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Summary Proceedings in Direct Contempt Cases

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NOTE

Summary Proceedings in Direct Contempt Cases

While I was busy for the common wealth,
Your highness pleased to forget my place,
The power and majesty of the law and justice,
The image of the king whom I presented,
And struck me in my very seat of judgement,
Whereon, as an offender to your father,
I gave bold way to my authority,
*And did commit you . . . .**

Henry IV, part ii, act v, scene 2

I. Introduction

That the "power and majesty" of the law, personified by the court and its decrees, could not be lightly brushed aside even by a prince was a settled fact by the time of Shakespeare; it remains so today. But the *proceedings* by which such an offense may be punished is another matter. At the present time a large number of contempts are disposed of by summary proceedings. It was not always so, and recently a number of highly respected judges and writers have begun to argue that the practice should be discontinued. This revival of interest is the *raison d'etre* of this note; it is devoted to considering the history, contemporary status, advantages and disadvantages of summary proceedings in direct contempt cases.

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* This excerpt is from Shakespeare's apocryphal sequel to the legendary tale of Prince Henry of Monmouth's contempt of court. A servant of Prince Henry had been brought before the court on a charge of felony. The prince, incensed with idea that a court would dare to touch even a servant of his, charged into court and argued valiantly but vainly for the servant. Enraged at his futility, he culminated the argument by striking (or so Shakespeare says) Chief-Jnstice Gascoigu, who immediately committed him for contempt. In Shakespeare's sequel, Henry IV has died, and Prince Henry ascends to the throne. The Chief-Justice, quaking with fear at the thought that his previous contemnor is now the king, converses with Henry V. Henry V, however, seeing the necessity of the contempt power even as to a prince, thanks the Chief-Justice for his zeal and courage, and encourages him to commit any sons of his if they have the audacity to tread the rebellious path of their father. Although some hold the story to be true, Mr. Solly-Flood has effectively demolished the authenticity of this rather amusing historical anecdote. Solly-Flood, *The Story of Prince Henry of Monmouth and Chief-Justice Gascoign,* 3 Transactions of the Royal Historical Soc'y (n.s.) 47 (1886). For another contempt by a famous historical personage, see Deutsch, *The United States Versus Andrew Jackson,* 46 A.B.A.J. 966 (1960).

Contempts of court are generally classified into the following groups:[1]

Civil Contempt.—This type of contemptuous act is the failure of a party in a civil action to carry out a decree of the court made for the benefit of the contemnor's opponent. The failure to obey the court's order is treated as contempt primarily for the purpose of making available the court's *coercive* power to the opposing party.

Criminal Contempt.—Such an act is generally the result of some *active* disrespect of the court, whereas civil contempt usually involves only the *passive* failure to obey the court. Criminal contempt is punished primarily to vindicate the authority of the court, being *punitive* in nature.

This classification is concededly rather vague and overlapping,[2] and one further distinction need be made between *direct* and *indirect* (also known as "constructive" or "consequential") contempt. The former is contempt committed "in the immediate view and presence of the court (such as insulting language or acts of violence) or so near the presence of the court as to obstruct or interrupt the due and orderly course of proceedings."[3] The latter involves conduct not in the presence of or near the court, but which nevertheless tends to obstruct or defeat the administration of justice (*e.g.*, abusive criticism of the judge made outside the court room tending to influence the result of a pending trial).

The term "summary proceedings" in its most restricted use involves the idea of a proceeding without a jury. As used in this note the term has a broader meaning: a proceeding which is "immediate, peremptory; off-hand; without a jury; provisional."[4]

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1. For a brief but excellent discussion of the various classifications of contempt, see THOMAS, PROBLEMS OF CONTEMPT OF COURT 2-3 (1934). He makes the point that, while contempt may be simply defined as "disregard of the authority of the court," this or any other definition of the term is more or less meaningless unless the definition be applied to the various acts which have been held to constitute contempt of court. *Id.* at 1.

