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Contempt Proceedings in Wisconsin

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CONTEMPT PROCEEDINGS IN WISCONSIN

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EVERY court of record shall have power to punish as for a criminal contempt.[1]

Chapter 256 by its title relates to, "General provisions concerning courts of record, judges, attorneys and clerks."

The Civil Court of Milwaukee County is a court of record.[2]

Sec. 15 (6) of the Civil Court Act reads: "Said Civil Court and the judges thereof shall have the power to punish for contempt prescribed in Chapter 150 of the Statutes, and all proceedings for contempt shall be governed by the provisions of said chapter."

Chapter 150 of the statutes is now numbered 295 relating to contempts in civil actions.

Therefore, while Chapter 256 concerns all courts of record and contains sections 256.03 to 256.07 relating to criminal contempts, and the Civil Court of Milwaukee County is a court of record, the provisions of the act relating to contempt limit the power of the court and its judges in contempt matters to Chapter 150 (now Chapter 295) of the statutes and do not give jurisdiction as to so-called criminal contempts, provided for in Chapter 256, although said chapter applies to all courts of record, especially so, Section 256.03.

In brief, the foregoing shows that the Civil Court is a court of record. As such it has power under Chapter 256 to punish acts as criminal contempts, yet under Section 15 (6) of the Civil Court Act it has power only to punish for contempts under Chapter 150 (now Chapter 295) of the statutes and derives no power from Chapter 256.

It is easily possible to imagine a situation in which the foregoing inconsistency would be important, in fact controlling. Let me illustrate. In *State, ex rel. Rodd* v. *Verage,* 177 Wis. 295, it was held and I quote from the syllabus first:

> The power of a court to punish for contempt is an inherent and necessary power to enforce orders and decrees, preserve order, compel the attendance of witnesses and jurors, and to enable the court to perform the functions for which it was created.

In my opinion the holding seems correct. It would seem to apply to any court. The power as to preserving order includes punishment

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[1] Sec. 256.03 Wis. Stat.

[2] Sec. 2 of the Civil Court Act, Chapter 549, Laws of 1909.

for disorderly conduct or a breach of the peace committed in open court. Such conduct would or might constitute a criminal contempt. It might be by a person not a party to any proceeding in court. It would not necessarily impede, impair, or prejudice the rights of any party to an action and hence would not be a civil contempt or a contempt in a civil action. It seems to me the Civil Court would have inherent power to punish for such a criminal contempt, yet the Civil Court Act restricts the contempt power to contempts in Civil actions under Chapter 150 (now Chapter 295) of the statutes.

Later I will consider what constitutes a civil contempt or a contempt in a civil action and what constitutes a criminal contempt, so far as these terms can be distinguished or defined under the decisions of our Supreme Court.

First I want to refer to the policy of the law and the courts as to the exercise of contempt jurisdiction. In the decision in *State, ex rel, Rodd* v. *Verage,* 177 Wis. 295, on pp. 305 and 306, Justice Owen in the majority opinion says:

> The people have not set up the courts as the instrumentalities for declaring justice without at the same time conferring upon them ample powers to enforce private and public rights. In order to make of the judiciary a virile and efficient institution, which will secure justice to every member of society, the weak as well as the strong, the poor as well as the rich, the humble as well as the powerful, it is necessary that courts have power to compel respect and obedience to their orders and decrees. For this purpose the power to punish for contempt, as a remedial and coercive measure, is deemed an inherent and indispensable power of the courts.

In a dissenting opinion in the same case,[3] Justice Eschweiler says in part:

> I subscribe to the doctrine that the power to punish as for a crime, that is, by imprisonment thereby restraining of his liberty one who violates the orders of a court or flouts its dignity, is an inherent, common-law power of a court of justice, essential for the upholding of its authority and maintaining its dignity and self respect.

