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Indiana Law Journal

Volume 2 | Issue 4 Article 2

1-1-1927

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Recommended Citation
Willis, Hugh Evander (1927) "Punishment for Contempt of Court," *Indiana Law Journal*: Vol. 2: Iss. 4, Article 2.
Available at: http://www.repository.law.indiana.edu/ilj/vol2/iss4/2

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PUNISHMENT FOR CONTEMPT OF COURT[1]

HUGH EVANDER WILLIS[2]

When should a court have the power to punish for contempt? This question was recently before the Indiana Supreme Court in the case of *Dale v. State.*[3]

Contempts are classified as

1. Criminal.
   a. Direct.
   b. Indirect.
      (1) Case pending.
      (2) No case pending.
2. Civil.
   a. Coercive.
   b. Punitive.

Criminal contempt is an act committed against the majesty of the court as an agency of government.[4]

Direct criminal contempt is an insult to the court or resistance of its authority, committed in its presence, and thus an interference with the process of litigation.[5] It is the universal rule

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[1] This paper was originally intended as a *Comment* to deal with certain recent cases involving contempt of court that have arisen in Indiana. In fairness to the author this should be kept in mind, since in undertaking to treat only of certain recent cases he did not feel called upon to develop the general principles in detail. Perhaps the reader will welcome this concise treatment, however, since a full consideration of the whole doctrine of contempt of court would go to greater length than an article in our Journal or even a series of articles.

It is in a way confusing to deal with the professional consideration of contempt of court since this legal question is also in part a political issue. Our readers will, of course, understand that this article and all other articles in our Journal are written from the professional point of view and do not in any way purport to present a political view. It is our policy to present differing views on the same legal questions; and from this it follows that all the conclusions expressed in the Journal are the professional opinions of the writers, for which the Indiana State Bar Association is not responsible. For instance, the law of contempt of court varies widely in the several states in this country. It would be fortunate if one holding different views from those presented here would prepare a presentation of them for our readers.—[THE EDITOR.]

[2] See biographical note, p. 316.

[3] (Ind. 1926) 150 N. E. 781.

[4] *Dale v. State, supra.*

[5] *Dale v. State, supra, Ex parte Wright,* (1879) 67 Ind. 504.

that contempts of this sort may be punished by the same judge without a jury trial and without truth as a defense.[6] This is clearly what the law ought to be. Unless offenses of this sort can be punished they cannot be stopped, and if they cannot be stopped litigation will have to stop. The necessity for punishment requires also that it be summary and exemplary. The offenders must be punished *instanter*. To do this there is no other course than punishment by the same judge without a jury and without going into the question of truth. In this there is danger of abuse, but such danger is less than the danger of the stoppage of justice. The judge should have the power to imprison the offender at once and let the offender purge himself later.

Indirect, or constructive, criminal contempt is an act, done not in the presence of the court but at a distance, but which tends to obstruct the administration of justice.[7] It may occur either when there is a case pending,[7a] or when there is no case pending.

When there is a case pending Anglo-American law permits the same judge to punish for contempt without a jury trial and without truth as a defense, the same as in the case of direct contempt.[8] Under the Act of 1831 the United States Supreme Court at first held that constructive contempt included only cases of physical propinquity. Later it extended the term to include direct tendency. Finally it extended the term to include newspaper criticisms. Then the United States rule became the same as the common law rule.[9] Yet, it is a general truth, if not a general principle of law, that no one should be judge in his own case. There is danger of injustice where punishment is left to a judge who has suffered from contempt, and who is both judge and jury in his own case. Such a power in the hands of

[6] *Ex parte Terry,* (1888) 128 U. S. 289; *Ex parte Wall,* (1882) 107 U. S. 265; *Coons v. State,* (1922) 191 Ind. 580; *Mahoney v. State,* (1904) 33 Ind. App. 655; 70 U. of Pa. Law Rev. 331.

[7] *Dale v. State, supra, Ex parte Wright,* (1879) 65 Ind. 504.

[7a] It has been held that a case is pending in a court until there has been a final disposition of it by that court. *Ex parte Nelson,* (1913) 251 Mo. 63; *State v. Ingwell* (1898) 13 Wash. 238. Thus a case is pending if it is still open to appeal. *In re Chadwick,* (1896) 109 Mich. 588; or to a petition for a rehearing. *People v. News-Times Co.,* (1906) 35 Colo. 253. *McDougal v. Sheridan,* (1913) 23 Ia. 191; or to modification on motion. *In re Chadwick,* (1896) 190 Mich. 588.

[8] *Regina v. Onslow* (Tichborne Case), (1873) L. R. 9 Q. B. 219; *Regina v. Skipworth,* (1873) L. R. 9 Q. B. 230; *Cheadle v. State,* (1886) 110 Ind. 301; *Dale v. State, supra; Patterson v. Colorado,* (1907) 205 U. S. 454.

