

PUBLIC COMMENT AS CONTEMPT OF COURT

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The First Amendment to the Constitution of the United States provides, among other things, that Congress shall make no law abridging the freedom of speech or of the press. Those great statesmen who led this country through its turbulent infancy preached revolt against tyranny to the masses, and unqualifiedly imbued this thought in their political masterpieces. The privileges of free speech and of an untrammelled press, both regarded as essential to the very existence and perpetuity of self-government, were zealously guarded.¹ The people of the states have adopted similar provisions in their several constitutions, theoretically creating a constitutional principle and placing it upon a pedestal above all judicial reproach.² From this guarantee has sprung up the closely related problem of the power of courts to protect themselves and the administration of justice from unwarranted abuse by newspapers and other agencies appealing to public sentiment. While the courts vigorously condemn the damaging force of "trial by newspaper," their very echoes ring with a stirring counter-denunciation of the combination in one person of complainant and tribunal.³ It is logical to conclude that when the constitutional guaranty of a free press is gone, the guaranty of free speech will go with it. But when newspapers do overstep the bounds of propriety in criticizing the bench or in attempting unscrupulously to influence the outcome of a pending case, such action should meet with a stern rebuke from the same public mind which refuses to sanction judicial tyranny.

It has been suggested that an honest and intelligent court will

¹2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 876.

²Missouri has a typical constitutional provision. Article 2, section 14, provides that no law shall be passed impairing the freedom of speech; that every person shall be free to say, write or publish whatever he will on every subject, being responsible for all abuse of that liberty; and that in all prosecutions for libel, the truth itself may be given in evidence, and the jury under the direction of the court, shall determine the law and the fact.

³It has even been suggested that if brother judges were called in, the objection would remain. *Cornish v. U. S.* (1924) 299 F. 283.

win its way to public confidence in spite of adverse newspaper remarks. While such a statement may not have warranted conscientious objection when made nearly a century ago,⁴ the powerful appeal of the press today undoubtedly minimizes the truth of such an assertion. But regardless of which attitude we adopt on this question, there exists the modern doctrine that courts have "inherent"⁵ power to punish summarily for certain classes of "constructive" contempts.⁶ Several authors of note have suggested that the claim by the courts of inherent power to punish summarily for contempts by publication out of court is founded upon a false view of the scope of summary judicial power at common law.⁷ However, the doctrine not only remains with us, but yearly fortifies itself with a greater chain of prece-

⁴Stuart v. People (1842) 4 Ill. 395.

⁵The jurisdiction of courts to punish for contempt because of printed matter has long been said to be inherent. *People v. Wilson* (1872) 64 Ill. 195. Originally it is said to have been used only to punish insults to the King or to his government. Beale, *Contempt of Court, Criminal and Civil* (1908) 21 HARV. L. REV. 161. The "inherent" idea of power to punish for contempt is now unhesitatingly asserted in all jurisdictions. See *U. S. v. Craig* (D. C. 1920) 266 F. 230; *Michaelson v. U. S.* (1924) 266 U. S. 42, 65; *Dale v. State* (1926) 198 Ind. 110, 150 N. E. 781. See also cases cited and discussed later in this paper.

⁶Contempts may be broadly divided into two groups, designated as direct and constructive. The ancient name for the latter was "consequential contempt." *Ex parte Duncan* (1916) 78 Tex. Crim. 447, 182 S. W. 313.

The problem of direct contempt, which will be considered later for purposes of comparison, is said to arise when there is an open insult committed in the presence of the Court to the person of the presiding judge, or a resistance or defiance in his presence to its powers or authority, or improper conduct so near to the court as to interrupt its proceedings. Constructive contempt is an act done, not in the presence of the court, but at a distance, which tends to belittle, to degrade, or to obstruct, interrupt, prevent or embarrass the administration of justice. 13 C. J. 5.

In this treatment we are concerned with criminal rather than with civil contempt. The distinction is well indicated in *Anderson v. Indianapolis Forging Co.* (1904) 34 Ind. App. 100, 72 N. E. 277, 278. "Contempts of Court for which punishment is inflicted for the primary purpose of vindicating public authority are denominated criminal, while those in which enforcement of civil rights and remedies is the ultimate object of the punishment are denominated civil contempts."

⁷Foremost among these critics is SIR JOHN C. FOX in his recent book, *THE HISTORY OF CONTEMPT OF COURT* (1927). He believes that by the actual ancient usage of the common law, "criminal contempt committed by a stranger out of court was proceeded against like any other trespass in the common law courts, with the assistance of a jury, unless the contempt was confessed."

dent, and denies even the power of the legislatures to obstruct its reign. Those who advocate its eradication or modification place their main reliance on the guaranties of freedom of the press and of trial by jury. It has also been urged that such punishment deprives of liberty or property without due process of law.⁸

The case of *Respublica v. Oswald*⁹ gave the State of Pennsylvania the distinction of witnessing within its territory the first American punishment for contempt by publication. Justice McKean opined that the punishment must be summary lest the offender persevere in his misconduct. He suggested that judges would not be influenced by personal motives because "judges discharge their functions under the solemn obligation of an oath, and if their virtue entitles them to their station, they can neither be corrupted by favor to swerve from, nor influence by fear to desert from their duty." He concluded with the argument of necessity, that "without this power no court could possibly exist." Such an opinion as to the virtues of a judge will meet with a storm of opposition from many critics in other walks of life, the more extreme of whom may yet regard the discretion of a judge as the law of tyrants. But even the most broad minded must agree that any human is apt occasionally to fall victim to some of the follies and passions of human nature. Such a feeling of resentment was given expression in 1809, one year after the retirement of Chief Justice McKean, when the Pennsylvania legislature enacted a measure which confined the summary power within strict limitations: (1) official misconduct of court officers; (2) disobedience of process; and (3) misbehavior in the

⁸ *Gitlow v. New York* (1925) 268 U. S. 652.

