

1942

## Supreme Court Decisions on Federal Criminal Procedure

Lester B. Orfield

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

Lester B. Orfield, Supreme Court Decisions on Federal Criminal Procedure, 33 J. Crim. L. & Criminology 219 (1942-1943)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

## SUPREME COURT DECISIONS ON FEDERAL CRIMINAL PROCEDURE

Lester B. Orfield<sup>1</sup>

### CRIMINAL CONTEMPT IN THE FEDERAL COURTS<sup>2</sup>

The Act of November 21, 1941, Chap. 492<sup>3</sup> provides that the Act of Congress of February 24, 1933<sup>4</sup> as amended giving the Supreme Court authority to lay down rules of criminal procedure after verdict and the Act of June 29, 1940<sup>5</sup>, giving the Supreme Court authority to lay down rules of procedure prior to and including verdict in criminal cases "are hereby extended to proceedings to punish for criminal contempt of court."

<sup>1</sup> Professor of Law, University of Nebraska; member United States Supreme Court Advisory Committee on Rules of Criminal Procedure.

<sup>2</sup> For the statutes dealing with or related to criminal contempt see 28 U. S. C. sections 263, 296, 385 through 390, 391, 647, 648, 703, 714-717, 750, 11 U. S. C. sections 11 and 69, 15 U. S. C., secs. 4, 49, 78u, 100, 155, 29 U. S. C., sec. 111, 112, 160(h), 161, 209; 7 U. S. C., sec. 499m; and 9 U. S. C., sec. 7; 17 U. S. C., sec. 36; 19 U. S. C., sec. 1333b; 22 U. S. C., secs. 155, 270f; 33 U. S. C., sec. 927; 35 U. S. C., sec. 56; 47 U. S. C., sec. 409; 48 U. S. C., sec. 1345a; 49 U. S. C., sec. 12.

The various statutes from 1789 to March 4, 1923 are cited in Frankfurter and Landis, "Criminal Contempts in 'Inferior' Federal Courts—a Study in Separation of Powers," 1924) 37 *Harv. L. Rev.* 1010, 1087-1088. For the relevant parts of the penal code see 18 U. S. C., secs. 240-243.

27 U. S. C. A., sec. 38 providing for the use of injunction and contempt procedure in liquor cases was repealed in 1835. See 49 Stat. 872. The statute set out in detail the method of procedure. See R. N. Golding, "Constitutional Questions Involved in the National Prohibition Act," (1924) 19 *Ill. L. Rev.* 71; J. M. Olmstead, "Padlock Injunctions," (1925) 11 *A. B. A. J.* 389; W. A. Shumaker, "Padlock Injunctions," (1927) 30 *Law Notes* 185.

See for discussion of criminal contempt Hughes, *Federal Practice*, (1931) vol. 9, sections 6601, 6899, 6904-6913; Longsdorf, 7 *Cyclop. of Federal Procedure*, (1930) sections 3705-3734, especially 3716-6913; Rapalje, *Contempt*, (1884); note, "Contempt Procedure in Federal Court," *Ann. Cas.* 1915D, 1084-1062; note on evidence, *L. R. A.* 1917B, 118; (1929) 7 *Tex. L. Rev.* 274; Larremore, "Constitutional Regulation of Contempt of Court," (1900) 13 *Harv. L. Rev.* 80; Barrett, "Contempt in Federal Courts," (1911) 72 *Cent. L. J.* 5; Fox, "The Practice in Contempt of Court Cases," (1922) 38 *L. J. Rev.* 185; Frankfurter and Landis, "Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers," (1924) 37 *Harv. L. Rev.* 1010; Fox, *The History of Contempt of Court*, (1927); Thomas, *Problems of Contempt of Court* (1934); Swayzee, *Contempt of Court in Labor Injunction Cases* (1935); Nelles and King, *Contempt by Publication in the United States*, (1928) 28 *Columb. L. Rev.* 401, 525; Nelles, *The Summary Power to Punish for Contempt*, (1931) 31 *Columb. L. Rev.* 956; Nelles, "A Strike and Its Legal Consequences—An Examination of the Receivership Precedent for the Labor Injunction," (1931) 40 *Yale L. J.* 507; Goodhart, "Newspapers and Contempt of Court in English Law," (1935) 48 *Harv. L. Rev.* 885; Durfee, *Cases on Equity*, (1928) 147-163; Seymour, D. Thompson, "Procedure in Cases of Criminal Contempts," (1884) 5 *Crim. L. Mag.* 150, 483, 647; Laski, "Procedure for Constructive Contempt in England," (1928) 41 *Harv. L. Rev.* 1031; (1936) 46 *Yale L. J.* 326.

<sup>3</sup> The Act was introduced on June 27, 1941 and passed the House of Representatives on October 6, 1941, 87 Cong. Rec. 7854. It passed the Senate without change on November 10, 1941, 87 Cong. Rec. 8943.

<sup>4</sup> 18 U. S. C. A., sec. 688, 47 Stat. 904.

<sup>5</sup> 18 U. S. C. A., sec. 687, 54 Stat. 688.

*Inherent Power*

Back in 1812 Mr. Justice William Johnson speaking for the court distinguished between crimes and contempts on the basis that the former necessarily rested on a statutory basis while the latter were inherent and not necessarily derived from statutes though he did not deny the validity of statutory regulation. He stated:

"The legislative authority of the Union must first make an act a crime, affix a punishment to it and declare the court that shall have jurisdiction of the offense.

"Certain implied powers must necessarily result to our courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far as our courts no doubt possess powers not immediately derived from statutes; but all exercise of criminal jurisdiction in common law cases, we are of opinion, is not within their implied powers."<sup>6</sup>

Summary power to punish for contempt is inherent, arising from the necessity of the court for self-preservation, or of preventing obstruction of their due administration of justice.<sup>7</sup> But the amplitude of the summary power

"is a command never to exert it where it is not necessary or proper."<sup>8</sup> Its great and only purpose is to secure judicial authority from obstruction in the performance of its duties."<sup>9</sup>

Necessity gives rise only to the "least possible power adequate to the end proposed."<sup>10</sup>

While Congress may regulate by statute contempt procedure in the lower federal courts Mr. Justice Field queried whether Congress could limit the authority of the Supreme Court, which derives its existence and power from the Constitution.<sup>11</sup> Mr. Justice Holmes expressed the same doubt in a subsequent decision.<sup>12</sup>

<sup>6</sup> *United States v. Hudson and Goodwin*, (1812) 7 Cranch. 32, 34, 3 L. Ed. 259, 260. See also *Ex parte Grossman*, (1925) 267 U. S. 87, 113, 69 L. Ed. 527, 532. For the latest statement as to the basis of federal substantive criminal law see the concurring opinion of Mr. Justice Jackson in *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, (1942) 62 Sup. Ct. 676, 684. Mr. Justice Jackson states that because of the present tendency to constrict the jurisdiction of the federal courts, the federal substantive criminal law is likely to continue on a statutory basis, as early laid down, though as he points out Mr. Charles Warren thought such view erroneous in his article, "History of the Federal Judiciary Act of 1789," (1923) 37 *Harv. L. Rev.* 49, 73.

<sup>7</sup> *Ex parte Bollman*, (U. S. 1807) 4 Cranch. 75, 94; *Bessette v. Conkey Co.*, (1904) 194 U. S. 324, 24 Sup. Ct. 665.

<sup>8</sup> *Gompers v. Bucks Stove and Range Co.*, (1911) 221 U. S. 418, 451, 31 Sup. Ct. 492, 502.

<sup>9</sup> *Ex parte Hudgings*, (1919) 249 U. S. 378, 383, 39 Sup. Ct. 337, 339.

<sup>10</sup> *Anderson v. Dunn* (U. S. 1821) 6 Wheat. 204, 227, 5 L. Ed. 242, 248.

<sup>11</sup> *Ex parte Robinson*, (1873) 19 Wall. (U. S.) 510, 22 L. Ed. 205. Compare 3 Street, *Federal Equity Practice*, (1909) p. 1423.

<sup>12</sup> *United States v. Shipp*, (1906) 203 U. S. 563, 8 Ann. Cases 265, 27 S. Ct. 165, 21 L. Ed. 319. It is stated in Ann. Cas. 1915 D, at 1049 that the point has never been determined.

Even the Supreme Court is subject to the free speech and press limitation of the Constitution in the exercise of its contempt power. *Bridges v. State of California*, (1941) 62 S. Ct. 190, 192.

*Contempt As Sui Generis*

Mr. Justice Brewer stated of contempt proceedings:

"A contempt proceeding is *sui generis*. It is criminal in nature, in that the party is charged with doing something forbidden, and, if found guilty, is punished. Yet it may be resorted to in civil as well as criminal actions, and also independently of any civil or criminal action."<sup>13</sup>

He stated in the same opinion:

"It is true they are peculiar in some respects, rightfully styled *sui generis*. They are triable only by the court against whose authority the contempts are charged. No jury passes on the facts; no other court inquires into the charge."<sup>14</sup>

Mr. Justice McReynolds in a case involving venue stated of contempt proceedings:

"These are *sui generis*,—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms."<sup>15</sup>

Later on in the same opinion he stated:

"While contempt may be an offense against the law, and subject to appropriate punishment, certain it is that, since the foundation of our government, proceedings to punish such offenses have been regarded as *sui generis*, and not criminal prosecutions within the 6th amendment or common understanding."<sup>16</sup>

In a 1932 case Mr. Chief Justice Hughes in a case involving failure by an American citizen abroad to return and testify after being subpoenaed, ruled that contempt proceedings are "*sui generis* and not 'criminal prosecutions' within the 6th Amendment or common understanding."<sup>17</sup> Hence there would be no violation of due process to hold the hearing and proceed to judgment in the absence of the defendant.

Not all the protections given an accused under the Bill of Rights apply to criminal contempt, according to Chief Justice Taft. In a case involving the power of the President to pardon for criminal contempt he stated:

"Contempt proceedings are *sui generis* because they are not hedged about with all the safeguards provided in the Bill of Rights for protecting one accused of ordinary crime from the danger of unjust conviction."<sup>18</sup>

He also stated:

"The power of a court to protect itself and its usefulness by punishing contemnors is of course necessary, but it is one exercised without the restraining influence of a jury and without many of the guaranties which the Bill of Rights offers to protect the individual against unjust conviction."<sup>19</sup>

<sup>13</sup> *Bessette v. W. B. Conkey Co.*, (1904) 194 U. S. 324, 38 L. Ed. 997, 24 Sup. Ct. 665, 666.

<sup>14</sup> 194 U. S. 324, 48 L. Ed. 997, 24 Sup. Ct. 665, 670. But he went on to say the mode of review should be as in a criminal case.

