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STUDENT NOTES

CONTEMPT BY PUBLICATION IN WEST VIRGINIA

The power of the courts to deal swiftly and summarily with offenders who interrupt the judicial processes has been subject to much criticism. The extreme critics would deny the necessity for the exercise of this ancient judicial prerogative even in the punishment of improper conduct in the presence of the court.[1] Clearly, the decorum of the courtroom must be maintained without the delay incident to the regular procedure of indictment and trial by jury. The force of this argument has directed most of the adverse comment to the use of the contempt power in the punishment of acts done outside the court.[2] The protagonists of the summary power to punish these distant offenses, which are called constructive contempts, base their arguments upon the necessity for an untrammelled flow of justice.[3] Unalterably opposed to this view are those who would call upon us to witness the arbitrary behavior of a judge who is at once prosecutor, principal witness, trier of fact, and tribunal.[4] They further insist that the natural resentment of the judge whose reputation is attacked emphasizes the unfairness of the proceedings.

Judicial assertion of the inherency of the contempt power is most frequently assailed when it seems to infringe upon the freedom of the press. The contemnor who has been guilty of publishing a newspaper article attacking the integrity of the court sits firmly upon his constitutional rights. An anomalous result emerges from this controversy. The courts have in such cases indulged in unusually careful analyses of the origin of their power.[5] They predicate their arguments upon the hypothetical conclusion that

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[1] DANGEL, CONTEMPT (1939) § 42A.

[2] FOX, CONTEMPT OF COURT (1927) 226; Nelles and King, *Contempt by Publication in the United States* (1928) 28 COL. L. REV. 401.

[3] Telegram Newspaper Co. v. Commonwealth, 172 Mass 294, 52 N. E. 445 (1899); Bridges v. California, 62 S. Ct. 190 (U. S. 1941), Frankfurter, J., dissenting at page 201.

[4] DANGEL, CONTEMPT § 42A; Nelles and King, *supra* note 2, at page 406 state the following criticism: "But though the popular reaction (against the Sedition Acts) implied an enlarged view of constitutional immunity for publications, it could not formulate its precise boundaries. They were left, and still remain, vague. Subsequent judicial decisions have established no test of the permissible limits of American freedom of the press which may not vary with the length of feet of the triers of fact."

[5] Anderson v. Dunn, 6 Wheat. 204 (U. S. 1821); Toledo Newspaper Co. v. United States, 247 U. S. 402, 38 S. Ct. 560, 62 L. Ed. 1186 (1918); Blankenburg v. Commonwealth, 260 Mass. 369, 157 N. E. 693 (1927).

such power sprang into being coeval with their creation. This claim, though now firmly established judicially, has been proved to be historically incorrect.[6] This writer pays due respect to the extensive research which has unearthed such information, but believes it practical to accept the self-evident fact that the American courts have consistently exercised this power. This brief introduction of the fundamental aspects of such a long-standing controversy seems necessary to a better understanding of the reaction of the West Virginia court to the problem.

The question of summary punishment for publication of a newspaper article libeling the court appeared in West Virginia for the first time in the case of *State v. Frew and Hart.*[7] The defendant had written statements which were libelous *per se.* Three judges of the supreme court of appeals were accused of having told a Democratic caucus that they would hold an exemption tax statute unconstitutional and sustain a certain assessment order. The article was published during the pendency of the tax case in the supreme court of appeals; it was obviously intended to influence the outcome of the litigation by placing the judges in a compromising and embarassing position. Doubtless the defendant reasoned that the court would be forced to make the decision he favored in order to vindicate its integrity. The court immediately issued a rule against him, ordering him to show cause why an attachment for contempt should not issue. The defendant insisted that the power of the court to punish summarily for constructive contempt had been cut off by statute. As the proceedings originated in the supreme court of appeals, it was necessary to decide whether these legislative limitations applied to the highest court of the state.

