

CRIMINAL CONTEMPT IN CHANCERY—The wide-spread interest elicited by certain proceedings in contempt in our court of chancery makes timely a consideration of the fundamental distinction between civil and criminal contempts and of the practise in such matters as developed by our decisions. Civil contempt has been defined as the refusal to do an act commanded and the remedy has been stated as imprisonment until the party performs the act.<sup>1</sup> It is a step in the original cause.<sup>2</sup> It relates solely to the freedom of the defendant and coerces obedience *inter partes* to the orders of the Chancellor. It is also prosecuted to preserve the power and vindicate the dignity of the Court.<sup>3</sup>

Criminal contempt lies in the doing of an act forbidden by the order of the Chancellor.<sup>4</sup> It is punished by fine or imprisonment for a definite term. Criminal contempt is more than *inter partes*; it is an offense against the Court<sup>5</sup> and must be separate from the originating cause.<sup>6</sup> The defendant inherits the substantial rights of the accused criminal<sup>7</sup> but he is also the unwilling legatee of that rule of our criminal law which allows an inference to be drawn from the failure of the accused to take the stand in his own defense.<sup>8</sup> The power to hold in contempt, either civil or criminal, is a necessary complement to the power to order and enjoin.<sup>9</sup>

<sup>1</sup> *Staley v. South Jersey Realty Co.*, 83 N.J.Eq. 300, 90 Atl. 1042 (E&A 1914). See also *Dorrian v. Davis*, 105 N.J.Eq. 147, 147 Atl. 338 (Ch. 1929), and the definition of Walker, C., in *In re Jenkinson*, 93 N.J.Eq. 545, 546, 118 Atl. 240 (Ch. 1922).

<sup>2</sup> *In re Merrill*, 88 N.J.Eq. 261, 102 Atl. 400 (Prer. Ct. 1917).

<sup>3</sup> *In re Cooley*, 95 N.J.Eq. 485, 125 Atl. 486 (Ch. 1924); *Orbey v. Wright*, 37 N.J.L.J. 50, 52 (C.P. 1914).

<sup>4</sup> "Criminal contempts are offenses against organized society and punishable as such in a proceeding at law, and while it may be administered by the court in which the contumacious conduct occurred, it is not a part of the prior litigation; that the proceeding instituted in the Court of Chancery for the purpose of having that court adjudge whether or not a defendant in the cause pending therein was guilty of a contumacious violation of an injunction issued by it, is a proceeding at law in a criminal contempt in which the defendant is entitled to all of the substantial rights of a person accused of crime that are consistent with the summary nature of the process of the tribunal in which it is administered, one of which rights is that the incriminating testimony shall be given by witnesses subject to cross examination and impeachment under the ordinary rules of evidence." *Dorrian v. Davis*, *supra*, note 1.

<sup>5</sup> *Garrigan v. United States*, 163 Fed. 16, 23 L.R.A. (N.S.) 1295 (1908), writ of certiorari denied in 214 U.S. 514, 53 L. ed. 1063, 29 Sup. Ct. Rep. 696 (1909). But see *Berger v. Superior Court for Sacramento County*, 175 Cal. 719, 167 Pac. 143, 15 A.L.R. 373 (1917).

<sup>6</sup> *Infra*, note 15.

<sup>7</sup> *Supra*, note 4.

<sup>8</sup> *Passaic-Athenia Bus Co., Inc. v. Consolidated Bus Co., Inc.*, 100 N.J.Eq. 188, 135 Atl. 282 (Ch. 1926).

<sup>9</sup> "The power to fine and imprison for contempt, from the earliest history of

Criminal contempts are of two kinds: (1) Direct and (2) Constructive or consequential.<sup>10</sup> Direct contempts are referred to as contempts in *facie curiae*, although they need not be committed before a judge presiding in open court.<sup>11</sup> Constructive contempts are acts done at a distance from the court, the result of which is to degrade the court or obstruct the administration of justice.<sup>12</sup>

There are two methods of procedure in criminal contempt in New Jersey. The ordinary method is *ex parte* by petition and affidavits and order to show cause.<sup>13</sup> The second is identical with the first but allows a writ of body attachment which issues to the sheriff.<sup>14</sup> Adjournments either of the return day or the trial day should be refused except for extraordinary reasons as not alone is the freedom of the individual endangered, but greater still, the dignity of the Court of Chancery has been besmirched.