<sup>15</sup> *Myers v. United States*, (1924) 264 U. S. 95, 103, 68 L. Ed. 577, 579, 44 Sup. Ct. 272.

<sup>16</sup> 264 U. S. 95, 104, 68 L. Ed. 577, 580, 44 Sup. Ct. 272.

<sup>17</sup> *Blackmer v. United States*, (1932) 284 U. S. 421, 440, 52 Sup. Ct. 252, 76 L. Ed. 375, 384.

<sup>18</sup> *Ex parte Grossman*, (1925) 267 U. S. 87, 117, 69 L. Ed. 527, 534.

<sup>19</sup> *Ex parte Grossman*, (1925) 267 U. S. 87, 122, 69 L. Ed. 527, 536.

*Constitutional Guaranties*

A series of cases establish that the Constitution does not compel trial by jury in criminal contempt cases.<sup>20</sup> The right of trial by jury in criminal cases does not cover criminal contempts. However the Constitution does not forbid trial by jury in criminal contempt cases either.<sup>21</sup>

The Debs Case raised doubt as to the validity of jury trial, or even trial by another judge, where the contempt occurred in injunction proceedings. Mr. Justice Brewer stated:

"But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."<sup>22</sup>

Congress may regulate criminal contempt procedure in the lower federal courts.<sup>23</sup> At least it may do so to the extent of providing for trial by jury in cases where the contempt is also a "crime under state law or federal statute."<sup>24</sup>

The so-called criminal contempt proceeding is not in the strict sense of the term a criminal prosecution. Hence it is not within the meaning of the Sixth Amendment to the Constitution, which guarantees that in all criminal prosecutions the defendant shall receive a speedy trial by an impartial jury of the state and district where the crime was committed.<sup>25</sup> The district court may punish by way of contempt for the violation of an injunction, even though the acts constituting the contempt were committed in another division of the district.

Mr. Justice Sutherland stated that the presumption of innocence obtains, proof of guilt must be beyond reasonable doubt, and the defendant may not be compelled to be a witness against himself in cases of criminal contempt.<sup>26</sup> He stated that the "fundamental characteristics" of both crimes and criminal contempts were the same.

<sup>20</sup> *Eilenbecker v. Plymouth County*, (1890) 134 U. S. 31; *Gompers v. United States*, (1914) 233 U. S. 604, 610.

<sup>21</sup> *Michaelson v. United States*, (1924) 266 U. S. 42, 69 L. Ed. 162, 45 S. Ct. 18, noted 23 *Mich. L. Rev.* 516 and 9 *Minn. L. Rev.* 368. As to the validity of analogous state statutes see comment by the writer (1935) 14 *Neb. L. Bull.* 184; 34 *Mich. L. Rev.* 123; 9 *Temple L. G.* 345; 11 *Wis. L. Rev.* 296.

<sup>22</sup> *Re Debs*, (1895) 158 U. S. 564, 594, 39 L. Ed. 1092, 1101.

<sup>23</sup> *Ex parte Robinson*, (1873) 19 Wall. (U. S.) 505.

<sup>24</sup> *Michaelson v. United States ex rel. Chicago, St. Paul, Michigan and Omaha Ry. Co.*, (1924) 266 U. S. 42, 66, 69 L. Ed. 162, 167; *Durfee, Cases on Equity*, (1928) 154, (1935) 14 *Nebraska Law Bulletin* 184.

<sup>25</sup> *Myers v. United States*, (1924) 264 U. S. 95, 44 S. Ct. 272, 68 L. Ed. 577.

<sup>26</sup> *Michaelson v. United States ex rel. Chicago, St. Paul, Michigan and Omaha Ry. Co.*, (1924) 266 U. S. 42, 66, 69 L. Ed. 162, 167.

The Supreme Court has intimated that the accused in a criminal contempt cannot be compelled to testify against himself.<sup>27</sup> In *Michaelson v. United States* the Court stated:

"In criminal contempts, as in criminal cases . . . the defendant may not be compelled to be a witness against himself."<sup>28</sup>

In *Gompers v. Bucks Stove and Range Company* Mr. Justice Joseph R. Lamar stated:

"In another most important particular the parties clearly indicated that they regarded this as a civil proceeding. The complainant made each of the defendants a witness for the company, and as such each was required to testify against himself—a thing that most likely would not have been done or suffered if either party had regarded this as a proceeding at law for criminal contempt, because the provision of the Constitution that 'no person shall be compelled in any criminal case to be a witness against himself,' is applicable not only to crimes, but also to quasi-criminal and penal proceedings."<sup>29</sup>

Freedom from self-incrimination in contempt proceedings is possibly to be implied from the statement of Mr. Justice Bradley in a case where a lawyer was disbarred for criminal contempt in taking part in a lynching near the federal court:

"The charge was specific, due notice of it was given, a reasonable time set for the hearing, and the petitioner was not required to criminate himself by answering under oath."<sup>30</sup>

The court said that the due process provision of the Fifth Amendment was not violated.<sup>31</sup>

Freedom from self-incrimination is perhaps hinted at in the language of Mr. Justice Bradley in a case involving an action for penalties and forfeitures:

"As therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think

<sup>27</sup> *Gompers v. United States*, (1911) 221 U. S. 418, 55 L. Ed. 797, 31 Sup. Ct. 492; *Michaelson v. United States*, (1924) 266 U. S. 42, 69 L. Ed. 162, 45 Sup. Ct. 18.

In *Merchants' Stock and Grain Co.*, (C. C. A. 20, 28) 201 Fed. 20, Judge W. H. Sanborn asserted that the practice of putting interrogatories was inconsistent with the guaranty against compulsory self-incrimination in the Fifth Amendment. There was a dissent by Hook, J. See also Longsdorf, *Cyclopedia of Federal Procedure*, Volume 7, (1929) sec. 3727, p. 782; Curtis and Curtis, "The Story of a Motion in the Law of Criminal Contempt," (1927) 41 *Harv. L. Rev.* 51, 60-63, 67-68; Merrick, "The Privilege Against Self-Incrimination as to Charges of Contempt"; (1919) 14 *Ill. L. Rev.* 181; (1937) 15 *Nebraska Law Bull.* 387; Note (1927) 54 *A. L. R.*, 1436; *L. R. A.* 1914B, 118; Wigmore, *Evidence*, par. 2257 (3).

<sup>28</sup> *Michaelson v. United States*, (1924) 266 U. S. 42, 58, 69 L. Ed. 162, 45 Sup. Ct. 18.

<sup>29</sup> *Gompers v. Bucks Stove and Range Co.*, (191) 221 U. S. 418, 447, 55 L. Ed. 797, 31 Sup. Ct. 492. Professor Durfee says that the "authorities *contra* suggest two distinctions (1) between answers to interrogatories propounded in accordance with the ancient practice in contempt cases, and oral examination in open court, (2) between testimony as to guilt of the contempt and testimony implicating defendant in a crime, in the proper sense." Durfee, *Cases on Equity*, (1928), 157, n. 13.

<sup>30</sup> *Ex parte Wall*, (1883) 107 U. S., 265, 271, 27 L. Ed. 552, 556 (mandamus disallowed to compel judge to reverse order of disbarment). Field, J. dissented on the ground that an attorney should not be disbarred for an offense not connected with his professional conduct, prior to a criminal prosecution.

<sup>31</sup> 107 U. S. 265, 288, 27 L. Ed. 552, 562.

that they are within the reason of criminal proceedings for all the purpose of the Fourth Amendment of the Constitution, and that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself."<sup>32</sup>

### SIMILARITY OF CONTEMPT TO CRIME

Mr. Justice Joseph R. Lamar stated that

"it is certain in proceedings for criminal contempt the defendant is presumed to be innocent" and that "he must be proved guilty beyond a reasonable doubt."<sup>33</sup>

When an act happens to be both a contempt and a crime, it may be punished both by indictment and by contempt proceedings.<sup>34</sup> Section 25 of the Clayton Act expressly declares

"nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts."<sup>35</sup>

Criminal contempts are treated as crimes within the federal statute of limitations for criminal prosecutions.<sup>36</sup> The fact that there is no constitutional right of trial by jury is immaterial. It is also immaterial that there is no indictment or information. Mr. Justice Holmes stated:

"If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech." He further pointed out that in early English law they were punished only by the usual criminal procedure, and that they still may be and preferably are tried in that way. Even if the statute of limitations did not expressly cover criminal contempts, the Supreme Court would apply it by way of analogy.

An information brought by the government for punishment of criminal contempt in violation of an injunction is a "criminal case" with the Criminal Appeals Act,<sup>37</sup> permitting the government to appeal in certain criminal cases.<sup>38</sup> The court by Mr. Justice Sanford also pointed out that criminal contempts are "offenses against the United States" within the statute of limitations applicable thereto, and are pardonable by the President under Article 2 of the Constitution. He stated:

"The only substantial difference between such a proceeding for criminal

<sup>32</sup> *Boyd v. United States*, (1886) 116 U. S. 616, 634, 29 L. Ed. 746, 752, 6 S. Ct. 524.

<sup>33</sup> *Gompers v. Bucks Stove and Range Co.*, (1910) 221 U. S. 418, 444. 55 L. Ed. 797, 807. Professor Durfee in his *Cases on Equity*, (1928) 157, note 13, says that the authorities are in conflict, citing Wigmore, *Evidence* (2nd ed. 1923), sec. 2498 (2); *L. R. A.* 1917 B, 118, 123.

<sup>34</sup> *Ex parte Savin*, (1889) 131 U. S. 267, 33 L. Ed. 150, 9 Sup. Ct. 699.

<sup>35</sup> 28 U. S. C. A., sec. 390.

<sup>36</sup> *Gompers v. United States*, (1914) 233 U. S. 604, 58 L. Ed. 1115, Van Devanter and Pitney, J. J., dissenting. The contempt consisted of violation of a labor injunction. See (1937) 15 *Nebraska Law Bulletin* 387.

<sup>37</sup> 18 U. S. C. A., section 682.