One section of the West Virginia code states:[8] "The courts and the judges thereof may issue attachments for contempt and punish them summarily only in the following cases: . . .", and lists four types of offenses commonly intrepreted by the judiciary as direct contempts.[9] Obviously the legislature intended to limit the

[6] FOX, CONTEMPT OF COURT c. II.

[7] 24 W. Va. 416 (1884).

[8] W. VA. CODE (Michie, 1937) c. 61, art. 5, § 26. This statute, and c. 61, art. 5, § 27 of the Code are substantial counterparts of c. 147, §§ 27, 28, 29 and 30 of W. VA. CODE (1868).

[9] By W. VA. CODE (Michie, 1937) c. 61, art. 5, § 26, these offenses are punishable summarily: "(a) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice; (b) violence or threats of violence to a judge or officer of the court, or to a juror, witness, or party going to, attending or returning from the court, for or in respect of

exercise of the summary power of punishment to the situations described in the statute. An analysis of the second section dealing with the subject of offenses against the court proves such intent. It reads as follows:[10]

> "If any person by threats, force, or otherwise, intimidate or impede, or attempt to intimidate or impede, any judge, justice of the peace, juror, witness, arbitrator, umpire, or an officer or member of any court in the discharge of his duty as such, or by any means obstruct or impede, or attempt to obstruct or impede, the administration of justice in any court, he shall be guilty of a misdemeanor, and, upon conviction thereof, unless otherwise provided by law, he shall be fined . . . , and be imprisoned . . ."

The import of the broad language employed here is clearly the inclusion of the offenses purposely left out of the previous section. All constructive contempts are to be punished by the regular procedure of trial by jury.

The Constitution of West Virginia, as amended in 1879, prescribed the organization and jurisdiction of the supreme court of appeals and of the circuit courts of the state.[11] It is generally said that courts created by constitutional provision have inherent power to punish for contempt, independent of any statute attempting to confer that power.[12] Conversely, any statute proscribing the exercise of the contempt power would seem to be ineffectual and liable to attack upon constitutional grounds.[13]

The court in the *Frew* case, after a lengthy opinion reviewing the decisions of other states and discussing the origin of our statutes, stated its position:[14]

> "That statute . . . might be considered constitutional now as to the circuit court, for . . . it might be deemed a mere regulation of the power of courts to punish as for contempt, as it leaves power to the circuit courts by indictments under their own supervision to punish as for constructive contempts of the character which we are considering. Whether such power

any act or proceeding had, or to be had, in such court; (c) misbehavior of an officer of the court, in his official character; (d) disobedience to or resistance of any officer of the court, juror, witness, or other person, to any lawful process, judgment, decree or order of the said court."

[10] W. VA. CODE (Michie, 1937) c. 61, art. 5, § 27.

[11] W. Va. CONST. art. VIII.

[12] State v. Howell, 80 Conn. 668, 69 Atl. 1057 (1908); People v. Gilbert, 281 Ill. 619, 118 N. E. 196 (1917); Carter v. Commonwealth, 96 Va. 791, 32 S. E. 780 (1899).

[13] State v. Morrill, 16 Ark. 384 (1855).

[14] 24 W. Va. 416, at 464.

under the Code is sufficient for the protection of said courts, we will not now determine. . . Neither is it necessary to decide whether the Legislature can limit the power of this Court to punish for constructive contempts, as it is evident to us it has not attempted to do so . . . The whole scope of the statute shows clearly that it is intended to apply to inferior courts and not to the Supreme Court of Appeals . . . This Court then has the unrestricted power, uncontrolled and unregulated by statute to punish for direct or constructive contempt by fine or imprisonment or both."

The court laid aside the constitutional question by the simple expedient of holding that the legislature disclaimed any intention of regulating the supreme court of appeals by providing for the impanelment of a jury to ascertain the proper punishment in certain instances. The supreme court has no machinery to carry out this particular requirement of the statute because it cannot impanel a jury.

