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FINES FOR CONTEMPT AS INDEMNITY TO A PARTY TO AN ACTION

By EDMUND T. MONTGOMERY *

When the petulant Prince Hal invaded the court of King's Bench, presided over by Chief Justice Gascoigne, furiously demanding that his favored servant, who was then being arraigned for a felony, be set free, it is reported that when his demands were refused, he threatened to attack the Court and do him bodily harm,

"but the Judge sitting still without moving, declaring the majesty of the King's place of judgment and with an assumed and bold countenance, said to the Prince these words following: 'Sir, remember yourself, I keep here the place of the King your sovereign lord and father, to whom ye owe double obedience: Wherefore eftsoons, in his name, I charge you desist of your willfulness and unlawful enterprise and from henceforth give good example to those which hereafter shall be your subjects. And now for your contempt and disobedience go you to the prison of the King's Bench, whereunto I commit you, and remain ye there prisoner until the pleasure of the King your father be further known.' With which words being abashed, and also wondering at the marvelous gravity of that worshipful justice, the noble Prince, laying his weapon apart, doing reverence, departed and went to the King's Bench as he was commanded."1

In this story we get a glimpse of the respect accorded to the early day English courts which may well be an inspiration to our present day judges. There are many who are invading the majesty of the state's place of judgment in ways less fierce and bold than undertaken by "the mad cap" Prince Hal, but which are nevertheless as clearly contemptuous of the purpose and authority of the court. Actions based on perjured testimony which are a fraud and deceit on the court are all too frequent, especially in the personal injury field;2 orders and injunctions are

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1 Of the Minneapolis, Minnesota Bar.
2 Elyot, The Governor, Croft ed., p. 61. See also Shakespeare, King Henry IV, part II, act V, scene 2, where the Prince admits the justice of his sentence. 1 Campbell, Lives of the Chief Justices 125, 137. 
3 A typical illustration of many of this variety is Clifford v. Chicago, M. & S. P. Ry., (D.C. Hennepin County, Minn., 1930) where the evidence of the plaintiff was to the effect that he had received a serious injury as a result of which he was incapacitated and had to spend several months
disregarded freely and too often with impunity. It is disconcerting to the lawyer who has successfully demonstrated to the court that a witness or a party is guilty of manifest perjury or has committed acts which clearly constitute contempt to have the court do nothing more than allow the action to be dismissed or merely leave any prosecutions to the criminal court. The hesitancy of the courts of this country to take the initiative in using their power to punish contempts is perhaps based on a commendably conservative principle, but contempts of the authority of the courts left unnoticed must inevitably lead to a contemptuous state of mind toward the majesty of the law, which will result in an increase of unjustified litigation and a disregard of process, orders, and decrees of the courts with consequent needless expense to the state and bona fide litigants.

Where a fraudulent action is brought, or a perjured and fabricated defense is interposed to a justifiable suit, the opposing party must in most cases go to great expense to investigate and expose the deceit in order to win; costs awarded him in no way compensate him for this outlay, and an action for damages on account of the fraud means delay and that he must prove again the facts, which will put him to further expense. Many times persons who commit these offenses are of the sort whose assets are difficult to get at, and an execution against their property is of little value. A criminal proceeding for perjury or contempt is of little satisfaction, even if successful, which is rare.

In such cases where there are contempts which result in damage to a party to an action, it is possible, in some jurisdictions, for the aggrieved party to obtain promptly after the contempt is committed an order to show cause or attachment for contempt in the main action, requiring the guilty party to show cause why he should not be adjudged guilty of his contempt and be fined for the benefit of the aggrieved party to indemnify him for his damage caused by the contempt. The hesitancy of the judges to take the initiative where these more subtle and indirect contempts have been committed should not embarrass them in a case of this kind. It is the purpose of this paper to point out the usefulness of proceedings of this kind where recognized and to discuss the rights of a party to obtain such relief.

convalescing and resting on a farm. The defendant produced moving pictures in court of the plaintiff doing heavy work on a threshing machine which the plaintiff's witness admitted were taken during the so-called period of convalescence.
Fines by way of indemnity to a party damaged by reason of an act constituting contempt are imposed under both statutory and common law power. It is sometimes said that this power rests entirely on statute, but there are jurisdictions in which a common law right to impose a fine to indemnify a party injured because of contempt is clearly recognized independently of statute. The New Hampshire court has been particularly insistent that such a right exists, and the federal courts have freely exercised this prerogative in many instances. Some state courts have taken the position that a statute providing for punishments for contempt which does not provide for indemnity to the injured party divests the courts of that state of that power, even if it existed at common law. While the power of the federal courts to punish for contempt is limited by statute, the federal statutes specifically provide for indemnity, and the right to award indemnity has been unquestioned in many cases.

