Vanderbilt Law Review

Volume 7
Issue 2 *Issue 2 - February 1954*

Article 7

2-1954

Falsification as Contempt

Stephen D. Potts

NOTE

FALSIFICATION AS CONTEMPT

The last twenty years have been witness first to an expansion and then to a retrenchment of constitutionally protected civil liberties. The exercise of the contempt power is an area in which constitutional limitations on modes of procedure are inapplicable so long as the power is used to preserve the judiciary.[1]

Contempts are either direct or constructive. Direct contempts are committed in the presence of the court[2] whereas constructive contempts are committed outside the presence of the court.[3] This distinction is significant in that direct contempts are punishable without a formulated charge, hearing or formal judgment of guilt.[4] Constructive contempts are less summarily punishable.[5] Both negative and positive conduct may constitute a contempt of court. Examples of negative direct contempts are failure to produce a prisoner at a trial or hearing[6] and refusal of a witness to testify.[7] Acts punishable as positive direct contempts include assaults on judges,[8] jurors,[9] attor-

1. *Ex parte* Hudgings, 249 U.S. 378, 39 Sup. Ct. 337, 63 L. Ed. 656 (1919).
2. *See, e.g.*, Blankenburg v. Commonwealth, 272 Mass. 25, 172 N.E. 209, 212, 73 A.L.R. 808 (1930). See DANGEL, CONTEMPT § 7 (1939); 12 AM. JUR., *Contempt* § 4 (1938).
3. *See, e.g., Ex parte* Earman, 85 Fla. 297, 95 So. 755, 760, 31 A.L.R. 1226 (1923); State v. Jones, 111 Ore. 295, 226 Pac. 433, 435, 33 A.L.R. 603 (1924); *Ex parte* Ratliff, 117 Tex. 325, 3 S.W.2d 406, 408, 57 A.L.R. 541 (1928). See also DANGEL, CONTEMPT § 5 (1939); 12 AM. JUR., *Contempt* § 4 (1938). A constructive contempt is synonymous with an indirect contempt. DANGEL, CONTEMPT § 8 (1939).
4. Cooke v. United States, 267 U.S. 517, 45 Sup. Ct. 390, 69 L. Ed. 767 (1925); *In re* Terry, 128 U.S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405 (1888); United States v. Landes, 97 F.2d 378 (2d Cir. 1938); Owens v. Dancy, 36 F.2d 882 (10th Cir.), *cert. denied*, 281 U.S. 746 (1929); United States v. Dachis, 36 F.2d 601 (S.D.N.Y. 1929); Mainland v. People, 111 Colo. 198, 139 P.2d 366 (1943); People v. Berof, 367 Ill. 454, 11 N.E.2d 936 (1937); Harding v. McCullough, 236 Iowa 556, 19 N.E.2d 613 (1945); *In re* Rotwein, 291 N.Y. 116, 51 N.E.2d 669 (1943); *Ex parte* Norton, 144 Tex. 445, 191 S.W.2d 713 (1946).
5. Ryals v. United States, 69 F.2d 946 (5th Cir. 1934); People v. McKinlay, 367 Ill. 504, 11 N.E.2d 933 (1937); Charles Cushman Co. v. Mackesy, 135 Me. 490, 200 Atl. 505, 118 A.L.R. 148 (1938); Hitzelberger v. State, 173 Md. 435, 196 Atl. 288 (1938); *Ex parte* Niklaus, 144 Neb. 503, 13 N.W.2d 655 (1944); *Contra:* Sullens v. State, 191 Miss. 856, 4 So.2d 356 (1941).
6. *Ex parte* Sternes, 77 Cal. 156, 19 Pac. 275, 11 Am. St. Rep. 251 (1888); State *ex rel.* Ewing v. Morris, 120 Wash. 146, 207 Pac. 18 (1922).
7. Joslyn v. People, 67 Colo. 297, 184 Pac. 375 (1919); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911); *In re* Hayes, 200 N.C. 133, 156 S.E. 791 (1931); *In re* Kelly, 200 Pac. 430, 50 Atl. 248 (1901).
8. Turquette v. State, 174 Ark. 875, 298 S.W. 15, 55 A.L.R. 1226 (1927); Weldon v. State, 150 Ark. 407, 234 S.W. 466, 18 A.L.R. 202 (1921); *Ex parte* McCown, 139 N.C. 95, 51 S.E. 957 (1905).
9. *In re* Fountain, 182 N.C. 49, 108 S.E. 342, 18 A.L.R. 208 (1921); *cf. In re* Glenn, 103 S.C. 501, 88 S.E. 294 (1916).

