merely performing its duty of pronouncing upon the validity of a given statute. Admittedly, the end result of this course of action may be the districting of Indiana in accordance with the provisions of the 1885 districting act. It is submitted, however, that neither the conscientious legislators nor the alert voters of Indiana will permit such a possibility to become a reality.

CRIMINAL CONTEMPT: VIOLATIONS OF INJUNCTIONS IN THE FEDERAL COURTS

The courts' power of contempt has been one of the most hated and feared remedies known to our legal system. This is chiefly due to the awful potential which is inherent in a system that allows the judge, one instinctively pictured as an impartial arbiter of justice, to become a prosecutor in greater or lesser degrees depending on the nature of the contempt.[1] Other factors contributing to the potential power of the court are the possibility of penal sanction and the relaxation of the usual pro-

1. Where contempt is committed in the presence of the court, the offender may be summarily tried and punished by the judge acting on his own motion. FED. R. CRIM. P. 42(a). This is often referred to as direct contempt.

In criminal contempt committed outside the actual presence of the court, such as disobedience of injunctions, the judge may decide if contempt proceedings are to be initiated. This function is analogous to the discretion of a prosecutor in initiating criminal prosecution. FED. R. CRIM. P. 42(b). Criminal contempt committed outside the actual presence of the court need not be prosecuted by a United States attorney. The court may appoint any competent attorney to serve as "prosecutor." FED. R. CRIM. P. 42(b); Cooke v. United States, 267 U.S. 517 (1925); United States v. Lederer, 140 F.2d 136 (7th Cir. 1944); In re Eskay, 122 F.2d 819 (3rd Cir. 1941). This is justified by the reasoning that the incentive to discover this type of injury outweighs the interests of "theoretical" impartiality. But the duty of the prosecutor is to protect the innocent as well as the guilty and this duty may well be slighted where the prosecutor is the attorney who represented the defendant's opponent in the civil suit for injunction. Therefore, the desired impartiality, in this situation, seems to be something more than "theoretical." On the other hand the prosecutor is chosen, either directly or indirectly, by the people and the offense involved is one committed against the authority of the courts which are instruments of the government. Therefore, the courts' inherent power should not extend to the point of displacing one chosen by society to prosecute wrongs committed against it. Judge Learned Hand supports this position in *In re* Guzzardi, 74 F.2d 671 (2d Cir. 1935). However, he later reversed himself and followed the accepted rule that a U. S. attorney is not required to act as prosecutor in criminal contempt cases. McCann v. New York Stock Exchange, 80 F.2d 211 (2d Cir. 1935).

Where the court chooses a private attorney as prosecutor, the judge must immediately enter an order directing the attorney to criminally prosecute the contempt and include a copy of this order in the process papers. Thus the crucial factor is one of notice. The defendant must be notified of the criminal nature of the charges against him. United States v. Lederer, *supra;* McCann v. New York Stock Exchange, *supra;* United States v. Balaban, 267 F. Supp. 491 (N.D. Ill. 1939).

See Note, 25 TULANE L. REV. 266 (1951); Comment, 57 YALE L.J. 83 (1947).

cedural protection accorded to one in jeopardy of imprisonment.[2] While it is true that the contempt power might become a vehicle for the imposition of judicial tyranny if used improperly, statutes[3] and judicial self-restraint have tempered its exercise. It is a useful and important remedy, the abrogation of which would seriously handicap the judicial system.

In respect to its role in enforcement of injunctions, the necessity for the contempt power is obvious.[4] It is the sole means available to the courts by which they may see that their decrees are carried out and without this power the remedy of injunction would be illusory. Both the

2. A defendant in criminal contempt proceedings is not entitled to a jury trial. *In re* Debs, 158 U.S. 564 (1895); Eilenbecker v. District Court, 134 U.S. 31 (1890). See Comment, 65 YALE L.J. 846 (1956). However, the right to jury trial can be conferred by statute. Maynard v. United States, 23 F.2d 141 (D.C. Cir. 1927). Also, an indictment is not necessary, even though the punishment may be longer than one year. United States v. Balaban, 26 F. Supp. 491 (N.D. Ill. 1939); Anargyros v. Anargyros & Co., 191 Fed. 208 (N.D. Calif. 1911).

However, the burden of proof is on the government and the contempt must be proved beyond a reasonable doubt. Michaelson v. United States, *ex rel.* Chicago, St. P., M., & O. Ry., 266 U.S. 42 (1924); United States *ex rel.* Porter v. Kroger Grocery & Baking Co., 163 F.2d 168 (7th Cir. 1947). Double jeopardy may also apply to criminal contempt. See *In re* Bradley, 318 U.S. 50 (1943). The criminal rules of appeal govern the appellate procedure for criminal contempt. McCrone v. United States, 100 F.2d 322 (9th Cir. 1938). Also, the President's pardoning power under the federal constitution extends to criminal contempt, *Ex parte* Grossman, 167 U.S. 87 (1925), as does the privilege against self-incrimination. Boyd v. United States, 116 U.S. 616, (1886); Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 444 (1911) (dictum); Merchants' Stock & Grain Co. v. Bd. of Trade, 201 Fed. 20, 22 (8th Cir. 1912) (dictum). The three year statute of limitations on crimes applies to criminal contempt. Pendergast v. United States, 317 U.S. 608 (1943); Gompers v. United States, 233 U.S. 604 (1914).