Since criminal contempt is not remedial, it is not a step in the original cause and there can be no intermingling of the proceeding in contempt with the original cause.<sup>15</sup>

The formal parts of the petition are the same in contempt as in other proceedings in which a petition is used.<sup>16</sup> The order usually provides for service of copies of the petition, affidavit and order upon the respondent within — days, either personally or by leaving them at the usual place of abode. The latter alternative is at variance with the theory that the respondent has all the rights of a criminal defendant.<sup>17</sup> The question of amendment has not been definitely passed upon in this state. In *Passaic Athenia Bus Co. v. Consolidated Bus Co.*,<sup>18</sup>

jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record and co-existing with them by the wise provisions of the common law. A court, lacking the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments or decrees against the recalcitrant parties before it, would be a disgrace to the legislation and a stigma upon the age which invented it." *Watson v. Williams*, 36 Miss. 331, 341.

"Not only my brethren and myself, but likewise all the judges of England, think that without this power no court could possibly exist; nay that no contempt could, indeed, be committed against us, we should be so truly contemptible. The law upon this subject is of immemorial antiquity and there is not any period when it can be said to have ceased or discontinued." *McKean, C. J.*, in *Respublica v. Oswald*, 1 Dallas 343 (Pa. 1788).

<sup>10</sup> 13 C. J. p. 5.

<sup>11</sup> *In re Jenkinson*, *supra*, note 1; *in re Merrill*, *supra*, note 2.

<sup>12</sup> *Supra*, note 10; *Staley v. South Jersey Realty Co.*, *supra*, note 1; *Dorrian v. Davis*, *supra*, note 1.

<sup>13</sup> Similar to order commitment nisi in old English practice. See note to *Evans v. Noton*, 1 Ch. 252, 62 L.J.Ch. 413 (1893); remarks of Mr. Justice Cozens-Hardy in *D v. A & Co.*, 69 L.J.Ch. 382 (1900).

<sup>14</sup> See Rules of Court of Chancery, No. 211, *et seq.*

<sup>15</sup> *Supra*, note 1.

<sup>16</sup> Phraseology similar to that used in indictments must be used in the charging paragraphs. *In re Staiger*, Docket 89-59 (Ch. 1932).

<sup>17</sup> See *Dorrian v. Davis*, *supra*, note 1.

<sup>18</sup> *Supra*, note 8. But see *Re Staiger*, *supra*, note 16, wherein amendment of petition was allowed.

after discussing the failure of the petitioner to make the cause separate instead of a mere proceeding in the suit for relief, the court refused to express an opinion on the question. It must be noted here that by the context the judicial doubt is limited to amendment of the title in the cause.

The hearing in criminal contempt in Chancery usually follows the same general procedure as trial of a defendant in a criminal action.<sup>19</sup> The facts contained in the affidavits must be elicited by testimony in open court.<sup>20</sup> The original pleadings in the injunctive cause must be placed in evidence. Service of a copy of the restraining order or injunction upon, or knowledge of, the respondent prior to the alleged contempt must be proved.<sup>21</sup> Labor legislation has made it possible for the respondent in contempt of an order relating to a labor dispute to request trial before a jury chosen from the panel of the Court of Common Pleas of the time of the alleged contempt.<sup>22</sup> The respondent in criminal contempt must be proved guilty beyond a reasonable doubt.<sup>23</sup> The rule is different in civil contempt, where no greater proof is required than was necessary to secure the injunction in the first instance.<sup>24</sup>

Historically appeal on the merits from an adjudication and punishment in criminal contempt was not allowable.<sup>25</sup> The Legislature in 1909 passed a statute which, recognizing the distinction between civil or remedial and punitive or criminal contempts, granted the right of appeal to one convicted of a constructive criminal contempt.<sup>26</sup> The

<sup>19</sup> It is not attempted herein to discuss situations wherein the respondent prefers to go to verdict on affidavits, or waives his right to procedure similar to that in criminal trials, or is absent at the hearing. See on these and kindred points, *Brown v. Brown*, 96 N.J.Eq. 428, 126 Atl. 36 (Ch. 1924); *Staley v. South Jersey Realty Co.*, *supra*, note 1; *In re Hayden*, 101 N.J.Eq. 361, 139 Atl. 328 (Ch. 1927); *Garrigan v. United States*, *supra*, note 5.

<sup>20</sup> *Dorrian v. Davis*, *supra*, note 1; *In re Hayden*, *supra*, note 19.

