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Criminal Contempt—Power of Federal Courts to Punish Summarily—Geographical Limitation—Toledo Newspaper Co. v. United States Overruled

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.

Code,[1] which provides that the summary contempt power of the federal courts does not extend beyond misbehavior in the presence of the court, or "so near thereto as to obstruct the administration of justice," imposes a geographical limitation on the contempt power. *Nye v. United States.*[2]

This case adds a new and confusing chapter to the history of the contempt power of the federal courts since 1831. Prior to that time there was little statutory restriction of the power to punish summarily for contempts of court.[3] Abuses arose, especially in regard to punishment of contempts consisting of publications which criticized the conduct and decisions of judges. The impeachment, trial, and acquittal of Judge Peck in 1831, following his summary punishment of a lawyer who criticized a decision by Peck,[4] was succeeded immediately by the act of Congress in question here, which was intended to prevent further abuses by limiting and defining the power of contempt.[5] The act was in two sections. The first limited the power of the court to punish contempt summarily to misbehavior in the presence of the court or so near thereto as to obstruct justice, to misbehavior of officers of the court in official transactions, and to disobedience of court orders.[6] The second section provided for indictment and criminal trial for attempting to obstruct justice or to influence jurors, witnesses, or officers of the court.[7]

The first decision following the act, *Ex parte Poulson,*[8] laid down a very strict interpretation of section 1, allowing summary punishments by the court for only "that kind of misbehavior which is calculated to disturb the order of the court, such as noise, tumultuous or disorderly behavior * * *."[9] A clear line was drawn between physical misbehavior and the subversive activities described in the second part of the act, and summary punishment was restricted to the former.

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1. (1831) 4 Stat. 487, c. XCIX, sec. 1, 28 U. S. C. A. sec. 385.
2. (1941) 61 S. Ct. 810.
3. (1789) 1 Stat. 83, c. XX, sec. 17, gave the courts power "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."
4. For a full account of the trial, see Stansbury, *Trial of James H. Peck* (1833). A shorter account of the circumstances and of the trial is to be found in Nelles and King, Contempt by Publication in the United States (1928) 28 Col. L. Rev. 401, 423-431.
5. See 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; Note (1941) 27 Va. L. Rev. 665.
6. (1831) 4 Stat. 487, c. XCIX, sec. 1, 28 U. S. C. A. 385. The part of the statute pertinent to the present case reads as follows: "The said courts shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, * * *."
7. (1831) 4 Stat. 488, c. 99, 18 U. S. C. A. 241. This is now sec. 135 of the Criminal Code.
8. (C. C. E. D. Pa. 1855) Fed Cas. No. 11,350. The case dealt with the power of the court to punish a newspaper summarily for a libel of plaintiff in a pending case.
9. (C. C. E. D. Pa. 1835) Fed. Cas. No. 11,350, at 1208.

Later cases weakened this distinction and relaxed the requirement of physical proximity.[10] In *Ex parte Savin*[11] the Supreme Court held that an attempt to bribe a witness was misbehavior punishable under the summary contempt powers of the court. The contemptuous acts took place in the corridor and witness room of the courthouse, which were held to be "in the presence of the court." The Court therefore found it unnecessary to decide the effect of the "so near thereto" clause.[12] Eventually a new line of cases arose which again broadened the power of federal judges to punish summarily for contempt.[13] *Ex parte McLeod*[14] interpreted the statute to mean that the criterion by which the misconduct must be brought within the statute was not physical nearness, but causal connection, based upon the likelihood of the misbehavior to obstruct justice. This interpretation was adopted by the Supreme Court in *United States v. Toledo Newspaper Co.*, involving a contempt by publication, so that the statute was denied any restrictive effect at all.[15]

The instant case specifically overrules the *Toledo* case,[16] as historically inaccurate.[17] The rule laid down, however, is not absolutely clear.[18] There are two possible views of the Court's interpretation of the statute. One would restrict the right to punish summarily for contempt to that sort of physical misbehavior which disturbs the order of the court.[19] This would seem to be a reversion to the interpretation in *Ex parte Poulson*. The other

10. See U. S. v. Holmes (C. C. E. D. Pa. 1842) Fed. Cas. No. 15,383. Cf. Ex parte Robinson (1874) 19 U. S. 505, 511, "the power of these courts in the punishments of contempts can only be exercised to insure order and decorum in their presence, * * *." See also U. S. v. Anonymous (C. C. W. D. Tenn. 1884) 21 Fed. 761, which, however, hinted at the more liberal rule. See also Nelles and King, supra note 4, at 530.