3. 62 STAT. 701 (1948), 18 U.S.C. § 401 (1952). "A court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of one of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command." In Morgan v. United States, 95 F.2d 830 (8th Cir. 1938), the court noted that the above statute has limited the common law concept of criminal contempt. The defendant obtained money from a trustee in bankruptcy by false representations. The court said this would be criminal contempt at common law but does not come within the terms of the statute.

FED. R. CRIM. P. 42(b). "A criminal contempt except as provided in subdivision (a) of this rule [contempts committed in actual presence of the court], shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. . . ." In United States v. United Mine Workers, 330 U.S. 258 (1946), this rule was interpreted as requiirng only that the defendant be aware of the nature of the charge, regardless of the fact that the rule seems to require that th words "criminal contempt" actually be used. See 17 *Federal Rules Decisions* 167 (1955).

4. Moskovitz, *Contempt of Injunctions, Civil and Criminal,* 43 COLUM. L. REV. 780 (1943).

fear and importance of the contempt power become more apparent in the use of criminal contempt in enforcing injunctions. This has been especially true during period of great social strife such as the labor movement and prohibition.[5] Therefore, in absence of civil rights legislation preempting the field, the criminal contempt power of the federal courts is certain to play an important role in enforcing desegregation orders.[6] Since courts have not set out a standard defining the evidentiary limits of criminal contempt in respect to disobedience of a court decree, it is important to determine the components of criminal contempt from the standpoint of what acts constitute, and who may be guilty of the offense.

Contempt is a disregard or disobedience of public authority. As applied to injunctions, criminal contempt is wilful disobedience of the courts' decree, thus resulting in a disregard for the courts' authority. Criminal contempt in the federal courts has to some extent been limited, both substantively and procedurally, by statute; but for the most part, the common law rules still prevail.[7] Formulation of general rules determining the evidentiary requirements for criminal contempt is difficult because the violation is defined largely by the terms of the specific injunction. For example, a guard accused of mishandling a federal prisoner in a county jail could not be convicted of criminal contempt because this conduct was not embodied in a decree.[8] But where there was a court order committing a prisoner into the custody of a sheriff to be held safe until the expiration of his sentence, his conduct in allowing a prisoner to go free was criminal contempt.[9] Thus it is seen that an injunction is analogous to a criminal statute. Conduct not forbidden cannot be criminal contempt. But, like statutes, injunctions frequently must be phrased in general terms to be effective and therefore require subsequent judicial interpretation to ascertain what they prohibit.[10] As a result, a wide range

5. See Gompers v. United States, 233 U.S. 604 (1914); *Ex parte* Lennon, 166 U.S. 548 (1897); *In re* Debs 158 U.S. 564 (1895); Hill v. United States, 33 F.2d 489 (8th Cir. 1929); McFarland v. United States, 295 Fed. 648 (7th Cir. 1923); *In re* Reese, 107 Fed. 942 (8th Cir. 1901).

6. Brown v. Bd. of Education, 394 U.S. 294 (1955); Frazier v. Bd. of Trustees, 134 F. Supp. 589 (M.D. N.C. 1955). See Comment, *Legal Sanction to Enforce Desegregation In the Public Schools: The Contempt Power and the Civil Rights Act,* 65 YALE L.J. 630.

7. See note 3 *supra.* A conspiracy to commit contempt is not criminal contempt. Kelton v. United States, 294 Fed. 491 (3d Cir. 1924); Doniphan v. Lehman, 179 Fed. 173 (C.C. Ind. 1902).

8. Wilson v. United States, 26 F.2d 215 (8th Cir. 1928).

9. Swepston v. United States, 251 Fed. 205 (6th Cir. 1918); United States v. Hoffman, 13 F.2d 269 (N.D. Ill. 1925).

10. The court has the power to enjoin acts which are of the same class as those complained of or whose commission in the future may be fairly anticipated from the defendant's past conduct. NLRB v. Express Publishing Co., 312 U.S. 426 (1941); Int'l Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers v. United States,

of conduct is prohibited and a judge trying a criminal contempt case is often faced with border-line situations which he must classify as violative or non-violative. The courts have been rather strict in requiring a clear violation. Perhaps this is a result of the heavy burden of proof, beyond a reasonable doubt, or it may be a judicial reaction against the harshness of imposing penal sanctions without the usual procedural protection of jury trial. Thus it was not criminal contempt to write letters criticizing the government and the litigation leading to the decree to those whose duty it was to obey the injunction if the letters "were not directly calculated to invite disobedience."[11] Where the decree prohibited the manufacture or sale of intoxicating beverages, making of near beer was not a violation.[12] At one stage of the brewing process, the alcoholic content exceeded the minimum requirements of one half of one percent, but the excess was extracted at a later stage.

