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Summary Procedure and Punishment for Direct Contempt

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In a strong dissent, Justice Johnston decrys the attitude of the majority in giving legal significance to words which also have a non-legal meaning, which latter was very much more probably the meaning intended by the parties.[50]

It may be that the parties worked out some equitable resolution of their difficulties. A motion for leave to appeal to the Court of Appeals was granted[51] but there is no record of a disposition of the case on appeal.

In the fields of relations of private parties, the almost invariable rule is that a war is over when the shooting stops. In the fields of relations with government and with rights and duties created by federal statute, a war is over when it is declared over by some action of the legislative or executive departments.

Perhaps the care exercised in the drafting of war powers legislation during World War II is in a measure responsible for the comparatively few cases which have gone up on appeal since World War II on the question of termination of the war. Most war power legislation made specific provision for the duration of its effectiveness and for its termination by resolution of congress or proclamation by the president.

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SUMMARY PROCEDURE AND PUNISHMENT FOR DIRECT CONTEMPT

A recent United States Supreme Court case[1] presented the question as to whether or not a summary conviction and punishment for direct contempt constituted a violation of due process. In a 5 to 4 decision the Court held, that from the facts of the case, it did not, but they indicated that certain conduct of a judge might make a subsequent summary proceeding for contempt against an attorney a violation of due process.[2] The dissent was united in the belief that the actions of the judge constituted a violation of due process.[3] Thus appears a recognition that, under certain circumstances, such a summary proceeding will constitute a violation of due process. This article will attempt to outline and analyze the justifications advanced for allowing the court to exercise such broad and arbitrary powers.

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50. Id. at 333.
51. 272 App. Div. 909, 72 N.Y.S. (2d) 411 (2nd Dept. 1947).
1. Fisher v. Pace, 336 U.S. 155, 69 Sup. Ct. 425 (1949).
2. "We cannot say . . . that mildly provocative language from the bench puts a constitutional protection around an attorney so as to allow him to show the contempt for judge and court manifested by this record . . ." Id. 69 Sup. Ct. at 428.
3. Justices Douglas and Black attacked the decision first on the ground that it was a violation of freedom of speech, but concluded, "This lawyer was the victim of the pique and hotheadedness of a judicial officer who is supposed to have a serenity that keeps him above the battle and the crowd. That is as much a perversion of the judicial function as if the judge who sat had a pecuniary interest in the outcome of the litigation." Id. 69 Sup. Ct. at 430.

Contempts appear to be divided into four classifications; i.e., direct or constructive,[4] and criminal or civil.[5] Criminal contempts can be either direct or constructive,[6] but it would appear, from the nature of civil contempt, that it could only be constructive. Due process requires, in the case of a constructive contempt, that notice and a fair hearing be afforded the alleged contemnor.[7] Thus, this article will be confined to summary proceedings for direct contempts.

Arriving at an exact and all inclusive definition of due process is difficult, if not impossible. Generally, "It has been said that due process of law must be understood to mean law in the regular course of administration through courts of justice according to those rules and forms which have been established for the protection of private rights. Substantially the same idea is embodied in the statement that it means law according to the settled course of judicial proceedings or in accordance with natural, inherent, and fundamental principles of justice, enforceable in the usual modes established in the administration of government with respect to kindred matters."[8] The test as to what constitutes a violation of due process has been expressed by the United States Supreme court in these words, " . . . the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[9] Due process appears to be composed of certain essential elements: (1) notice,[10] (2) a hearing,[11] (3) an opportunity to defend,[12] (4) an orderly proceeding,[13] and (5) jurisdiction.[14] It would appear that an absence of any one of these elements would be a deprivation of due process.

The question is now directly presented as to whether or not summary

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4. " . . . a direct contempt is one committed within the presence of the court while in session, or so near to the court as to interrupt its proceedings. Whenever there is doubt as to the character of the alleged contempt . . . the doubt should be resolved in favor of it being constructive . . ." Ex Parte Hennies, 33 Ala. App. 377, 34 So. (2d) 22, 25 (1948).
5. "Proceedings for contempts are of two classes,—those prosecuted to preserve the power, and vindicate the dignity, of the courts, and to punish for disobedience of their orders; and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court had found them to be entitled." The former are criminal—the latter are civil. In Re Nevitt, 117 Fed. 448, 458 (C. C. A. 8th 1902); Nye v. United States, 313 U. S. 33, 61 Sup. Ct. 810, 85 L. Ed. 1172 (1941).
6. See note 4 supra.
7. In Re Oliver, 333 U. S. 257, 68 Sup. Ct. 499, 92 L. Ed. 491 (1948); Cooke v. United States, 267, U. S. 517, 45 Sup. Ct. 390, 69 L. Ed. 767 (1925); Ex Parte Savin, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150 (1889).
8. 12 Am. Jur., sec. 571 and cases cited therein.
9. Nebbia v. New York, 291 U. S. 502, 54 Sup. Ct. 505, 510, 78 L. Ed. 940, 89 A. L. R. 1469 (1934).
10. Snyder v. Commonwealth of Mass., 291 U. S. 97, 54 Sup. Ct. 330, 78 L. Ed. 674, 90 A. L. R. 575 (1934); Powell v. Alabama, 287 U. S. 45, 53, Sup. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527 (1932); Chicago v. Cohn, 326 Ill. 372, 158 N. E. 118, 98 Am. St. Rep. 724, 55 A. L. R. 196 (1927).
11. See note 10 supra.
12. George Moore Ice Cream Co. v. Rose, 289 U. S. 373, 53 Sup. Ct. 620, 86 A. L. R. 298 (1933); Chicago v. Cohn, supra note 10.
13. Powell v. Alabama, supra note 10; Chicago v. Cohn, supra note 10.
14. See note 13 supra.

