

1954

# Leonard Black and Vera Johnson v. David F. Anderson : Brief of Respondents

Utah Supreme Court

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Horace J. Knowlton; Robert J. Schum; Attorneys for Respondents;

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IN THE SUPREME COURT <sup>U.</sup>  
OF THE STATE OF UTAH

LEONARD BLACK and VERA  
JOHNSON also known as  
Vera Johnson Black,  
Plaintiffs and  
Respondents

vs.

Case No. 8234

DAVID F. ANDERSON, Judge  
of the Juvenile Court of  
Washington County, State  
of Utah, et al.,  
Defendants and  
Appellants

FILED  
OCT 26 1954

Supreme Court, Utah

BRIEF OF RESPONDENTS

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## INDEX

	Page
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS UPON WHICH RESPONDENTS RELY.....	11
Point 1. The Court acted properly in de- claring the judgment of the Juvenile Court null and void as in violation of Amendments One and Fourteen of the Constitution of the United States of America and of Article One of the Consti- tution of the State of Utah.....	12
Point 2. The District Court in habeas corpus proceedings involving cus- tody of minors must act as a court of equity and award custody as the best interests of the min- ors shall indicate, hearing and deciding all questions of fact in- volved and making conclusions of law to achieve this end.....	13
Point 3. The District Court in restoring the custody of the minors involved to their parents acted within its own jurisdiction and in obedience to its own duties in such cases and not in disturbance of the previously acquired jurisdiction of the Juve- nile Court.....	48
ARGUMENT.....	12
CONCLUSION.....	73

## CONSTITUTION OF UTAH CITED

	Page
Article 1, Section 1.....	11, 12, 13
Article 1, Section 4.....	11, 12, 13
Article 1, Section 7.....	11, 12, 13
Article 1, Section 15.....	11, 12, 13

## CONSTITUTION OF THE UNITED STATES OF AMERICA CITED

Amendment 1.....	11, 12, 13
Amendment 14.....	11, 12, 13

## STATUTES CITED

Section 55-10-5 (4), Utah Code Annotated, 1953.....	43
--	----

# CASES CITED

	Page
Baldwin v. Nielson, 110 Utah 172, 170 P (2d) 179.....	26
Bowen v. Johnston, 306 U. S. 19, 59 S. Ct. 442.....	58
Buchanan v. Buchanan, 170 Va. 458, 197 S.E. 426, 116 A. L. R. 688.....	71
Chapman v. Graham, ___Utah___, 270 P. (2d) 821.....	20, 45, 46, 47
Ex Parte Hudgins, 249 U. S. 378, 39 S. Ct. 337.....	53
Ex Parte In The Matter of Hans Nielsen, Appt., 131 U.S. 176, 9 S. Ct. 672, 33 L. Ed. 118.....	61
Ex Parte Lange, 18 Wallace 163, 85 U. S. 18	60
Ex Parte McDaniel, 90 Cal. App. 307, 265 P. 884.....	69
Ex Parte S. H., 1 Utah (2d) 186, 264 P. (2d) 850.....	32, 35
Hardcastle v. Hardcastle, 118 Utah 192, 221 P. (2d) 883.....	25
In Re Bradley, 109 Utah 539, 167 P. (2d) 978.....	26
Jensen v. Sevy, 103 Utah 220, 134 P. (2d) 1081.....	36, 42, 44

	Page
Jones v. Moore, 61 Utah 383, 213 P. 191 14, 18, 20, 23, 24	
Merchant v. Bussell, 139 Me. 118, 27 A. (2d) 816.....	70
People Ex Rel Klee v. Klee, 195 N.Y.S. 778.	71
Sunal v. Large, 332 U. S. 174, 67 S. Ct. 1588, 91 L. Ed. 1982.....	54
Thompson v. Harris, 106 Utah 32, 144 P. (2d) 761.....	66
Wallick v. Vance, 76 Utah 209, 289 P. 103..	25
Walton v. Coffman, 110 Utah 1, 169 P. (2d) 97.....	27

**Abstract**

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Case No.  
8234

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in their brief. We feel, however, that Appellants' Statement of Facts is not sufficiently complete to fully appraise the Court of the situation involved. The first sentence of Appellants' Statement of Facts is as follows:

"Vera Johnson also known as Vera Johnson Black is the polygamous wife of Leonard Black and from this unlawful relationship there have been born eight children ranging, now from eighteen to two years of age."

The marriage of Vera Johnson and Leonard Black was entered into in obedience to Section 132 of Doctrine and Covenants of the Church of Jesus Christ of Latter Day Saints. This relationship was entered into with the firm understanding and belief that said Section 132 is the Word of God, written in the hand of Joseph Smith, His Prophet. In living in obedience to the admonitions of said Section 132, these parents conscientiously felt that they were



fulfilling a duty imposed upon them by God.

From this holy relationship there were born eight children "ranging, now, from eighteen to two years of age." These children have been raised in the home maintained by their parents in Short Creek, Utah. The rearing given these children by their parents has been such that the children have never been deprived of any of the necessities of life, have always been adequately clothed, fed, and housed, and under the loving care of their parents they are all developing into normal, healthy, intelligent citizens of the State of Utah and of the United States of America.

The parents of these children are, in matters of religious faith, what are known as Fundamentalist Mormons. They, and those who profess the same creed, hold to the tenets of the Church of Jesus Christ of Latter Day Saints as that creed stood prior to the issuance and

adoption by that church of the so-called "Manifesto" of Wilford Woodruff in 1890. They feel in conscience that Mormon Celestial or Plural Marriage is the law of God today, even as it was when revealed as an "everlasting" covenant to the Prophet Joseph Smith, and that any effort on the part of men to change that or any law of God is as nothing, and that such an attempted change by men cannot relieve men of the duties imposed upon them by the Supreme Law-Giver. Devoutly and sincerely these parents entered into this relationship following God's Command, and, in obedience to all the laws of marriage and chastity which surround and protect Mormon Celestial or Plural Marriage from the abuses and excesses which we otherwise see about us on every side destroying the sacredness of marriage and the vitality of the American family, they have had given to them by God this grand family of eight children.

On page 2 of their brief the Appellants

correctly set out what are Findings of Fact 17, 18, and 19 of the Juvenile Court, as follows:

"That the home of Leonard Black and Vera Johnson Black at Short Creek, Utah, is an immoral environment for the rearing of said children.

"That Leonard Black, the father, and Vera Johnson Black, the mother of said children, have each knowingly failed and neglected to provide for said children the proper maintenance, care, training and education contemplated and required by both law and morals.

"That both the public welfare and the welfare of the children requires that the rights of custody and control over said children be taken from their parents."

In this connection it would seem appropriate to point out that Finding of Fact 16 of the Juvenile Court is as follows:

"That there was no evidence that any of the children were destitute and without proper sustenance, clothing or medical care."

The Juvenile Court in its Finding of Fact 13 found that these parents had not been living

together as man and wife since July 24, 1953, stating that the reason for this behavior was "not because they have abandoned their religious beliefs, but out of fear of criminal or juvenile court action involving themselves and their children." In other words, from a time prior to the time the complaint was filed in the matter before the Juvenile Court, continuing through the time that court rendered its decision, through the date on which the court took the actual custody of these children forcibly from the arms of their mother, through the present date, these parents have not been practicing plural marriage and, according to the finding of the Juvenile Court have refrained from doing so in deference to civil authority, including that of the Juvenile Court itself.

Findings of Fact 17, 18, and 19 of the Juvenile Court, taken in conjunction with the other

Findings of Fact, amount to a Conclusion of Law, regardless of designation, and that conclusion of law is to the effect that the offspring of a Mormon Celestial or Plural Marriage living in the care and custody of their mother in a home maintained by their parents, which parents no longer cohabit as man and wife, are, by reason of their birth and of the fact that the parents still hold to their religious beliefs, neglected children under the law of this State.

On pages 2 and 3 of their brief Appellants set out certain conditions which the Juvenile Court imposed upon these parents as a condition for them retaining actual custody of their children. To the conditions (a), (b), and (c) set out by the Appellants the Juvenile Court in its Decree and Judgment had added conditions (d), (e), and (f) which, for the convenience of the court are as follows:

"(d) That until further order of the

court, the parents, and each of them, together with all of the children, shall report in person once each month to the probation officer or other designated representative of the Court at Short Creek, Utah, on the 25th day of each month commencing May 25, 1954, unless such time and place of reporting be changed with the approval of the Court.

