

## **HABEAS CORPUS IN BANKRUPTCY**

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# HABEAS CORPUS IN BANKRUPTCY

## 1. Introduction

This paper inquires into the power of the bankruptcy court to assist debtors who are penalized for being insolvent, and who become incarcerated as a result. A brief tour through the development of bankruptcy law shows the development of the law in the past, and where we are now. The remedy of habeas corpus is available in the event a debtor is in jail today for the reason of being insolvent. Perhaps you say that it can not happen today, that a citizen of Texas can not be incarcerated for debt. Not so. The focus of this paper is on the habeas corpus remedy available to a debtor, when the process goes to far. This paper is not intended to provide legal advice, or jail house lawyering. The history of bankruptcy, and specifically habeas corpus as it relates to bankruptcy, is a story of the development of public policy and the value which society places upon the orderly structuring of debts.

## 2. Ancient law

### a. Bankruptcy defined

The word "bankrupt" is taken from the Italian word *bancarupta*, which means "bench broken" or "bank broken". It is believed this term alludes to the custom in the Medieval Ages of breaking a merchant's marketplace table upon failure to pay a debt. While the concept of "acts of bankruptcy" was developed in medieval Italy in response to insolvent traders, the concept of debt repayment is as old as civilization itself.

### b. The Beginnings of Bankruptcy

The Code of Hammurabi, written by King Hammurabi who ruled Babylon between 1795-1750 BC, contained one of the earliest attempts to set rules for settling debts. According to the Code, a creditor could levy a pledge or distress (*nipûtum*) upon default on a debt, which entitled the creditor to take the debtor's wife, child or slave to his home to work for him until the debt was repaid as a debt-hostage. An alternative remedy was to allow the debtor to sell his wife or child into bondage, with or without the right of redemption, for a three-year period. If the debt was still not satisfied, the debtor himself could be put into bondage to the creditor by a judgment. There were penalties for creditors who wrongfully enforced a debt, or overcharged interest rates which were lawfully allowed from 20% to 33%, see Rus Versteeg, *Law In The Ancient World*, Carolina Academic Press 2002.

Ancient Greece followed similar methods of debt repayment. However, by the 7th Century BC, the wealthy in and around Athens held so many of the poor in bondage that economic collapse and rebellion appeared likely. To avert potential disaster, the lawmaker Solon granted amnesty to many of those in bondage and outlawed contracts which used a person's liberty as collateral for the debt.

## 3. Law of the Twelve Tables

### a. Roman Republic 510 BC to 49 BC

Rome, in the 5th Century BC, studied Solon's reforms when it decided to codify its laws into the Law of the Twelve

Tables. Romans wanted to improve on the laws and the punishments for not following the laws, which were at the whim of the ruler. Most early civilizations had been ruled by custom or the arbitrary judgments of kings or priests.

In 450 BC, after a revolt of citizens who felt they were entitled to know and be able to interpret the code of laws, the Twelve Tables were established. A ten man commission with extraordinary powers, (*decemviri legibus scribundis*), set forth the basis of law for all Roman citizens. It was a complete law of the Twelve Tables, with customs, and statutes (*ius civile*). These tables covered all areas of the law emphasizing the procedure that was to be followed for various crimes. They made the law open and applicable, supposedly, to all citizens, but those with wealth generally found ways to escape judgment. The laws of the Twelve Tables were never repealed but some fell into disuse as the centuries passed. The Twelve Tables established procedures to substitute for self help or outright retaliation, although private vengeance was allowed by retaliation in kind (*lex talionis*) but only if financial terms were not agreed upon. The original copies of the laws do not exist, due to being burned in the sack of Rome by the Gauls in 390 BC.

b. **Execution** There were two ways in which a creditor could enforce a debt owed to him, execution against the person of the debtor, and execution against his property. The details of personal execution are uncertain. It seems unlikely that one provision of the Twelve Tables was literally carried out, "let them cut up their shares" (*partes secanto*) as being carving up the debtors' body. Rome maintained the right of

creditors to use the debtor himself to secure the debt. This right was called *manus injectio* and allowed the creditor to keep the debtor in chains in the creditor's house for 60 days. The creditor was under a duty during this period to take the debtor to the marketplace three times so that a ransom could be paid or other arrangements to settle the debt could be made, such as the debtor leasing out the services of his wife or child to raise money (known as *manicipium*). In the early Roman times, the failure to resolve the debt within 60 days resulted in the debtor either being put to death or sold into foreign slavery.

By the end of the Roman Republic, these harsh penalties were abolished. In the closing days of the Republic, a significant reform was made that recognized a link between the assets and liabilities of a debtor. This was called the *venditio bonorum*, whereby a creditor could seize the property of the debtor rather than the debtor himself. The creditor could take possession and administer the whole of the property, and other creditors could join in, followed by a public auction and equal distribution of proceeds. There was a distinction made between execution against a debtor and an execution against a debtor's property. This remedy remained harsh, in that all property was sold, not just enough to pay the debts. The Roman approach was that the debtor must be punished, by proceedings that made the debtor *infamis* (not the same as infamous, but involving social stigma). In addition the debtor suffered civil disabilities, such as being unable to be a judge or to appoint an agent to represent one in litigation, see David Johnson, *Roman Law in Context*, Cambridge University Press 1999.