<sup>38</sup> *United States v. Goldman*, (1928) 277 U. S. 229, 72 L. Ed. 862, 48 Sup. Ct. 486, 487.

contempt and a criminal prosecution is that in the one the act complained of is the violation of a decree and in the other the violation of a law."<sup>39</sup>

*Direct Contempt and Summary Procedure*

The clearest case of criminal contempt is actual disturbance made in the court room itself which interferes with the process of litigation. An example is Terry's contempt in the Hill divorce case.<sup>40</sup> While that case was being tried in a United States circuit court, the libellant, Sarah Terry, was guilty of misbehavior in the presence of the court which thereupon ordered that she be removed by the marshal. Her husband, a member of the bar, assaulted and beat the marshal to prevent his executing the court's order. This was done in open court in the presence of the judges. Summary punishment of six months imprisonment was administered even though the contemner had left the room and gone into a nearby room in the same building.<sup>41</sup> In another case<sup>42</sup> the defendant together with various other persons riotously took from a jail a person charged with a crime during an intermission of the court which was trying him, and hanged him from the limb of a tree immediately in front of the court house door through which the judge passed on his way into court after the intermission. The act was not only unlawful but insulting to the court. As the Supreme Court said, it was perpetrated with audacious effrontery in the virtual presence of the court. The power of the court extends to contemptuous conduct in any part of the building which is set aside for the use of the court and its officers, and the grand and petit juries.<sup>43</sup>

In a dissenting opinion Justice Lucius Q. C. Lamar and Chief Justice Fuller asserted that an assault upon a member of the Supreme Court while he is on a train is not a contempt of court committed in the presence of the court.<sup>44</sup>

<sup>39</sup> 277 U. S. 229, 72 L. Ed. 862, 48 Sup. Ct. 486, 487. He also ruled, however, that the venue provision of the Sixth Amendment did not apply to criminal contempt involving violation of an injunction.

<sup>40</sup> *Ex parte Terry*, (1888) 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405 (application for habeas corpus in Supreme Court). Such contempts have been referred to as direct contempts. C. H. Thomas, *Problems of Contempt of Court*, (1934) 3. Even here one writer would prefer a criminal prosecution by indictment. Nelles, "The Summary Power to Punish for Contempt," (1931) 31 *Columb. L. Rev.* 956, 964-965.

<sup>41</sup> The court expressly refused to decide on the issue of the right to punish summarily for direct contempt at a subsequent term of court, or a subsequent day of the same term of court. *Ex parte Terry*, (1888) 128 U. S. 289, 314, 9 Sup. Ct. 77, 32 L. Ed. 405, 412.

<sup>42</sup> *Ex parte Wall*, (1883) 107 U. S. 265, 27 L. Ed. 552.

<sup>43</sup> *Savin, Petitioner*, (1809) 131 U. S. 261, 9 Sup. Ct. 699, (bribery of jury). The penalty was one year imprisonment. There was a pardon by the president. In *Cuddy, Petitioner*, (1889) 131 U. S. 280, 9 Sup. Ct. 703, the record being silent, it was assumed that an attempt to influence a juror was made in the presence of the court.

<sup>44</sup> *Cunningham v. Neagle*, (1890) 135 U. S. 1, 77, 97, 34 L. Ed. 55, 76, 83, 10 Sup. Ct. 658. "Great as the crime of Terry was in his assault upon Mr. Justice Field, so far from its being a crime against the court, it was not even a con-



Mr. Justice Stone in a dissenting opinion suggested that the whole court were probably in accord that the

"surreptitious tampering with witnesses, jurors or parties in the presence of the court, although unknown to it, would be summarily punishable because in its presence."<sup>45</sup>

He also stated:

"I do not understand my brethren to maintain that the secret bribery or intimidation of a witness in the court room may not be summarily punished."<sup>46</sup>

Mr. Chief Justice White thus describes the constitutional limitations or lack of limitations on federal contempt procedure:

"Existing within the limits of and sanctioned by the Constitution, the power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the rights of the citizen."<sup>47</sup>

In the case of summary contempt procedure no evidence need be presented.<sup>48</sup> There is no right to assistance of counsel. There is no right of trial nor issue to try. There is no right to a hearing and the contemner cannot offer an explanation of his motives. The court may proceed to fix the punishment immediately without notice to the contemner.

Procedure for the prosecution of a direct contempt is very summary.<sup>49</sup> The contemner may be jailed without a hearing and without being given an opportunity to defend himself. There is no necessity for affidavit, notice, or other process.<sup>50</sup> The court may order the bailiff to attach the contemner and bring him before the bar of the court. The court may then immediately pass sentence, and may either fine or imprison the contemner.<sup>51</sup>

Where an accused found guilty of contempt and sentenced to imprisonment seeks release by writ of habeas corpus on the ground that the contempt was not committed in the presence of the court, the writ may be refused where the record does not show that the contempt occurred out of the presence of the court but is silent concerning the matter, the petition for the writ is also silent, and no evidence is offered to the contrary.<sup>52</sup>

tempt of court, and could not have received adequate punishment as such. Section 725 of the Revised Statutes limits contempt to cases of misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice."

See Milton Green, "In re Neagle—A Study in Judicial Motivation," (1941-1942) 14 *Rocky Mountain L. Rev.* 29, 86.

<sup>45</sup> *Nye v. United States*, (1941) 61 Sup. Ct. 810, 817, 818. Compare (1935) 28 *Ill. L. Rev.* 970.

<sup>46</sup> 61 Sup. Ct. 810, 817, 819.

<sup>47</sup> *Ex parte Hudgings*, (1919) 249 U. S. 378, 383, 63 L. Ed. 656, 658.

<sup>48</sup> *Cooke v. United States*, (1924) 265 U. S. 517, 534, 69 L. Ed. 757, 773; *Ex parte Terry*, (1888) 128 U. S. 289, 32 L. Ed. 405, 9 Sup. Ct. 77.

<sup>49</sup> C. H. Thomas, "Problems of Contempt of Court," (1934) 4; (1929) 7 *Tex. L. Rev.* 274, 277 (1935) 28 *Ill. L. Rev.* 970.

<sup>50</sup> 13 C. J. 63; *Durfee, Cases on Equity*, (1928) 152, note 4.

<sup>51</sup> *Ex parte Terry* (1888) 128 U. S. 289, 32 L. Ed. 405.

<sup>52</sup> *Ex parte Cuddy*, (1889) 131 U. S. 280, 33 L. Ed. 154.

*Forms of Contempt*

Even the most serious kind of a crime may be punishable as contempt. In one case the Supreme Court considered as a contempt the lynching of a negro after an appeal had been taken to that court from a conviction of rape.<sup>53</sup> An attempt to influence the verdict of a jury by bribery is punishable, one year's imprisonment being imposed in one case.<sup>54</sup> Shadowing of the jury has been treated as contempt.<sup>55</sup>

The Supreme Court has stated, however, that

"of course, a proceeding in contempt cannot be considered as an infamous crime."<sup>56</sup>

Not all forms of perjury amount to contempt. The perjury must be shown to be obstructive of justice.<sup>57</sup> Mr. Chief Justice White stated:

"In order to punish perjury in the presence of the court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty. It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily obstructive effect to false swearing."<sup>58</sup>

Concealment or misstatement by a juror upon a *voir dir* examination is punishable as a contempt if its tendency and design are to obstruct the processes of justice.<sup>59</sup> It is immaterial that one of the aggravations of such contempt is the commission of perjury.

<sup>53</sup> *United States v. Shipp*, (1906) 293 U. S. 563, 214 U. S. 386, (1909) 214 U. S. 439, 215 U. S. 586. (original jurisdiction).

<sup>54</sup> *In re Savin*, (1889) 131 U. S. 261, 33 L. Ed. 150, 9 Sup. Ct. 699. (attempt to bribe witness.)

Six months imprisonment was imposed in *Cuddy*, Petitioner, (1889) 131 U. S. 280, 9 Sup. Ct. 703. (Attempt to influence prospective juror in case pending.)

<sup>55</sup> *Sinclair v. United States*, (1929) 279 U. S. 749, 49 Sup. Ct. 471, 73 L. Ed. 938, noted 28 *Mich. L. Rev.* 199.

<sup>56</sup> *Bessette v. Conkey Co.*, (1904) 194 U. S. 325, 335, 48 L. Ed. 997, 1005.

<sup>57</sup> The wisdom of summary contempt prosecution is doubted in *Nelles*, "The Summary Power to Punish for Contempt," (1931) 31 *Columb. L. Rev.* 956, 969-970.

That perjury may be a direct contempt and therefore summarily punishable is asserted in (1935) 28 *Ill. L. Rev.* 970, 972.

<sup>58</sup> *Ex parte Hudgings*, (1919) 249 U. S. 378, 383, 39 Sup. Ct. 337. The court asserted there was no jurisdiction and a writ of habeas corpus was granted. He went on to point out the danger of too sweeping a use of contempt procedure for perjury:

"When a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful, and thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely impaired."

<sup>59</sup> *Clark v. United States*, (1933) 289 U. S. 1, 53 S. Ct. 465, 77 L. Ed. 993, noted 31 *Mich. L. Rev.* 850; 17 *Minn. L. Rev.* 654; 81 *U. Pa. L. Rev.* 1000; 8 *Wis. L. Rev.* 371. The court also stated that deceit by an attorney might be punished as a contempt if the deceit was an abuse of the function of his office.

A talesman when accepted as a juror becomes a part or member of the court. More may thus be required of him than of a witness. The privileges from disclosure of the deliberations of the jury will not apply.<sup>60</sup>

It is proper to punish for contempt witnesses summoned to testify before a federal grand jury who, alleging the invalidity of the statutes under which the grand jury's investigation is conducted and the consequent war of jurisdiction of court or jury over the subject-matter, refuse to testify.<sup>61</sup> He may not urge objections of incompetency or irrelevancy such as a party might raise, for this is no concern of his. They may be remanded to the custody of the marshal until they comply, and habeas corpus will not be available to release them. Under the Fifth Amendment and the statute relating to the organization of the grand jury there is a duty to testify.

The Act of July 31, 1936,<sup>62</sup> providing for the subpoenaing in a foreign country, upon service by an American consul of a citizen of the United States whose presence in a criminal prosecution in a federal court was desired, does not violate the due process clause of the Fifth Amendment.<sup>63</sup> If the citizen disobeys this statute in the foreign country, he is punishable by a federal court. There is no violation of international law. He may be punished for contempt of court even though he is not present here if suitable notice and opportunity to appear and be heard are given, by the seizure of his property to satisfy a fine. This does not violate the Fourth Amendment. The fact that only the prosecutor may subpoena may not be challenged by a recalcitrant witness as violating the provision of the Sixth Amendment that an accused shall have compulsory process for obtaining witnesses in his favor.

If a trial orders a district attorney to return to the owner certain books and papers seized in violation of his constitutional rights and he refuses to do so he may be committed for contempt, and no writ of error will lie to the Supreme Court to review the order committing for contempt.<sup>64</sup>

In a case coming up from the District of Columbia it was held

289 U. S. 1, 12. 77 L. Ed. 993, 999.

The contempt hearing in this case was before a district court of two judges. 289 U. S. 1, 9, 77 L. Ed. 993, 997. The original trial was held before a third judge.