It is apparent that courts have been careful to require acts amounting to a clear violation of the injunction before instituting criminal contempt proceedings. But what is a clear violation seems to depend more on the natural and probable results of the defendant's conduct rather than on the conduct itself. The court will examine the acts in light of surrounding circumstances and if the direct consequences of the act tend to result in a violation, then the conduct constitutes a criminal contempt. For example, inciting or urging others to violate the injunction is criminal contempt.[13] And where the defendant had been enjoined from infringement of a patent covering a refrigerating process, a contribution to a general fund raised by a group of shippers of meat for the purpose of financing defenses against suits brought by the patent holder was criminal contempt.[14] Likewise, furnishing strikers with a meeting place near the plant for the purpose of assisting them in their violation of the decree is a criminal contempt.[15] Where an injunction allowed peaceful picketing, but restrained acts of violence, members of the strike committee were

291 U.S. 293, 299 (1934). Decrees of broad generality are often necessary to prevent further violation. McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949). But the court, in interpreting the decree, must define it as exact as the circumstances permit. J.I. Case Co. v. NLRB, 321 U.S. 332 (1944); Terminal R.R. Ass'n v. United States, 266 U.S. 17 (1924). Also, if the injunction is ambiguous, one will not be guilty of criminal contempt if he is placed in a dilemma by its terms. NLRB v. Bell Oil & Gas Co., 98 F.2d 405 (5th Cir. 1938). Before one may be guilty of criminal contempt, there must be an ability to comply. United States v. Bryan, 339 U.S. 323 (1950); Healey v. United States, 186 F.2d 164 (9th Cir. 1950).

11. United States v. So. Wholesale Grocers' Ass'n, 207 Fed. 434 (N.D. Ala. 1913).

12. McFarland v. United States, 295 Fed. 648 (7th Cir. 1923).

13. Minerich v. United States, 29 F.2d 565 (6th Cir. 1928); *Ex parte* Richards, 117 Fed. 658 (S.D. W. Va. 1928).

14. Bates Refrigerating Co. v. Gillett, 30 Fed. 683 (C.C. N.J. 1887).

15. Schwartz v. United States, 217 Fed. 866 (4th Cir. 1914).

guilty of criminal contempt for continuing the picket lines after repeated violent incidents even though they ordered the pickets to behave in an orderly manner.[16] On the other hand, it was not criminal contempt for the editor of a newspaper to write editorials calling the employees of a company "dirty scabs," "snakes" and "scavengers."[17] The injunction in this case restrained strikers and their sympathizers from preventing the employees from working by threats, intimidation or force. The court said that the injunction contemplated only language that was spoken to an employee and was not intended to include newspaper publications. Also, where an injunction ordered the bankrupt to turn over all assets to the trustee in bankruptcy, one not acting in concert with the bankrupt is not guilty of criminal contempt for obtaining money belonging to the bankrupt estate by defrauding the trustee. Such conduct was held not to violate the order of the court.[18] In another case, certain railroads acting jointly as members of a "terminal association" were enjoined from operating their property in any manner other than as a terminal facility for the railroads that used them. The railroads comprising the association were not guilty of criminal contempt for failing to pay reasonable transfer charges to the association while requiring competing railroads to pay full transfer charges.[19]

Use of indirect and devious means to bring about disobedience of an injunction may be criminal contempt. An individual, enjoined from patent infringement cannot avoid punishment for a violation by incorporating for the purpose of creating an entity to infringe upon the patent.[20] In another case, the defendants were restrained from boycotting a certain firm. After complying for fifteen months, the defendants began issuing to builders monthly booklets which contained a list of the mills the defendants considered "fair." The complainant's name did not appear on the list. A supplemental letter was issued with the booklets which stated that unless the builders purchased their materials from the "fair" mills, union labor would refuse to handle them. This was held to constitute a criminal contempt of court.[21]

Non-action where there is a duty to act may be criminal contempt. For example, where a strike occurred without express orders from the union heads, a temporary restraining order was issued prohibiting the

16. Allis-Chalmers Co. v. Iron Molders' Union No. 125, 150 Fed. 155 (E.D. Wis. 1906).
17. Cohen v. United States, 295 Fed. 633 (6th Cir. 1924).
18. Morgan v. United States, 95 F.2d 830 (8th Cir. 1938).
19. Terminal R.R. Ass'n v. United States, 266 U.S. 17 (1924).
20. Frank F. Smith Hardware Co. v. Yates, 244 Fed. 793 (2d Cir. 1917); Bernard v. Frank, 179 Fed. 516 (2d Cir. 1910).
21. Huttig Sash and Door Co. v. Fuelle, 143 Fed. 363 (E.D. Mo. 1906).

union, its officers and all persons in active concert with them from *continuing* the strike. The strike continued for several days after service of the order, until union demands had been granted. The defendant union head ordered the workers back to work and they obeyed. The defendant was held guilty of criminal contempt, not for causing or encouraging the strike, but for failing to comply with the restraining order which sought a return to work during arbitration.[22] The act of ordering the workers back to work showed the defendant's power to make them return. In another case, a sheriff and his jailer were convicted of criminal contempt for allowing a mob to break in the jail and lynch a Negro who had been convicted of rape.[23] After the prisoner had appealed, the Supreme Court ordered a stay in all proceedings. The sheriff had expected mob violence the night of the lynching as a result of public indignation at the interference of the federal courts. In spite of this knowledge, he dismissed all deputies who had guarded the prisoner during the trial, leaving only the night jailer on duty. The sheriff went to the jail after the mob had entered but made no attempt to stop them beyond speaking to them, even though he was armed. He made no effort to identify any of the mob and, although police and military assistance were readily available, he did not send for help. As to the jailer, as soon as the mob entered he gave them his gun and keys. It was shown that he could have gone for help but made no attempt to do so. The jailer and sheriff were held to be guilty of criminal contempt for aiding and abetting the mob in violating the court's mandate through their non-action.

