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DISTINGUISHING CRIMINAL AND CIVIL CONTEMPT [WASHINGTON]

The line of demarcation between civil and criminal contempts is exceedingly hazy.[1] Contempt proceedings are neither wholly civil nor altogether criminal, and it may not always be easy to classify a particular contempt action as belonging to one or the other category. It may partake of the characteristics of both.[2] For this reason, such an action is said to be *sui generis* by the courts. In general, contempts of court for which punishment is inflicted for the primary purpose of vindicating public authority are denominated criminal. Those in which the enforcement of civil rights and remedies is the ultimate object are called civil contempt proceedings.[3] Corpus Juris Secundum defines civil contempt as failing to do something ordered to be done in a civil action for the benefit of the opposing party therein.[4] But that source further intimates that what might ordinarily be a civil contempt may become a criminal contempt when the authority of the court is flouted.[5]

State v. Sanchez,[6] a recent Washington case, raises this question of determining the differences between civil and criminal contempt. In that case judgment had been rendered against the appellant in a previous filiation proceeding, but he had failed to support the illegitimate child as directed by the court in that proceeding. Action for contempt was instituted by the deputy prosecuting attorney for King County, and appellant was adjudged guilty. Although he was in arrears only twenty dollars, he was ordered to pay fifty dollars into the court within one week, or face incarceration until it should be paid. Appellant gave notice of appeal, but did not post an appeal bond, as is required in civil actions.[7] Respondent moved to dismiss the appeal for the reason that the case was civil in nature, and required the giving of a proper appeal bond.

Because the lower court had failed to make and enter findings of fact upon which to rest its judgment of contempt, the reviewing court declared that it could not make any determination of two important problems in the case, viz., the problem of determining the nature of the proceedings from their purpose, i.e., whether they were coercive or remedial, or punitive in whole or in part, and the problem of the sufficiency of *inability* to comply with an order of the court as a defence for *failure* to comply. The trial court is required to enter its findings by statute and precedent.[8] If the case was one of criminal contempt, appeal bond was not necessary, and this failure to enter findings would be sufficient to remand it. For the purpose of remanding, the court assumed this, but it reserved

[1] State v. Bland, 189 Mo. 197, 88 S. W. 28, 3 Ann. Cas. 1044 (1905); Costilla Land and Investment Co. v. Allen, 15 N. M. 528, 110 Pac. 847 (1910).

[2] State ex rel. Dailey v. Dailey, 164 Wash. 140, 2 P. (2d) 79 (1931); In re Christensen Engineering Co., 194 U. S. 458 (1903) and cases cited; Bessette v. W. B. Conkey Co., 194 U. S. 324 (1903).

[3] In re Nevitt, 117 Fed. 448 (1902); Bessette v. W. B. Conkey, 194 U. S. 324 (1903); In re Debs, 158 U. S. 564 (1894); Gompers v. Buck Stove and Range Co., 221 U. S. 418 (1910), 34 L. R. A. (NS) 874; Denny v. State, 203 Ind. 682, 182 N. E. 313 (1932); Root v. MacDonald, 260 Mass. 344, 157 N. E. 684 (1927), 54 A. L. R. 1422; State ex rel. Dailey v. Dailey, 164 Wash. 140, 2 P (2d) 79 (1931).

[4] 17 C. J. S. 8, §6.

[5] Ibid.

[6] 4 Wash. (2d) 432, 104 P (2d) 464 (1940).

[7] Rem. Rev. Stat. (1932) §1721.

[8] Rem. Rev. Stat (1932) §367; State ex rel. Dunn v. Plese, 134 Wash. 443, 235 Pac. 961 (1925).

the right to re-examine the question in the event that the case should again appear before it, amplified by appropriate findings of fact and conclusions of law. The policy behind such a decision is not hard to recognize, but the real problem of determining the differences between the two kinds of contempt goes unsolved.

The outstanding case on this problem in the federal courts is that of *Gompers v. Buck Stove and Range Co.*[9] There the United States Supreme Court said that the affirmative violation of an injunction, without special elements of contumacy, called for coercive action on the part of the court and not for a punitive sentence.[10] The Indiana court came squarely up against this problem in *Denny v. State.*[11] That case also arose out of the violation of an injunction, and the trial court found the defendants guilty of criminal contempt and placed a fine upon them. The Supreme Court of that state denounced such a decision, saying 'that the injunction having been granted solely for the protection of the other parties to the suit, its violation is a wrong primarily to those parties and not to the state, and is, therefore, a civil rather than a criminal contempt, in absence of an intent to defy the court and thus affront the dignity of the state.[12]

A similar view was taken in an earlier Washington case: "There is a difference between 'quasi-criminal contempt' and civil contempt. A judgment for criminal contempt is not only unnecessary, but positively unwarranted, unless there has been a wilful disobedience of the court's order. A party may be guilty of both a criminal and a civil contempt, or may be guilty of one and not the other. A criminal contempt, actual or constructive, or, as Blackstone says, 'direct or circumstantial,' partakes of the quality of an offense against the state; whereas, a civil contempt under the statute is such a disobedience of an order of a court of competent jurisdiction, entered for the benefit or advantage of a party to a civil action, as works a loss or injury to the litigant. The one is quasi-criminal and the other is a civil wrong; the one is absolved by a fine payable to the state or imprisonment, and the other, by reparation to the other party litigant. Under Ballinger's Ann. Codes and St., Sec. 5807, Pierce's Code, Sec. 1476, providing that, if any loss or injury to a party in an action prejudicial to his rights therein have been caused by the 'contempt,' the court may give judgment that the party aggrieved recover of the defendant a sum sufficient to indemnify him, it is not necessary that the contempt be a criminal one for which a fine could be adjudged."[13] This is the general view taken in cases of contempt arising out of violations of injunctions.[14]