For comments on this aspect of the case see 3 *Idaho L. J.* 259; (June 1933) 21 *Ill. B. J.* 26, 28 *Ill. L. Rev.* 292; 24 *J. Crim. L.* 446; 17 *Marq. L. Rev.* 300; 17 *Minn. L. Rev.* 299, 340, 654; 11 *N. C. L. Rev.* 347; 81 *U. Pa. L. Rev.* 1000.

<sup>60</sup> *Clark v. U. S.*, (1933) 289 U. S. 1 at 12.

<sup>61</sup> *Blair v. United States*, (1919) 250 U. S. 273, 39 Sup. Ct. 468, 63 L. Ed. 979.

<sup>62</sup> Chap. 762, 44 Stat. Cit. L. 35; 28 U. S. C. A., sections 711-718.

<sup>63</sup> *Blackmer v. United States*, (1932) 284 U. S. 421, 52 S. Ct. 252, 76 L. Ed. 375, noted 30 *Columb. L. Rev.* 747, 17 *Corn. L. Q.* 117, *Geo. Wash. L. Rev.* 132, 2 *Idaho L. J.* 211, 30 *Mich. L. Rev.* 137 and 968, 6 *So. Calif. L. Rev.* 60, 17 *St. Louis L. Rev.* 85 and 274, 65 *U. S. L. Rev.* 640.

<sup>64</sup> *Wise v. Mills*, (1911) 229 U. S. 549, 55 L. Ed. 31 S. Ct. 597.

that the Supreme Court of the District of Columbia had no jurisdiction to *disbar* an attorney for a contempt committed before another court, namely, the Criminal Court of the District.<sup>65</sup> Such court could not punish him upon an *ex parte* proceeding without notice or opportunity of defense, or explanation of misbehavior. Mandamus would therefore lie from the United States Supreme Court.

The Act of 1789 prescribing fine or imprisonment as the penalty for contempt does not authorize disbarment of a contemner who happens to be a lawyer.<sup>66</sup> The Act negates all other methods of punishment.

Mr. Justice Frankfurter, while a professor of law thus defined contempt in an article on criminal contempt:

"The particular aspect of 'inherent power' of the inferior Federal courts with which we are dealing concerns their incidental capacity to remove obstructions to the discharge of their work. The conventional description of such obstruction is contempt, and the mode of dealing with it is characterized as the power of courts to punish for contempt."<sup>67</sup>

#### *Distinction Between Criminal and Civil Contempt*

The difference between criminal and civil contempt is rather vague and uncertain.<sup>68</sup> This may be seen in the numerous proceedings against Samuel Gompers for disobeying an injunction issued on behalf of the Bucks Stove and Range Company. The Supreme Court reversed a conviction for civil contempt.<sup>69</sup> There was then a trial for criminal contempt which also was taken up for review by the Supreme Court.<sup>70</sup> That Court reversed upon the ground that prosecution had been outlawed by, or by the policy of the criminal statute of limitations.

Perhaps the classic statement of the difference between criminal and civil contempt is that by Mr. Justice Brewer:

"Proceedings for contempts are of two classes, those prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders, and those instituted to preserve and enforce rights of private parties to suits, and to compel obedience to orders and decrees made to enforce

<sup>65</sup> *Ex parte Bradley*, (1869) 7 Wall. (U. S.) 365, 19 L. Ed. 214, Miller, J. dissenting.

<sup>66</sup> *Ex parte Robinson*, (1874) 19 Wall. (U. S.) 505, 512, 22 L. Ed. 205, 208, opinion by Field, J. The Act of 1831 is to the same effect.

<sup>67</sup> Frankfurter and Landis, "Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers," (1924) 37 *Harv. L. Rev.* 1010, 1023.

<sup>68</sup> For a general discussion of the distinction see Beale, "Contempt of Court, Criminal and Civil," (1908) 21 *Harv. L. Rev.* 161; note (1912) 25 *Harv. L. Rev.* 375; (1923) 36 *Harv. L. Rev.* 617 (1924) 24 *Columb. L. Rev.* 921; Schofield, (1913) 8 *Ill. L. Rev.* 210; (1921) 5 *Minn. L. Rev.* 459; (1934) 20 *Iowa L. Rev.* 121; Chafee and Simpson, *Cases on Equity* (1934) 54-57; *Ann. Cas.* 1915D, 1048; Chafee, *Cases on Equitable Relief Against Torts*, (1924) 491-498; 13 *L. R. A.* (n. s.) 591; 34 *L. R. A.* (n. s.) 874; 42 *L. R. A.* (n. s.) 794; 21 *Ann. Cas.* 907; (1936) 46 *Yale L. J.* 326.

<sup>69</sup> *Gompers v. Bucks Stove and Range Company*, (1910) 221 U. S. 419, 30 Sup. Ct. 492, 55 L. Ed. 791. See discussion in Nelles, "The Summary Power to Punish for Contempt," (1931) 31 *Columb. L. Rev.* 956, 961-962. See H. S. Schofield, (1913) 8 *Ill. L. Rev.* 210.

<sup>70</sup> *Gompers v. United States*, (1914) 233 U. S. 604, 34 Sup. Ct. 693, 58 L. Ed. 1115.

the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce."<sup>71</sup>

Mr. Justice Joseph R. Lamar stated:

"Contempts are neither wholly civil nor altogether criminal."<sup>72</sup> He also stated. "It is not the fact of punishment, but rather its character and purpose, that often serves to distinguish between the two classes of cases."<sup>73</sup>

A possible implication, though the court does not say it directly is that where the party refuses to do what he is ordered to do the contempt is civil, and that where he does what he is forbidden to do it is criminal.<sup>74</sup>

In 1939 Mr. Justice Black stated:

"While particular acts do not always readily lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public."<sup>75</sup>

It seems to have been held that where a defendant not a party to an injunction suit violated a temporary restraining order of a federal court such contempt was criminal and not civil since the Supreme Court called for review by writ of error as in criminal cases.<sup>76</sup> The defendant's act was in resistance of the order of the court and therefore came more fully within the punitive than the remedial class.

A contempt may be criminal even though under a statute the fine is to be paid to the United States or to the complainant or divided among the parties injured by the act as the court may direct.<sup>77</sup> This is true where the discretion given to the court is incidental to the dominating purpose of the proceeding, which is punitive, to vindicate the authority of the court and punish the act of disobedience as a public wrong.

<sup>71</sup> *Bessette v. Conkey Co.*, (1903) 194 U. S. 324, 328, 48 L. Ed. 997, 1002, 24 Sup. Ct. 665, 666. The court was quoting the view of Judge Walter H. Sanborn, *Re Nevitt*, (C. C. A. 8th, 1902) 117 Fed. 448, 458, 54 C. C. A. 622, 632.

<sup>72</sup> *Gompers v. Bucks Stove and Range Co.*, (1910) 221 U. S. 418, 441, 55 L. Ed. 797, 806, 31 Sup. Ct. 492, 34 L. R. A. (n. s.) 874.

<sup>73</sup> 221 U. S. 418, 441, 55 L. Ed. 797, 806.

<sup>74</sup> (1923) 36 *Harv. L. Rev.* 617; (1921) 5 *Minn. L. Rev.* 461. But it has been pointed out that punishment which on its face seems purely punitive may in fact be coercive. Beale, "Contempt of Court, Criminal and Civil," (1907) 21 *Harv. L. Rev.* 161, 170; (1921) 5 *Minn. L. Rev.* 461, 463.

<sup>75</sup> *McCrone v. United States*, (1939) 307 U. S. 61, 64; 58 Sup. Ct. 685, 686. In this case it was held that a failure to obey a district court order to testify before an internal revenue official was a civil contempt, involving simply procedure for the collection of taxes and not being in "vindication of the public justice." Hence on appeal, the statutory rules of civil appeals, with respect to the time for taking an appeal, applied.

<sup>76</sup> *Bessette v. W. B. Conkey Co.*, (1904) 194 U. S. 324, 48 L. Ed. 997, 24 Sup. Ct. 665; Longsdorf and Nichols, *Cyclopedia of Federal Procedure*, volume 7, (1929) section 3711, p. 758.

<sup>77</sup> *Michaelson v. United States ex rel. Chicago, St. Paul, Michigan and Omaha Ry. Co.*, (1924) 266 U. S. 42, 65, 69 L. Ed. 162, 167.

An example of a civil contempt, though not so stated in the opinion, is a case where the contemner had been perpetually enjoined from setting up any claim or title to any of the bonds which were the subject-matter of the suit, and disobeyed such injunction by setting up claim of title to certain of the bonds mentioned in the decree. He was sentenced to a fine of \$250 and costs, and committed to the custody of the marshal of the Supreme Court until said fine and costs were paid.<sup>78</sup> The court stated that punishments for contempt of court have two aspects: (1) to vindicate the dignity of the court from disrespect shown to its orders; and (2) to compel the performance of some order or decree of the court which it is in the power of the party to perform and which he refuses to obey.<sup>79</sup>

A proceeding to punish an attorney for contempt in filing conveyances of property from his client to himself pending a suit to set aside as fraudulent to judgment creditors, conveyances of the same property to other persons is civil in its nature, even though the acts of the attorney might take the characteristics of both a civil and a criminal contempt.<sup>80</sup> The prayer of the petition for relief declaring that its purpose was to secure restoration of the directed property in order to carry out the decree in the principal suit is determinative.

One of the latest cases to discuss the difference between criminal and civil contempt is *Nye v. United States*.<sup>81</sup> It was there stated that the contempt is civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public. For purposes of review, where a fine is imposed on a person adjudged guilty of contempt, partly as compensation to the complainant and partly as punishment, the criminal feature of the order is dominant and fixes its character.<sup>82</sup> It is not controlling that in the district court the contempt proceedings were entitled in a wrongful death action, and that the United States was not a party until the appeal.<sup>83</sup> The prayer for relief and the acts charged may indicate the criminal character.<sup>84</sup> The fact that the contemner is not a party to a principal civil action points to the criminal character.<sup>85</sup>

<sup>78</sup> *In re Chiles*, (1875) 22 Wall. (U. S.) 157, 169, 22 L. Ed. 819, 823.

<sup>79</sup> *In re Chiles*, (1875) 22 Wall. (U. S.) 157, 168, 22 L. Ed. 819, 823.

<sup>80</sup> *Lamb v. Cramer*, (1932) 285, U. S. 317, 220, 52 S. Ct. 315, 76 L. Ed. 715, 719.

