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CONTEMPT - CONSTITUTIONAL LAW - PARDONS - POWER OF A GOVERNOR TO PARDON FOR CONTEMPT

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CONTEMPT — CONSTITUTIONAL LAW — PARDONS — POWER OF A GOVERNOR TO PARDON FOR CONTEMPT. — Dolan and Quinn were indicted for crime, and while awaiting trial were cited for contempt because of alleged attempts to influence members of the jury panel who might be drawn to sit on the jury in the trials of Dolan and Quinn. They were convicted of contempt and committed to jail, from which they petitioned the governor for pardon. The governor and his council adopted an order requiring the opinion of the justices of the Supreme Judicial Court on the question whether the governor had power to pardon such a contempt. *Held*, these contempts were criminal in their nature and "offenses" against the commonwealth within the meaning of "offenses" as used in the pardoning clause of the constitution, so that a pardon would be valid. *In re Opinion of the Justices*, (Mass. 1938) 17 N. E. (2d) 906.

Courts have increasingly tended in recent years to divide contempt into two main categories, civil and criminal.[1] A clear cut distinction between these two

[1] Bessette v. W. B. Conkey Co., 194 U. S. 324, 24 S. Ct. 665 (1904); Lester v. People, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004 (1890); Hurley v. Commonwealth, 188 Mass. 443, 74 N. E. 677 (1905).

categories, however, has not yet emerged. It has been said that if the contempt consists of an "offense" or "crime" against the state then it is "criminal" contempt.[2] But if merely an unjustified injury to the other party then it is "civil."[3] Some courts have gone to the extreme of saying that the contempt will be classified by the punishment given,[4] but other courts have made the result depend on a variety of other factors. The problem becomes acute where, as in the principal case, the executive attempts to exercise the pardoning power. It is usually assumed that executive pardon is inadmissible in cases of civil contempt, since the object of the proceeding is enforcement of the private right of the litigant and a pardon would remove the sanctions essential for such enforcement.[5] It has been held in several cases, however, that criminal contempt is sufficiently close to crime so that executive pardon will be effective.[6] The chief difficulty at this point is the possible effect of a pardon in depriving courts of effective means of preserving judicial authority. The public interest involved in criminal contempt is commonly said to be the interest in maintaining the prestige and authority of the judicial system. It might therefore be argued that executive interference would remove one of the essential elements of judicial power.[7] The justification for admitting the pardoning power in cases of criminal contempt has been chiefly historical, the argument being that the executive in this country has inherited the power to pardon contempts of court which was exercised in earlier English history.[8] But this analogy is imperfect since it ignores the separation of governmental powers which characterizes the American system of government. In this country the courts are created either by constitution or by the legislature, and an offense to the court is not so clearly an offense against the political sovereign or the public interest in general. The essential question in each case will be the meaning of the words "crime" or "offense" in the pardoning power clauses of the state and federal constitutions. In cases of civil contempt, the injury to private right provides a sufficient reason for excluding the pardoning power of the executive. In cases of criminal contempt, the larger question of policy is raised whether arbitrary action of judges is sufficiently

[2] Bessette v. W. B. Conkey Co., 194 U. S. 324, 24 S. Ct. 665 (1904).

[3] In re Nevitt, 54 C. C. A. (8th) 622, 117 F. 448 (1902).

[4] Gompers v. Bucks Stove & Range Co., 221 U. S. 418 at 441, 31 S. Ct. 492 (1911).

[5] State ex rel. Rodd v. Verage, 177 Wis. 295, 187 N. W. 830, 23 A. L. R. 491 at 524 (1922); People ex rel. v. Peters, 305 Ill. 223, 137 N. E. 118 (1922); In re Nevitt, 54 C. C. A. (8th) 622, 117 F. 448 (1902); but see State ex rel. Van Orden v. Sauvinet, 24 La. Ann. 119 (1872), where the contempt in question was civil and the court held that the governor had the power to grant a pardon.

[6] State v. Magee Publishing Co., 29 N. M. 455, 224 P. 1028 (1924); Ex parte Hickey, 4 Smedes & M. (12 Miss.) 751 (1844); Sharp v. State, 102 Tenn. 9, 49 S. W. 752 (1899); In re Mullee, 7 Blatchf. 23, 17 Fed. Cas. No. 9,911 (1869); Ex parte Grossman, 267 U. S. 87, 45 S. Ct. 332 (1925).

[7] In Gompers v. Bucks Stove & Range Co., 221 U. S. 418 at 450, 31 S. Ct. 492 (1911), the court said: "Without it [power to punish for contempt] they are mere boards of arbitration whose judgments and decrees would be only advisory." See also Taylor v. Goodrich, 25 Tex. Civ. App. 109, 40 S. W. 515 (1897).

[8] Ex parte Grossman, 267 U. S. 87, 45 S. Ct. 332 (1925).

likely that executive restraints should be admitted. The principal case, like the majority of other cases decided, finds reasons both of history and convenience for maintaining such restraints on the judiciary.

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