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Criminal Contempt—Newspaper Publication Concerning Closed Case—Right to Jury Trial

an irrevocable submission to arbitration without procedural devices assuring a fair hearing involves too great a limitation upon the fundamental right of appeal to the courts for protection.[23] The welcome liberal approach of the court in re-examining the bases of a hoary common law doctrine is, however, more important than the minutiae of the new law of arbitration which it opens up. These can be shaped by future legislative and judicial action; for there is nothing in the opinion which precludes the legislature from making a suitably devised statutory method of arbitration exclusive.

M. G.

CRIMINAL CONTEMPT—NEWSPAPER PUBLICATION CONCERNING CLOSED CASE—RIGHT TO JURY TRIAL—[Missouri].—An information was filed against relator, a publishing corporation, and petitioners, the editor and cartoonist, because of the publication of two editorials and a cartoon strongly criticizing a trial judge for suggesting a *nolle prosequi* and dismissing a criminal action. The judge, after a hearing, found all three guilty of contempt, assessed a fine against relator, and imposed sentences of imprisonment upon petitioners. The Supreme Court of Missouri in quashing the judgments and granting release by habeas corpus, *held:* published comment concerning a decided case is not punishable as a contempt of court, even though it scandalizes the court and tends to bring it into disrepute. The court, however, rejected a contention that jury trial in contempt proceedings is essential to procedural due process. *State ex rel. Pulitzer Publishing Co. v. Coleman.*[1]

The court bases its holding that the action of a trial judge in dismissing a case terminates his authority to deal summarily with the publisher of comment concerning it upon the view that a more technical interpretation of pendency would restrict permissible discussion so narrowly as to make it of little practical value in informing the public and serving as a check on judicial maladministration.[2] Technically, a dismissal does not operate to conclude a case until the expiration of the term of court, since a dismissal

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Contracts (rev. ed. 1938) 5377-5380, sec. 1922. An excellent example in point is Illustration 6, Restatement, *Contracts* (1932) sec. 550, comment a: "A, on entering the employment of B * * * deposits $65 with B and signs a contract which provides that B can retain the whole or any part of the deposit as liquidated damages for any breach by A of the rules of B, and that C, the president of B, shall be the sole judge of whether the whole or any part of the deposit is to be retained."

23. Sayre, op. cit. supra, note 7, at 611.

1. Decided with Ex parte Fitzpatrick v. Fitzsimmons and Ex parte Coghlan v. Fitzsimmons. (Mo. 1941) St. Louis Post-Dispatch, June 11, 1941, p. 6A:1.

2. Cf. dissenting opinion of Mr. Justice Holmes in Craig v. Hecht (1923) 263 U. S. 255, 281: "I think * * * that there was no matter pending before the Court in the sense that it must be to make this kind of contempt possible. It is not enough that somebody may hereafter move to have something done. There was nothing then awaiting decision when the petitioner's letter was published."

may be set aside during the term and the case be reinstated on the docket.[3] The decision here is realistic and sound, however.

In arriving at its decision, the supreme court re-examines the basis of the summary power to punish indirect contempts, i. e. those not committed in the presence of the court, and restricts the previous rule of *State ex inf. Crow v. Shepherd*,[4] asserting the existence of the power, to pending cases. The *Shepherd* case held (1) that the contempt power arises out of the inherent necessity for courts to be able to maintain order and protect themselves against interference with the impartial administration of justice; (2) that it is rooted in the common law by immemorial usage; and (3) that it may be invoked for the protection of the court whenever any publication tends to scandalize it, whether or not the publication refers to a pending case.[5] In the instant case, however, the court finds that the power to punish for contempt not connected with pending litigation is not based on "immemorial usage." Rather it cites recent researches[6] to show that "scandalizing the court" became punishable as a contempt by summary process only because of the weight accorded to certain wholly unfounded assumptions of Wilmot[7] and Blackstone,[8] subsequently adopted by such authorities as Hardwicke,[9] Kent,[10] and others. Thus the summary power to punish contempts relating to closed cases did not exist in fact at common law.[11] The basis for the contempt power is to protect the court from external interference with its judicial functions. Since, however, such interference can operate only during the pendency of a case, no publication, no matter how scandalous, concerning a case which has been decided, need be summarily

3. State v. Lonon (1932) 331 Mo. 591, 56 S. W. (2d) 378.

4. (1903) 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624.