### c. **Citizenship in Rome**

The extent of time during which Rome's republic and empire covered, was a significant factor in Roman law. About 160 AD, which was about 600 years after the establishment of the Twelve Tables, the jurist named Gaius wrote about Roman laws. About 400 years after that, the emperor Justinian engaged jurists to create a complete compilation of Roman laws.

Legal rights depended on one's citizenship and status in Roman society. Citizenship was exclusive and the Roman Empire was marked by strong class distinctions. The wealthy had control of most of the legal customs prior to the establishment of the Twelve Tables and they kept their influence in the Roman courts. "Standing jury courts" (*questiones perpetuae*) basically comprised the criminal courts of the late Republic. There were several of these courts, each one dealing with a different statutory offense. The large juries were drawn from a list of upper class citizens and ruled by majority vote. The option of appeal did not become available until after Augustus' rule.

Citizenship allowed access to the legal system. Those who were born Roman citizens could hold governmental office, could marry another citizen and could participate in commercial transactions and their enforcement. Foreigners (*peregrine*) were required to retain a citizen as a patron, to transact business. Should a slave or foreigner, or one without full citizenship be involved in an insolvency matter, they suffered from diminished capacity (*media capitas deminuto*), and had less or no relief available to them. Where a citizen who became insolvent may be required to go into exile or move to a colony, those

without full citizenship were sold into slavery, or killed.

The Romans organized their citizenry in a way that permitted expansion. This was regarded as a source of strength by Rome's replenishing its citizen ranks with freed slaves, see Ancient Rome. Encyclopedia Britannica. 2005. Encyclopedia Britannica Premium.

### d. **Roman Prison**

One of the biggest differences between Roman and contemporary legal systems is the use of prisons. Roman prisons were not used to punish criminals, but instead served only to hold people awaiting trial or execution. Those who disobeyed court magistrates could also be imprisoned. The wealthy were generally held in house arrest at the home of a friend who would guarantee their presence at the trial. Private prisons existed for slaves.

## **4. The Roman Empire 49 BC to 549**

By the time Augustus ruled Rome (31 BC - 14 AD), a debtor could choose to give his property to his creditors, called a *cessio bonorum*, to avoid being seized himself. This law of cession (*cessio bonorum*) provided that if a debtor ceded, or yielded up all his property to his creditors, he was secured from being dragged to his death. Due to worries about debtors who hid or squandered their property, by 379 AD, this method was only available to debtors whose insolvency was deemed to have been caused by an act of God.

Most of what is reliably known about Roman law comes from the Justinian Code, created between 529 and 534 AD by the emperor Justinian. The

surviving two thousand or so works of Roman jurists at that time were compiled into fifty books named the Digest, (*Corpus Iuris Civilis*), David Johnston, *Roman Law in Context*, Cambridge University Press, 1999.

a. Roman trial procedures

The procedure of a trial differed during the Republic and the Empire. In the Republic, any citizen could press charges against another through a patron (*patronus*) as his advocate. The accused had to be present at the making of a formal charge (*nominis delatio*). The charge had to be in writing (*inscriptio*), signed by the accuser (*delator*) and witnesses (*subscriptores*) and delivered to the magistrate (*praetor*) who presided over the jury (*questiones*). The *delator* and *subscriptores* took an oath swearing they were not bringing false witness. Penalties were assessed against the *delator* should he or his witnesses lie. The accuser could ask for as many as 48 *subscriptores* during the *inquisitio*, all of whom could be questioned and subjected to speeches attacking their credulity. A vote by the jury allowed the *praetor* to announce the verdict. If the *delator* (accuser) won the case, he received a *praemium*, if he lost, he brought a false accusation (*calumnia*) or a conspiracy w/defendant to acquit (*praevaricatio*) and was fined.

During the Empire, there were many professional *delators* (accusers) because of the monetary rewards that awaited the winner. The senate took on the role of the *questiones* in three criminal courts presided over by the emperor, the consuls or the prefect of the city. None of these three were subjected to the *provocatio ad populum* (review by citizens). The government court system had its beginnings, with the *Postulatio-*

application for a hearing; the *Nominis delatio* (formal charge) by *delator* (accuser) with *subscriptiones* (witnesses) present; consuls summoned the senate to determine whether charges should be heard as one charge or divided; *inquisitio*-hearing the evidence; speeches were limited by a water clock; evidence heard; debate and a vote on the verdict ensued. *Praetors* (magistrates) and *propraetors* (governors) published a list of principles and formulae of their practices in the form of an edict at the beginning of each term. Each could effectively alter the formulae but, in general, the list remained the same.

Rules for permitting evidence were lax and the court considered the written work or spoken work as legally binding. While it was easy to bring suit against another, there were many lawsuits, many of which were frivolous as people were enticed by material rewards when a suit was won.

b. Penalties Crime, especially violent crime, increased as the lower class population, forced from their small farms by the large farm owners, swelled the population there. Slaves were brought to Rome as a consequence of the wars as well as creating mass unemployment amongst the people. At its peak, the population of Rome was more than 1,000,000. Idleness led to the increase of crimes as well. Any who were accused of a crime could be brought in front of the *praetor urbanus* by his accuser. This dispute could also be settled by a junior magistrate (*tres viri capitales*). In either case, the punishment, was severe. If a criminal was caught red-handed or confessed the deed, punishment was inflicted without trial. If he were a reputable citizen and claimed to be not guilty, trial was held before *praetor*;

otherwise, in front of *triumvir*. An advisory commission in both instances was called *consilium* to determine the question of guilt.

