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## Contempt—Power of Chancery to Punish

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ever the injured employee desires.<sup>21</sup> If he decides to sue at law, it has been held constitutional to hold the employer *liable without fault* for the injury sustained.<sup>22</sup> The express ground of decision of the principal case would thus seem to be at variance with these cases as to the right to provide for judicially imposed liability without fault for nonsubscribing employers as an incident to a coordinated compensation system.

If recognition is once accorded to the fact that it is within the limits of the due process clauses to deprive a subscribing or nonsubscribing employer of his common-law defenses, to make a subscriber liable without fault under both the compulsory and elective acts, at law or before the administrative body or officer and to impose a compulsory act upon all employers, it would seem no great departure to take the further step and impose absolute liability upon a nonsubscribing employer. It is not a matter of punishing the employer, since he is not engaging in blameworthy conduct — but he is creating hazards, necessary though they may be to society. Notions of fairness cannot require that the risk should fall on the employee, and it is submitted, that since the employer can readily escape liability by electing to accept the provisions of the compensation act, it is neither arbitrary, nor counter to any conception of fairness to impose upon a nonsubscriber absolute liability.<sup>23</sup>

A. A. A.

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CONTEMPT — POWER OF CHANCERY TO PUNISH. — An attorney for the special receiver of the defendant coal company filed an answer to an order by the court directing him to pay a certain sum to the receiver, averring that he had paid the sum. The receiver's receipt showed such a payment. On examination it was found that the answer had been drafted in anticipation of a payment which had never been made. Both the attorney and the receiver were found guilty of contempt of court. The question was

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<sup>21</sup> *Fahler v. City of Minot*, 49 N. D. 960, 194 N. W. 695 (1923).

<sup>22</sup> *Fahler v. City of Minot*, 49 N. D. 960, 194 N. W. 695 (1923); *State of North Dakota v. Watland*, 51 N. D. 710, 201 N. W. 680 (1924).

<sup>23</sup> “. . . we cannot assent to the proposition that the rights of life, liberty, and property guaranteed by the Fourteenth Amendment prevent the States from modifying that rule of the common law which requires or permits the workingman to take the chances in such a lottery.” *Arizona Employers' Liability Cases*, 250 U. S. 400, 423-424, 39 S. Ct. 553, 63 L. Ed. 1058 (1918). “The common law system of rights and remedies as it existed at the time of the adoption of the Fourteenth Amendment to the federal Constitution did not thereby acquire a perpetual guarantee against change by legislative processes.” *ROTTSCHAEFER, CONSTITUTIONAL LAW* 547 (1939).

whether a criminal contempt proceeding would properly lie on the chancery side of the circuit court. *Held*, that a chancery court has jurisdiction over civil contempt therein; and that although a criminal contempt proceeding, whether or not the contempt was committed in the chancery court, should be docketed and heard on the law side of the court in order to conform to well-established procedural precedents, it does not constitute reversible error to enter such an order on the chancery side of the court. *Hallam v. Alpha Coal Corp'n.*<sup>1</sup>

The power of courts, both civil and criminal, to punish for contempt was derived from the power of the King to punish direct insults.<sup>2</sup> This power to punish for contempt was delegated to the judges of the English courts for the punishment of insults to themselves not as judges but as lords. Later active contempt was extended to any act which insulted the court or directly prevented it from administering justice; and finally any disobedience to a writ of the King was held to be contempt of the King's seal.<sup>3</sup> Thus under the common law of England the courts had the inherent power to punish for contempt. That principle became part of our common law and is the source of early statutes on the subject.<sup>4</sup> Without this power, the machinery for enforcing obedience to judgments, orders, and judicial writs could not possibly function,<sup>5</sup> and the administration of the law would be in danger of being thwarted by the lawless.<sup>6</sup>

While giving lip-service to this principle, the legislature and the courts of West Virginia restricted the power of equity to punish for contempt. In 1873 the West Virginia legislature provided that for a contempt of court, other than for the nonperformance of or the disobedience to a judgment, decree, or order, a writ of error should lie to a judgment of the circuit court.<sup>7</sup> Construing this statute in the light of the holding in the Virginia case of *Baltimore & Ohio R. R. v. City of Wheeling*,<sup>8</sup> our supreme court

<sup>1</sup> 9 S. E. (2d) 818 (W. Va. 1940).

<sup>2</sup> Beale, *Contempt of Court, Criminal and Civil* (1908) 21 HARV. L. REV. 161.

<sup>3</sup> Beale, *supra* n. 2.

<sup>4</sup> *Blankenburgh v. Commonwealth*, 260 Mass. 369, 157 N. E. 693 (1927).

<sup>5</sup> *Bessette v. Conkey Co.*, 194 U. S. 324, 24 S. Ct. 665, 48 L. Ed. 997 (1904); *State v. Frew and Hart*, 24 W. Va. 416 (1884).