⁹ (1788) 1 Dall. 319. While the controversy over the ratification of the federal Constitution waxed heatedly in that state, Eleazer Oswald, the editor of the *Independent Gazetteer*, was arrested for a libel of one Browne, the master of a female academy. He published an article appealing to the public, charging that the prosecution struck at the fundamental rights of the press and of freemen, and was probably instituted as a result of his opposition to the ratification, in which Browne was merely the handmaid of some of his enemies among the federalists. "I may well suppose," wrote Oswald, "the same love of liberty yet pervades my fellow citizens, and that they will not allow the freedom of the press to be violated upon any refined pretense which oppressive ingenuity or courtly study can invent." Oswald was ordered to show cause why he should not be attached for contempt.

actual presence of the court, actually obstructing the administration of justice. Summary punishment for publication was expressly forbidden.¹⁰ The State of New York witnessed a similar turmoil, and in 1829 passed statutes aiming at the elimination of "constructive" contempts, which are still theoretically in force.¹¹

The growth of the Federal doctrine of constructive contempt and its present influence on the policies of the states, present a chain of colorful events.¹² Section 17 of the Judiciary Act of 1789 empowered the courts of the United States to punish by fine or imprisonment "all contempts of authority in any cause or hearing before the same." As early as 1812 the Supreme Court suggested the doctrine of "inherent" contempt power,¹³ but gave no intimation that it might extend to publications. In 1821 the case of *Anderson v. Dunn*¹⁴ sustained the inherent power of the House of Representatives to punish for contempt by analogy to that of the courts. In the words of Justice Johnson, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution." But it remained for the famous *Peck-Lawless* case, 1826-1831, to pave the way to the passage of a Federal statute which exists inviolate on the statute books today, but whose force in at least one respect has been completely nullified through construction of the act by the courts.

The early part of the last century saw Missouri in the condition of a pioneer state, with its resulting frequent clashes over speculative land claims. James H. Peck was appointed Federal Judge for Missouri in 1822. Lawless, a lawyer representing many claimants to land under French and Spanish grants but

¹⁰ Pa. Acts 1808-09 c. 78 p. 146. The act still stands. It now appears (with slight modifications) in Digest Pa. Stat. L. (1920) secs. 5484-5488.

¹¹ Judiciary Law, secs. 750, 753. Penal Law, sec. 600.

¹² A most illuminating article, Nelles and King, *Contempt by Publication in the United States*, replete with detail, appears in (1928) 28 COL. L. REV. 401.

¹³ *U. S. v. Hudson* (1812) 7 Cranch 32, with opinion by Mr. Justice Johnson.

¹⁴ 6 Wheat. 204, 227.

unconfirmed by this government, brought a test case known as the *Heirs of Antoine Soulard*, which came on for trial before Judge Peck in 1824 and 1825. The claim was for an enormous tract of land which was alleged to have been conceded to Soulard in 1796 in reward for his services as Surveyor General under the Spanish Intendant. The concession was incomplete in the sense that it had not been located or confirmed by the Lieutenant Governor. It was explained that the documents attesting the incomplete concession had been accidentally thrown into the fire and destroyed. Judge Peck ruled that the concession had not been legally made by the proper authorities, a view which, if sustained, would prove fatal to the whole mass of unconfirmed claims. After the publication of Judge Peck's opinion, Lawless published in a rival paper a "concise statement of some of the principal errors" of which Judge Peck had been guilty, "to counteract the effect that his opinion was calculated to produce on the value of the unconfirmed French and Spanish land titles, and save the claimants from those speculators who would have availed themselves of the panic which the opinion created, to buy up those titles for an inadequate consideration." Judge Peck held Lawless guilty of contempt and sentenced him to one day's imprisonment and suspension from practice for eighteen months.

Aroused by an inflamed public sentiment, the Senate brought impeachment proceedings against Judge Peck in 1830-31, from which he escaped an unmerited public disgrace by the narrow margin of a single vote. In the same year of his acquittal, 1831, there was passed "an act declaratory of the law concerning contempts of court," apparently with the view to prevent any similar action on the part of a Federal judge.¹⁵ The text of the act follows:

Be it enacted . . . that the power of the several courts of the United States to issue attachments and inflict summary punishments for contempt of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of said courts, or *so near thereto as to obstruct the administration of justice*,¹⁶ the

¹⁵ Mar. 2, 1831 c. 98, 4 Stat. 487.

¹⁶ Italics are author's. The Federal interpretation of this clause will be explained later.

misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree or command of the said courts.

Sec. 2. And be it further enacted, that if any person or persons shall corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct or impede or endeavor to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment not exceeding three months, or both, according to the nature and aggravation of the offense.¹⁷

Judged in the light of the acts preceding their passage, the Pennsylvania, New York, and Federal statutes all had the primary object of confining the summary power within bounds of strict necessity. It was in this spirit, according to several cases decided not long after the act, that the clause "so near thereto (the presence of the court) as to obstruct the administration of justice" was intended to be interpreted and applied.¹⁸ But the tide turned in 1915 in the famous case of *U. S. v. Toledo Newspaper Co.*,¹⁹ and modern judicial construction treats the "so near" clause to include all misbehavior, however remote from the presence of the court, which obstructs the administration of justice.²⁰ In the *Toledo* case there was pending a suit to enjoin the enforcement of a city ordinance imposing drastic conditions

¹⁷ This law is still on the books. The two sections have stood separate since the Revised Statutes. Sec. 1 is now 28 U. S. C. sec. 385; and sec. 2 is now 18 U. S. C. sec. 241.

¹⁸ *Ex parte Poulson* (1835) 19 Fed. Cas. No. 11,350, aff. *Ex parte Robinson* (1873) 19 Wall. 505, 510-11. These cases indicate that Federal draftsmen intended the clause to mean only a disturbance directly tending to interrupt proceedings.

¹⁹ (1915) 220 F. 459; (1916) 237 F. 986; aff. (1918) 247 U. S. 402.

²⁰ It has been suggested that whether the test of jurisdiction is the physical proximity of the act to the court, or the tendency to affect the administration of justice, under either view newspapers could be held accountable by applying to contempts the law of constructive presence in criminal cases, the misbehavior being considered to have been committed where it takes effect. *In re Independent Pub. Co.* (1917) 240 F. 849.

upon the continued use of the streets by the traction company after the expiration of their franchises. The Toledo News-Bee published articles and cartoons strongly intimating a bias on the part of Judge Killits of the Northern District of Ohio in favor of the traction interests. It was held, and affirmed on appeal, that the criterion whether an alleged misbehavior is within the "so near" clause is not the physical or topographical propinquity of the act to the court; but, having reference to all the pertinent circumstances attending its commission, it is the nature of the act as tending directly to affect the administration of justice. Several cases decided within the last year will be considered at this point to show the present day application of this rule.