He is speaking of criminal contempts. Then he refers to civil contempts saying, "There is no question but that a court may imprison one who, violating its orders, thereby interferes with, impedes, defeats, or repudiates the rights or remedies of a litigant." "These, however, are separate, distinct and independent proceedings; one to protect the court's dignity, the other for the protection of a litigant's property rights."

I have been referring to the powers of courts and judges (mostly courts) to punish for contempt.

[3] *Rodd* v. *Verage,* 177 Wis. 295, on pp. 331 and 332.

What is the power of court commissioners in these matters? I have already shown that the power to punish for a criminal contempt is only conferred on courts of record by Section 256.03 of the statutes. It is not conferred upon the circuit judge or presiding judge or any judge in chambers or in vacation. Chapter 295 relates to contempts in civil actions.

Section 295.01, Wisconsin Statutes, grants power to every court of record and every judge of such court at his chambers, including the power as to actions or proceedings before a court commissioner, in the cases mentioned in the next eight subsections, which are a part of Section 295.

Because the power is apparently conferred upon the judge at chambers as well as upon the court, it would seem that it is likewise conferred upon a court commissioner, under the provisions of Section 252.15, Wisconsin Statutes, which states that a court commissioner shall also have power concurrent with but not exceeding that of a judge of the Circuit Court at chambers to punish as for contempt, disobedience of any lawful order made by himself in supplementary and other proceedings and matters properly and lawfully instituted or pending before him; subject, however, to review in all cases by the Circuit Court as provided by law and the rules and practices of the court, except where such powers shall be exercised in an action pending in another court of record of the county for which such court commissioner shall have been appointed and acting and in such case the review shall be by the court in which the action is pending.

See also Section 269.29, Wisconsin Statutes, as to when Court Commissioner may act.

His power is therefore concurrent with, but not exceeding that of a circuit judge at chambers.

We must therefore consider the extent of the power of a judge of the Circuit Court at chambers.

Section 295, Wisconsin Statutes, by itself appears to grant the power to a circuit judge at chambers in all of the instances specified in the eight subsections of Section 295.

As a matter of fact such broad power is not conferred because it is limited by the following sections in the chapter.[4]

The only instances in which the circuit judge at chambers can punish for contempt are those specified in Sections 295.02 and 295.03. In all other instances he must make the order to show cause or attachment returnable before the court.

Section 295.02 relates to summary punishment for misconduct in the immediate view and presence of the court.

[4] Sec. 295. Wis. Stat.

Section 295.03 relates to an order of the court or judge requiring the payment of costs or any other sum of money and proof by affidavit of a personal demand, including orders for payment of money in divorce cases without proof of demand, there being proof of personal service of the order and refusal to pay.

Section 295.04 provides that in a case specified in Sections 295.02 and 295.03 the court may, in its discretion, as in all other cases, either make an order to show cause or issue an attachment to bring the offender before the court. The order to show cause or attachment may be made or issued by a judge in vacation, but must be made returnable to the court.

Section 295.12 requires that the court shall cause interrogatories to be filed and shall determine whether the defendant has been guilty of the misconduct alleged.

Section 295.13 relates to judgment by the court.

Section 295.14 requires the finding of indemnity or imposition of fine to be by the court.

Under Section 295.18 proceedings on default are by the court and under Section 295.20 an action on the undertaking for appearance is to be ordered by the court.

A failure of a judgment debtor to appear upon order in supplementary proceedings, likewise a failure of a witness, garnishee defendant or probably even a juror to appear is not misconduct committed within the immediate view and presence of the court, hence not included in Section 295.02; neither is the failure to appear in answer to an order requiring the payment of costs or other sum of money provided for in Section 295.03, therefore such failure to appear is not punishable summarily by a judge in chambers or by a court commissioner. The order to show cause or attachment to punish for contempt for such failure to appear must be made returnable to the court under the provisions of Section 295.04. A court commissioner or judge in chambers cannot punish for contempt for any of the offenses assumed in this paragraph.