<sup>81</sup> *Nye v. United States*, (1941) 61 Sup. Ct. 810. The court cited *McCrone v. United States*, (1939) 307 U. S. 61, 64, 59, S. Ct. 685, 686, 83 L. Ed. 1108.

<sup>82</sup> The court cited *Union Tool Co. v. Wilson*, (1922) 259 U. S. 107, 110, 42 S. Ct. 427, 428, 66 L. Ed. 848.

<sup>83</sup> The court cited *Gompers v. Bucks Stove and Range Co.*, (1911) 221 U. S. 418, 445, 31 S. Ct. 492, 499, 500, 55 L. Ed. 797, 34 L. R. A. (n. s.) 874.

<sup>84</sup> The court cited *Gompers v. Bucks Stove and Range Co.*, (1911) 221 U. S. 418, 449, 31 S. Ct. 492, 501, 55 L. Ed. 797, 34 L. R. A. (n. s.) 874.

<sup>85</sup> The court cited *Bessette v. W. B. Conkey Co.*, (1904) 194 U. S. 324, 329, 24 S. Ct. 665, 667, 48 L. Ed. 997.

*The Act of 1831*

The Act of 1789 did not define contempts nor prescribe any procedure. Mr. Justice Harlan states:

"The Act of 1789 did not define what were contempts of the authority of the courts of the United States, in any case or hearing before them, nor did it prescribe any special procedure for determining a matter of contempt. Under that statute the question whether particular acts constituted a contempt, as well as the mode of proceeding against the offender, was left to be determined according to such established rules and principles of the common law as were applicable to such situation."<sup>86</sup>

Section 268 of the Judicial Code, 28 U. S. C. A., section 385 provides:

"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 cases except for 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 any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

This section was enacted into law in 1831.<sup>87</sup> The Act of 1789<sup>88</sup> provided that courts of the United States

"shall have power . . . to punish by fine or imprisonment . . . all contempts of authority in any cause or hearing before the same."

Abuses of this undefined power to punish for contempt resulted in the House of Representatives instructing its Judiciary Committee

"to inquire into the expediency of defining, by statute, all offenses which may be punishable as contempts of the courts of the United States, and also to limit the punishment of the same."<sup>89</sup>

The upshot was the Act of 1831, of which Section 1, the present 28 U. S. C. A., sec. 385, restricted the powers of summary punishment for contempts of court to cases of

"misbehavior of any person or persons in the presence of said courts, or so near thereto as to obstruct the administration of justice."

Section 2 of the 1831 act, from which 18 U. S. C. A. sec 241 or Section 135 of the Criminal Code derives, provided that any person attempting by threats, force, or corruption, to obstruct the due

<sup>86</sup> *Ex parte Savin*, (1889) 131 U. S. 267, 275, 33 L. Ed. 150, 152.

<sup>87</sup> 4 Stat. 487 (1831). For the history of the act see Frankfurter and Landis, "Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Power (1924)." 37 *Harv. L. Rev.* 1010, 1024.

<sup>88</sup> Section 17 of the Act of 1789, 1 Stat. 73, 83. It was held that Section 17 enacted "a limitation upon the manner in which the power shall be exercised and must be held to be a negation of all other modes of punishment." *Ex parte Robinson* (1873) 19 Wall. (U. S.) 505, 512.

<sup>89</sup> 7 Cong. Deb. 560 (1831). See also House Journal, 21st Cong. 2d Sess. (1831) 245. The courts themselves recognized the possibility of abuse under the undefined power. *Ex parte Kearney*, (1822) 7 Wheat. (U. S.) 38, 45; *Craig v. Hecht*, (1923) 263 U. S. 255, 279; *Ex parte Wall*. (1882) 107 U. S. 265, 302.

administration of justice "shall be liable to prosecution therefor, by indictment." The Supreme Court has indicated that although an act punishable under section 2 could also be a contempt if committed in the presence of the court, the primary purpose of section 2 was to create a separate category of offenses involving trial by jury.<sup>90</sup>

The Supreme Court first interpreted the Act of 1831 in 1874. Referring to the lower federal courts it said

"... the power of these courts in the punishment of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes."<sup>91</sup>

In 1889 the Court upheld a conviction for contempt for attempts to bribe a witness in the hallway of the courtroom.<sup>92</sup> The court overruled the view of a lower court case<sup>93</sup> that section 2 of the statute was meant to apply to acts no longer summarily punishable as contempts, and substituted the construction of section 2 as an alternative procedure if the behavior was in the "presence" of the court.

It was not until 1918 that the Court found that 28 U. S. C. A., sec. 385 "conferred no power not already granted and enforced no limitations not already existing."<sup>94</sup> The Court upheld the district court in holding in contempt a newspaper editor who had printed editorials containing misleading remarks and cartoons injurious to the dignity of the court. This result was arrived at by interpreting the phrase "so near thereto" in a causal relation sense rather than as a matter of geographical nearness. By this doctrine the federal criminal contempt power was held not limited to those acts occurring in the vicinity of the court, but to extend to acts which have a "reasonable tendency" to "obstruct the administration of justice."

In the latest case, through one coming up from the state courts, the Supreme Court by a five to four decision reversed judgments of

<sup>90</sup> *Nye v. United States*, (1941) 313 U. S. 33. A writer has suggested the following explanation for the adoption of section 2: (1) to provide an alternative method for the trial of some of the more serious acts of contempt to save the courts having to sit in judgment of their own cases and permitting them to shift the burden to a jury; (2) to provide proceedings for acts formerly punishable summarily by contempt, but now freed from such punishment under section 1 of the Act. Thomas, *Problems of Contempt of Court*, (1934) 56. Compare Nelles and King, "Contempt by Publication in the United States," (1928) 28 *Columb. L. Rev.* 525, 530.

<sup>91</sup> *Ex parte Robinson*, (1874) 86 U. S. 505. This case also upholds the power of Congress to regulate the lower federal courts in the punishment of contempts.

<sup>92</sup> *Savin, Petitioner*, (1889) 131 U. S. 267, 33 L. Ed. 150, 9 Sup. Ct. 699. Accord: *Cuddy, Petitioner*, (1889) 131 U. S. 280; 9 Sup. Ct. 703.

<sup>93</sup> *Ex parte Poulson*, (C. C. E. D. Pa. 1835) 19 Fed. Cas. 1205, No. 11, 350.

<sup>94</sup> *Toledo Newspaper Co. v. United States*, (1918) 247 U. S. 402. Only five justices concurred in this opinion. Two justices took no part and two—Holmes and Brandeis—dissented.

The case is criticized in Frankfurter and Landis, (1924) 37 *Harv. L. Rev.* 1010, 1029-1037; Nelles and King, "Contempt by Publication in the United States," (1928) 28 *Columb. L. Rev.* 525, 540.



conviction for contempt of state courts based upon publications in newspapers of comments relating to pending litigation.<sup>95</sup> The court applied to publications not the "reasonable tendency test" but "clear and present danger" test:

"that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."<sup>96</sup>

The First Amendment, applicable to the state through the Fourteenth Amendment, was intended to give to liberty of the press "the broadest scope that could be countenanced in an orderly society." The court stated by Mr. Justice Black that in deciding whether the contempt power in publication cases was forbidden by the "sweeping constitutional mandate" against any law abridging the freedom of the press the Court was "necessarily measuring a power of all American courts, both state and federal," including the Supreme Court itself. The court expressly declined to pass on the situation if there were a statute increasing the power of the court to punish for contempt in cases of constructive contempt. The whole court agrees that contempt by publication may still exist after their decision. The whole court agrees that there can be no contempt where the publication occurs after the final decision of the case.

A letter written by an attorney to a federal district judge condemning the judge in a pending case was held not a contempt committed "in open court."<sup>97</sup> It therefore could not be punished summarily. The court agreed with an earlier case that the statutory phrase "in open court" was narrower in meaning than the phrase "in the presence of the court."<sup>98</sup> Summary punishment might not be possible as to the latter in some cases.

The latest significant case interpreting this section is *Nye v. United States* decided in 1941. This case directly overrules the "reasonable tendency" doctrine laid down in *Toledo Newspaper Company v. United States*.<sup>99</sup> It limits a good deal the summary contempt power invoked by federal judges in applying that doc-

<sup>95</sup> *Bridges v. State of California*, (1941) 62 Sup. Ct. 190. The question was left undecided in *Patterson v. Colorado*, (1907) 247 U. S. 402, 38 Sup. Ct. 560. For discussion see Hansen, "The Supreme Court on Freedom of the Press and Contempt by Publication," (1942) 27 *Corn. L. Q.* 165; Radin, *Freedom of Speech and Contempt of Court*, (1942) 36 *Ill. L. Rev.* 599; 15 *So. Calif. L. Rev.* 367; 26 *Minn. L. Rev.* 552.

<sup>96</sup> 62 Sup. Ct. 190, 194.

<sup>97</sup> *Cooke v. United States*, (1925) 267 U. S. 517, 69 L. Ed. 767.

<sup>98</sup> *Re Savin*, (1889) 131 U. S. 267, 33 L. Ed. 150, 9 Sup. Ct. 699.

<sup>99</sup> *Nye v. United States*, (1941) 61 Sup. Ct. 810, Hughes, C. J., Stone and Roberts, J. J., dissenting, noted 54 *Harv. L. Rev.* 1397; 19 *N. C. L. Rev.* 219; 20 *N. C. L. Rev.* 89; 1 *Bill of Rights Rev.* 303, 312; 21 *Boston U. L. Rev.* 546; 16 *Temple L. Q.* 94; 90 *U. Pa. L. Rev.* 104; 27 *Va. L. Rev.* 665, 1093; 26 *Wash. U. L. Q.* 566.

However even after this case there may be contempt though no physical disturbance is involved. (1941) 54 *Harv. L. Rev.* 1397, 1398; Savin, Petitioner (1889) 131 U. S. 267 (witness approached in witness room and hallway); Cuddy, Petitioner, (1889) 131 U. S. 280 (juror approached); *Sinclair v. United States* (1929) 279 U. S. 749 (juror shadowed near court room).

trine. The facts of *Nye v. United States* were as follows: The defendant attempted through the use of alcohol and persuasion to induce one Elmore, a person illiterate and enfeebled in mind and body, to terminate a suit brought by him for the death of his son. Such misconduct occurred more than one hundred miles from the location of the district court. On motion of the attorney for Elmore, the court issued a show cause order to the defendants, who, after a hearing were adjudged guilty of contempt for "misbehavior so near to the presence of the court as to obstruct justice." The Supreme Court reversed on the ground that the district court did not have the power to punish defendants for contempt because of this behavior, since the place of misconduct on hundred miles away was not so near the court as to obstruct the administration of justice. It refused to interpret the phrase "so near thereto" in a causal relation sense. It gave a literal meaning to the phrase by reading it in relation to the word "presence" and by demanding physical proximity to the court.