The closest analogous case to the principal case of this note is that of *State ex rel. Geiger v. Geiger,*[15] a contempt proceeding arising out of failure to pay alimony as ordered in a divorce suit. Wilful disobedience of the mandate was alleged. The defendant was found guilty of contempt by the trial court; he appealed, but failed to post the appeal bond as required in appeals in civil cases. The appeal was dismissed because of this defect, the court saying that the mandate being for the benefit of the other party in the divorce suit, violation of it was an injury to her rather than

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[9] Gompers v. Buck Stove & Range Co., 221 U. S. 418 (1910).

[10] The following is an illuminating excerpt from that opinion:

"For example. If the defendant should refuse to pay alimony, or to make a conveyance required by a decree for specific performance. he could be committed until he complied with the order. Unless there were *special elements of contumacy,* the refusal to pay or to comply with the order is treated as being in resistance to the other party rather than as contempt of court. The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the law, but is remedial. and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly stated in In *Re Nevitt,* 54 C. C. A. 622, 117 Fed. 451, 'he carries the keys of his prison in his pocket.' He can end his sentence and discharge himself at any moment by doing what he had previously refused to do."

[11] 203 Ind. 682. 182 N. E. 313 (1932).

[12] Ibid.

[13] State ex rel. Newcomen Boom Co. v. North Shore Boom and Driving Co., 55 Wash. 1, 107 Pac. 196 (1910).

[14] Costilla Land and Invest. Co. v. Allen, 15 N. M. 528, 110 Pac. 847 (1910); Gorham v. New Haven, 82 Conn. 153, 72 Atl. 1012 (1909); Re McCormack, 117 N. Y. S. 70 (1909); and the cases cited in note 3 supra. with the exception of the Washington case which involved the violation of a mandate rather than an injunction.

[15] 20 Wash. 181. 54 Pac. 1129 (1898).

to the state. The court would not admit that the "wilful disobedience" alleged was of such a nature as to make the contempt criminal rather than civil.

Further citation of authorities for the point intended to be made would only be redundant and tautologous. The point is that "wilful disobedience of the court order" or "special elements of contumacy" must be shown to change an otherwise civil contempt to one of a criminal nature, or to give it a double aspect. Viewed in the light of these opinions, the facts of the principal case indicate that the contempt was basically civil rather than criminal.

However, if this is assumed to be a case of criminal contempt, the problem of the function of the defendant's answer to the contempt charge, in relation to the necessity of entering findings of fact by the trial court, presents itself. The question arising is: Does the answer receive a different treatment in the two types of proceedings, and are findings of fact required in both?

The defendant's answer to the show cause order very clearly sets out his inability to comply with the order of the court in the filiation proceeding to support the child. The defendant alleged that all his meagre wages as a hotel clerk and as an employee of a steamship company had been needed to support his own family; that he had been involuntarily unemployed since the inception of the filiation suit.

The effect given the defendant's answer in a contempt action depends upon whether or not a state still follows the old common law rule. Where the common law is followed, quite a bit of difference is attached to the answer in the two types of contempt proceedings.[16] A denial under oath is conclusive in criminal contempt,[17] and no evidence is taken.[18] If the denial is false, the defendant may be punished for perjury, but may not be held in contempt.[19] In civil contempt cases, however, the denial is not conclusive and the court may hear evidence.[20] Although the question of the function of the answer has not been raised directly in the State of Washington, neither statute[21] nor the cases recognize a difference in its operation in the two types of contempt actions, and apparently, evidence can be taken in both.[22]

It is almost universally held that inability to pay money in accordance with the order of the court is a good defense to the charge of contempt.[23] Cases arising out of the failure to pay alimony or separate maintenance costs are the closest analogies found in the state of Washington to the principal case, and in those cases lack of present ability to pay is a complete defense.[24] Therefore, if the defendant in the principal case can establish the defense alleged, he should not be found guilty of either criminal or civil contempt, if the same rule applies to maintenance of an illegitimate child as applies to alimony and separate maintenance cases; and there seems to be no ground on which to distinguish the cases in this regard.

As to the necessity of findings of fact and conclusions of law, a distinction between civil and criminal contempt actions is recognized where the common law view obtains. As to findings of fact in *civil contempt* where the common law distinction is

[16] 17 C. J. S. 108 §83.

[17] People v. Rongetti, 344 Ill. 107, 176 N. E. 292 (1931); Zuver v. State, 188 Ind. 60, 121 N. E. 828 (1919).

[18] People v. Gilbert, 281 Ill. 619, 118 N. E. 196 (1917); State v. Branner, 174 Ind. 684, 93 N. E. 70 (1910).

[19] Stewart v. State, 140 Ind. 7, 39 N. E. 508 (1895).

[20] Ibid.; People v. White, 334 Ill. 465, 166 N. E. 100, 64 A. L. R. 1006 (1929).

[21] Rem. Rev. Stat. (1932) §367; State ex rel. Dunn v. Plese, 134 Wash. 443, 235 Pac. 961 (1925).

