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Crimes--Contempt by Publication

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country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of our system destroyed by the perpetuity of error." 1 Kent's Comm. 477.

Kentucky seems to line up with the majority of the states upon the problem of the adequacy of damages for breach of a contract to convey realty. *Mills* v. *Metcalf*, 8 Ky. 477, (1819); *Flege* v. *Covington & Cincinnati Elevated R. R. and Bridge Co.*, 122 Ky. 348, 91 S. W. 738 (1906); *McGee* v. *Bell*, 3 Littell (13 Ky.) 190 (1823). However, there are few cases in this state with direct language to this effect; probably the case which best illustrates the view of the Kentucky courts is the case of *Mills* v. *Metcalf, supra.* In this case the plaintiff filed a bill in equity with a double aspect of either gaining specific execution or cancellation of contract for the sale of 1,600 acres of land. The court held that although a complainant may maintain an action at law for a breach of such a contract he may further, if he elects to do so, resort to equity for specific execution of the contract. In the principle case, however, it is quite evident that the court has departed from the beaten path as set out in the majority of the cases, and to the writer this view seems to be the better one.

In conclusion, it might be said, that in spite of the overwhelming number of cases bearing out the so-called majority view, it cannot be said that the status of contracts concerning the sale of land is definitely settled. Now, more than ever before, the courts of this country seem to realize that they cannot support this rule, and at the same time, line up with some of the basic principles of equity. From the attitude taken by the court in some of the recent cases, it may be safely predicted, that in the near future the courts will take a less arbitrary attitude toward this problem and refuse to grant relief by specific performance unless the plaintiff affirmatively shows that he has no adequate relief in a court of law.

W. R. JONES.

CRIMES—CONTEMPT BY PUBLICATION.—In a recent case the question of summary punishment by the court for contempt by publication again arises. Defendant was the publisher of the San Diego Herald, a paper printed and circulated in San Diego, Cal. On March 13th, 1930, this newspaper contained an article captioned as follows: "New Grand Jury is Sweet Scented Bunch of Hollyhocks Designed to 'Protect San Diego'. Judge Andrews Picked Them but Could Have Added More. (By A. R. Sauer)"; and contained a lengthy article berating the court and its officers in the same vein. On March 20th, 1930, Judge Andrews filed an affidavit for contempt and had the sheriff attach the body of Sauer and bring him before the court. When the case came to trial the accused filed an affidavit alleging the disqualification of the respondent judge and made application to have the case transferred to another department of the San Diego Superior Court. The applica-

tion was denied and the petitioner sought a writ of prohibition from this court. *Held*, determination of the contemptous nature of the context rests with the court offended but the respondent has no right to pass on his own disqualification. This should be determined by another judge and until then respondent was restrained and prohibited from any further proceedings in the matter. *Sauer* v. *Andrews, Judge*, 115 Cal. App. 272, p. 1 (2d) 997 (1931).

This case lines up with the modern weight of authority in that it does not question the offended court's right to try the author of the alleged contemptous publication but it does question the judge's right to settle on his own qualifications. Decisions such as these, though not repudiating the general principle, go a long way towards undermining it.

The history of the punishment of contempt by publication has been a single bitter struggle between the advocates of freedom of the press and the proponents of the inviolability of the judiciary, with the advantage being first on the one side and then on the other.

Contempts have been punished on two grounds; the tendency to besmirch the dignity of the courts and, to obstruct the paths of justice. The courts have claimed either an inherent power from "time immemorial" or a power derived from the constitution. Likewise those advocates of the freedom of the press point to that constitutional provision in the bill of rights and to the right guaranteed each citizen of a trial by jury in criminal cases. The claims of the proponents originate with the work of Blackstone in which he lists crimes which may be proceeded against summarily, including "speaking and writing contemptously of the court or judges acting in their official capacity," and "printing false accounts of pending causes . . . . The process of attachment for these and the like contempts must of necessity be as ancient as the laws themselves . . . . A power therefore in the supreme courts of justice to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments and must be an inseparable attendant upon every superior tribunal." 4 Bl. Comm., 284 *et seq.*

But Sir John Fox points out in "The History of Contempt of Court," 19, 65 *et seq.*, 101, 227 *et seq.*, "that the learned commentator neglected to inquire whether persons attached for contempt had formerly been tried by jury or to be inspired with mistrust by his inability to cite any case of attachment for publication." Ibid. 19. Rather he based it on the draft of a "judgment," never delivered, of his friend Judge Wilmot. This was an abortive proceeding, responsive to the political pressure of the times, to attach Almon, the bookseller, for publishing a criticism of Lord Mansfield's conduct of proceedings against John Wilkes. *King* v. *Almon*, Wilmot's Op. 243, 254; *Reg* v. *LeFroy*, L. R. 8 Q. B. 135 (1873).

