

October 1970

## The Recovery of Attorney's Fee and Damages in Civil Contempt Proceedings in Illinois

John H. Andrew

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Law Commons](#)

---

### Recommended Citation

John H. Andrew, *The Recovery of Attorney's Fee and Damages in Civil Contempt Proceedings in Illinois*, 47 Chi.-Kent L. Rev. 211 (1970).  
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol47/iss2/4>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [dginsberg@kentlaw.iit.edu](mailto:dginsberg@kentlaw.iit.edu).

## THE RECOVERY OF ATTORNEYS' FEES AND DAMAGES IN CIVIL CONTEMPT PROCEEDINGS IN ILLINOIS

JOHN H. ANDREW\*

THE POWER of the courts of equity to enforce compliance with their injunctive orders and decrees through contempt proceedings is an important attribute of our system of justice. "For," the United States Supreme Court has declared, ". . . the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory."<sup>1</sup>

For the private litigant injured by the violation of an injunction, an important aspect of this power is the ability of the court to make him whole. Should a recalcitrant defendant fail to abide by the terms of an injunction which has been entered against him, what remedies are available to the plaintiff? Can the plaintiff recover the damages he has sustained because of the defendant's violation of the injunction? Can he recover his attorneys' fees expended in calling the contempt to the attention of the court and securing enforcement of the injunction? Surprisingly, in Illinois the answers to these questions depend on whether the original suit was brought in a state or federal court.

### THE NATURE OF CIVIL CONTEMPT

Contempts of court are usually classified as criminal or civil. In the federal courts, the character and purpose of the punishment imposed often serves to distinguish the two classes.<sup>2</sup> Where the purpose is punitive, the contempt is classified as criminal.<sup>3</sup> Where it is remedial, the contempt is classified as civil,<sup>4</sup> and the punishment is for the benefit of the complainant.<sup>5</sup> In *Gompers v. Bucks Stove & Range Co.*,<sup>6</sup> the Supreme Court distinguished "between refusing to do an act commanded

\* John H. Andrew graduated with a B.A. from University of Minnesota. He received his J.D. from Northwestern University Law School in 1961.

<sup>1</sup> *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911).

<sup>2</sup> *Id.* at 441.

<sup>3</sup> *Cheff v. Schnackenberg*, 384 U.S. 373, 377-378 (1966).

<sup>4</sup> *Shillitani v. United States*, 384 U.S. 364, 368-370 (1966).

<sup>5</sup> *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911).

<sup>6</sup> 221 U.S. 418 (1911).

—remedied by imprisonment until the party performs the required act; and doing an act forbidden—punished by imprisonment for a definite term.”<sup>7</sup> The former case is civil contempt; the latter, criminal. A given case may, of course, involve elements of both civil and criminal contempt.<sup>8</sup>

In Illinois, a distinction is also made between civil and criminal contempts, the state supreme court having defined criminal contempts “as those directed to preservation of the dignity and authority of the court,”<sup>9</sup> and civil contempts as “those prosecuted to enforce the rights of private parties and to compel obedience to orders and decrees for the benefit of opposing parties.”<sup>10</sup> However, the distinction is blurred by the Illinois rule that, “The enforcement of a Court’s decree by civil contempt is not the enforcement of a private right but rather the process of the Court to secure obedience to its decrees, the benefit to the party invoking the aid of the Court being merely incidental.”<sup>11</sup>

#### THE AWARD OF ATTORNEYS’ FEES AND DAMAGES IN CIVIL CONTEMPT PROCEEDINGS IN THE FEDERAL COURTS

The rule that in civil contempt proceedings the defendant may be punished by the imposition of a fine payable to the complainant is universally followed in the federal courts.<sup>12</sup> In *Parker v. United States*<sup>13</sup> the court explained the reasons for the rule:

Proceedings in civil contempt are between the original parties and are instituted and tried as a part of the main cause. Though such proceedings are “nominally those of contempt,” [citations] the real purpose of the court order is purely remedial—to coerce obedience to a decree passed in complainant’s favor, or to compensate complainant for loss caused by respondent’s disobedience of such a decree. If imprisonment is imposed in civil contempt proceedings, it cannot be for a definite term. [Citations.] The respondent can only be imprisoned to

<sup>7</sup> *Id.* at 443.