The place of the violation has no effect on the court's power to punish for contempt. Thus acts committed in the Western District of Arkansas which violate a decree issued in the Eastern District Court are punishable as criminal contempt in the Eastern District Court.[24]

It is also clear that actual harm to those in whose favor the injunction was issued is not an element of criminal contempt. The complainant has already proved in the injunction proceedings that he will be irreparably damaged if the defendant's conduct continues. Since the merits of the injunction are not an issue in criminal contempt proceedings, an erroneous issuance of an injunction will not relieve a defendant from punishment for criminal contempt. Even if the judgment had been reversed, acts committed before reversal may be the subject of subsequent criminal contempt proceedings because the punishment is for past con-

22. United Mine Workers v. United States, 177 F.2d 29 (D.C. Cir. 1949).
23. United States v. Shipp, 214 U.S. 386 (1909).
24. Binkley v. United States, 282 Fed. 244 (8th Cir. 1922). See McCourtney v. United States, 291 Fed. 497 (8th Cir. 1923).

duct, not a protection from prospective injury.[25] However, if the injunction is completely void, so-called violations cannot be criminal contempt because the injunction is a complete nullity.[26] The defendant can do nothing that would result in a violation of the court's decree or in obstructing the administration of justice when there is no valid order restraining him from acting. Thus no harm to the private interest is necessary; an injunction shields the private interest from potential injury. The necessary harm is the danger to the judicial system in allowing disobedience and resistance to its decrees. Therefore the interest threatened is strictly public in nature.

Consequently, the crucial factor in ascertaining what acts constitute a violation of the decree is not whether the defendant's conduct violated the decree, but whether his acts tended to bring about a violation. The court should view the injunction in light of the circumstances which resulted in its issuance and attempt to determine what conduct the issuing court was seeking to prohibit, what interests it was seeking to protect and in what manner it was trying to protect them. It is criminal contempt if, after making these determinations, the consequences of the defendant's acts resulted in a violation.

However, there is an intent factor that must be met before one may be held guilty of criminal contempt; the violation must be wilful.[27] It is clear that an intent to defy the authority of the court fulfills the requirement as does an intention to disobey the injunction.[28] While there are some opinions to the contrary, it appears that an intent to do the acts complained of also meets the requirement of wilfulness.[29] The necessary intent is analogous to that usually required in criminal law. It is not the intent to violate the law, or the injunction, but the intent to do the act the law, or the injunction, forbids.[30] For example, the court's order directed

25. Land v. Dollar, 190 F.2d 366 (D.C. Cir. 1951); Salvage Process Corp. v. Acme Tank Cleaning Process Crop., 86 F.2d 727 (2d Cir. 1936); Blake v. Nesbet, 144 Fed. 279 (W.D. Mo. 1905).

26. *Ex parte* Rowland, 104 U.S. 604 (1882); Western Fruit Growers v. Gotfried, 136 F.2d 98 (9th Cir. 1943).

27. United States v. Kroger Grocery & Baking Co., 163 F.2d 168 (7th Cir. 1947).

28. Anderson v. Comptois, 109 Fed. 971 (9th Cir. 1901); *In re* Wheeland, 108 F. Supp. 10 (M.D. Pa. 1952).

29. See Moskovitz, *Contempt of Injunctions, Civil and Criminal,* 43 COLUM. L. REV. 780 (1943), where it is contended that there must be at least intent to violate the injunction. This view is supported in Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 230 Fed. 120, 131-4 (6th Cir. 1915). United States v. Kroger Grocery & Baking Co., 163 F.2d 168 (7th Cir. 1947), while at first glance seems to support this proposition, closer examination indicates that there is no intent in this case, therefore no criminal contempt.

30. "One is always held to intend the direct, natural, and probable consequences of acts intentionally done. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent." *In re* Rice, 181 Fed.

the defendant sheriff to receive a federal prisoner and keep him safely in jail until his sentence expired. The defendant was told by the United States marshall to give the prisoner "all the good treatment and liberty possible because he was being unjustly punished and would soon be pardoned." The prisoner was seen on several occasions driving about the countryside with friends. In spite of an absence of any intent to violate the order of the court, the defendant was found guilty of criminal contempt.[31] Thus a good faith belief that an injunction is being complied with does not affect the wilful character of the violation.[32] Nor does the fact that one acts upon advice of counsel relieve the wilful nature of the contempt.[33]