"(e) That until further order of the Court, the parents, and each of them, shall submit to the Court each month at the times mentioned in Paragraph (d) above, a written sworn statement stating whether or not he or she has complied with the conditions set forth in subparagraph 3 (a) through (c) above, during the preceeding thirty days.

"(f) That each parent shall file with the court on or before May 25th, 1954, a sworn statement in writing to the effect that he or she is willing to comply with the requirements set forth in sub-paragraph 3 (a) through (e) above."

The conditions required by the Juvenile Court amounted to a request to these parents to do an affirmative act contravening their faith in God, i. e., to deny their faith in God and to deny it under oath. The Juvenile Court would have had these parents perjure themselves, not only in the eyes of the court, but before God, as well.

For these reasons, the parents complained by

writ of habeas corpus, as pointed out by Appellants in their brief on page 3. The Appellants, on pages 3 and 4 of their brief, set out the pertinent portions of the decree of the Honorable William Stanley Dunford, Judge, Fourth Judicial District Court of the State of Utah in and for Utah County, complaining of paragraph (b) of that decree in which the court restored the custody of the subject children to the parents "upon the conditions, pending the appeal of the above entitled case, that the parents do not live together as man and wife, that they retain the custody of the children within the geographic bounds of the State of Utah and return them to this court or to any other court which may have jurisdiction at any time that they are ordered by said court to do so." The appellants feel, as they state on page 4 of their brief, "that the district court did err, after having considered the legality of the restraint and ruled thereupon,

by proceeding thereafter to adjudicate questions going to the qualifications and fitness of the parents to retain custody of their children." Appellants then set out Findings of Fact 7 of the District Court which is to the effect that it is in the best interests of the children for them to be under the custody of their parents.

The Appellants point out on page 3 of their brief that: "This appeal is being taken solely for the purpose of determining what the law is, in this State, as to matters subject to review or collateral attack in habeas corpus proceedings."

The respondents feel that the District Court acted properly in this matter in acting in the best interests of the children, as it was compelled to do under the law of this State, and that its action should be sustained by this court on this appeal.



STATEMENT OF POINTS UPON WHICH  
RESPONDENTS RELY

Point 1. The Court acted properly in declaring the judgment of the Juvenile Court null and void as in violation of Amendments One and Fourteen of the Constitution of the United States of America and of Article One of the Constitution of the State of Utah.

Point 2. The District Court in habeas corpus proceedings involving custody of minors must act as a court of equity and award custody as the best interests of the minors shall indicate, hearing and deciding all questions of fact involved and making conclusions of law to achieve this end.

Point 3. The District Court in restoring the custody of the minors involved to their parents acted within its own jurisdiction and in obedience to its own duties in such cases and not in disturbance of the previously acquired juris-

diction of the Juvenile Court.

## ARGUMENT

Point 1. The court acted properly in declaring the judgment of the Juvenile Court null and void as in violation of Amendments One and Fourteen of the Constitution of the United States of America and of Article One of the Constitution of the State of Utah.

This point is intended to squarely controvert Point 1 of Appellants' brief. In their argument to Point 1 on page 6 of their brief Appellants make the following statement;

"A companion case pending before this Honorable Court titled 'State of Utah, in the Interest of Elsie Johnson Black, et al.,' seeks an adjudication of the constitutionality of the judgment of the juvenile court as declared void in the proceedings from which we here appeal. Therefore, appellants request the Court's permission to waive argument on this Point 1 for the reason that the said companion case will resolve that issue."

Respondents agree that the said companion case, Case No. 8220, deals with the constitutionality of the Decree and Judgment of the Juvenile Court. We also request the Court's permission to waive argument on this Point 1 "for the reason that the said companion case will resolve that issue." Respondents wish to point out their position that said Decree and Judgment of the Juvenile Court is null and void in that it sets up requirements which are contrary to the provisions of Sections 1, 4, 7, and 15 of Article 1 of the Constitution of Utah and Amendments 1 and 14 of the Constitution of the United States of America, in that said requirements violate the constitutional guarantees of freedom of speech and freedom of religion.

Point 2. The District Court in habeas Corpus proceedings involving custody of minors must act as a court of equity and award custody

as the best interests of the minors shall indicate, hearing and deciding all questions of fact involved and making conclusions of law to achieve this end.

The Appellants cite the case of JONES v. MOORE, 61 Utah 383, 213 P. 191 (1923) as authority for the proposition that "In habeas corpus proceedings, nothing is inquired into except the legality of the restraint." The case may well be authority for that proposition, but analysis of that case will show that it is more correctly authority for the proposition that a proceeding involving the custody of minors is one which is highly equitable in nature and one which will be decided in such a manner as to reflect the best interests of the children involved.

In the case of JONES v. MOORE the plaintiff sought to obtain the custody of his minor daughter, under two years of age, which child had been left with the defendants, maternal grandparents, since

birth. In the original hearing below the defendants won and had an award of custody. Plaintiff, however, filed a motion for a new trial and while the motion was pending, the judge who heard the case was retired from office. The new judge granted the motion after counsel had stipulated that he should rule on it. After a further stipulation to that effect, the new judge ruled on the evidence as presented in the original hearing and gave custody to the plaintiff father. The court in upholding the decision of the lower court awarding the custody to the father considered this question: "Can a case like the one at bar be treated as a law case merely?" The court answered in the negative, saying that this type of a case is an equitable proceeding. The court, Mr. Justice Frick writing the opinion, reasoned as follows:

"While it is true that the proceeding, in form at least, is habeas corpus proceeding, it is, however, so merely as a matter

of convenience to the parties and to expedite a hearing upon the issues. No case involving the custody of minor children has ever been tried or considered in this jurisdiction as merely a habeas corpus proceeding, although the case in form is such. In habeas corpus proceedings nothing is inquired into except the legality of the restraint<sup>+</sup>, and if it be found that the petitioner is illegally deprived of his liberty, but one conclusion is permissible, and that is that the same must be restored to him. Where, as here, however, the sole issue involved is who shall have the custody, care, and education of a child, and especially one of tender years the inquiry extends far beyond the ordinary issues involved in a habeas corpus proceeding. Cases like the one at bar partake of all the incidents of a proceeding in equity. Indeed, under our procedure, it has become a proceeding which is equitable in the highest degree, as clearly appears from the decisions in all of the cases decided by this court, where the right to the custody, nurture, care, and education of children was the controlling issue. See *Stanford v. Gray*, 42 Utah 229, 12 Pac. 423, Ann. Cas. 1916A, 989; *Hummel v. Parrish*, 43 Utah 373, 134 Pac. 898; *Harrison v. Harker*, 44 Utah 541, 142 Pac. 716; *Farmer v. Christensen*, 55 Utah 1, 183 Pac. 328; *Kurtz v. Christensen* (Utah) 209 Pac. 340. In view of the equitable nature of the proceeding, this court, in *Harrison v. Harker*, supra, held that the rule applicable in equity cases prevails, namely, that this court must examine into the evidence, and, in case the findings of the trial court are clearly against the evidence, they will not be upheld. In every case of this character that has come before

this court during the past 17 years while the writer has been a member, the proceeding has always been considered and treated as equitable. The mere fact that such cases are commenced under the habeas corpus statute in order to expedite a speedy hearing and determination of the case cannot alter the issues involved nor the nature of the proceeding. Moreover, from time immemorial the chancellors and not the law court have determined the controversies respecting the care, nurture, education, and custody of minor children. The technicalities of the law must therefore give way to the more important questions, all of which appeal most strongly to the conscience of the chancellor. To that effect are all of the decisions. There is therefore - there can be - no merit to the contention that these cases should be treated merely as law cases, ...."

The court in this case clearly quoted the general rule as cited by the Appellants but, in the language just set out, then went on to point out that in cases involving the "custody, nurture, care, and education of children" the court will look "far beyond the ordinary issues involved in a habeas corpus proceeding." The Respondents concede that the District Court in the instant case went beyond the usual scope of inquiry in

habeas corpus matters, but it did so because it was required to do so by the very nature of the case it was considering. The District Court was bound to inquire, in the nature of an inquiry as by a court of equity, as to all the facts and circumstances surrounding the custody of the minors whose disposition it was, by the proceeding, called upon to decide.

