

Summary Contempt and Due Process:

England, 1631, California, 1888

By Marc Alexander



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Terminating sanctions usually result from failure to answer a complaint or egregious discovery abuses, despite repeated admonitions from the court. There is, however, a dramatic example of contempt of court after which the misbehaving party himself was terminated, an example of “summary contempt” powers exercised with what was then considered due process within the rule of law. It took place in 1631 at the “high-water mark” of English judges’ contempt powers.

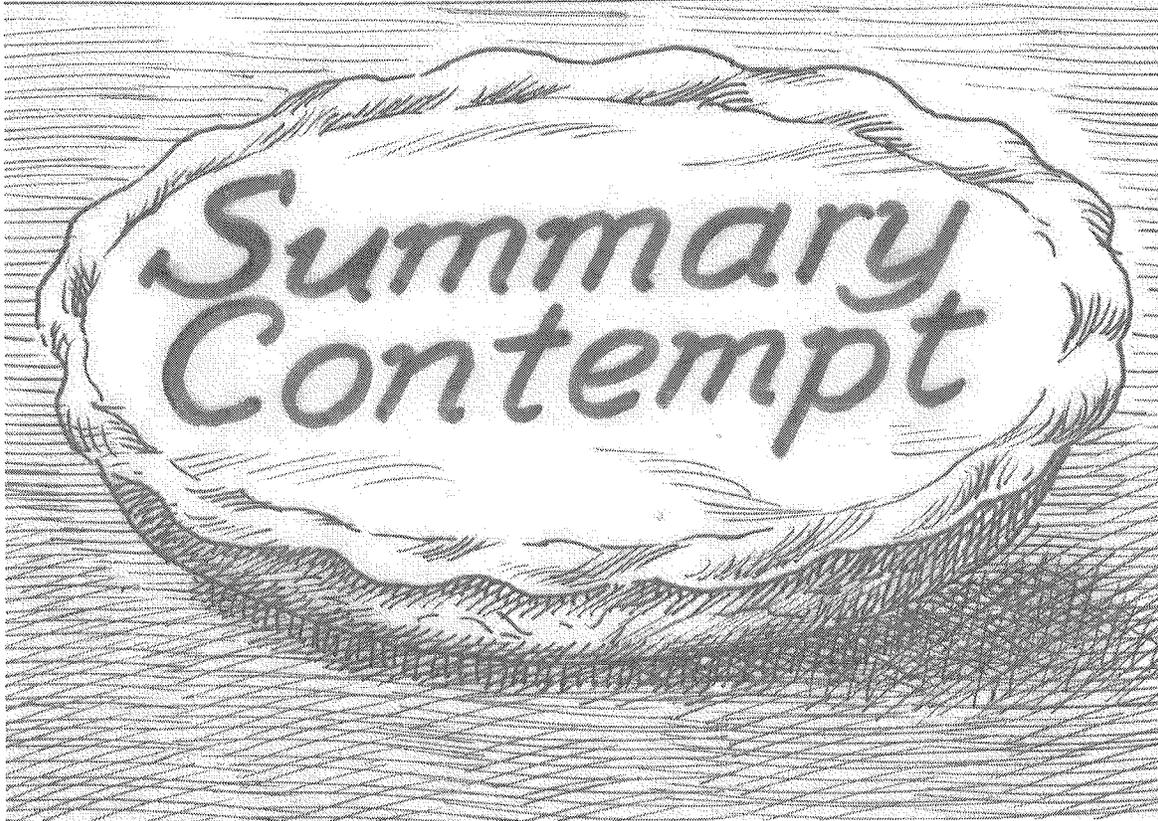
“Richardson, Chief Justice of C.B. at the

assizes at Salisbury in the summer of 1631 was assaulted by a prisoner condemned there for felony, who after his condemnation threw a brickbat at the said Judge, which narrowly missed; and for this an indictment was immediately drawn by Noy against the prisoner, and his right hand cut off and fixed to the gibbet, upon which he was immediately hanged in the presence of the Court.” (73 Eng. Rep. 416 (1378-1865).)

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“Assizes” were the English criminal courts that heard the most serious cases. The gibbet was a scaffold for public executions. “[T]he brickbat, according to some reports, was a large flintstone.” (Jeffrey Miller, *Where*

tempt, 31 Colum. L. Rev. 956, 956 (1931), Walter Nelles, co-founder and first chief legal counsel for the National Civil Liberties Bureau and its successor, the ACLU, despaired “that the power to punish summar-



There's Life, There's Lawsuits (ECW Press 2003), p. 238.) Mr. Miller also provides us with the flavor of some of the original legal “dog-French” found in the musty report: “upon being convicted of a felony a prisoner ‘ject un Brickbat a le dit justice que narrowly mist.’” *The Dictionary of National Biography* informs us that Justice Richardson dryly remarked, “when by stooping low he had just avoided a missile aimed at him by a condemned felon, ‘if I had been an upright judge I had been slain.’” (*Id.*, 1885-1900, vol. 48, p. 248.)

In *The Summary Power to Punish Con-*

tempt for contempt of court is encroaching upon the once sacred ‘right’ of trial by jury in criminal cases.” He argued forcefully for a limited use of summary contempt powers:

“When the serious criminality of a contempt is apparent, the most efficient prevention of its recurrence should naturally be by ordinary criminal prosecution; when that is untrue in fact, the summary power does disservice as an inadequate substitute for the correction of inadequacy.” (*Id.* at pp. 966-967.)