An examination of English authorities reveals that the practice of making an order for compensation other than ordinary taxable costs to the party injured by a contempt prevails at the present time and has an early origin. In a case where a solicitor

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313 C. J. 89, sec. 136.
3 Stimpson v. Putnam, (1868) 41 Vt. 238.
828 U. S. C. A., sec. 385, Mason's U. S. Code, tit. 28, sec. 385. "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any such cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."
10 "If the contempt be confessed or proved, it shall be referred to the master to tax the costs of the prosecutor; and the party offending shall be committed until he pays them and give satisfaction to the court for the misdemeanor." Rules and Orders in the Exchequer, 160 rule 40. 2 Comyn, Digest 221, Title Chancery. Costs in the English chancery
filed a false and scandalous affidavit in a bankruptcy matter, Lord Eldon ordered that he "pay the costs of the application and all costs, out of pocket, to be taxed as between attorney and client.""\textsuperscript{11}

In 1790 proceedings for contempt were instituted in the Common Pleas against a sheriff for making an improper return. The court "ordered that the sheriff should immediately without further delay, pay the whole debt and costs due the plaintiff Bond together with the costs of all the applications."

The closing paragraph of the report shows the efficacy of the procedure:

"Upon hearing this, the sheriff thought proper to comply with the terms prescribed, and accordingly soon after paid the whole debt and costs, and the costs of all the applications."\textsuperscript{12}

In a few states where there is no statute the existence of the power has been denied.\textsuperscript{12} Since most states have statutes making specific provision for punishment for contempts, limitation on the right to indemnity, where there is no statutory provision for such indemnity, would most likely result from a restrictive interpretation of these statutes. It is beyond the scope of this paper to review such statutes as they exist in the various states, but most of them are for the obvious purpose of limiting punishment for criminal contempts. As will be hereafter pointed out, a proceeding by a party for indemnity because of a contempt should not be regarded as a criminal proceeding; the indemnity is limited to actual damages, and hence no reason is perceived why a statute limiting the court's power to inflict punishment in a criminal contempt proceeding should be deemed to abrogate the common law rule that indemnity may be had in a civil proceeding. There might be more difficulty, however, where the statute specifically attempts to limit the court's power to deal with civil contempts.

In a few jurisdictions there are statutes specifically providing that a party aggrieved because of a contempt may be indemnified.\textsuperscript{14}

\textsuperscript{11} Ex Parte Simpson, (1809) 15 Ves. Jr. 476, 478.
\textsuperscript{12} Rex v. Sheriff, (1791) 1 H. Bl. 543, 546.
\textsuperscript{14} U. S. C. A.; see 387, Mason's U. S. Code, tit. 28, sec. 387. "If the accused be found guilty, judgment shall be entered accordingly, pre-
Except in New York the decisions do not indicate that the usefulness of such statutes is fully realized.

The versatility of these statutes and the common law principle of indemnity may be appreciated by reviewing a few of the cases where indemnity has been awarded. For fabricating a printed exhibit in an infringement case a federal court fined two parties, found guilty of the contempt, each $1000.00, half of which was to go to the complainant in the contempt proceeding.15

cribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.”

McKinney's Cons. Laws of N. Y. Bk. 29, sec. 773. “If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section.”

Mason's Minn. Stat. 1927, sec. 9803. “If any actual loss or injury to a party in an action or special proceeding, prejudicial to his right therein, is caused by such contempt, the court or officer, in addition to the fine or imprisonment imposed therefor, may order the person guilty of the contempt to pay the party aggrieved a sum of money sufficient to indemnify him and satisfy his costs and expenses, which order, and the acceptance of money thereunder, shall be a bar to an action for such loss and injury.”

Utah Comp. L. 1917, sec. 7068. “If an actual loss or injury to a party in an action or special proceeding, prejudicial to his right therein, is caused by the contempt, the court, in addition to the fine or imprisonment imposed for the contempt, or in place thereof, may order the person proceeded against to pay the party aggrieved a sum of money sufficient to indemnify him and to satisfy his costs and expenses; which order and the acceptance of money under it is a bar to an action by the aggrieved party for such loss or injury.”

Wisconsin, Statutes 1929, sec. 295.14. “If an actual loss or injury has been produced to any party by the misconduct alleged the court shall order a sufficient sum to be paid by the defendant to such party to indemnify him and to satisfy his costs and expenses, instead of imposing a fine on such defendant; and in such case the payment and acceptance of such sum shall be an absolute bar to any action to recover damages for such injury or loss. Where no actual loss or injury has been produced the fine shall not exceed two hundred and fifty dollars over and above costs and expenses of the proceedings.”