But however authentic might be the source, it must be admitted that England has followed this doctrine until the present. *Regina* v. *Wilkinson*, 41 Q. B. 47 (1871); *Felkin* v. *Herbert*, 33 L. J. Chan. (N. S.)

294 (1863); *Reg* v. *Parnell*, 14 Cox, C. C. 474 (1880); *Rex* v. *Clarke*, 103 L. T. (N. S.) 636 (1910); and a long line of cases cited in 2 Brit. Rul. Cas. 488-494. However, if the article is not of a particularly contemptous nature and publication is made without knowledge of the pending trial, or when the case is no longer pending, the English courts have refrained from use of their summary power. *Metropolitan Music Hall Co.* v. *Lake*, 58 L. J. Ch. (N. S.) 513 (1889); *Phillips* v. *Hess*, 18 T. L. R. 400 (1902); and other cases cited 2 Brit. Rul. Cas. 494.

Our own courts followed the strict rule of summary punishment during the early days of our judicial development. *Respublica* v. *Oswald*, 1 Dall. 319 (Pa. 1788), is the first American case on contempt by publication. *Hollingsworth* v. *Duane*, Wall. C. C. 77 (Pa. Fed. 1801). But a people so recently freed from the imagined oppression of Britain were not long to submit to the despotic power of the judiciary. The antagonism created by the decisions on these two Pennsylvania cases burst into flame after the summary punishment, by the Supreme Court of Pennsylvania, of editor Passmore, *Bayard & Petit* v. *Passmore*, 3 Yeates 439 (Pa. 1802). Articles for impeachment of the justices were drawn up in the lower house by vote of 57-24, but in the Senate the vote was two short of the necessary two-thirds for impeachment, 13-11. In 1809 Pennsylvania enacted the first American legislation on the subject, confining the summary power of the court to: (1) official misconduct of court officers; (2) disobedience of process; (3) misbehaviour in the actual presence of the court, actually obstructing the administration of justice; and (4) expressly prohibited summary punishment for any publication. 1809 Pa. Acts, c. 78, p. 146. The Act, originally experimental, was made permanent by the Act of June 16, 1836, Pa. L. sec. 23 *et seq.* It now appears with unimportant modifications in the 1920 Dig. Pa. Stat. L. secs. 5484-5488. Pennsylvania courts, with an occasional recurrence in their dicta of the doctrine of summary punishment, *Hummell* v. *Bishoff*, 9 Watts 416 (Pa. 1840), have adhered strictly to the statutory limitation.

Following the adjustment in Pennsylvania, a controversy broke out in New York. Chancellor (then Justice) Kent had broadly asserted, but moderately applied, the power of summary punishment in the case of *"People* v. *Freer*, 1 Caines 485 (N. Y. 1803). But the case which so greatly incensed the critics was the denial of *habeas corpus* to the defendant in the contempt case of *Yates*, 4 Johns. (N. Y.) 316 (1809). On appeal it was reversed and Yates discharged. About this time Livingston's "System of Penal Law Prepared for the State of Louisiana," began to attract world-wide attention. In this Livingston proposed to completely deprive the courts of their power of summary punishment for any and all contempts, submitting that contemnors as in all other criminal cases should be punishable by the State, only on conviction by jury.

Whatever may have been the deciding factor, the legislature of 1829 drastically curtailed the power of summary punishment, limiting

it to certain specified crimes and no more, including "the publication of a false and grossly inaccurate report of its proceedings; but no court shall have the power to punish, as for a criminal contempt, the publication of true, full and fair reports of any trial, argument, proceedings or decision had in such courts." 1829 Rev. Stat. Part 3, Ch. 3, Tit. 2, Art. 1, sec. 10. These provisions are still in force in New York Jud. Law, secs. 750-753, Penal Law, sec. 600. They have been construed in the spirit of their enactment. *Rutherford* v. *Holmes*, 5 Hun 317 (1875); *aff'd*, 66 N. Y. 367 (1876); *People ex rel. Barnes* v. *Court of Sessions*, 147, N. Y. 290, 41 N. E. 700 (1895); *People ex rel. Brewer* v. *Platzek*, 133 App. Div. 25, 117 N. Y. Supp. 852 (1909).

