SMU | Dedman School of Law

SMU Law Review

Volume 7 | Issue 4 Article 1

January 1953

# Affidavit of Inability to Pay Costs in Federal and Texas Civil Actions, The

Edward C. Fritz

Robert E. Keeton

SOUTHWESTERN LAW JOURNAL

VOLUME VII FALL, 1953 NUMBER 4

# THE AFFIDAVIT OF INABILITY TO PAY COSTS IN FEDERAL AND TEXAS CIVIL ACTIONS

*Edward C. Fritz**

THIRTY years ago a leading scholar vigorously alerted the Bar to its failure to protect the judicial equality of the poor.[1] The American Bar Association briefly responded[2] and as to free legal aid has maintained its interest. But as to relief from prepayment of court costs, little has been said since 1925.[3] Has anything been accomplished? A careful study of the pertinent law in two jurisdictions will help answer that question.

The affidavit of inability to pay costs has replaced the "pauper's oath" in Texas and federal courts. A century of legal development has, in the last two decades, culminated in establishing that a person need not be called or considered a pauper in order to proceed in court without prepaying or securing court costs. The development of the substantive law on what constitutes financial inability is a signal example of how federal and state courts under our judicial system can keep in step with economic trends without changing fundamental objectives.

Theoretically, the principle of equal justice for all requires that no man shall be barred from the courts because of his financial

*A. B., University of Chicago; LL.B. Southern Methodist University; member of the Dallas and Texas Bars.

[1] Maguire, *Poverty and Civil Litigation*, 36 Harv. L. Rev. 361 (1923).

[2] 50 A.B.A. REP. 456 (1925).

[3] Notes, 31 Calif. L. Rev. 207 (1943), 48 Harv. L. Rev. 127 (1934), 9 Tulane L. Rev. 306 (1935); all on tangential facets.

position. Along with legal aid clinics, court-appointed attorneys and the public defender system of some states, the cost inability affidavit stands as evidence that our legal system is truly concerned with the interests of all economic classes.

Since the early development of the English law, and the Roman law before it, a person with neither property nor income has been permitted to proceed without making deposit of court costs or security.[4]

Although serious impediments soon arose to obfuscate such proceedings,[5] the free-cost privilege survived. About a hundred years ago, when confronted with an affidavit of inability to pay costs in a situation not covered by the Texas statute, the Supreme Court of Texas allowed the affidavit under its general powers, "as no man should be prevented from prosecuting a suit, seeking redress for an outrage upon his person, on the ground of his poverty."[6]

The courts have consistently granted to the abject pauper the privilege of litigating without prepayment of costs. But the courts have long debated how to assure access to the honest affiant who has some minimal necessary property and a living wage but insufficient funds to pay court costs, without opening the door to the unqualified.

The latest federal and Texas decisions have completed a coherent formulation of a standard for solving that problem under all economic conditions. This standard is that any financially ill-equipped citizen will be permitted to litigate without prepayment of costs if prepayment would deprive him and his dependents of the necessities of life.[7] An analysis of the latest decisions

[4] Maguire, *Poverty and Civil Litigation*, 36 Harv. L. Rev. 361 (1923); Notes, 31 Calif. L. Rev. 207 (1943); 31 Harv. L. Rev. 485 (1918); 9 Tulane L. Rev. 306 (1935).

[5] *Ibid.*

[6] Hickey v. Rhine, 16 Tex. 577, 578 (1856).

[7] Adkins v. DuPont, 335 U. S. 331 (1948); Wright v. Peurifoy, 260 S. W. 2d 234 (Tex. Civ. App. 1953).

enables a practicing attorney in either federal or Texas courts to anticipate with considerable accuracy the results which will be reached when this standard is applied to the facts in his case.

There is no similarity of federal and Texas practice in the procedural law concerning affidavits of inability to pay costs. The federal procedure has become simple, uniform, and, except for review procedure, free of technical obstacles which might block a consideration of the substantive merits of the affidavit. In contrast, for half a century there has been no progress or clarification in the Texas procedure. Obstacles and conflicts abound. The requirements for the affidavit and the time schedules for contest are purposelessly different among the different courts. Review procedure is a law unto itself — completely ignored in the Texas Rules of Civil Procedure. Major amendments to these Rules would go far toward eliminating the procedural traps, which make proceeding on an inability affidavit something like piloting a ship through three sets of navigation rules from Corpus Christi to Orange.

The purposes of this article are as follows:

1. To analyze the substantive development, concurrent in federal and Texas courts, of the formula for determining whether an affiant is unable to make payment of or security for court costs in civil actions. Such an analysis will enable society to evaluate this formula, and will assist practicing attorneys and courts in applying the formula.

2. To compare federal and Texas civil procedure in proceedings on inability affidavit. Such a comparison will afford a partial basis for the construction of a model procedure for inability affidavit proceedings, and will serve as a procedural guide for practicing attorneys and judges in all courts in Texas.

3. To present a proposed revision of pertinent portions of the

Texas Rules of Civil Procedure in order to correct defects concerning procedure on inability affidavit.

## THE OPERATIVE FORMULA FOR DETERMINING INABILITY TO PAY COSTS

In early practice the English courts denied such persons as the following from proceeding free of court costs: a person who had an inheritance paying 40 shillings a year and who owned furniture worth 10 pounds;[8] a woman who was able to pay as high as 28 pounds per year house rent and who owned household furniture worth 40 pounds.[9] Even into the Nineteenth Century a person was "dispaupered" if he was entitled to furniture worth 20 pounds,[10] or if he made 150 pounds a year,[11] or if he had been a coach builder with employees and owned a carriage, trade implements and other goods worth 20 pounds, although he swore he was presently "without a situation" and unable to earn sufficient to support himself and his family.[12]

After a vast increase in both the standard and the cost of living through the past century, those early judicial considerations have evolved into decisions that ownership of an automobile[13] or a 3450-dollar home[14] or having an income of $320 per month[15] does not disqualify a party to proceed without prepayment of costs if such possessions and income are necessary to provide a living for him and his dependents. In Texas this rule emerged suddenly, in the last two decades, after practically no decisions had been made

[8] Tunstall v. Freeney, 1 Colly. 233 n., 63 Eng. Rep. 398 n. (Rolls Ct. 1702).

[9] Clarke v. Pyke, 1 Colly. 234 n., 63 Eng. Rep. 398 n. (Rolls Ct. 1706).

[10] Goldsmith v. Goldsmith, 5 Hare 123, 67 Eng. Rep. 853 (Rolls Ct. 1846).

[11] Boddington v. Woodley, 5 Beav. 555, 49 Eng. Rep. 693 (Rolls Ct. 1842).

[12] Mather v. Shelmerdine, 7 Beav. 267, 49 Eng. Rep. 1068 (Rolls Ct. 1844).

[13] Burleson v. Rawlins, 174 S. W. 2d 979 (Tex. Civ. App. 1943); Aguirre v. Hanney, 107 S. W. 2d 917 (Tex. Civ. App. 1937); Carlisle v. Wilson, 103 S. W. 2d 434 (Tex. Civ. App. 1937).

[14] Adkins v. DuPont, 335 U. S. 331 (1948).

[15] Wright v. Peurifoy, 260 S. W. 2d 234 (Tex. Civ. App. 1953).

on the subject for a century of Texas history.[16] As of 1920, a report of the law throughout the United States demonstrated that no general rule had yet emerged on the subject.[17] The method of analysis now used was devised in the federal courts in a single decision, *Adkins v. DuPont*,[18] and in the Texas courts in ten decicisions of the past two decades.[19]

The fact that the general rule was suddenly formulated in an era of development of pensions and social security legislation may afford a valuable supplement to such studies of the Anglo-American judicial system as that of Dean Levi.[20] In the law of inability to pay court costs, it is observed that the courts have plunged suddenly into Dean Levi's second stage of the legal process, namely, the formulation and application of a classificatory concept.

The formula currently in use by federal and Texas courts when determining whether an affiant is truly unable to pay costs or to give security therefor will not be studied in detail. Following is a list of the factors considered:

(1) Relation between income of affiant and cost of necessities for him and his dependents.

(2) Personal property of affiant free of liens.

(3) Real property of affiant free of liens.

---

[16] The exceptions made no effort to formulate a general rule of law, *e.g.:* Meyer v. Weber, 40 S. W. 627 (Tex. Civ. App. 1897), holding that even if a man owns lots and lands, they may be so encumbered as to be of no help in securing his court costs; Kruegel v. Johnson, 93 S. W. 483 (Tex. Civ. App. 1906), holding that a man out of work for two or three years, in bad health, devoting his time to his lawsuits instead of to his trade where he formerly earned "as much as $5.00 per day," but owning a home which was mortgaged, was unable to pay costs where there was no evidence he had money to pay costs or friends willing to serve, or acceptable, as sureties; Hart v. Wilson, 156 S. W. 520 (Tex. Civ. App. 1913), holding owner of two cows and a yearling worth $105, not shown to be milk cows, not entitled to free appeal.