Seemingly the statute does not limit the use of the contempt power to cases of actual physical disturbance. The Court cited with approval an earlier case<sup>100</sup> holding that the contempt power was available to punish for any misbehavior whether there was any physical disturbance or not if committed "in" or "near" the "presence" of the court. The dissent criticized this position by questioning any difference between secret bribery of a witness in the court room and the same bribery one hundred miles away.

The result of this decision is that the federal courts may not punish summarily by contempt proceedings for defamatory publication. Summary jurisdiction for this purpose has been the chief bone of contention in the entire law of criminal contempt since it is at this point that the personality of the individual judge is most likely to become involved.<sup>101</sup> Hereafter it will be necessary to prosecute for defamatory publication by indictment under Section 135 of the Criminal Code, 18 U. S. C. A. sec. 241. Thus this right of free speech is safeguarded. However, the majority opinion goes beyond this and prohibits summary punishment in other cases where no such danger of personal bias is present. Whether that be desirable as a matter of policy or not the Court stated that it "gave full respect to the meaning which Congress unmistakably intended the statute to have." If the contempt power is to be expanded, it is a matter for Congress to deal with.

The early contempt cases were centered around the problem of publication as contempt. In recent years the bone of contention

<sup>100</sup> *Savin, Petitioner*, (1889) 131 U. S. 267, (attempt to bribe a witness in the hallway of the courtroom).

<sup>101</sup> *Nelles and King, "Contempt by Publication in the United States,"* (1928) 28 *Columb. L. Rev.* 401, continued at 525; (1941) 36 *Ill. L. Rev.* 471, 474; Goodhart, "Newspapers and Contempt of Court in English Law," (1935) 48 *Harv. L. Rev.* 885. See also Sullivan, *Contempts by Publication*, (1940).

has been the use of contempt procedure to enforce injunctions, particularly labor injunctions. The primary objective of law reformers has been to secure the right of trial by jury.

In 1890 Congress passed an act allowing federal officials to go into the federal courts to obtain injunctions restraining the commission of conspiracies which threaten to obstruct interstate commerce.<sup>102</sup> In 1894 suit was filed to restrain the unlawful acts of certain strikers and labor leaders. The restraining order was violated and Debs was adjudged guilty of contempt and given a jail term of three to six months.<sup>103</sup>

The Clayton Act of 1914 provided in the special class of criminal contempts "within the purview" of that Act that the trial of such contempts

"may be by the court, or upon the demand of the accused by a jury . . . and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information."<sup>104</sup>

But the act specifically leaves for summary treatment those cases which "involve the characteristics upon which the power to punish for contempt must rest," namely obstructions

"to the performance of judicial duty resulting from an act done in the presence of the court."<sup>105</sup>

The special class of cases under the Clayton Act for which the procedure of jury trial is permitted, is confined to acts which

"constitute also a criminal offense under any statute of the United States, or under the laws of any state in which the act was committed."<sup>106</sup>

The jury trial provision is constitutional. However the court pointed out in connection with the Act:

"It is of narrow scope, dealing with a single class where the act or thing constituting the contempt is also a crime in the ordinary sense."<sup>107</sup>

The Norris-LaGuardia Act provides for the right of trial by jury except as to direct contempts in the labor cases within its scope.<sup>108</sup> This is more limited in scope than Senator Norris' original bill which would have allowed trial by jury in all cases of indirect contempts.<sup>109</sup> The Act also provides for the retirement and substitution of the judge sitting in the proceeding if the contempt con-

<sup>102</sup> 15 U. S. C. A. sec. 4.

<sup>103</sup> *In re Debs*, (1895) 158 U. S. 564, 39 L. Ed. 1092. See W. D. Lewis, "A Protest Against Administering Criminal Law by Injunction," (1894) 33 *Am. L. Reg.* (n. s.) 879; C. N. Gregory, "Government by Injunction," (1898) 11 *Harv. L. Rev.* 487; W. H. Dunbar, "Government by Injunction," (1897) 13 *L. Q. Rev.* 347.

<sup>104</sup> Sec. 22, par. 2; 38 Stat. 730, 739, 2i U. S. C. A., sec. 387.

<sup>105</sup> *Ex parte Hudgings*, (1919) 249 U. S. 378, 383.

<sup>106</sup> Sec. 21; 38 Stat. 730, 738; 28 U. S. C. A. sec. 386. See discussion by Frankfurter and Landis, "Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers," (1924) 37 *Harv. L. Rev.* 1010, 1038-1042.

<sup>107</sup> *Michaelson v. United States*, (1924) 266 U. S. 42, 66, 69 L. Ed. 162, 45 S. Ct. 18.

<sup>108</sup> 29 U. S. C. A., sec. 111. Possibly this includes both criminal and civil contempts. See Orfield, "The Norris-LaGuardia Act," (Bar Proc. 1939) 18 *Neb. L. Bull.* 153, 157.

<sup>109</sup> C. H. Thomas, *Problems of Contempt of Court*, (1934) 45.

sists of an attack upon his character or conduct.<sup>110</sup> Possibly this section is applicable in non-labor cases also.<sup>111</sup>

A federal statute<sup>112</sup> provides that anyone who is an American citizen or domiciled therein may, though outside the United States, be subpoenaed as a witness at the trial of a criminal action when desired by the Attorney General. There is a provision for personal service by an American consul with tender of traveling expenses. On failure to appear, an order to show cause why the recalcitrant should not be punished for contempt may be issued, and his property in the United States seized to satisfy the fine assessed. On being found guilty of contempt under this statute and his property to the extent of \$100,000 being seized, petitioner, a citizen of the United States domiciled in France appealed. The Supreme Court affirmed. It was held that there was no violation of the Fifth Amendment. There was due process since there was appropriate notice and an opportunity to be heard. Apparently a contempt of this particular kind may occur without the borders of the United States.<sup>113</sup> Judgment may be rendered though the accused never comes to the United States and in his absence since adequate notice is given. The court stated that

"contempt proceedings are *sui generis* and not 'criminal prosecutions' within the meaning of the Sixth Amendment or of common understanding."

The court stated that the petitioner could not properly raise the question that failing to make subpoenas available to the accused as well as to the government was a denial of "compulsory process for obtaining witnesses in his favor" under the Sixth Amendment.<sup>114</sup> The witness has no concern with the rights of the parties to the case in which he is subpoenaed.

#### *Procedure in Constructive Contempt*

The venue of a prosecution for contempt under the Clayton Act is not governed by the provisions of the Judicial Code relating to venue of civil and criminal cases. Contempt for violation of an order of court may be punished in the division of the district in which the order was passed, although disobedience occurs in another division.<sup>115</sup> Possibly this case simply controls the situation

<sup>110</sup> 29 U. S. C. A., sec. 112. This embodies the hope of Taft, C. J. in *Cook v. United States*, (1925) 267 U. S. 517, 69 L. Ed. 767.

<sup>111</sup> (1932) 30 Mich. L. Rev. 1257, 1264.

<sup>112</sup> 28 U. S. C. A., sections 711-718; 44 Stat. 835 (1926).

<sup>113</sup> *Blackmer v. United States*, (1932) 284 U. S. 421, 52 Sup. Ct. 252, 76 L. Ed. 375, noted 9 *Boston U. L. Rev.* 143; 27 *Columb. L. Rev.* 204; 32 *Columb. L. Rev.* 747; 17 *Corn. L. Q.* 117; 1 *Geo. Wash. L. Rev.* 132, 41 *Harv. L. Rev.* 1067; 43 *Harv. L. Rev.* 121; 2 *Idaho L. J.* 211; 30 *Mich. L. Rev.* 137, 968; 17 *St. Louis L. Rev.* 85; 6 *So. Calif. L. Rev.* 60; 65 *U. S. L. Rev.* 639; 40 *Yale L. J.* 1325.

<sup>114</sup> See (1928) 26 *Mich. L. Rev.* 441. Criminal offenses by American citizens abroad have been punished. *United States v. Bowman*, (1922) 260 U. S. 94, 43 Sup. Ct. 39 (conspiracy in Rio De Janiero, Brazil to defraud a corporation of the United States was the sole stockholder) see (1927) 27 *Columb. L. Rev.* 204, 210; 30 *Mich. L. Rev.* 137, 141; 30 *Mich. L. Rev.* 968.

<sup>115</sup> *Myers v. United States*, (1924) 264 U. S. 95, 68 L. Ed. 577, 44 Sup. Ct.

where the contempt takes the form of violation of an injunction, though this was not stated by the Court. Moreover the case does not say that contempts in different districts could be punished.<sup>116</sup>

It has been implied that criminal contempt of a court of equity should be punished by a proceeding in a court of law or on the law side of the court.<sup>117</sup> But another case seems to imply the doctrine that every court has jurisdiction to punish contempts of itself and that no court can punish contempt of another court.<sup>118</sup> The latter doctrine was applied even where the two courts were presided over by the same judge.

As to cases of disobedience mentioned in the Clayton Act, it is provided that the "trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information."<sup>119</sup>

A criminal contempt not committed in the presence of the court may be commenced by an information.<sup>120</sup> Under the Clayton Act a rule to show cause issues upon a showing that there is "reasonable ground to believe that any person has been guilty" of contempt within the act, and such showing may be "by the return of a proper officer on lawful process" or "upon affidavit of some credible person" or "by information filed by any district attorney."<sup>121</sup>

Where the contempt is not one calling for summary punishment, the proper practice is by a rule to show cause, containing enough to inform the accused of the nature of the contempt charged.<sup>122</sup> Attachment and arrest are not proper. There must be a charge against the accused. The accused must have an opportunity to present his defense by witnesses and argument. However, the exact form of the procedure is not important. The accused has the right to assistance of counsel, if he requests it. He has the right to offer

272. The Clayton Act was silent as to venue in contempt proceedings.

In *United States v. Goldman*, (1927) 277 U. S. 299, 72 L. Ed. 862, 48 Sup. Ct. 486, 487 Mr. Justice Sanford cited the Myers case as holding that "a proceeding instituted by the United States for the punishment of a criminal contempt committed by a violation of an injunction is not a criminal prosecution within the provisions of the Sixth Amendment relating to venue in a jury trial."

<sup>116</sup> Compare Longsdorf and Nichols, *Cyclopedia of Federal Procedure*, (1929) vol. 7, sec. 3714.