neys,[10] witnesses,[11] and officers of the court;[12] interferences with the trial jury by invitation to the room of defendant's counsel to drink liquor[13] or discussion of the case by a litigant in the presence of jurors who may try it;[14] and perjury or false swearing by a witness in court or before a grand jury.[15] The problems raised by the positive direct contempt of perjury or false swearing are the subject of this note.

Perjury is a criminal offense, the elements of which are material, willful falsity under oath in a judicial proceeding.[16] False swearing is falsification less than perjury in that it need not be material or in a judicial proceeding.[17] Because of disproportionately harsh sentences and technical rules of proof, convictions for perjury are difficult to obtain.[18] Two methods of correcting this undesirable situation have been employed: (1) legislative enactments making false swearing a crime equivalent to second degree perjury;[19] (2) judicial punishment of perjury and false swearing as contempt.[20] The statutory method of reform is usually employed. The extension of the summary contempt power to embrace perjury and false swearing is somewhat alarming when framed against the injustices which have occurred as a result of use of the contempt power to punish publications critical

10. United States v. Barrett, 187 Fed. 378 (S.D. Ga. 1911); United States v. Patterson, 26 Fed. 509 (W.D. Tenn. 1886).

11. Brannon v. Commonwealth, 162 Ky. 350, 172 S.W. 703 (1915); State v. Little, 175 N.C. 743, 94 S.E. 680 (1917).

12. *Ex parte* McLeod, 120 Fed. 130 (N.D. Ala. 1903); *In re* Terry, 36 Fed. 419 (D. Cal.), *habeas corpus denied,* 128 U.S. 289 (1888).

13. Poindexter v. State, 109 Ark. 179, 159 S.W. 197 (1913).

14. Baker v. State, 82 Ga. 776, 9 S.E. 743 (1889).

15. See Notes, 73 A.L.R. 817 (1931), 11 A.L.R. 342 (1921).

16. 41 AM. JUR., *Perjury* § 2 (1942).

17. See ARK. STAT. ANN. § 41-3002 (1947); DEL. REV. CODE § 5246 (1935); GA. CODE ANN. § 26-4003 (1935); KY. REV. STAT. ANN. § 432-170 (Baldwin 1943); LA. CODE CRIM. LAW & PROC. ANN. art. 740-125 (1943); N.J. STAT. ANN. § 2:157-4 (1939); N.Y. PENAL LAW § 1620-b; UTAH CODE ANN. § 76-45-8 (1953); W. VA. CODE ANN. § 6000 (1949). These statutory provisions are either entitled false swearing or second degree perjury. Other examples of attempts to make perjury more easily punishable are: FLA. STAT. ANN. § 837.01 (1944) (false swearing not in a judicial proceeding punishable); MD. ANN. CODE GEN. LAWS art. 27, § 533 (1951) (if a person makes oath to contradictory statements a conviction for perjury may be had by proving the falsity of one of the statements); TENN. CODE ANN. § 11073 (Williams 1934) (false swearing not in a judicial proceeding punishable).

18. See King, *Perjury in Illinois,* 17 ILL. L. REV. 596 (1923); McClintock, *What Happens to Perjurers,* 24 MINN. L. REV. 727, 755 (1940).