The case of *Froelich v. U. S.*²¹ reveals how jealously the Federal courts maintain the power unqualifiedly obtained for them by the *Toledo* case. An indictment was returned against one Frank W. Sommers and others in the District Court of the United States for the District of Minnesota, Judge John B. Sanborn presiding. Before trial of the case, Froelich wrote a letter to the special assistant to the attorney-general in charge of the case, calling attention to so-called reports that Judge Sanborn was favorable to Sommers, and had approached grand jurors in an endeavor to forestall the finding of an indictment, concluding with the statement that it was all-important that Judge Sanborn be not permitted to preside at the trial. There was testimony that before mailing the letter, Froelich had exhibited it to several residents of Saint Paul. It was held that the acts of Froelich were punishable as contempt.²² In the words of the Court, "the contention, long asserted, that only that is so near to the presence of the court as to obstruct the administration of justice which from its physical proximity to the court, disturbs and interferes with judicial proceedings, was finally

²¹ (1929) 33 F. (2d) 660.

²² Writing letters concerning a pending action to witnesses or others, calculated to interfere with the administration of justice, has been held a contempt in England. *Welby v. Still* (1892) 66 L. T. Rep. N. S. 523. Writing insulting letters to the judge has also been held punishable as contempt in Federal courts. *U. S. v. Huff* (1913) 206 F. 700. In *re Griffin* (1888) 1 N. Y. S. 7, held contra, the state statute providing that contempt of court shall consist of insolent behavior toward a court, committed during its sitting, or publication of a false or grossly inaccurate report of its proceedings.

disposed of by the Supreme Court in *Toledo Newspaper Co. v. U. S.*" So we have no alternative in Federal jurisdiction but to accept the ultimatum that an act is judged to be contemptuous not because of the place where it is committed, but because of its character. If it tends to "obstruct and prevent the untrammelled and unprejudiced exercise of the judicial power," it is punishable contempt.²³ We cannot help but comment that such an elastic rule is a dangerous instrumentality even in the hands of the most level-headed public servant.

The case of *U. S. v. Sullens*²⁴ reveals a factual situation decorated throughout by political influences, too often the unfortunate cause of contempt proceedings. There were pending in District Court in Mississippi several indictments for violation of an act of Congress forbidding the sale of one's influence to secure any appointive office under the United States. These were commonly known as the *Patronage Cases*. After one acquittal and before the next case was called for trial, the defendant published an article which said substantially that politics was the sole issue that would be considered; that regardless of the guilt or innocence of the defendants, they would be acquitted because the jury would be composed exclusively of white Democrats, who would be unwilling to convict, as such a result

²³ The reasoning of the court, revealing how the acts of the defendant had a tendency to obstruct the administration of justice, is enlightening. The opinion implies that the natural effect of the entire letter, if its contents were believed by the recipient, was to induce him to file an affidavit of prejudice. The obstruction follows from (1) the necessary rearrangement of judicial machinery and possible delays incident to the filing of such an affidavit; and (2) the fact that the recipient would be led to suspect, not only the judge, but the jury and the officers of the court, and prevent a rightly conducted trial.

The contention that the letter written by defendant was a privileged communication failed to sway the court. "The law is that any citizen having knowledge of a violation of the laws of the United States may and is duty bound to communicate that knowledge to the government, and will be protected in so doing. In re Quarles and Butler, Petitioners, 158 U. S. 532, 535." The acts of defendant, however, were denied the protection of this privilege because (1) the letter was not a communication to any official of the government having any duty to institute a prosecution for any of the offenses suggested in the letter; and (2) the letter on its face showed that it was not intended as a communication to the government made for the purpose of bringing to justice offenders against the law, but that its sole object was to affect a particular case pending in court.

²⁴ (1929) 36 F. (2d) 230.

would help to establish a Lily White Republican Party in Mississippi, which was politically objectionable to the jury. Although the court suspended sentence during good behavior,²⁵ it used strong language in condemning the action of the editor. "To buttonhole a juror and tell him that it was not altogether a case of whether the defendants were guilty or innocent, but whether the juror would be willing to encourage the establishment of a white Republican party in Mississippi, would clearly have been improper, and the defendant would not have thought of doing it. To write that much and more under his own name and print it on the front page of a large newspaper which circulates in the vicinity of the trial, and which is sold at public news stands and in the hotels of Meridian, was of equal, if not greater, harmful tendency toward the prevention of an impartial verdict, as the power of the printed page is stronger than the spoken word."²⁶

The spirit of the Federal Contempt Act of 1831 soon wended its way into a majority of state statute books, and state legislation defining or limiting the summary power to punish for constructive contempt has continued to accumulate. But the nerve was not removed from the doctrine which these statutes repudiated, for again and again the old rule has burst up in a flame of public excitement, with the tendency of the state courts constantly growing to misconstrue or disregard any restrictions on

²⁵ The suggestion of the need of some limitation, even though only a moral one, on the use of the summary power, is phrased in this fashion: "In short, this jurisdiction of punishing for contempt, being practically unlimited and potentially arbitrary, should be most zealously guarded by the courts and exercised by them with the greatest anxiety only in the most extreme cases where there is no other pertinent remedy which can be found in order to enable justice to be properly administered without pernicious influence."

²⁶ The feelings of the defendant were expressed in a subsequent article published while other patronage cases were still pending:

"Concerning Contempt

"If everybody in Mississippi who expressed opinions to the effect that the Federal government would not succeed in convicting the alleged patronage grafters were sent to jail for contempt of court, it would cause a complete suspension of business in the commonwealth.

"And if everybody who had expressed contempt and derision concerning the hypocritical declaration of the Republican leaders that they intend to make the party decent in Mississippi should be sent to jail, it would cost about twenty million dollars to build enough jails to hold them."

the summary power. Regardless of any guaranties of a free press which newspapers may oratorically call to their defense, it is plain that in this century they are not privileged to attempt by their comments to intimidate the judges of a court and compel them to submit to popular clamor the decision of a pending case.²⁷ Necessarily, this power which the courts exert for their own preservation must be exercised with the greatest of precaution. If it became the established policy that all courts are above reproach, the sea of justice might become hemmed in by a tide of dishonest judges and pitiful law enforcement. Newspaper editors could only mutter ominous threats to themselves, but none would dare criticise a judge's rulings, no matter how deserving of criticism. Political machinery, rather than judicial knowledge and integrity, would prevail. Happily, such is not the case, and the comparatively small number of contempt prosecutions against publications in this age of public expression indicates an attitude on the part of our newspapers to stay within reasonable bounds.

