



Notre Dame Law Review

Volume 5 | Issue 1

Article 5

10-1-1929

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Recommended Citation

Francis T. Ready, *Pardon for Contempt*, 5 Notre Dame L. Rev. 31 (1929).

Available at: <http://scholarship.law.nd.edu/ndlr/vol5/iss1/5>

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EDITORIAL COMMENT

PARDON FOR CONTEMPT

The question of whether or not an executive, state or federal, has authority to issue pardons for contempt of court, whether it be civil or criminal contempt, is a moot, but an interesting one. The courts of the several states are not in accord as to what, in a given case, constitutes civil or criminal contempt. They are, however, in almost complete accord in holding that, assuming the question to be determined, neither the governor nor the president has authority to pardon civil contempt.

It is generally understood that the distinction between civil and criminal contempt is that the former consists in failing to do something ordered to be done by a court in a civil action for the benefit of the opposing party therein, and is therefore not an offense against the dignity of the court, but against the party in whose behalf the violated order is made; while the latter is a direct offense against the dignity of the court. In other words, contempts of court for which punishment is inflicted for the primary purpose of vindicating public authority are denominated criminal, while those in which the enforcement of civil rights and remedies is the ultimate object of the punishment are denominated civil contempts. It was decided in *State Ex Rel. Rodd v. Verage*, a 1922 Wisconsin case reported in 187 N. W. 830, that whether a contempt was of a civil or criminal nature was a question to be determined by the court rather than by the governor. While punishment inflicted for a contempt growing out of the performance of a forbidden act may be criminal, and may be imposed for punitive purpose merely, it may be imposed for the purpose of securing to a party litigant his lawful rights—this to be determined by the court.

The Constitution vests in the governor the power to grant pardons "for all offenses except treason and cases of impeachment." Under this authority it has been held in two states that the power to pardon for criminal contempt rests with the governor. Cases illustrating are: *State ex rel. Van Orden v. Saw-*

inet, a Louisiana case reported in 13 AM. Rep. 115; and Sharp v. State, a Tennessee case reported in 49 S. W. 752. The Supreme Court of the United States also took this view in *Ex parte Grossman*, a 1925 case reported in 267 U. S. 87. On the other hand, Indiana and Texas, as shown by the respective cases of *Taylor v. Goodrich* reported in 40 S. W. 415 and the recent case of *State v. Shumacher* reported in 157 N. E. 769, have taken the position that contempt of court is not an "offense" within the meaning of the term as used in the Constitution, and that contempt—even criminal contempt—is not an offense subject to executive pardon. It is not an ordinary offense because one charged with it is not entitled to a trial by jury—a constitutional right secured to the ordinary offender. The Constitution provides that for all offenses against the United States one is entitled to a trial by jury. Since it is a proposition too well established to be the subject of dispute that one charged with contempt is not entitled to a trial by jury, it follows, logically, that criminal contempt of court is not an "offense" within the meaning of the Constitution. These latter courts, it occurs to the writer, have taken the more logical and enlightened view.

It is a function of the judiciary to declare and enforce private and public rights. The power to punish for contempt is an inherent power to enforce its orders and decrees and, in general, to enable it to perform the functions for which it was created. The founders of our government intended that the three branches of our government—legislative, executive, and judicial—should be distinct and independent; that in the exercise of their respective Constitutional functions each should be free from interference on the part of every other. The judiciary, more than any other department of the government, should be immune from outside influence and interference. If the governor is permitted to pardon those guilty of contempt of court, the judicial branch of the government is, to that extent, made dependent on the executive branch. It is obvious that the judicial branch of the government cannot effectively perform its functions in the administration of justice unless its authority and dignity are accorded the highest respect, and its dignity and authority are imperiled when the executive branch possesses a veto over the exercise of its power to punish for contempt and disobedience.

Chief Justice Marshall once defined a pardon as "an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed, from the punishment the law inflicts for the crime he has committed." As the governor is charged with the duty of seeing that the laws are faithfully executed it is in strict accordance with the theory of the power of pardon that he should have power to pardon offenders against the laws which it is his duty to execute. But it does not by any means follow that he should have the power of pardoning offenses with respect to which he has no duty or concern; and he has no duty or concern with respect to the offense of contempt of court.

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