19. See 41 AM. JUR., *Perjury* § 2 (1942).

20. Howard v. United States, 182 F.2d 908 (8th Cir.), *vacated,* 340 U.S. 898 (1950) (cause moot); *In re* Meckley, 137 F.2d 310 (3d Cir.), *cert. denied,* 320 U.S. 760 (1943); *In re* Presentment by Grand Jury of Ellison, 133 F.2d 903 (3d Cir.), *cert. denied,* 318 U.S. 791 (1943); Schleier v. United States, 72 F.2d 414 (2d Cir.), *cert. denied,* 293 U.S. 607 (1934); Young v. State, 198 Ind. 629, 154 N.E. 478 (1926); *In re* Caruba, 140 N.J. Eq. 563, 55 A.2d 289 (Ct. Err. & App.), *cert. denied,* 335 U.S. 846 (1947); *In re* D'Amore, 119 N.Y.S.2d 361 (2d Dep't 1952); Tracy Loan and Trust Co. v. Openshaw Inv. Co., 102 Utah 509, 132 P.2d 388 (1942).

of the courts.[21] But perjury or false swearing as contempt has its own appeal to history.

Perjury as contempt first appeared in bankruptcy cases.[22] The limitation of the application of the doctrine to proceedings of this type[23] in the early years of its pronouncement may be traced to two sources. During the last half of the nineteenth century a notion existed in the law courts to the effect that a defendant could deny the contempt charged against him, and, if the answers completely cleared him of the offense, they must be taken as true.[24] The only way to get at the contemnor was to proceed by information or indictment for perjury. Significantly, however, this notion was not applicable in equity.[25] There the defendant's denial of the contempt under oath was not conclusive. Thus, in bankruptcy proceedings, which are equitable in nature, the defendant could not purge himself of the contempt;[26] but in law actions he could. The above theory adequately explains the limitation of the perjury as contempt doctrine to equity cases, but what additional factors were present to limit it to bankruptcy? In addition to the contempt power embodied

21. See Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924); Nelles and King, *Contempt by Publication in the United States*, 28 COL. L. REV. 401, 423-31 (1928).

22. See *In re* Schulman, 177 Fed. 191 (2d Cir. 1910); *In re* Steiner, 195 Fed. 299 (S.D.N.Y. 1912); *In re* Fellerman, 149 Fed. 244 (S.D.N.Y. 1906); *In re* Salkey, 21 Fed. Cas. 235, No. 12, 253 (N.D. Ill. 1875); *Ex parte* Bradbury, 78 E.C.L. 15 (1853); *Ex parte* Lord, 16 M. & W. 462, 153 Eng. Rep. 1271 (Ex. 1847); Taylor's Case, 8 Ves. Jr. 328, 32 Eng. Rep. 381 (Ch. 1803); Rex v. Perrot, 2 Burr. 1122, 97 Eng. Rep. 745 (K.B. 1761).

23. For application of the doctrine in an action by a creditor to compel discovery of his debtor's property, see *In re* Rosenberg, 90 Wis. 581, 63 N.W. 1056 (1895). In this type proceeding, as in bankruptcy, the debtor will usually be the only person who can locate the property. The first exception to the limitation of the exercise of the power to bankruptcy cases appears in New York in cases where a surety makes a false justification on a judicial bond. See *In re* Woods, 134 App. Div. 361, 119 N.Y. Supp. 69 (1st Dep't 1909); *In re* Goslin, 95 App. Div. 407, 88 N.Y. Supp. 670 (1st Dep't), *aff'd*, 180 N.Y. 505, 72 N.E. 1142 (1904); Buffalo Loan, T. & S. D. Co. v. Medina Gas & E. L. Co., 68 App. Div. 414, 74 N.Y. Supp. 486 (4th Dep't 1902); *In re* Sheppard, 33 Misc. 724, 68 N.Y. Supp. 974 (Sup. Ct. 1901); People *ex rel.* Wise v. Tamsen, 17 Misc. 212, 40 N.Y. Supp. 1047 (Sup. Ct. 1896); *In re* Hopper, 9 Misc. 171, 29 N.Y. Supp. 715 (N.Y. City Ct. 1894), *aff'd*, 145 N.Y. 605, 40 N.E. 164 (1895); Lawrence v. Harrington, 17 N.Y. Supp. 649 (Sup. Ct.), *aff'd*, 133 N.Y. 690, 31 N.E. 627 (1892); Simon v. Aldine Publishing Co., 14 Daly 279, 12 N.Y. Civ. Proc. Rep. 290 (N.Y. City Ct. 1887); Keating v. Goddard, 8 N.Y. Civ. Proc. Rep. 377 (N.Y. City Ct., 1885); Stephenson v. Hanson, 67 How. Pr. 305, 6 N.Y. Civ. Proc. Rep. 43 (N.Y. City Ct., 1884); Eagan v. Lynch, 49 N.Y. Super. Ct. Rep. 454, 3 N.Y. Civ. Proc. Rep. 236 (1883).