<sup>117</sup> *Michaelson v. United States*, (1934) 266 U. S. 42, 64, 69 L. Ed. 162, 35 A. L. R. 451. That this is erroneous is asserted in Durfee, *Cases on Equity*, (1928) 159, note 14.

<sup>118</sup> *Ex parte Bradley*, (1869) 74 U. S. 364, 19 L. Ed. 214.

<sup>119</sup> 18 U. S. C. A., section 387.

<sup>120</sup> *United States v. Shipp*, (1906) 203 U. S. 563, 51 L. Ed. 319, 27 Sup. Ct. 165; *Toledo Newspaper Co. v. United States*, (1918) 247 U. S. 402, 62 L. Ed. 1186, 38 Sup. Ct. 560; *United States v. Goldman*, (1928) 277 U. S. 229, 72 L. Ed. 862, 48 Sup. Ct. 486. In *United States v. Shipp*, it was held that the court or judge is not a party to the proceeding.

An information was used in *Clark v. United States*, (1933) 289 U. S. 1, 9, 53 S. Ct. 465, 77 L. Ed. 993, 997 where the contempt was in the presence of the court, but only later discovered to be such.

<sup>121</sup> 28 U. S. C. A., section 387.

<sup>122</sup> *Cook v. United States*, (1925) 267 U. S. 517, 534, 69 L. Ed. 767, 773; *Re Savin*, (1889) 131 U. S. 267, 33 L. Ed. 150, 9 Sup. Ct. Rep. 699.

evidence in mitigation of punishment. If possible, the substitution of another judge may be desirable, except where the accused deliberately shows by a personal attack to deserve the judgment.

When a contempt is not committed in open court the accused is entitled to a hearing and the assistance of counsel.<sup>123</sup> This is true where the alleged contempt was the delivery of a derogatory letter to a judge in his chambers.

The alleged contemner may enter a plea of not guilty.<sup>124</sup> He may move to dismiss on the ground that the information discloses on its face that the proceeding was barred by the statute of limitations. On a prosecution appeal the latter was treated as the equivalent of a special plea in bar.

It is within the discretion of the court in a contempt proceeding to refuse to hear evidence offered in mitigation, where such evidence consists of the testimony of a large number of witnesses, and the defendants have been afforded opportunity to state the facts which might excuse or mitigate their conduct.<sup>125</sup>

Apparently the evidence need not be taken in open court.<sup>126</sup> It may be taken before a commissioner or special examiner.<sup>127</sup> In one case<sup>128</sup> a special examiner was appointed with an understanding that at the trial the parties might also introduce additional testimony either oral or documentary. The testimony taken by the examiner was lodged with the district judge and in accordance with a *nunc pro tunc* order, indorsed as "filed with the court pending trial in open court."

Even though improper evidence be admitted in a proceeding before a judge to punish for contempt, this does not necessarily constitute ground for reversal on appeal, since the appellate court will merely reject it, and proceed to decide the case as if it was not in the record.<sup>129</sup>

An early case held that an accused has the right to purge himself under oath of the contempt as to contempts not committed directly "under the eye or within the view of the court."<sup>130</sup> The court is not bound however to require service of interrogatories upon the accused so that in answering them he might purge himself

<sup>123</sup> *Cook v. United States*, (1925) 267 U. S. 517, 45 S. Ct. 390, 69 L. Ed. 767. See (1935) 14 Neb. L. Bull. 182.

<sup>124</sup> *United States v. Goldman*, (1928) 277 U. S. 229, 72 L. Ed. 862, 48 Sup. Ct. 486.

<sup>125</sup> *Sinclair v. United States*, (1929) 279 U. S. 749, 766, 73 L. Ed. 938, 946. The court said that *Cook v. United States*, 267 U. S. 517, 537, 538, 69 L. Ed. 767, 774, 775, 45 Sup. Ct. 390, was not intended to limit such discretion.

<sup>126</sup> *United States v. Goldman*, (1928) 277 U. S. 229, 72 L. Ed. 862, 48 Sup. Ct. 486.

<sup>127</sup> *United States v. Shipp*, (1906) 203 U. S. 563, 51 L. Ed. 319, 27 Sup. Ct. 165; *United States v. Shipp*, (1909) 214 U. S. 386, 53 L. Ed. 1041, 29 Sup. Ct. 637.

<sup>128</sup> *United States v. Goldman*, (1928) 277 U. S. 229, 72 L. Ed. 862, 48 Sup. Ct. 486.

<sup>129</sup> *Sinclair v. United States*, (1929) 279 U. S. 749, 767, 73 L. Ed. 938, 947.

<sup>130</sup> *Ex parte Savin*, (1889) 131 U. S. 267, 278, 33 L. Ed. 150, 154.

of the contempt charged. It may in its discretion adopt such mode of determining that question as it deems proper, provided due regard is had to the rules obtaining in trials of matters of contempt.

Back in 1906 in an opinion by Mr. Justice Holmes the Supreme Court greatly limited the power of purging contempt by sworn denials. It was held that sworn answers denying any participation in the alleged murder of a prisoner under sentence of death in a state court, pending his appeal to the Supreme Court from an order of a circuit court denying relief by habeas corpus, were not sufficient to purge the affiants of a charge of contempt of the Supreme Court by taking part in such murder after the appeal had been allowed and a stay of proceedings ordered. Mr. Justice Holmes stated:

"On this occasion we shall not go into the history of the notice. It may be that it was an intrusion or perversion of the canon law, as is suggested by the propounding of interrogatories and the very phrase, 'purgation by oath' (*juramentum purgatorium*). If so, it is a fragment of a system of proof which does not prevail in theory or as a whole; and the reason why it has not disappeared perhaps may be found in the rarity with which contempts occur. It may be that even now, if the sole question were the intent of an ambiguous act, the proposition would apply."<sup>131</sup>

In 1933 in an opinion by Cardozo, J., it was finally ruled that the oath of a contemner is no longer a bar to a prosecution for contempt.<sup>132</sup> The court stated:

"Little was left of that defense after the decision of this court in *United States v. Shipp*, 203 U. S. 563, 574, 51 L. Ed. 319, 324, 27 S. Ct. 165, 8 Ann. Cas. 265. Since then there has been no purgation by oath where an overt act of defiance is the gist of the offense. The point was reserved whether sworn disavowal would retain its ancient force (if the sole question were the intent of an ambiguous act).

"The time has come, we think, to renounce the doctrine altogether and stamp out its dying embers. It has ceased to be a defense in England since 1796."

It is improper to impose a general sentence for separate acts of contempt alleged and found against the defendant.<sup>133</sup> The punishment for different offenses should be so separated that the appellate court can analyze the evidence and determine which, if any, of the charges are sustained.

<sup>131</sup> *United States v. Shipp*, (1906) 203 U. S. 563, 574, 51 L. Ed. 319, 324.

See the continuation of the case (1908) 214 U. S. 386, 53 L. Ed. 1041; (1909) 54 L. Ed. 1213; (1909) 54 L. Ed. 337. Three prisoners received ninety days, and three sixty days in the jail of the District of Columbia, (1909) 54 L. Ed. 337.

<sup>132</sup> *Clark v. United States*, (1933) 289 U. S. 1, 19, 53 S. Ct. 465, 77 L. Ed. 993, 1002. See (1913) 8 Ill. L. Rev. 210; note by Kenneth Sears, 21 Ill. B. J. 32 (June 1933); 24 Ill. L. Rev. 598; 31 Mich. L. Rev. 850; Curtis, "The Story of a Notion in the Law of Criminal Contempt," (1927) 41 Harv. L. Rev. 51; (1907) 9 L. R. A. (n. s.) 1119; (1929) L. R. A. 1917E, 654; Seymour D. Thompson, "Procedure in Cases of Criminal Contempts," (1884) 5 Crim. L. Mag. 483, 508; Ann. Cas. 1915D, at 1055; *Durfee, Cases on Equity*, (1928) 153, note 5.

<sup>133</sup> *Gompers v. Bucks Stove and Range Co.*, (1910) 221 U. S. 418, 55 L. Ed. 797, 31 Sup. Ct. 492.

The judgment should be entered of record in such a way as to meet attack by appeal or habeas corpus.<sup>134</sup> Even in the case of a summary commitment there should be a proper and sufficient record.<sup>135</sup>

### *Habeas Corpus*

It was early ruled that the Supreme Court would not itself grant a writ of habeas corpus where a party has been committed for contempt by a court of competent jurisdiction.<sup>136</sup> The court for such purpose thought a contempt similar to a crime. Mr. Justice Story stated that

"when a court commits a party for a contempt, their adjudication is a conviction, and their commitment, in consequence, is execution."<sup>137</sup>

Where a lower federal court undertakes to punish for contempt one refusing to obey an order which it had no strict jurisdiction to make, the Supreme Court may discharge the accused on a writ of habeas corpus.<sup>138</sup>

The Supreme Court exercised original jurisdiction in discharging on habeas corpus a petitioner who had been punished for contempt solely because the trial court thought he was committing perjury.<sup>139</sup> The Court regarded the case as so exceptional in character as to call for this remedy, but pointed out that in ordinary cases there should be resort to other available sources of judicial power.

### *Review*

At common law contempt cases were not reviewable.<sup>140</sup> In England findings of criminal contempt are not appealable.<sup>141</sup> The Supreme Court as recently as 1904 upheld their appealability under the Act of March 3, 1891.<sup>142</sup> Possibly the effort to use habeas corpus as a substitute for appeal ended only as recently as 1923.<sup>143</sup> Prior

<sup>134</sup> *Ex parte Savin*, (1889) 131 U. S. 267, 33 L. Ed. 150, 9 Sup. Ct. 699.

<sup>135</sup> *Ex parte Terry*, (1888) 128 U. S. 289, 32 L. Ed. 405, 406, 407, 9 Sup. Ct. 77; *Ex parte Cuddy*, (1889) 131 U. S. 280, 33 L. Ed. 154, 8 Sup. Ct. 703.

<sup>136</sup> *Ex parte Kearney*, (1822) 7 Wheat. (U.S.) 39, 5 L. Ed. 391.

<sup>137</sup> 7 Wheat 39, 43, 5 L. Ed. 391, 392.

<sup>138</sup> *In re Sawyer*, (1888) 124 U. S. 200, 31 L. Ed. 402, 8 Sup. Ct. 482; *Ex parte Fisk*, (1885) 113 U. S. 713, 718, 28 L. Ed. 1117, 1119, 5 S. Ct. 724, 726.

<sup>139</sup> *Ex parte Hudgings*, (1919) 249 U. S. 378, 63 L. Ed. 656. See note (1938) 16 N. C. L. Rev. 389, 390; Talbert, "Review of Contempt Proceedings by Habeas Corpus," (1912) 46 Am. L. Rev. 838; Mc Lomere, "Review of Contempt Proceedings by Habeas Corpus," (1912) 74 Cent. L. J. 152.