If anyone does not agree with this conclusion it would seem that it must be admitted that the power of the court commissioner in such situation is at least doubtful. I haven't found any case in the Wisconsin reports arising out of a commitment for contempt by a court commissioner, except that of *In re Remington.*[5] Justice Cole wrote the decision of the court and said:

That a court commissioner—a mere appointee of the Circuit Court —can attach a citizen and imprison him summarily, at his own pleasure, for a contempt, without any reference even to Chapter 115 revised

[5] 7 Wis., 541, Star paging 643, decided in 1858.

Statutes is certainly a most extraordinary position. Now, I deny in toto the power of a court commissioner to punish for contempt, even in a matter where he has full and ample jurisdiction. I shall dismiss the whole matter here, without further suggestions; it will be time enough to examine the question, when some law is cited that gives him, or professes to give him, that high authority; for that, by involved implication, it can be made to appear that a court commissioner can exercise this high discretionary power of punishing as for a contempt by imprisonment a citizen who disobeys his orders—a power usually jealously guarded and hedged in by strong legal enactments which the wisdom and experience of centuries in this country and England have proved necessary to prevent abuse, and secure the liberties of citizens, when it is exercised by the highest judicial tribunals—that a court commissioner can rightly exercise this power without its being conferred upon him by law, I do not believe. I cannot admit it until I see an act conferring it upon him in the clearest and most unequivocal manner.[6]

Referring to the power of a court commissioner to punish, as for contempt, a disobedience of an order made by him, Justice Cole says: "A power, I venture to say, never exercised by any circuit judge in this state in chambers, and a power which no circuit judge could properly exercise at chambers, unless it was clearly conferred upon him by law."[7]

In *Haight* v. *Lucia,* 36 Wis., 355, decided in 1874, a court commissioner granted an injunctional order, which was violated by defendants. He issued an order to show cause why they should not be punished for contempt. This was disregarded and he then issued an attachment returnable before the court, by virtue of which they were arrested and held to bail for their appearance at the Circuit Court to answer for their alleged contempt.

Lyon, J. says:

We have reached the conclusion that a court commissioner has no power to issue an attachment against the person in a case like the one before us. The power is claimed to exist by virtue of the statutory provision, conferring upon court commissioners the authority of a judge of the Circuit Court at chambers, in civil actions. We will not now decide whether, in a case like this, the circuit judge may award an attachment in vacation p. 359.[8]

The case of *In re Remington,* 7 Wis., 643, is referred to and it is said, "subsequently the legislature conferred upon court commissioners the powers there denied them,[9] and referring to contempt committee in proceedings supplementary to execution.

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[6] *Ibid.*

[7] *Ibid.*

[8] *Haight* v. *Lucia,* 36 Wis., 355.

[9] Laws of 1860, Ch. 44, p. 359. (Taylor Statutes 1864, Sections 100 to 113.)

Paragraph 2 of the syllabus[10] reads:

Court commissioners have no power to issue attachments for contempt except in those cases (as in proceedings supplementary to execution) where the power is expressly conferred upon them by statute.

By present statutes as already shown the power of the court commissioner does not exceed that of a circuit judge at chambers, and the power of a circuit judge at chambers is very much restricted by Chapter 295 of the statutes.

In *State ex rel Rodd* v. *Verage,* 177 Wis., 295, paragraph 9 of the syllabus, states that a judgment adjudging one violating an injunction guilty of contempt and sentencing him to imprisonment is a final judgment and not a mere order, and a writ of error would lie whether the proceedings were civil or criminal.[11]

Would not any finding of contempt and a sentence thereon be a judgment and not a mere order, even though it was not based on the violation of an injunction? Suppose it were for failure to appear as a witness or in response to an order of a court commissioner or for refusal to testify? If it is a judgment and not a mere order, can such judgment be entered by a court commissioner, or by a judge in vacation?