<sup>21</sup> A recent decision is *In re United Hatters*, 110 N.J.Eq. 42 (E&A 1932). That notice in, or knowledge of the respondent is sufficient alone, see *In re Singer*, 109 N.J.Eq. 103, 156 Atl. 427 (E&A 1931); *Re United Hatters*, *supra*. That a stranger to the order may be held in criminal contempt for violation of it, see *State ex rel. Thompson v. Laverty*, 31 Or. 77, 49 Pac. 582; *State ex rel. Lindsley v. Grady*, 195 Pac. 1049 (Wash.); *O'Brien v. People*, 216 Ill. 354, 75 N.E. 108; *Ex parte Lennon*, 166 U.S. 548, 17 Sup. Ct. Rep. 658, 41 L. ed. 1110; *Tosh v. West Kentucky Coal Co.*, 252 Fed. 44; *In re Singer*, *supra*. But see *Berger v. Superior Court*, etc., *supra*, note 5. On the question of newspaper or other publication of the order or injunction as notice to the alleged contemnors, see *Garrigan v. United States*, *supra*, note 5; *State ex rel. Lindsley v. Grady*, *supra*, and dissent in *Lewes v. Morgan*, 5 Price 518, 146 Eng. Rep. 681 19 Rev. Rep. 566 (1818).

<sup>22</sup> P.L. 1925, p. 418.

<sup>23</sup> *In re Ries*, 101 N.J.Eq. 315, 341, 138 Atl. 586 (Ch. 1927); *Barnet Foundry Co. v. Crowe*, 80 N.J.Eq. 109, 74 Atl. 964 (Ch. 1909).

<sup>24</sup> *Hilton v. Hilton*, 89 N.J.Eq. 417, 105 Atl. 65 (Ch. 1918).

<sup>25</sup> See *Staley v. South Jersey Realty Co.*, *supra*, note 1. *Dood v. Una*, 40 N.J.Eq. 672, 713, 5 Atl. 155 (E&A 1885).

<sup>26</sup> P.L. 1909, p. 270.

filing of an appeal may suspend the punishment.<sup>27</sup> The statute has been held constitutional.<sup>28</sup>

The early case of *Magennis v. Parkhurst*<sup>29</sup> held that costs in contempt are not usually allowed, since the action is in its nature criminal. The allowance of costs in a criminal contempt case later became a settled doctrine in the Court of Chancery, and in *O'Rourke v. Cleveland*<sup>30</sup> this doctrine was affirmed by the Court of Errors and Appeals. Similarly, counsel fees were awarded to neither party, even though successful, in criminal contempt proceedings. In *O'Rourke v. Cleveland*,<sup>31</sup> it was stated that the power to award counsel fees was purely statutory and, in the absence of a statute, the court declined to impose a counsel fee upon the party held guilty of contempt. In 1910, Section 91 of an act concerning the Court of Chancery was amended so that by construction counsel fees may be awarded.<sup>32</sup> In *Hilton v. Hilton*,<sup>33</sup> Lane, V.C., in an opinion which reviews the authorities, granted counsel fees against the adjudged contemnor.

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VALIDITY OF COVENANTS BY VENDORS AND EMPLOYEES IN RESTRAINT OF COMPETITION—Covenants in restraint of competition naturally divide themselves into two general types: (1) those entered into by a vendor of a business with his vendee, whereby the former agrees not to engage in a similar line of business within a certain area for a specified time; and (2) those entered into by an employee as part of his original contract of employment, agreeing that he will not, after the termination of his employment with his covenantor, work or engage in a similar business for a certain period of time within a prescribed area. Different economic and social considerations applicable to the two classes would seem to dictate the application of different tests to determine the validity of covenants of each class. The New Jersey courts have not, however, recognized any basis for differentiation, although substantial justice seems to have been reached in almost every case.

The attitude of the courts toward the validity of covenants in restraint of competition has undergone a broadening development roughly

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<sup>27</sup> *Bijur Motor etc. Co. v. International Association of Machinists*, 92 N.J. Eq. 183, 111 Atl. 642 (Ch. 1921).

<sup>28</sup> *Bijur Motor etc. Co. v. International Association of Machinists*, 92 N.J. Eq. 644, 114 Atl. 802 (E&A 1921); *Staley v. South Jersey Realty Co.*, *supra*, note 1.

<sup>29</sup> 4 N.J. Eq. 433 (Ch. 1844).

<sup>30</sup> 49 N.J. Eq. 577, 25 Atl. 367, 31 AM. ST. REP. 719 (E&A 1892).

<sup>31</sup> *Supra*, note 29.

<sup>32</sup> The section was amended to read: "In any cause, matter or proceeding in the Court of Chancery the Chancellor may make such allowance by way of counsel fee to the party or parties obtaining the order or decree as shall seem to him to be reasonable and proper and shall direct which of the parties shall pay such allowances."

<sup>33</sup> 89 N.J. Eq. 422, 105 Atl. 65 (Ch. 1918). See also *Re United Hatters*, *supra*, note 21.