A good faith belief that the injunction is being obeyed is, however, a definite factor mitigating the severity of the punishment. Where an injunction restrained any interference with mining operations of a certain company and intimidation of its employees, the strikers, acting in the good faith belief that they were not violating the injunction, formed a body of two hundred men and marched with music and banners between the homes of the non-strikers and the mines. The column was so situated that the workers were forced to cross the lines in going to and returning from work. There were no acts of violence nor use of boisterous or abusive language. While the labor leaders were held guilty of criminal contempt for wilfully violating the decree, the good faith belief that their action was proper led the court to impose a jail sentence of only six days.[34] In another case involving a similar injunction, the defendant made a speech in a vacant lot adjacent to the struck plant calling the non-strikers "scabs" and "blacklegs." As a result of his speech a group of strikers marched on the factory in a menacing manner, shouting at and cursing the employees. It was shown that the leaders of the strike counseled obedience of the injunction and believed that they were complying with it. The defendants were held guilty of criminal contempt but fined only five dollars each because of their belief that they were acting within the terms of the decree.[35]

It therefore appears that the intent necessary to satisfy the wilful requirement is merely intention to do the acts that constitute criminal conempt. While this is the law, a better rule would require an intent to violate the order of the court. The wrong is of a criminal nature and

217, 223 (N.D. Ala. 1910). See Economist Furnace Co. v. Wrought-Iron Range Co., 86 Fed. 1010 (C.C. Ind. 1898).

31. Swepston v. United States, 251 Fed. 205 (6th Cir. 1918).

32. Bates Refrigerating Co. v. Gillett, 30 Fed. 683 (C.C. N.J. 1898).

33. *In re* La Varre, 48 F.2d 216 (S.D. Ga. 1930).

34. Mackall v. Batchford, 82 Fed. 41 (C.C. W. Va. 1897).

35. *Ex parte* Richards, 117 Fed. 658 (S.D. W. Va. 1902).

arises out of a disregard for the authority of the court. Intent to disobey the injunction should be a minimum requirement because without this the authority of the court cannot be defied. The private interest injured by a violation of a decree through ignorance has an adequate remedy in civil contempt for damages and the public interest in maintaining respect for the judiciary is not injured by violation of an injunction where the defendant in good faith believed he was complying.

Courts have limited the scope of criminal contempt by attaching an additional connotation to the word "wilful" by applying it to the nature of the act by the alleged violator. Consequently, the meaning of "wilful" is twofold: (1) intent to do acts which result in disobedience of an injunction and (2) some extenuating factor that makes a simple violation more culpable. Thus a violation of the injunction accompanied with the necessary intent (wilful in the former sense) could be criminal contempt, but these courts have limited it further by requiring a flagrant violation also characterized as wilful. Courts require both elements to be present. Wilful, as used in the latter sense is difficult to define. Acts of violence are a wilful violation,[36] as are threats of violence,[37] inciting others to violence[38] and allowing violent acts to continue where there is the power to stop them.[39] Repeated violations have also been held to be wilful.[40] Likewise fraudulent attempts to make disobedience seem lawful fall within this category.[41] These are not definitive rules and seem only to represent the exercise of discretion of the court in its cautious use of criminal contempt. Thus the court sometimes refuses to punish a seemingly clear violation, as in the case where an injunction was issued ordering a Spanish crew to abandon a ship and surrender possession to the owner's representative. The order was read in Spanish to the defendants who replied that they would obey no order except one from the Spanish consul or the ship's committee and would resist by force any attempt to take possession of the ship. The court said this was not criminal contempt because the

36. *Ibid.*

37. Mackall v. Batchford, 82 Fed. 41 (C.C. W. Va. 1897); *In re* Wabash Ry. Co., 24 Fed. 217 (W. D. Mo. 1885).

38. Stewart v. United States, 236 Fed. 838 (8th Cir. 1916).

39. United States v. Shipp, 214 U.S. 386 (1909); United States Mine Workers v. United States, 177 F.2d 29 (D.C. Cir. 1949); Phillips Sheet & Tin Plate Co. v. Amalgamated Ass'n of Iron, Steel & Tin Workers, 208 Fed. 335 (S.D. Ohio 1913). Furnishing a meeting place for those who violate the injunction by use of force is a wilful violation. Schwartz v. United States, 217 Fed. 866 (4th Cir. 1914); as is allowing others to use one's property in such a manner as to incite violence. (Placed sign bearing insulting language in a window of a barbershop.) United States v. Taliaferro, 290 Fed. 906 (4th Cir. 1923).

40. *In re* Wheeland, 108 F.Supp. 10 (M.D. Pa. 1952).

41. *In re* La Varre, 48 F.2d 216 (S.D. Ga. 1930); *Ex parte* Young, 50 Fed. 526 (E.D. Tenn. 1892).

defendants had not disobeyed any order.[42] However, a more realistic explanation seems to be that the court was reluctant to invoke the contempt power with the resulting penal sanction against persons unfamiliar with our law when the only injury sustained by the private interest was a delay in obtaining possession of the vessel. In another case, a judgment had been rendered against the defendant in a suit concerning a lessee's right to possession and operation of certain mining property. The defendant interfered on the mistaken assumption that the lessee had committed a breach which gave the defendant a right to possession. Because the disobedience was prompted by ignorance, the court said the violation was not wilful.[43]