<sup>140</sup> *Bessette v. Conkey Co.*, (1904) 194 U. S. 324, 330, 24 Sup. Ct. 665, 48 L. Ed. 997, 1003.

<sup>141</sup> Nelles, "The Summary Power to Punish for Contempt," (1931) 31 *Columb. L. Rev.* 956, 958, note 6, citing Oswald, *Contempt of Court*, (3rd ed. 1911) 229; *Ex parte Yates*, (1809) 4 Johnson (N.Y.) 318, 369; *Case of Shaftsbury*, 1 Mod. 144.

<sup>142</sup> *Bessette v. Conkey Co.*, (1904) 194 U. S. 324, 24 Sup. Ct. 665. Review was by writ of error and not by appeal. Durfee, *Cases on Equity*, (1928) 157, note 11. Today, however, writ of error is abolished, and appeal takes its place. See note (1938) 16 N. C. L. Rev. 389, 391.

<sup>143</sup> *Craig v. Hecht*, (1923) 263, U. S. 255, 44 Sup. Ct. 103, Holmes and Brandeis, J. J. dissenting. There was a concurring opinion by Taft, C. J. while Sutherland, J., took no part.



to the Act of 1891 review in criminal cases was upon certificate of division of opinion.<sup>144</sup> And the Supreme Court had issued certiorari in aid of habeas corpus proceedings and applications for prohibition, by which the facts had been brought before the Court, and the Court had then passed on the merits of the decision in the lower court.<sup>145</sup> The reason for the limited review of criminal contempt was that they were of a criminal nature and no provision had been made for review of criminal cases. But since the Act of 1891 allowed review by writ of error in criminal cases it does so also in criminal contempt cases. The order in the criminal contempt case imposing punishment is final and should therefore be reviewed like a final decision in other criminal cases. The fact that trial of contempt is by the court does not affect the mode of review.

As to the scope of review only matters of law are considered. The decision of the trial tribunal on the facts is final.<sup>146</sup>

In one case the Court held that disobedience to process of equity in a civil action was contempt of a criminal nature, and distinct from the civil action in the course of which the attachment for contempt was issued.<sup>147</sup> Furthermore since the attachment was of a criminal character it could not be taken up to the Supreme Court on error but only on a certificate of difference of opinion between the judges, the early method of review in criminal cases. It has been asserted that the ordinary method of raising the question of the legality of the commitment in the Supreme Court is by a writ of habeas corpus.<sup>148</sup> The same writer suggests that in the case of "commitment for contempt in the case of civil proceedings where no separate process is issued, but the party offending is dealt with upon motion for a mere breach of an order of the court pending the progress of the suit, that the question cannot be taken directly up to the higher court, either by appeal or by writ of error. In such a case, if there be no ground for *habeas corpus*, the determination of the question of contempt by the higher court must await the final disposition of the principal suit."

That is to say it is asserted that where there is a contempt, whether civil or criminal arising during a civil proceeding there may be no review of the decision on the question of contempt until final disposition of the civil suit.

In 1880 Chief Justice Waite thus spoke of the reviewability of contempts:

"If the proceeding below, being for contempt, was independent of and separate from the original suit, it cannot be re-examined here either by writ of

<sup>144</sup> *New Orleans v. New York Mail S. S. Co.*, (1874) 20 Wall (U. S.) 387, 22 L. Ed. 354.

<sup>145</sup> *Bessette v. Conkey Co.*, (1904) 194 U. S. 324, 334, 24 Sup. Ct. 665, 48 L. Ed. 997, 1004. See (1938) 16 N. C. L. Rev. 389, 390.

<sup>146</sup> *Bessette v. Conkey Co.*, (1904) 194 U. S. 324, 338, 24 Sup. Ct. 665, 48 L. Ed. 997, 1006.

<sup>147</sup> *New Orleans v. Steamship Co.*, (1874) 20 Wall. (U. S.) 387, 22 L. Ed. 354.

<sup>148</sup> Beale, "Contempt of Court, Criminal and Civil," (1908) 21 *Harv. L. Rev.* 161, 168, citing *Ex parte Terry*, (1888) 128 U. S. 289, 32 L. Ed. 405, 9 Sup. Ct. 77.

error or appeal. This was decided more than fifty years ago in *Ex parte Kearney*, 7 Wheat., 38, and the rule then established was followed as late as *New Orleans v. Steamship Co.*, 20 Wall. 387 (87 U. S., xxii, 354).<sup>149</sup>

Mr. Justice Brandeis thus stated the rule as to method of review:

"Where a fine is imposed, partly as compensation to the complainant and partly as punishment, the criminal feature of the order is dominant and fixes its character for purposes of review."<sup>150</sup>

He also stated that an order punishing one criminally for contempt, is a final judgment.<sup>151</sup>

On appeal findings of fact supported by any competent and substantial evidence will not be disturbed. In a case where defendants, concluded that there was no evidence that newspaper articles presenting the basis for the prosecution tended to obstruct the administration of justice, the Supreme Court said that it would not consider the weight of the evidence, but simply whether the evidentiary facts found by the court below had any reasonable tendency to sustain general conclusions of fact based thereon.<sup>152</sup>

On appeal the facts were reviewed in one case to this extent: The Supreme Court held an adjudication of contempt improper where there was no material evidence to connect the alleged contemner with the act charged, and he denied any connection, although there were circumstances affording reasonable ground for suspecting his participation.<sup>153</sup>

In civil contempt proceedings on appeal the whole record may be examined. In criminal contempt proceedings the evidence as to disobedience of injunction cannot be examined if there be no bill of exceptions.<sup>154</sup> The character and purpose of the punishment determines whether the contempt is criminal or civil. Civil contempt is remedial and for the benefit of the complainant. Criminal contempt is punitive and to vindicate the authority of the court.

In criminal contempt the proceedings are not a part of the main cause, whereas in civil contempt they are. In criminal contempt the petition is properly entitled "*United States v. Accused*" or "*In re Accused*." Such title enables the accused to know that it is a charge and not a suit. Civil contempt proceedings are entitled as in the principal suit.

<sup>149</sup> *Hayes v. Fischer*, (1880) 102 U. S. 121, 26 L. Ed. 95, 96.

<sup>150</sup> *Union Tool Co. v. Wilson*, (1922) 259 U. S. 107, 110, 66 L. Ed. 848, 24 Sup. Ct. 427, 428. He cited *In re Merchants' Stock Co.*, Petitioner, (1912) 223 U. S. 639, 32 Sup. Ct. 339, 56 L. Ed. 584. See (1938) 16 N. C. L. Rev. 389, 394.

<sup>151</sup> *Union Tool Co. v. Wilson*, (1922) 259 U. S. 107, 111, 66 L. Ed. 848, 24 Sup. Ct. 427, 428. See (1938) 16 N. C. L. Rev. 389, 393.

<sup>152</sup> *Toledo Newspaper Co. v. United States*, (1918) 247 U. S. 402, 62 L. Ed. 1186, 38 Sup. Ct. 560.

<sup>153</sup> *Sinclair v. United States*, (1929) 279 U. S. 749, 73 L. Ed. 938.

<sup>154</sup> *Gompers v. Bucks Stove and R. Co.*, (1911) 221 U. S. 418, 55 L. Ed. 797. The court does not seem to accept the argument that on review of criminal contempt the scope of review is confined to the legal question of whether the alleged disobedience constitutes contempt.

An appeal from an order adjudging a person guilty of criminal contempt is governed by the statute requiring application for allowance of appeal to be made within three months after judgment and not by the Criminal Appeal Rules, since there was no plea of guilty, no verdict of guilt by a jury, and no finding of guilt by the court where a jury was waived pursuant to the rules.<sup>155</sup>

The pardoning power of the President under Article 2, section 2, clause 1, extends to fully completed criminal contempts of court.<sup>156</sup> The language "offenses against the United States" used in that provision is broad in its meaning, and does not include only crimes defined and punished by Act of Congress. It has a wider meaning than it has in Article I, section 8 covering "offenses against the law of nations," and as used in the double jeopardy provision of the Fifth Amendment. It covers more than "crimes" and criminal prosecutions.

<sup>155</sup> *Nye v. United States*, (1942) 61 Sup. Ct. 810. See (1938) 16 N. C. L. Rev. 389, 392, as to appeal where a jury trial is provided by statute as to certain contempts; it is asserted that there the Criminal Appeal Rules would apply.

<sup>156</sup> *Ex parte Grossman*, (1925) 267 U. S. 87, 69 L. Ed. 527, 45 S. Ct. 332, 38 A. L. R. 131 (liquor injunction). See also 23 A. L. R. 524; 21 Ill. L. Rev. 379; 38 Yale L. J. 819; 24 Ill. L. Rev. 483; 14 Iowa L. Rev. 447; 14 Corn. L. Q. 484; 13 Minn. L. Rev. 506; 9 Minn. L. Rev. 574. See discussion in Thomas, *Problems of Contempt of Court*, (1934) 75-96; *Attorney General's Survey of Release Procedures*, (1939) Vol. III, Pardon, p. 140.

#### FOR CIVIL SERVICE COMMISSIONS: EXAMPLE OF OBJECTIVE TEST

Following are "True-False" statements. They are samples of such as may be used in an "objective" examination. The candidate writes "T" or "F" before or after each statement according as he thinks it is true or false. With a key at hand any one who can read is competent to grade the papers. Good professional judgment is required only in making up the statements.

We invite correspondence with Civil Service Commissions on the subject of examinations especially. We will be glad to help them with their problems as far as possible.

- (1) A grand jury commonly refuses to admit or pay attention to hearsay evidence.
- (2) If an officer stops a speeding car and the driver locks the car door and refuses to accompany the officer, he may lawfully use force to open the door.
- (3) Intoxication is never a defense but always an excuse.
- (4) If mortal wound is inflicted in State A, and the party dies in State B, the slayer may be tried in either state.
- (5) In felonies there may be accessories while in misdemeanors all participants are principals.
- (6) Evidence of the bad character of the defendant is always admissible.
- (7) A car going 40 miles an hour produces approximately twice as much energy as the same car going 20 miles per hour.
- (8) The laws of evidence deal with admissibility of evidence, not weight.
- (9) In general crimes *mala in se* (morally wrong) are punishable whether or not there is a criminal intent.
- (10) Contributory negligence has no application in criminal cases.
- (11) Confession, to be admissible in court, must be signed, sworn to or witnessed.
- (12) It is illegal for a police officer to use force when arresting a woman.