24. See *In re* May, 1 Fed. 737 (E.D. Mich. 1880); Curtis and Curtis, *The Story of a Notion in the Law of Criminal Contempt*, 41 HARV. L. REV. 51, 64 (1927). For a twentieth-century version of the application of the notion, see Appeal of Verdon, 89 N.J.L. 16, 97 Atl. 783 (Sup. Ct. 1916).

25. See 4 BL. COMM. *288; Curtis and Curtis, *supra* note 24, at 53, 65.

26. *In re* Fellerman, 149 Fed. 244 (S.D.N.Y. 1906). Originally the right to purge a contempt applied only in constructive contempts on the law side. See 4 BL. COMM. *286, *287. As the language in the *Fellerman* case indicates,

in Section 401 of the Criminal Code[27] there was a specific statute authorizing the punishment of such contempts.[28] This power to compel a truthful answer was no doubt considered necessary because questions concerning the disposition of the bankrupt's property are more likely to be solely within his knowledge. A failure to answer truthfully on his part would in fact block any further proceedings.

The limitation of the doctrine's applicability to bankruptcy cases was short lived. It soon began to spread into other areas of litigation.[29] The adoption of the doctrine was made possible on the law side by rulings of the Supreme Court which first weakened[30] and then denied the right of a witness to purge himself of contempt.[31] No doubt the courts conceived of the power to punish perjury as contempt as a useful means of extracting the truth from a witness. Often it seems the "truth" extracted was merely the reflection of the court's views.[32] The courts were further tempted to use the summary contempt power to punish perjurers because of the difficulty in obtaining convictions for perjury.[33]

The expansion of the perjury as contempt doctrine was temporarily halted in Ex parte *Hudgings*[34] out of fear that "it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled."[35] This fear did not persist. The Court of Appeals

this distinction was often ignored in stating the rule of purgation of contempt under oath.

27. 18 U.S.C.A. § 401 (1950).

28. 30 STAT. 556 (1898), 11 U.S.C.A. § 69 (1943). This statute provides, *inter alia*, that "a person shall not, in proceedings before a referee . . . refuse to be examined according to law. . . ."

29. See, *e.g.*, *Ex parte* Steiner, 202 Fed. 419 (2d Cir. 1913) (swearing to false affidavits); *In re* Ulmer, 208 Fed. 461 (N.D. Ohio 1913) (perjury of trial witness); Gordon v. Commonwealth, 141 Ky. 161, 133 S.W. 206 (1911) (trial witness admittedly testified falsely); Edwards v. Edwards, 87 N.J. Eq. 546, 100 Atl. 608 (Ch. 1917) (perjury committed by petitioner who induced court to grant divorce decree); Seastream v. N. J. Exhibition Co., 61 Atl. 1041 (N.J. Ch. 1905) (contradictory affidavits).

30. See *Ex parte* Savin, 131 U.S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150 (1889).

31. United States v. Shipp, 203 U.S. 563, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265 (1906).

32. This theory was first pronounced in State v. Lazarus, 37 La. Ann. 314 (1885). See also *Ex parte* Hudgings, 249 U.S. 378, 384, 39 Sup. Ct. 337, 63 L. Ed. 656 (1919); State v. Meese, 200 Wis. 454, 225 N.W. 746 (1929), 229 N.W. 31, 33 (1930).

33. See King, *Perjury in Illinois*, 17 ILL. L. REV. 596 (1923); McClintock, *What Happens to Perjurers*, 24 MINN. L. REV. 727, 755 (1940).

34. 249 U.S. 378, 39 Sup. Ct. 337, 63 L. Ed. 656 (1919). For a note criticizing the case see, 19 COL. L. REV. 335 (1919). The restriction of the summary contempt power to punish perjury was announced by Chief Justice White. It is interesting to note that only a year earlier in Toledo Newspaper Co. v. United States, 247 U.S. 402, 38 Sup. Ct. 560, 62 L. Ed. 1186 (1918), Chief Justice White allowed an extension of the use of the summary contempt power in dealing with newspapers.