11. (1889) 131 U. S. 267.

12. In Ex parte Cuddy (1889) 131 U. S. 280, which involved an attempt to bribe a juror, the court likewise refused to decide the effect of distance.

13. See Note (1941) 27 Va. L. Rev. 665, 668.

14. (1903) 120 Fed. 130.

15. (1918) 247 U. S. 402. Holmes and Brandeis dissented, on the ground that no real obstruction was shown. The prevailing view up to the present case has been the same as the McLeod and Toledo cases. Cooke v. U. S. (1925) 267 U. S. 517; Sinclair v. U. S. (1929) 279 U. S. 749; McCann v. N. Y. Stock Exch. (1935) 80 F. (2d) 211. But see Coll v. U. S. (1925) 8 F. (2d) 20; Berry v. Midtown Service (1939) 104 F. (2d) 107. For a summary of the trends of decisions to the present case, see Thomas, *Problems of Contempt of Court* (1934) c. VII.

16. (1941) 61 S. Ct. 810, 817.

17. There is considerable authority for the Court's view. See, e. g., Frankfurter and Landis, Power to Regulate Contempts (1924) 37 Harv. L. Rev. 1010, 1029 et seq. Fox, *The History of Contempt of Court* (1927) 6.

18. Query the precise meaning of: "The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the court in any normal meaning of the term. It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business." (1941) 61 S. Ct. 810, 817.

19. This rule seems to have been deplored by some contemporary writers. See, e. g., 1 Kent, *Commentaries* (3rd. ed. 1836) 300. Kent thought that the statute deprived courts of protection against libels of the press.

would allow summary punishment of any contempt, so long as it took place in geographical proximity to the court. The dissent regards this latter view as the holding of the majority.[20] If that is the correct interpretation, the difficult problem remains of what is a sufficiently short distance to come within the meaning of the statute.[21] The geographical criterion, moreover, seems unrealistic; there is little difference in practical effect between bribery in the corridors of the courthouse and bribery miles away which affects the same case. Any other criterion, however, seems out of accord with the statutory language.

J. D. H.

DOMESTIC RELATIONS—1917 ADOPTION STATUTE—INHERITANCE FROM KINDRED OF ADOPTIVE PARENTS—EQUITABLE ADOPTIONS—[Missouri].—Plaintiff sought to be decreed the adopted son of Bert L. McIntyre and as such the great grandson and heir of Tabitha T. Cunningham, in an action brought against her legatees. A deed of adoption had been made out whereby the Children's Home Board on March 17, 1917 relinquished plaintiff to the McIntyres, who, by the deed, agreed to adopt and said they did adopt plaintiff as their child and heir. The deed was not recorded, as was necessary to make it effective under the statute,[1] because there was then pending in the Missouri General Assembly a proposed adoption law[2] (which became effective June 18, 1917) that would enlarge the privileges of an adopted child, and the adopting parents were advised to confer these rights on the child. It was contended that plaintiff was entitled to inherit under the 1917 statute[3] either because of an agreement to adopt under that statute or because the 1917 law applied to prior as well as subsequent adoptions no matter when the status was created. The trial court held that the agreement to adopt made plaintiff an adopted child under the old law on March 17, when the deed was signed and the child taken from the Children's Home.[4] It further held that the act of 1917 applied only prospectively.[5] The plaintiff appealed from the latter holding. *Held:* affirmed. *McIntyre v. Hardesty.*[6]

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20. Mr. Justice Stone says: "I do not understand my brethren to maintain that the secret bribery or intimidation of a witness in the court room may not be summarily punished." (1941) 61 S. Ct. 810, 819.

21. See, e. g., Ex parte Savin (1889) 131 U. S. 267 (attempt to bribe a witness in corridor and witness room of the court house). Sinclair v. U. S. (1929) 279 U. S. 749 (juror shadowed near courtroom).

1. R. S. Mo. (1909) secs. 1671 & 1673.

2. The act of 1917 was part of Chapter 125, Article 1, R. S. Mo. (1929) secs. 14073-14081, and is now the present adoption law of Missouri, R. S. Mo. (1939) secs. 9608-9614.

3. R. S. Mo. (1939) secs. 9608-9614.

4. In a previous action plaintiff had obtained a decree of a circuit court declaring he was the adopted child of Bert L. McIntyre by and after July 30, 1917.

5. R. S. Mo. (1939) secs. 9608-9614, particularly 9614. The first sentences of section 9614: "When a child is adopted in accordance with the provisions of this article, all legal relationship, and all rights and duties, between such