Crimes such as false witness, adultery and counterfeiting were punished with the death penalty. Less serious crimes were punished with a policy of "an eye for an eye". The death penalty was enforced by burying alive, throwing from a cliff or burning the guilty. Executions were ordered for possession of weapons with criminal intent or for possession of poison. Strict punishment, however, was generally only enforced on criminals of the lower classes. Members of the senatorial and equestrian classes were generally exiled for a given time (food and water forbidden within a given distance of Rome) and their property confiscated. Plebeians (lower class citizens) were scourged or sent to work in the mines.

During the empire, one could also choose to be sent to the arena. Since scourging and working in the mines often meant a slow lingering death, the choice of the games seemed a kinder solution. There is contradictory evidence of whether a citizen could be given a death penalty but, in effect, many of the punishments that members of the lower classes received were a sentence to death. If a Roman citizen were in a province, he was not allowed to be put to death, flogged, tortured or put in chains by verdict of a court in the provinces. If accused of a crime, a citizen could petition to be sent to Rome for his trial. If a crime was significant, the accused could be sent to Rome against his will for a trial. When there seemed no way to avoid a conviction, the accused patrician would commit suicide prior to being brought to

trial, thus avoiding both a conviction and the resulting social stigma.

### c. Examples of penalties

If one admitted to stealing or killing an animal or slave, he must pay the rightful owner the value of the property. If he denied the action and was found guilty, he would then be required to pay double the value.

A thief, caught in the night, could be killed provided the thief had been forewarned by a shout.

One might legally kill to defend oneself.

A father might recover the amount of his loss of prospective profit from his son's services, should the son be maimed.

Excessive brutality on the part of a teacher was punishable.

If there was a slip and fall while carrying a heavy burden, and that burden did harm to another, the 1st party was culpable since he should not have overburdened himself nor been so negligent as to walk on a slippery surface.

If one died from a drug administered by another, the administering person was liable. If the drug was given to the victim to take himself, and he died, he was at fault.

From an article of the VIIth Table: If anyone mutilates another's limb, he should suffer the same unless he comes to a friendly understanding with the wounded one.

Arsonists were killed by fire.

It was a crime for a Freedman to claim to be Freeborn.

Heads of family could put to death their children and slaves for any act of disobedience or disloyalty.

d. Lawyers The role of the lawyer was somewhat different than

that in the United States. The individual plaintiff and defendant were largely responsible for their own representation. Throughout the proceedings, the lawyer could offer strategic advice and could give a speech on behalf of the client, but he was not allowed to be paid for his services. The lawyer was not trained in the law but in the art of speaking. During their training, they followed the speeches of others and incidentally learned of the law. Lawyers were all men of means, interested more in practical solutions than in theory, and had other interests, usually working their way up the *cursus honorum* (pay scales) which were recovered from the offending party.

## 5. Developments from the Middle Ages to 19th Century England

a. Private law The Roman law that evolved under Augustus, and later Justinian, formed the basis for the development of Europe's laws of trade and commerce over the next several hundred years. After the Barbarian invasions at the end of the 5<sup>th</sup> century, the invaders retained Roman law for their own use, and began adjusting and taking on new qualities as times changes. Roman law evolved into different forms in the countries which had been subject to the Roman empire. The Romans had considered criminal and administrative laws as being public laws, and laws relating to individuals as being private laws, such as property, contracts and family law. This private law system has significantly influenced and been adopted by much of modern law. Various European nations adapted and used Roman law. The emperors of Europe issued their edicts based upon codifications of Roman law. Before the French Revolution in 1789 AD, France did not have its own Code. Napoleon had studied the Justinian

code (*Corpus Iuris Civilis*) as a young officer, and upon coming to power, adopted it for French law, becoming the Napoleonic Code, which then further influenced other nations.

b. English law The United Kingdom was not as greatly affected by Roman law as other countries which had been subject to the Roman empire. The king's judges invented the common law in the 11<sup>th</sup> century when judges heard cases for the crown and decided them on principals of equity, creating the common law system and *stare decisis*. The English system was primarily a case law system at that time. Roman law was primarily statutory law. In the 10<sup>th</sup> century, two important books had been published in England, one authored by Bracton and the other by Glanville. These books studied and described Roman law in a systemic manner. When king's judges later came across difficult cases, they used the authority of these authors to decide, thereby indirectly adopting Roman law, Russ Versteeg, *Law In The Ancient World*, Carolina Academic Press 2002.

c. English bankruptcy law As commerce became more sophisticated, especially with the exploits of the merchants of Lombardy beginning in the 13th Century, the previous ways of resolving debts became inadequate to the task of handling insolvent traders. Various approaches were developed to address this problem. In France, the Ordinance of 1673 and the Code de Commerce de 1807 influenced the development of "law merchant" in civil law jurisdictions. In England, a law was enacted in 1351 to try to hold the Lombard Merchants company responsible for the debts of its member merchants. Creditors who did not fall under such legislation had to rely on the

clumsy procedure set out in the common (judge-made) law to recover payment from the debtor's assets. It was basically a case of "first come, first served".