35. *Ex parte* Hudgings, 249 U.S. 378, 384, 39 Sup. Ct. 337, 63 L. Ed. 656 (1919).

for the Sixth Circuit picked up where it had left off in a bankruptcy case,[36] and the second circuit, in a series of cases, proceeded to extend the application of the doctrine by holding that a witness who testified falsely before the grand jury was guilty of contempt of the district court.[37] The argument in these cases, that the allegedly false testimony before the grand jury did not fall under the statutory summary contempt power in that it was not committed in the presence of the court, or so near thereto as to obstruct the administration of justice, was unavailing. In dismissing this argument one case referred to Ex parte *Savin*[38] which held that witnesses before a grand jury are within the court's presence, but said it was unnecessary to decide this point because there was no doubt that they fall either under that class or the "so near as to obstruct" class.[39]

The state courts did not hesitate to follow the trend of extension established by the federal courts,[40] but the most easily traceable line of development remained in the federal courts. By 1945 the third and seventh circuits had seen fit to follow the second circuit's lead in summarily committing witnesses who testified falsely in grand jury proceedings,[41] and the Supreme Court similarly treated a juror who on *voir dire* had concealed her previous employment by the defendant and had caused a mis-trial by unreasonably refusing to vote for conviction.[42] Even if the correctness of these decisions as judged by the tests pronounced in the early bankruptcy cases is conceded, it is evident that the application of the doctrine had undergone a mushroom-like growth. The opinion by Mr. Justice Black in In re *Michael*[43] in 1945 seriously stunted this growth. The Court reiterated the prin-

36. Haimsohn v. United States, 2 F.2d 441 (6th Cir. 1924).

37. Loubriel v. United States, 9 F.2d 807 (2d Cir. 1926) (although disallowing the particular use of the contempt power, case indicated that under certain circumstances witnesses before a grand jury may be held in contempt for false swearing); O'Connell v. United States, 40 F.2d 201 (2d Cir. 1930) (Manton, J., dissenting); Lang v. United States, 55 F.2d 922 (2d Cir. 1932); United States v. McGovern, 60 F.2d 880 (2d Cir.), *cert. denied*, 287 U.S. 650 (1932); Schleier v. United States, 72 F.2d 414 (2d Cir.) (Manton, J., dissenting), *cert. denied*, 293 U.S. 607 (1934). The second circuit in *The Reno*, 61 F.2d 966 (2d Cir. 1932), did not extend the doctrine to trial witnesses giving contradictory testimony.

38. 131 U.S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150 (1889).

39. O'Connell v. United States, 40 F.2d 201, 203 (2d Cir. 1930).

40. See, *e.g.*, Blankenburg v. Commonwealth, 272 Mass. 25, 172 N.E. 209, 73 A.L.R. 808 (1930) (probate proceedings); People v. Doe, 226 Mich. 5, 196 N.W. 757 (1924) (grand jury); Backer v. A. B. & B. Realty Co., 107 N.J. Eq. 246, 152 Atl. 241 (Ch. 1930) (affidavits); *In re* Nunns, 188 App. Div. 424, 176 N.Y. Supp. 858 (2d Dep't 1919) (*voir dire*).

41. *In re* Meckley, 137 F.2d 310 (3d Cir.), *cert. denied*, 320 U.S. 760 (1943); *In re* Presentment by Grand Jury of Ellison, 133 F.2d 903 (3d Cir.), *cert. denied*, 318 U.S. 791 (1943); Blim v. United States, 68 F.2d 484 (7th Cir. 1934). The trend of extension was not without its setbacks. See United States v. Arbuckle, 48 F. Supp. 537 (D.D.C. 1943).