[9] 33 Yale Law Jour. 536.

an angry man is liable to be abused. In the case of direct contempt, for the reasons given, the same judge has to be the judge in his own case. Should he be the judge in his own case in the case of indirect contempt? In such case summary punishment is not necessary. In fact, there must be regular procedure by attachment, or rule to show cause, on affidavits, and an opportunity for the accused to disprove the charges, although a jury is not required.[10] Otherwise the procedure is not due process of law. There is time to secure another judge and to secure a jury. The objection to hearing without a jury is not that a person is being convicted of a crime without a jury; he can still be proceeded against criminally; but that justice requires a jury trial in a contempt case as much as in a criminal case.[11] Prior to the eighteenth century libel on a court by one other than an officer of the law was punished only after a jury trial. An erroneous decision in 1765 held that it could be punished summarily. Subsequent cases have propagated the error. It is time for the error to be corrected.[12] The objection to the same judge trying the case is the same objection that is ground for change of venue. It would seem that a sense of common decency and of the appropriateness of things would make a judge refrain from sitting in his own case. The objection to excluding truth as a defense is also that it violates our sense of justice. It is like the old rule that truth was not a defense in criminal libel, but that "the greater the truth the greater the libel." It would seem as though the rule which makes truth no defense in indirect criminal contempt when there is a case pending is a hang-over, and is as wrong as the denial of a jury trial and the obtrusion of the same judge into the hearing.[13]

When there is no case pending, Anglo-American law now holds by the great weight of authority that there is no contempt, but that the judge offended must rely upon the law of slander and libel if he is to obtain any redress.[14] The early English

[10] *Cooke v. United States,* (1925) 267 U. S. 517; *Stewart v. State,* (1894) 140 Ind. 7; *Interstate Commerce Com. v. Brimson,* (1894) 154 U. S. 447.

[11] *Cooke v. United States,* (1925) 267 U. S. 517.

[12] *Holdsworth Hist. of Eng. Law* 391, 4; 24 *Law Quart. Rev.* 184, 266.

[13] *McClatchy v. Sacramento Co. Sup. Ct.* (1897) 119 Cal. 413; *Ex parte Nelson,* (1913) 251 Mo. 63; *State v. Eau Claire Co. Cir. Ct.* (1897) 97 Wis. 1.

[14] *Patterson v. Colorado,* (1907) 250 U. S. 454; *Cheadle v. State,* (1886) 110 Ind. 301; *Storey v. People,* (1875) 79 Ill. 45; *In re Dalton,* (1891) 46 Kan. 253; *Percival v. State,* (1895) 45 Neb. 741; *Ex parte Green,* (1904) 46 Tex. Crim. 576; *State v. Eau Claire Cir. Ct.* (1897) 97 Wis. 1; *Dunham v. State,* (1858), 6 Ia. 245; *State Brd. of Bar Exmrs. v. Hart,* (1908) 104 Minn. 88.

law and the law of some of the States of the United States is *contra*.[15] The majority rule is clearly correct. The judge is not accountable for his language at all. To make others liable, other than in actions for slander and libel, when their offense can affect no litigation, is an outrage on justice.[16] It is judicial tyranny. Freedom of discussion of public business and offices—consistent with truth and decency—should be not only allowable; it should be encouraged as essential to public welfare. Of course no present day judge would think of punishing anyone for contempt for abuse of Chief Justice Taney and the Supreme Court because of their Dred Scott decision. Then why should he desire to punish anyone for contempt for abuse of himself because of one of his decisions after it has been rendered?

Civil contempt is a violation of an order, or decree of a court made for the benefit of the opposing party. It is not an offense so much against the dignity of the court as against the party.[17] The privilege of Parliament is a protection in the case of civil contempt, but not in the case of criminal contempt.[18] The executive cannot pardon for civil contempt. Imprisonment for civil contempt may be either for the purpose of preventing violation of the decree and to cease as soon as danger of disobedience is over, or it may be in the nature of punishment. Originally imprisonment was coercive.[19] Today it may be either coercive or punitive, and whether one or the other may be administered by the same judge without a jury.[20] Where the imprisonment is coercive, the decisions are clearly correct. There is no chance for passion or prejudice, but rather a knowledge of the issues is essential. But where imprisonment is punitive, the rule should be the same as it should be in the case of indirect criminal contempt when a case is pending,—another judge and a jury.[21]

How can the reforms advocated herein be brought to pass? They cannot be accomplished by legislation. Legislatures may require a jury trial in courts created by the Legislature;[22] the executives may pardon for criminal contempt both direct[23] and

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15 *Burdett v. Commonwealth*, 103 Va. 838.

16 *People v. Gilbert*, (1917) 281 Ill. 619.

17 *Ex parte Wright*, (1879) 65 Ind. 504.

18 *Catmer v. Knatchbull*, (1797) 4 T. R. 448.

19 2 R. III, 9 pl. 22; 27 Hen. VIII, 15.

20 *In re Debs*, (1895) 158 U. S. 564.

21 21 Harv. L. Rev. 161.

22 *Ex parte Robinson*, (1873) 86 U. S. 505; *Michaelson v. United States*, (1924) 266 U. S. 42.