English legislation enacted between the 1300s and the early 1800's was directed at insolvent traders. A debtor, who was not engaged in trade and thus could not be made "bankrupt", was not much better off than the tradesman under Babylonian law: he was imprisoned until his debt was paid. In the English system the bankrupt laws were limited to persons, who were traders, or connected with matters of trade and commerce, as such persons are peculiarly liable to accidental losses, and to an inability of paying their debts without any fault of their own.

The primary objectives of the early English laws were to recover the creditors' losses and to exact retribution against debtors. For instance, legislation enacted in 1705 allowed the merchant debtor to be discharged from his debts, if he submitted to the Court's authority, surrendered all of his property and obeyed the restrictions imposed on him by the law. However, a debtor, who committed fraud by concealing his assets, perjured himself on his examination by creditors or failed to submit to the authority of the Court faced penalties ranging from having to stand in the pillory, to having an ear cut off, to suffering death by hanging.

It was not until the early part of the 19th Century that the issue of non-tradesman debtors began to be addressed. At first, laws were passed in England to allow such debtors to be released from prison, but they remained liable for repayment of their debts. Later, non-tradesman debtors could be discharged

from their debts, if they surrendered all of their property to the creditors. However, they still did not fall under the bankruptcy legislation, which had developed a more lenient approach to business debtors who had suffered losses through misfortune rather than dishonesty or extravagance. In 1869, the distinction between tradesmen and other debtors - and in effect, the distinction between bankruptcy and insolvency - was abolished in England. Only debtors, who had the ability to pay their debts but refused to do so, could be imprisoned. The ability of the creditors to fully control the administration of the bankrupt's estate was eliminated by the English Bankruptcy Act of 1883. The administration of a bankrupt's estate was thereafter jointly controlled by the government and the creditors; the model of control which remains today.

The English system of bankruptcy, as well as the name, was borrowed from the continental jurisprudence, and derivatively from the Roman law.

"We have fetched, well the name, as the wickedness of bankrupts, from foreign nations; for *banque* in the French is *mensa*, and a *banquer* or *eschanger* is *mensarius*; and route is a sign or mark, as we say a cart route is the sign or mark, where the cart hath gone" wrote Lorde Coke. The debtor was "him, that hath wasted his estate, and removed his bank, so as there is left but a mention thereof".

Commentators say that word bankruptcy is derived from *banque* and *rumpue*, as "he that hath broken his bank or state". Mr. Justice Blackstone wrote as to the latter translation, saying, that the word is derived from the word *bancus*, or

*banque*, which signifies the table or counter of a tradesman, and *ruptus*, broken; denoting thereby one, whose shop or place of trade is broken and gone. The first English statute against bankrupt, was 'against such persons, as do make bankrupt,' (34 Hen. 8, ch. 4,) which is a literal translation of the French idiom, "qui font banque route."

The system of discharging persons, who were unable to pay their debts, was transferred from the Roman law into continental jurisprudence at an early period.

## 6. Habeas Corpus Defined

A most basic and ancient human right, is that of *habeas corpus*. Habeas corpus is essentially a right to order an official under whose authority a prisoner is being held, to be brought to court to justify the lawfulness of that detention.

It is a writ ordering that a detained person be brought before a court or judge, at a specified time and place, in order to determine whether such detention is lawful. The right of any citizen to obtain the issue of such a writ is regarded as one of the most fundamental civil liberties. *Habeas Corpus* is a civil, as distinguished from a criminal remedy or proceeding, regardless of whether a prisoner is detained under civil or criminal process, *Ex parte Hurth*, 764 So. 2d 1272 (Ala. 2002), *Gibson v. Turpin*, 270 Ga. 855, 513 S. E. 2d 186 (1999); *Schlanger v. Seamans*, 401 U.S. 487, 91 S. Ct. 995, 28 L.Ed. 2d 251 (1971). The classification of the writ as being civil is inexact, because it is unlike a general civil action where parties seek to remedy a private wrong, because the writ is used to challenge the validity of a conviction and sentence. Strictly

speaking, it is not an action or a lawsuit, but a summary remedy open to the person detained, *Overholser v Treibly*, 147 F. 2d 705 (App. D.C. 1945).

## 7. English establishment

The basis of British law is the Magna Carta of 1215, which is the origin of the English Common Law system of Habeas Corpus. The Great Charter not only guaranteed the freedom of the English Church from Rome, but established the principles of 'trial by jury', 'due process of the law', 'innocent until proven guilty' and 'liberty and freedom of the subject'.

Habeas Corpus is the generic term based upon English statutory and common law, consisting of several different kinds of writs, *Ex parte Bollman*, 8 U.S. 75, 2 L.Ed. 554 (1807). Where the term "habeas corpus" is used alone, it is the writ of *habeas corpus ad subjucendum*, the remedy provided for when a person is deprived of their liberty, *Carbo v. U.S.*, 364 U.S. 611, 81 S. Ct. 338. 5 L. Ed. 2d 329 (1961). This is known as the "Great Writ", which was known in early common law, and is adopted into the Constitution of the United States.