In Minnesota, attorney's fees and other expenses have been awarded to the complaining party, where the violation of an injunction was a contempt. Where a party violated an order of the United States circuit court of appeals and was held in contempt of its authority, its order, granting indemnity to the aggrieved party, was upheld. In New York there are many cases where parties have been fined for the benefit of a party whose remedies have been impaired because of a contempt arising out of a failure to obey orders in supplementary proceedings.

It will be observed that the contempts cited were of the class commonly classified as civil, as well as criminal contempts. There is nothing in the common law statement of this rule of indemnity, or its statement in the majority of state statutes, which restricts its application to any particular type of contempts. There is a great variety of contempts which often result in injury or damage to a party to an action. Willful and persistent perjury, subornation of perjury, interference with jurors and witnesses, disobedience of a court order, failure to heed a subpoena, and the bringing of false and fraudulent actions have all been held under certain circumstances to be contempts, and the rule that a party whose rights have been impaired or prejudiced by the contempt may recover his damages "out of pocket" in a summary proceeding supplementary to the main action is of wholesome practical value. A more widespread use of this power might have a salutary effect on many who these days look upon an action in court as merely a business or gambling transaction attended by the morals and ethics of the market place, rather than as a function of government whose purpose is the preservation and maintenance of justice.

This paper is a suggestion of the uses of this seldom used legal remedy, rather than an encyclopedic review of authorities, and no attempt will be made to detail the decisions defining contempts, but citation of a few cases will show what possibilities there are for indemnity through proceedings of this kind.

Where an action or other proceeding is instituted which is based on false affidavits or perjured testimony, the other party is

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123 Fed. 194.

16State v. District Court, (1911) 113 Minn. 304, 129 N. W. 583; Campbell v. Motion Picture Mach. Op., (1922) 151 Minn. 238, 188 N. W. 787.


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often unjustly called upon to make large expenditures to investigate the case and defend himself. A contempt proceeding may provide a speedy remedy, not only against the parties who instituted the proceedings, but against their attorneys and others who conspired with them. And the decisions show that the court may enforce payment of the indemnity by imprisonment.\textsuperscript{1} Misconduct in office by any officers of the court, whereby the administration of justice is brought into disrepute, and deceit or abuse of process or proceedings of a court by a party to an action or special proceeding all constitute contempt.\textsuperscript{20} Upon this general principle parties have been held guilty of contempt for presenting false affidavits upon which an order of reference was obtained,\textsuperscript{21} for bringing an action to dispossess a tenant based on untrue facts,\textsuperscript{22} for obtaining possession of the books of a registry office by representing that a mandamus nisi was a mandamus absolute,\textsuperscript{23} and for falsely claiming to be an heir in a probate proceeding.\textsuperscript{24} Also under this principle attorneys and other court officers have been guilty of contempt for their part in false or fraudulent proceedings.\textsuperscript{25} A physician and an attorney may be guilty of a conspiracy


"It is high time for the court in unmistakable language to denounce conduct such as that of which the defendant stands proven guilty. It is not enough to say that one guilty of such conduct may be punished by prosecution at the hands of the criminal authorities. There are penalties more severe to a man of the character of the defendant than a prosecution for perjury. To such a man the deprivation of liberty means nothing as compared with deprivation of property. The former may annoy or disgrace, but the latter affects him most. The court has carefully examined all the facts and circumstances in this case and it has no compunction in performing the duty which now devolves upon it. Affidavits of the character made by the defendant are offered daily in the courts with almost as much ease as the presentation of visiting cards, and the court has heretofore expressed its determination of rendering all its aid in stamping out an evil which is fast stifling justice in our courts.

"The motion to punish for contempt is granted. The defendant is fined the sum of $1,759.46, to be paid within 10 days after the entry of an order hereon and service of a copy of the order hereon upon him. In default of such payment, let a commitment to the county jail be issued."
\textsuperscript{23}In re McLay, (1864) 24 U. C. Q. B. 54.
\textsuperscript{25}In Barber v. Jones Shoe Co., (1923) 80 N. H. 507, 120 Atl. 80, attorneys were fined for the benefit of a party because they violated a
to commit a contempt where they conspire with the plaintiff in a personal injury action to bring a suit upon a false claim of injury. The theory of conspiracy is particularly useful in a fraudulent personal injury suit, as the plaintiff is often financially irresponsible and the attorney and physician are the only ones from whom indemnity can be collected. Difficulty of proof will always be encountered, but where investigation clearly shows the persistent perjury of the plaintiff, sufficient proof to involve the physicians and attorneys if they be in conspiracy is often uncovered and is ample for a conviction. If this remedy were

stipulation entered into in open court. United States v. Ford, (D.C. Mont. 1925) 9 F. (2d) 990 (atty. filing a false bill of exceptions). In re Toepel, (1905) 139 Mich. 85, 102 N. W. 369, (coroner presenting false certificate that he had held inquest.)

