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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 King 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-


\(^2\) 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 de-
erved from the Ecclesiastical Courts; prevailed in the Council
in the 14th century; and was reproduced in the Court of Chanc-
ery 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 in-
quisitorial procedure of the Star Chamber resulted, in contempt
cases, in a success that the Stuart judges themselves could not
accomplish. Since Almon’s case did not become law in England
until 1821, 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 in-
direct 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 errone-
ously 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 con-
stitutional 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 pres-
ence 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 pay-
ment 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 impris-
oned 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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TREATISE ON THE LAW OF WILLS*

The first edition of Professor Rood's work was perhaps the most popular textbook on Wills for many years after its publication in 1904. The present edition of this work involves some extension in point of subject matter, but for the most part it is the first edition over again with the added element of ample citations to more recent cases and particular references to the Lawyer's Reports Annotated, Ruling Case Law and other encyclopaedias and digests of the law. In some instances there has been a re-writing of the original exposition, but for the most part the sections in the present edition will correspond pretty closely to those in the 1904 edition with the exception of the added material in the footnotes and slight changes to make the original text conform with recent developments in the subject.

The reader should remember that the author in his preface to both editions makes it clear that his purpose has been to write a thorough and accurate work on the law of Wills in a single volume, in which the subject would be so explained and documented that the book would be useful for practicing lawyers. For more than twenty years the first edition of this work has fulfilled this purpose; the reviewer thinks it likely that the present edition will continue to do so and that it will be welcomed by the profession for its own merits and for the value which full citations down to date now give to it.

The method of treatment is somewhat similar to the Hornbook method although the bold face type is much less than in the Hornbook series. Thus for the most part Professor Rood has not put more in the headings than a single statement or single phrase while the text matter which follows under these set forth the significance of this phrase as a part of the exposition of the law of Wills. In keeping with this plan the reader will understand how natural it is for the author to quote some word or phrase from a famous judicial exposition of a principle in the law of Wills and then let his textual comment be an explanation of the significance of that word or phrase in the law itself. Thus in the treatment of Gifts Causa Mortis we have independent sections in exposition of the following words which are placed at the head of the sections in quotation marks—