In England, writs began with the instruction 'Habeas corpus' (Latin for 'Have the body...', meaning 'You are to produce the person detained') were first issued in the 13th century. The law relating to them was formalized by the Habeas Corpus Act of 1679, passed to prevent British officials sending prisoners to offshore penal colonies beyond the reach of the law, 31 Charles 2, c.2 1679.

Habeas Corpus Act "you may have the body". A writ of habeas corpus

requires someone holding a person in prison to produce the person to a court;

"roughly speaking the result is this - any person who stands committed for any crime except for treason or felony plainly expressed in the warrant of commitment, is to have the writ. He is to be able to get it in vacation time as well as term time. The chancellor or any judge to whom he applies must grant it, or incur a penalty of £500. the gaoler must make the return within a very brief time, or incur a penalty. No person is to be sent into prison out of the kingdom; anyone who breaks this rule is to incur the penalty of a *praemunire* and be incapable of pardon. Prisoners who are committed for treason or felony are to have the right to a speedy trial. The heavy penalties which judges and gaolers incur if they break this act are given to the injured person, may be sued for by him as debts; this scheme makes it impossible for the king to protect or pardon them, for the king has no power to forgive a debt due to his subjects," James 2nd king 1685 to 1688 1688: William 3rd and Mary, king and queen. Mary died 1694, William died 1702.

Acts before 1963 are named by the year/s of the monarch's reign for the session of Parliament in which they were passed, plus the number of the Act. The 1959 Mental Health Act is 7 + 8 Eliz, 2 c.72 because it was the 72nd Act in the session of parliament in the seventh and eighth year of the reign of Queen Elizabeth 2nd. Charles 2nd is counted as

reigning from 1649: when his father's head was cut off.

## 8. U.S. Constitution and statutes

a. The Writ "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." U.S. Constitution, Article 1, section 9, paragraph 2.

b. Bankruptcy Courts lack power to issue the Writ In 1978, through the Bankruptcy Reform Act, Congress significantly revised the Bankruptcy Code and the role of bankruptcy referees. Though stopping short of making bankruptcy referees Article III judges, Congress significantly increased the status, the duties, and the powers of those referees. Northern Pipeline held that the broad powers granted to bankruptcy judges under the Bankruptcy Act of 1978 were judicial powers and violated Article III of the Constitution.

In Northern Pipeline, the court reviewed the expanded powers under the new Act which included "the power to hold jury trials, to issue declaratory judgments, [and] to issue writs of habeas corpus under certain circumstances," 458 U. S., at 55. In addition, Congress had provided for broad injunctive powers. In the place of §2(a)(15), Congress added 11 U. S. C. §105, which provided in relevant part "The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Along with both this marked expansion of the power of bankruptcy judges and the broad delegation of injunctive authority, Congress indicated its intent to limit the

power of those judges to enjoin other courts. Although Congress provided that "[a] bankruptcy court shall have the powers of a court of equity, law, and admiralty," it also provided that bankruptcy courts "may not enjoin another court." 28 U. S. C. §1481 (1982 ed.). By this act, it was clear that Congress intended to deny bankruptcy judges the power to enjoin other courts, which had been exercised for well over 50 years prior to the adoption of the 1984 amendments to the Bankruptcy Code, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53, n. 2, 102 S. Ct.2858, 2862, n 2. 73 L.Ed 2d. 598 (1982).

The actual holding in *Marathon Pipe Line* was that Congress, had invested unconstitutionally broad powers in the untenured judges who served in the newly created bankruptcy courts. The Supreme Court invalidated the entire statutory grant of jurisdiction to the new bankruptcy court system set up by the 1978 Act, holding that untenured judges could not, consistent with Article III, exercise the judicial power of the United States. In the dicta cited by the Majority, Justice Brennan endorsed the possible constitutionality of partial restrictions on judicial review, rather than a complete bar on such review.

The Supreme Court has, however, upheld magistrate judge authority under the following circumstances: *McCarthy v. Bronson*, 111 S. Ct. 1737 (1991) (prisoner litigation challenging prison conditions); *Peretz v. United States*, 111 S.Ct. 2661 (1991) (felony voir dire with defendant's consent); *Gomez v. United States*, 490 U.S. 858 (1989) (felony voir dire over defendant's objection); *United States v. Raddatz*, 447 U.S. 667 (1980) (evidentiary hearing in motion to suppress proceedings), reh'g denied, 448 U.S. 916

(1980); *Mathews v. Weber*, 423 U.S. 261 (1976) (Social Security proceedings); *Wingo v. Wedding*, 418 U.S. 461 (1974) (habeas corpus proceedings).

## 9. Texas Authority

a. The Texas Constitution  
Article 1 - BILL OF RIGHTS, Section 18 - IMPRISONMENT FOR DEBT  
No person shall ever be imprisoned for debt.

b. The Texas Constitution  
Article 1 - BILL OF RIGHTS, Section 12 - HABEAS CORPUS

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.

c. The Texas Constitution  
Article 16 - GENERAL PROVISIONS, Section 28 - GARNISHMENT OF WAGES

No current wages for personal service shall ever be subject to garnishment, except for the enforcement of court-ordered: (1) child support payments; or (2) spousal maintenance. (Amended Nov. 8, 1983, and Nov. 2, 1999.)