Such an inquiry is by its very nature bound to be a broad one. That it should be so broad as to involve consideration by the District Court of much the same facts and circumstances as would be considered by the Juvenile Court in a case of alleged neglect is not surprising.

In speaking of the meaning of the term "best interests" of the child as being determinative of the courts' proper judgment in matters of this nature, the court in the JONES case said,

"Without now pausing to go into the question of what may be involved within the term 'best interests', it must suffice to say that



that term as it is understood and applied in cases like the one at bar has reference more particularly to the moral welfare than to mere comforts, benefits, or advantages that wealth can give. If such were not the case, poor parents could not sustain their right to the custody of a child in which a rich man has taken a special interest, and where between himself and the child there exists a strong liking or affection. It is the comparatively poor and not the rich parents who rear the large families and who give to the world a large majority of the men and women who conduct its affairs. Unless, therefore, a parent has by his acts and conduct in some way forfeited or lost the right to custody of his minor child the presumptions respecting his right to have such custody are all in his favor. If the cases of this character heretofore decided by this court are critically examined, it will be found that such is the spirit that pervades all of them..."

It is readily seen that the duty of determining, in cases of this sort, what is in the best interests of the children is a very particular and highly important duty. It is easy to conceive that the District Court in making this inquiry may have uncovered certain facts which did not come to the attention of the Juvenile Court which compelled it to come to a legal

conclusion at complete variance to that arrived at by the Juvenile Court. Could the District Court escape its judicial duty of considering what was to the best interests of the children by pointing to the fact that the Juvenile Court make certain Findings of Fact and Conclusions of Law with reference to the family before it in a matter brought before that Juvenile Court on a petition alleging neglect? The rule of the JONES case indicates no circumstance or set of circumstances under which the District Court, in a habeas corpus proceeding properly brought before it involving the custody of minors, may escape this obligation.

The rule of the JONES case is still the rule by which the courts of this State are bound. The JONES case was reaffirmed by the case of CHAPMAN v. GRAHAM, \_\_\_Utah\_\_\_, 270 P. (2d) 821 (1954). In this case Chapman had obtained a writ of habeas corpus releasing him from confinement at the State

Prison. The writ was granted on grounds that Chapman had been subjected to cruel and unusual punishment, in that, the prison officials had refused to permit him to return to the Mayo Clinic in Minnesota for certain surgery. Chapman had previously been paroled so that he might undergo treatment at the Mayo Clinic but had been returned to prison for a parole violation. This court on the appeal ruled that Chapman had not been subjected to cruel and unusual punishment and that he should not have been discharged as a result of the habeas corpus proceeding. This court also held that the lower court under the circumstances should have made the discharge conditional.

In the opinion of the court written by Mr. Justice Henroid, the function of the writ of habeas corpus is dealt with as follows:

"Use of the writ in a case like this would pierce and wound the administrative processes of constitutionally created executive agencies with a habeas corpus lance thrust by the judiciary. Almost universally such use has been condemned, and the function

of habeas corpus has been confined to a single test: That of legality of restraint (Coburn v. Schroeder, 71 Olk. Cr. 405, 112 P. 2d 191; Kauble v. Haynes, D. C., 64 F. Supp. 153; Sarshik v. Sanford, 5 Cir., 142 F. 2d 676; Edmondson v. Warden, 194 Md. 707, 69 A. 2d. 919; Ex parte Pickens, D. C., 101 F. Supp. 285; Siegel v. Ragen, D. C., 88 F. Supp. 996. Contra: Harper v. Wall, D. C., 85 F. Supp. 783.), even to the exclusion of those cases where an individual's health has been shown to be in jeopardy. We have adopted such view in Jones v. Moore, 1923, 61 Utah 383, 213 P. 191, 193, where we said that 'In habeas corpus proceedings nothing is inquired into except the legality of the restraint.' We re-affirm that principle as it applies to cases like this and as applied to child custody cases where the welfare of children may lend a different complexion to, but not a basic difference in the principle...

"We prefer to adhere to the principle, until that rare case approaches which to date we have not encountered, that courts, by means of the writ, will not interfere with the management, control or internal affairs, nor will they, nor can they substitute their judgment in discretionary matters for those of administrative agencies of a different department of government... "

This case, as is pointed out by the Appellants is authority for the general rule that, "In habeas corpus proceedings nothings is inquired into except the legality of the restraint." The

The court said that it reaffirmed "that principle as it applied to cases like this and as applied to child custody cases where the welfare of children may lend a different complexion to, but not a basic difference in the principle ..." The court there recognizes the peculiar nature of cases involving the custody of children. They are cases in which "the welfare of children may lend a different complexion to, but not a basic difference in the principle." The court did not overrule the JONES case, but, rather, it seems to have emphasized the rule of that case. It seems to have pointed out the obvious, that, in cases involving the custody of children, the inquiry as to the legality of the restraint must go far and beyond the inquiry made in an ordinary habeas corpus matter. Naturally, the very broad scope of such an inquiry might lead one to feel that these cases are outside the rule; however, as the court so carefully points out

"the welfare of children" in these cases "may lend a different complexion to, but not a basic difference in the principle."

When the District Court in the instant case inquired into the fitness of these parents to have the care and custody of these children, it did so in order to determine whether these children were illegally restrained. In making its inquiry it must be governed by the rules constraining all courts. It must get the facts, make its findings and draw its legal conclusions. The District Court in this case made its inquiry. It had witnesses before it, it listened to their testimony. The District Court then made its findings of fact and conclusions of law while cognizant of the fact that it was required to act under the cases as in the nature of a court of equity and in the best interests of the children.

The rule of the JONES case, that cases involving the custody of minors are cases equitable

in nature which must be decided in the best interests of the children involved, has been followed and reenunciated in all cases where these questions have been raised. We note a few of these cases in passing.

WALLICK v. VANCE, 76 Utah 209, 289 P. 103 (1930) was a case in which the father of a minor child appealed from a decree of the lower court awarding custody of his daughter to her aunt, the father's sister. The court in that case, having the question of custody of a minor before it, upheld the lower court in its action in deciding the question of custody so as to best serve the child's welfare and interests.

HARDCASTLE v. HARDCASTLE, 118 Utah 192, 221 P. (2d) 883 (1950), although not a habeas corpus matter but a matter involving a petition to modify a divorce so as to obtain custody of a minor child, is another case in which the best interests of the child was the decisive issue in the case.

In IN RE BRADLEY, 109 Utah 539, 167 P. (2d) 978, (1946), the mother of a minor child appealed from the Juvenile Court's denial of her petition that the custody be returned to her. The Supreme Court upheld the Juvenile Court but ruled, on page 984 (P.), as follows:

"Before determining this question we call attention to the fact that cases involving the custody of a child are cases in equity and this court is required to determine the facts as well as the law. Harrison v. Harker, supra; Jones v. Moore, 61 Utah 383, 213 P. 191; Jensen v. Earley, supra; Wallick v. Vance, 76 Utah 209, 289 P. 103."

In BALDWIN v. NIELSON, 110 Utah 172, 170 P. (2d)179 (1946), the rehearing of which case appears in the reports at 110 Utah 180, 174 P. (2d) 437 (1946), a father by habeas corpus sought custody of his minor son from the family of the child's deceased mother. In agreeing with the decision of the lower court awarding custody to the father, the court in both opinions followed the rule that in cases of this kind the most important consideration



is what will be for the best interests and welfare of the child.