42. Clark v. United States, 289 U.S. 1, 53 Sup. Ct. 465, 77 L. Ed. 993 (1932).

43. 326 U.S. 224, 66 Sup. Ct. 78, 90 L. Ed. 30 (1945).

ciples announced in Ex parte *Hudgings*[44] and showed concern lest the contempt power be used to punish perjurers. Such action would constitute a denial of trial by jury, a particularly undesirable occurrence in these circumstances because the judge would don the garb of both prosecutor and trier of fact. There is evidence that the principles of this case will be heeded,[45] but it is not to be assumed that the death knell of perjury as contempt has been tolled.[46] The use of the power is appealingly convenient in handling recalcitrant witnesses. It is an historical fact that the scope of the applicability of the doctrine has been considerably widened since its inception in bankruptcy cases. Thus it becomes important to take note of those factors which should be considered by a court today in deciding whether or not allegedly false testimony constitutes a contempt of court.

Hegelaw v. State[47] contains a concise statement of the elements which must subsist to justify a finding that falsification also constitutes a contempt. These elements are: "(1) That the alleged false answer had an obstructive effect. (2) Judicial knowledge of the falsity of the testimony. (3) The question must be pertinent to the issues."

(1) *That the allegedly false answer obstructed the administration of justice.* The courts' summary contempt power is based on the necessity of self-preservation.[48] In the cases this principle is expressed by saying the court may summarily prevent an obstruction to the administration of justice.[49] From a common sense viewpoint there are three ways in which a false answer can obstruct the administra-

44. 249 U.S. 378, 39 Sup. Ct. 337, 63 L. Ed. 656 (1919).

45. See United States *ex. rel.* Johnson v. Goldstein, 158 F.2d 916 (7th Cir. 1947). There is also a line of state cases which restricts the use of the summary contempt power but the basis of those holdings is more that the court did not have judicial knowledge of the falsity than the absence of an obstruction to the administration of justice. See *Ex parte* Blache, 40 Cal. App.2d 687, 105 P.2d 635 (1940); Mitchell v. Parrish, 58 So.2d 683 (Fla. 1952); State *ex. rel.* Luban v. Coleman, 138 Fla. 555, 189 So. 713 (1939); People *ex rel.* Butwill v. Butwill, 312 Ill. App. 218, 38 N.E.2d 377 (1941); People v. Tomlinson, 296 Ill. App. 609, 16 N.E.2d 940 (1938); People v. La Scola, 282 Ill. App. 328 (1936); Wilder v. Sampson, 279 Ky. 103, 129 S.W.2d 1022 (1939); State v. Illario, 10 N.J. Super. 475, 77 A.2d 483 (App. Div. 1950); Fawick Airflex Co. v. United Electrical, R. & M. Wkrs., 87 Ohio App. 371, 92 N.E.2d 436, *app. dismissed,* 93 N.E.2d 409 (1950). See Note, 27 J. CRIM. L. & CRIMINOLOGY 452 (1936).

46. Howard v. United States, 182 F.2d 908 (8th Cir.), *vacated,* 340 U.S. 898 (1950) (cause moot). The eighth circuit opinion tended to minimize the policy reasons for restricting summary punishment.

47. 24 Ohio App. 103, 155 N.E. 620, 621 (1927).

48. Marshall v. Gordon, 243 U.S. 521, 37 Sup. Ct. 448, 61 L. Ed. 881 (1917). See 4 BL. COMM. *486; Frankfurter and Landis, *supra* note 21, at 1022; Nelles, *The Summary Power to Punish for Contempt,* 31 COL. L. REV. 956, 959 (1931).

49. *In re* Michael, 326 U.S. 224, 66 Sup. Ct. 78, 90 L. Ed. 30 (1945); *Ex parte* Hudgings, 249 U.S. 378, 39 Sup. Ct. 337, 63 L. Ed. 656 (1919); Nelles, *supra* note 48; Frankfurter and Landis, *supra* note 21.

