisoned for failure to make support payments. He was not personally served with notice of the "show cause" hearing at which he was adjudged to be in contempt. He had no knowledge from any source that the hearing was to be held. Notice of the "show cause" hearing was given to Herring's attorney pursuant to rules 308-A and 21a of the Texas Rules of Civil Procedure. Herring's attorney replied that she had not seen Herring and that he should be given personal service. An affidavit by her stated that she could not locate Herring prior to the September 3rd "show cause" hearing, and that he did not have notice of the contempt hearing until he came to her office late in September.

The Supreme Court discussed the relationship between rules 308-A and 21a, citing pertinent parts.[81] The Court, although acknowledging the fact that the rules had been followed, ordered the discharge of the Relator:

> We do hold, however, that it is a denial of due process to commit a person to prison for contempt who is not shown to be avoiding deliberately the service of process, and who has not had personal notice or knowledge of the show cause hearing at which he was held in contempt.
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> . . . Even though the notice of the show cause hearing was accom-

78 *Id.* at 384.
79 *Id.* at 384.
80 12 Tex. Sup. Ct. J. 243 (1969).
81 *Id.* at 244.

plished under our rules 308-A and 21a, Mr. Herring under the record before us, was not afforded due process of law.[82]

CONCLUSION

The importance of the writ of habeas corpus is firmly anchored in the common law and in the Constitution of the State of Texas. Historically, it has played a central role in the preservation of human freedom.

The historical and continuing importance of the writ was made abundantly clear by the Supreme Court of the United States in *Fay v. Noia*:[83]

> Although in form the Great Writ is simply a mode of procedure its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment; if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.

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[82] *Id.* at 244.

[83] 372 U.S. 391, 401, 83 S. Ct. 822, 828, 829, 9 L. Ed. 2d 837, 846, 847.