WALTON v. COFFMAN, 110 Utah 1, 169 P. (2d) 97 (1946) is a habeas corpus case involving the custody of a minor. The court said it was an equity case. The court, Mr. Justice Wade writing the opinion, on page 100(P.), went into the question of the office of the writ of habeas corpus in cases involving the custody of children, as follows:

"Under the English Common law, originally, the writ of habeas corpus was used only in cases of arrest or forceable restraint under claim of authority of law. Later it was broadened to cover all kinds of cases where one person forceably restrained another of his liberty whether under claim of authority of law or not and in cases where the restraint was such that the person restrained was unable to make application in person for the writ, other persons were allowed to do so in his behalf and this applied in cases of children as well as adults. In all of these cases originally, at least in theory, if the court found that there was unlawful restraint, it merely ordered the person freed from the restraint. But in cases of small children unable to exercise mature judgment in such matters, who are always the wards of

someone, they were held to be the wards of courts of equity, and such courts tried out the question, usually, of which of two contending parties should have the custody of the child. In so doing, courts of equity, as the sovereign power exercising the king's conscience, made the choice for the child, and placed the child in the custody of the person where its best interests and welfare would be subserved. This jurisdiction of equity had developed long before the American revolution... This jurisdiction has been followed in the states and it is generally held that the determining factor is the best interest and welfare of the child..."

The District Court in the instant case was faced with a situation in which both plaintiffs and defendants claimed they should have the care and custody of these children. Confronted with this situation in a habeas corpus matter what was the court required to do? First of all, it had to inquire into the legality of the restraint. It had to answer at the very beginning the question as to whether these children were properly being held by the parties designated to care for them by the Utah State Department of Public Welfare. In answering that question, it had to determine

whether the decision of the Juvenile Court awarding the custody of these children to the Utah State Department of Public Welfare was a correct one, and if it were an improper decision, were its faults such as might be corrected on appeal or were they such as to result in a void judgment by the Juvenile Court. If, as found by the District Court, the judgment of the Juvenile Court was so violative of human rights guaranteed by the Constitution of United States of America and by the Constitution of the State of Utah as to be utterly void, the court then had no alternative; it had to release the children from the unlawful restraint.

It seems to be the position of the Appellants as expressed in their brief that the District Court should have stopped with the discharge, that it should not have restored the custody of the children to their parents and especially that it should not have inquired into the fitness of

the parents to have the care and custody of their children. Having determined that the Decree and Judgment under which the children were being restrained was unconstitutional and void and being faced with the necessity of discharging the children, the District Court then had a situation before it wherein children, who had been taken from the custody of their parents and placed in the custody of the State Department of Public Welfare, were now to be discharged from the custody of that department. Was the District Court free, then to discharge these children, minors of tender age, and to place them in the custody of no one, or did it have the obligation as a court of equity to consider the fact that these minors should be placed in the custody of persons capable of taking care of them and to decide the question as to who were the proper persons to have custody?

The question would seem logically to answer itself. The District Court, as a court of equity,

could not have released these children from the illegal restraint imposed upon them by the Juvenile Court and have provided for them nothing further. There was no way for the District Court to evade the obvious question: Who are the proper parties to have the custody of these children? There is always a presumption in favor of the parents when such a question is presented. The parents were before the Court seeking the custody of their children. The Court had the clear obligation of determining the fitness of the parents to have custody. This it did, and it restored the custody of the children to the parents. Certainly, its Findings of Fact on this issue are at variance with those made by the Juvenile Court. The Findings of Fact of the District Court are clearly supported by the evidence presented before it. Even the Appellants do not dispute this fact. The District Court would not have been able to have ignored the evidence presented before it

and have refused these parents the care and custody of their children and to have given as its reason for doing so the fact that the Juvenile Court had determined that these parents were unfit. The District Court was certain from the testimony of the witnesses who had appeared before it that these parents were the proper persons to have the care and custody of their children. It had no alternative but to restore that custody to those parents.

The Appellants conclude that the District Court had no right to consider the matter of the parents' fitness to have the custody of their children, and they cite on page 7 of their brief the case of EX PARTE S. H., 1 Utah (2d) 186, 264 P. (2d) 850 (1953) as authority for the proposition "that matters reviewable on appeal, but which do not go to the juvenile court's jurisdiction are not subject to review or collateral attack in habeas corpus proceedings."

In the case of EX PARTE S. H., a 13 year old

boy had been sent to the Industrial School by the Juvenile Court. His mother sought a writ of habeas corpus in the court below on grounds that (1) he was too young, (2) there was no finding that she was unfit to have his custody and (3) that her son was returned to the school without a hearing after he had been allowed to return to his mother.

The questions presented to the Court were:

(1) Are (1) and (2) above proper subjects of inquiry in habeas corpus proceedings? and (2) Is a hearing necessary before returning a child on probation to the Industrial School?

The Court held in this case that inquiry as to (1) and (2) should properly be on appeal and that a hearing was not necessary before returning a child to the Industrial School but the authorities must have good reason for doing so and the burden of proving lack of good reason is on the person so contending, proof of which lack must be clear and convincing.

The reasoning of the Court on these points,  
Mr. Justice Henroid writing, is as follows:

"As to (1) and (2): These matters are reviewable on appeal, but do not go to the Juvenile Court's jurisdiction, and are not subject to review or collateral attack in habeas corpus proceedings (U.S. v. Valante, 264 U.S. 563, 44 S. Ct. 411, 68 L. Ed. 850). As to (3): Under our statutes the Public Welfare Commission, and hence its agency, the Industrial School, has continuing jurisdiction over a committed child, and may expand and contract the walls of the institution as the welfare of the child dictates (64-6-8 U. C.A.). However, it could not be construed to operate as a device for oppression, and this court, in a proper case, would not hesitate to intercede if it faced a situation where the authorities had acted under the statute without good reason, capriciously or arbitrarily. There appears to be no proof of any such unreasonableness in the record here.

"In this case an offer of proof was made with respect to the fitness of the mother, but none as to the unreasonableness of the School authorities' action, the petition having stated only in the form of a conclusion that the boy had been returned without a 'legal hearing', and the matter having been made the subject of but a brief colloquy between court and counsel. Consequently, the trial court was justified in refusing to entertain jurisdiction in a habeas corpus proceeding, to review the merits of the case before the Juvenile Court. There is no question but that the Juvenile Court had jurisdiction over



children 13 years of age, and over the subject matter relating to parents' fitness to have custody. In truth, the Juvenile Court enjoys far wider jurisdiction and very well may commit a delinquent to the Industrial School for cause even though his parents are eminently fitted to have its custody."

It should be noted that in EX PARTE S. H. we have a case where a juvenile delinquent has been committed to the Industrial School. The instant case is one in which children have been taken from their parents because of the alleged neglect by the parents. The matters not proper for consideration in a habeas corpus action with reference to the particular situation appearing in EX PARTE S. H. were whether the juvenile was too young and the question of the fitness of the mother to have his custody. The Court pointed out that there was no question that the Juvenile Court had jurisdiction over children 13 years of age and that the Juvenile Court could "commit a delinquent to the Industrial School for cause

even though his parents are eminently fitted to have its custody." The holding in that case that the matters considered "do not go to Juvenile Court's jurisdiction and are not subject to review or collateral attack in habeas corpus proceedings" does not mean that the District Court in the instant case was wrong in considering the fitness of the parents to have the custody of their children after it had determined that the children were being restrained under a void Decree and Judgment.

The Appellants point out, on page 8 of their brief, that confusion has arisen from the case of JENSEN v. SEVY, 103 Utah 220, 134 P. (2d) 1081 (1943). The case would seem to be of sufficient importance to merit a more detailed analysis.

The Juvenile Court had with consent of the plaintiff father entered an order declaring his daughter a ward of the court and dividing her custody on a semi-annual basis between her grand-

parents, the mother having died. When the plaintiff remarried, he sought custody. The Juvenile Court then issued an order to the effect that if the plaintiff's behavior was proper until a certain date he could then have custody, the juvenile court expressly retaining jurisdiction. Plaintiff appealed that order. The date having passed before the appeal was heard, the plaintiff applied to the Supreme Court for a writ of habeas corpus; the court issued the writ and made it returnable before District Judge, John L. Sevy, Jr. Judge Sevy refused to consider the matter and dismissed the writ. Plaintiff then applied to the Supreme Court for a writ of mandamus requiring Judge Sevy to hold a hearing on the writ of habeas corpus. The court issued an alternative writ requiring the judge to hold the hearing or show cause. The judge elected to show cause. The court itself posed 5 questions for decision. Question 5 is as follows:

"Is the jurisdiction of the Juvenile Court over minors so exclusive as to divest the Supreme Court or the District Courts of jurisdiction, to inquire by habeas corpus, into the legality of the restraint of a ward of the Juvenile Court, exercised by any person, either under an order of the Juvenile Court or otherwise?"