Policy of Courts as to Contempts

"The power to punish for contempt, in which in a measure the magistrate sits as prosecutor, judge and jury, while necessary and essential for a proper upholding of the power and the dignity of a court of justice, is nevertheless one to be *sparingly used.*" I am quoting Justice Eschweiler in his dissenting opinion in *State ex rel. Rodd* v. *Verage,* 177 Wis., 295, 341.

Speaking of criminal contempts, he says: "Though a creation of the common law and existing from the time whereof the memory and reading of man runneth not to the contrary, yet in England, the home of the common law, it is very seldom resorted to, for as stated in *Gompers* v. *United States,* 233 U.S., 604, 611, 612, (34 Sup. Ct. 693), "The English courts seem to think it wise, even when there is much seeming reason for the exercise of a summary power, to leave the punishment of this class of contempts to the regular and formal criminal process." (p. 341.)

Whether Contempt Proceedings are Civil or Criminal

In *Emerson* v. *Huss,* 127 Wis., 215, decided in 1906, the court says: "The statutes preserve a marked distinction in the remedies they afford and the procedure to be followed in each class." Also that the decisions of the court involving these statutes show a considerable con-

[10] *In re Remington,* 7 Wis., 643.

[11] See p. 318 citing *State ex rel Jackson* v. *Reid* 174 Wis., 536.

trariety of opinion as to their construction and scope. The court says, however, that in the application of the statutes to the cases actually presented, with certain exceptions noted, the decisions rendered are in substantial harmony. The court says as to criminal contempts the proceeding is to be prosecuted in the name of the State. (p. 223.) If the defendant is adjudicated guilty punishment by fine or imprisonment, or both, may be imposed, within the limits provided; and, if imprisonment is imposed, the commitment must specify the particular circumstances of the offense. The court also says there is no question but that the moneys paid as fines go to the school fund as in criminal prosecutions, and that if imprisonment be ordered it is a commitment as a punishment for a criminal offense.

Justice Doerfler, however, in his dissenting opinion in *State ex rel Rodd* v. *Verage,* 177 Wis., 295, on p. 347 (decided in 1922) says:

The writer cannot agree with what is said in *Emerson* v. *Huss,* 127 Wis., 215 that the fine under a proceeding for remedial relief shall be paid to the state treasurer for the benefit of the school fund. It would stamp it as a criminal proceeding, and under such holding the civil and the criminal proceeding would be so blended as to involve both an appeal and a writ of error in the same case.

Justice Owen says: "One who is prosecuted for contempt is entitled to know whether the proceeding is civil or criminal."[12]

In *Emerson* v. *Huss,* 127 Wis., 215, p. 224, the court says that in proceedings to punish as for a contempt under Chapter 150 (now Chapter 295 relating to civil contempts) much confusion has arisen from attempts to restrict the scope of the statute by limiting the remedy under it to an indemnity of the injured party in his private rights by a recovery of his money loss or injury, and by coercing performance of a duty unperformed, owing to the injured party, and still within the power of the contemnor to perform. They say that the provisions, however, plainly authorize the court to punish by fine and imprisonment all acts of misconduct, though the misconduct may not pertain to the performance of a duty still within the power of the contemnor to perform and though it may produce no actual loss or injury. (p. 224.) No good reason is perceived why, in protecting the rights of parties in civil actions, a money penalty or imprisonment may not appropriately be visited on the offender in civil proceedings, even though it appears that no actual pecuniary loss has resulted to the parties. (p. 225.)

We perceive no reason why the money paid by the contemnor may not very properly be turned over to the school fund of the State. (p. 225.)[13] We discover no force in the claim that this will result in a

[12] *State ex rel Rodd* v. *Verage,* 177 Wis., 295 on pp. 316, 317.

[13] *Emerson* v. *Huss,* 127 Wis., 215.

blending of proceedings to punish contempts in civil actions with those authorized for the punishment of contempts criminally. The two classes of proceedngs seek to reach entirely different objects and are subject to wholly different procedures; the one having all the characteristics and incidents of a civil proceeding, while the other has those of a criminal prosecution in the name of the state.