In view of the statements in the *Frew* case regarding the soundness of the statute as applied to the circuit courts, it is hardly surprising to find its constitutionality affirmed in the later case of *State v. McClaugherty*.[15] There proceedings were started in a circuit court on facts similar to those in the *Frew* case. At the supreme court hearing on an appeal by the defendant, the state argued that the sanction of legislative power to limit and regulate the procedure in the punishment of contemnors allows that body to wipe out jurisdiction altogether and render the court useless. The court, by way of answer to that contention, upheld the statute as a regulation of proceedings rather than a limitation of the jurisdiction of courts in contempt cases. Subsequent decisions have affirmed the validity of the statutory limitation upon proceedings originating in the circuit courts.[16]

From a procedural viewpoint, the argument of the court in the *McClaugherty* case is sound. The effect of the two statutes upon the circuit courts is not the limitation of jurisdiction over such offenses. It simply forbids the use of the summary remedy as an efficient alternative to the more cumbersome process of indictment and jury trial. It is arguable that the reason for preserving the summary power in the supreme court of appeals applies with equal force to the circuit courts. If the power is based on the

[15] 33 W. Va. 250, 10 S. E. 407 (1889).

[16] State v. Ralphsnyder, 34 W. Va. 352, 12 S. E. 721 (1890); State v. Hansford, 43 W. Va. 773, 28 S. E. 791 (1897); State v. Porter, 105 W. Va. 441, 143 S. E. 93 (1928).

inherent right of constitutional courts, grounded in the necessity of maintaining dignified and orderly judicial procedure, the circuit courts have a valid claim to this weapon. The danger of malicious attacks on the integrity of the courts, and of premature discussion of the rights of litigants, is a real one. If the court may not invoke the summary power to prevent the contemnor from making further attacks while the case is pending, the damage will be complete before the offender is brought to trial. The contempt power is a wise preventive measure which the courts have for the most part used with restraint for the protection of litigants. There seems to be little feasibility in a legislative denial of its use by the circuit courts, especially in view of the constitutional protection against statutory limitation which is afforded the supreme court of appeals.

G. W. E.

UNITY PLAN IN DEDICATION OF WAYS

The recent case of *Huddleston v. Deans* gives rise to a problem over which there is a wide divergence of opinion, namely, the legal proposition known as the "unity plan".[1] It has been defined as a sale of lots with reference to a plat or map delineating streets and alleys whereby the purchasers acquire a right in *all* the ways designated thereon.[2] Generally it may be said that West Virginia has adopted the unity plan.[3] Other jurisdictions limit the rights of the purchaser to those streets and alleys affording the lot owner necessary ingress and egress to his property.[4] New York extends the right to those streets on which the lot owner's property abuts only as far as the first cross-street in each direction.[5] Massachusetts is even more stringent.[6]

[1] 21 S. E. (2d) 352 (W. Va. 1942).

[2] 2 THOMPSON, REAL PROPERTY (Perm. ed. 1940) 38; 1 ELLIOTT, STREETS & ROADS (4th ed. 1926) 157.

[3] In Rudolph v. Glendale Improvement Co., 103 W. Va. 81, 87, 137 S. E. 349 (1927), the court said, "there are strong expressions in . . . [Cook v. Totten, 49 W. Va. 177, 38 S. E. 491 (1901) and Edwards v. Moundsville Land Co., 56 W. Va. 43, 48 S. E. 754 (1904)] which would favor the unity rule if a case solely presenting that question . . . was to be decided. The great weight of authority sustains the unity rule; and the reasons for its adoption are very persuasive."

[4] State v. Hamilton, 109 Tenn. 276, 70 S. W. 619 (1902); Bell v. Todd, 51 Mich. 21, 16 N. W. 304 (1883).

[5] Reis v. City of New York, 188 N. Y. 58, 80 N. E. 573 (1907).

[6] See Regan v. Boston Gas & Light Co., 137 Mass. 37 (1884).