Three opinions were filed in the case. The portions of them dealing with this question are set out. The opinion of Mr. Justice Larson is in part as follows:

"The District Court was mindful of the provisions of Sec. 14-7-4, R. S. U. 1933 which reads: 'The juvenile court shall have exclusive original jurisdiction in all cases relating to the neglect, dependency and delinquency of children...., and the custody, detention, guardianship of the person....of such....children.' (Italics added). And subdivision (3) of the section which reads: 'When jurisdiction shall have been acquired by the court in the case of any child, such child shall continue for the purposes of such case under the jurisdiction of the court...'

"(4) Nothing herein contained shall deprive other courts of the right to determine the custody of children upon writs of habeas corpus..... Such other courts may, however, decline to pass upon questions of custody and may certify the same to the juvenile court for hearing and determination or recommendation.' (Italics added). And

that pursuant to such statute he intended the order to be that he 'declined to pass upon questions of custody' and left the same for determination by the Juvenile Court... The District Court concluded that since petitioner admitted he had not made a showing to the Juvenile Court as provided in its order, he was not entitled to custody under the order of the Juvenile Court; and since the order itself was valid, he was not entitled to custody in derogation of it. It held therefor that the detention of the child by the grandparents was lawful and under valid legal process; that the right to modify the Juvenile Court order lay only in that court or in the Supreme Court by appeal, and therefor petitioner was not entitled to have the child discharged from the custody of its grandparents. In this we think the District Court was right and the alternative writ of mandamus is recalled and quashed." Moffat, J. concurred.

Wolfe, C. J. concurred in the result, but said:

"The opinion of Judge Hoyt expresses my opinion on the reason and interpretation of the action of the District Court in refusing to take jurisdiction of the question raised by the writ of habeas corpus and the intention of the District Court in dismissing the writ. It also expresses my opinion that where the Juvenile Court has obtained jurisdiction of a child because of neglect, dependency or delinquency, the District Court must dismiss the writ. It is not discretionary. The orders of the Juvenile Court are appealed to this court under Sec. 14-7-33, Utah Code Ann. 1943, and the judgment of the Juvenile Court

cannot be overturned by suing out a writ and obtaining a hearing on the very same issue by that method either in the District or the Supreme Court."

Hoyt, D. Judge, concurred in the result,

but said

"...I think it reasonable clear that what the court did was to hear the habeas corpus matter and, finding that the child involved had been taken into the custody of the Juvenile Court, because of neglect or misconduct of the father (petitioner) and that the juvenile court had retained jurisdiction of the matter, the district court concluded, and I think rightly, that it had no jurisdiction to take the child from the custody of the juvenile court or to determine the question of the father's fitness to have his child returned to him...

"...I think it was the intention of the district court to hold that it had no jurisdiction to hear and determine the question of the father's fitness and qualification to have his child returned to him. I cannot agree with the holding inferable from the opinion that the district court could have proceeded to hear and determine that question. In my opinion it was not a matter of discretion. I think the legislature intended to confer exclusive original jurisdiction upon the juvenile court to determine such questions in every case wherein the state had become a party by the juvenile court taking custody of a child because of neglect or delinquency. The provisions of subsection 4 of section 14-7-4 R. S. re-

lating to powers of courts to determine questions of custody in habeas corpus proceedings should not, in my opinion, be construed to apply to cases in which the state has become a party by intervention of the juvenile court. Unless we so construe it we cannot reasonably give effect to the provision of subsection 3 of section 14-7-4 that 'when jurisdiction shall have been acquired by the court in the case of any child, such child shall continue for the purposes of such case under the jurisdiction of the court until he becomes twenty-one years of age, unless discharged prior thereto or unless he is committed to the state industrial school or to the district court as hereinafter provided....'

"It is a sufficient answer to a writ of habeas corpus to show that a child is held pursuant to the terms of a valid order made after due notice and hearing by the juvenile court in a case in which the juvenile court had jurisdiction.... To hold otherwise is to hold that by reason of subsection 4 of Section 14-7-4 R.S. the district courts have concurrent jurisdiction with the juvenile courts in cases of alleged neglect of children. I cannot believe that it was so intended."

The confusion resulting from the case may well spring from the fact that the opinion of Mr. Justice Larson, concurred in by Mr. Justice Moffat, is found first in the reports, while the opinion of Chief Justice Wolfe concurring in the result but

in the reasoning of Judge Hoyt is next in order, followed by the opinion of Judge Hoyt concurring in the result but employing reasoning differing from that of Mr. Justice Larson, Judge Hoyt's opinion being concurred in by Mr. Justice McDonough.

A great deal of the confusion, however, may arise from a failure to note these words of Judge Hoyt:

"It is a sufficient answer to a writ of habeas corpus to show that a child is held pursuant to the terms of a valid order made after due notice and hearing by the juvenile court in a case in which the juvenile court had jurisdiction."

The order must be a valid order. In the instant case the order was invalid. It was void. It was an order violating constitutional guarantees of human freedom and was in excess of the jurisdiction of the Juvenile Court to make. If we agree that the opinion of Judge Hoyt is the prevailing opinion of the court in the JENSEN v. SEVY case, we must still conclude that such did not preclude



the District Court from proceeding as it did in the instant case.

Section 55-10-5 (4), Utah Code Annotated (1953) is as follows:

"Nothing herein contained shall deprive other courts of the right to determine the custody of children upon writs of habeas corpus, or when such custody is incidental to the determination of causes in such courts. Such other courts may, however, decline to pass upon questions of custody and may certify the same to the juvenile court for hearing and determination or recommendation."

Even without such a provision the statute conferring jurisdiction on the juvenile courts could not have constitutionally infringed upon the power of courts generally to protect citizens from illegal restraint by use of the writ of habeas corpus. This provision appearing in the statute, there can be no contention that the legislature, in giving the juvenile courts exclusive jurisdiction of cases of neglect or delinquency of children, intended to infringe upon the traditional authority of the courts to act with the power of

the writ of habeas corpus in cases appropriate for its exercise.

The JENSEN v. SEVY case is certainly not authority for the proposition that the District Courts may never intervene by means of the writ of habeas corpus after the Juvenile Courts have acted in a matter involving the neglect, dependency, or delinquency of children. To use the example and language of Judge Dunford in his Memorandum Decision in the instant case,

"In plain reason it could not be contended that the rule would prevent intervention of the Supreme Court by means of Habeas Corpus under all, or any, conditions. Could that decision be reasonably interpreted as holding that if a Juvenile Court so far departed from reason that in a charge of dependency of a five-year old child, he sentenced it to 20 years in the State penitentiary, and the executive officers were likewise so bereft that they executed the judgment, that the child would have to languish in an institution for felons while the slower processes of appeal were made effective? It doesn't seem so. Clearly in such circumstances, Habeas Corpus would lie, because such a judgment would transcend all legal authority of the court and its officers, and would be in gross violation of the Constitutional rights

of the child. Such a situation would be quite distinctive from a mere irregularity, such as failing to set and notice a hearing of a claimed violation of probation which cannot be reviewed upon Habeas Corpus as held by our court in *Stoker v. Gowans*, 147 P. 911.

"Habeas Corpus has always been, and may always be, resorted to to protect the Constitutional rights of an individual under unlawful restraint, even though there may also exist a right of correction by appeal when the restraint results from an unlawful or void judgment."

The logic of this position seems incontrovertible.

The Appellants, on page 9 of their brief, suggest that the "discharge of the children could have been made conditional by the court, either upon review of the holding of the district court or upon the outcome of an appeal from the finding, as to neglect, of the juvenile court. *CHAPMAN v. GRAHAM*, *supra*."

In the *CHAPMAN* case, the criminal case discussed above, the court spoke of such a conditional discharge in the opinion written by Mr.

Justice Henroid as follows:

"In passing, we are constrained to suggest that in this case the trial court more properly could have made the petitioner's discharge conditional upon affirmance by us or upon failure of appeal within the prescribed time, or knowing that this prisoner would depart the state posthaste upon his release admitted him to bail in order to assure his return to proper custody should this court happen to disagree, as we have, with the trial court. Both procedures we have approved (*Dickson v. Mullings*, 66 Utah 282, 241 P. 840), although we are aware that a different conclusion was reached in early cases touching the matter. (41 Harv. Law Rev.)"