It is contempt for an attorney to counsel disobedience to a court order which the court had power to make, even though erroneous. Anderson v. Comptois, (C.C.A. 1901) 109 Fed. 971; People v. Seymour, (1916) 272 Ill. 295, 111 N. E. 1008; (1925) 25 Col. L. Rev. 97.

In Melton v. Commonwealth, (1914) 160 Ky. 642; 170 S. W. 37, L. R. A. 1915B 689, two attorneys and a doctor had induced the plaintiff, who had been in an accident in which he received no injuries, to bring a suit claiming that a former injury was received in the accident. The attorneys brought the suit, and the physician testified in plaintiff's behalf. The trial judge filed informations charging the attorneys and the physicians with contempt on which they were convicted. The physician appealed, and his conviction was reversed. The court, however, was divided. The following quotation from the dissenting opinion is persuasive: "It is well settled that courts have an inherent power at common law to punish any act, whether committed in or out of their presence, which tends to impede, embarrass or obstruct them in the discharge of their duties; and the legislature, while it may regulate the procedure, cannot fetter the power."

"That the conspiracy of the defendants to have an action instituted upon grounds which were false, and which they knew to be false, carried out by the actual bringing of the suit, was the doing of that which 'tends directly to impede the course of justice and to corrupt justice itself' there can be no question. That the courts at common law had the power to protect themselves from false and fraudulent suits must also be admitted. In Coxe v. Phillips, Hardw. 237, Lord Hardwicke held a fictitious action to be a contempt of court and committed the parties and their common law attorney. See, also, R. J. Elsaw, 10 Eng. Com. Law 272; Henkins v. Guerss, 12 East. 247; Gibson v. Tilton, 17 Am. Dec. 306. These were cases of feigned causes of action, and if the bringing of such an action is a contempt, how much more a contempt is it to bring a fraudulent action for the express purpose of corrupting justice?"

"The authorities cited by the court do not conflict with those above cited. A long quotation is made from Blackstone's Commentaries, but it will be observed that Blackstone, among other things says: 'Some of these contempts may arise ... by anything, in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people.'"

26The physician's own records, statements of the plaintiff or his family to investigators, coupled with moving pictures or photographs are often more than persuasive that the physician and the attorney had knowledge of the falsity of the claim. In this connection the argument of the dis-
made use of in all clear cases, the example should act as a deterrent to many frauds and contempts.

The bringing of fictitious and unauthorized actions has also been held to be contempt from early times.

Closely allied to these cases are the decisions which hold that perjury is a contempt, although the cases are not in entire accord as to when perjury is a contempt. It is well established that the court should not take the position that the witness is perjuring himself unless the court has judicial knowledge that the testi-

senting opinion in Melton v. Commonwealth, (1914) 160 Ky. 642, 170 S. W. 37, L. R. A. 1915B 689, is instructive.

"A conspiracy is usually carried out by a succession of acts, and the nature of the conspiracy is to be determined by all that was done, and not by what took place on one occasion alone. The plastering up of Collins at the drug store, the drawing of the contract by which the attorney was to receive a sum equal to one-half of the amount recovered, and the persuasion of Collins that he was injured and should bring a suit was the first step. This was followed by the actual bringing of the suit pursuant to the purpose of the conspiracy. Under a regulation in force in the Jefferson circuit court, suits are assigned to the different divisions in rotation, and, this suit having fallen into the division presided over by Judge Fields, the conspiracy culminated in the bringing of a false suit in his court. It is true that Dr. Melton did not write the petition, and did not file it in the clerk's office with his own hands. This was done by his ally and fellow worker, the attorney, but Dr. Melton is as much responsible for the contempt as if he had filed the petition with his own hands, because it was all done by his associates pursuant to the plan mapped out between them and for the purpose of carrying out that plan. . . . Dr. Melton is equally responsible with the attorneys who were simply acting for him as well as themselves in what they did. After the suit was brought, Dr. Melton, though he did not treat him professionally, directly and indirectly made efforts to get Collins to stand up to the action which had been brought and the attempt to foist the fraud upon the court. What he did at the drug store before the action was brought, and what he did by himself and others after the action was brought, is all to be considered together, for it was part of one purpose.