It would seem that after the final disposition of a case, the press and the public have the right freely to discuss, criticise, and censure the decisions of the courts, and this has been asserted by good authority to be the rule in this country.²⁸ But at common law the criticism of a judicial officer even after the termination of a cause was often regarded as contempt.²⁹ *State*

²⁷ The rule that publications as to a past proceeding cannot be punished as contempts generally prevails in this country. In *re Independent Pub. Co.* (1917) 240 F. 849; *State v. District Court* (1916) 52 Mont. 46, 155 Pac. 278; *State v. Young* (1910) 113 Minn. 96, 129 N. W. 148; *State v. Circuit Court* (1897) 97 Wis. 1, 72 N. W. 193; *In re Shannon* (1891) 11 Mont. 67, 27 Pac. 352; *State v. Kaiser* (1890) 20 Ore. 50, 23 Pac. 964; *Cheadle v. State* (1887) 110 Ind. 301, 11 N. E. 426. But a number of cases viciously attack such a doctrine, and we will have occasion later to consider the conflict in some detail.

²⁸ *Patterson v. Colorado* (1906) 205 U. S. 454.

²⁹ In the old English case of *In re Read and Huggonson* (1742) 2 Atkyns 469, where the punishment was for libeling a party to a pending cause, Lord Hardwicke added that scandalizing the court itself and prejudicing mankind against persons before the cause is heard, were also contempts. "There cannot be anything of greater consequence than to keep the streams of justice clear and pure." It was Lord Hardwicke's opinion, then, that there are three different categories of contempt. It is also interesting to note that he advanced as a reason for not remitting the contempt to the criminal courts, his general power as Chancellor to find facts without a jury.

v. Hildreth,³⁰ a modern Vermont case, sets forth the common law rule. The defendant objected by demurrer that as the case was not pending when the article was published, but had been finally determined, the court had no jurisdiction to proceed against him for contempt. In overruling the objection the court remarked that many cases in this country support the defendant's contention, but that most of them rest upon statutes which expressly or impliedly undertake to limit the jurisdiction of courts to punish for contempt, which statutes the courts follow without questioning the power of the legislature to make them. But since there was no such constitutional provision or statute in Vermont, the court guided its decision by common law principles. It rested its authority on several English decisions,³¹ and on some of the more radical American cases which we shall soon consider in detail.³² The common law rule can be nicely illustrated by reference to two important Virginia cases. In *Commonwealth v. Dandridge*,³³ there was an attachment for contempt in insulting a judge as he was entering the court house. The insult related to what the judge had done the term before in a case then tried and still pending. Respondent claimed the attaching power could not be exercised for contempts touching the past conduct of a judge. It was held, however, that as the

³⁰ (1909) 82 Vt. 382, 74 Atl. 71.

³¹ Wilmot, C. J., in an undelivered opinion in *The King v. Almon*, 8 St. Trials 54: "And I am sure it wants no great intuition to see that trials by jury will be buried in the same grave with the authority of courts that are to preside over them." *McLeod v. St. Aubyn* [1899] A. C. 549. The Privy Council held that contempts of court could be committed by publishing scandalous matter respecting the court after adjudication as well as pending a case before it; but said that in England, committals for contempt for scandalizing the court itself had become obsolete. But in the very next year there arose the case of *The Queen v. Gray* [1900] 2 Q. B. 36, which held that the publication in a newspaper of an article containing scurrilous personal abuse of a judge with reference to his conduct as a judge in a judicial proceeding that had terminated, was a contempt of court, punishable by the court on summary process. A note to that case says that in England the court will still, when the circumstances demand its action, exercise its jurisdiction to punish on summary process the contempt of "scandalizing the court," though no contempt has been committed *ex facie* of the court, nor in respect of a case pending.

³² *State v. Morrill* (1855) 16 Ark. 384; *State v. Shepherd* (1903) 177 Mo. 205, 76 S. W. 79. Also cited by the court were the cases of *In re Chadwick* (1896) 109 Mich. 588, 67 N. W. 1071; *Commonwealth v. Dandridge* (1824) 2 Va. Cas. 408; *Burdett v. Commonwealth* (1904) 103 Va. 338, 48 S. E. 878.

³³ *Supra* note 32.

authority and independence of the court might be equally assailed either way, the distinction was merely ideal. This case is referred to approvingly in *Burdett v. Commonwealth*.³⁴ Twelve indictments had been found against respondent, to all of which he pleaded guilty and paid fines. He then caused to be published in a newspaper an article signed by him in which he charged the judge with acting toward him in a harsh and arbitrary manner and actuated by vicious and corrupt motives. This was held a contempt as at common law, as being of that kind which consists of "scandalizing and defaming the court itself."

Those of us who profess a due regard for the spirit of freedom which pervades our system of government will undoubtedly criticise the application of the common law doctrine in this country. Regardless of the character of the publication, and regardless of what other liability it may bring upon its author, it is difficult to conceive of how it will obstruct the administration of justice in a case unless it is written and published while that case is pending before a court. Liberty of the press should not be sanctioned where it is used to invade the rights of others³⁵ by assailing litigants, intimidating witnesses, or spreading before a jury opinions on the merits of a case before them,³⁶ for a privilege should always be subject to recall where it appears to have been abused. Consequently, it is a rule of almost universal application in this country that publications concerning a pending cause, trial, or judicial investigation, constitute contempt when calculated to prejudice or prevent fair and impartial action.³⁷ And the general rule is that the truth of the publica-

³⁴ *Supra* note 32.

³⁵ As in *Tate v. State* (1915) 132 Tenn. 131, 177 S. W. 69, where a newspaper, disregarding an order of the court, published an article containing information in regard to certain affidavits which had been declared inadmissible in a suit pending at the time. *Held*, it was clearly within the power of the court to punish such an offense as contempt.

³⁶ *In re Shortridge* (1893) 99 Cal. 526, 34 Pac. 227.

³⁷ This is the rule as stated in the case of *In re Cheeseman* (1886) 49 N. J. L. 115, 6 Atl. 513.

In *McDougall, Atty.-Gen., v. Sheridan* (1913) 23 Idaho 191, 128 Pac. 954, certain editorials and articles directly charged that the court corruptly rendered the decision in a certain case then pending, and that it was rendered by reason of a political trade, and not on the law and facts. *Held*, such publications were a direct attack upon the court, as a court, and the basis of a contempt proceeding.

tion cannot be set up as a defense,³⁸ nor will the plea of an editorial mistake³⁹ or ignorance of the law⁴⁰ ordinarily prevail. So though we are dealing with an offense called criminal contempt, it differs from the ordinary criminal offense not only in method of punishment and lack of trial by jury, but also in that no criminal intent is necessary for its commission.⁴¹ We must then reach the rather general conclusion that the determination as to whether a criminal contempt has been committed does not depend on the intention of the offending party, but on the shady criterion whether the act tends to obstruct the administration of justice.⁴²

While criticism of decided cases is not, under the prevailing American view, a sufficient obstruction to be considered a contempt, it is conceivable that certain factual situations may arise which would make the application of this rule unwise. The recent Indiana case of *State v. Shumaker*⁴³ might be regarded as being on the line, possibly depending on the view we take of prohibition. The superintendent of the State Anti-Saloon

³⁸ *Patterson v. Colorado* (1906) 205 U. S. 454; *Hughes v. Territory* (1906) 10 Ariz. 119, 85 Pac. 1058; *Globe Newspaper Co. v. Commonwealth* (1905) 188 Mass. 449, 74 N. E. 682.