Vilter Mfg. Co. v. *Humphrey,* 132 Wis. 587, decided in 1907 follows *Emerson* v. *Huss.* Justice Winslow on p. 590[14] says it is a civil proceeding.

> Where it is desired to punish an act as a criminal contempt, the proceeding should be brought in the name of the state. . . . . There are doubtless some acts which are civil as well as criminal contempts. . . . . The wilful disobedience of an order of the court by a party to the action would seem to be such an act if the rights or remedies of the opposing party are injured or prejudiced thereby. . . . . In such case the form in which the proceeding is brought will necessarily determine its character.

In *State ex rel Rodd* v. *Verage,* 127 Wis., 295, the application was to punish for criminal contempt. The court, however, ruled that the proceeding was under Chapter 150 relating to civil contempts. (p. 315, 316.)

Justice Eschweiler in his dissenting opinion says it is clear that the proceedings were for a criminal contempt and punitive solely.

As to the necessary finding see *Emerson* v. *Huss,* 127 Wis., 215, p. 228, 229. In this case the contempt orders were set aside as invalid for want of proper findings. (p. 229.)

In 1912 the same questions were considered in *Stollenwerk* v. *Klevenow,* 151 Wis., 355. The order made had failed to comply with the requirements of *Emerson* v. *Huss*[15] in some important respects. (p. 360, 361.) The failure to do so was held to be overcome by reason of the passage of section 3072 m of the statutes,[16] which provides that "No judgment shall be reversed in any action or proceeding, civil or criminal, for error as to any matter of procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse the judgment."

In his dissenting opinion in *State ex rel Rodd* v. *Verage,* 177 Wis., 295, Justice Doerfler on p. 342 quotes from *In re Pierce,* 44 Wis. 411, 423:

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[14] *Vilter Mfg. Co.* v. *Humphrey,* 132 Wis., 587.
[15] *Emerson* v. *Huss,* 127 Wis., 215.
[16] Laws of 1909, Ch. 192.

The final order in contempt proceedings must be one thing or the other; it must impose criminal punishment for the misconduct, or enforce the civil remedy by awarding indemnity. It cannot do both. . . . . This conclusion of the court in the Pierce case[17] has never been modified or receded from, unless the holding in *Emerson* v. *Huss*, 127 Wis., 215 can be so construed. Great confusion has arisen in this court from a construction of Chapter 117 of the statutes, involving purely criminal contempts, and Chapter 150 entitled "Proceedings to punish contempts to protect the rights of parties in civil actions." The offenses contemplated by Chapter 150 involve criminal contempts in each instance, as much so as do the offenses referred to in Chapter 117; the only distinction between the two sets of offenses consisting of the fact that Chapter 117 refers to what are known as purely criminal contempts, viz. violations against the dignity and authority of the court, and therefore an affront against the administration of justice, while those included in Chapter 150 contain all of the elements of the offenses referred to in Chapter 117, are fully as serious in their nature and consequences, have a like effect upon the dignity and standing of the court, and equally interfere with the proper administration of justice; but, in addition to all of the foregoing, the contemnor has been guilty of something which is calculated to or actually does defeat, impede, or prejudice the rights or remedies of a party in an action or proceeding in a court.

Justice Doerfler then reviews the statutes relating to contempts in civil actions and seems to conclude that it is the punishment inflicted that determines whether it was for a civil or criminal contempt.

He whole heartedly approves the decision of the Federal Supreme Court in *Gompers* v. *Bucks S. & R. Co.*, 221 U. S. 418, 441, 443, 31 Sup. Ct. 492 stating:

This decision is a crystallization of the judicial wisdom of the ages by the highest court of the greatest country in the world. No vested property rights or interests have resulted from any judicial holding upon the subject of contempt, and we are therefore at liberty to adopt the reasoning in the Gompers case. (p. 349, 350.)