[22] In State ex rel. Dailey v. Dailey, 164 Wash. 140, 2 P(2) 79. (1931), the court declared that if the proceeding is for criminal contempt, the presumption is that the defendant is innocent, and he cannot be examined concerning the matters which were the subject-matter of the inquiry. To hold otherwise would be to allow self-incrimination. If criminal and civil contempt are combined in the same action, if the defendant is questioned, the court's power to enter a purely punitive order cannot thereafter be invoked.

[23] In re Sobol, 242 Fed. 487, (C. C. A.); Mueller v. Van Driessche, 236 Ill. App. 420 (1925); Laff v. Laff, 161 Minn. 122, 200 N. W. 936 (1924); Burack v. Mayers, 122 N. J. Eq. 270, 194 Atl. 178 (1937); In re Lieberman, 264 N. Y. S. 303 (1933); State v. Phipps, 174 Wash. 443, 24 P(2d) 1073 (1933).

[24] State ex rel. Smith v. Smith, 17 Wash. 430, 50 Pac. 52 (1897); State ex rel Olsen v. Allen, 14 Wash. 684, 45 Pac. 644 (1896); In re Anderson, 97 Wash. 683, 167 Pac. 70 (1917); Snook v. Snook, 110 Wash. 310, 188 Pac. 502, 9 A. L. R. 262 (1920); Hubbard v. Hubbard, 130 Wash. 593, 228 Pac. 692 (1924).

recognized we refer to Ruling Case Law: "That the facts constituting the contempt need not be set out in the record is the general rule in England, and there are some authorities in this country holding that a judgment or sentence for contempt is valid without any recital of the facts which constituted the contempt where there are moving papers which contain the facts. But there is a decided tendency toward adopting a rule which obviously serves the surer ends of justice, that a court has no right to adjudge a party to be in contempt of court without making findings of fact showing as a matter of law that the party accused is in fact guilty of contempt."

If the case is one of *criminal contempt*, the same source says, "In some courts, when defendant is attached for contempt of court for a criminal offense and files a sworn answer, that answer, if sufficient to purge him of the alleged contempt, may be taken as true and the defendant discharged. But this rule applies only where the proceeding is brought to vindicate the law or dignity of the court, and does not apply to acts treated as contempts, for the enforcement of orders and decrees, as a part of the remedy sought to be enforced; and it has been held not to be conclusive."[25]

However, the principal case was properly remanded for findings of fact because Washington has done away with the common law distinction and requires such findings of fact in all contempt actions.[26] In states such as Illinois or Indiana, which retain the older view, such an order could not be entered by the reviewing court. The defendant in a criminal contempt case would be ordered released upon his sworn answer.[27]

Assuming this case to be one of criminal contempt, the defendant is imprisoned indefinitely until he pays the fine, not until he complies with the order of the court in the original filiation action. Nowhere can authority be found for this form of sentence in a criminal trial. It means that the defendant must face life-long imprisonment if he is so unfortunate as not to have money to pay the fine imposed on him. He surely would not have the opportunity to earn money to pay it while in prison. Such a judgment recalls to mind our legislative movement to abolish debtors' prisons, and makes one feel that the courts have lost sight of the policy behind it when it passes such a harsh and unreasonable sentence. The penalty should be determinate in time or certain as to the amount of money.[28] There cannot be an indeterminate sentence passed upon a specific fine.[29]

The court has the alternative of viewing the fine as being for the benefit of the illegitimate child. This, however, would make the suit a civil one, and the appeal would fail for want of an appeal bond.

JOSEPH C. OWENS.

COMPENSATION FOR COURT APPOINTED COUNSEL [INDIANA]

The sixth amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense"; practically all of the states have similar provisions either in their constitutions or in statutes almost contemporaneous with their constitutions. The laws of many of these states have gone on to provide that where an indigent defendant in a criminal case is unable to hire an attorney the court will appoint counsel for him.[1] But where there is no such provision the courts have held that

[25] 6 R. C. L. 526 §49.

[26] Rem. Rev. St. (1932) §367; State ex rel. Dunn v. Plese. 134 Wash. 443, 235 Pac. 961 (1925).

[27] People v. Gilbert, 281 Ill. 619, 118 N. E. 292 (1917); State v. Branner, 174 Ind 684, 93 N. E. 70 (1910).

[28] Rem. Rev. St. (1932) §1050 declares that in this type of case the fine cannot exceed three hundred dollars nor the imprisonment six months. If the criminal code section, Rem. Rev. St. §2206, applies, there is no objection to the judgment. That section provides for the reduction of the amount of the fine by three dollars for every day spent in jail. Gompers v. Buck Stove and Range Co., 221 U. S. 418, 34 L. R. A. (NS) 874 (1910).

[29] Ibid.

[1] Knox County Council v. State ex rel. McCormick, 29 N. E. (2d) 405 (Ind. S. Ct., Oct. 21, 1940).

[1] See American Law Institute. Code of Criminal Procedure (1930). commentary to section 203. pp 630-4 for the citation of the statutes involved. Some states limit the right to court appointed counsel to capital or felony cases.

the broad provisions granting the right to representation by counsel necessarily imply the right to have counsel appointed whenever the defendant can not otherwise afford it.