³⁹ In the case of *In re Providence Journal Co.* (1907) 28 R. I. 489, 68 Atl. 428, it was held that an editorial misstatement of the law as stated in a court's written opinion on a matter of wide application and importance is, although unintentional, a contempt of court. In some states inaccurate publication of a court's decision is, by statute, made a contempt of court. *People ex rel. Barnes v. Court of Sessions* (1895) 147 N. Y. 290, 41 N. E. 700; *State ex rel. Haskell v. Faulds* (1895) 17 Mont. 140, 42 Pac. 285; *In re Robinson* (1895) 117 N. C. 533, 23 S. E. 453.

⁴⁰ *Seastream v. N. J. Exhibition Co.* (1907) 71 N. J. Eq. 785, 65 Atl. 982.

⁴¹ *In re Independent Pub. Co.* (1915) 228 F. 787. But it has been held that the absence of such intent may be considered in mitigation of the offense. *State v. Howell* (1908) 80 Conn. 668, 69 Atl. 1057.

⁴² From *Ex parte Nelson* (1913) 251 Mo. 63, 157 S. W. 794, we take this statement: "The authorities seem to be uniform in holding that where a publication is unambiguous and clearly constitutes contempt, the intent is conclusively presumed, that is, the publisher is conclusively presumed to have meant what the publication clearly stated on its face." *People v. Wilson* (1872) 64 Ill. 195, 212, 218, 220; *In re Chadwick* (1896) 109 Mich. 588, 604, 67 N. W. 1071; *Telegram Newspaper Co. v. Commonwealth* (1899) 172 Mass. 294, 52 N. E. 445; *Sturoc's Case* (1869) 48 N. H. 428; *Fishback v. State* (1892) 131 Ind. 304, 314, 31 N. E. 86.

⁴³ (1927) 157 N. E. 769.

League caused his annual report to be published in pamphlet form and distributed throughout the State. The report also appeared in the official publication of the League. In the course of his report, the superintendent asserted that substantial justice had been defeated through the refusal of the State Supreme Court to allow the admission of illegally obtained evidence in several liquor cases which he named. He also called upon the electors to return a dry supreme court at the next election, stating that at least one of the then sitting members was said to be bitterly hostile to prohibition. The Attorney-General of the State filed an information alleging that the superintendent was guilty of an indirect contempt of court. It was held, in substance, that the defendant was guilty of contempt of court because the report in question was apt improperly to influence the court on a principle of law that would certainly be involved in future cases.⁴⁴ But it is submitted that if every court presiding at such a contempt proceeding were to take into consideration similar cases that might arise in the future, then the defendant might as well forego the trouble and formality of a trial.

The writer has already stated that a number of state courts have disregarded the limitations placed by legislatures on their powers to cite for contempt. Two cases in particular are of sufficient importance to warrant a thorough analysis of the opinions handed down therein. The earliest of these was an Arkansas case, *State v. Morrill*,⁴⁵ one of the first decisions to hold a publication summarily punishable since the passage of the Federal Contempt Act of 1831.⁴⁶ A newspaper had intimated that the State Supreme Court had been bribed to admit an alleged murderer to bail. The publication was clearly not punishable if the plain meaning of the state statute were given ef-

⁴⁴ Prior to the decision in the Shumaker case, Indiana was apparently in accord with the prevailing view. *Cheadle v. State* (1887) 110 Ind. 301, 11 N. E. 426; *Zuver v. State* (1919) 188 Ind. 60, 121 N. E. 828.

⁴⁵ (1855) 16 Ark. 384.

⁴⁶ Apparently the only preceding decision so holding was *Tenney's Case* (1851) 23 N. H. 162, which rested on the authority of Blackstone, Lord Hardwicke, Kent, and early Pennsylvania cases, ignoring all subsequent doctrine and experience.

fect.⁴⁷ The Arkansas court stated that "the Legislature may regulate the exercise of, but cannot abridge the express or necessarily implied powers, granted to this court by the constitution. If it could, it might encroach upon both the judicial and executive departments, draw to itself all the powers of government; and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the Federal and State institutions, and a favorite theory in the governments of the American people." Such terminology may well confuse the most conscientious interpreter, for it may be argued that the Arkansas statute *did* only regulate the exercise of the powers of the courts, for it left all the common and ordinary contemptuous offenses open to punishment. The court proceeded to assert, in what was perhaps a sarcastic note, that the prohibitory clause of the statute was entitled to great respect as an opinion of the Legislature, but that it was certainly not binding. For to say that it were "would be to concede that the courts have no constitutional and inherent power to punish any class of contempts, but that the whole subject is under the control of the legislative department; because, if the General Assembly may deprive the courts of power to punish one class of contempts, it may go the whole length and divest them of power to punish any contempt."⁴⁸

"The statute on the subject of contempts declared that "Every court of record shall have power to punish, as for criminal contempt, persons guilty of the following acts, and no others: *First*. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority. *Second*. Any breach of the peace, noise or disturbance, directly tending to interrupt its proceedings. *Third*. Willful disobedience of any process or order lawfully issued or made by it. *Fourth*. Resistance willfully offered by any person to the lawful order or process of the court. *Fifth*. The contumacious and unlawful refusal of any person to be sworn as a witness, and when so sworn, the like refusal to answer any legal and proper interrogatory." Digest c. 36 sec. 1, approved Feb. 23, 1838.

⁴⁸ Chief Justice English, apparently exceedingly irked by the scandalous charge of defendant, also took occasion to remark that if a judge were really corrupt, impeachment proceedings might be brought against him where he could meet his accuser face to face.