But there is a body of cases that seem to ignore this latter requirement of wilfulness.[44] Some of these may be rationalized on the basis of the inadequacy of the civil contempt remedy because of the difficulty in ascertaining damages. For example, where the injunction prohibited suits concerning a shipwreck, the defendant was held guilty of criminal contempt for instituting suit.[45] Thus, while wilfulness in the sense of intent is present, wilfulness in the other sense is not. Others may be justified on the grounds of the compelling public interest involved. Thus acts may be classified as wilful if the policy underlying the injunction is: (1) price control of vital materials during wartime;[46] (2) governing either management or labor in a labor dispute;[47] (3) enforcing the prohibition laws;[48] or (4) enforcing the anti-trust laws.[49] Other cases, where the injunction dealt with patent infringement, bankruptcy and purely private interests, have also been held to be criminal contempt in absence of any wilful conduct as required by some courts.[50] In these, there is no way of rationalizing or distinguishing the result. The court simply ignored this aspect of the wilful requirement in these cases.

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42. The Navemar, 17 F. Supp. 495 (E.D. N.Y. 1936).

43. Alabama Vermiculite Corp. v. Patterson, 130 F. Supp. 867 (W.D. S.C. 1955).

44. *In re* Mallow Hotel Corp., 18 F. Supp. 869 (M.D. Pa. 1937); Am. Const. Co. v. Jacksonville, T. & K.W. Ry. Co., 52 Fed. 937 (N.D. Fla. 1892).

45. Brougham v. Oceanic Steam Navigation Co., 205 Fed. 857 (2d Cir. 1913).

46. United States *ex rel.* Bowles v. Seidmon, 154 F.2d 228 (7th Cir. 1946).

47. Reliance Mfg. Co. v. NLRB, 143 F.2d 761 (7th Cir. 1944), (Management); United States v. Brotherhood of Railroad Trainmen, 96 F. Supp. 428 (N.D. Ill. 1951), (Labor).

48. Donato v. United States, 48 F.2d 142 (3d Cir. 1931); Hill v. United States, 33 F.2d 489 (8th Cir. 1929).

49. United States v. So. Wholesale Grocers' Ass'n, 207 Fed. 434 (N.D. Ala. 1913).

50. *In re* Fletcher, 216 F.2d 915 (4th Cir. 1954), (private); Cassidy v. Puett Elec. Starting Gate Corp., 182 F.2d 604 (4th Cir. 1950), (patent infringement); Merchants' Stock & Grain Co. v. Bd. of Trade, 201 Fed. 20 (8th Cir. 1912), (private); Clay v. Waters, 178 Fed. 385 (8th Cir. 1910), (bankruptcy); Anderson v. Comptois, 109 Fed. 971 (9th Cir. 1901), (private); Bates Refrigerating Co. v. Gillett, 30 Fed. 683 (C.C. N.J. 1887), (patent infringement).

Therefore it seems that the term "wilful," as applied to the nature of the act, means very little and is merely a reflection of the courts' hesitancy to invoke its criminal contempt power in all but the most compelling cases. The nature of the act is but one factor a court will weigh in deciding whether the violation should be punished as criminal contempt. Others to be considered are the value of the public interest protected by the injunction and the adequacy of civil contempt and damages.

Another problem arises in determining what persons may be held for criminal contempt when they act in a manner forbidden by the injunction. Clearly everyone cannot violate the injunction. The court cannot enjoin the world at large.[51] Those persons who are parties to the injunction suit and are specifically named in the decree may be guilty of criminal contempt, as may others impersonally named in the decree such as agents, attorneys, and servants if the violative acts are performed with actual knowledge of the injunction.[52] The requirement of actual knowledge has caused little difficulty in this area of the law. While the knowledge must be actual,[53] it is determined on an objective rather than a subjective basis.[54] Thus, in a criminal contempt proceeding involving a liquor injunction, actual knowledge was found by service of the injunction upon the wife of one of the defendants. Additional factors involved here were the small size of the community, indicating that if the injunction was issued, the defendants were almost certain to be informed of it, and the concert of action between the party served and the defendants in maintaining the unlawful tavern.[55] In a labor injunction case, actual knowledge was found to exist on the part of the defendant union leader on the basis of the prominent publication and posting of the injunction, the fact that the defendant could read, and the fact that the union knew of the injunction when it sent the defendant to the scene of the strike.[56] On the other hand, newspaper publicity of the order and notices posted at the scene of the violation have been held not to amount to actual knowledge but only an inference of knowledge. Therefore, clear opportunity to know is not sufficient.[57] There must be additional evidence showing that the defendant *did* know. A letter telling the defendant of a court decision that a certain structure was held to be a patent

51. Kean v. Hurley, 179 F.2d 888 (8th Cir. 1950).
52. *Ex parte* Lennon, 166 U.S. 548 (1897); *In re* Reese, 107 Fed. 942 (8th Cir. 1901).
53. McCauley v. First Trust and Sav. Bank, 276 Fed. 117 (7th Cir. 1921); Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 124 Fed. 736 (C.C. Minn. 1903).
54. Garrigan v. United States, 163 Fed. 16 (7th Cir. 1908).
55. Hill v. United States, 33 F.2d 489 (8th Cir. 1929).
56. *Ex parte* Richards, 117 Fed. 658 (S.D. W.Va. 1902).
57. See note 54, *supra*.

infringement, without notice that the court had issued an injunction, was not sufficient to amount to actual knowledge even where the trial court had previously issued an injunction against the defendant on another structure.[58] Thus it is seen that the standard for actual knowledge is not objective in the sense that one is held to know if by the exercise of reasonable intelligence he should have known, but is objective in the sense that a state of mind is ascertained only by viewing conduct and the surrounding circumstances. The test is whether the defendant knew, not whether he should have known, but in making the determination, objective facts must be weighed.