[17] Note, 6 A.L.R. 1281 (1920).

[18] 335 U. S. 331 (1948).

[19] Cases cited *infra*, notes 22 through 31.

[20] LEVI, AN INTRODUCTION TO LEGAL REASONING (Univ. of Chicago Press, 1949).

(4) Indebtedness of affiant.

(5) Health of affiant and his dependents.

(6) Effort of affiant to pay costs and to obtain security.

(7) Probable amount of costs to be incurred.

Analysis of *Adkins v. DuPont*[21] and the ten latest pertinent Texas cases factor by factor will disclose a well demarcated pattern of law governing inability to pay costs. The factors will be indicated by numerals in parentheses.

*Adkins v. DuPont:* (1) sole source of income was rentals from parts of affiant's home, barely sufficient to purchase necessities; (2) no personal property; (3) home appraised at $3450; (5) widow aged seventy-four; (7) estimated costs $4000. The court observed that the public does not benefit if a party pays the costs of court and then goes on charity, nor does the public benefit if the party is forced to abandon a meritorious claim in order to avoid the destitution which would result from paying court costs. The court stated that absolute poverty is not a necessary qualification for a free appeal, and vacated the trial court order denying the appeal on inability affidavit.

Analysis will now be made of the five latest Texas decisions in favor of the affiant.

*Van Benthuysen v. Gengler:*[22] (1) "... all of his income was required to pay his board and to assist in the maintenance of his mother and father, as well as to provide his contributions for his child's support as ordered by the court;" (2) tools of his occupation as mechanic; (3) no real property; (4) apparently no debts.

*Carlisle v. Wilson:*[23] (1) income $17.50 to $23.00 per week and "his entire earnings were required to support himself and his

[21] 335 U. S. 331 (1948).

[22] 100 S. W. 2d 116, 117 (Tex. Civ. App. 1936).

[23] 103 S. W. 2d 434, 436 (Tex. Civ. App. 1937).

family;" (2) automobile purchased for $295, with balance of $60 against it; (3) no real property; (4) $60 debt on automobile, $2.50 every two weeks on tires; (6) "he had made every reasonable effort to procure assistance through borrowing and otherwise, but without success;" (7) estimated cost of transcript of testimony, $50. The court noted that affiant was suing as next friend on behalf of his ten-year-old daughter, who had no money or property.

*Aguirre v. Hanney*:[24] (1) maximum wages $6.00 a day, and "the whole amount of his wages was necessary to provide for his family;" (2) Model A Ford automobile, mortgaged; (3) no real property; (4) $2.50 per week payments on automobile; (5) wife had recently undergone operation; (6) unable to borrow money and had interviewed friends for the purpose of procuring their signature on a cost bond, but they were in the same financial condition as affiant; (7) district clerk offered to accept ten-dollar court costs deposit.

*Burleson v. Rawlins*:[25] (1) affiant's income before injury $100 per month, her husband working at a defense plant earning as much as $36 per week, "but . . . [he] helped to take care of his mother, and . . . it took all they made to get along;" (2) clothing, wrist watch, wedding ring, piano costing $400 encumbered with a mortgage of $200, and husband had automobile encumbered with a mortgage of $500; (3) no real property; (4) indefinite amount of medical bills; (5) unable to work as a result of injuries upon which suit was brought; (6) "they had no way of raising money for court costs and could not give bond as security;" (7) bond for costs or deposit of $75 required by trial court.

*Wright v. Peurifoy*:[26] (1) income $320 per month, but ". . . his reasonably necessary expenses, under the circumstances present in his case exceed that amount," for himself and four depend-

[24] 107 S. W. 2d 917, 918 (Tex. Civ. App. 1937).
[25] 174 S. W. 2d 979, 980 (Tex. Civ. App. 1943).
[26] 260 S. W. 2d 234, 236 (Tex. Civ. App. 1953).

ents; (2) five rooms of furniture against which there was a mortgage of $350, and affiant possessed one dollar in cash; (3) no real property; (4) indebtedness $71 in addition to $350 mortgage on furniture; (5) physical and mental injuries to affiant, and also, although not mentioned in the opinion, expensive illnesses of wife and daughter; (6) affiant recently tried unsuccessfully to refinance the mortgage on his furniture, to place second mortgages against his furniture, and to obtain security for costs; he did not know of anyone who would go on a bond for him, and, while suit was pending in the trial court, he made cash deposits totaling $70; (7) estimated cost of statement of facts $1200, of which trial court ordered a cash deposit of $250. The court of civil appeals ordered a writ of mandamus against the trial judge on its "inescapable conclusion, supported by the overwhelming weight of the testimony," that affiant could not raise the $250 cash deposit.

Following are the five latest Texas decisions in favor of the contestant.

*Stark v. Dodd*:[27] (1) income, indefinite, including stock and an interest in an oil company as consideration for affiant's leasing out his house, and dividends from 82 shares of Texas Company stock; expenses, indefinite, including the cost of educating two children at the University of Texas; (2) aforesaid stock, cause of action for $105,000 for the manufactured value of certain cut timber, cause of action for $85,000 for the stumpage value of the said timber, proceeds of sale of certain realty; (3) 686-acre tract, large lot, 38½-acre tract, 169-acre tract; (4) $1850 owed his mother's estate, "several judgments for several thousand dollars;" (6) affiant had made money deposits and had furnished a cost bond prior to the trial; (7) balance of costs limited to indefinite costs of appeal.

*Durant v. Stone*:[28] (1) income, $5307.60 gross for preceding

[27] 76 S. W. 2d 865 (Tex. Civ. App. 1934).
[28] 97 S. W. 2d 1006 (Tex. Civ. App. 1936).

year, expenses not shown; (2) dairy business, 298 head of cattle and a team of mules, family car and new car; (3) one-fourth mineral interest in 40 acres and law suit in question for 265 acres; (4) mortgage on all cattle; (6) no effort to pay any part of costs.

*Pinchback v. Hockless:*[29] (1) income, indefinite, but affiant was "practicing attorney of long experience and considerable practice, who has his own office," and made a cash consideration of $3000 for one real estate deal; expenses, head of a family; (2) law office equipment, automobile; (3) homestead, unmortgaged; (4) apparently no indebtedness; (6) no effort to sell or encumber property.

*Stephens v. Dodson:*[30] (1) income, $85 per month wages, $190 per year rentals from farm, $25 per month child support (in arrears), expenses equal to income; (2) household goods; (3) farm worth about $5000 with lien against it for $250, not affiant's residence; (4) $250 lien on farm; (6) affiant requested four businessmen to go on her appeal bond, and they all refused, but affiant did not try to mortgage the farm or use it as security.

*Palm v. Palm's Estate:*[31] (1) income, $1.25 and $1.35 per hour as expert carpenter, expenses not indicated; (6) affiant and his attorney asked two persons, including affiant's son who owed affiant $300, to sign bond.

Analysis indicates that the inability of an affiant to pay costs is determined by no one factor alone, but rather is determined by the affiant's total financial picture. It cannot be said that if an affiant makes $320 per month, as in *Wright v. Peurifoy,*[32] he will necessarily be denied an appeal without bond; nor will a bond-free appeal necessarily be allowed if the affiant is required to expend $320 or more for the necessities of himself and his dependents. The affiant should also develop the facts concerning the

[29] 139 Tex. 536, 164 S. W. 2d 19 (1942).
[30] 226 S. W. 2d 924 (Tex. Civ. App. 1950).
[31] 250 S. W. 2d 232 (Tex. Civ. App. 1952).
[32] 260 S. W. 2d 234 (Tex. Civ. App. 1953).

property he owns, his indebtedness, physical illness in his family, his efforts to obtain the costs or security, and the probable amount of the costs.

