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Problems and New Developments in Contempt

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PROBLEMS AND NEW DEVELOPMENTS IN CONTEMPT

The following remarks are part of a panel discussion on Problems and New Developments in Contempt given at the Annual Meeting of the National Conference of State Trial Judges in Montreal, Canada, August 6, 1966. Specific areas covered by the panel were "Problems in Contempt," "Civil and Criminal Contempt," and "Contempt by Publication: The Press." The panelists were the Honorable Eugene A. Burdick of Williston, North Dakota, the Honorable William W Keller of Laconia, New Hampshire, and Arthur E. Sutherland, Bussey Professor of Law, Harvard Law School.

PROBLEMS IN CONTEMPT

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The judicial power, one of the three coordinate branches of government, is usually conferred by constitutional provisions or pursuant to constitutional power granted to the legislative branch to create judicial trribunals. Many of the powers which the court must exercise in keeping its house in order are necessarily implied. These include the rule-making power, the power to regulate the conduct of counsel as officers of the court, the power to regulate all phases of the trial of cases, the power to enforce obedience to its process, the power to compel the attendance of witnesses, the power to enforce its judgments, and the power to afford protection to litigants, witnesses and counsel in maintaining decorum and a proper respect for its own dignity These powers are inherent to an orderly exercise of judicial authority

Perhaps the most important of the inherent powers of a court is the power to punish for contempt. Broadly speaking, the contempt power is exercised with great restraint and is infrequently invoked. This is as it should be. When a contempt situation does arise, there is usually an element of urgency about it that leaves the judge little opportunity for research or reflection. For these reasons, the judge should become thoroughly familiar with the basic

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concepts of contempt so that he may deal with a contempt problem promptly, effectively and correctly when it arises.

In considering any problem in contempt, it is important to keep in mind several fundamental distinctions. Contempt committed in the immediate view or presence of the court is a *direct contempt.* A direct contempt requires no separate hearing or special pleading.[1] Generally, a simple order stating with particularity the facts which constitute an actual contempt, without the aid of speculation, will suffice whether a fine or imprisonment is imposed.[2] The power to punish summarily for direct contempt does not seem to be open to question.[3] In an older case,[4] the Supreme Court held that a contempt order for a direct contempt can be issued absentia.

Contempt committed out of the view or immediate presence of the court is *indirect* or *constructive contempt.* Examples of such contempt may be found in the news publication problems (which will be discussed by Professor Sutherland) and in the widespread failure to comply with an order for support in matrimonial cases. Contempts of this character require a hearing in order that the court may become fully informed of the facts comprising the contempt of court.

Another important criteria for a direct contempt is that the court must be functioning as an open court whose proceedings can be publicly observed. *In re Oliver,*[5] held that perjury, even if committed before a judge sitting as a grand jury in secret session, would be an indirect criminal contempt requiring a public hearing.

While the power to punish contempt is inherent, legislation regulating the exercise of the contempt power is almost universal.[6] With respect to indirect contempt, in particular, legislation has the virtue of providing uniformity of procedure and reasonable limits on the disposition the court may make. The courts, it seems, have accepted this legislative encroachment on the judicial power.[7]

Contempt, whether direct or indirect, may be criminal or civil. If the sole purpose of punishment is to coerce the contemner into compliance with an order of the court and compliance would benefit the adverse party, then such contempt is civil. On the other hand, if the purpose of punishment is retribution to the contemner for conduct disrespectful or insulting to judicial authority or which

1. State v. Root, 5 N.D. 487, 67 N.W 590 (1896).
2. N.D. CENT. CODE § 27-10-06 (1960), Chula v. Superior Court, 57 Cal.2d 199, 368 P.2d 107 (1962), State v. Crum, 7 N.D. 299, 74 N.W 992 (1898).
3. Fisher v. Pace, 336 U.S. 155 (1949).
4. *Ex Parte* Terry, 128 U.S. 289 (1888).
5. 333 U.S. 257 (1948).
6. N.D. CENT. CODE Ch. 27-10 (1960).
7. Bridges v. Superior Court, 14 Cal.2d 464, 94 P.2d 983 (1939), Keller v. Keller, 323 P.2d 231 (Wash. 1958).

obstructs the court in the performance of judicial functions, the contempt is criminal. If punishment serves both purposes, the contempt is both civil and criminal.

We shall now consider a few specific problems to illustrate these fundamentals.

How does the court deal with a witness who conveniently "forgets"?

In *Second Additional Grand Jury v Cirillo*,[8] Cirillo, while testifying before a grand jury, had been granted immunity and being required to answer questions regarding his actions on a certain date, simply answered that "I don't remember." It was clear from the evidence that Cirillo had a detailed recollection of many events on the day in question and that his answer to certain vital questions "I don't remember" was a mere sham and constituted a refusal to testify. This was held to be a criminal contempt. To constitute contempt, however, the state of the evidence must be such that the witness can recall the events about which he is interrogated, but merely declines to answer.