It is surprising to note that though both Judge English and Judge Peck (in the Peck-Lawless case) wished to uphold and enforce the sacred and "inherent" power of the courts to punish for contempt, the Arkansas court

No intense public clamor and hysteria for free speech and a free press greeted the increasing attempts of state courts to invalidate what they deemed a legislative interference with their proper functions. Most of our courts now sustain the power of a judge to punish for publications out of court reflecting upon his judicial conduct, or deemed capable of influencing the decision in a pending case, as "necessary" and "inherent." Such power is admittedly inconsistent with constitutional guaranties of "trial by jury as heretofore" unless it was well established at common law when those guaranties were adopted. Following the doctrine enunciated by Blackstone,⁴⁹ it has generally been assumed that the power was firmly entrenched by "immemorial usage." We have seen how this doctrine, supposedly legislated into extinction by the Federal Contempt Statute in 1831, was unquestionably reestablished in the Federal courts by "construction" of that statute in the famous *Toledo* case. The same cycle had previously occurred in the state courts, following chiefly the rather daring precedent set by the case of *State v. Morrill*. These courts, too, it must be remembered, set forth their attitudes under the shadow of inconsistent statutes.

Remarkable as was the *Morrill* case, the first few years of the present century were fated to witness an even more intense controversy in the courts of Missouri. The case of *State v. Shepherd*⁵⁰ was concerned with an article published by Shepherd after an unsuccessful attempt of one Oglesby to secure damages from the Missouri Pacific Railroad for the loss of a limb in an accident, his case having gone to the Supreme Court three times. According to the information filed by the Attorney-General, the

had this to say of the Federal decision: "But we may venture to remark that independent of any statutory provisions upon the subject, the distinction between the constitutional freedom and licentious abuse of the press is now so well understood in this country, that no American judge would consider himself authorized to punish, as for contempt, authors of publications of the character of that made by Mr. Lawless."

* The reader will recall the recent critical attacks upon Blackstone's theory. Sir John Fox's opinion was referred to in note 7, *supra*.

** (1903) 177 Mo. 205, 76 S. W. 79. The *Shepherd* case has been said to be of doubtful authority. See the dissenting opinion of Judge Martin in *State v. Shumaker* (Ind. 1927) 157 N. E. 769. Its decision was the reason for the writing in 1904 of the textbook, *THE LAW OF CONSTRUCTIVE CONTEMPT*, by JOHN L. THOMAS, an ex-judge of the Missouri Supreme Court, wherein he pointed out what he conceived to be the errors of that case.

defendant's article (1) charged the Attorney-General and the Governor with faithlessness in the discharge of their duties; (2) charged the legislative department with high and grave misdemeanors; (3) charged the Supreme Court with having "sold its soul to the corporations"; and (4) charged the Democratic nominating convention of 1902 with having been dominated by the railroads. A reading of the case substantiates this description of the tenor of defendant's publication. The next step in the factual situation may be garnered from these condemning words of the court: "Instead of making the *amende honorable* by withdrawing the charges and apologizing like a man, he (defendant) seeks to escape punishment by challenging the jurisdiction of this court to protect itself from insult and to maintain the respect and dignity with which the people have invested it, denies the facts charged are sufficient to constitute a contempt, and raises other technical and constitutional questions." The Missouri statute⁵¹ which was invoked by the defendant as limiting the court's power to punish for contempt, was worded exactly as was the Arkansas statute in the *Morrill* case.⁵² The Missouri court stated its reason for disregarding the statute in these words: "The law is well settled, both in England and America, that the Legislature has no power to take away, abridge, impair, limit, or regulate the power of courts of record to punish for contempts." It will be noted that this statement carried the doctrine of the *Morrill* case even a step farther, for the Arkansas court had been kind enough to leave at least the power of regulation in the hands of the Legislature.⁵³ As for the right of trial by jury in contempt cases, the Missouri court unflinchingly declared that such privilege never existed at common law, and was wholly unknown to the laws of Missouri at the time of the adoption of the Constitution of 1820, and those of 1865 and 1875. If we adopt this statement as indicative of the law, the conclusion necessarily follows that the guarantee of the

⁵¹ R. S. Mo. (1899) sec. 1616.

⁵² See note 47, *supra*.

⁵³ The Missouri court further took occasion to remark that in only the states of Georgia and Louisiana is power given by the constitution of the state to the legislature to limit the power of the court to punish for contempt, and that in all the other states the better opinion is that where the court is a creature of the constitution, the inherent power to punish contempt cannot be shorn, abridged, limited or regulated. 177 Mo. 205, 236.

Constitution of 1875, that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate," was not intended to confer such a right in contempt cases, for such a right had never been "heretofore enjoyed" in this state.

Recent decisions by state courts reveal an increasing tendency to override all legislative restrictions on the contempt power. The case of *In re Simmons*,⁵⁴ decided last year in Michigan, brings several new factors into the situation. The trial of certain men who were charged with the crime of extortion was in progress in the recorder's court in the city of Detroit. The case was notorious. One Jacoby testified that he collected money from persons in the cleaning and dyeing business under the direction of Frank X. Martel, president of the Detroit Federation of Labor, and had paid the money to him. Defendant Simmons was secretary of the Federation, and Martel's attorney. A reporter of the Detroit Free Press asked the defendant if he might quote his statements to the effect that Martel had never received any money from Jacoby, and defendant consented. The next day the Press contained an article headed "SIMMONS DENIES GRAFT," and "JACOBY DISPOSED OF MONEY." The case was still pending and testimony not yet closed. Simmons was found guilty of contempt.⁵⁵ He contended that the court had no jurisdiction because the acts charged as contempt were not "within the immediate view and presence of the court and directly tending to interrupt its proceedings or to impair the respect due to its authority," as required by statute.⁵⁶ The Michigan court not only upheld the imperialistic doctrine of the *Morrill* and *Shepherd* cases, ruling that criminal contempt statutes were not designed to limit or prohibit jurisdiction, but held further that such statutes were in affirmation of the common law inherent power of courts of record to punish for all contempts. It is difficult to criticise the practical result of the case, since at

⁵⁴ (1929) 226 N. W. 907.

⁵⁵ During the Jacoby trial, Simmons presented to the trial judge at chambers a written document, severely criticizing the conduct of the case. This fact was cited by the court in aid of its conclusion that defendant's statement was deliberately intended to embarrass the court and jury and bring the trial into public disrepute, in furtherance of a general scheme to that end.

⁵⁶ 3 Comp. Laws (1915) sec. 12,268, defining contempts punishable by courts of record.

least the theory of our system of trial is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.⁵⁷ The *Simmons* case also brings up the question of who may be responsible for a publication. Under that decision, a party need not have requested the publication or even have given his express consent, but if the statement is indicated for publication, with the intention that it will be written and published, and the purpose in that respect is carried out, the party who makes it with such intent and understanding is equally guilty as if an express request for publication had been made. This same rule of responsibility has been approved in cases involving criminal libel,⁵⁸ and has been asserted to be the prevailing rule in this country in such proceedings.⁵⁹ Another section of the Michigan statute required in all cases of misconduct not committed in the immediate view and presence of the court, that the court before proceeding "shall be satisfied by due proof by affidavit of the facts charged."⁶⁰ Such provisions are justified on the ground that the public is entitled to the protection afforded by the penalties imposed for false swearing.⁶¹ Objection that the facts are set forth in the form of a verified petition rather than in the form of an affidavit has been held to be technical and without substance.⁶² The rule that

⁵⁷ *Patterson v. Colorado* (1906) 205 U. S. 454.