"This is a very serious case, and not without importance in the administration of justice. Hairsplitting distinctions should not be indulged to protect from punishment a man who is clearly guilty of an effort to corrupt public justice. Dr. Melton is a member of a learned profession. He did not act ignorantly, and it is especially important that the administration of justice should be protected against frauds devised by people of learning and position in the community. It is peculiarly important that the big fish should not escape the net of the law in which the little fish nearly always find themselves entangled."

28Smith v. Brown, (1848) 3 Tex. 360.
29Howard v. Rooson, (1930) 2 Leigh (29 Va.), 733. "Suing in feigned names, or in the names of others without their privity and consent is an abuse of process and contempt."
mony is false, or unless the perjury is admitted, or manifest from other testimony of the witness. Some opinions state that perjury is contempt only when it "operates as an obstruction to the administration of justice," and some decisions hold that the perjury must be "willful and persistent" in order to constitute contempt, and must relate to material issues in the case. But there are many cases holding perjury to be contempt where such elements are attendant.

Building up a line of false testimony in regard to a non-existent injury or accident ought clearly to be "wilful and persistent" perjury and punishable as contempt where on cross examination the witness or party is forced to admit its falsity in material particulars. Subornation of perjury may also be a contempt and involve responsible persons behind the scenes. Fabrication of printed exhibits has been held contempt warranting the granting of indemnity, and the filing of contradictory affidavits has

33United States v. Karnes, (N.D. Okla. 1928) 27 F. (2d) 453; Edwards v. Edwards, (1917) 87 N. J. Eq. 546, 548, 100 Atl. 608, "Where the facts are admitted or demonstrated the court would be shirking a clear duty if it failed to punish perjury as a contempt" (Divorce secured on perjured testimony); Young v. State, (1926) 198 Ind. 629, 154 N. E. 478, (where defendant admitted falsity of testimony); In re Rosenberg, (1895) 90 Wis. 581, 63 N. W. 1065 (refusal to answer questions); Gordon v. Commonwealth, (1911) 141 Ky. 461, 133 S. W. 206 (where defendant admitted testifying to an accident he had in fact never seen); Eykelboom v. People, (1922) 71 Colo. 318, 206 Pac. 388 (refusal to produce documents subpoenaed; the falsity of the witness's justification was manifest from his own testimony).

For reviews of cases where perjury is or is not contempt see notes (1924) 8 MINNESOTA LAW REVIEW 441, (1926) 10 MINNESOTA LAW REVIEW 252. See also note in (1929) 38 Yale Law J. 543, where after reviewing authorities allowing and limiting perjury as contempt, it is said, "It is submitted that the social necessity of a deterrent decidedly over-balances these objections to the punishment of perjury as contempt."
34"Of possible acts, few are so antagonistic to the objects of judicial administration as the intentional false swearing which seeks to baffle the search of truth, without which justice is impossible. Such swearing is a flagrant insult to the dignity of the court." 1 Chamberlayne, Modern Law of Evidence, sec. 249.
36Chicago Directory Co. v. U. S. Directory Co., (C.C. N.Y. 1903) 123 Fed. 194. Following is the opinion in full:

"There are many contradictions in the affidavits presented by the respective parties; but a careful review of the whole case, and an analysis of the evidence afforded by the documents on file, has clearly convinced the court that, subsequent to the order to show cause why injunction should
been construed as contempt where material matters were deliberately misstated.\textsuperscript{37}

Since interference with witnesses or jurors is a contempt, indemnity might be obtained because of loss occasioned by such contempt.\textsuperscript{38} Such interferences with the proceedings of the court are often indulged in by intermeddlers without the consent of either party; where such interference makes a new trial necessary and is also a contempt, ought there not to be ground for indemnity?

Violations of orders, decrees, or injunctions of a court are among the most common forms of contempt. On proof of damages by the party for whom the order was made, the person in contempt has been in many cases fined for the benefit of the injured party in an amount equal to his loss plus costs and attorneys' fees incurred in the contempt proceeding.\textsuperscript{39} And fines have been imposed as indemnity in cases where orders in proceedings supplementary to execution have been ignored.\textsuperscript{40}


\textsuperscript{38}State v. Havel, (1931) 120 Neb. 832, 235 N. W. 584. Inducing a witness to testify falsely interferes with the administration of justice, and the parties stand out against the authority of the court and are guilty of contempt even though no action is pending at the time the inducement is made. In re Brule, (D.C. Nev. 1895) 71 Fed. 943; Hale v. State, (1896) 55 Ohio St. 210, 45 N. E. 199 (attempts to induce witnesses to leave state); Sinclair v. United States, (1929) 279 U. S. 749, 49 Sup. Ct. 471, 73 L. Ed. 938, 63 A. L. R. 1258 (jury shadowing); Matter of Werra, (1924) 123 Misc. Rep. 788, 206 N. Y. S. 455, affirmed (1924) 208 App. Div. 856, 204 N. Y. S. 957 (juror guilty of contempt for soliciting bribe.)