The majority of the constitutions and *early* statutes stopped at this point, leaving it to the courts to determine the right of the attorneys appointed to receive compensation for their work. There have been a large number of cases on this problem and the courts in a majority of the jurisdictions held that in the absence of statutes specifically allowing compensation the attorney can look for compensation only to the future ability of the defendant to pay.[2] Only Indiana, Iowa and Wisconsin held the attorney had a correlative right to compensation growing out of his duty to serve when appointed by the court.[3]

The courts that have denied compensation have based their conclusions on several lines of reasoning; which are: (1) Since attorneys are licensed by the courts and thereby gain special privileges, they in turn owe certain duties as officers of the court, one of which is to represent indigent defendants, when appointed by the court, without remuneration.[4] (2) The county is not liable to the appointed attorney because, the county is not an interested party, since the prosecution is by and for the state, or because, by statute, the court cannot make the county liable except on action of the county authorities.[5] (3) It is the prerogative of the legislature to provide compensation for court officers and, since they have made provisions for other court officers, it is presumed that they did not intend that the appointed attorneys should be paid.[6] (4) Because of his professional standing the attorney is under a moral duty to aid needy persons requiring legal aid whether they can pay him or not.[7]

The minority view is just as firmly entrenched behind reasons for allowing recovery as the majority is behind reasons for denying it. Most of these have recently been set out by the Indiana Supreme Court in *Knox County Council v. State ex rel. McCormick*.[8] In that case two attorneys were appointed by the Circuit Court to defend a pauper charged with murder. On change of venue, the cause went to an adjoining county where, after the trial, the court made allowances to the attorneys for their services in representing the defendant. The Auditor in the envenued county issued the warrants to the attorneys for their services[9] but payment was refused by the Treasurer of that county for want of funds. The attorneys then brought an action to mandate the county council to appropriate sufficient funds to pay the warrants. From a judgment holding the county liable for the fees the county council appealed to the state Supreme Court where the judgment was affirmed.

The court in its decision reviews all of the earlier Indiana decisions which set out most of the arguments found in the decisions of the three minority states. These arguments are that the attorney is not obliged to represent indigents without re-

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[2] 7 C. J. S. 1033 §172; 36 L. R. A. (N. S.) 377 (1911). See cases cited in notes 4-7 *infra*.

[3] Dane County v. Smith, 13 Wis. 585 (1861) (held void a statute providing that county should not be liable to court appointed counsel); Carpenter v. Dane County, 9 Wis. 249 (1859); Ferguson v. Pottawattamie County, 224 Iowa 516, 278 N. W. 223 (1938) (juvenile court proceeding); State v. Froah, 220 Iowa 840, 263 N. W. 525 (1935) (held while right to fees they are limited by the statutory provision); Korf v. Jasper County, 132 Iowa 682, 108 N. W. 103 (1906); Hyatt v. Hamilton County, 121 Iowa 292, 96 N. W. 855 (1903) (attorney to prosecute disbarment proceeding); White v. Polk County, 17 Iowa 413 (1864) (special prosecutor); Hall v. Washington County, 2 G. Greene (Iowa) 473 (1850). For Indiana cases see notes 11-13 *infra*.

[4] Nabb v. United States, 1 Ct. Claims (U. S.) 173 (1864); Vise v. County of Hamilton, 19 Ill. 78 (1857); Johnson v. Whiteside County, 110 Ill. 22 (1884); Arkansas County v. Freeman & Johnson, 31 Ark. 266 (1876); Elam v. Johnson, 48 Ga. 348 (1873).

[5] Pardee v. Salt Lake County, 39 Utah 482, 118 Pac. 122, 36 L. R. A. (N. S.) 377 (1911); Rowe v. Yuba County, 17 Cal. 62 (1860); Board of Com'rs of Miami County v. Mowbray, 160 Ind. 10, 66 N. E. 46 (1903); Boykin v. People, 23 Colo. 183, 46 Pac. 635 (1896). See 7 C. J. S. 1033 §172.

[6] Yates v. Taylor County Court, 47 W. Va. 376, 35 S. E. 24 (1900); Arkansas County v. Friedman & Johnson, 31 Ark. 266 (1876).

[7] Elam v. Johnson, 48 Ga. 348 (1873); Rowe v. Yuba County, 17 Cal. 62 (1860); Lamont v. Solano County, 49 Cal. 158 (1874); Henley v. State, 98 Tenn. 665, 41 S. W. 352 (1897); Presby v. Klickitat County, 5 Wash. 329, 31 Pac. 876 (1892)

[8] 29 N. E. (2d) 405 (Ind. S. Ct., Oct. 21, 1940).

[9] The Auditor of Knox County issued the warrants only after a judgment against him mandating the issue of the warrants had been obtained by the lawyers in the instant case

muneration for (1) the duty to act as counsel is more than an honorary duty, as some courts have claimed, for a duty merely honorary could hardly be susceptible of enforcement in a court of law,[10] and (2) since the lawyer gets no special benefits from the public he should not be specially burdened—the lawyer's "professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant, the crops of the farmer, or the wares of the mechanics." Yet the burden of defending the poor rests somewhere so it must rest on the state or a portion of it. The court has inherent power to do all things that are reasonably necessary for the proper administration of justice so, since it may only try persons given the right to counsel, must furnish counsel for those unable to hire their own, and can only obtain counsel by paying them, it may hold the county liable to pay such counsel.[12] Since the county is a subdivision of the state it is, as a part of the state, an interested party and so may be held liable for such expenses. And further, since the county provides for the physical needs of the poor it should certainly provide for their even more vital legal needs;[13] and if it pays a prosecuting attorney and all other expenses of a trial to convict an accused person, if guilty, it should also provide a defense attorney, if needed, to help acquit him, if innocent.[14]

If the law has remained as first settled by the courts there would be little value in discussing the different holdings; it would be very unlikely that the courts could have been induced to change positions of such long standing. However, in most states the legislatures have alleviated the severity of the early court holdings by

[10] Webb, Auditor v. Baird, 6 Ind. 13, 16 (1854); Blythe v. State, 4 Ind. 525 (1853).