The decisions frequently digest the factors of inability in order to determine the ultimate issue — whether the affiant could pay the court costs and still have enough money left for the necessities of life. In all six of the cited cases where the affidavit prevailed, the affiant showed that his income and property were required to pay the necessities of life for him and his dependents. In all five cases where the affidavit failed, the affiant failed to present facts on this point, or the facts showed that he had property which could have been sold or mortgaged to obtain the costs. The relationship between income and necessities of life was specifically recognized in the only Texas Supreme Court decision on this subject in the last twenty years, *Pinchback v. Hockles*.[33] In this case the court stated:

> Obviously, if a laborer was barely earning the necessities of life for himself and family, ordinarily he should not be required to mortgage his hand tools or his household furniture in order to raise funds to pay the court costs. On the other hand, if a party has a credit rating that will enable him to borrow the money, or if he is earning a substantial income, although he is expending it as rapidly as it comes in, or if he owns an automobile or truck or other valuable property, although exempted from execution, which he could mortgage or otherwise dispose of and thereby secure the necessary funds without depriving himself and his family of the necessities of life, he should be required to pay the costs, or give security therefor.[34]

In *Stephens v. Dodson*[35] the affiant testified "it . . . [took] every penny she . . . [got] hold of to support herself and children and she . . . [had] no money left when she . . . paid her bills." The court stated, "There is no testimony that she endeavored to mortgage the farm or use it as security for the costs."[36]

[33] 139 Tex. 536, 164 S. W. 2d 19 (1942).
[34] *Id.* at 538, 164 S. W. 2d at 20.
[35] 226 S. W. 2d 924, 925 (Tex. Civ. App. 150).
[36] *Id.* at 926.

The law in Texas is, therefore, that if a person owns property which he can mortgage or sell without depriving himself and his family of the necessities of life, he is disqualified from proceeding without the payment of costs. In *Stephens v. Dodson* the $5000 farm owned by affiant, although a homestead, was not occupied by affiant and her family, and drew an annual rental of only $190. Affiant relied for her income primarily upon her job at a drugstore. In *Adkins v. DuPont*[37] the affiant resided in her $3450-home, and her only source of income was rentals from units she rented in said home. The factual distinctions between these two cases may delineate the boundary between ability and inability to pay costs, so far as property ownership is concerned.

As to factors (2) and (3), whether the property of the affiant is exempted is of no significance so long as it can be mortgaged.[38]

Inasmuch as the reasoning of the Supreme Court of the United States in *Adkins v. DuPont* is substantially the same as the reasoning of the Texas courts, and the rulings are reconcilable, it is concluded that the federal and Texas law on factors of inability are substantially the same.

The first pertinent English statute allowed free proceedings to persons worth less than five pounds, excepting their wearing apparel and the matters under consideration in the law suit in which the affidavit was filed.[39] These exceptions are still honored in the present English law (which has far higher limits than five pounds).[40] None of the recent decisions in the federal or Texas courts requires a party to account for his contingent rights in the law suit in which he seeks to proceed without paying or securing costs.[41]

[37] 335 U. S. 331 (1948).
[38] Pinchback v. Hockles, 139 Tex. 536, 164 S. W. 2d 19 (1942).
[39] 2 Hen. VII, c. 12 (1487).
[40] See *In Re* Atkin's Trusts, [1909] 1 Ch. 471, 78 L. J. Ch. (n. s.) 307 (1908).
[41] Although in Stark v. Dodd, 76 S. W. 2d 865 (Tex. Civ. App. 1934), the court made note of the fact that affiant was suing in two other cases for $185,000 in cut timber and stumps, indicating he must have had an interest in the land on which the trees grew.

Although it would appear that a party who could raise no money whatsoever for court costs would ordinarily be unable to obtain a corporate surety on his bond because of the premiums required, and would ordinarily have no friends or relatives who would go on his bond, several of the foregoing decisions indicate that every affiant should produce evidence that he has tried to borrow money for costs and has asked people to be sureties on his bond.[42]

Two other aspects of the *Adkins v. DuPont* decision should be considered. The first is the ruling that the attorney for the affiant does not have to state his own inability to pay the costs, even though he is to share in the recovery if his client's claim is upheld. This ruling brings the federal law into line with the long-standing law of Texas on the point.[43]

The second is the ruling that a plaintiff, in order to proceed without costs, need not obtain the inability affidavits of all co-plaintiffs. Texas decisions are not so clear on this point. In *Pinchback v. Hockles*[44] the court overruled a motion by two co-parties for a proceeding without costs, but in this case, unlike *Adkins v. DuPont,* the co-parties filed a joint affidavit instead of separate ones. The decision considered almost exclusively the financial status of only one of the co-parties, except for noting, "No showing is made as to the credit rating of either of the parties, nor as to their ability to borrow funds with which to pay the costs."[45] With better facts, a co-party might file a separate affidavit in a Texas court and be allowed to proceed free of costs, regardless of the ruling as to the other co-parties. In Texas courts, as in federal courts, each co-party should stand upon his own ability or inability.[46]

---

[42] *E.g.,* see cases cited *supra* notes 25 and 28.

[43] See Notes, 31 Calif. L. Rev. 207, 210 (1943), 48 Harv. L. Rev. 127 (1934).

[44] 139 Tex. 536, 164 S. W. 2d 19 (1943).

[45] *Id.* at 537, 164 S. W. 2d at 19.

[46] See Note, 11 A.L.R. 2d 607-617 (1950).

On one other point both federal and Texas decisions state a rule which appears out of line with the usual liberal philosophy on court costs. When one suit has already been dismissed for any reason, the plaintiff therein may not bring a new suit on the same cause of action until he pays the costs of the previous suit, regardless of how poor he is.[47]

It is a tribute to the Anglo-American judicial system, as practiced in both federal and Texas jurisdictions, that the courts have kept in step with our changing economy in their determination of financial inability. By comparing the modern cases heretofore cited with the cases cited in a similar study of financial inability written more than thirty years ago,[48] one can see that as the purchasing power of the dollar has decreased, the courts have permitted cost-free proceedings to persons with higher and higher incomes. Now that the courts examine the ratio of income to necessary expenses, it is probable that the courts will be all the more able to keep up with economic conditions, good or bad.

Cases on inability affidavits have not been limited to hard times, as may be deduced by observing that six of the eleven cases heretofore analyzed were filed in prosperous years for the nation. There are always citizens who are unable to give security for costs. Frequently their inability was caused by the very act of the defendant out of which the suit arose, such as a tragic collision or a long-sustained exaction of usury. One of the tactics of usurers in court is to engage in lengthy delaying procedures and technical objections at each stage of pleading and trial, thus running up the court costs. Likewise, usurers refuse to divulge their records, thus necessitating discovery action by the plaintiff. It would indeed be against the interests of society if such parties, as a result of a contest filed by them or a court clerk against an inability affidavit, could obtain the dismissal of lawsuits because they had by their own actions financially disabled the plaintiff and caused large

[47] See Note, 156 A.L.R. 956, 962 (1945).

[48] See Note, 6 A.L.R. 1281 (1920).

court costs to accrue. The inability affidavit is thus not only an institution for equalizing access to justice in general among all citizens, but is also a specific shield of defense against those who would attempt to suppress opposition in court by methods causing inability to pay costs.

The noteworthy improvement of the substantive law on inability to pay costs does not enable financially ill-equipped persons to surmount the barrier of court costs. In Texas, grave inequality persists because of procedural ambushes which can be avoided only by the most patient and persistent affiants, aided by the most careful attorneys.

## FEDERAL PROCEDURE ON INABILITY AFFIDAVITS

In federal court the procedure on inability affidavits is set forth in a single statute,[49] with the exceptions that a complementary statute provides for the administration of payment by the United States for a transcript of evidence when allowed on free appeal,[50] and a federal rule permits the district court to provide for preparing the record on free appeal in an economical manner,[51] *e.g.*, in narrative form. These statutory provisions are substantially the same as when enacted in 1892,[52] except that the privilege was extended to appellants in 1910,[53] and to defendants in 1910 and 1948;[54] and that in 1922 the United States undertook prepaying the costs of printing the record on appeal;[55] and that in 1948 the requirement of stating one's poverty was stricken.[56] The federal statute, which covers criminal as well as civil actions, provides that an affidavit may be filed at any time in the proceedings

[49] 62 STAT. 954 (1948), amended, 63 STAT. 104 (1949), 65 STAT. 727 (1951); 28 U. S. C. 1946 ed. Supp. V, § 1915.
[50] 62 STAT. 922 (1948), 28 U. S. C. 1946 ed. Supp. V, § 75(f).
[51] Rule 75m, Federal Rules of Civil Procedure (1946). See 3 MOORE'S FEDERAL PRACTICE (1938) (1952 Cum. Supp.) c. 75.
[52] 27 STAT. 252.
[53] 36 STAT. 66.
[54] 36 STAT. 866, 62 STAT. 922.
[55] 42 STAT. 666.
[56] 62 STAT. 922.

in any federal court, averring that the affiant is unable to pay the costs or give security therefor, and stating the nature of the action, defense or appeal and affiant's belief that he is entitled to redress. No appeal may be taken on affidavit if the trial court certifies in writing that it is not taken in good faith.