punishment for a direct contempt is a violation of due process. It is almost universally held that such procedure does not constitute due process.*15* The exercise of this power is upheld on the basis that it is an inherent power necessary to the preservation of the dignity and power of the court and for the protection of society.*16* Thus, from the statement that the power to punish direct contempts is inherent and necessary, the courts conclude that such proceedings are not a violation of due process. It is apparent that such proceedings deny the accused his right to a hearing and the opportunity to defend—essential elements of due process.*17* The Supreme Court of Wisconsin appeared to recognize this when it said, "It may be conceded that this method of dealing with direct contempt is an anomaly in our law, which guarantees due process of law. However, it grows out of necessity and is deemed essential, in order to enable courts to preserve their existence and power and to confer upon society the rights which they are instituted to protect."*18* Thus, even though recognizing that such proceedings are incompatible with our concepts of due process, the court applies the argument of necessity and retains an arbitrary power diametrically opposed to our views of personal liberty.*19* Yet, even though the argument that a power is inherent and necessary is urged in behalf of another governmental exercise of power, it may be stricken down as a violation of due process.

It appears that some courts have recognized that such summary proceedings are a violation of due process. Thus, the Supreme Court of Illinois has held, in a case in which a witness was adjudged to be in contempt and sentenced to one year's imprisonment for his refusal to answer a question because it would tend to incriminate him, that "Though the proceeding was summary, plaintiff-in-

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15. Bridges v. California, 314 U. S. 252, 62 Sup. Ct. 190, 86 L. Ed. 192 (1941); Bevan v. Krieger, 289 U. S. 459, 53 Sup. Ct. 661, 77 L. Ed. 1316 (1933); Cooke v. United States, 267 U. S. 517, 45 Sup. Ct. 390, 69 L. Ed. 767 (1925); Toledo Newspaper Co. v. United States, 247 U. S. 402, 38 Sup. Ct. 560, 62 L. Ed. 1186 (1918) overruled on other grounds 313 U. S. 33; Eilenbecker v. Dist. Ct. of Plymouth County, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801 (1890); Ex Parte Savin, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150 (1889); In Re Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405 (1888); Fleming v. United States, 279 Fed. 613 (C. C. A. 9th 1922) dismissed 260 U. S. 752; Bridges v. Superior Ct., 14 Cal. (2d) 464, 94 P. (2d) 983 (1939) rev'd on other grounds 314 U. S. 252; White v. George, 195 Ga. 465, 24 S. E. (2d) 787 (1943); Levick v. State, 224 Ind. 561, 69 N. E. (2d) 597 (1946); State v. Baker, 222 Iowa 903, 270 N. W. 359 (1936) dismissed 302 U. S. 769; Rust v. Pratt, 157 Ore. 505, 72 P. (2d) 533 (1937), dismissed 303 U. S. 621; State v. Buddress, 63 Wash. 26, 114 Pac. 879 (1911).

16. Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797 (1911); In Re Terry, see note 15 supra; United States v. Landes, 97 F. (2d) 378 (C. C. A. 2d 1938); United States v. Pendergast, 35 F. Supp. 593 (W. D. Mo. 1940); Ex Parte Wetzel, 243 Ala. 130, 8 So. (2d) 824 (1942); Bridges v. Superior Ct., see note 15 supra; Evans v. State, 69 Ga. App. 178, 24 S. E. (2d) 130 (Ct. of App. 1943); White v. George, see note 15 supra; McDougall v. Sheridan, 23 Idaho 191, 128 Pac. 954 (1913); Rust v. Pratt, see note 15 supra; Rubin v. State, 192 Wisc. 1, 211 N. W. 926 (1927).