## 10. Texas Standards of Habeas Corpus

a. Nature of Remedy. The primary use of the writ of habeas corpus is to compel the release of a person whose

liberty is unlawfully restrained by an order of contempt issued because of a violation of an order, judgment, or decree previously made, rendered, or entered by the court or judge in a civil case, Tex. Gov't. Code Ann. §§ 22.002(e), 22.221(d). The remedy of habeas corpus is in the nature of a collateral attack and its purpose is not to determine the ultimate guilt or innocence of the relator, but only to ascertain whether the relator has been unlawfully imprisoned, *Ex Parte Gordon*, 584 S.W.2d 686, 687-88 (Tex. 1979).

Where the judgment ordering confinement is "void," the confinement is illegal and the relator is entitled to discharge. *Ex Parte Rhodes*, 163 Tex. 31, 34, 352 S.W.2d 249, 250 (Tex. 1961). Because habeas corpus is a collateral attack, the reviewing court has no authority to reform the order being attacked, *Ex Parte Morris*, 171 Tex. Crim. 499, 352 S.W.2d 125, 129 (1961)(the reviewing court can only order the relator discharged from custody). The central question in a habeas corpus proceeding is whether the confinement is illegal.

b. Direct Contempt

Contempt of court is broadly defined as disobedience to or disrespect of a court by acting in opposition to its authority, *Ex Parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995). There are two basic types of contempt: direct contempt and constructive contempt. Direct contempt is that type of disobedience or disrespect which occurs within the presence of the court, while constructive contempt occurs outside the court's presence, *Ex Parte Gordon*, 584 S.W.2d at 688.

This distinction is more significant than just identifying the physical location of a contemptuous act, since more

procedural safeguards are afforded to constructive contemnors than to direct contemnors, *Ex Parte Werblud*, 536 S.W.2d 542, 546 (Tex. 1976). In direct contempt cases, the court is not required to give the contemnor notice and a hearing before holding the contemnor in contempt, *Ex Parte Chambers*, 898 S.W.2d at 259.

c. Constructive Contempt

In constructive contempt cases, the trial court must give the contemnor notice and a hearing before holding the contemnor in contempt, *Ex Parte Gordon*, 584 S.W.2d at 688. The judge may hold a person in contempt, without notice and a hearing, for inappropriate conduct occurring in court, but cannot hold a person in contempt without notice and hearing, for violating a court order when the violation occurred outside of court.

d. Civil Contempt

When a person is guilty of contempt, the court may resort to civil contempt, criminal contempt, or both, *In re Weise*, 1 S.W.3d 246, 247 (Tex.App.—Corpus Christi 1999, orig. proceeding), citing, *Ex Parte Sanchez*, 703 S.W.2d 955, 957 (Tex. 1986). The distinction between civil and criminal contempt lies in the nature and purpose of the penalty imposed, *Ex Parte Busby*, 921 S.W.2d 389 (Tex.App.—Austin 1996, pet. ref'd).

A judgment that provides that a contemnor is to be committed unless and until he or she performs the affirmative act required by the court's order is a civil contempt order. This type of conditional penalty is civil because it is designed to compel the doing of some act, *Ex Parte Johns*, 807 S.W.2d 768, 770 (Tex.App.—Dallas 1991)(orig. proceeding).

e. Criminal contempt A criminal contempt order is punitive in

nature and is an exertion of the court's inherent power to punish a contemnor for some completed act which affronted the dignity and authority of the court. In criminal contempt proceedings, the court punishes the contemnor for improper actions and no subsequent voluntary compliance can enable the contemnor to avoid punishment for past acts, *Ex Parte Busby*, 921 S.W.2d at 391.

f. Restraint. A writ of habeas corpus can issue only when the relator is actually confined or restrained in his or her liberty in some way, *Deramus v. Thornton*, 160 Tex. 494, 333 S.W.2d 824, 827 (Tex. 1960). It is not required that the relator actually be confined in a jail. Any character of restraint which precludes absolute and perfect freedom of action will justify the issuance of the writ, *Ex Parte Williams*, 690 S.W.2d 243, 244 (Tex. 1985); *Gibson v. State*, 921 S.W.2d 747, 754 (Tex.App.—El Paso 1996, writ denied). For example, a contempt order that places the relator on probation constitutes a sufficient restraint on the relator's liberty where the terms of the probation require the relator to report to a probation officer once a month, *Ex Parte Duncan*, 796 S.W.2d 562, 564 (Tex.App.—Houston [1st Dist.] 1990, orig. proceeding).