Inasmuch as the federal courts have held that the right to proceed without prepayment of costs is a privilege, limited by statute, and not a right,[57] and the statute limits the privilege to citizens, the affidavit should recite that affiant is a citizen of the United States.[58]

The application to proceed without prepayment of costs may be made even after the court has entered an order requiring security for costs.[59] The affidavit should be accompanied by a motion for leave to proceed thereupon.[60] The statute requires specific court authorization before the affidavit has any effect.

The act does not specifically provide for a contest, but the decisions reflect that written opposition may be filed by adverse parties and may be granted by the court.[61] The act makes no provision for the presentation of testimony when the affidavit is contested, but the decisions reflect that testimony can be taken in the federal courts to determine the financial inability of an affiant, at least on motion to dismiss.[62] If the written opposition contains factual statements, better practice is that it be verified.[63] Although no specific time limit is imposed for the filing of a contest, it has been held that a motion to set aside an order allowing a proceeding on inability affidavit may be barred by unreasonable delay.[64]

[57] Higgins v. Steele, 195 F. 2d 366 (8th Cir. 1952).

[58] For form of affidavit see 5 BARRON, DARNIEDER & KEOGH, FEDERAL PRACTICE & PROCEDURE (Rules ed. 1951) § 4483.

[59] Woods v. Bailey, 113 Fed. 390 (2d Cir. 1902).

[60] For form see 5 BARRON, DARNIEDER & KEOGH, FEDERAL PRACTICE & PROCEDURE, (Rules ed. 1951) § 4482.

[61] Nix v. U. S., 131 F. 2d 857 (5th Cir. 1942), *cert. denied*, 318 U. S. 771 (1943).

[62] Woods v. Bailey, 113 Fed. 390 (2d Cir. 1902).

[63] See 2 MOORE'S FEDERAL PRACTICE (2d ed. 1948) § 34.07 n.; Victory v. Manning, 128 F. 2d 415 (3d Cir. 1942).

[64] St. Louis, etc. R. Co. v. Farr, 56 Fed. 994 (8th Cir. 1893).

An inability affidavit for appeal from one federal court to another should first be filed in the court from which the appeal is sought, although the appellate court has discretionary authority to consider an inability affidavit first filed in such appellate court.[65] In order to obtain a free transcript of the trial proceedings, an affiant must obtain the certificate of the court of appeals or trial court that the appeal is not frivolous but presents a substantial question, and also the approval of the Director of the Administrative Office of United States Courts.[66] The affidavit for cost-free appeal should be filed and authorization obtained in advance of the thirty-day deadline for filing notice of appeal, so that timely filing of the notice of appeal may not be prevented.[67] Otherwise, the clerk may refuse to file the notice of appeal, and the appeal may be a nullity.[68]

Although the statute does not specifically so provide, the decisions hold that the application to proceed without prepayment of costs will be denied if it appears that the affiant's cause or appeal is without merit.[69] Therefore, a full statement of the justice of the cause of action or ground of appeal should be included in the affidavit, and on appeal affidavit the affiant should attach copies of the proceedings below wherever they will help show the merit of the appeal.

In the federal courts the procedure for review of a lower court ruling is restrictive. Let us first observe how a party obtains review of a trial court ruling as to an affidavit of inability to pay for trial court proceedings. It has been stated in *Crockett v. U. S.*,[70]

[65] Nix v. U. S., 131 F. 2d 857 (5th Cir. 1942), *cert. denied*, 318 U. S. 771 (1943).

[66] McLeod v. Union Barge Line Co., 11 F.R.D. 167 (W. D. Pa. 1951), holding approval is jurisdictional.

[67] Smith v. Johnston, 109 F. 2d 152 (9th Cir. 1940); see 28 U. S. C. 1946 ed. Supp. V, § 1917.

[68] See 3 BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE (Rules ed. 1950) § 1553.

[69] Holland v. Capital Transit Co., 184 F. 2d 686 (D. C. Cir. 1950), *cert. denied*, 341 U. S. 954 (1951).

[70] 136 F. 2d 11 (9th Cir. 1943).

and *Barkdoll v. U. S.*,[71] that an order denying leave to proceed to trial without prepayment of costs is not a final order from which appeal lies. The decisions on this point were based on the fact that the proper remedy was mandamus. But it had previously been held in *Fisher v. Cushman*[72] that mandamus does not lie in a case where the trial court has denied leave to appeal on inability affidavit because such action was strictly in the discretion of the trial court. Denial of leave to proceed to trial would then also be impregnable to mandamus. This is true in any event because the writ of mandamus has now been abolished in the federal courts.[73] What, then, is the remedy of an affiant who has been wrongly denied the right to proceed to trial on his inability affidavit? Can the affiant ignore *Crockett v. U. S.* and *Barkdoll v. U. S.* because they were based on the wrong assumption that mandamus was the proper remedy? Can he promptly file his appeal affidavit and seek immediate review? Or must he wait until the trial court dismisses his cause, and then make his appeal from the order of dismissal? Inasmuch as an order denying leave to proceed to trial on inability affidavit prevents further action in the trial court by a person unable to advance court costs, the statute should be amended to allow immediate review.

Now let us examine the procedure for review of a trial court ruling as to an appeal affidavit. Where an applicant is denied leave to appeal on his affidavit, he merely files in the appellate court a new application, along with his appeal or petition for writ of certiorari.[74] The contestant has the same right to review. When the appeal on inability affidavit reaches the appellate court, the contestant by appropriate motion may bring to the attention of the appellate court his contention that the trial court erred in finding that the appeal was in good faith and meritorious.

[71] 147 F. 2d 617-619 (9th Cir. 1945).

[72] 99 F. 2d 918 (9th Cir. 1938). Note that this decision was by the same court that decided the *Crockett* and *Barkdoll* cases.

[73] Rule 81(b), Federal Rules of Civil Procedure.

[74] Adkins v. DuPont, 335 U. S. 331 (1948); Steffler v. U. S., 319 U. S. 38 (1943).

According to *Higgins v. Steele*[75] the appellate court can then take a look at the documents and dismiss the appeal if it is satisfied the appeal is frivolous or malicious. The review may also be had on the question of whether the affiant is actually unable to pay costs, as in *Adkins v. DuPont.*

There are dicta to the effect that a trial court order denying an affidavit for appeal is not a final order from which an appeal lies.[76] These dicta would appear to be contradictory to the earlier decision of the Supreme Court in *Adkins v. DuPont*, except that the court of appeals then turns around and examines the appeal, and thus does afford a review in spite of its dicta to the contrary. The wording of the decision reflects an obvious desire of the court to be able to screen the excessive number of habeas corpus appeals which are without merit. Inasmuch as the federal procedure is the same for civil and criminal cases, there is a danger that the attitude of the court in *Higgins v. Steele* may, by stare decisis, lead to the virtual impossibility of an affiant's obtaining review of a trial court denial of free appeal in civil cases.

In the great majority of efforts of habeas corpus applicants to obtain a free appeal, the trial court denies an authorization and certifies in writing that the appeal is not taken in good faith, under the last sentence of Section (a) of the federal act.[77] The cases hold that such a certificate by the trial court is binding on the appellate court and cannot be reviewed unless the appellant shows that the certificate of the trial court itself was without warrant or was not made in good faith.[78] Needless to say, no decision yet reflects that a litigant has ever successfully attacked the good faith of a federal trial judge.

---

[75] 195 F. 2d 366 (8th Cir. 1952).

[76] *Id.* at 367, also citing cases to the contrary.

[77] "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." 62 STAT. 954 (1948) as amended; 28 U. S. C. 1946 ed. Supp. V, § 1915(a).

[78] Wells v. U. S., 318 U. S. 257 (1943); Newman v. U. S., 184 F. 2d 275 (D. C. Cir. 1950); Johnson v. Hunter, 144 F. 2d 565 (10th Cir. 1944).

The Supreme Court has advised that the inability affidavit should follow the words of the statute.[79] Although in two cases the Supreme Court was lenient about the form of the affidavit when such leniency appeared necessary in order to expound the law,[80] it seems clear that an inability affidavit will stand little chance of review in the appellate court if it fails to state whether the trial court made a certificate of good faith.[81]

## PROCEDURE ON INABILITY AFFIDAVIT IN TEXAS COURTS

In the Texas courts, instead of finding the procedure for inability affidavits consolidated into one statute, one discovers that the procedure is scattered through nine Rules of Civil Procedure, which contain many purposelessly varying provisions, with many a possible pitfall.[82]

The inability affidavit may be filed at any stage in the proceeding, even after the court has ruled the party for costs.[83] Rule 145 extends the privilege of proceeding to trial on inability affidavits to the plaintiff only. The Texas Rules extend the privilege to all plaintiffs and appellants, apparently whether residents of Texas or elsewhere,[84] and in at least one recent case where no objection was made on the point, a non-resident successfully appealed to the Supreme Court of Texas on inability affidavit.[85]

Two steps must always be taken by the affiant in filing an inability affidavit, the filing and the notice to adverse parties. The affidavit, if for proceeding in the trial court, must include

[79] Adkins v. DuPont, 335 U. S. 331 (1948).