The latest case *Wetzler* v. *Glassner*, 185 Wis. 593 was decided in 1925. Therein the court says: "The real character of the proceeding is to be determined by the relief sought." (p. 506.) The contempt proceedings were brought under Chapter 295, statutes, entitled "Contempts in civil actions." The court says that while the proceeding is denominated a civil contempt and the procedure is that prescribed in Chapter 295, nevertheless it was in the nature of a proceeding for criminal contempt. (pp. 595, 596.)

Circuit Court Rules

The Circuit Court rules adopted by the Supreme Court in 1906, as amended, are published in the second volume of the statutes.

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[17] *In re Pierce*, 44 Wis., 411, 423.

Rule 27 relates to creditors' actions, supplemental proceedings and receivers. Sec. 4 of Rule 27 reads in part: "No injunction granted in such action or proceeding shall be construed to prevent the debtor from receiving and applying the proceeds of his subsequent earnings to the support of himself or his family, etc."

It would seem that the debtor should have the same right to apply present earnings in his possession to the support of himself and family, referring of course to earnings reasonably necessary in amount for that purpose. Otherwise he would be forced to rely on public or private charity or further credit for support of himself and family. Perhaps the exemption statute as to exemption of earnings should be considered to determine whether or not the amount already spent by him, together with the amount on hand is within the exemption limits.

Separate rules of circuit judges for the second circuit are also published. Of these rules 22 to 27 relate to rules of practice before court commissioners in Milwaukee County.

Rule 25 reads:

Should the debtor fail to appear at the time fixed by the order for his examination, no warrant of attachment shall issue against him until after the judgment creditor or his attorney files an affidavit showing cause and procures an order from the commissioner requiring the judgment debtor to show cause why he should not be punished for contempt for his failure to appear, which order shall be duty served on the judgment debtor and shall be made returnable at a time specified in said order; except it be made to appear by affidavit filed with commissioner after the debtor's failure to appear that good cause exists for the immediate issue of a warrant of attachment.

The rule just stated contemplates that the order to show cause be made returnable before the commissioner and commissioners are now acting upon it. Likewise the rule contemplates that the warrant of attachment be made returnable to the commissioner.

If I am correct in my construction of the various sections of Chapter 295 of the statutes heretofore cited, then the order to show cause and warrant of attachment should be returnable to the court and rule 25 is in conflict with the statutes.

Further, if the original order to appear before the commissioner also forbids a transfer of property and there is a violation by some disposition of property, or spending of money, any contempt involved therein is not punishable by the commissioner, but by the court.

I quote from Winslow's Forms, the two-volume work on Pleading and Practice under the Code. In the chapter on contempt proceedings he states that in Minnesota no distinction is preserved by the statutes between civil and criminal contempt proceedings; but contempts are divided into direct contempts, which are those committed in the im-

mediate view and presence of the court, and may be punished summarily without process or proof; and constructive contempts, which are those not committed within the immediate presence of the court. A prosecution for constructive contempt is begun by affidavit to be followed by warrant of arrest or order to show cause. Punishment is by imprisonment or fine or both, and by imposition of an indemnity to be paid for any actual loss to the injured party.[18]

In Iowa contempt proceedings are criminal in their nature. If the contempt be committed in the presence of the court it may be punished summarily, but if not the proceedings must be based on affidavit and rule to show cause.

In Nebraska the proceedings are held to be in their nature criminal, direct when committed in presence of the court and constructive when not so committed. Proceedings for constructive contempts must be commenced by information under oath or affidavit stating positively all the necessary facts, as in a prosecution for crime.

The North Dakota statutes and procedure are similar to Wisconsin.

It seems to me that it would be worth while to consider whether or not the Wisconsin statutes can be simplified, thereby tending to eliminate the confusion existing in the decisions attempting to construe the statutes.

It would seem that Minnesota has the right idea about the matter.

The question might be considered by the local bar associations and by the state bar association.

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[18] *Winslow's Forms* Vol. 2, p. 1217.