17. See notes 10, 11, 12, 13, and 14 supra.

18. Rubin v. State, see note 16 supra. 211 N. W. at 931.

19. " . . . I am unable to divest my mind of the idea that in the interest of liberty and in harmony with the genius of our government every citizen should have a right at some time and in some place to defend himself against a charge of crime, a conviction of which works a deprivation of his liberty or his property rights. . . . the considerations I have mentioned are paramount." See State v. Buddress, note 15 supra, dissenting opinion, 114 Pac. at 883.

error was entitled to a fair hearing, and an opportunity to state the facts constituting his justification, and, if necessary, to offer evidence to sustain his claim of constitutional privilege."[20] The Supreme Court of Montana also said, in a case in which the relator, an attorney, was adjudged guilty of a direct contempt for remarks made by him to the court, " . . . counsel for the relator make the point that he was not accorded an opportunity to explain or excuse his contempt and thus purge himself or show that no contempt was intended. This seems to be the better practice even in flagrant cases. *No one should be condemned without a hearing."*[21] (Italics added). Justice Frankfurter of the United States Supreme Court has said, " . . . it does not seem to me that it would be violative of due process to allow the judge-grand juror of Michigan to find criminal contempt for conduct in his proceedings without the familiar elements of an open trial, provided that the State furnishes the accused a public tribunal before which he has full opportunity to be quit of the finding. . . . an opportunity to meet a charge of criminal contempt must be a fair opportunity. It would not be fair, if in the court in which the accused can contest for the first time the validity of the charge against him, he comes handicapped with a finding against him which he did not have an adequate opportunity of resisting."[22] Thus, at least by implication, Justice Frankfurter appears to support the position that the alleged contemnor should be accorded an opportunity of a hearing and the chance to defend.

Such a position is neither new nor surprising. It seems to be in accordance with the procedure which had been adopted at common-low at the time of the Magna Charta. "With reference to the punishment of contempts committed in the face of the Court, the late Mr. Solly-Flood Q. C., who had made an elaborate study of the records, found numerous instances of such contempts dealt with according to the course of the common law by impanelling a jury *instanter,* and he came to the conclusion that the punishment by summary process of contempt committed by a stranger *in facie* was not resorted to till long after the death of Henry IV. The earlier committals for contempt *in facie,* are, he says, *ad respondendum."*[23] This conclusion is challenged by Mr. Fox who cites some twelve cases in support of his (Fox's) contrary conclusion. From these cases Mr. Fox forms the opinion that, "These authorities make it clear that from the reign of Edward I it was established that the Court had power to punish summarily contempt committed by a stranger in the actual view of the Court."[24] This conclusion is a far cry from the courts' contention that they have the *inherent* power to punish for direct contempts. The results of Mr. Solly-Flood's labors also cast considerable doubt upon the validity of the contention made by the courts that such power is necessary. It is apparent that the courts of that day and age were proceeding to carry out their business without using such summary

20. People v. Zazove, 311 Ill. 198, 142 N. E. 543 (1924).
21. State ex rel, Rankin v. Dist. Ct., 58 Mont. 276, 191 Pac. 772 (1920).
22. See In Re Oliver, 333 U. S. 257, 68 Sup. Ct. 499, 513, 92 L. Ed. 491 (1948) (dissenting opinion).
23. Fox, Contempt of Court 50 (1927).
24. Id. at 52.

procedures. That the method used by them for the determination and punishment of direct contempts was crude, cumbersome and time consuming is also undoubted. It seems, however, that this method was better designed to preserve the individual's personal liberty than our speedy method of summary procedure wherein the judge, who, it must be remembered, has not been turned into a paragon of virtue merely by his success in having himself elected or appointed to the bench, determines whether the court's dignity has been sullied and then hands down a fine or sentence of committal to vindicate the dignity of the court. The Minnesota Supreme Court has said, "The unusual and arbitrary power incident to the common idea of a judge trying his own case should be exercised cautiously, and only in the maintenance of the dignity of the court and the unfettered administration of justice."*25* This statement seems to touch the nub of the problem—the court is not a separate, ideal entity, but it is the judge, who is merely a human being subject to the passions and prejudices to which we are all prey. Thus, as in the instant case, it is the judge vindicating by fine or imprisonment his own injured feelings and dignity. That such a system should lead to arbitrary, unreasonable, and capricious results is patent.

It is submitted that summary proceedings for the punishment of a direct contempt which afford no hearing and no opportunity to defend are, at best, inconsistent with the philosophy of personal freedom upon which our government is founded. Such proceedings often end in glaringly unfair results.*26* It is indeed an anachronism that at the present time, in the midst of the solicitude for personal liberties which the national Supreme Court has been exhibiting,*27* it should cold shoulder such liberties in a case so appealing as the instant one. It would appear that the courts' dignity might be upheld in another manner which would, at the same time, tend to preserve the liberty of the alleged contemnor and afford him due process. Such a method might be that indicated by the Courts of Illinois and Montana and that followed by the common-law courts as indicated by the research of Mr. Solly-Flood.*28* It is further submitted that the argument of the courts that the power is inherent and necessary is, at its best, weak and unconvincing, and, that even if the argument be true, that the power can be exercised

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25. See In Re Cary, 165 Minn. 203, 206 N. W. 402, 404 (1925) (dissenting opinion).