[80] *Id.* at 333; Kenney v. Plymouth Rock Squab Co., 236 U. S. 43 (1915).

[81] Bayless v. Johnston, 127 F. 2d 531 (9th Cir. 1942); Smith v. U. S., 124 F. 2d 517 (9th Cir. 1941).

[82] Rules 126, 145, 333, 361, 444, 485, 508, 572. See FRANKI, VERNON'S TEXAS RULES of CIVIL PROCEDURE (1942).

[83] Brooks v. Hicks, 20 Tex. 666 (1858); Warren v. Scarborough, 241 S. W. 551 (Tex. Civ. App. 1922).

[84] Notwithstanding Jenks v. Jenks, 47 Tex. 220 (1877), decided under a former notary public statute, and Fletcher v. Anderson, 145 S. W. 622 (Tex. Civ. App. 1912) decided under provisions discarded in Rule 572.

[85] Rumpf v. Rumpf, ..... Tex. ....., 242 S. W. 2d 416 (1951).

two representations, namely, that the affiant is unable to pay the court costs and that he is unable to make security therefor.[86] The affiant's attorney, if a notary public, has been permitted to take the acknowledgment.[87] One co-party may make the oath for himself and the other co-party, at least under certain circumstances.[88] A next friend may take the oath for a minor.[89]

An appeal affidavit, except in probate, must aver that the affiant is unable to pay the costs of appeal "or any part thereof," or to give security therefor.[90] On appeal of a probate matter from county court to district court, the affidavit must recite that the affiant has made diligent effort to give bond and has been unable to do so by reason of his poverty.[91] A recent opinion contains a dictum that failure to recite diligent effort is fatal regardless of whether the undisputed facts at the hearing show that a diligent effort was made.[92] This dictum sounds more like a pronunciamento of the Middle Ages than a declaration under the twelve-year-old Rules of Civil Procedure, and will surely not be accepted generally as the law. The careful practitioner will, of course, follow Rule 333 strictly in preparing his affidavit, in order to avoid any such pitfall.

The second step, notice of filing, is not specifically made a duty of the affiant under the inability affidavit Rules, but is so under the general Rule applicable.[93] However, the Rules on appeal

[86] Rule 145.

[87] Ryburn v. Moore, 72 Tex. 85, 10 S. W. 393 (1888).

[88] Dignowity v. Fly, 110 Tex. 613, 223 S. W. 165 (1920); Clark v. Briley, 193 S. W. 419 (Tex. Civ. App. 1917) *er. ref.* The same may be said with respect to appeal affidavits, Morrison v. Brooks, 189 S. W. 1094 (Tex. Civ. App. 1916). To be safe, all co-parties eligible should sign. See Dixie Motor Coach Corp. v. Wilson, 138 S. W. 2d 314 (Tex. Civ. App. 1940); Boone v. McBee, 280 S. W. 295 (Tex. Civ. App. 1926); Crocket v. Maxey, 18 S. W. 138 (Tex. Civ. App. 1892).

[89] St. Louis & S. F. R. Co. v. Williams, 37 S. W. 992 (Tex. Civ. App. 1896) *er. dism.* See Carlisle v. Wilson, 103 S. W. 2d 434 (Tex. Civ. App. 1937).

[90] Rules 355(a), 572; but *cf.* Rules 388-A, 444, 485, 508. The omission of "or any part thereof" has been held not to invalidate an affidavit. Stewart v. Heidenheimer, 55 Tex. 644 (1881).

[91] Rule 333.

[92] Palm v. Palm's Estate, 250 S. W. 2d 232 (Tex. Civ. App. 1952).

[93] Rule 72.

affidavits specifically require the court clerk to give the notice.[94]

Once having been filed, the affidavit entitles the affiant to proceed without prepayment or security for costs, but if he loses, the final judgment may include an assessment of costs against him.[95] However, a contest may be filed, in which event, under all the Rules, the burden reverts to the affiant to establish his right to proceed on his affidavit.

A contest may be filed by the clerk, justice, or any adverse party,[96] and, against an appeal affidavit, by any other interested officer of the court.[97] The form of the contest is unspecified in the Rules, except that Rule 355(c) requires the contest of an appeal affidavit to be under oath. Perhaps all that is necessary under Rule 355(c) is to state that the appellee contests the appellant's affidavit, and to add an acknowledgment of that fact. If this were the only intent of the Rule, the requirement for an oath would be useless. The only interpretation which would give meaning to the oath requirement would be that specific facts are required tending to show that the appellant is able to pay costs.

The time for filing a contest in the county and district court is in the same term in which the affidavit was filed, and the contest must likewise be heard in said term.[98] It is difficult to prognosticate what the courts will hold if a case arises where contest is filed in the same term as the inability affidavit but is not heard within that term. Contest of an appeal affidavit in justice court must be filed within five days after notice of the affidavit,[99] and in district court within ten days after notice.[100]

Rule 145 does not state who should give notice of setting of

[94] Rule 355(b). This is the only instance in the Rules where the court clerk has such responsibility except in the event an out-of-town attorney makes special request under Rule 246.
[95] McPherson v. Johnson, 69 Tex. 484, 6 S. W. 798 (1888).
[96] Rule 145.
[97] Rule 355(c).
[98] Rule 145.
[99] Rule 572.
[100] Rule 355(c).

the contest hearing, except on appeal affidavit, but Rule 72 would appear to place this burden on the contestant. On appeal affidavit the clerk issues notice of setting.[101]

At the hearing all the Rules concerning inability affidavits place the burden of proof on the affiant, in contrast to the common law before the adoption of the Rules of Civil Procedure.[102] The analysis of the factors of inability in a preceding section of this article indicates that the affiant who presents evidence in the greatest detail on the largest number of factors of inability has the best chance of defeating the contest.

At the conclusion of the hearing, the court may sustain the contest in whole or in part, ordering either payment or security, or both for all or a part of the costs,[103] or may overrule the contest. Rule 355(f) leaves open a difficult question: can the trial court frustrate an appeal against his final judgment in a cause by entering an order, after the time for filing an appeal bond has expired, requiring the affiant to make a bond for some small part of the costs, for example, five dollars? Failure by the affiant to have filed such a bond would deprive the appellate court of jurisdiction,[104] unless the appellant should by writ of mandamus require the trial court order to be set aside. But it would be difficult for the appellant to convince the appellate court that the five-dollar security requirement was without support in the facts below, since almost anybody can raise five dollars one way or another when he is forced to do so.

An inability affidavit may be filed originally in the Texas appellate courts at all stages of an original or appellate proceed-

---

[101] *Ibid.*

[102] Currie v. Missouri, K. & T. Ry. Co., 101 Tex. 478, 108 S. W. 1167 (1908); Tisdale v. F. Hannes & Co., 278 S. W. 324 (Tex. Civ. App. 1925). *Contra*: Durant v. Stone, 97 S. W. 2d 1006 (Tex. Civ. App. 1936); Stark v. Dodd, 76 S. W. 2d 865 (Tex. Civ. App. 1934).

[103] Rule 355(f). The court probably has the same power under Rules 145 and 572.