<sup>8</sup> *United States v. United Mine Workers*, 330 U.S. 258, 298-299 (1947) and cases cited therein.

<sup>9</sup> *People v. Barasch*, 21 Ill. 2d 407, 409, 173 N.E.2d 417, 418 (1961).

<sup>10</sup> *Id.*

<sup>11</sup> *Eberle v. Greene*, 71 Ill. App. 2d 85, 93, 217 N.E.2d 6, 10 (1966).

<sup>12</sup> *See, e.g.*, *United States v. United Mine Workers*, 330 U.S. 258 (1947); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911); *Norstrum v. Wahl*, 41 F.2d 910 (7th Cir. 1930); *Folk v. Wallace*, 394 F.2d 240 (4th Cir. 1948); *Sunbeam Corp. v. Golden Rule Appliance Co.*, 252 F.2d 467 (2d Cir. 1958); *Lance v. Plummer*, 353 F.2d 585 (5th Cir. 1965).

<sup>13</sup> 153 F.2d 66 (1st Cir. 1946).

compel his obedience to a decree. If he complies, or shows that compliance is impossible, he must be released, for his confinement is not as punishment for an offense of a public nature. If a compensatory fine is imposed, the purpose again is remedial, to make reparation to a complainant injured by respondent's disobedience of a court decree. While respondent may be confined to coerce payment of the compensatory fine, he must be released if he pays the fine or shows his utter inability to do so—confinement beyond that point would be punitive, not remedial. If complainant makes a showing that respondent has disobeyed a decree in complainant's favor and that damages have resulted to complainant thereby, complainant is entitled as of right to an order in civil contempt imposing a compensatory fine. [Citations.] The court has no discretion to withhold the appropriate remedial order. In this respect the situation is unlike that of criminal contempt where the court in its discretion may withhold punishment for the past act of disobedience. An order imposing a compensatory fine in a civil contempt proceeding is thus somewhat analogous to a tort judgment for damages caused by wrongful conduct.<sup>14</sup>

Often a monetarily important part of the damages sustained by the complainant in a civil contempt proceeding is the cost of the proceeding itself. In *In re Federal Facilities Realty Trust*,<sup>15</sup> the Court of Appeals for the Seventh Circuit considered the court's authority to include an award of attorneys' fees as part of the compensatory fine in such cases and held that,

The rule to be spelled out from the court decisions is that a party compelled to resort to a civil contempt proceeding to preserve and enforce an adjudicated right is entitled to a decree by way of a fine for injuries actually sustained by him as a result of the contemptuous act [citations], which may include, in the discretion of the court, an award of reasonable attorneys' fees. [Citations.]<sup>16</sup>

Recently, the Supreme Court has recognized the inclusion of attorneys' fees as a part of the compensatory fine awarded in civil contempt proceedings to be an exception to the "American rule" denying the award of attorneys' fees to successful litigants.<sup>17</sup>

### THE ILLINOIS RULE

Contrary to the federal practice, the Illinois courts have consistently refused to allow damages and attorneys' fees to complainants in civil contempt proceedings. In *Barnes & Co. v. Chicago Typographical*

<sup>14</sup> *Id.* at 70.

<sup>15</sup> 227 F.2d 657 (7th Cir. 1955).

<sup>16</sup> *Id.* at 658.

<sup>17</sup> *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

*Union*,<sup>18</sup> a 1908 decision, the Illinois Supreme Court held that no statute authorized the imposition of a fine for the use of the complainant in a contempt proceeding and that, in the absence of a statute, the court had no power to impose a compensatory fine for contempt.<sup>19</sup> Following the decision of the United States Supreme Court in the *Gompers* case, the question of punishment in civil contempt cases was again brought before the Illinois Supreme Court, in *Rothschild & Co. v. Steger & Sons Piano Mfg. Co.*,<sup>20</sup> and that court was strongly urged to follow the rationale of the *Gompers* decision. The Illinois court declined to do so, characterizing the *Gompers* decision as proceeding "on the theory that a civil contempt proceeding for the violation of a prohibitory injunction is a mere private remedy afforded to complainant, in which the dignity of the court and the public is not concerned."<sup>21</sup> The court held:

The law is well settled in this state that the fine imposed in such cases is so far regarded as a penalty that it is treated as other fines, and paid over when collected, not to the complainant in the equity proceeding, but to the public.<sup>22</sup>

The Illinois courts have continued to deny damages to civil contempt complainants. In *Eberle v. Greene*,<sup>23</sup> a 1966 decision, the defendant, having been found guilty of contempt, was ordered to pay to the plaintiff the damages plaintiff had suffered as a result of the contemptuous conduct. On appeal, the appellate court reversed, holding that, "The established rule in Illinois is that the Court may imprison or fine for contempt of its orders but is without authority to recompense Plaintiff for his damages."<sup>24</sup>

### THE "ERIE" PROBLEM

The federal courts sitting in Illinois have, in conformity with the general federal rule, awarded damages and attorneys' fees—including fees incurred in the court of appeals—to civil contempt complainants

<sup>18</sup> 232 Ill. 402, 83 N.E. 932 (1908).

<sup>19</sup> Section 42 of the Illinois Chancery Act (Ill. Rev. Stat., 1969, ch. 22, § 42), enacted in 1872, provides that a court may enforce its decree "by fine or imprisonment, or both . . . and by the exercise of such other powers as pertain to courts of chancery . . ." The act does not restrict the imposition of a fine.

<sup>20</sup> 256 Ill. 196, 99 N.E. 920 (1912).

<sup>21</sup> *Id.* at 204, 99 N.E. at 923.

<sup>22</sup> *Id.* at 205, 99 N.E. at 923.

<sup>23</sup> 71 Ill. App. 2d 85, 217 N.E.2d 6 (1966).

<sup>24</sup> *Id.* at 93, 217 N.E.2d at 10.

in appropriate cases.<sup>25</sup> Indeed, the Civil Rules adopted by the United States District Court for the Northern District of Illinois specifically provide that the affidavit upon which an order to show cause is based shall set out the complainant's claim of damages, which may include a reasonable attorney's fee, and that the order finding the contemner guilty shall fix the fine to be imposed, including damages, and name the person to whom the fine shall be paid.<sup>26</sup> In view of the refusal of the Illinois courts to award such damages and attorneys' fees, does the federal practice conflict with the doctrine of *Erie v. Tompkins*?<sup>27</sup> Despite the *Rothschild* court's characterization of the question of punishment in civil contempt cases as "merely a matter of procedure,"<sup>28</sup> it can be argued that it does conflict.

In *Danville Building Corp. v. Gates*,<sup>29</sup> the court considered the right of the plaintiff in an action brought under the Federal Interpleader Statute<sup>30</sup> to recover attorneys' fees. Prior to the *Erie* decision, the federal courts had, at their discretion, awarded attorneys' fees in actions brought under the statute. The Illinois courts did not do so. The court held that, following *Erie*, "a federal court may no longer grant an equitable remedy in a diversity action where that relief is not available in the courts of the state."<sup>31</sup> Declaring the existence or non-existence of a remedy to be a matter of substance rather than one of procedure, the court denied plaintiff attorneys' fees. The *Danville Building* decision has subsequently been adhered to in two opinions by Chief Judge Campbell.<sup>32</sup> It may be argued that the non-existence of a right to compensatory damages and attorneys' fees in a civil contempt proceeding is likewise a substantive matter as to which the federal courts should conform their practice to that of the courts of the state in which they sit.<sup>33</sup>

<sup>25</sup> See, e.g., *Crane v. Gas Screw Happy Pappy*, 367 F.2d 771 (7th Cir. 1966).

<sup>26</sup> N.D. Ill. (Civ.) R. 18.

<sup>27</sup> *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>28</sup> 256 Ill. at 207, 99 N.E. at 924.

<sup>29</sup> 66 F. Supp. 706 (E.D. Ill. 1946).