⁵⁸ *Clay v. People* (1877) 86 Ill. 147; *State v. Osborn* (1894) 54 Kan. 473, 38 Pac. 572.

⁵⁹ 17 R. C. L. 386.

⁶⁰ 3 Comp. Laws (1915) sec. 12,270.

⁶¹ *Necessity of Affidavit or Sworn Statement as Foundation for Constructive Contempt* (1919) 2 A. L. R. 226.

⁶² *Campbell v. Jeffries* (1928) 244 Mich. 165, 221 N. W. 138. There was pending in the recorder's court of Detroit a cause known as Owen Memorial Park Link condemnation case. There appeared in the Detroit Evening News a purported interview by defendant respecting the case, stating that, "Mr. Campbell declared the figures set by the city outrageous and fabulous. . . . This case smells to heaven. . . . The manner in which the case was rushed through court by the outgoing administration is hardly understandable." The verified petition set forth the interview of Mr. Campbell as published. Campbell was found guilty of contempt and sentenced to jail. "Neither refinement nor discussion is necessary to demonstrate that the interview published is contemptuous. It is so on its face. The language tends to degrade the court and to embarrass the administration of justice. It charges the court with participation in conduct so vile and so corrupt that it 'smells to heaven'."

there can be no statutory limitation on the power of the judiciary to define contempts without express constitutional authority is also well established in Georgia.⁶³

The recent Indiana case of *State v. Shumaker*, already referred to, is interesting not only because it punishes as contempt a criticism of a decided case, but also for the broad-minded and scholarly dissent of Judges Gemmill and Martin. The majority opinion expresses a rather belligerent attitude toward the perpetrators of acts calculated to arouse public prejudice against the judges in the performance of their judicial functions, and suggests that for the court to pass unnoticed such conduct would be "so cowardly that it would be contemptible and a disgrace." In a rather apparent attempt to defend itself for reelection against a bitter attack of the Anti-Saloon League, the court endeavors to justify its decisions in certain liquor cases on the very questionable ground that, "The trend and weight of public opinion and sentiment on questions of importance is subject to change; but sound legal principles founded on reason and justice should never change." The dissenting opinion admits that the defendant may have made some misstatements as to just what certain cases had held, but suggests that anyone not trained in the law is apt to make such mistakes in discussing technical legal questions. If we adopt this view of the facts (and it cer-

⁶³ Cf. note 51, *supra*. *Bradley v. State* (1900) 111 Ga. 168, 36 S. E. 630, held that the provision of the Georgia Constitution which declares that "The power of the courts to punish for contempts shall be limited by legislative acts," gives to the legislature only the power to prescribe the punishment, after conviction. A recent case showing the present rule in Georgia is *Jones v. State* (1928) 39 Ga. App. 1, 145 S. E. 914. A petition for injunction prayed that the judge declare himself disqualified from passing upon the questions presented, for the alleged reason that he had deprived the petitioner of her constitutional rights by passing upon "various and sundry petitions and bills" after holding secret conferences with opposing counsel, and without giving her a chance to be heard, and averred that "with regret and humiliation she is compelled to assert to this court that she can not get a fair, impartial, and legal hearing," and prayed that the judge "will conscientiously and honestly consider" the question of his disqualification. The presentation of such petition was adjudged in contempt of court on the broad ground that all constitutional courts have the inherent power to define and punish contempts. The case denies the power of the legislature, without express constitutional authority, to define what are contempts and declare that the court shall have jurisdiction over no acts except those specified, citing *Bradley v. State*, *supra*.

tainly seems the more logical one since the defendant Shumaker was a minister), then it appears that the defendant's criticism was directed toward the judgment or reasoning of the court and not against the integrity or honesty of the court, or of its members. The action of contempt of court is an extraordinary one in our system of jurisprudence and should be invoked only when the offending act unquestionably impedes or disturbs the administration of justice.⁶⁴ "Supreme Courts are neither honored or helped by being held up as above criticism," stated the dissenting opinion. "Constructive criticism of judicial decisions, whether it be professional or lay, is to be desired rather than to be stifled. The time when men, whether kings or judges, could be considered incapable of doing wrong, is buried in the historic past." The unfortunate situation of the judge whose decisions are criticised sitting in judgment of the person who has made the criticism has many times been sharply condemned. However, there now exists small possibility of the jury becoming a necessity in proceedings for contempt, although that suggestion was often made in former years with great vigor.⁶⁵

It has already been stated that newspaper publications, when considered as contempts of court, are usually classed as indirect or constructive contempts.⁶⁶ In a few cases, however, they have actually been designated as direct contempts,⁶⁷ and there are a number of cases in which they have been considered as some-

⁶⁴ Francis v. People (1926) 11 F. (2d) 860, 865. See also 6 R. C. L. 512, sec. 25.

⁶⁵ In Storey v. People (1875) 79 Ill. 45, the court, quoting from Stuart v. People (1842) 4 Ill. 395, 406, said: "If a judge be libeled by the public press, he and his assailant should be placed on equal grounds, and their common arbiter should be a jury of the country."

⁶⁶ Further cases applying this general rule are: Kilgallen v. State (1922) 192 Ind. 531, 132 N. E. 682, 137 N. E. 178; Ray v. State (1917) 186 Ind. 396, 114 N. E. 866; Herald-Republican Pub. Co. v. Lewis (1913) 42 Utah 188, 129 Pac. 624; State v. Bee Pub. Co. (1900) 60 Neb. 282, 83 N. W. 204; Cooper v. People (1881) 13 Colo. 337, 22 Pac. 790; State v. Frew (1884) 24 W. Va. 416.