<sup>6</sup> *State v. Frew and Hart*, 24 W. Va. 416 (1884); *August v. Gilmer*, 53 W. Va. 65, 44 S. E. 143 (1903).

<sup>7</sup> W. Va. Acts 1872-73, c. 174.

<sup>8</sup> 13 Gratt. 40, 57 (1855) Moncure, J.: "A contempt of court is in the nature of a criminal offense; and the proceeding for its punishment is in the nature of a criminal proceeding. The judgment in such a proceeding can be reviewed, by a superior tribunal, only by writ of error, and not always in that way."

held that, upon the service and return of the rule, the proceeding should be placed upon the law docket and entitled, "The State of West Virginia at the relation of the person at whose instance the rule was issued, against the person accused of contempt," and that further proceeding should be had upon the law side.<sup>9</sup>

The first recognition that these holdings were inconsistent with the common-law doctrine of the court's inherent power to punish for contempt is found in *State v. Fredlock*.<sup>10</sup> In that case, however, there was an attempt to reconcile the two views. The trend back toward the common-law doctrine nevertheless continued, and punishment of contempt by a chancery court was allowed where the commitment was not so much to punish as to compel obedience.<sup>11</sup>

It remained, however, for the case of *Smith v. Smith*<sup>12</sup> to determine definitely that a civil contempt proceeding could be had in equity. Judge Poffenbarger pointed out that the argument that all contempts are of a criminal nature was fallacious and that the statute meant that only certain contempts should be reviewable; those not expressly allowed a right of review were not reviewable since they were not so at common law.<sup>13</sup>

The question still remains as to the power of a court of equity to punish purely criminal contempt. The principal case holds that a proceeding for criminal contempt brought on the chancery side is not reversible error.<sup>14</sup> Why should the court consider it as error at all? It has been shown that the power of the courts to punish

<sup>9</sup> *State v. Harpers Ferry Bridge Co.*, 16 W. Va. 864 (1880); *Ruhl v. Ruhl*, 24 W. Va. 279 (1884); *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413 (1887).

<sup>10</sup> 52 W. Va. 232, 43 S. E. 153 (1902): "Our circuit court is a single court exercising both law and equity jurisdiction, and the proceeding is as effectual to vindicate and uphold the dignity of the court as a court of equity, as if the proceeding were had on the chancery side of the court."

<sup>11</sup> *Petrie v. Buffington*, 79 W. Va. 113, 90 S. E. 557 (1916); *Ex parte Beavers*, 80 W. Va. 34, 91 S. E. 1076 (1917).

<sup>12</sup> 81 W. Va. 761, 95 S. E. 199 (1918): "Under practically all of the earlier decisions . . . lies the fallacious assumption of a right of review for errors in the sentence or order, in all cases of contempt. From the lack of provision for review otherwise than by writ of error, the court inferred legislative intent to make all contempts criminal, to the end that they may be so reviewed. This process of interpretation completely overlooked plainly expressed legislative purpose not to allow review at all, for mere error, in certain classes of cases, namely, non-performance of, or disobedience to, a judgment, decree or order." (At p. 769.)

<sup>13</sup> *Ex parte Kearney*, 7 Wheat. 38, 5 L. Ed. 391 (U. S. 1822); *Blankenburgh v. Commonwealth*, 260 Mass. 369, 157 N. E. 693 (1927); *State v. Van Bittner*, 102 W. Va. 677, 136 S. E. 202 (1926); *Wells v. Commonwealth*, 21 Gratt. 500 (Va. 1871). For statute giving the right of review see W. Va. Acts 1872-73, c. 174.

<sup>14</sup> *Hallam v. Alpha Coal Co.*, 9 S. E. (2d) 818 (W. Va. 1940).

for contempt is inherent. Construing the statute<sup>15</sup> which allows writs of error in certain classes of contempt in light of the above doctrine, either there would be no review of punishment for criminal contempt in chancery, or the statute would be open to the construction that some other means of review would lie;<sup>16</sup> so it would seem that the statute would not preclude chancery's power to punish for criminal contempt. It has been held that the courts of chancery have jurisdiction to punish for civil contempt.<sup>17</sup> The distinction between civil and criminal contempt is of little importance.<sup>18</sup> To deny courts of equity the power to punish for criminal contempt would seem to be as much a restriction upon chancery as a denial of the power to punish for civil contempt.<sup>19</sup>

There is no force to the argument that a court of equity is not equipped to punish contempt in the nature of a crime. There is no necessity for a jury in contempt cases, nor is there need to bring witnesses to testify; the court may act summarily without indictment and without jury.<sup>20</sup>

Finally, weight must be given to the statute which gives courts the power to proceed summarily in punishing the enumerated in-

<sup>15</sup> W. VA. CODE (Barnes, 1923) c. 160, § 4. The statute was enacted in 1873 and provides that "To the judgment of a circuit court for a contempt of court other than for the non-performance of, or disobedience to, a judgment, decree or order, a writ of error shall lie from the supreme court of appeals." The writer has been unable to find this provision in W. VA. REV. CODE (1931). The reviser's note to c. 62, art. 7, reports that c. 160, § 4 of W. VA. CODE (Barnes, 1923) is covered in c. 58, arts. 4 and 5. From this it may be presumed that it was the intention of the revisers to include c. 160, § 4 in W. VA. REV. CODE (1931).