[11] Knox County Council v. State ex rel. McCormick, 29 N. E. (2d) 405, 408 (Ind. 1940) quoting Webb, Auditor v. Baird, 6 Ind. 13, 16 (1854). Blythe v. State, 4 Ind. 525 (1853).

The basis of the instant case, *supra*, is very tersely stated at page 413—"The conclusion seems unavoidable that it is the duty of courts to see that criminal cases are tried; that these cases cannot be legally tried unless the defendant, if he is a pauper, is provided with counsel; that attorneys cannot be compelled to serve without compensation; and therefore that, in order to conduct a legal trial, the court must have power to appoint counsel, and order that such counsel shall be compensated if necessary; and that the right to provide compensation cannot be made to depend upon the will of the Legislature or of the county council."

[12] Gordon v. Board of Com'rs of Dearborn County, 52 Ind. 322 (1876); Board of Com'rs of Fountain County v. Wood, 35 Ind. 70 (1871); Knox County Council v. State ex rel. McCormick, 29 N. E. (2d) 405, 408, 413 (Ind. 1940).

Board of Com'rs of Miami County v. Mowbray, 160 Ind. 10, 66 N. E. 46 (1903) and Board of Com'rs of Vigo County v. Moore, 93 Ind. App. 180, 166 N. E. 779 (1929) held that the court could not hold the county liable to pay attorney's fees, however, this view was rejected by both earlier and later cases.

[13] "If the prisoner was brought into court not decently or comfortably clad, and was too poor to provide for himself, no one would doubt the power and duty of the court, on general principles, without any statute, to order suitable clothes for him. It cannot be admitted for a moment that the law regards the physical wants of the citizen of more consequence than his life or his liberty. . . . The generous feelings which prompt acts of charity are admirable and ennobling to our nature. But even charity itself almost ceases to be a virtue, when they, whose duty it is to provide for the poor, make private charity a pretext for public neglect. If the state has not made provision for the defense of poor prisoners, it has presumed and trespassed unjustly upon the rights and generous feelings of the bar." Knox County Council v. State ex rel. McCormick, 29 N. E. (2d) 405, 409 (Ind. 1940) quoting Webb, Auditor v. Baird, 6 Ind. 13, 18-9 (1854).

[14] "Can counsel thus assigned sustain an action against the county for their fees? The first impression is in the negative. Counsel are officers of the court, and are obliged as such to render to the court any services that may be necessary to the maintenance of public justice. Counsel, with the emoluments, must take the burdens of their profession. Among the burdens is the gratuitous defense of the poor; and the remuneration for this, in those cases in which no remuneration can be had from the state, must be found, it is urged, in the general income of a profession of which such service is one of the incidents, as well as in the consciousness of duty performed. For these and other reasons it has been held that counsel can not recover from the county compensation for such services. Yet a more careful examination teaches us that this view is not consistent either with English precedent or sound public policy. Counsel for the defense are as essential to the due examination of the case as are counsel for the prosecution; and to leave the services of the one unremunerated is as impolitic as it would be to leave the services of the other unremunerated. If the state pays to convict its guilty subjects, it should also pay counsel to acquit such as are innocent." Kerr, Wharton's Criminal Procedure (10th ed. 1918) §1494.

specifically providing for remuneration for court appointed counsel in certain instances. The statutes are in no way uniform and in many instances their scope is uncertain. Because of this, the different considerations for and against payment of counsel enter into the interpretation of these statutes and in the pleas to the legislatures to alter their statutes or to enact additional legislation.[16]

It is exceedingly difficult to untangle the opposing considerations involved and suggest an ideal arrangement for paying counsel. Because of his professional position the lawyer should not refuse to give his services to those unable to pay for them.[17] Yet it is a heavy burden on the lawyer to require him to defend an indigent to the fullest extent of his ability without remuneration, where the preparation of the defense takes a great deal of time and money. Too often, when no, or grossly inadequate, fees are allowed, the defense of the indigent accused is left to unexperienced recent graduates who are willing to act as counsel to get experience in handling cases, or to "professional" assigned lawyers who haunt the jails and who are adept at wringing every possible cent out of the accused's family and friends.[18] Even when capable lawyers are assigned they often slight the assignment because their time is taken up by work for regular clients or because they feel a properly prepared defense would be too expensive. On the other hand, it is difficult to justify the situation found in Illinois[19] and apparently also in New York where certain lawyers make a practice of