In his concurring opinion Mr. Justice Crockett felt that if there had been cruelty,

"The Court could very well order a discontinuance of the cruelty. The prisoner's discharge would not be indicated unless that was the only way to relieve the situation. At most, the discharge could be conditioned upon failure to comply with the order to correct it. The remedy would not be to peremptorily grant the prisoner's release.."

Reasons for making a discharge conditional in a case such as the CHAPMAN case may well not be present in a case such as the instant case. There would seem to have been nothing to indicate

in the instant case that the children were going to be spirited out of the jurisdiction of our courts or that they would not be voluntarily surrendered to our courts upon request to the parents that they do so. It would seem, nonetheless, that the District Court did make its judgment conditional. In its judgment quoted by the Appellants, on page 4 of their brief, the District Court restored the custody of the children to the parents "upon the conditions, pending the appeal of the above entitled case, that the parents do not live together as man and wife, that they retain the custody of the children within the geographic bounds of the State of Utah and return them to this court or to any other court which may have jurisdiction at any time that they are ordered by said court to do so." Not only did the District Court make its discharge conditional as suggested by the CHAPMAN case, but it was careful not to disturb the jurisdiction of any other

court. The District Court made no attempt to deprive the Juvenile Court of its continuing jurisdiction which it obtained by virtue of the statute.

The District Court in the action taken by it in the instant case, in considering the question of fitness of the parents to have custody of their children, did not disturb the previously acquired jurisdiction of the Juvenile Court, but was, in fact, most careful not to do so. In making the inquiry it made, the District Court did nothing more than perform the obligation imposed upon the district courts whenever they have before them a matter involving the custody of children.

POINT 3. The District Court in restoring the custody of the minors involved to their parents acted within its own jurisdiction and in obedience to its own duties in such cases and not

in disturbance of the previously acquired jurisdiction of the Juvenile Court.

The jurisdiction of the District Court in cases in which it must decide the custody of children, as has been discussed under Point 2, is the jurisdiction of a court of equity charged with making its decision in the best interests of the children involved. In exercising this jurisdiction the District Court does not infringe upon the jurisdiction of the Juvenile Court. It may differ in its findings with the Juvenile Court, but it acts as an independent court upon the evidence and testimony presented before it.

No one can disagree with the statement of the Appellants, on page 11 of their brief, "that had there been no question raised as to the legality of the restraint of these children, the Honorable Court below would have dismissed the writ;" Legality of the restraint is the basic issue presented in any habeas corpus proceeding.

If there is no illegal restraint, there can be no relief by habeas corpus.

The Appellants then continue, on page 11 of their brief, to state that the District Court would have dismissed the writ "upon the ground that the issues raised (as to the parents' fitness, right to custody, neglect, delinquency, etc.) were not subject to review in habeas corpus proceedings. This is the well established law of this State."

This latter statement would give one the impression that under no circumstances could these issues ever be raised by means of a habeas corpus proceeding. The Appellants are apparently asking this court to so declare.

The lives of little children should be tampered with by the State for only the gravest reasons. If children are taken from their parents for reasons insufficient to empower the Juvenile Court to so disrupt their lives,



other courts will, and should intervene by habeas corpus to protect the fundamental human rights inherently possessed by every citizen of this State and of the United States of America, whether such citizens be adults or minors.

Surely it is not the law of this State, that should a Juvenile Court declare parents unfit and take the custody of their children from them by making a finding of neglect when it has had before it not one iota of evidence to support such a finding, that the District Courts and the Supreme Court are powerless to invoke the great protecting arm of the age-old writ of habeas corpus to release such children and return them to their parents but that the children and the parents must await the slow, tedious processes of appeal to be restored to a condition from which they should never have been removed in the first place. The lives of our children are too precious. Irreparable harm can be done a child by forcibly

tearing it from its mother's arms, even for an instant. Irreparable harm was undoubtedly done to the Black children by being forcibly torn from their home and parents even for the short period of one week, as happened in the instant case. The kind of a decision which the Appellants ask this court to make is one which could make tyrants of juvenile judges and which could ruin the lives of countless honorable citizens of this State. Think of the heartaches, of the broken homes, of the tortured minds of children which might result should a Juvenile Court decide to take the custody of children from their parents for reasons not in the record, if that court's finding, under any circumstances, for any reasons, regardless of how arbitrary and abusive that court might be of human liberties, could never be challenged save by the method of appeal. The office of the writ of habeas corpus to relieve from unlawful restraint in order to prevent irreparable harm would be

destroyed.

The writ of habeas corpus is one of the oldest safeguards of human liberty born of English Jurisprudence. Its strength is not to be lightly sapped. Its great protecting arm is not to be strapped behind Justice's back. Human liberties are not so casually to be trampled into the dust.

The general rule, of course, is that a writ of habeas corpus cannot be utilized for the purpose of proceedings in error.

EX PARTE HUDGINS, 249 U.S. 378, 39 S. Ct. 337 (1919) throws some light on the office of the writ of habeas corpus when exceptional circumstances are presented. In this case the District Judge had sentenced a witness for contempt, the Judge feeling that the witness was failing to tell the truth on the witness stand. The writ of habeas corpus having been brought in the U. S. Supreme Court, Mr. Chief Justice White in his

opinion considered the general rule with respect to the application of the writ of habeas corpus and found that the District Court under the facts of the case had exceeded its power and that habeas corpus did properly lie. The opinion on page 384 (U. S.) states as follows:

"In view of the nature of the case, of the relation which the question which it involves bears generally to the power and duty of courts in the performance of their functions, of the dangerous effect on the liberty of the citizen when called upon as a witness in a court which might result if the erroneous doctrine upon which the order under review was based were not promptly corrected, we are of opinion that the case is an exception to the general rules of procedure to which we have at the outset referred, and therefore that our duty exacts that we finally dispose of the questions in the proceeding for habeas corpus which is before us."

Another case in which the office of the writ is discussed is *SUNAL v. LARGE*, 332 U.S. 174, 67 S. Ct. 1588, 91 L. Ed. 1982, (1947). The case involved convictions under the Selective Training and Service Act of 1940 and came to the Supreme Court of the United States by certiorari from

denials of writs of habeas corpus in the lower courts. The prevailing opinion of Mr. Justice Douglas held that the defendants, having failed to take an appeal, could not later have their convictions reviewed by a habeas corpus proceeding. Mr. Justice Frankfurter in his dissenting opinion states on p.185 (U.S.) et. seq,

"The extent to which this court has left itself unhampered by not drawing sharp jurisdictional lines, is indicated by the following very tentative classification of categories in which habeas corpus has not been deemed beyond the power of federal courts to entertain."

The Justice then cites eight different situations, citing many cases and concludes on page 187 (U.S.), as follows:

"Perhaps it is well that a writ the historic purpose of which is to furnish 'a swift and imperative remedy in all cases of illegal restraint', see Lord Birkenhead, L.C., Secretary of State for Home Affairs v. O'Brien, (1923) A.C. 603, 609, should be left fluid and free from the definiteness appropriate to ordinary jurisdictional doctrines. But if we are to leave the law pertaining to habeas corpus in the unsystematized condition in which we find it, then

I believe it is true of both cases what Judge Learned Hand said of the Kulick case, that the writ is necessary 'to prevent a complete miscarriage of justice'. 157 F 2d. 811, 813. If the justification need be no more definite than the existence of 'exceptional circumstances', Bowen v. Johnston, 306 U.S. 19, 27, the reasons for allowing the writs in these cases are more compelling than were those in Bowen v. Johnston, where there merely appeared 'to be uncertainty and confusion... Whether offenses within the ... National Park are triable in the state or federal courts.'...."