The *Cirillo* case presents a further interesting question as to whether a series of refusals to answer constitute a series of contempts or a single contempt. Cirillo was asked to testify before the grand jury at an earlier session on November 1, 1961. He refused to answer and was held in criminal contempt and served a 30-day sentence. At the second session of the grand jury, held on December 5, he was asked the same questions and, in like manner, he refused to testify The contempt order for the second refusal was sustained, apparently because of the substantial lapse of time between the two hearings.

If the lapse of time between the two interrogations is unreasonably short, the refusal to testify will be considered as a single subject of inquiry, justifying only one contempt order [9] In *Gautreaux v Gautreaux*,[10] the contemner was found guilty of a direct criminal contempt by reason of an outburst in court and was summarily ordered to be confined. After the order was issued and before he could be removed from the courtroom his outburst was repeated. This was held to be but a single contempt.

The test of reasonableness for determining whether contemptuous acts constitute separate and distinct contempts is not whether there has been a previous adjudication for contempt, but whether the subsequent contemptuous act is so interwoven with the previous

8. 12 N.Y.2d 206, 188 N.E.2d 138 (1963).
9. Yates v. United States, 355 U.S. 66 (1957).
10. 220 La. 564, 57 So.2d 188 (1952).

conduct that it is inseparable therefrom.[11]

Courts often have difficulty in determining whether contemptuous conduct was comitted within the immediate view or presence of the court. Suppose the court calls a pre-trial conference and plaintiff's counsel fails to appear Is this a direct contempt of the court? In *Link v Wabash Railroad Company*,[12] the Court upheld an order dismissing the plaintiff's action with prejudice where plaintiff's counsel had failed to appear at the pre-trial conference. Justice Black wrote a vigorous dissent which is worthy of your consideration.

In *Chula v Superior Court*,[13] defendant's counsel failed to appear for sentencing of the defendant. Defendant's counsel had sent an associate to represent him. The associate counsel was tardy. Defendant's counsel had a history of other unexcused failures to appear in this case and in other cases. The court, following procedure for an indirect contempt, held counsel to be in direct criminal contempt of court. A strong dissent by Justice Traynor points out that the finding of a direct contempt is questionable in view of the fact that the court could not possibly have been aware of excusable conduct if any existed, without a hearing. The majority placed the burden upon the attorney to establish his inability to be present. This case seems to reverse the usual presumption of innocence. While this writer agrees with the result, it seems questionable that the conduct of counsel constituted a *direct* criminal contempt of the court.

When does perjury constitute a direct contempt? *State v Estill*,[14] held that because it was necessary for the trial court to receive evidence in order to establish the falsity of the testimony, it did not judicially know that the accused's testimony was false. Therefore, it was not a direct contempt. *In re Oliver*,[15] would support this view.

In another case involving the failure of counsel to file a defense memorandum, as required by a local rule of the court, the court struck the names of defense witnesses and fined counsel $100.00 and costs. This order was reversed on appeal as constituting a penalty not authorized by the Federal Rules of Civil Procedure.[16] In *Green v United States*,[17] the defendant failed to surrender for the purpose of serving his sentence pursuant to a custody order

11. See 94 A.L.R.2d 1246.
12. 371 U.S. 873 (1962).
13. 57 Cal.2d 199, 368 P.2d 107 (1962).
14. 349 P.2d 210 (Wash. 1960).
15. *Supra* note 5.
16. Gamble v. Pope and Talbott, Inc., 307 F.2d 729 (3rd Cir. 1962).
17. 356 U.S. 165 (1958).

abiding the outcome of an appeal. The majority of the Supreme Court speaking by Justice Harlan, held that this failure to surrender constituted a direct criminal contempt, punishable summarily There were four dissenting Justices. In a plethora of precedent, the majority also held that the contemner was not entitled to trial by jury

Two significant companion cases were recently decided by the United States Supreme Court. In *Shillatani v United States*,[18] the Court held that the contemner was not entitled to trial by jury for a civil contempt. The contemner had been sentenced to serve a term of two years for refusal to answer questions after being granted immunity under the Narcotics Control Act of 1956. It may be noted, following *In re Oliver*,[19] that this was an indirect contempt. The grand jury before whom he refused to testify was dissolved while his sentence had been partially served. The Court held that the sentence, although termed criminal, was clearly civil as its purpose was to coerce the contemner into testifying, rather than to punish and that the contemner had the power of escaping punishment at any time he wished by testifying. The grand jury having been dissolved, however, the purpose of the punishment could no longer be served and he was released.