Conditions, as they existed in our federal courts, were much the same. The common law doctrine of summary punishment for contempt, insofar as it was not inconsistent with our constitution, was followed, *Ex parte Kearney*, 7 Wheat. 38 (U. S. 1822); *U. S.* v. *Hudson*, 7 Cranch 32 (U. S. 1812) contains an intimation of the inherent "contempt" power and Anderson D. Dunn, 6 Wheat. 204 (U. S. 1821), in which Johnson, J., said that the inherent power was not dependent upon statutory authorization nor subject to statutory curtailment.

But in 1826 Judge Peck of the Federal District Court for the district of Missouri imprisoned and disbarred a lawyer, Luke Lawless, for publishing a detailed criticism of an opinion while an appeal from him was still pending. Lawless presented to Congress a petition for his impeachment which passed the lower house and on his trial before the Senate he was acquitted, but twenty-one out of forty-three senators pronounced him guilty (1831). Stansbury, Report of the Trial of James H. Peck (Hilliard, Gray & Co., Boston, 1833); 37 Harv. L. Rev. 1024. One week after his acquittal a bill had passed both houses and had been signed by the President, based on the Pennsylvania Act of 1809, *supra*, and the New York Act of 1829, *supra*, limiting the court's power to attach and inflict summary punishment for contempt to the following cases: Misbehaviour of "persons in presence of said court or so near thereto as to obstruct the administration of justice; misbehaviour of any of the officers—and the disobedience of any officer—." Act of March 2nd, 1831 Ch. 98; 4 Sta. 487. The law is still on our books—U. S. Code (1926) § 385 (Jud.) and U. S. Code § 241 (Crim.).

By 1860 twenty-three of the thirty-three states had enacted statutes limiting the power of summary punishment for contempt, 28 Col. L. Rev. 533 n. 30.

Between 1831 and the Civil War only seven cases were found which raised the question of contempt by publication. In five of them it was held that the court had no power to punish for the publication in question. *Ex parte Poulson*, Fed. Case No. 11, 350, (1835); *Stewart* v. *People* 3 Scam. 395 (Ill. 1842); *Ex parte Hickey*, 4 Smed. & Mars. 751 (Miss. 1844); *Dunham* v. *State*, 6 Ia. 245 (1858); *Byron* v. *Calkins* (Wis. 1854) unreported but summarized in *ex rel. Ashbaugh v. Eau Claire*, 97 Wis. 1, 72 N. W. 193 (1897).

In two states publications were held summarily punishable. *Ten-*

ney's Case, 23 N. H. 162 (1851), *held* that the publisher and circulator of a handbill tending to obstruct the administration of justice was subject to summary punishment. The court relied on Blackstone and the authorities prior to 1831, completely disregarding the decisions and statutes of the other states since that time.

The Arkansas case of *State* v. *Morrill*, 16 Ark. 384 (1853), was more daring. The court punished summarily the publisher of an article alleging that the Supreme Court had been bribed, holding, in regard to the Act of 1838, Dig. Ch. 36 sec. 1, that inasmuch as it sanctioned summary punishment it was merely declaratory of the power of the courts derived from the constitution and in accord with common law. Inasmuch as it prohibited, it was merely indicative of the legislature's opinion, and as such was entitled to respect but was not binding on the courts, who, as the legislature, derive their power from the constitution. "The legislature may regulate the exercise of, but cannot abridge the express or necessarily implied powers granted to this court by the Constitution . . . . The right to punish for contempt, in a summary manner, has long been admitted as inherent in all courts of justice."

This outright repudiation of the doctrine of curtailment of the summary power rapidly gained followers. Few other, if any, Arkansas cases have been so widely cited. The courts of State after State have followed Arkansas in revival of the repudiated doctrine until that revival has swept practically all American jurisdictions. By 1903 the courts of fifteen other states had aligned themselves with the reactionary doctrine of New Hampshire and Arkansas. The leading cases were: *People* v. *Wilson*, 64 Ill. 195 (1872); *State* v. *Frew*, 24 W. Va. 416 (1884); *Myers* v. *State*, 46 Ohio St. 473, 22 N. E. 43 (1889); *In re Chadwick*, 109 Mich. 588, 67 N. W. 1071 (1896); *Telegram Newspaper Co.* v. *Comm.*, 172 Mass. 294, 52 N. E. 445 (1899); *Globe Newspaper Co.* v. *Comm.*, 188 Mass. 449, 74 N. E. 682 (1905); *State ex inf. Crow* v. *Shepherd*, 177 Mo. 205, 76 S. W. 79 (1903).