[15] *Arizona*, Ariz. Code Ann. (1939) §44-905; *California*, Gen. Laws of Cal. (1937) Art. 1910, §§1. 2, 3, 4, 5, 6, 7, 8; *Colorado*, Colo. Stat. Ann. (1935) §§502, 503, 504; *Connecticut*, Gen. Stat. of Conn. (1930) §6476; *Florida*, Comp. Gen. Laws of Fla. (1927) §8375; *Hawaii*, Rev. Laws of Hawaii (193) §5354; *Idaho*, Idaho Code Ann. (1932) §19-1413; *Illinois*, S. H. Ill. Ann. Stat. (1935) c. 38 §§730, 730a, c. 34 §§163b. 163c; *Indiana*, Burns Ind. Stat. Ann (1933) §§9-1314, 2-211; *Iowa*, Code of Iowa (1939) §13774; *Maine*, Rev. Stat. of Me. (1930) c. 146 §14; *Maryland*, Ann. Code of Md. (1939) art. 26 §§7, 8; *Massachusetts*, Ann. Laws of Mass. (1933) c. 277 §§55, 56; *Michigan*, Mich. Stat. Ann. (1938) §§28.1253, 28.1254, 28.1255; *Minnesota*, Mason's Minn. Stat. (1927) §9957; *Montana*, Rev. Codes of Mont. (1935) §11886; *Nebraska*, Comp. Stat. of Neb. (1929) §§29-1803, 29-1804; *Nevada*, Nev. Comp. Laws (1929) §§10883, 11357, 11358; *New Hampshire*, Pub. Laws of N. H. (1926) c. 368 §§1, 2, 3; *New Jersey*, N. J. Stat. Ann. (1939) §2:190-3; *New York*, Gilbert's Code of Crim. Proc. (1940) §§308, 308a; *North Carolina*, N. C. Code of 1939 Ann. §§4515, 4516; *North Dakota*, Comp. Laws of N. D. (1913) §8965; *Ohio*, Pages Ohio Gen. Code (1939) §§13439-2, 13439-3; *Oklahoma*, Okla. Stat. (1931) §§2929, 2930; *Pennsylvania*, Purdon's Pa. Stat. Ann. (1930) title 19 §784; *Rhode Island*, Gen. Laws of R. I. (1938) c. 626 §§62, 63; *South Dakota*, S. D. Code (1939) §§34.3506, 34.1901; *Vermont*, Pub. Laws of Vt. (1933) §2370; *Virginia*, Va. Code (1936) §§4970, 3518; *Wisconsin*, Wis. Stat. (1939) §357.26; *Washington*, Rem. Rev. Stat. (1932) §2305; *Wyoming*, Wyo. Rev. Stat. (1931) §33-901.

Attorneys appointed by the courts to represent indigent defendants in Arkansas, Georgia, Kentucky, Missouri, Tennessee, West Virginia, the Federal courts and likely in certain other states are still allowed no recovery from the state for their services.

[16] ". . . it [the Montana statute] merely provides that whenever an attorney defends an indigent person accused of crime his fee shall be paid by the county, up to the amount specified. There is, therefore, nothing in the law to prohibit the district court from appointing more than one attorney to defend difficult cases and those of a grave nature, such as the prosecution of a man for murder, the matter is left to the sound judgment of the district judge presiding, and if the court sees fit to appoint two attorneys to defend, each is entitled to compensation for his services." Huntington v. Yellowstone County, 80 Mont. 20, 25, 257 Pac. 1041, 1043 (1927).

The question of whether an attorney has a right to compensation for prosecuting an appeal or for defending on retrial has called for much statutory interpretation by the courts; they have generally interpreted the statutes broadly to allow added compensation. Moran v. Otoe County, 95 Neb. 658, 146 N. W. 956 (1914); Tomlinson v. Monroe County, 134 Iowa 608, 112 N. W. 100 (1907); Washoe County v. Humboldt County, 14 Nev. 123 (1879); People v. Ferrero, 162 N. Y. 545, 57 N. E. 167 (1900); People v. Montgomery, 101 App. Div. 338, 91 N. Y. S. 765 (1905); People ex rel. McAvoy v. Pendergast, 67 Misc. 541, 124 N. Y. S. 713 (1910). *Contra*, Czaki v. Coler, 44 App. Div. 183, 60 N. Y. S. 656 (1899); Weisbrod v. Winnebago County, 20 Wis. 418 (1866); John v. Municipal Court of Milwaukee County, 220 Wis. 334, 264 N. W. 829 (1936). See also Reilly v. Berry, 250 N. Y. 456, 166 N. E. 165 (1929) for the result of an unduly strict statute.

[17] Kraus v. State, 102 Neb. 690, 169 N. W. 3 (1918) (where attorney volunteered to defend an indigent as a friend of the court he was not thereafter entitled to compensation for his services, either in the trial court or on appeal).

[18] See R. H. Smith, Justice and the Poor (1919) 114; W. J. Wood, Unexpected Result from the Establishment of the Office of Public Defender (1916) 7 J. Crim. Law 595.

[19] The Criminal Court in Cook County [Chicago], Illinois, almost always allows the maximum statutory fee [$250] in all cases where an

representing indigents charged with capital offenses merely for the fees allowed.

While certain types of cases, especially capital cases, should and usually do take much more of the attorney's time and effort than others, it is certainly debatable whether substantial fees should be allowed in these cases and none at all in the others, as some statutes have provided.[20]

The problem is a difficult one; indeed, it is very unlikely that any arrangement could work well in all jurisdictions—a method of compensation in a district where lawyers generally have some spare time, where the court procedure is fairly simple, and where the expenses of practicing law are comparatively low would likely be wholly inadequate in a large metropolitan district. Full time public defenders, appointed for a specified term and receiving a fixed salary, have apparently solved the question of the representation of the indigent defendant satisfactorily in the metropolitan districts; but it is very unlikely that such offices would be practical in the less populous districts throughout the country.[21]

Yet it would seem very proper to offer some suggestions. The many state statutes allowing payment are an indication that there is a general feeling that counsel should be paid; and the courts of Indiana, Iowa, and Wisconsin have furnished sufficient reasons for doing so. Because the adequate defense of those accused of any crime take time and money, payment should seemingly be made in all cases and should bear some relation to the amount of work done.[22] The attorney should be allowed a reasonable fee for his work and reimbursement for reasonably necessary expenses incurred upon appeal[23] or retrial

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attorney is assigned. Certain lawyers are thus able to make a practice of inducing those charged with capital offenses to object to being represented by the public defender and so get themselves appointed to represent these prisoners. Judging only from the New York court opinions it appears that the courts in that state also generally allow the maximum fee [$1,000].