Contrastingly, in *Cheff v Schnackenberg*,[20] the Supreme Court held that six-months imprisonment for an indirect criminal contempt for violation of a cease and desist order did not require trial by jury to satisfy due process of law under the Fifth Amendment. In this respect, the court followed *Green v United States*,[21] and *United States v Barnett*,[22] with a noteworthy exception. Without any precedent whatever to sustain his position, Justice Clark, speaking for the majority and joining the dissenters in *United States v Barnett*, pronounced a dictum that henceforth any sentence for a criminal contempt in the federal courts (and it may be presumed that the Court was referring to an *indirect* form of criminal contempt) which carries the punishment of imprisonment for more than six months will violate the due process clause of the Constitution unless a jury trial has been received or waived. It would seem to be inevitable that the Court will apply the same rule to the States under the due process clause of the 14th Amendment.

What should a judge do who is personally involved in the matter of the contempt? A borderline case on the subject is *Fisher v*

18. 384 U.S. 364 (1966).
19. 333 U.S. 257 (1948).
20. 384 U.S. 373 (1966).
21. *Supra* note 17.
22. 376 U.S. 681 (1964).

Pace.[23] In that case, counsel persisted in an effort to present to the jury, contrary to the rules of the court, the suggestion that so many weeks of disability in a Workmen's Compensation Case would result in the loss of X dollars. After admonishing counsel, the court said, "I'll declare a mistrial if you mess with me two minutes and a half, and fine you besides." Counsel responded, "That is all right, we take exception to the conduct of the court." The court replied, "That is all right, I'll fine you $25.00." The colloquy grew in intensity from there and ultimately a fine of $100.00 and three days in jail were imposed. This contempt order was upheld on appeal. There were three vigorous dissents by Justices Douglas (Black concurring), Murphy and Rutledge. This case can be contrasted with *Offutt v United States*,[24] wherein the Court held that a judge who becomes embroiled with counsel in a continuous wrangle should call in another judge to sit on the contempt hearing. A similar result was reached in *United States v Bradt*,[25] where the attorney had filed an affidavit of prejudice against the judge, setting forth some rather strong references to improprieties by the judge. After the judge rejected the affidavit or prejudice, counsel withdrew from the presence of the court. The judge held him to be in direct contempt. On appeal, the order was reversed.

In a news item appearing in the Associated Press, dateline Sioux City Iowa, on May 18, 1966, a juvenile court judge observed a disturbance outside his house at midnight, involving four unruly boys who were grabbing and teasing a young girl. He told the boys to go home and informed them that he was a judge and that he was giving an order of the court. The boys attacked him, saying, "To hell with judges and the courts," and administered a beating to the judge. About two weeks later, after holding hearings, he found the boys in contempt of court and handed out six months county jail sentences and fines to the offenders. Without in any way justifying the reprehensible conduct of the boys, it would seem that this is another case where the judge should have called in another judge to hear the contempt matter, if it was indeed contempt of court. That it was contempt, is highly questionable, in view of the fact that the court was nowhere near its court facilities, was not sitting as a court, and certainly no jurisdiction had been acquired in any way over the youths involved. *In re Oliver*,[26] would seem to apply.

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23. 336 U.S. 155 (1949).
24. 348 U.S. 11 (1954).
25. 294 F.2d 879 (6th Cir. 1961).
26. *Supra* note 5.

Suppose the court's jurisdiction over the subject matter of the suit is challenged and the court issues an injunctional order upon the plausible, but erroneous, conclusion that it had such jurisdiction. Thereafter, the order is violated and the court issues a contempt order In *United States v United Mine Workers*[27] the Court held that the trial court has power to punish for contempt while considering its own jurisdiction even though the order is later reversed on appeal.

In *In re Green's Petition*[28] the court issued an ex parte restraining order and had denied petitioner's request for a hearing on a motion to vacate the restraining order. The state's authority in the matter was doubtful. A petitioner, counsel for the respondent, had advised the restrained union to continue to picket to test the jurisdiction of the state court. Such a test was made upon agreement with opposing counsel. The petitioner was not allowed to testify at the contempt hearing and was summarily held in contempt. This order was reversed.

It is often difficult to determine when the spoken word constitutes contempt of court. So much depends on the circumstances, the inflection of voice or word emphasis. In *Taylor v Gladden*[29] the defendant in a criminal case had requested the judge to disqualify himself. After stating his case, and being overruled on this point, the defendant persisted, "I think you better disqualify yourself." The judge replied, "I hold you in contempt of court." The defendant responded, "I can't express my contempt for you." The contempt order was upheld by the Oregon Supreme Court. Situations of this kind call for the drawing of close lines and are further illustrated by the story of the young lawyer who was making a vain but energetic effort to introduce objectionable evidence. After several objections were sustained, he appeard to be seething in frustration and mumbled something barely audible. The judge asked, "Young man, are you trying to show your contempt for this Court?" The young lawyer replied, "No, Your Honor, I am trying my best to conceal it."

27. 330 U.S. 358 (1947).
28. 369 U.S. 689 (1962).
29. 377 P.2d 14 (Ore. 1962).