[104] De Miller v. Yzaguirre, 143 S. W. 2d 425 (Tex. Civ. App. 1940) *er. ref.*

ing in such courts.[105] The Rules on affidavits in appellate courts, with the possible exception of Rule 361, which is vague, all adopt the procedure set forth in Rule 355 for the contest of an affidavit. Carrying out such procedure would require a regular court trial with witnesses before the court of civil appeals or supreme court on the factual question of affiant's inability to pay costs. A preferable method of conducting an inability affidavit contest in the appellate courts would be strictly by affidavit, as was done in *Texas Central Railway Company v. Pledger*.[106]

The Texas Rules of Civil Procedure provide for no review of a lower court ruling on an inability contest, with the exception of a unique type of review by the county court of a justice court action sustaining a contest.[107]

In the absence of provision for review in the statutes and Rules, the courts of civil appeals have been reviewing the county and district court rulings through mandamus proceedings. Such proceedings have always been brought by the affiant against whom a contest has been sustained.[108] The reason contestants do not apply for mandamus may be their recognition that they have another remedy which becomes available on appeal of the case. If contestant loses the main case below, he may then appeal from the prior adverse ruling of the trial court on his contest, although it would appear that the point would then be moot. No contestant has ever attempted such an appeal.[109] If contestant on the other hand, although unsuccessful in opposing the inability affidavit, is victor in the main case below, he may file a motion in the court of civil appeals to dismiss the appeal on the ground his contest below should have been sustained.[110]

[105] Rules 361, 388-A, 444 (courts of civil appeal); Rules 485, 508 (supreme court).
[106] 85 S. W. 470 (Tex. Civ. App. 1905).
[107] Rule 572. Such a review was considered as a mandamus proceeding in Hardin v. Hamilton, 204 S. W. 679 (Tex. Civ. App. 1918), and yet the same decision speaks of the review as a hearing de novo.
[108] Cases cited *supra* notes 22-28, 30.
[109] But see unusual circumstances in Palm v. Palm's Estate, 250 S. W. 2d 232 (Tex. Civ. App. 1952).
[110] See Clark v. Briley, 193 S.W. 419 (Tex. Civ. App. 1917) *er. ref.*

Since substantially all Texas reviews of lower court rulings on inability affidavits are through the mandamus route, examination will now be made of how the mandamus procedure is applied to such cases.[111]

An affiant seeking a mandamus against a trial judge who denied his right to proceed or appeal by affidavit promptly encounters the rule that mandamus lies against a public official only in case of willful misconduct or abuse of discretion.[112] Where mandamus is against the trial judge, as usual in these cases, the findings of fact by the trial judge on disputed issues are accepted as binding on the court of civil appeals.[113] Therefore, the only time an affiant can obtain mandamus, his only means of review, is when the undisputed testimony below clearly establishes that he is unable to pay the costs.[114] This is an unfair handicap, especially in view of the fact that the decision involves not merely a party's right to win, but also a party's right to have his cause adjudicated or reviewed on the merits.

In the mandamus action the relator must include as parties respondent the court official or officials who have violated their duty with regard to the inability affidavit[115] and the adverse parties litigant.[116] Usually, the trial judge is the court official who is made the principal respondent. Where the relator seeks a writ of mandamus specifically naming the court clerk and the court reporter therein, the court clerk and court reporter have been held in one case to be indispensable parties.[117] But otherwise, unless the court clerk or court reporter is charged with a specific violation of his official duty, he is not a proper party.[118]

---

111 Rule 383.

112 See Warren v. Scarborough, 241 S. W. 551 (Tex. Civ. App. 1922).

113 Wortham v. Walker, 133 Tex. 255, 128 S. W. 2d 1138 (1939).

114 Stephens v. Dodson, 226 S. W. 2d 924 (Tex. Civ. App. 1950).

115 Durant v. Stone, 97 S. W. 2d 1006 (Tex. Civ. App. 1936); Stark v. Dodd, 76 S. W. 2d 865 (Tex. Civ. App. 1934).

116 Williams v. Wray, 123 Tex. 466, 72 S. W. 2d 577 (1934).

117 Caldwell v. Boyd, 146 S. W. 2d 296 (Tex. Civ. App. 1941).

118 See case cited *supra* note 115.

The rule that the adverse litigants must be made party respondents to the mandamus action is unique in the law. Nowhere else is there an example of the necessity to join as a party someone against whom no order whatsoever is sought or even authorized. In the line of decisions expressing the rule that the adverse litigants must be joined in the mandamus action, although several cases hold that the motion for leave to file the original petition for mandamus is fatally defective,[119] and some say that the petition for mandamus itself is fatally defective,[120] none of the decisions necessarily holds that the adverse litigants are indispensable parties to the mandamus proceeding, because in none of those cases does it appear that the non-joinder was called to the attention of the court after it had acted upon the petition for mandamus. A plea of non-joinder when timely filed makes fatally defective a proceeding even when the parties not joined are merely conditionally necessary parties.[121] In one case the language shows that the court considered the omission of the adverse litigants a "fundamental error," but that case is not necessarily authority that parties who are not to be named in or specifically bound by a mandamus judgment must nevertheless be joined as indispensable parties.[122]

In a mandamus proceeding for review of a trial court order sustaining a contest of an inability affidavit, it is essential that the

[119] *E. g.*, cases cited *supra* notes 116, 117.

[120] H. N. Cohen Lumber & Bldg. Co. v. McCalla, 142 S. W. 2d 685 (Tex. Civ. App. 1940).

[121] 1 McDONALD, TEXAS CIVIL PRACTICE (1950) 239.

[122] Rushing v. Thomas, 63 S. W. 2d 323 (Tex. Civ. App. 1933), in which the mandamus involved was not by a court of civil appeals but was by a county court against a county clerk for failure to issue execution against the adverse litigants in an action in that court. The decision was based mainly upon the failure by the relator to show that the county clerk had a clear duty to issue the execution. After deciding the case on that ground in two and one-half pages, the court added in one-sixth of a page that the adverse litigants should have been joined. The decision does not indicate when the respondents first raised their point, but they obviously did so prior to motion for rehearing in the court of civil appeals, and they may have done so in the county court; at any rate the objection was timely enough to support the decision even if the omission was not "fundamental error". Thus that wording was dictum. Moreover, if mandamus had issued in that case, the order would have directed the clerk to issue a writ of execution specifically against litigants who were not joined.

applicant for mandamus include in his application a record of the testimony in the trial court. If the applicant fails to do this, it will be impossible to show the appellate court that the trial judge abused his discretion in making a ruling contrary to the undisputed evidence. An applicant for mandamus, without presenting a record of the testimony to the court of civil appeals, is at the mercy of the findings of the trial judge.[123]

The suggested method of presenting the record of the testimony to the court of civil appeals is to attempt to follow the provisions of Rule 377, although this Rule applies to the preparation of the statement of facts on appeal, and not on mandamus, which is an original proceeding in the court of civil appeals coming under Rule 388-A. If the agreement of opposing counsel or the approval of the trial court is not immediately obtainable under Rule 377(d), the transcript of the testimony, bearing the affidavit of the court reporter that it is a full and complete transcript of the testimony at the hearing, should be incorporated into the petition for writ of mandamus.

There is no provision whatsoever in Texas law for obtaining such a transcript of the testimony without prepayment of the court reporter's fee. This means that a person unable to pay the costs of appeal must obtain the sympathy of the court reporter or the necessary sum to prepay the preparation of a transcript of the testimony at the hearing on the inability affidavit in order to obtain a review of a trial judge's ruling against such affiant. Therefore, a trial judge's adverse ruling on an affidavit of inability to pay costs is almost impregnable to review as a practical matter. Such a situation is unconscionable, and would appear to encourage in the trial court a feeling of almost absolute authority on the vital question of whether or not a financially ill-equipped person can proceed in court.

The filing of the mandamus action in the court of civil appeals

[123] Palm v. Palm's Estate, 250 S. W. 2d 232 (Tex. Civ. App. 1952).

would ordinarily, under Rule 388-A, require a ten-dollar deposit on filing of motion for leave to file the petition for writ of mandamus, and if leave is granted, an additional fifteen-dollar deposit for the filing of the petition. But these requirements can be avoided by the filing of a separate inability affidavit in the court of civil appeals under the provisions of the last paragraph of Rule 388-A.

If an affiant, denied the right to proceed in the trial court, obtains a writ of mandamus against the trial judge, he must return to the trial court and obtain an order under Rule 380 for a free narrative transcript of the evidence. Then, finally, he will be in a position to perfect his appeal. If the court reporter refuses to comply with the order under Rule 380, he is subject to contempt action by the trial court. If the court clerk refuses to prepare the transcript under Rule 376, he is subject to a mandamus order by the trial judge and, if he disobeys same, to a contempt proceeding. In some cases mandamus has been brought directly in the court of civil appeals against a court clerk who refused to file a case without a deposit of costs,[124] and it is probable that such a mandamus would also lie directly in the court of civil appeals against a court clerk who refused to make a free transcript after a free appeal became authorized under Rule 355.

If mandamus proceedings have become necessary, such delay will be encountered that the affiant is unlikely to be able to file his statement of facts in the trial court within fifty days as required by Rule 381(a), and will need to apply for an extension of time in the trial court under Rule 381(b). Furthermore, the affiant is unlikely to be able to file his transcript and statement of facts in the court of civil appeals within sixty days under Rule 386, and therefore will probably have to file a motion for extension in the court of civil appeals under such Rule. Such a motion would ordinarily require a five-dollar court cost deposit under Rule 388-A, but the affiant may make a new inability affidavit

[124] See Van Benthuysen v. Gengler, 100 S. W. 2d 116 (Tex. Civ. App. 1936).

in the court of civil appeals under the last paragraph of Rule 388-A, in order to avoid the necessity for such a cost deposit.