5. The court specifically refrained from attaching importance to the purely technical pendency which it recognized as present. The case involved contempt of the supreme court itself. A motion for rehearing was still possible in the proceeding that was criticized. The case held R. S. Mo. (1889) sec. 1616 unconstitutional insofar as it might purport to limit in any way the judicial power to punish for contempt, on the ground that it constituted legislative interference with the judicial prerogative and hence violated the separation of powers. The act was interpreted, however, as not really restrictive upon the courts. Though later modified by Ex parte Creasy (1912) 243 Mo. 679, 148 S. W. 914, 41 L. R. A. (N. S.) 478, to permit reasonable limitation by statute of the punishment which courts might impose for contempt, the decision was part of a trend which has resulted in the subversion by judicial construction of statutes which were generally recognized and accepted throughout most of the nineteenth century as intended to protect basic American rights. (See Frankfurter and Landis, infra note 6, at 1029 et seq.; Nelles and King, infra note 6, at 536 et seq.)

6. Fox, *The History of Contempt of Court* (1927); Frankfurter and Landis, Power to Regulate Contempts (1924) 37 Harv. L. Rev. 1010; Nelles and King, Contempt by Publication in the United States (1928) 28 Col. L. Rev. 401 and 525; Thomas, *Problems of Contempt Court* (1934).

7. See Frankfurter and Landis, supra note 6, at 1046, footnote 128, citing Wilmot, *Notes and Opinions of Judgments* (1802) 243, 254.

8. 4 Blackstone, *Commentaries*, c. 20, sec. III.

9. Roach v. Garvan (Chan. 1742) 2 Atk. 469, 471, 26 Eng. Rep. 683, 684.

10. 1 Kent, *Commentaries* (12th ed. 1873) note p. 300.

11. Fox, op. cit. supra note 6, pp. 116-117.

dealt with. The court thus manifests a desire to limit the possibility of judicial encroachment on the rights of freedom of speech and of the press. It reflects a salutary reaction from the recent tendency toward undue expansion of the contempt power.[12] The present case brings Missouri law approximately into line with that of a majority of the states and of the federal courts.[13]

Despite the liberalizing effect of this decision, the reasoning of the court may be criticized as disingenuous. The court avails itself of researches in legal history to confine to pending cases the summary power over contempt by publication, but ignores the point that the central fact developed by these same researches is that the courts had no power at common law to punish any indirect contempt, whether relating to a past or to a pending case, except after a jury trial.[14] The Missouri court, refuting defendants' claim of a right to jury trial, properly states that the guarantee in the Missouri Constitution of 1820 refers to that right as it existed at common law prior to 1820, and then says further that contempts have always been punished summarily at common law. This is true as to direct contempts, those committed in the presence of the court, but the whole point of the authorities which the court itself cites is that it was never true of indirect contempts until the courts usurped such power in the seventeenth century.[15]

Again, in reasserting the inherent and necessary power of judicial tribunals to safeguard the administration of justice from interference, the court fails to recognize that contempt by publication, or other conduct outside the presence of the court which interferes with a pending case, has traditionally been dealt with through criminal process.[16] Here the court assumes that any scandalous publication referring to a pending case will be obstructive, denying that there is any valid distinction between contempts committed in the presence of the court and indirect contempts by publication. This fails to discriminate between conduct which is obstructive and comment which may be merely defamatory. Contempt means something more than adverse criticism or disrespect. Published matter is not often obstructive in any real sense, even of pending litigation.

R. K.

CRIMINAL CONTEMPT—POWER OF FEDERAL COURTS TO PUNISH SUMMARILY —GEOGRAPHICAL LIMITATION—TOLEDO NEWSPAPER CO. V. UNITED STATES OVERRULED—[United States].—Defendant was convicted of criminal contempt in a federal district court for attempting to bribe the plaintiff in a wrongful death action to dismiss it. The attempt took place more than 100 miles from the courthouse. *Held:* reversed. Section 268 of the Judicial

12. See supra note 5.

13. 17 C. J. S., Contempt (1939) 41, sec. 30; Note (1935) 24 Cal. L. Rev. 114; Nye v. U. S. (1941) 61 S. Ct. 810.

14. See Frankfurter and Landis, supra note 6, at 1042; see also Fox, op. cit. supra note 6, at pp. 116-117.

15. Frankfurter and Landis, supra note 6, at 1045.

16. See Nye v. U. S., supra note 13. See Comment (1941) 26 WASHINGTON U. LAW QUARTERLY 566.