<sup>16</sup> See language of court in note 12, *supra*.

<sup>17</sup> *Smith v. Smith*, 81 W. Va. 761, 95 S. E. 199 (1918).

<sup>18</sup> *State v. Van Bittner*, 102 W. Va. 677, 136 S. E. 202 (1926). Judge Woods states that: "Both are violations of the court's order, and strike at the power, dignity and authority of the court. Both are subversive to good government. The contemnor disregards the command of organized society proceeding through its courts, relying for justification upon his own judgment although in violation of the established forms of law. When the courts cease to function in full force and vigor, society will revert to its primitive order." (At p. 686.)

<sup>19</sup> The court in *Ex parte Kearny*, 7 Wheat. 38, 44, 5 L. Ed. 391 (1822) refers to a statement made by Blackstone: "The sole adjudication of contempt, and the punishment thereof, belongs exclusively and without interfering, to each respective court." In *State v. Fredlock*, 52 W. Va. 232, 238, 43 S. E. 153 (1902), the court said, concerning the entrance of the rule on the law side of the court: "This is not in conflict with the proposition that all courts are vested with the power to punish for contempt. Our circuit court is a single court exercising both law and equity jurisdiction, and the proceeding is as effectual to vindicate and uphold the dignity of the court as a court of equity, as if the proceeding were had upon the chancery side of the court." While this view might be true in a jurisdiction where one court administers both law and equity, in a state such as New Jersey, where the courts of law and equity are separate, the fallacy of this argument is apparent.

<sup>20</sup> *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153 (1902).

stances of contempt.<sup>21</sup> The *Smith* case could have been based partly on the fact that this statute<sup>22</sup> was intended by the legislature to be applicable to both law courts and chancery tribunals.<sup>23</sup>

Since the conclusion reached by the instant case is that the order should be entered upon the law docket in order to conform to the well-established procedural precedents, in view of the fact that the recent tendency seems to be away from those precedents, it would seem that the court should have gone further and held that the entry on the chancery side of the order imposing punishment was not error.

W. H. S.

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DEEDS — CONSTRUCTION — WHERE NOT EFFECTIVE UNTIL THE FUTURE. — In consideration of love and affection and one dollar, X and her husband executed an instrument, without warranty, granting to their children in fee a tract of land. The instrument contained the clause, "this grant does not take effect until the death of the said Mary E. Queen. . . .", and was promptly recorded. *Held*, that the instrument will be construed as a deed vesting in the grantee an immediate estate though its enjoyment is postponed until the grantor's death. *Liggett v. Rohr*.<sup>1</sup>

In the early English case of *Adams v. Savage*<sup>2</sup> it was held that a use limited after an estate for years to a person not *in esse* was bad as a contingent remainder unsupported by a freehold. This type of estate was impossible at common law because there was no one to take the seisin at the time of the conveyance.<sup>3</sup> But, by way of a use, a freehold could be granted to commence in the future.<sup>4</sup> Later English cases<sup>5</sup> hold that a future contingent devise after an estate for years is a good executory devise and not a bad remainder. As there is no intelligible difference between a springing executory devise and a springing use, if the above estate were created by deed it would be a valid springing use in England today.<sup>6</sup>

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<sup>1</sup> W. VA. REV. CODE (1931) c. 61, art. 5, §§ 26-27.

<sup>2</sup> W. VA. CODE (Hogg, 1913) c. 147, § 27.

<sup>3</sup> *Hallam v. Alpha Coal Co.*, 9 S. E. (2d) 818 (W. Va. 1940).

<sup>1</sup> 7 S. E. (2d) 867 (W. Va. 1940).

<sup>2</sup> 2 Ld. Raym. 854, 92 Eng. Rep. R. 71 (1703).

<sup>3</sup> *Adams v. Savage*, 2 Ld. Raym. 854, 92 Eng. Rep. R. 71 (1703); *Rawley v. Holland*, 22 Vin. Abr. 189, 2 Eq. Cas. Abr. 753, 22 Eng. Rep. R. 638 (1712).

<sup>4</sup> GRAY, *RULE AGAINST PERPETUITIES* (3d ed. 1915) 54.

<sup>5</sup> *Gore v. Gore*, 2 P. Wms. 28, 24 Eng. Rep. R. 629 (1722); *Harris v. Barnes*, 4 Burr. 2157, 98 Eng. Rep. R. 125 (1768).

<sup>6</sup> GRAY, *RULE AGAINST PERPETUITIES* 54.