## PROPOSED REFORM OF TEXAS PROCEDURE

In 1923 Professor Maguire stated that the keynote of our inability affidavit laws in the United States was discord.[125] It has been observed that our federal and Texas substantive law, unhampered by statutory technicalities, has, since Professor Maguire's article, caught up with the times in formulating a utilitarian standard of judging inability to pay costs. The briefing of federal procedure earlier in this article demonstrates that Congress has long ago worked out a simple, uniform system of inability proceedings except in regard to review of lower court rulings on inability affidavits. By way of contrast, the foregoing briefing of Texas procedure shows that in Texas the same procedural discord and obfuscation noted by Professor Maguire in 1923 continues.[126]

For no apparent reason, the affidavit in the Texas trial courts is not required to contain a recitation that the affiant is unable to pay "any part" of the costs, nor do Rules 388-A, 444, 485 and 508 in the appellate courts require such a recitation; but Rule 355, governing appeals from the county and district courts, and Rule 572, governing appeals from justice courts, do require such a recitation. Rule 333, governing appeals from county to district courts, requires a totally different recitation from all the other Rules. Rule 361, governing writs of error from the courts of civil appeals to the district courts, fails to specify which of the foregoing requirements applies. If a party makes his affidavit under the wrong Rule, it may cost him his day in court.[127]

---

[125] Maguire, *Poverty and Civil Litigation*, 36 Harv. L. Rev. 361, 381 (1923).

[126] *Id.* at 399.

[127] Palm v. Palm's Estate, 250 S. W. 2d 232 (Tex. Civ. App. 1952). But in the matter of substantial compliance and right to amend see Commercial Credit Corp. v. Smith, 143 Tex. 612, 187 S. W. 2d 363 (1945), and Davis v. Cavanaugh, 231 S. W. 2d 959 (Tex. Civ. App. 1950), *rev'd on other grounds*, 149 Tex. 573, 235 S. W. 2d 972 (1951).

Mention has been made how Rules 145 and 572 differ from the other Rules concerning how notice of filing of the affidavit or contest must be given. Likewise, note has been taken how Rule 355 and the Rules incorporating it require an oath of some vague sort, whereas Rules 145 and 572 require no oath.

The requirement under Rule 145 of filing and trying a contest in the same term as the inability affidavit is filed is an encouragement of the filing of protective contests which are not based upon investigation or facts, but which are hurriedly made in order to preserve the right of contest. The same objection applies to the five-day requirement for contest in the justice court under Rule 572 and to the ten-day requirement under Rule 355. Furthermore, the imposition of such time limits prevents the parties from filing a later contest in the event the affiant's circumstances improve to where he would be able to pay court costs.

The requirement under Rule 126 that the clerk endorse the citation, "pauper's oath filed", is not only an invitation to technical error, threatening the validity of the citation, but is also objectionable as a throwback to the old "pauper" concept. This requirement, and the reference to "poverty" in Rule 333, should be eliminated. Such references tend to distort the substantive law and to place upon inability affidavit proceedings a discredit which is contrary to the spirit of equal justice. Deserving persons who have meritorious causes of action but are unable to advance costs will frequently sacrifice their rights rather than sign an instrument entitled a "pauper's oath". The Latin phrase, "in forma pauperis", so commonly used in the federal courts, sounds so much like its English derivative that it is almost as effective a handicap upon an unfortunate litigant. The "affidavit of inability to pay costs" bears no such opprobrious connotation.

Just as Rule 572 sets up a review procedure after denial of affiant's right to proceed, so should Rules 145 and 355 establish a review procedure. The latter procedure should afford the court

of civil appeals the same power to determine the facts as it has in an ordinary appeal from a trial before the court without a jury.

A complete analysis of the legislative history of the present Rules concerning inability affidavits reveals that, except for the extension of the privilege to appeal in 1871[128] and 1887,[129] and a slight clarification in the justice court appeal procedure in 1931,[130] there has been no progress whatsoever in the past century.[131] When the Texas Rules of Civil Procedure were adopted, the long-stagnant statutes on inability affidavits were taken into the Rules almost verbatim. The only noteworthy changes were the shifting of the burden of proof from the contestant to the affiant, a leap backward twenty centuries to the era before the Roman Republic first allowed cost-free proceedings to persons who merely made oath of their inability,[132] and the withdrawal of the privilege from defendants in spite of the fact that many defendants are financially ill-equipped and may incur costs as the trial proceeds.[133] Since the Rules became effective on September 1, 1941,[134] the only important change concerning inability affidavits was the extension of the privilege in 1950 to cover original proceedings in the court of civil appeals.

Why has Texas procedure lagged so badly in this field while the Texas courts have been able to keep the substantive law up-to-date? In answering this question it must be remembered that substantively, under the doctrine of stare decisis, the courts have not been bogged down by rigid statutes or rules, and have been free to maintain a flexible standard for judging inability. Having been free to do so, they have sustained the inability

[128] Acts 1871, c. 71, § 1; PASCHAL'S ANN. DIG. OF TEX. LAWS (2d ed. 1870) art. 6180.
[129] Acts 1887, c. 122; 9 GAMMEL'S LAWS OF TEXAS (1898) 911.
[130] Acts 1931, c. 134, § 2; TEX. REV. CIV. STAT. (1925) art. 2457.
[131] See Acts 1846, pp. 363, 366, § 8; PASCHAL'S ANN. DIG. OF TEX. LAWS (2d ed. 1870) art. 1429; effective from 1846 to 1871.
[132] See Maguire, *Poverty and Civil Litigation*, 36 Harv. L. Rev. 361, 362 (1923).
[133] See Rules 73, 170(c).
[134] Rule 814.

affidavit on the basis of reasonable standards whenever an unusually determined affiant has managed to press his case through the procedural morass to a consideration on the merits. But while the courts were free to reason on the substantive law, they were bound by the procedure left with them by the legislature until the supreme court obtained the rule-making authority in 1939.[135]

One reason that the legislature and the supreme court have devoted so little attention to cost inability procedure is that the Bar has been indifferent to its responsibility of protecting the equality of the financially ill-equipped in the courts. Those who should be most acutely aware of the obstacles confronting the financially ill-equipped litigant are the practicing attorneys. Yet no proposed reforms in cost inability procedure have been presented to the legislature or the supreme court by the Bar.

In view of the defects in Texas procedure on cost inability affidavits, one might surmise that the Texas Rules in this respect are the worst in the nation, and possibly that is now true, but it was not so when Professor Maguire surveyed the field in 1923.[136] Procedural defects were rampant throughout the American jurisdictions which recognized the inability affidavit. And in many states there was no provision whatsoever for the inability affidavit,[137] except insofar as those states had adopted the common law of England.[138] What reforms the other states have accomplished since Professor Maguire vigorously alerted them is a subject for another article. Our immediate concern is the reform of Texas procedure.

As possible guides for the improvement of cost inability procedure in Texas, the standards set forth by Professor Maguire for model legislation are available,[139] as well as his second draft of a Poor Litigant's Statute, reported by the Committee on Legal Aid

[135] Acts 1939, c. 25, p. 201; TEX. REV. CIV. STAT. (Vernon, 1948) art. 1731a.
[136] Maguire, *Poverty and Civil Litigation*, 36 Harv. L. Rev. 361, 381-390 (1923).
[137] *Id.* at 362.
[138] See Note, 31 Calif. L. Rev. 207 (1943).
[139] Maguire, *Poverty and Civil Litigation*, 36 Harv L. Rev. 361, 399 (1943).

Work of the American Bar Association.[140] These guides attack both the substantive and the procedural issues. Inasmuch as the substantive law on determination of inability is now satisfactorily formulated in Texas and is admirably adapted to all economic trends, specific reform proposals may be confined to the procedural field.

Appended hereto is a tentative proposal for a unified Rule on inability affidavits. This proposed Rule unifies the procedure in all Texas courts. It provides a definite outline for the contents of the affidavit, affording all the information to which the court clerk and adverse parties are entitled, thus discouraging unqualified persons from attempts to make baseless affidavits, and at the same time reducing the likelihood of a qualified affiant's losing the privilege because his lawyer failed to adduce all the facts. The requirement of a complete affidavit also eliminates the need for a hearing of testimony, thus affording to the courts some relief from clogging of their dockets, and saving the parties time and expense. The elimination of the hearing also enables the litigants to obtain review of a ruling on the fact question of inability without having to pay the expense of a transcript of the evidence, which payment would be impossible for a truly needy litigant.

The requirement that all contests based on the factual question of inability must be specific and under oath should relieve the court dockets of most dilatory and frivolous contests. The elimination of time schedules for the contest will for the first time afford to potential contestants a reasonable opportunity to investigate the inability affidavit before deciding whether or not to contest it, thus providing for an effective system of screening out false affidavits at no expense to the state.