tion of justice. First, it may mislead the court and thereby frustrate the purpose of the trial, that is, a decision based on truth. Or it may cause the consumption of time and energy in an attempt to show its falsity. Last, it may block the inquiry. However sensible these views may appear at first blush, the Supreme Court of the United States has held that false answers have an obstructive effect only when they block the inquiry.[50] Is the Court, like Humpty-Dumpty, saying these words mean what we say they mean, regardless of normal understanding? Possibly yes, but not without reason. This is an area in which the procedural safeguards of the Constitution are normally inapplicable.[51] Thus the Court has felt that it must be responsive to any abuse. The avenue chosen seems to be a restrictive interpretation of an obstruction to the administration of justice. The theory is that there is a distinction between an obstruction of justice and an obstruction to the administration of justice.[52] The domain of the former is substantive and of the latter mechanical. The Supreme Court indicates that since self-preservation, the principal justification of the summary contempt power, demands only the mechanical functioning of the court, the exercise of the power should be limited to those cases wherein that functioning is impeded.[53] Yet is it not fundamental that an institution which consistently fails to perform its substantive function will be destroyed? Thus the principal justification of the summary contempt power, self-preservation, demands more than mere mechanical functioning. Substance rather than form is critical. An accurate construction would encompass perjuries which would thwart the dispensation of justice. This is not to say that the decisions arrived at by applying the "blocking of the inquiry" test were unjust. The point is that the decisions are based on a tortured construction of an obstruction to the administration of justice and are, therefore, vulnerable to attack.

Since obstruction to the administration of justice is not an adequate standard by which to judge whether perjury constitutes a contempt, what alternative standard is available?

(2) *Judicial knowledge of the falsity of the testimony.* The federal courts generally rely upon obstruction to the administration of justice as a limitation on the summary contempt power.[54] The tendency

50. Cases cited note 49 *supra*. See Note, 18 So. CALIF. L. REV. 284 (1945).
51. See *Ex parte* Hudgings, *supra* note 49, at 383. But see *In re* Oliver, 333 U.S. 257, 68 Sup. Ct. 499, 92 L. Ed. 682 (1948).
52. Rosner v. United States, 10 F.2d 675 (2d Cir. 1926). See Nelles, *supra* note 48, at 960. But see Note, 21 CALIF. L. REV. 582, 587 (1933).
53. United States v. Appel, 211 Fed. 495 (S.D.N.Y. 1913). The Supreme Court, in *Ex parte* Hudgings, 249 U.S. 378, 383, 39 Sup. Ct. 337, 63 L. Ed. 656 (1919) seems to adopt the reasoning of the *Appel* case.
54. See, *e.g.*, United States *ex. rel.* Johnson v. Goldstein, 158 F.2d 916 (7th Cir. 1947); *The Reno*, 61 F.2d 966 (2d Cir. 1932); United States v. Ar-

of the state cases is to submerge discussion of that element and rely on the requirement that the falsity be within the judicial knowledge of the court.[55] No doubt one reason for this tendency is the difficulty encountered in applying the obstruction test.[56] Another is that the judicial knowledge test is a short-hand expression of the courts' policy not to deny an alleged offender a jury trial if there is an issue as to the falsity of his testimony. Use of judicial knowledge as a test invades the province of the jury very little and yet leaves the court power to deal with patent falsification. The deterrent effect of the summary contempt power on persistent and flagrant perjury is left intact. In this capacity it will be particularly useful in those state courts where the judge is not allowed to comment on the evidence. The possibility that the jury will be mislead by perjured testimony is combatted.

As a practical matter judicial knowledge of falsification has been held to be acquired by an admission of the testifying party,[57] by the introduction of affidavits by a party which set up conflicting sets of facts,[58] or by uncontrovertible documentary evidence.[59] Of course lack of judicial knowledge prohibits summary commitment.[60] There is a definite indication that the Supreme Court has recognized the efficacy of this test;[61] however, recent decisions of the courts of appeals give small hope that it will be adopted.[62]

(3) *That the falsification be material.* This requirement is actually

buckle, 48 F. Supp. 537 (D.D.C. 1943). See also 18 So. CALIF. L. REV. 284 (1945).