It is of great practical importance to determine whether a proceeding to adjudge a person in contempt in order that he may be fined for the benefit of a party to the action is a civil or a criminal proceeding. In most jurisdictions the defendant in a criminal contempt proceeding is given the same rights as a defendant in an ordinary criminal case. Provisions are made for jury trial by statute, and the accused cannot be compelled to testify against himself. If these statutes and rules, applicable to criminal contempts, govern a proceeding of this kind, in any particular case, it is obvious that the complaining party will be faced with greater difficulties in the manner and degree of proof.

The distinction between civil and criminal contempt has not always been so carefully defined by writers and judges as it might have been. Criminal contempt is usually defined as an act which is directed against the dignity and authority of the court, while civil contempt is said to be a failure or refusal to do something ordered by the court to be done for the benefit of a party to an action. It would follow from these definitions that a proceeding to procure indemnity because of a contempt where the party attached had violated an injunction, order in supplementary proceedings, or other writ or decree, for the benefit of a party, is a civil proceeding, but it might seem that where the contempt consisted in perjury or the bringing of a fraudulent action the proceeding was for criminal contempt and to be governed by the rules applicable to criminal contempts. It is submitted, however, that the customary definitions distinguishing the two types of contempt are not sufficiently inclusive; they may have been lifted from cases where they had had a limited meaning and long held up as general rules with insufficient discrimination and analysis of the principles involved.

It is common knowledge that the same act may have both civil and criminal consequences, as where an assault is committed. In such a case the act might be called both tortious and criminal, or perhaps speaking in pure technical language the act itself should not be referred to as either civil or criminal, for it is

42 A contempt proceeding, however, is never a criminal prosecution. A person attached for contempt may thereafter be indicted and punished for the crime he has committed. Beale, Contempt of Court, (1908) 21 Harv. L. Rev. 161, 173.
the judicial proceedings which arise as a consequence of the act which are either criminal or civil. These proceedings are characterized as such, not by the nature of the act itself, for the act itself gives rise to both types of proceedings, but by the character of the parties and proceeding before the court and the remedy sought.

There are a few well reasoned decisions where this line of thought is recognized as the true basis of the distinction between civil and criminal contempts. The conclusion of these decisions is that the distinction between civil and criminal contempt lies, not in the character of the act of contempt, but in the character of the proceeding for contempt and the nature of the remedy sought.

The Supreme Court of The United States in *Gompers v. Buck Stove & Range Co.* drew the distinction as follows:

"Proceedings for civil contempt are between the original parties and instituted and tried as a part of the main cause. But on the other hand, proceedings at law for contempt are between the public and the defendant and are not a part of the original cause."

Two tests were set up by the court. First is the purpose of the punishment. Where a sentence is wholly punitive, the proceedings are criminal, and the rules as to presumption of innocence apply. But where fine or imprisonment is imposed for the purpose of coercing obedience to an order, the proceeding is not thereby rendered criminal in its nature. And where the only relief is remedial for the purpose of indemnifying a party, the proceeding is civil. The second test is in the nature of the proceeding. The court remarked that a criminal contempt should have been entitled "United States v. Gompers et al" or "In re Gompers." The contempt proceeding in question being under the original title to the action indicated it was a civil proceeding. And the court further found that the prayer for relief, "that the

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The Supreme Court of the United States in Lamb v. Cramer, (1932) 52 Sup. Ct. 315, clearly indicated that its conclusions in the Gompers case would be followed: "It is the purpose of the punishment, rather than the character of the act punished, which determines whether the proceeding is for civil or criminal contempt. Even though the particular acts of the petitioner may take the characteristics of both a civil and a criminal contempt, and so may not be classified as exclusively one or the other, still, under the allegations and prayer of the petition, it would have been competent for the District Court to have punished the contempt by its coercive order until Lamb made restitution of the property or to have imposed a fine, payable to the receiver, compensating for its taking. A proceeding to secure such relief is civil in its nature."
petitioner may have such other and further relief as the case may require," showed that the proceeding was not for the government to vindicate the authority of the court, but for the relief of the complainant.