After the adoption of such a Rule, the financially ill-equipped litigant will no longer be greatly handicapped as to court costs. However, critical inequalities will remain. One is the unavail-

[140] 50 A.B.A. REP. 456 (1925).

ability of temporary restraining orders and temporary injunctions to those who cannot make bond.[141] The courts should be empowered in proper cases, after notice and preliminary hearing, to issue injunctions on inability affidavits without bond, or on bond without sureties. A spouse seeking a divorce in Texas may obtain a temporary restraining order or injunction without bond.[142] Such an exception should be extended to all persons financially unable to obtain sureties on a bond.

Another obstacle which will continue to hamper a party without funds is his difficulty in obtaining depositions, photostatic copies of documents, and other discovery and investigation materials, and in paying witness fees required by statute.[143]

Another inequality which remains to be eliminated is the inequality between the financially ill-equipped and the financially well-equipped in ability to obtain competent legal counsel. The federal courts are empowered to request attorneys to serve inability affiants in both civil and criminal actions, but not to pay them for the service.[144] In Texas there is no provision for a court to appoint free civil counsel.

The remedies for these latter inequalities would require legislation. On the other hand, the reforms proposed in this article as to court costs can be effectuated by amendment of the Rules of Civil Procedure by the Texas Supreme Court. Therefore, it is practical to proceed with the court costs amendments separately from the other reforms.[145]

---

141 Rule 684; Rule 65(c), Federal Rules of Civil Procedure.

142 Rule 693-a.

143 Acts 1846, p. 353; TEX. REV. CIV. STAT. (Vernon, 1948) art. 3708. An inability affiant is relieved of paying witness fees in the federal courts. 62 STAT. 954 (1948), as amended, 28 U. S. C. 1946 ed. Supp. V, § 1915(c). The same would be true in Texas under a dictum in Pinchback v. Hockles, 139 Tex. 536, 164 S. W. 2d 19, 20 (1942), quoted in Stephens v. Dodson, 226 S. W. 2d 924 (Tex. Civ. App. 1950).

144 62 STAT. 954 (1948); 28 U. S. C. 1946 ed. Supp. V, § 1915(d). For the value of such a statute see Maguire, *Poverty and Civil Litigation*, 36 Harv. L. Rev. 361 (1923).

145 However, all these problems are met simultaneously in the Second Draft of the Poor Litigant's Statute, 50 A.B.A. REP. 456 (1925).

## CONCLUSION

The age-old recognition of the privilege of cost-free proceedings for the financially unable has been paralleled by an age-old failure of the Anglo-American judicial system to provide adequate machinery for the implementation of that privilege. In the last twenty years the federal courts have formulated a utilitarian substantive law, and Congress has maintained the procedural law in workable form, except for review. The Texas courts have concurrently arrived at the same substantive formula, but the legislature and rule-making authority have neglected the highly inadequate procedure, not having been alerted to the problem by the Bar. The Supreme Court of Texas, in directing its attention to these proposed reforms, should be given the support and advice of the Bar.

## APPENDIX

### SUGGESTED RULE ON INABILITY AFFIDAVITS

Rule 145. *Proceedings on Inability Affidavit.*

(a) *Affidavit of Inability.*

(1) Any party, whether resident or non-resident, citizen or alien, plaintiff, defendant, appellant, appellee, or otherwise, who is unable to pay the costs of court or to give security therefor shall be entitled to commence and prosecute, defend, appeal, or otherwise proceed in any court and any judicial or quasi-judicial proceeding within the scope of these Rules upon filing with the clerk at any time prior to the time for filing the appeal bond an affidavit that the party is unable to pay the costs of court or any part thereof and is unable to give security therefor (other than such payment or security already or concurrently made in said cause.)

(2) Incorporated in the affidavit should be an itemized statement, as full and correct as possible, of the financial condition of the party on each of the following subjects:

(a) All income received by the party, the party's spouse, and each

person listed below as a dependent, for the past year from all sources, itemized.

(b) Names, addresses, ages and relationship of all persons to whose support the party is now contributing.

(c) Itemized expenses of the party and dependents for the past year and expected changes in future expenses.

(d) All money on hand, in a bank, or otherwise available to the party and each dependent.

(e) Description of each category of personal property and full description of each piece of real property in which the party or any dependent has any interest, together with statement of estimated value of each said item and amount and description of all encumbrances.

(f) Itemization of each indebtedness against the party and each dependent.

(g) Any further important information concerning financial condition or ability of the party to borrow the money to pay costs or make security therefor.

(3) The affidavit should state the estimated court costs accrued at the time of filing the affidavit and the estimated costs for completion of the action.

(4) If for appeal or writ of error, the affidavit should state the ground or grounds for said appeal in brief but self-sufficient form.

(5) The affidavit may incorporate under oath other pertinent documents attached thereto.

(6) When the party is represented in court by a guardian, administrator, executor, trustee, next friend, or other person duly authorized to represent the personal or financial interests of the party in legal proceedings, such representative party may make the affidavit on behalf of the represented party, and need set forth the facts concerning the represented party, his spouse and dependents, only.

(7) The party filing the affidavit shall serve a complete copy thereof on each adverse party in accordance with Rule 72.

(8) If the deposition of the party has been taken prior to notice of his affidavit, the filing thereof shall entitle the adverse parties to take his deposition again, limited to the issue of his ability to pay costs or give security therefor.

(9) The filing of such affidavit shall entitle the party to proceed without prepayment of costs or making of security therefor unless and until a contest may be sustained for reasons of substance.

(b) *Contest.*

(1) The court clerk or any party to the suit may file a contest of the affidavit at any time. If the affidavit is for appeal, or writ of error, the contest shall not be filed in the trial court subsequent to the time for filing the appeal or application for writ of error, but if not timely filed in the lower court may be filed in the appellate court at any time after the appeal is perfected therein.

(2) The contest shall either attack the procedural sufficiency of the affidavit, or state that the facts alleged in the affidavit even if true are insufficient to warrant proceeding without prepayment of costs or giving security, or state under oath facts contrary to or additional to those stated in the affidavit of inability.

(3) Only one contest may be filed by each party unless a subsequent contest states under oath specific material changes of condition of the inability affiant since the previous contest.

(4) Upon the filing of a contest, the contestant shall notify the court thereof and the court shall promptly consider the inability affidavit and the contest and either sustain as to all or a part of the costs, or overrule the contest. It shall be discretionary with the court whether oral argument shall be made.

(5) A complete copy of the contest shall be served on each adverse party in accordance with Rule 72.

(6) Counter-affidavits may be filed by any party to any preceding affidavits.

(7) If the court sustains a contest for reasons of procedure, the inability affiant shall have the right to amend.

(8) If the court sustains a contest as to a part of the costs after the time for posting appeal bond has expired, the inability affiant may within a reasonable time thereafter deposit in cash or make security for that part of the costs as to which the contest was sustained and such deposit or security shall have the effect of meeting all time requirements for the posting of appeal bond.

(c) *Review.*

If a court sustains a contest for reasons of substance, or dismisses an appeal or writ of error on account of the insufficiency of an inability affidavit, the injured party may file with the clerk of the court which has jurisdiction for review over that court an affidavit of inability to pay costs in accordance with Section (a) of this Rule, together with a copy of the affidavit below, the contest below, and the order thereupon, and shall deliver a complete copy in accordance with the provisions of Rule 72 to all persons who contested the affidavit below; whereupon the reviewing court shall consider de novo the inability affidavit therein and any contest filed in said reviewing court, and may enter an appropriate order. In the event the affidavit reviewed is an affidavit for appeal, and the court allows such appeal upon said affidavit, the clerk below and court reporter below shall prepare the transcript and statement of facts in accordance with the Rules of Civil Procedure but without the necessity for further order under Rule 380.

SUGGESTED AMENDMENTS TO OTHER RULES

Rule 126. Strike the last sentence.

Rule 333. Amend Rule to read, "The provisions of Rule 145 shall likewise apply to appeals under this section."

Rule 355. Amend to read, "The provisions of Rule 145 shall apply to the Courts of Civil Appeals."

Rule 356. Strike paragraph (b). In the next to last sentence, substitute "All procedure concerning," in place of "Contest of."

Rule 444. Repeal. (Covered by Rules 145, 355.)

Rule 485. In last sentence substitute, "All procedure concerning," in place of, "Contest of;" substitute "Rule 145" in place of "Rule 355."

Rule 508. Repeal. (Covered by Rule 145.)

Rule 572. Amend to read, "The provisions of Rule 145 shall apply to the justice court."