26. Bevan v. Krieger, 289 U. S. 459, 53 Sup. Ct. 661, 77 L. Ed. 1316 (1933) (where it was held that even though a notary public is not a judicial officer, he has the power to commit summarily upon the refusal of a witness to answer questions upon the taking of a deposition and such procedure is not a violation of due process); Fleming v. United States, 279 Fed. 613 (C. C. A. 9th 1922) (where, in answering charge of criminal libel, plaintiff-in-error asked for a change of venue and read a supporting affidavit charging the judge with prejudice, being a member of a conspiracy against plaintiff-in-error and being guilty of embezzlement which plaintiff-in-error had asked to be investigated; held, that the judge could summarily sentence for contempt without giving plaintiff-in-error a chance to prove the truth of his allegations); Fisher v. Pace, 336 U. S. 155, 69 Sup. Ct. 425 (1949) (instant case).

27. See for example: Watts v. Ind., —U. S.—, 69 Sup. Ct. 1347 (1949); Turner v. Pa., —U. S. —, 69 Sup. Ct. 1352 (1949); Harris v. So. Car., —U. S. —, 69 Sup. Ct. 1354 (1949); Terminiello v. Chicago,—U. S. —' 69 Sup. Ct. 894 (1949); Upshaw v. United States, 335 U. S. 410, 69 Sup. Ct. 170 (1949); Thornhill v. Ala., 310 U. S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093 (1940).

28. See notes 20, 21 and 23 supra.

so as to preserve the requirements of due process. Justice Rutledge of the United States Supreme Court, appears to have summed up the situation quite nicely when he said, " . . . restrictions upon authority for securing personal liberty, as well as fairness in trial to deprive one of it, are always inconvenient—to the authority so restricted."[29]

JACK D. JONES.

LIABILITY OF A CAR OWNER FOR A THIEF'S NEGLIGENCE

An interesting question of tort liability arises when an automobile owner, upon parking his car, fails to remove the keys from the ignition, the car is stolen, and the thief subsequently negligently injures a third party. Should the car owner be held liable to the third party for his carelessness in failing to take adequate precautions against the theft of his car?

In answering this question, the courts have shown little agreement, in either approach or solution to the problem. In general, decisions have been rendered on the basis of proximate cause, emphasizing intervening factors, or a duty owed by the car owner to the third party, usually legislatively imposed. Courts talking in terms of proximate cause have ordinarily denied recovery from the defendant, often holding that the theft and later negligence of the thief were intervening factors, breaking the casual connection between the owner's original negligence and the plaintiff's injury.[1] The Minnesota court has held that the plaintiff could not recover because his injury was too far removed in time and place from the scene of the theft,[2] suggesting directness of harm as a test for proximate cause. In none of these decisions did the courts look to the applicable statute or ordinance prohibiting leaving ignition keys in a parked auto, in defining the extent of the defendant's liability.

In the absence of statutes or ordinances prohibiting such conduct, courts have also used proximate cause extensively. Two New York decisions,[3] without elaborating, held that the plaintiff's injury was not proximately caused by the defendant's negligence. In contrast is a 1944 District of Columbia decision,[4] unusual in that it is the only case to have held, without citing a statute, that the question of defendant's negligence and whether it was the proximate cause of the plaintiff's injury, should be submitted to the jury.

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29. See In Re Oliver, 333 U. S. 257, 68 Sup. Ct. 499, 511, 92 L. Ed. 491 (1948) (concurring opinion).
1. Galbraith v. Levin, 81 N.E. (2d) 560 (Mass., 1948); Sullivan v. Griffin, 318 Mass. 359, 61 N.E. (2d) 330 (1945); Slater v. T. C. Baker Co., 261 Mass. 424, 158 N. E. 778 (1927); Squires v. Brooks, 44 App. D.C. 320 (1916), cited 3-3 Decennial Digest 939 (1926).
2. Wannebo v. Gates 227 Minn. 194, 34 N.W. (2d) 695 (1948).
3. Walyer v. Bond, 292 N.Y. 574, 54 N.E. (2d) 691 (1944); Wilson v. Harrington, 295 N.Y. 667, 65 N.E. (2d) 101 (1946).
4. Schaff v. R. W. Claxton, Inc., 79 App. D.C. 320, 144 F. (2d) 532 (1944).