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Constitutional Law-Indirect Criminal Contempt- Publications

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Constitutional Law—Indirect Criminal Contempt—Publications. Appellant editor was charged with publishing contemptuous articles relating to the past appointment by the court of a receiver for a bank. Held, publications regarding matter which has been finally adjudicated so that carrying out of the court's judgment cannot be obstructed are not contempt and cannot be summarily punished unless such publications obstruct, impede, or interfere with, or embarrass the court in the administration of justice in future stages of the case.¹

Criminal contempts of court embrace all acts committed against the majesty of the law or the dignity of the court, and the primary purpose of the punishment of offenders is the vindication of the public authority of which the court is the embodiment.² Criminal contempt is to be distinguished from civil contempt. The latter is violation of an order or decree of a court made for the benefit of the opposing party. It is not an offense so much against the dignity of the court as against the party.³ Criminal contempts are classified as either direct or indirect. A contempt is direct when committed in the presence of the court, or so near to the court as to interrupt the proceedings thereof; and such contempts are punished in a summary manner, without evidence, but upon view and personal knowledge of the presiding judge. That is, contempts of this sort may be punished by the same judge without a jury trial and without truth as a defense.⁴ The power of the courts summarily to punish their critics, curbing as it does the liberty of the press and freedom of speech, has been fruitful of controversy. However, it would seem that such power in the matter of direct contempts is clearly reasonable in the light of the necessity for it if litigation is to continue.⁵

Contempts are indirect or constructive when they are done, not in the presence of the court, but tend by their operation to interrupt, obstruct, or embarrass the due administration of justice.⁶ Such contempts may occur either when there is a case pending or when there is no case pending. A

²¹ See Willis, *The Dartmouth College Case—Then and Now* (1934) 19 St. Louis Law Review 183.

¹ *Nixon v. State* (1935), 193 N. E. 591 (Ind.).

² *Coons v. State* (1922), 191 Ind. 580, 134 N. E. 194; *Dale v. State* (1926), 198 Ind. 110, 150 N. E. 781.

³ *Ex parte Wright* (1876), 65 Ind. 504; *Anderson v. Indianapolis Drop Forging Co.* (1904), 34 Ind. App. 100, 72 N. E. 277; *Denny v. State* (1932), 203 Ind. 682, 182 N. E. 313.

⁴ *Whittem v. State* (1871), 36 Ind. 196. See *Coons v. State* (1922), 191 Ind. 580, 134 N. E. 194; *Mahoney v. State* (1904), 33 Ind. App. 655, 72 N. E. 151; *Ex parte Wall* (1882), 107 U. S. 265; *Ex parte Terry* (1883), 128 U. S. 289; (1922) 70 U. of Pa. L. Rev. 331.

⁵ Hugh E. Willis, "Punishment for Contempt of Court," (1927) 2 Ind. L. J. 309.

⁶ *Whittem v. State* (1871), 36 Ind. 196; *Ex parte Wright* (1876), 65 Ind. 504; *Dale v. State* (1926), 198 Ind. 110, 150 N. E. 781.

case is held to be pending so long as it is open for rehearing⁷ or while the court may modify the opinion.⁸

When there is a case pending the law permits the same judge to punish for contempt without a jury trial and without truth as a defense, the same as in the case of direct contempt.⁹ Though at first constructive contempt included only cases of physical proximity, it was extended to include newspaper criticisms.¹⁰ The question arises as to the necessity for summary punishment in such cases. It is urged that the exercise of the power to punish summarily for indirect contempt may be justified when it prevents a serious obstruction to the administration of justice.¹¹ On the other hand, there is an increasing realization of the danger in having an aggrieved judge act as accuser, trier of fact, and sentencer.¹² Several authors of note have suggested that the claim by the courts of inherent power to punish summarily for contempts by publication out of court is founded upon a false view of the scope of summary judicial power at common law.¹³ It would seem that in such indirect contempts there is very little basis in history or reason for summary punishment.¹⁴ It may be noted that the modern tendency as evidenced by legislation is to limit the manner of summary punishment and to restrict its application to acts spatially near the court.¹⁵

When there is no case pending, the great weight of authority holds that to restrain or punish a criticism of the official conduct of judges would be an infringement upon the constitutional guaranty of freedom of speech and press, and that in this respect they stand in no better position than other public officers.¹⁶ Criticisms of the judge as an individual are, of course,

⁷ *People v. News-Times Publishing Co.* (1906), 35 Colo. 253, 84 Pac. 912, appeal dismissed in *Patterson v. Colorado* (1907), 205 U. S. 454, 463.

⁸ *In re Chadwick* (1896), 109 Mich. 588, 67 N. W. 1071; *State v. Tugwell* (1898), 19 Wash. 238, 52 Pac. 1056.