The Federal Courts were slower to return to the Blackstonian doctrine but in 1915 Judge Killits of the Northern District of Ohio punished the "Toledo News-Bee" for articles and cartoons strongly intimating a bias on his part in favor of Traction interests in a pending suit to enjoin enforcement of a city ordinance imposing drastic conditions upon their continued use of the streets after expiration of the franchises. *U. S.* v. *Toledo Newspaper Co.*, 220 Fed. 458 (1915). He was sustained by the Supreme Court of the United States, 247 U. S. 402, 38 Sup. Ct. 560 (1918). Justice Holmes with caustic irony, dissenting: "But a judge of the United States is expected to be a man of ordinary firmness of character and I find it impossible to believe that such a judge could have found in anything that was printed even a tendency to prevent his performing his sworn duty."

In spite of Justice Holmes' vigorous dissent, in which Justice Brandeis concurred, the case has been followed in the Federal courts since. *In re Independent Publishing Co.*, 240 Fed. 849 (1917); *U. S.* v.

Providence Tribune Co., 241 Fed. 524 (1917); *U. S.* v. *Markevitch*, 261 Fed. 537 (1919); *U. S.* v. *Sanders*, 290 Fed. 428 (1923); *Francis* v. *People of the Virgin Island*, 11 F. (2d) 860 (1926).

Since the reassertion by Federal judges of the power of summary punishment as to publication, all of the states but six have sanctioned it. Cases so holding will be found in 6 3rd. Dec. Dig. pp. 959-962 and Current Digests Contempt, Secs. 8 and 9.

An Indiana court in *Dale* v. *State*, 198 Ind. 110, 150 N. E. 781, 49 A. L. R. 647 (1926), best states the overwhelming weight of authority in regard to contempts and the reasons therefor. "Any contempt of court, whether it be direct or constructive, which makes an attack upon the integrity of the court or an attack upon its officers, which attack, hinders and delays the operation of the court with a case or cases then pending in the court, which act is in disrespect of the court, or tends to obstruct the administration of justice by the court, or which tends to bring the court into disrespect, is a criminal contempt, and is subject to punishment . . . . An alleged contempt which is not in the immediate presence of the court is a constructive contempt, and must be presented to the court for its action, upon the information of some one who knows of the contemptous action." See also: 6 R. C. L. 531; 2 R. C. L. Supp. 148; 5 R. C. L. Supp. 352; 6 R. C. L. Supp. 395.—"An act of the legislature which attempts to give power to a constitutional court to recognize contempts against it and to punish the contemnors is not a declaration of any new power but merely a recognition of that broad power which the courts have had since their inception." 6 R. C. L. 524; 2 R. C. L. Supp. 146. "Contempts of court are dealt with by the court and judge against whom they are directed . . . . A criminal contempt of court is not within the operation of a statute providing for a change of venue in criminal cases." 4 R. C. L. Supp. 423; the "constitutional guaranty of freedom of the press is not infringed by summary procedure for contempt of court, and a conviction thereunder, based upon publications which tend to obstruct the administration of justice." 5 R. C. L. 510; 2 R. C. L. Supp. 140; 6 R. C. L. Supp. 393

The Indiana court goes on to hold that neither a denial of intent by verified answer, nor proof of the truth of facts alleged in published articles, will constitute such justification as will purge one of the charge.

There are strong principles in support of the majority view as expressed by this case. The courts claim an inherent power to exercise and enforce the common law. They hold that this power is delegated to the judiciary by the Constitution and that legislation, insofar as it seeks to deprive the courts of this power, is worthy of respect merely as the opinion of a co-ordinate branch of the government, deriving its powers, as with the judiciary, from the Constitution; that although freedom of the press is a Constitutional guaranty, yet so is man's right to a fair trial by a free and impartial jury; that when publishers hinder the administration of justice by disqualifying many

for jury service, poisoning the minds of jurors serving and bringing the courts into disrespect, they are turning a constitutional right into criminal license.

Only four states have definitely repudiated this "inherent power" of the courts to summarily attach and punish their contemnors. This has been done by statute: Pennsylvania in 1809; New York in 1829; and Kentucky and South Carolina in 1829 and 1813, respectively.