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that the judge ordered the prisoner to be summarily executed for throwing an ax at him. This would have stood for the proposition that an act of criminal contempt, committed in the presence of the court, could be summarily punished by the court. Applying

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Nelles’ proposed rule, however, one would never execute the brickbat assailant on the spot without due process, for the harm was past and irreparable.

However, the 1631 case neither demonstrates a complete absence of due process nor execution of the prisoner for contempt. “Only the amputation was upon the convic-

tion by jury for the contempt; the hanging was for the antecedent felony.” (*Id.* at p. 959, fn. 20.) The prisoner had already been condemned for a “felony.” Most felony convictions then resulted in capital punishment. *Blackstone’s Commentaries on the Laws of England*, Book the Fourth, Chapter the Seventh.

While amputation may today be associated with the most extreme version of Sharia law, it was available as a punishment for contempt under English law. On the same page as the brickbat case in the English Reports — presumably to shore up precedent for the punishment of outrages against the court — the following was reported: “Thomas Jones struck one in the palace *sedentibus Curii* [sitting courts], and killed him, upon which he had judgment to have his hand cut off, and judgment of death.” As primitive and unusual as hanging may seem in England and Western Europe today, it is worth considering that the last hanging in England took place as late as 1964, shortly before the abolition of capital punishment for murder in Great Britain (1965) and Northern Ireland (1973).

The most sensational case of summary contempt in California occurred in 1888, with ultimately tragic results. David S. Terry, Chief Justice of the California Supreme Court from 1857 to 1859, killed state senator David Broderick in a duel. After being acquitted, Justice Terry left the state and was replaced as Chief Justice by his friend, Stephen J. Field. Their paths were to cross again.

In the 1880’s, Terry became involved as an attorney in a messy divorce case on behalf of Sarah Althea Hill, who claimed she was the legal wife of a silver millionaire. Terry eventually married Hill. Hill and Terry lost the divorce case. The appeal was heard by Stephen Field, sitting as a judge on the Federal Circuit. It did not go well. Terry lost the appeal, and he and his wife ended up being jailed for six months and one month, respectively, for contempt of court, leading to writ petitions to the Federal Circuit and to the



United States Supreme Court.

According to the Circuit Court, Hill "was guilty of misbehavior in the presence and hearing of said court," and a marshal was ordered to remove her from the courtroom. (*Ex Parte* (1888) 128 U.S. 289.) The marshal "was resisted by one David S. Terry, an attorney of this court, who, while the said marshal was attempting to execute said order in the presence of the court, assaulted the said United States marshal, and then and there beat him, the said marshal, and then and there wrongfully and unlawfully assaulted said marshal with a deadly weapon..." (*Id.* at p. 298.)

Terry denied many of the allegations, though he admitted that he "drew from inside his vest a small sheath knife" and that he "lost his temper." (*Id.* at p. 300.) He claimed that this was as "a natural consequence of himself being assaulted when he was making an honest effort to peacefully and quietly enforce the order of the court so as to avoid a scandalous scene, and of seeing his wife so unnecessarily assaulted in his presence." (*Ibid.*) The Supreme Court took a dim view of Terry's actions. Terry "with drawn knife forced his way into another room in the same building, occupied by the marshal, and to which, we presume, the latter in executing the order above referred to, had removed Mrs. Terry." (*Id.* at pp. 310-311.)

The Supreme Court denied Terry's writ of habeas corpus, despite the fact that the order was made in his absence without any previous notice and without any opportunity of being heard in defense of the charges. The Supreme Court explained that the general rule in all actions requires a hearing and an opportunity to be heard.

"But there is another rule of almost immemorial antiquity, and universally acknowledged, which is equally vital to personal liberty, and to the preservation of organized society.... It has relation to the class of contempts which, being committed in the face of a court, imply a pur-

pose to destroy or impair its authority, to obstruct the transaction of its business, or to insult or intimidate those charged with the duty of administering the law. Blackstone thus states the rule: 'If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination.'" (*Id.*)

But this was not the end of the matter. On August 14, 1889, Terry snuck up behind Judge Field in a breakfast car on a train and struck him a blow on one side of his face and then the other side. He was about to strike again when a U.S. marshal (who was also involved in Terry's assault in the courtroom in the divorce action) arose from his seat with his revolver in his hand and shouted to stop. Terry appeared to the marshal to reach into his shirt for a bowie knife. "At this instant [the marshal] fired two shots from his revolver into the body of Terry, who immediately sank down and died in a few minutes." (*In re Neagle* (1890) 135 U.S. 1, 53.) Terry's wife was admitted to Stockton's State Hospital for the Insane in 1892, where she died in 1937.

Walter Nelles offers his own judgment. "The dignity of Mr. Justice Field was tarnished by the handling of the court-room broil in which Terry drew a weapon. The offence was too big, and the pressure on the court's personal feelings too strong, for the summary punishment to be seemly." (Nelles, *supra*, at p. 965.) Nelles believed that Chief Justice Richardson set a better example in 1631, prosecuting the brickbat assailant by indictment. "Criminal punishment for serious irreparable harm is for the ordinary criminal law." (*Id.* at p. 967.)

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Marc Alexander is a litigator and mediator at AlvaradoSmith APC. An abbreviated version of this article appeared earlier as a post on California Attorney's Fees, a blawg to which he contributes. He also publishes the blawg California Mediation and Arbitration.