The New York court of appeals has declared the established nomenclature faulty on analysis and has suggested that the distinction should be termed "private" and "public" contempts to indicate that the nature of the proceeding, rather than the act, is determinative. The supreme court of Minnesota has also ob-

45 The occasion and result of proceedings for contempt furnish a clear and well defined line of division separating them into two classes which have become somewhat mingled and confused by the use of a fixed but ambiguous nomenclature. (In re Watson, (1870) 3 Lans. (N.Y.) 408, affirmed (1872) 5 Lans. (N.Y.) 466.) There may prove to be rare and exceptional cases which do not easily fall within either class, or some which so commingle the characteristics of both as to make their location doubtful and difficult; but in the main the division is exhaustive and clear. In one class are grouped cases whose occasion is an injury or wrong done to a party who is a suitor before the court, and has established a claim upon its protection; and which result in a money indemnity to the litigant, or a compulsory act or omission enforced for his benefit. In these cases the authority of the court is indeed vindicated, but it is, after a manner, lent to the suitor for his safety, and vindicated for his sole benefit. The authority is exerted on his behalf as a private individual, and the fine imposed is measured by his loss and goes to him as indemnity; and imprisonment, if ordered, is awarded, not as a punishment, but as a means to an end, and that end the benefit of the suitor in some act or omission compelled which are essential to his particular rights of person or of property. . . . The second class of contempts consists of those whose cause and result are a violation of the rights of the public as represented by their constituted legal tribunals, and a punishment for the wrong in the interest of public justice, and not in the interest of an individual litigant. In these cases if a fine is imposed its maximum is limited by a fixed general law, and not at all by the needs of individuals; and its proceeds when collected go into the public treasury and not into the purse of an individual suitor. The fine is punishment rather than indemnity, and if imprisonment is added, it is in the interest of public justice and purely as a penalty, and not at all as a means of securing indemnity to an individual. Necessarily these contempts in their origin and punishment partake of the nature of crimes, which are violations of the public law, and end in the vindication of public justice; and hence are named criminal contempts. As described in the statute, an element of willfulness, or of evil intention enters into and characterizes them. They are a disturbance of the court which interferes with its performance of duty as a judicial tribunal; willful disobedience to its lawful mandate; resistance to such mandate willfully offered; contumacious and unlawful refusal to be sworn as a witness, or to answer a proper question; and publication of a false and grossly inaccurate report of its proceedings. These cases and their punishment are placed under the head of "general powers of the courts and their attributes; and they very evidently relate to public offenses tending to cast discredit upon the administration of public justice, and having no reference to the particular rights of suitors. But here again we find that they occur as well in civil as in criminal actions, and so, for convenience, we may speak of them in view of the present classification, as public contempts, although the established legal nomenclature must remain unchanged." People v. Oyer, etc., Court, (1886) 101 N. Y. 245, 4 N. E. 259, 54 Am.
served this distinction, and has pointed out that the same proceeding may partake of both civil and criminal characteristics where the remedy sought is dual, for the private benefit of a party and for punishment to vindicate the authority of the court. Unfortunately, however, in these jurisdictions there are also decisions which, failing to recognize these principles, quote the old formulas without discrimination, with the result that there is in the law a confusion which is misleading to the bar and the trial courts.

The statutory definitions of civil and criminal contempts also furnish some clues. In defining criminal contempts there is usu-


In State v. Leftwich, (1889) 41 Minn. 42, a contempt proceeding was brought before the supreme court on certiorari. The court in determining whether review should be by appeal or certiorari had to determine whether the proceeding was civil or criminal. The test was made as follows: "But objection was made that appeal, and not certiorari, is the proper mode of bringing such a matter here for review. This, we think, depends on the nature and purpose of the adjudication for contempt. In Re Fanning, (1889) 40 Minn. 4, 41 N. W. 1076, we held that an order committing for contempt may have a double aspect—First, in the nature of a remedy to a party to enforce his rights; Second, punitive merely, in punishment of the offence of contempt... When of the former character it is a proceeding in the action between the parties; when of the latter, it is collateral to it, and the parties, as such, have no interest in it."

In State v. Willis, (1895) 61 Minn. 20, 63 N. W. 169, where the defendant had been punished for contempt in failing to pay alimony, the court held that the proceeding could not be reviewed by certiorari as it was not criminal.

In Red River Potato Growers' Association v. Bernardy, (1915) 128 Minn. 153, 150 N. W. 383, the court defined civil and criminal contempt as follows: "A proceeding in civil contempt is one instituted in a civil action for the private benefit of a party to the action, and where punishment is imposed it is remedial and is imposed for the benefit of the party and to aid in the enforcement of his alleged rights. A proceeding in criminal contempt is one instituted for the sole purpose of penalizing the defendant. Its purpose is public and it is resorted to to maintain and vindicate the authority of the court and to secure the orderly conduct of Court procedure... The same act of disobedience may have a double aspect. It may warrant punishment for both civil and criminal contempt."