<sup>30</sup> 28 U.S.C. § 1335.

<sup>31</sup> 66 F. Supp. at 709.

<sup>32</sup> *Illinois Bankers Life Assurance Co. v. Blood*, 69 F. Supp. 705 (N.D. Ill. 1947); *Aetna Life Ins. Co. v. Johnson*, 206 F. Supp. 63 (N.D. Ill. 1962).

<sup>33</sup> *But, cf., Sunbeam Corp. v. Golden Rule Appliance Co.*, 252 F.2d 467, 470 (2d Cir. 1958), holding that a remedy provided by a state contempt statute is not applicable in a diversity case in a federal court.

## CONCLUSION

In *People v. Redlich*<sup>34</sup> the Illinois Supreme Court declared,

In civil contempt proceedings the order entered serves two purposes. In addition to vindicating the authority and dignity of the court, it also advances the relief granted to a party to the litigation.<sup>35</sup>

It is submitted, however, that where a party is required to go to considerable effort and expense to obtain relief to which he has already been found entitled and is denied compensation for his damages and expenses, his advance may well be offset by its loss. Moreover, the authority and dignity of the court may be far from vindicated in the eyes of a party who has been forced to bear the expenses of litigation to obtain enforcement of the court's decree. This is especially true when the fine imposed is minimal and may be regarded by the defendant as a fee for a license to ignore the court's injunction.<sup>36</sup>

Clearly the federal rule, permitting the complainant in a civil contempt proceeding to recover his damages and attorneys' fees, is more equitable than the Illinois rule. It is submitted that the time has come to amend the Chancery Act to bring the state practice into conformity with that of the federal courts and thus provide the state courts with an effective tool for vindicating their authority and dignity, while at the same time truly advancing the relief to which the complainant has been found entitled.

<sup>34</sup> 402 Ill. 270, 83 N.E.2d 736 (1949).

<sup>35</sup> *Id.* at 277, 83 N.E.2d at 740-741.

<sup>36</sup> In this regard it is interesting to note that while the court in *Barnes & Co. v. Chicago Typographical Union* held that the fine imposed could not be paid to the complainant, the dissenting opinion indicates that the majority approved the use of the amount of the complainant's damage and expense as a measure of the fine to be imposed. 232 Ill. 402, 411-412, 83 N.E. 932, 935-936 (1908).

# CHICAGO-KENT LAW REVIEW

Copyright 1971, Illinois Institute of Technology

---

PUBLISHED SPRING AND FALL BY THE STUDENTS OF  
CHICAGO-KENT COLLEGE OF LAW OF ILLINOIS INSTITUTE OF TECHNOLOGY  
10 N. FRANKLIN STREET, CHICAGO, ILLINOIS 60606  
Subscription Price, \$4.00 per year  
Single Copies, \$2.50  
Foreign Subscription, \$4.50

---

## EDITORIAL BOARD

### *Editor-in-Chief*

ARTHUR L. NEWELL

### *Associate Editors*

HARRY J. BENSON  
STEVEN C. BONAGUIDI

CHARLES H. LEVAD  
DAVID A. THOMPSON

### *Staff*

GEORGE BURRIER  
DENNIS COOLEY  
DONALD L. DUDYCHA  
ROBERT GERAGHTY

LYLE HASKIN  
JOHN KALNINS  
LESTER H. MCKEEVER  
GEORGE PAPPAS  
THOMAS REMICK

PAUL WHITE  
ALBERT J. WOJCIK  
PHILLIP YAFFA  
FERN ZITTLER

### *Candidates*

THOMAS BROWN  
KEVIN BURKE  
KENNETH FLAXMAN

THOMAS GALLACHER  
JANE LIZARS

BRUNO TABIS  
RICHARD TRAVIS  
BRUCE VODICA

## BOARD OF MANAGERS

PROFESSOR ROBERT J. O'CONNELL, *Chairman and Faculty Advisor*

DEAN FRED HERZOG

MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS

---

The Illinois Institute of Technology assumes no responsibility for any  
statement appearing in the columns of this publication.

---

VOLUME 47

FALL-WINTER, 1970

NUMBER 2

---