55. *Ex parte* Blache, 40 Cal. App.2d 687, 105 P.2d 635 (1940); Mitchell v. Parrish, 58 So.2d 683 (Fla. 1952); State *ex. rel.* Luban v. Coleman, 138 Fla. 555, 189 So. 713 (1939); People *ex. rel.* Butwill v. Butwill, 312 Ill. App. 218, 38 N.E.2d 377 (1941); People v. Tomlinson, 296 Ill. App. 609, 16 N.E.2d 940 (1938); People v. La Scola, 282 Ill. App. 328 (1936); People v. Hille, 192 Ill. App. 139 (1915); Wilder v. Sampson, 279 Ky. 103, 129 S.W.2d 1022 (1939); Russell v. Field, 192 Ky. 262, 232 S.W. 375 (1921); Riley v. Wallace, 188 Ky. 471, 222 S.W. 1085, 11 A.L.R. 337 (1920); State v. Illario, 10 N.J. Super. 475, 77 A.2d 483 (App. Div. 1950); Edwards v. Edwards, 87 N.J. Eq. 546, 100 Atl. 608 (Ch. 1917); Fawick Airflex Co. v. United Electrical, R. & M. Wkrs., 87 Ohio App. 371, 92 N.E.2d 436, *app. dismissed,* 93 N.E.2d 409 (1950); State v. Meese, 200 Wis. 454, 225 N.W. 746 (1929).

56. The source of this difficulty lies in the notion that the theoretical basis of contempt power, self-preservation, demands only the mechanical functioning of the court. However, that there is a "penumbra as well as a distinction between justice and its administration" is recognized by at least one commentator. See Nelles, *supra* note 48, at 960.

57. People v. Freeman, 256 Ill. App. 233 (1930); *In re* Caruba, 140 N.J. Eq. 563, 55 A.2d 289 (Ch. 1947).

58. *Ex parte* Steiner, 202 Fed. 419 (2d Cir. 1913); Sachs v. High Clothing Co., 90 N.J. Eq. 545, 108 Atl. 58 (Ch. 1919).

59. Blankenburg v. Commonwealth, 272 Mass. 25, 172 N.E. 209, 73 A.L.R. 808 (1930).

60. See note 54 *supra.*

61. See *In re* Michael, 326 U.S. 224, 229, 66 Sup. Ct. 78, 90 L. Ed. 30 (1945).

62. See, *e.g.,* Howard v. United States, 182 F.2d 908 (8th Cir.), *vacated,* 340 U.S. 898 (1950) (cause moot); United States *ex. rel.* Johnson v. Goldstein, 158 F.2d 916 (7th Cir. 1947).

an element of perjury; therefore, discussion of it in this paper will be brief. Although materiality is generally said to be necessary for falsification to be contempt,[63] there is authority to the effect that any falsification which has an obstructive tendency may be contempt though not perjury because immaterial.[64] An immaterial falsification is held to be a contempt on the theory that it is an affront to the dignity of the court.[65] This theory should have disappeared with that of the divine right of kings. Today the basis of the contempt power is preservation of the court system.[66] Since falsifications on immaterial matters do not threaten the existence of the courts, they should not be punished as contempts. Thus the materiality of the falsification should be set forth before the summary contempt commitment will be held valid.

CONCLUSION

The problem in falsification as contempt lies in striking a balance between two conflicting policies: (1) that of not encroaching on an individual's constitutional right to a jury trial, and (2) that of preservation of the judiciary by use of the summary contempt power as a deterrent to falsification. These conflicting policies must be weighed against the background of repeated extension of the summary contempt power into virgin areas of litigation and the concomitant restriction of the right to a trial by jury. Weigh these policies, but weigh them with a judicious concern for the individual liberties embodied in the fifth and sixth Amendments. It is believed that these requirements measure up to this standard: in order to summarily commit a false swearer for contempt a court should find that the statement was material to the trial or investigation and that the falsity of the statement was within its judicial knowledge.

STEPHEN D. POTTS.

63. Gold Sign Co. v. Cosmas, 124 Misc. 877, 209 N.Y. Supp. 611 (Sup. Ct. (1925); Hegelaw v. State, 24 Ohio App. 103, 155 N.E. 620 (1927).
64. Young v. State, 198 Ind. 629, 154 N.E. 478 (1926).
65. Young v. State, 198 Ind. 629, 154 N.E. 478, 479 (1926). See Note, 21 CALIF. L. REV. 582, 588 n.29 (1933).
66. Myers v. United States, 264 U.S. 95, 103, 44 Sup. Ct. 272, 68 L. Ed. 577 (1924); United States v. Karns, 27 F.2d 453 (N.D. Okla. 1928); Nelles, *supra* note 48, at 959.