⁶⁷ In Dale v. State (1926) 198 Ind. 110, 150 N. E. 781, the defendant was found guilty of contempt for a newspaper article attacking the jury commissioners, the grand jury which returned a certain indictment, other officers of the court, and the presiding judge, and it seems to be held that this was a direct contempt.

what analogous to direct contempts.⁶⁸ On first thought one might desire to criticise severely such action as carrying doubtful powers of the court to an unwarranted extreme, but on consideration we must realize that such discrimination is for the most part a matter of terminology. But where the court takes the liberty of stretching the meaning of a direct contempt statute beyond all reasonable bounds, or endeavors to condemn a party charged with constructive contempt without a hearing, such action should meet with frank disapproval and condemnation.⁶⁹ Under the view which the courts have arbitrarily adopted, the power to punish is the same in cases of direct or constructive contempt. The difference is only one of procedure. In cases of direct contempts, the court acts spontaneously, and commits the offender summarily. In cases of constructive contempts, the court, upon information, issues a citation to the offender to show cause why he should not be punished for contempt. Some offenses seem to contain characteristics of both direct and constructive contempts, as in a case where the defendants surreptitiously photographed the prisoner on trial in violation of the order of court and published the photographs in their newspaper.⁷⁰ But it is the substance of this power assumed by the judiciary which should bear the brunt of our criticism, rather than the technical name given the offense by the courts.

The distinction between criminal contempt and other criminal offenses is forcefully enunciated in those cases dealing with the question of when the pardoning power may be exerted. The doctrine of separation of powers has frequently been invoked to prevent the executive's pardoning power from extending to cases where the judicial organ of the state has punished for criminal contempt. In the *Shumaker* case the Indiana court de-

⁶⁸ In a number of cases, publications have been considered as done in the presence of the court. *Stuart v. People* (1842) 4 Ill. 395; *People v. Wilson* (1872) 64 Ill. 195; *Telegram Newspaper Co. v. Commonwealth* (1899) 172 Mass. 294, 52 N. E. 445; *Territory v. Murray* (1887) 7 Mont. 251, 15 Pac. 145; *Field v. Thornell* (1898) 106 Iowa 7, 75 N. W. 685.

⁶⁹ In *Ex parte Nelson* (1913) 251 Mo. 63, 157 S. W. 794, it was held that an attempt on the part of the lower court to so condemn resulted in denying defendant due process of law—a hearing according to the law of the land—and defendant was discharged on habeas corpus.

⁷⁰ *Ex parte Sturm* (1927) 152 Md. 114, 136 Atl. 312.

nied the power of the Governor to pardon the defendant after conviction.⁷¹ It declared that the structure of the government of the state of Indiana is based upon the doctrine of the separation of powers whereby the political state is divided into three branches, each of which may not be controlled or embarrassed by another. From this position, the argument is advanced that a criminal contempt is an affront to the judiciary which has inherent power to punish, unhampered by the pardoning power of the executive.⁷² It has even been asserted that such pardoning power in the executive would result in the subservience of the judiciary to the executive and a total destruction of its independence.⁷³ But is not abuse of the pardoning power just as likely to occur in any division of the criminal field? If such a view were consistently adopted, we might as well abolish the pardon. The court can convict the defendant of the contempt, just as it can convict one guilty of another criminal offense, and so maintain its respect and dignity. Nor is there actually a total division of the powers of government, but a strange combination for some purposes and a division for others. Cooperation and separation are equally necessary. Further, contempt is not a sacred offense which can be committed only against the judiciary, but it may be committed against legislative bodies, who are generally held to have inherent power to punish.⁷⁴ When the Supreme Court of the United States was confronted in 1925 with

⁷¹ After Shumaker was adjudged in contempt of court, fined, and imprisoned, the governor granted him a pardon. On an information by the sheriff, a peremptory writ was issued out of court to the defendant to show cause why judgment should not be executed notwithstanding the governor's pardon. The defendant's demurrer was overruled, and the jail sentence reinstated.

⁷² The Indiana court followed the view of *Taylor v. Goodrich* (1897) 25 Tex. Civ. App. 109, 40 S. W. 515. But the Texas decision was based largely on the fact that criminal contempt was not included in the criminal code of the state, and, therefore, could not come under the term "crimes" in the pardon clause of the state constitution.

⁷³ *Taylor v. Goodrich*, note 72, *supra*.

⁷⁴ *McGrain v. Daugherty* (1927) 273 U. S. 135. The defendant was held guilty of contempt when he refused to testify before a committee of the Senate which was seeking information as a basis for law making. For a thorough review and discussion of authorities, see Landis, *Constitutional Limitations on the Congressional Power of Investigation* (1927) 40 HARV. L. REV. 153.

the question whether the President had power to pardon in case of criminal contempt, Mr. Chief Justice Taft held that the President had that power.⁷⁵ The opinion likened our executive pardoning power to the King's prerogative,⁷⁶ and also pointed out that the separation of powers doctrine could not be used as a fixed concept.

The writer has briefly traced the development of our present Federal and state doctrines governing actions for contempt against those making improper public comment to the detriment of the judiciary and judicial proceedings. The right to punish for constructive contempts by publication was assumed by the state courts to be one of their inherent powers in the early years of this country's development. State statutes passed to eliminate this attitude of independence proved fruitless when their application was attempted a few years subsequent. The Federal Contempt Statute, enacted to remedy the evil made apparent by the *Peck-Lawless* case, has been so broadly interpreted that it has served only to emphasize the autocratic dominion of the judiciary. State statutes following in the wake of the Federal enactment met with even greater abuse, and soon proved of no avail as a restrictive force. Even the requirement that the criticism be of a pending case to be contemptuous is gradually being brushed away, the courts tending to disregard all limitations placed on their jurisdiction over contempts by the legislature. The power to punish for acts committed spatially distant from the court, a power of doubtful origin, has been slowly extended by practically all American courts in rather arbitrary fashion. The appellate courts are extremely hesitant to deny the righteousness of a lower court's citation for contempt, generally advancing the reason that they are not in as favorable a position to judge the contemptuousness of the offense, and thus do their bit to uphold the dignity and austerity of the judiciary. Though some decisions of late indicate a tendency to recognize the wise limitations of physical proximity of the act to the court

⁷⁵ *Ex parte Grossman* (1925) 267 U. S. 87.

⁷⁶ In England, since the judicial power of the state is representative of the sovereign, and since there is no constitutional division of powers, a criminal contempt is an offense against the sovereign, which he may pardon in his discretion.

and the pendency of a trial, such tendency is offset by a grim determination apparent in other cases that the judiciary shall not be subjugated to the desires of any public agency or influence. Two conflicting forces, each affected with a public interest, must be given careful consideration. If the public may override the courts and sap their strength to the degree that their independence no longer obtains, then the institution of legitimate trial will gradually wither away. But if the courts may so arbitrarily hold themselves aloof from reproach that the popular conception of justice is not at all considered, then democracy must merge into autocracy. Of the two, this is the graver danger.