Mr. Justice Rutledge, also dissenting, on page 187, et seq., states

"I am in agreement with Mr. Justice Frankfurter in the result and substantially in the views he expresses. I would modify them by making definite and certain his tentatively expressed conclusion that the great writ of habeas corpus should not be confined by rigidities characterizing ordinary jurisdictional doctrines. And I agree with Judge Learned Hand, in the view stated for the Circuit Court of Appeals in Kulick's case, that upon the sum of our decisions, regardless of the variety of statement in the opinions, no more definite rule is to be drawn out than that 'the writ is available, not only to determine points of jurisdiction, stricti juris, and constitutional questions; but whenever else resort to it is necessary to prevent a complete miscarriage of justice.' 157 F. 2d 811, 813.

"In my opinion not only is this the law, measured by the sum of the decisions and the applicable statute, but the aggregate of the results demonstrates it should be the law.

"Confusion in the opinions there is in quantity. But it arises in part from the effort to pin down what by its nature cannot be confined in special, all-inclusive categories, unless the office of the writ is to be diluted or destroyed where that should not happen. And so limitation in assertion gives way to the necessity for achieving the writ's historic purpose when the two collide. Admirable as may be the effort toward system, this last resort for human liberty cannot yield when the choice is between tolerating its wrongful deprivation and maintaining the systematist's art.

"The writ should be available whenever there clearly has been a fundamental miscarriage of justice for which no other adequate remedy is presently available. Beside executing its great object, which is the preservation of personal liberty and assurance against its wrongful deprivation, considerations of economy of judicial time and procedures, important as they undoubtedly are, become comparatively insignificant. This applies to situations involving the past existence of a remedy presently foreclosed, as well as to others where no such remedy has ever been afforded..."

One of the leading cases on the office of the writ of habeas corpus and one which indicates that the rule which scrupulously protects the

jurisdiction of courts will yield in the face of exceptional circumstances to the power of the writ of habeas corpus is BOWEN v. JOHNSTON, 306 U.S. 19, 59 S. Ct. 442 (1939).

The petitioner had been convicted of murder in federal District Court, the act having occurred in a National Park in Georgia. He sought a writ of habeas corpus on grounds that he had been wrongly tried in federal court, the United States not having exclusive jurisdiction of the park. The court held that the United States had jurisdiction within the park and affirmed the denial of the writ. Mr. Chief Justice Hughes, however, on page 25 (U.S.), considered the rule that "Where on the face of the record the District Court has jurisdiction of the offense and of the defendant and the defendant contends that on the facts shown the crime was not committed at a place within the jurisdiction of the United States, ... the judgment is one for review by the



Circuit Court of Appeals in error proceedings and ... the writ of habeas corpus is properly refused" and on page 26 (U.S.), made the following comment:

"But the rule, often broadly stated, is not to be taken to mean that the mere fact that the court which tried the petitioner had assumed jurisdiction, necessarily deprives another court of authority to grant a writ of habeas corpus. As the Court said in the case of Coy, supra, pp. 757, 758, the broad statement of the rule was certainly not intended to go so far as to mean, for example, 'that because a federal court tries a prisoner for an ordinary common law offense, as burglary, assault and battery, or larceny, with no averment or proof of any offense against the United States, or any connection with a statute of the United States, and punishes him by imprisonment, he cannot be released by habeas corpus because the court which tried him had assumed jurisdiction.' Despite the action of the trial court, the absence of jurisdiction may appear on the face of the record (see *In re Snow*, supra; *Hans Nielsen*, Petitioner, Supra, P. 183) and the remedy of habeas corpus may be needed to release the prisoner from a punishment imposed by a court without jurisdiction to pass judgment.

"It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired.

Ex parte Lange, supra. The rule requiring resort to appellate procedure when the trial court has determined its own jurisdiction of an offense is not a rule denying the power to issue a writ of habeas corpus when it appears that nevertheless the trial court was without jurisdiction. The rule is not one defining power but one which relates to the appropriate exercise of power. It has special application where there are essential questions of fact determinable by the trial court. Rodman v. Pothier, supra. It is applicable also to the determination in ordinary cases of disputed matters of law whether they relate to the sufficiency of the indictment or to the validity of the statute on which the charge is based. Id.; Glasgow v. Moyer, supra; Henry v. Henkel, supra. But it is equally true that the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent."

In EX PARTE LANGE, 18 Wallace 163, 85 U.S. 18 (1873), a leading case on double jeopardy and habeas corpus, the Supreme Court of the United States discharged a prisoner on a writ of habeas corpus after the district court, which had convicted him, imposed a second sentence, the first sentence imposed having been contrary to statute, holding that this resentencing and holding of the

prisoner in custody thereunder constituted double jeopardy. The court was confronted with the rule that a court may set aside or modify its own judgments during the term at which they are made but ruled that this power cannot be so used as to violate the guarantees of personal rights found in the common law, and in the constitutions of the States and of the Union. In its opinion discharging the prisoner, the court, Mr. Justice Miller writing, said, at page 178:

"There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied."

Another case of importance on this particular question, the rule of which is still the law, is EX PARTE IN THE MATTER OF HANS NIELSEN, APPT., 131 U.S. 176, 9 S. Ct. 672, 33 L. Ed. 118 (1889).

The petitioner had been convicted of unlawful

cohabitation in the Utah Territorial District Court and had served his sentence. He was then tried and convicted of adultery covering the same period of time as for the conviction for unlawful cohabitation and involving the same polygamous wife. The petitioner filed an application for a writ of habeas corpus on the grounds that he had been twice convicted for the same offense. The lower court refused to give the petitioner any relief by habeas corpus on grounds that the judgment of conviction, being regular on its face, could not be challenged collaterally. The United States Supreme Court reversed the lower court, holding that habeas corpus would lie and did so in a unanimous opinion written by Mr. Justice Bradley. The reasoning of the court is as follows:

"The objection to the remedy of habeas corpus, of course, would be that there was in force a regular judgment of conviction, which could not be questioned collaterally, as it would have to be on habeas corpus. But there are exceptions to this rule which have more than once been acted upon by this court.

It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus. This was so decided in the cases of EX PARTE LANGE, 85 U. S. 18, and EX PARTE SIEBOLD, 100 U.S. 371, and in several other cases referred to therein.

"In the case of RE SNOW, 120 U. S. 274, we held that only one indictment and conviction of the crime of unlawful cohabitation, under the Act of 1882, could be had for the time preceding the indictment because the crime was a continuous one and was but a single crime until prosecuted; that a second conviction and punishment of the same crime for any part of said period was an excess of authority on the part of the District Court of Utah; and that a habeas corpus would lie for the discharge of the defendant imprisoned on such conviction. ...It was laid down by this court in RE COY, 127 U.S. 731, that the power of Congress to pass a statute under which a prisoner is held in custody may be inquired into under a writ of habeas corpus as affecting the jurisdiction of the court which ordered his imprisonment; and the court, speaking by Mr. Justice Miller, adds: 'And if their want of power appears on the face of the record of his condemnation, whether in the indictment or elsewhere, the court which has authority to issue the writ is bound to

release him...

"In the present case, it is true, the ground for the habeas corpus was, not the invalidity of an Act of Congress under which the defendant was indicted, but a second prosecution and trial for the same offense, contrary to an express provision of the constitution. In other words, a constitutional immunity of the defendant was violated by the second trial and judgment. It is difficult to see why conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case, but, in the other, it has no authority to render judgment against the defendant. This was the case on EX PARTE LANGE where the court had authority to hear and determine the case, but it had no authority to give the judgment it did. It was the same in the case of SNOW: the court had authority over the case, but we held it had no authority to give judgment against the prisoner. He was protected by a constitutional provision, securing to him a fundamental right. It was not a case of mere error in law, but a case of denying to a person a constitutional right. And where such a case appears on the record, the party is entitled to be discharged from imprisonment. The distinction between the case of a mere error in law, and of one in which the judgment is void, is pointed out in EX PARTE SIEBOLD, and is illustrated by the case of EX PARTE PARKS as compared with the cases of Lange and Snow. In the case of

Parks there was an alleged misconstruction of a statute. We held that to be a mere error in law, the court having jurisdiction of the case. In the cases of Lange and Snow, there was a denial or invasion of a constitutional right. A party is entitled to a habeas corpus, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner. As said by Chief Baron Gilbert in a passage quoted in *Ex Parte Parks*, 93 U.S. 18: 'If the committment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge.' This was said in reference to cases which had gone to conviction and sentence. Lord Hale laid down the same doctrine in almost the same words. (2 Hale P.C. 144). And why should not such a rule prevail in favorem libertatis? If we have seemed to hold the contrary in any case, it has been from inadvertance. The law could hardly be stated with more categorical accuracy than it is in the opening sentence of *EX PARTE WILSON*, 114 U.S. 417, where Mr. Justice Gray, speaking for the court, said: 'It is well settled by a series of decisions that this court, having no jurisdiction of criminal cases by writ of error or appeal, cannot discharge on habeas corpus a person imprisoned under the sentence of a circuit or district court in a criminal case unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under that sentence.' This proposition, it is true, relates to the power of this court to discharge on

habeas corpus persons sentenced by the circuit and district courts; but with regard to the power of discharging on habeas corpus, it is generally true that, after conviction and sentence, the writ only lies when the sentence exceeds the jurisdiction of the court, or there is no authority to hold the defendant under it. In the present case, the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the constitution, which bounds and limits all jurisdiction."