[20] Florida, Illinois, New Jersey, Massachusetts, New York, North Carolina, Pennsylvania, and Virginia allow compensation only in capital offenses; Minnesota, Ohio and Vermont also allow compensation only in certain cases. No relief is given the attorney who represents indigents in other cases in these states.

[21] The defense of indigents is handled by public defenders in California, Connecticut, and certain more populous districts in Illinois, Minnesota, Nebraska, and Virginia.

The problem of compensation for court appointed counsel, discussed in this note is only one phase of the much larger problem of obtaining adequate defense of the poor. The question of the advisability of public defenders is inexorably bound up with this larger problem. For a full discussion see the following articles that have previously appeared in the Journal: N. F. Baker, The Public Defender's Work in Cook County (1934) 25 J. Crim. Law 5; P. J. Finnegan The Work of the Public Defender of Cook County (1936), 26 J. Crim. Law 709; C. Mishkin, The Public Defender (1931), 22 Crim. Law 489, reprinted from 14 Chicago Bar Assn Rec. 98; F. R. Anman, Public Defender in the Municipal Courts of Columbus (1930), 21 J. Crim. Law 392; R. G. DeForest, Public Defender in Connecticut (1928), 18 J. Crim. Law 522; S. Rubin, The Public Defender, An Aid to Criminal Justice (1927) 18 J. Crim Law 345; K. Wynne, Public Defenders in Connecticut (1926), 17 J. Crim. Law 358; Note (1923), 14 J. Crim. Law 319, reprinted from The Baltimore Sun, Jan. 29, 1922; W. J. Wood, Necessity for Public Defender Established by Statistics (1916), 7 J. Crim. Law 230; M. C. Goldman, The Necessity for a Public Defender (1915), 5 J. Crim. Law 660; M. C. Goldman, Public Defender (1915), 6 J. Crim. Law 557; R. Ferrari, H. A. Forster, A. E. Adelman and J. H. Stolper, On the Public Defender, a Symposium (1915), 6 J. Crim. Law 371; A. Adelman, In Defense of the Public Defender (1914), 5 J. Crim. Law 494. See 14 J. Crim. Law 556 for a complete bibliography on the public defender to 1924. See also R. H. Smith, Growth of Legal Aid Work in the United States (1926, rev. ed. 1936); R. H. Smith, Justice and the Poor (1919); M. C. Goldman, The Public Defender, a Necessary Factor in the Administration of Justice (1917).

[22] New York requires the action to be disposed of by a formal order, ". . . by a verdict of not guilty, by a conviction or a plea of guilty and a judgment entered thereon, or else by an order of the court dismissing the indictment", so the courts have refused to allow a fee where there was a mistrial, Stern v. Taylor, 2 N. Y. S. (2d) 42 (1938); or an agreement not to prosecute, Snitkin v. Taylor, 276 N. Y. 148, 11 N. E. (2d) 573 (1938), regardless of the amount of work done by the attorney.

[23] Additional compensation is allowed by statute to one who prosecutes an appeal in Illinois, Iowa, Michigan, Nevada, New York, South Dakota, Wisconsin and Hawaii. Other states, by statutory construction, allow added compensation on appeal See note 16 *supra*. Many states also allow reasonable expenses incurred in the defense of the indigent.

as well as on the original trial.[24] Since the courts often make a practice of allowing the maximum fee in practically all cases, this maximum, if a substantial amount, should not be set at a flat figure but should be a stipulated amount for each trial, or better, for each day of actual trial work.[25] And since, at best, a statute can provide payment that only approximates reasonable compensation, setting different maximums for different classes of cases seems justifiable.

DONALD G. BAIRD.

EVIDENCE OF WOUNDS AS SHOWING INTENT TO MURDER [ALABAMA]

In *State v. Beck*[1] the defendant's son, allegedly at the defendant's bidding, shot and wounded one Daughtry. For this the defendant and the son were indicted; it being alleged that they "unlawfully and with malice aforethought did assault Ralph Daughtry with intent to murder him." A severance was granted and the defendant was tried and convicted of assault with intent to murder. The question on appeal is whether testimony allowed by the trial court that the complainant had "continuously had boils around the wound made by the shot of Wiley Beck's pistol" was properly admitted. The court of appeals held such evidence irrevelant and prejudicial to the defendant, and reversed the trial court. The Supreme Court reversed the appellate court on the grounds that in a situation where murderous intent is involved evidence of the nature and result of the wound may properly be considered in ascertaining the intent of the assault.

In support of their holding the supreme court offered the following statement in Underhill's treatise on Criminal Evidence: "The evidence of the condition of the person injured, showing the character of his wounds and the manner in which they were treated by the physician, and evidence to show how long he was confined in a hospital is always relevant on the prosecution for assault with intent to murder to show the grevious nature of the injury inflicted, from which injury the court may infer that the accused intended to kill the person assaulted."[2]

The court then cites *Wright v. State*[3] as authority for its holding. In that case the question raised was the admissibility of evidence of the number of wounds inflicted upon the complainant and its bearing upon the defendant's intent; testimony was introduced to show that there were fourteen or fifteen wounds of a serious nature upon the complainant's body. In that situation it is clear the number of wounds should be taken into consideration by the jury. Such wounds furnish a fairly sound yardstick in determining the defendant's state of mind —that he meant to do more than merely assault. They lend probative force to the state's hypothesis that the defendant intended to murder the complainant.

