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The History of Contempt of Court

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REVIEWS

THE HISTORY OF CONTEMPT OF COURT*

Does a court in the United States have the inherent power, without a jury trial, to punish a stranger, by fine and imprisonment, for an indirect contempt of court?

Many state and the Federal courts have held that this is not only a power given to them, but that it is an inherent power which cannot be taken away from them by another branch of the government[1] and the Indiana Supreme Court has recently held that the courts have this power even where there is no case pending;[2] but Sir John Fox has shown conclusively in his exploration of the antiquities of contempt, that this is a fallacious doctrine, because it is in violation of the constitutional guarantee of trial by jury, since this power of the courts was not established at the common law when that guarantee was adopted in the United States. The existing law upon the subject all rests upon Justice Wilmot's unsupported statement in the extra-legal case of *The King v. Almon*[3] that "the jurisdiction is as ancient as any other part of the common law" and the perpetuation of the error by Wilmot's friend, Blackstone.[4] The opinion in this case was written in 1765, but it was never delivered because the proceedings were entitled *"The King v. Wilkes"* instead of *"The Kig v. Almon"* and the proceedings had to be abandoned. The opinion was concealed until 1802 and was first cited in 1811 and was never followed until 1821.

Sir John Fox shows that attachment as a process by which a man was brought up for trial stands on immemorial usage (Hen. II), but that attachment followed by examination in-

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* *The History of Contempt of Court. The Form of Trial and the Mode of Punishment.* By Sir John Fox. The Clarendon Press, Oxford. Pp. xxiii, 252. 1927. Price $2.75.

[1] *State v. Morrill,* (1855) 16 Ark. 384; *Little v. State,* (1883) 90 Ind. 338; *State v. Frew and Hart,* (1884) 24 W. Va. 416; *Bradley v. State,* (1900) 111 Ga. 168; *Carter v. Commonwealth,* (1899) 96 Va. 791; *State v. Shepherd,* (1903) 177 Mo. 205; *Toledo Newspaper Co. v. United States,* (1918) 247 U. S. 402; *Craig v. Hecht,* (1923) 263 U. S. 255. See on this subject Frankfurter and Landis, *Power to Regulate Contempt* (1924), 37 *Harv. L. Rev.;* and Willis, *Punishment for Contempt of Court,* 2 *Ind. Law. J.* 309.

[2] *State v. Shumaker,* (1927) 157 N. E. 769. See *Comments,* 14 *Va. L. Rev.* 227; 26 *Mich. L. Rev.* 440; 41 *Harv. L. Rev.* 254. Of course where there is no case pending the question is not so much whether a person should be punished for contempt without a jury trial as whether he should be punished at all—a very different question. *Patterson v. Colorado,* (1907) 205 U. S. 454.

[3] First published in 1802 in Wilmot, *Notes and Opinions of Judgments,* 243 ff.

[4] Blackstone's *Commentaries,* IV, pp. 283-288.

stead of trial does not. The practice of examination was derived from the Ecclesiastical Courts; prevailed in the Council in the 14th century; and was reproduced in the Court of Chancery in civil cases and in the Star Chamber in criminal cases. Down to the 16th Century criminal contempts out of court by strangers were, like trespass, tried either by jury or in the Star Chamber (though contempts in the actual view of the court and by officers were punished summarily). Upon the abolition of the Star Chamber in 1641 libels on the court were tried by information down to 1721. Hence there was still recognized the distinction between contempt in court and contempt out of court. But in that year a stranger was tried for libel by attachment and examination, and by 1821 summary process without jury was established as regular practice. Thus fifty-six years after Almon's case the high-handed attempt of the common law judges of the Stuart Restoration to take over the summary inquisitorial procedure of the Star Chamber resulted, in contempt cases, in a success that the Stuart judges themselves could not accomplish.[5] Since Almon's case did not become law in England until 1821,[6] it was after the establishment of the United States Constitution and constitutional bills of rights generally. If prior to that time the English courts had not punished for indirect contempt by attachment and examination but only by information and jury trial, this power could not have become an inherent power of the courts prior to the adoption of our state and federal constitutions with their guarantee of jury trial and doctrine of separation of powers, and under the usual rules of construction would never become an inherent power.

Yet courts in the United States, misinformed, have erroneously held that it is a power and such an inherent power that under the doctrine of separation of powers it cannot be taken away from the courts by legislation. So that now, without constitutional amendment or the voluntary abandonment of the practice by the courts themselves, it is impossible to prevent a court from being party, judge, evidence, and jury in its own case where the only contempt is some act done not in the presence of the court but at a distance.

Sir John Fox has done a fine piece of work in showing how our courts have gone astray and how there is no substantial basis for the power now exercised by them, but it is to be feared that his work is a work of supererogation and has come too late to accomplish any reform. Lovers of truth, however, will enjoy

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[5] Amercement was introduced by William the Conqueror in place of the Anglo-Saxon wite. According to the old law before the 17th Century a person punished for contempt was imprisoned but discharged on the payment of a fine and it was only after the 17th Century that a person was punished in case of contempt both by imprisonment and a fine and imprisoned until the fine was paid.

[6] Even Lord Hardwicke, as Chancellor, *Roach v. Garvan*, (1742) 2 Ark. 469, did not succeed in establishing the practice as a regular thing.

reading his invigorating book, and possibly some lover of justice may some day win a great case on the strength of its historicity.

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