Kentucky Statutes do not define contempt but Ky. Stat. (Carroll, 1930) § 1291 provides: "A court shall not, for contempt, impose upon the offender a fine exceeding thirty dollars or imprison him exceeding thirty hours, without the intravention of jury." And in regard to publications, section 1295, provides "No court or judge shall proceed by process of contempt or impose a fine against any person who shall, by words or writing, animadvert upon or examine into proceedings or conduct of such judge or court, by words spoken or writing published not in the presence of such court or judge in the court-house during the sitting of the court." (1893, c. 182, p. 756, Sec. 165).

The constitutionality of this statute was questioned in the case of *in re Wooley*, 11 Bush 95 (Ky. 1875). There the court relied somewhat upon the authority of *State* v. *Morrell, supra* but in *Arnold* v. *Commonwealth*, 80 Ky. 300 (1882), the court affirmed the right of the legislature to regulate the court's power to punish. The constitutionality of the statute now is definitely established; *Talbott* v. *Commonwealth*, 207 Ky. 749, 270 S. W. 32, (1925).

South Carolina's Code of Civil Procedure (1932) section 339 provides that "no citizen of this State shall be sent to jail for any contempt of court, or supposed contempt of court, committed during the sitting of the court, and in disturbance of the court until he be brought before the court, and there be heard by himself or counsel or shall stand mute." (S. C. Acts, of 1731 and 1813). The courts have adhered to this limitation.

The rules in force in these jurisdictions must be gleaned from the statutes themselves for there have been no reported cases of contempt by publication since their passage. Although the language in each statute varies, the general rule seems to be that offensive publications are to be regarded merely as constructive contempts and as such punishable only after trial by jury.

Yet in these four states we certainly find no decadent judiciary, weakened by the attacks of contemnors. Justice is freely administered, its cause not unduly hampered or prejudiced, the dignity of the courts not besmirched, though they have dared proceed without that strong arm of protection, "summary power."

Though it is admitted that in many instances "trial by newspaper" is an unmitigated evil and as such deserving of rigorous punishment, yet in the vast majority of cases it is not "trial by newspaper" which is punished but rather those publications which reflect upon the dignity, integrity and ability of the court, the offended court sitting as

the sole arbiter. In only fifteen of the sixty cases examined did the publication involve pending litigation. The remainder were punished as reflecting upon the court.

The conclusion is almost inevitable that the courts employ this weapon more often as a means of self-vindication than as a shield to protect jurors and prospective jurors from that bias and prejudice which prevent an impartial verdict. When used to this end "summary power" has its usefulness. For this reason alone the wisdom of the statutes of Pennsylvania, New York, South Carolina and Kentucky is to be doubted. As a means of self-vindication its necessity permits of grave doubts. It is difficult to see why our judiciary should be more zealously guarded from the searchlight of criticism than the two other branches of our government. But assuming the necessity of such protection, why not allow the contemnor the right to be tried by a court other than the one offended. Are judges not human and subject to human weaknesses?

The principal case seems to suggest that justice would be better served were another judge to pass on the contemptous nature of the publication.

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CRIMES—FEDERAL CRIMINAL COMMON LAW.—The doctrine of a federal criminal common law is inseparably linked with the rise and fall of the Federalist party. The establishment of the Supreme Court by the Judiciary Act of 1789 was looked upon with misgivings and even alarm by the people at large, because of the potentiality of the powers as yet undefined which the enactment granted to it, and the possibility of its being used as an effective instrument to increase the centralization of the national government to the detriment of states' rights in the hands of the party then in power which was bent upon accomplishing this very thing. Every move of this body in the first years of its existence was watched with jealous eye; every decision was greeted with a deluge of acrimonious criticism by the Anti-Federalist leaders and press in their eagerness to protect undiminished the rights of the individual states. It was unfortunate that at this time one of the chief sources of litigation was the subject of a federal criminal common law.

The inclination of authority is that the Federal courts have no common law jurisdiction whatever in criminal cases. *U. S.* v. *Eaton*, 144 U. S. 677 (1892); *In Re Greene*, 52 Fed. 104 (1892); *U. S.* v. *Martin*, 176 Fed. 110 (1910); *U. S.* v. *Gladwell*, 243 U. S. 476 (1917). *U. S.* v. *Smith*, 6 Dana Abr. 718 (1792), is the earliest case which arose on the subject. It answered the question in the affirmative. In the second case in which the controversy was mooted *U. S.* v. *Ravara*, 2 Dallas 297 (1793), it was argued that the offence committed was not an offence at common law, nor made so by any positive law of the United States, but it was not urged that unless defined by statute, it could not