A Utah case which goes into the broad nature of the writ of habeas corpus and which indicates that the rule contended for by the Appellants will yield to exceptional circumstances is THOMPSON v. HARRIS, 106 Utah 32, 144 P. (2d) 761 (1943). The cases involved sentences under the Habitual Criminal Act and the applicability of the Indeterminate Sentence Law and came before the court on applications for writs of habeas corpus. Mr. Chief Justice Wolfe in his opinion denying the writs, at page 766 (P.), dealt with the question of the scope of review on habeas corpus as follows:

"It is often stated that the scope of review on habeas corpus is limited to the



examination of the jurisdiction of the court whose judgment of conviction is questioned. We must never lose sight, however, of the fact that habeas corpus is the precious safeguard of personal liberty. That jurisdictional questions only are reachable by the writ is not such an inflexible rule as cannot yield to exceptional circumstances. It may be better to say that the rule which apparently limits the scope of the writ to jurisdictional questions is not a rule of limitation, but a rule of defining the the appropriate spheres in which the power should be exercised. Thus it has been held that the writ will lie if the petitioner has been deprived of one of his constitutional rights such as due process of law. See *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A.L.R. 357; *Bowen v. Johnston*, 306 U.S. 19, 59 S. Ct. 442, 83 L. Ed. 455."

If the abuse is sufficiently great a court may by habeas corpus relieve from an unlawful restraint even in cases where on the face of the record of the restraining court all things were in order. That such a use of the writ of habeas corpus requires exceptional circumstances is certainly true, but just as true is it that when such circumstances exist the power of the courts in exercising the great writ is such that it will

cut quickly and cleanly through the narrow rules ordinarily restricting its use and will restore liberty unjustly restrained.

As pointed out in the argument under Point 2, and by the cases therein discussed, the District Court in the instant case, by virtue of its own jurisdiction and not by interference with the jurisdiction of the Juvenile Court, and by the very nature of this case, had certain duties imposed upon it which required it to place the custody of these children so that their best interests would be served. The parents sought the children. Their desires were opposed by the State Department of Public Welfare which claimed the right to custody. The District Court had to decide the facts and determine the issues. In so doing it acted properly within its own jurisdiction.

The District Court could not escape the obligation of determining the question of custody. Its duty to do so in a case of this nature is not

a duty peculiar to courts of this State. In California the proper disposition of the children must be made by the court in addition to deciding the legality of the restraint. A case pointing this out is *EX PARTE McDANIEL*, 90 Cal. App. 307, 265 P. 884 (1928). The mother of children had failed in an attempt to obtain their custody by habeas corpus, the court below in that action having awarded the custody to their aunt. The District Court of Appeals had before it the question of the duty of the court below, having the question of custody of minors before it, to award that custody as it saw fit. The court considered the question and stated, as follows:

"It thus appears that, notwithstanding the main feature of the proceeding was the question of the legal right of the respondent to the custody of the children, in effect a judicial determination was had of what possibly might be termed the subsidiary or dependent question of the proper disposition to be made of the children. While ordinarily it may be said that the function of the writ of habeas corpus is to determine only the legality of the detention of a person under

restraint of his liberty (13 Cal. Jur. 217, and note), in cases involving the custody of infants, the rule seems to be relaxed and extended so that the determination of the matter may include an order looking to the best interests of the children (13 Cal. Jr. 279)."

A similar rule is pronounced by the Maine Court in *MERCHANT v. BUSSELL*, 139 Me.118, 27 A. (2d) 816 (1942). The case involved a custody fight between a grandmother, in whose care a minor child had been left, and the father, who sought custody. The court below denied the father's request and awarded custody to the grandmother. The father objected to the court's awarding of custody, contending that its only jurisdiction was to order a release or refuse to do so. The court said, on page 818 (A),

"A writ of habeas corpus is ordinarily a proper remedy for a parent who claims to have been unlawfully deprived of the custody of a child. Generally speaking, the object of a writ of habeas corpus is to release one from an illegal restraint. In the case of an adult, who may go his own way, no more is required. An infant of tender years must, however, be in the custody of someone, and

to do no more than order a release would as a rule be a futility. In such cases courts have accordingly gone farther and have entered orders providing for custody."

The New York courts follow the rule, as indicated by *PEOPLE EX REL KLEE v. KLEE*, 195 N.Y.S. 778 (1922). The court considered the question of the power of a court on habeas corpus involving a minor to award custody by looking into the history of the use of the writ in such cases. On page 780, the court states:

"When as early as 1819, the writ was issued to obtain the custody of a child, it was granted by Chancellor Kent, who observed that - 'the object of the court was to release the infant from all improper restraint, and not to try in this summary way, the question of guardianship, or to deliver the infant over to the custody of another; that the course and practice of the courts in these cases was only to deliver the party from illegal restraint, and if competent to form and declare an election, then to allow the infant to go where she pleased, and if the infant be too young to form a judgment, then the court is to exercise its judgment for the infant.' Matter of Wollstonecraft, 4 Johns. Ch. 80."

The rule is recognized by the Virginia Court in *BUCHANAN v. BUCHANAN*, 170 Va. 458, 197 S.E. 426,

116 A.L.R. 688 (1938). The court considered the nature of habeas corpus in these cases as follows (page 691, A.L.R.):

"The primary object of habeas corpus is to determine the legality of the restraint under which a person is held. As applied to infants, the primary object is to determine in whose custody the best interests of the infants will probably be advanced. In determining such custody, the natural rights of the parents are entitled to due consideration. 'By immemorial tradition the aim of habeas corpus is a justice that is swift and summary'...

"In *Armstrong v. Stone and Wife*, 9 Grat. 102, 50 Va. 102 the court said: '...Whilst, therefore, it is undoubtedly true that the proper office of the writ is to release from illegal restraint, and, where the party is of years of discretion and sui juris, nothing more is done than to discharge him; yet, if he be not of an age to determine for himself, the court or judge must decide for him, and make an order for his being placed in the proper custody.'"

The District Court simply followed the well-recognized rule and performed the duties imposed upon it thereby, being very careful to refrain from depriving the Juvenile Court of what the Appellants, on page 9 of their brief, refer to as

"its continuing jurisdiction over the children previously acquired by that court under authority of Section 55-10-5 (3), U.C.A. 1953."

### CONCLUSION

The District Court in its handling of this matter proceeded properly in all respects. That court was charged with certain obligations, having before it children whose custody was in dispute. Those obligations it performed in complete accord with the law in cases of this nature. The nature of the proceeding as in habeas corpus required the court to decide whether the children were illegally restrained. Having decided that they were illegally restrained, the District Court, under the doctrine of the cases, had to decide who should have custody of the children. Since their parents sought custody, the District Court was required to determine the fitness of the parents. To do so, it heard testimony, made findings of fact

and conclusions of law, all of which was within its jurisdiction. The findings of fact and conclusions of law compelled the District Court to restore the custody of these children to their parents, which restoration it made on certain conditions, being careful not to disturb the continuing jurisdiction of the Juvenile Court.

We cannot conclude with the Appellants that the discharge of the children "would have accomplished the object of, and satisfied the purpose of, the writ of habeas corpus." In restoring the custody of the children to the parents, the District Court, acted within its jurisdiction and in complete accord with law governing the type of case it had before it.

Respectfully submitted,

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