This principle, as stated in Underhill and as applied in the Wright case, has been generally accepted in determining intent in criminal cases.[4] However, it seems clear

[24] "Nearly every case, if it is to be properly prepared and tried, involves some cash outlay, but in the great majority of cases, even where counsel is assigned, no provision is made for such expense. This is a substantial defect in the assigned counsel plan. It means that either the attorney must pay the incidental expenses out of his own pocket, which, of course, he cannot afford to do, and therefore does not do, or the defendant must go to trial and do the best he can in spite of an inadequate preparation of his case. In only eight States are the expenses defrayed by the State, and in two of these the expenses will be borne by the State only in capital cases. In seven States the law expressly prohibits any reimbursement to the lawyer for such incidental expenses." R. H. Smith, Growth of Legal-Aid Work in the United States (rev. ed. 1936) 78.

[25] There are great differences in the size of the fees allowed by the different state statutes. Maximums range from $1,000 in New York, $250 in Illinois, and $200 in Pennsylvania and Hawaii to $25 in North Dakota, Oklahoma and Virginia; the statutes in Indiana, Maine, Massachusetts, Michigan, New Jersey, North Carolina and Vermont provide for "reasonable" fees and set no maximum; the statutes in Idaho, Iowa and Wyoming allow certain fixed fees to the court appointed counsel.

[1] 197 So. 43 (Ala. S. Ct., Apr. 4, 1940), reversing 197 So. 42 (Ala. App. Ct., Feb. 27, 1940).

[2] Underhill, Criminal Evidence (4th ed. 1935) §596.

[3] 184 Ala. 596, 42 So. 745 (1907).

[4] Wharton, Criminal Evidence (11th ed. 1935) §197; Brown v. Commonwealth, 226 Ky. 255, 105 S. W. (2d) 820 (1928); State v. Harmon, 127 S. Car. 424, 121 S. E. 257 (1924); State v. Compton, 48 S. Dak. 430, 205 N. W. 31 (1925); State v. Young, 52 Ore. 227, 96 Pac. 1067 (1908); Stevens v. State, 84 Neb. 759, 122 N. W. 58 (1909).

that in the instant case evidence of the boils presents an entirely different situation. Boils around a wound, unlike fourteen knife thrusts, are demonstrative of no malicious intent on the part of the defendant.

The principle of admitting evidence to show intent is subject to the basic rule underlying the entire law of evidence—that it must be relevant to the issue to which it is addressed. The evidence as to the boils lacks this essential element; it neither proves nor supports any theory of the state as to the defendant's intent at the time of the shooting.[5]

The gunshot wound itself furnishes such evidence and in Alabama establishes a strong presumption of intent to murder.[6] The presence of this presumption may furnish a reasonable explanation of the court's decision in the instant case. It may have considered that the evidence of the wound established such a strong case that it could not be overcome by the effect of the other improperly admitted testimony. In other words, the error was of insufficient importance to command a new trial with its attendant expenses, delays and inconveniences.

Such a rationalization, however, is not justified for, while the presence of intent might have already been proved beyond a reasonable doubt by the other evidence, nevertheless other elements of the crime were quite likely in issue. Evidence of the boils was certainly highly inflammatory and its admission could easily prejudice the jury and result in a very unfair trial of the defendant. Evidence, when relevant, may be prejudicial and still be admissible.[7] But when it is both irrelevant and prejudicial, as in the case here, it is difficult to see how a trial judge, in the reasonable exercise of his judicial discretion could permit its use, and even more unexplainable, how an appellate court could sanction such discretion.

LeRoy A. Solberg.

[5] Harcrow v. State, 97 Tex. Crim. 274, 261 S. W. 1046 (1924) is the only case similar to the instant case found; the criticisms of the instant case are also applicable to it.

"There are two complaints evidenced by bills of exception showing objections to testimony as to the fact that Blount took pneumonia, and pus formed in the wound, and a rib had to be taken out, and that he wore a tube for some time; also that the doctor thought Blount was going to die, and told him so. We do not regard either of the bills as presenting serious error. . . . In view of the fact that the jury gave the appellant the lowest penalty, we do not regard the evidence as calculated to affect the minds of the jury or inflame them. . . . The deadly character of the weapon and the serious nature of the injury inflicted were both for the jury and were material as reflecting the intent and purpose of the appellant and the character of the weapon used by him." *id.* 1048.

[6] Underhill, Criminal Evidence (4th ed. 1935) §596 n. 43; Henson v. State, 112 Ala. 41, 21 So. 79 (1895); DeArman v. State, 71 Ala. 351 (1882); Eiland v. State, 52 Ala. 332 (1875); Clements v. State, 50 Ala. 117 (1873).

"The general rule, however, is that the law presumes that a man intends the natural and necessary consequences of his acts; and so in case of an assault with a dangerous or deadly weapon used in such a way as naturally, probably, or reasonably to produce death or prejudice life, intent to kill is presumed." 30 C. J. 140 §347.

[7] For a discussion of prejudicial testimony see Note (1941), 31 J. Crim. Law 604.