Fox says that "no better concise definition of 'contempt of court' can be found than that given in the New English Dictionary: 'Any disobedience of the rules, orders or process of a court, whether committed by an inferiour court, by the servants of the court or officers of the law or by strangers, and any disrespect or indignity offered to the judges in their judicial capacity within or without the court.'" Fox, *The Nature of Contempt of Court*, 37 L.Q. REV. 191-92 (1921). See the more extensive definition of contempt of court which Fox cites with approval, *id.* at 192. Fox traces the term "contempt of court" from the phrase *"Contemptus Couriae,"* first used about the year 1187. Fox, *The Practice in Contempt of Court Cases*, 38 L.Q. REV. 185 (1922). See generally Mosk, *Direct Contempt*, 31 CALIF. S.B.J. 510 (1956) for an ofttimes humorous discussion of the various elements of direct contempt.

2. For an excellent example of a situation where the classification of the various contempts is difficult, see Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911). See Green, *Equity—1957 Tennessee Survey*, 10 VAND. L. REV. 1095, 1097-98 (1957).

3. BLACK, LAW DICTIONARY (4th ed. 1951). Fox recounts an amusing case of direct contempt by egg-throwing. Fox, *The Practice in Contempt of Court Cases*, 38 L.Q. REV. 185-86 (1922).

4. BLACK, LAW DICTIONARY (4th ed. 1951). The United States Supreme Court

II. History

A. England

For many years a number of English and American courts have justified their use of the contempt power by referring to "immemorial usage."[5] The concept that contempt power was exercised in summary proceedings by the earliest English courts was promulgated in this country in *Blackstone*, which was widely read and accepted by judges and lawyers of the colonial period.[6] Blackstone's statement was that summary proceedings had been "immemorially used" to punish both direct and consequential contempts.[7]

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explained the term "summary" as used in FED. R. CRIM. P. 42(a) as follows: "We think 'summary' as used in this Rule does not refer to the timing of the action with reference to the offense but refers to a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial." Sacher v. United States, 343 U.S. 1, 9 (1952).

5. *In re* Debs, 158 U.S. 564, 594 (1895); Pass v. State, 181 Tenn. 613, 617, 184 S.W.2d 1, 2 (1944); State v. Buddress, 63 Wash. 26, 114 Pac. 879, 881 (1911); State *ex rel.* Radd v. Verage, 177 Wis. 295, 187 N.W. 830, 840 (1922). "[T]he right of trial by jury . . . existed at common law, by immemorial usage, in harmony with the power of the courts to punish for contempts by attachment, each applying to its appropriate class of cases . . . ." State v. Morrill, 16 Ark. 384, 400 (1855).

6. "Blackstone was widely known to the colonials, so that even a misstatement by him would shed light on the possible intent of the [Constitutional] Convention." Comment, 57 MICH. L. REV. 258, 261 (1958). "The meagreness of American law libraries contributed, of course, to account for the almost Scriptual authority of Blackstone in our early law." Nelles & King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401, 405 n.25 (1928). That this infatuation with Blackstone was not unanimous is proposed by Warren, when he states that the older colonial lawyers agreed with Lord Eldon's statement that "at present, lawyers are made good, cheap, by learning law from *Blackstone* and less elegant compilers. Depend upon it, men so bred will never be lawyers . . . ." WARREN, A HISTORY OF THE AMERICAN BAR 175 (1911).

7. 4 BLACKSTONE, COMMENTARIES *283-84. "To this head of summary proceedings may also be properly referred the method, immemorially used by the superior courts of justice, of punishing contempts by *attachment*, and the subsequent proceedings thereon. The contempts that are thus punished are either *direct*, which openly insult or resist the powers of the courts or the persons of the judges who preside there, or else are *consequential*, which (without such gross insolence or direct opposition) plainly tend to create a universal disregard of their authority." Blackstone goes on to say that for contempts committed in the face of the court, the offender could be instantly apprehended and imprisoned. For other contempts, the judge, upon affidavit, either made a rule on the suspected party to show cause or, in flagrant cases the court brought the offender directly into court and put interrogatories to him. If the party could swear on his oath that he was innocent, he was discharged. See Curtis, *The Story of a Notion in the Law of Criminal Contempt*, 41 HARV. L. REV. 51 (1927). If he lied, he could be committed for perjury. If he confessed the acts, or refused to answer, the court immediately sentenced him. 4 BLACKSTONE, *op. cit. supra* at *286-87. Blackstone, though holding this procedure to be of "immemorial usage," gave a clue to his personal opinion, especially as to interrogatories, when he said that "this method of making the defendant answer upon his oath to a criminal charge is not agreeable to the genius of the common law in any other instance . . . ." *Id.* at *287.