Habeas corpus is also available even if the appellate court allows the relator to be released on bond while it considers the petition for writ of habeas corpus, because the relator may be remanded to custody, *Ex Parte Williams*, 690 S.W.2d 243, 244 (Tex. 1985).

g. Void Order An appellate court will only issue a writ of habeas corpus where the underlying order or judgment affecting the contemnor is void, *Ex Parte Rhodes*, 163 Tex. 31, 34, 352

S.W.2d 249, 250 (Tex. 1961). An order is void if: (1) the order was beyond the power of the court to make the order, (2) the order is not supported by any evidence, (3) the person conclusively established an inability to comply with the underlying order, or (4) the person was deprived of due process of law in relation to the issuance of the order, *Rosser v. Squire*, 902 S.W.2d 962 (Tex. 1995)(contempt order was void because fine imposed by trial court exceeding statutory maximum); *Ex Parte Williams*, 960 S.W.2d at 244 (contempt order was void for lack of evidence contemnor violated temporary injunction); *Ex Parte Chambers*, 989 S.W.2d 257, 261-62 (Tex. 1995)(contempt order was void because relator conclusively proved inability to comply with order); *Ex Parte Barnett*, 600 S.W.2d 252, 254 (Tex. 1980)(contempt order was void because order was never reduced to writing).

h. Written Order Required Due process requires a court, before imprisoning a person for violating a prior order, to sign a written judgment or order of contempt and a written commitment order, *Ex Parte Proctor*, 398 S.W.2d 917, 918 (Tex. 1966). More importantly, the order must set out the terms for compliance in clear and unambiguous terms, *Ex Parte Brister*, 801 S.W.2d 833, 834 (Tex. 1990). If the order or judgment does not meet these requirements, the person cannot be held in contempt for violating the order or judgment and habeas corpus is available if the relator's liberty is restrained as a result, *Ex Parte Hodges*, 625 S.W.2d 304, 306 (Tex. 1981).

i. Notice and Hearing Required. The amount of process provided the contemnor varies

depending on whether the contempt is direct or constructive, civil or criminal, *Ex Parte Werblud*, 536 S.W.2d 542, 545-46 (Tex. 1976)(orig. proceeding)(explaining classifications of contempt). In a case involving conduct outside the presence of the court (i.e., constructive contempt cases), due process requires that the alleged contemnor receive full and unambiguous notice of the accusation of contempt and be given an opportunity to be heard, *Ex Parte Adell*, 767 S.W.2d 521, 522 (Tex. 1989); *Ex Parte Vetterick*, 744 S.W.2d 598, 599 (Tex. 1988). This notice should be by show cause order or equivalent legal process personally served on the alleged contemnor, and it should state when, how and by what means the defendant has been guilty of contempt, *Ex Parte Vetterick* 744 S.W.2d at 599.

Failure to give the alleged contemnor notice and a hearing will result in a void order that may be attacked by writ of habeas corpus if the contemnor's liberty has been restrained, *Ex Parte Swate*, 922 S.W.2d 122, 124 (Tex. 1996)(commitment order that enhanced punishment without giving relator notice or opportunity to be heard deprived relator of due process and was void).

j. Reformation of Order

If a contempt order contains both valid and void provisions, most reviewing courts sever the void provision where it is possible to do so, *Ex parte Rosser*, 902 S.W.2d at 962 (writ granted to reduce amount of excessive fine); *Ex Parte Ramzy*, 424 S.W.2d 220, 226 (Tex. 1968)(reforming contempt order to delete portions which relator could not perform); *Ex Parte Ramon*, 821 S.W.2d 711, 715 (Tex.App.–San Antonio 1991, orig. proceeding)(coercive portion of contempt order vacated, but punitive portion left in

tact). However, if an order assesses one punishment for multiple acts of contempt and one act of contempt is not punishable by contempt, the entire order is void, *Ex Parte Davila*, 718 S.W.2d 281, 282 (Tex. 1986). A contempt order is void if it divides one contemptuous act into several acts and assesses punishment for each allegedly separate act, *In re Long*, 984 S.W.2d 623, 625 (Tex. 1999).

k. Burden of proof In a habeas corpus proceeding, relator has the burden of proving that the contempt order is void and not merely voidable, *Ex Parte Lowery*, 518 S.W.2d 897, 899 (Tex.Civ.App.–Beaumont 1975, orig. proceeding). The relator must conclusively show her entitlement to the writ, *In re Pruitt*, 6 S.W.3d 363, 364 (Tex.App.–Beaumont 1999, orig. proceeding); *Ex Parte Barlow*, 899 S.W.2d 791, 794 (Tex.App.–Houston [14th Dist.] 1995, orig. proceeding).

This burden includes bringing forward a record establishing relator's right to relief. *Ex Parte Savelle*, 398 S.W.2d 918, 921 (Tex. 1966)(orig. proceeding)(the relator must bring forward an adequate record to establish the invalidity of the order, and in the absence of a complete record, the court will presume that the evidence supported the trial court's contempt judgment).

l. Standard of Review

The order or judgment challenged on habeas corpus is presumed to be valid and the appellate court will not weigh the evidence offered at the contempt hearing to determine whether it preponderates against the judgment, *Ex Parte Helms*, 152 Tex. 480, 259 S.W.2d 184, 186 (Tex. 1953)(orig. proceeding); *In re Pruitt*, 6

S.W.3d at 364. The burden of proof is on the debtor to show the trial court's contempt findings are so completely without evidentiary support that the trial court's judgment is void because it deprives a relator of liberty without due process of law, *In re Pruitt*, 6 S.W.3d at 364 (explaining that the reviewing court will not review the trial court's exercise of its discretion nor the sufficiency of the evidence to support the trial court's action).

## 11. Courts, Case Situations

The debtor was incarcerated for failure to pay child support prior to filing bankruptcy in chapter 13. Since there was no stay at the time of incarceration, the court held there was no willful violation of the stay. The court noted that it had no jurisdiction to entertain a Petition for Writ of Habeas Corpus. . The statute which permitted the bankruptcy court to issue a writ of habeas corpus, 28 U.S.C. § 2256, never took effect; *Womack v. Mays (In re Mays)*, 253 B.R. 241, 242–44 (Bankr. E.D. Ark. 2000).