State ex rel. Sandquist v. District Court, (1919) 144 Minn. 326, 175 N. W. 908, while the opinion indicates that the distinction between civil and criminal contempt is to be determined by the nature of the act, the record in this case shows that the defendant was given a definite prison sentence for tampering with a juror, the proceedings having been brought by the State, and clearly a criminal contempt proceeding. See also Franzone v. Tumminelli, (1910) 67 Misc. Rep. 549, 123 N. Y. S. 455.

But cf. Blanchard v. Bryant, (1921) 83 Okla. 33, 200 Pac. 444, where after stating the customary definitions of civil and criminal contempt the court said, "The term 'civil' is used to denote the purpose sought to be accomplished. If the purpose sought is remedial and for the benefit of a party to the litigation, then it is civil."
ally a provision that they shall be misdemeanors, or authorizing certain punishments.49 These statutes also frequently define disobedience of a court order as a criminal contempt, although the decisions would indicate that at common law such a contempt is civil.60 Likewise, statutes define as contempts punishable civilly matters which are in clear disregard of the authority of the court.61

Since a proceeding to obtain indemnity from a party guilty of contempt is a proceeding between the parties to the action to enforce a private remedy, it would seem that the proceeding should be deemed a civil contempt proceeding regardless of the character of the act constituting the contempt.62

The amount of indemnity which may be awarded in a proceeding of the kind here discussed is of interest to complete the paper, but does not warrant extended discussion. In most cases it is held that the fine must be based on proof of damage actually sustained as a proximate result of the contempt.55 Included in the award may be fair and reasonable compensation to the complaining party for fees paid his attorney for his services in the proceedings, and the fine should be sufficient to cover costs and expenses to which he has been put by reason of the misconduct.64


50Mason's Minn Stat., 1927, sec. 10042, "Criminal Contempts.—Every person who shall commit a contempt of court, of one of the following kinds shall be guilty of a misdemeanor: . . . 4. Wilful disobedience to the lawful process or other mandate of a court. 5. Resistance wilfully offered to its lawful process or other mandate."

McKinney's Consol. Laws of N. Y., Bk. 29, sec. 750, "A court of record has power to punish for a criminal contempt, a person guilty of either of the following acts, and no others: . . . 3. Wilful disobedience to its lawful mandate. 4. Resistance wilfully offered to its lawful mandate."

51McKinney's Consol. Laws of N. Y., Bk. 29, sec. 753. "A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in either of the following cases: . . ."

52Campbell v. Motion Picture Mach. Operators, (1922) 151 Minn. 238, 186 N. W. 787, "The fine was imposed 'for the benefit of plaintiff herein,' and therefore cannot be held to be a penalty imposed under section 8363 for the criminal contempt. Consequently it rests upon the provision of Section 8364 authorizing the Court to award indemnity to plaintiff 'for actual loss or injury.' . . . That the award may be designated as a fine does not change its character. It is imposed for the purpose of compelling defendants to make compensation for the loss or injury caused to plaintiff by their violation of the order and judgment of the court."


The New York Statute provides for a payment of $250.00 in addition to actual damages. A fine for that amount may be imposed even in absence of proof of damages and paid to the complaining party. Payment of the fine may be coerced by imprisonment, and it is proper to issue an execution or mandate against the person, rather than against his property. It has been held that a fine for contempt is not dischargeable in bankruptcy and that there can be no pardon for civil contempt.

Motion Picture Mach. Op., (1922) 151 Minn. 238, 186 N. W. 787.

53 McKinney's Consol. Laws of N. Y., Bk. 29, sec. 773.
57 Campbell v. Motion Picture Mach. Operators, (1922) 151 Minn. 238, 186 N. W. 787.

"It is urged that payment of the money judgment entered by the court cannot be enforced by imprisonment without violating the constitutional provision forbidding imprisonment for debt. That a person convicted of contempt, who fails to comply with the judgment imposed therefore, may be coerced to do so by imprisonment without infringing this constitutional provision, whether the judgment directs the payment of money or the doing of some other act, has been settled too long and too firmly to require further discussion or the citation of authorities."

Stewart v. Smith, (1919) 186 App. Div. 755, 176 N. Y. S. 468; McKinney's Cons. Laws of N. Y. Bk. 29, sec. 774, as amended L. 1919, ch. 184 (providing for imprisonment for a term up to six months for failure to pay fine.)

59 State v. Verage, (1922) 177 Wis. 295, 187 N. W. 830.