23 *Ex parte Magee*, (N. M. 1925) 242 Pac. 332.

indirect;[24] and the legislatures may regulate the amount of punishment and the procedure in contempt cases; yet the courts hold that they cannot take the power away from them and give it to juries in other cases,[25] because they hold that the power to punish for contempt (indirect as well as direct) is an inherent power of the courts, and therefore under our doctrine of separation of powers that it is unconstitutional for legislatures to take this power away from courts created by constitutions.[26] However, the reforms can be obtained by constitutional amendment or by judicial legislation. The courts should exercise a wise restraint and put a voluntary limitation upon themselves[27] to give the accused the privilege of a jury, the defense of truth, and a trial before another judge in the case of punishment for civil contempt if punitive and in the case of indirect criminal contempt when there is a case pending, and never to punish for contempt when there is no case pending. The contrary working hypotheses under which some courts have meted out punishment have not stood the test of experience, and they should be reformulated.

The facts in the instant case were as follows: The case included two cases. In the first case Dale was prosecuted for contempt in publishing in his newspaper an article, alleged to be defamatory, which criticised the jury commissioners, the officers of the court, the presiding judge, and the not yet discharged grand jury, which had returned against him an indictment charging him with the manufacture, sale and giving away of intoxicating liquors. In the second case Dale was prosecuted for contempt in repeating the above article in the answer which he filed in the first case. The Delaware Circuit Court, which was the object of Dale's attack, without a jury trial and without admitting evidence of truth, found him guilty in both cases. On appeal the Indiana Supreme Court classified the first case as a case of direct criminal contempt, held that Dale was guilty thereof and affirmed the judgment of the lower court; and it classified the second case also as a case of direct criminal con-

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[24] *Ex parte Grossman,* (1924) 267 U. S. 87; *State v. Magee Pub. Co.* (1924) 29 N. M. 455; 4 Col. L. Rev. 65.

[25] *Batchelder v. Morse* (1871) 42 Cal. 412; *Dunham v. State,* (1858) 6 Ia. 245.

[26] *Hale v. State,* (1896) 55 Ohio St. 210; *Carter v. Commonwealth,* (1899) 96 Va. 791; *Little v. State,* (1883) 90 Ind. 338.

[27] *Cooke v. United States,* (1925) 267 U. S. 517. The United States Supreme Court might accomplish the reforms suggested by holding that it is not due process of law to punish for indirect contempt without these privileges.

tempt, but held that Dale was not guilty thereof and reversed the judgment of the lower court.

The Supreme Court cannot be criticised for its decision in the second case, and if it was correct in its classification of the first case as one of direct criminal contempt it cannot be criticised for its decision in the first case. Was it correct in its classification of the case? With all due respect for the court, it is submitted that it was not correct in its interpretation of the facts. It may be admitted that there was a criminal case pending, but in the opinion of the writer it cannot be admitted that there was any insult to the court committed in its presence and which could be punished summarily without a rule to show cause and an opportunity to be heard. The argument of the court for making it a case of direct contempt is not convincing. The earlier Indiana case[28] upon which it relied, it would seem, either does not support its position, as is apparently the case, or is another erroneous decision. The "first case" it is believed should have been classified as a case of indirect criminal contempt when there is a case pending.

But, would it have made any difference in the decision of the court? Of course if Dale was not given any opportunity to disprove the charges against him he was denied due process, and the judgment of the lower court should have been reversed on this ground. Assuming that he was given this opportunity, but before the same judge and without a jury trial and without any chance to prove the truth of his statements, would the Supreme Court have reversed the case for any of these reasons? The court took the position that truth was not a defense. It did not discuss the other points. If it would conservatively have followed the weight of authority it would have rendered the same decision in the case of indirect criminal contempt as it did in the case of what it called direct criminal contempt. But it would have had an opportunity to announce a better principle and to place the law of contempt on a basis which would meet with general approval. Indiana has already taken a good position on the question of whether or not there is contempt when there is no case pending,[29] a position from which it is to be hoped it will never recede. It is too bad that it did not progressively arise to its opportunity in the instant case so as to make the law of indirect criminal contempt and civil punitive contempt what it ought to be.

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[28] *Coons v. State*, (1922) 191 Ind. 580.

[29] Note 14, *supra*.

INDIANA LAW JOURNAL

Published Monthly, October to June, inclusive, by The Indiana State Bar Association

EXECUTIVE OFFICE, 217 STATE HOUSE, INDIANAPOLIS, INDIANA
EDITORIAL OFFICE, BLOOMINGTON, INDIANA

SUBSCRIPTION PRICE $3.00 A YEAR SINGLE COPIES 50 CENTS
Canadian Subscription Price is $3.50; Foreign, $4.00

Subscription price to individuals, not members of the Indiana State Bar Association, $3.00 a year; to those who are members of the association the price is $1.50 and is included in their annual dues, $5.00.

The complete management of the Indiana Law Journal is exercised by The Indiana State Bar Association through its officers. The Editor, Editorial Boards and other officers of The Journal are appointed by the President of The Indiana State Bar Association with the advice and approval of the Board of Managers. The Indiana State Bar Association founded the Indiana Law Journal and retains full responsibility and control in its publication. The participation of Indiana University School of Law is editorial.

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