Persons incidentally named in the decree such as agents, servants and attorneys may be guilty of criminal contempt, but only when acting in the capacity in which they were enjoined.[59] For example, where an injunction ran against a dealer and its agents prohibiting the sale of patent infringing goods, a manufacturer who had previously sold the offending goods to the dealer did not violate the injunction by selling them to others.[60] Where a president of an enjoined corporation makes a bona fide severance with the corporation, he may perform the enjoined acts without fear of criminal contempt.[61] But where the resignation of an officer is merely a subterfuge, the officer is still restrained by the injunction.[62]

As to persons not named in the decree, there is some opinion that anyone who performs the forbidden acts with actual knowledge of the injunction may be guilty of criminal contempt.[63] In light of the majority of cases, this view seems erroneous. The correct view seems to be that, when persons not named in the injunction are involved, it must also be shown that the unnamed person aided and abetted the enjoined parties in the violation.[64] Aiding and abetting encompasses almost any act done

58 Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 124 Fed. 736 (C.C. Minn. 1903).

59. Alemite Mfg. Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930); Janney v. Pancoast Int'l Ventilator Co., 124 Fed. 972 (C.C. E.D. Pa. 1903); Mexican Ore Co. v. Mexican Guadalupe Mining Co., 41 Fed. 351 (C.C. N.J. 1891).

60. United States Playing Card Co. v. Spalding, 92 Fed. 368 (C.C. S.D. N.Y. 1899). (Agent here includes manufacturer).

61. Hoover Co. v. Exchange Vacuum Cleaner Co., 1 F. Supp. 997 (S.D. N.Y. 1932).

62. Cassidy v. Puett Elec. Starting Gate Corp., 182 F.2d 604 (4th Cir. 1950).

63. This position is taken in Comment, 65 YALE L.J. 630 (1956).

64. Swetland v. Curry, 188 F.2d 841 (6th Cir. 1951); Alemite Mfg. Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930); Puget Sound Traction, Light & Power Co. v. Lowrey, 202 Fed. 263 (W.D. Wash. 1913). See Annot., 15 A.L.R. 387 (1943).

This reasoning is further supported by FED. R. CIV. P. 65(d): "Every order granting an injunction . . . is binding *only* upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." (Emphasis added.) The courts have applied this rule in two instances to

in violation of the injunction where there is some privity between the parties. There need not be active concert between the defendant and the enjoined party; it is sufficient if the relationship arises out of the defendant's acts. That is, if the defendant performs the enjoined act, and the purpose of the act is to further the interest of the enjoined party, then it is aiding and abetting. For example, the injunction protected the remaining assets of a bankrupt. The defendant, a city marshal, executed a writ of replevin against the property in the hands of a receiver in bankruptcy. Although having no personal interest in the matter, the officer was held for criminal contempt for aiding and abetting an enjoined party.[65] On the other hand, merely performing the forbidden act is not sufficient. Where an injunction restrained interference with employees at a certain mine, such interference ten years later, by a different union and arising out of a new and wholly different attempt to unionize the mine was held not to constitute criminal contempt.[66]

Some courts have stated that one who is not named in the injunction may still be punished for criminal contempt if he violates the decree with knowledge, not requiring that the defendant be an aider and abettor. Some of these cases can be dismissed on the grounds that the statements are dicta.[67] In others, while the courts set out this rule, it appears from the facts that the defendants actually were aiding and abetting.[68] In one such case a railroad was enjoined from refusing to haul the complainant's railroad cars and was ordered to continue to exchange cars with other railroads. The defendant, an engineer for the enjoined railroad, refused to haul one of the complainant's cars. The court, in holding the defendant guilty of criminal contempt, said all that was necessary was actual knowledge of the injunction and a violation. Though it was not expressly recognized, the defendant in this case was an aider and abettor. He was an employee of the enjoined party and the only conceivable purpose he could have had in refusing the car was to further the interests

limit the scope of criminal contempt. See Kean v. Bailey, 82 F. Supp. 260 (Minn. 1949); United States v. Dean Rubber Mfg. Co., 71 F. Supp. 97 (W.D. Mo. 1946).

See 2 HIGH, INJUNCTIONS § 1440(b) (4th ed. 1905); RAPALJE, CONTEMPT § 47 (1884).

65. *In re* Wilk, 155 Fed. 943 (S.D. N.Y. 1907).

66. Tosh v. West Kentucky Coal Co., 252 Fed. 44 (6th Cir. 1908).

67. United States v. Debs, 64 Fed. 724, 755-6 (C.C. N.D. Ill. 1894); United States v. Aglar, 62 Fed. 824, 827 (C.C. Ind. 1894).