⁹ *Regina v. Onslow* (*Tichborne Case*) (1873), L. R. 9 Q. B. 219; *Regina v. Skipworth* (1873), L. R. 9 Q. B. 230; *Cheadle v. State* (1886), 110 Ind. 301, 11 N. E. 426; *Dale v. State* (1926), 198 Ind. 110, 150 N. E. 781; *Patterson v. Colorado* (1907), 205 U. S. 454.

¹⁰ (1924) 33 Yale L. J. 536.

¹¹ Beale, "Contempt of Court, Criminal and Civil," (1908) 21 Harv. L. Rev. 161, 163.

¹² See *Cooke v. United States* (1925), 267 U. S. 517; *Cornish v. United States* (1924), 299 Fed. 283. For discussion see Hugh E. Willis, "Punishment for Contempt of Court," (1927) 2 Ind. L. J. 309.

¹³ Foremost among these critics is Sir John C. Fox in his recent book, *The History of Contempt of Court*, (1927). He believes that by the actual ancient usage of the common law, "criminal contempt committed by a stranger out of court was proceeded against like any other trespass in the common law courts, with the assistance of a jury, unless the contempt was confessed."

¹⁴ Hugh E. Willis, "Punishment for Contempt of Court," (1927) 2 Ind. L. J. 309. See Holmes dissenting opinion in *Toledo Newspaper Co. v. United States* (1918), 247 U. S. 402, in which he contended that nothing has been said or printed which constituted an emergency warranting a summary action for contempt, and that except in extraordinary circumstances contempt should be dealt with as the law deals with other illegal acts.

¹⁵ See *Coll v. United States* (1925), 8 Fed. (2d) 20; (1923) 36 Harv. L. Rev. 1012; *Frankefurther and Landis*, "Power of Congress over Procedure in Criminal Contempts in Inferior Federal Courts," (1924) 37 Harv. L. Rev. 1010. But see *Francis v. Virgin Islands*, 11 Fed. (2d) 860.

¹⁶ *State v. Circuit Court* (1897), 97 Wis. 1, 72 N. W. 193; *State v. District Court* (1916), 52 Mont. 46, 155 Pac. 278; *Ex parte Green* (1904), 46 Tex. Crim. App. 576, 81 S. W. 723; *Patterson v. Colorado* (1907), 250 U. S. 454; *Storey v. People* (1875), 79 Ill. 45; *In re Dalton* (1891), 46 Kans. 253; *Percival v. State* (1895), 45 Neb. 741; *State v. Dunham* (1858), 6 Ia. 245; *State v. Eau Claire Cir. Ct.* (1897), 97 Wis. 1; *State Brd. of Bar Exmrs. v. Hart* (1908), 104 Minn. 88; *Cheadle v. State* (1887), 110 Ind. 301, 11 N. E. 426; *Zuver v. State* (1919), 188 Ind. 60, 121 N. E. 828.

punishable as a libel.¹⁷ A few cases hold that the contemptuous conduct, such as criticism or vilification of the court, need not refer to a pending case.¹⁸ They are in accord with the old common law practice.¹⁹ Such proceedings have become obsolete in England, it is said in *McLeod v. St. Aubyn*.²⁰ The majority rule is clearly correct. These cases recognize that respect to the courts cannot be compelled; that it is "the voluntary tribute of the public to worth, virtue, and intelligence, and, whilst they [these] are found upon the judgment seat, so long and no longer will they [courts] retain the public confidence. If a judge be libelled by the public press, he and his assailant should be placed on equal grounds, and their common arbiter should be a jury of the county; and if he has received an injury, ample remuneration will be made."²¹ Further, "When a case is disposed of, and the decision announced, such decision becomes public property, so to speak. The construction given to a statute, the reasoning and the conclusion of the court upon the facts, all go to the public, and become subject to public scrutiny and investigation. In such cases it is perfectly competent and lawful for anyone to comment upon the decision, and expose its errors and inconsistencies. If such comments do not correct errors, they will, at least, lead to renewed caution and circumspection upon the part of those whose duty it is to declare the law. It would be a fruitless undertaking in this country—where the freedom of speech and the press is so fully recognized and so highly prized—to attempt to prevent judicial opinions from being as open to comment and discussion as an opinion or treatise upon any other subject. It is well and fortunate that it is so."²² These cases recognize the fact that an elective judiciary loses its basis justification if there can be no outspoken criticism of candidates. In the words of *Story v. People*,²³ "The judiciary is elective, and the jurors, although appointed, are, in general, appointed by a board whose members are elected by popular vote. There is, therefore, the same responsibility, in theory, in the judicial department that exists in the legislative and executive departments, to the people, for the diligent and faithful discharge of all duties enjoined on it; and the same necessity for public information with regard to the conduct and character of those entrusted to discharge those duties, in order that the elective franchise shall be intelligibly exercised, as obtains in regard to the other departments, of the government."

¹⁷ *Hamma v. People* (1908), 42 Colo. 401, 94 Pac. 326; *State v. Dunham* (1858), 6 Ia. 245; *Ex parte Hickey* (1845), 4 Sm. & M. 751 (Miss.).