Some courts conclude that prior to discharge in a Chapter 13 case there is no automatic stay to protect the debtor from criminal actions or proceedings, even if the action is purely debt collection in content. A bankruptcy court issued a writ of habeas corpus to release from jail a Chapter 13 debtor incarcerated for failing to pay restitution, and was reversed on appeal based in part on the district court's finding that § 362(b)(1) excepts from the automatic stay even debt collection in the form of a criminal prosecution. State officials were charged with violating the stay by revoking probation and incarcerating the debtor for failure to pay restitution; the bankruptcy court issued a

writ of habeas corpus to release debtor from jail and enjoined continuing prosecution, but refused damages under § 362(h). The debtor pleaded guilty to stealing \$21,000 from her employer. The Alabama criminal court had sentenced the debtor to 10 years but ordered probation and restitution in lieu of incarceration. Debtor had failed to pay restitution because her husband was ill and out of work. Debtor filed Chapter 13 and with notice of the bankruptcy, probation officer filed a delinquency report. The criminal court conducted a delinquency hearing, and revoked the debtor's probation and incarcerated the debtor. While in jail, state officials counseled the debtor on ways to earn release by agreeing to make restitution. "Such actions, even under the guise of a continuing criminal proceeding, are in violation of the stay as determined by 11 U.S.C. § 362(a)(6)." The bankruptcy court applied *Gruntz v. County of Los Angeles (In re Gruntz)*, 166 F.3d 1020 (9<sup>th</sup> Cir. 1999), because the debtor was without an adequate state forum in which to assert rights under the automatic stay. The bankruptcy also applied *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), which provides an exception to Eleventh Amendment immunity of state prosecutor. Bankruptcy court issued a writ of habeas corpus, but declined to award damages because prospective injunctive relief is the only relief available under *Ex parte Young*.), *Rainwater v. Alabama (In re Rainwater)*, 233 B.R. 126, 157 (Bankr. N.D. Ala.1999), rev'd, 254 B.R. 273(N.D. Ala. 2000).

When debtors are inmates in state or federal custody at the time of filing, it is difficult for to meet the requirements for eligibility and confirmation of a plan. The bankruptcy courts have resisted requests

by incarcerated pro se debtors to attend hearings in person using habeas corpus as the means. A habeas corpus petition by an incarcerated Chapter 13 debtor was jurisdictionally defective, was filed on the wrong forms, and was found to be without merit, *In re Farr*, 192 B.R. 193 (Bankr. E.D. Wis. 1995).

In a similar case, a pro se tax protester, convicted of multiple counts of rape, sexual battery and coercion of witnesses, and incarcerated on sentences totaling 24 years, was not entitled to transport from the Morgan County Regional Correctional Facility in Wartburg, Tennessee, to the bankruptcy court in Knoxville, Tennessee, to participate in hearings with respect to his Chapter 13 case, because “the debtor’s appearance will not benefit the debtor, the court or the IRS because of the expense of transporting the debtor, the security risk and danger, and the lack of probability of the debtor gaining confirmation of his plan”, *In re Burrell*, 186 B.R. 230, 233 (Bankr. E.D. Tenn. 1995).

In older cases, the habeas corpus power of bankruptcy courts was used to release parties from the custody of other courts. Where there was a state court arrest upon civil process for a debt which was subject to a discharge in bankruptcy, the bankruptcy court was authorized to issue a writ of habeas corpus, *People v Erlanger*, 132 F. 883, (S.D.N.Y. 1904).

Modern cases are reluctant to allow a habeas corpus power to the bankruptcy court. For example, 28 U.S.C. § 2241 authorizes federal district courts to review state court decisions in habeas corpus proceedings. The Rooker-Feldman doctrine would be irrelevant in such an instance. There is no comparable

bankruptcy statute, *In re Siskind*, 258 B.R. 554, (Bankr.E.D.N.Y., 2001). Where the debtor was being prosecuted, the subsequent filing of a chapter 13 case did not allow a habeas corpus power to release the debtor, *In re Womack*, 253 B.R. 247, (Bankr.E.D.Ark. 2000).

A bankruptcy filing can give rise to a review of the automatic stay, by state courts. A habeas corpus writ was granted because the order of incarceration was found to be void, being not specific, *In Re Mona Naguib*, WL 2335029, 2004. The distinction between criminal contempt and civil contempt was reviewed. The debtor argued that her 30 day criminal incarceration for not allowing child visitation violated the automatic stay and brought an original proceeding for habeas corpus in the appellate court. The state appellate court noted the automatic stay does not apply to criminal contempt proceedings, pursuant to *In re Weise*, 1 S.W. 3d 246, 248-49 (Tex. App.-Corpus Christi 1999). The state standards for habeas corpus are applied in seeking relief for a debtor.

When a debtor is unable to comply with the civil portion of a contempt order of incarceration as to unpaid child support., he must be released, *In Re Steven Kelly Kaptain*, (No 01-04-00001-CV, Houston 1<sup>st</sup> 2004, not published).