68. Bessette v. Conkey Co., 194 U.S. 324 (1903), (defendants aided and abetted those enjoined in violating the decree.) See Conkey Co. v. Russell, 111 Fed. 417 (C.C. Ind. 1901) for a clearer statement of the facts; Diamond Drill & Mach. Co. v. Kelly Bros. & Spielman, 120 Fed. 282 (E.D. Pa. 1904), (defended on the grounds that the accused was not a party to the injunction and was merely an agent of one of the enjoined parties).

of his employer.[69]

The cases that expound this rule[70] base their contentions upon two English cases which held that one need not be a named party to the injunction to be guilty of criminal contempt. In one case the servant of the enjoined party had entered on another's land and cut timber that his master had been restrained from cutting.[71] In the other case, a business associate acted in concert with the enjoined party in violating the injunction by holding boxing matches upon certain premises.[72] Although the defendants were held guilty of criminal contempt in both cases, it was clear that they were aiding and abetting the enjoined parties. Consequently, it appears that aiding and abetting is necessary to hold a non-party to an injunction amenable for criminal contempt and that use of these two cases to support any broader rule is erroneous.

Without this restriction the court could, in effect, enjoin the world at large. Also, this requirement is in accordance with Federal Rule of Civil Procedure 65(d), which limits the court's power to bind persons by injunction. As to the concept that disobedience by a non-party is not a violation of the decree but an obstruction of justice, it is difficult to understand how one not a party to the injunction can be guilty of obstructing justice, since the injunction merely orders certain parties to do, or refrain from doing, certain acts. The aider and abettor must necessarily be punished for contempt because without this requirement, the enjoined party would be provided with a means of avoiding the decree simply by procuring others to perform the forbidden act. But it is difficult to justify extension to persons with knowledge of the decree who act independently of the enjoined parties. Such an extension deprives one of a hearing adjudicating his rights in the matter. Holding a person who assists the enjoined party in disobeying the decree guilty of criminal contempt is justified by expediency in enforcing the injunction against the named party and the fact that the aider and abettor has no legal interest in the matter. But where one independently performs acts which would violate the injunction if it applied to him, he has a personal interest which goes to the merits of the injunction and should have a hearing to decide his rights before he is compelled to comply.

While the criminal contempt power is justifiably feared, it is seen

69. *Ex parte* Lennon, 166 U.S. 548 (1897). This narrower construction of the *Lennon* case was substantiated in Chase Nat'l Bank v. City of Norwalk, 291 U.S. 431, 436-7 (1934).

70. Two of the cases are indistinguishable; Kelton v. United States, 294 Fed. 491 (3d Cir. 1924) and Chisolm v. Caines, 121 Fed. 397 (C.C. S.C. 1903). Both hold that anyone with actual knowledge is amenable to criminal contempt.

71. Wellesley v. Mornington, 11 Beav. 181 (1848).

72. Seaward v. Paterson, 1 Chy. 545 (1897).

that it is a vital remedy if our legal system is to continue its use of injunctions. The substantive requirements applied by the courts set out a system of self-imposed restraints which greatly limit the use of the power and serve as a check against misuse of criminal contempt. Therefore, in ordinary times, the substantive controls seem adequate. The great danger lies in the use of the power to enforce some great social policy, the justice of which most men cannot fail to agree upon. Such a policy is desegregation. With an issue of such compelling national importance, there is a possibility that the judges, in their anxiety to bring about racial equality, will relax some of the controls.[73] This might result in injustice to some persons who are against the desegregation policy and perhaps some who are merely victims of circumstances, caught between two powerful forces. Many of the southern school authorities fall within the last category.[74] They are faced with strong local pressures on one hand and the power of the federal courts on the other. Even those who honestly wish to comply with the desegregation orders will have difficulty. As to those who resist desegregation, while most cannot agree with them, it is still highly desirable that they be afforded their full legal rights. Therefore, the courts should exercise even greater caution in the use of the contempt power, and because the procedural protections are fewer, make certain that the substantive requirements are met.

MALPRACTICE AND THE STATUTE OF LIMITATIONS

Statutes of Limitation are said to serve the dual purpose of protecting defendants against the evidentiary difficulties inherent in litigating stale claims[1] and providing for security of transactions with the passage of time.[2] In negligence cases, the stale claims policy consideration is particularly cogent in view of the perishable nature of evidence usually involved.[3] Thus, the shorter statutory period for actions to recover

73. This was not the case in *In re* Kasper, No. 1555 (E.D. Tenn. 1956). The defendant was enjoined from interfering with the execution of a previously issued desegregation order. The restraining order was served on Kasper while he was making a speech. He ignored the order and continued the speech in which he urged resistance to the desegragation order. The court found this conduct amounted to inciting others to violence and held the defendant guilty of criminal contempt.

74. See Hoxie School Dist. v. Brewer, 135 F. Supp. 296 (E.D. Ark. 1955), where the school board sought to enjoin persons who were interfering with the board's attempt to comply with a desegregation order.

1. See WOOD, LIMITATION OF ACTIONS § 5 (1st ed. 1882).

2. See Patterson, *Can Law Be Scientific?*, 25 ILL. L. REV. 121 at 144 (1930); Marshall v. Watkins, 106 Ind. App. 235, 18 N.E.2d 954.

3. See Note, 28 CONN. B. J. 346, 348.