¹⁸ *State v. Morrill* (1855), 16 Ark. 384; *Burdett v. Commonwealth* (1904), 103 Va. 838, 48 S. E. 878; see (1923) 9 Va. L. Rev. 467; *State v. Hildreth* (1909), 82 Vt. 382, 74 Atl. 71; *Crow v. Shepard* (1903), 177 Mo. 205, 76 S. W. 79; *In re Fite* (1912), 11 Ga. App. 665; *State v. Shumaker* (1927), 200 Ind. 623, 157 N. E. 769; see note (1905) 69 L. R. A. 251.

¹⁹ The theory that a criticism of a court relating to a matter finally disposed of is a contempt of court was adopted by the high courts of England because the King originally was a member thereof, and, in theory, still occupies a place on the bench. As to these courts, the rule, therefore, is merely the application of the well-established doctrine that "the King can do no wrong." The language of Blackstone is also based upon the cases formulating this doctrine; neither can therefore be said to be any authority in this country for such a proposition.

²⁰ (1899) A. C. 549. However, in *Reg. v. Gray* (1900), 2 Q. B. 36, an editor was punished for scurrilous language regarding a court by contempt process, but not by the same court.

²¹ *Stuart v. People* (1841), 4 Ill. 402. See also *People ex rel. Elliot v. Green* (1884), 7 Colo. 237, 3 Pac. 374.

²² *Stuart v. People* (1841), 4 Ill. 402. See also *State v. Anderson* (1875), 40 Ia. 207.

²³ (1875), 79 Ill. 45.

In spite of the reasonable, judicious, and conclusive character of these arguments, in 1927 Indiana by *State v. Shumaker*²⁴ overruled the well reasoned cases of *Cheadle v. State*²⁵ and *Zuver v. State*²⁶ to decide that any published disagreement with recent decisions is contemptuous, if similar cases may arise in the future. By this decision Indiana reverted to the old common law rule in entire disregard of freedom of speech and press. Following the principle, "that criticism of past cases is prohibited because there are pending cases involving the same general principle of law," to its logical conclusion practically put an end to the freedom of speech and liberty of the press as far as the court, judges, and their decisions were concerned. And this rule of judicial tyranny obtained until the instant case was decided. By the rule of the instant case Indiana has returned to the majority view and the more sane basis of recognizing criminal contempt only where there is a case pending. It is to be regretted that nowhere in the opinion of the court is the *Shumaker* case referred to, or the law of that case expressly overruled. Ignoring this precedent is scarcely overruling it. However, having returned to its earlier position, it is to be hoped that the court will adhere to its rule. As indicated above, considerable reform is still wanting in indirect criminal contempt proceedings where a case is pending. The courts should exercise a wise restraint and put a voluntary limitation upon themselves²⁷ to give the accused the privilege of a jury, the defense of truth, and a trial before another judge in the case of punishment for indirect criminal contempt when there is a case pending.²⁸

C. Z. B.

Corporations—Contracts by Foreign Corporations Before Compliance with Statutes Governing Admission—Validity. Action to quiet title to real estate alleged to belong to appellant. On January 15, 1929, the appellant, in consideration of \$24, executed a right of way agreement to the appellee to operate, lay, maintain and remove a pipe line across the land of appellant. And on February 21, 1929, over the same land, the appellant, in consideration of \$10, executed a right of way agreement to the appellee for the purpose of erecting, maintaining and removing telephone and telegraph poles and the necessary wires and fixtures. Appellant contends that the foregoing contracts were void for the reason that appellee was a foreign corporation and had not complied with the Indiana law with reference to admission of foreign corporation to do business in Indiana. It is shown, however,

²⁴ (1927), 200 Ind. 623, 157 N. E. 769, 162 N. E. 441, 163 N. E. 272. See criticisms of this case in (1927) 3 Ind. L. J. 149; (1927) 41 Harv. L. Rev. 254; (1927) 76 U. Pa. L. Rev. 210; (1928) 8 B. U. L. Rev. 59; (1928) 14 Va. L. Rev. 227; (1928) 26 Mich. L. Rev. 440.

²⁵ (1887), 110 Ind. 301, 11 N. E. 526.

²⁶ (1919), 188 Ind. 60, 121 N. E. 828.

²⁷ *Cooke v. United States* (1925), 267 U. S. 517. The United States Supreme Court might accomplish this reform by holding that it is not due process of law to punish for indirect contempt without these privileges.

Legislatures cannot put such restrictions upon the courts for the reason that courts hold that the power to punish for contempt is an inherent power of the courts, and therefore under our doctrine of separation of powers that it is unconstitutional for legislatures to take this power away from courts created by constitutions. See *Hale v. State* (1896), 55 Ohio St. 210; *Carter v. Commonwealth* (1899), 96 Va. 791; *Little v. State* (1883), 90 Ind. 338.

²⁸ *Hugh E. Willis, "Punishment for Contempt of Court,"* (1927) 2 Ind. L. J. 312-313.