While the basis for his statement has never been satisfactorily explained, a convincing argument concerning Blackstone's sources has been advanced by Sir John Fox in his scholarly and detailed articles on the history of contempt of court in England.[8] Fox contends that Blackstone based his statement on the opinion in *Rex v. Almon*,[9] written by Justice Wilmot. The case involved a libelous pamphlet written by Almon impugning the judicial integrity and motives of Lord Maisfield, who had been dealing rather sharply with the right of juries and the liberty of the press.[10] Wilmot, perhaps influenced by his friendship with Maisfield,[11] wrote the judgment in favor of granting the attachment against the libelor-contemnor, Almon. The following extract reveals the general tenor of the decision:

> The power which the Courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a neccssary incident to every court of justice, whether of record or not, to fine and imprison for a contempt to the court, acted in the face of it . . . and the issuing of attachments by the supreme courts of justice in Westminster Hall for contempts out of court stands upon the same immemorial usage as supports the whole fabric of the common law . . . .[12]

Because of a procedural delay, the case was continued until a new set of ministers decided to drop the matter.

The judgment, written in 1765, was never delivered; it was, however, published in 1802, ten years after Wilmot's death. Although this publication occurred several years after Blackstone finished his work, the judgment was nevertheless a very probable basis for his statements, since he had received it in correspondence with his friend Wilmot.[13] Thus it has been said that

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8. These articles, which will be cited and referred to frequently, have been accepted by the experts as correctly expounding the true history of contempt of court in England, especially as to summary procedure. For a variety of authors who have incorporated Fox's articles into their own work, see THOMAS, PROBLEMS OF CONTEMPT OF COURT 8-9 (1934); Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempt in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1042-47 (1924); Nelles & King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401, 408 (1928).

9. Wilmot's Notes 243 (1765) (undelivered opinion).

10. Fox, *The King v. Almon*, 24 L.Q. REV. 184, 187 (1908).

11. *Ibid.*

12. Excerpt from Rex v. Almon, Wilmot's Notes 243, 254 (1765), quoted in Fox, *supra* note 10, at 185-86.

13. Although the fourth volume of Blackstone's *Commentaries* (in which his views on summary proceedings in contempt cases are stated) was published in 1769, 33 years before *Rex v. Almon* appeared, Fox relates that Wilmot had written the decision in 1765 and that Blackstone had submitted the proofs of part of this volume to Wilmot. Fox, *supra* note 10, at 193 n.4. From this Fox concluded that Blackstone's statements on summary procedure in contempt cases (see note 7 *supra*) were based on *Rex v. Almon*.

"the present scope of the summary power is due almost exclusively to the opinion of one man."[14]

This opinion, however, was based on a questionable foundation, for, as Wilmot himself said, "I have examined very carefully to see if I could find out any vestiges or traces of its [summary proceeding's] introduction but can find none."[15] From this Wilmot draws the conclusion, apparently a *non sequitur*, that such proceedings are "as ancient as any other part of the common law."[16] Fox takes issue with this case and painstakingly cites a plethora of decisions at odds with Wilmot's conclusions.[17] In discussing the case,[18] he draws the distinction between contempt committed *in facie* and contempt committed out of the presence of the court.[19] Fox argues that historical precedents would better justify summary procedure in direct contempt cases than in indirect contempt proceedings. He cites several early English cases of direct contempt in which the proceedings were in the ordinary course of law, that is, by bill, information, indictment, or presentment;[20] however, after the fifteenth century, Fox concludes that a distinction was recognized between direct and indirect contempts[21] and that the former was punished summarily.[22] Solly-Flood, an earlier writer, has come to the following conclusion:

> [N]o instance whatever has yet been found in any of those rolls or in the year-

14. THOMAS, *op. cit. supra* note 8, at 5.

15. Excerpt from Rex v. Almon, Wilmot's Notes 243, 254 (1765), quoted in Fox, *supra* note 10, at 186.

16. *Ibid.*

17. Fox, *The King v. Almon*, 24 L.Q. REV. 266-68 (1908); Fox, *The Summary Process To Punish Contempt*, 25 L.Q. REV. 238, 242-44 (1909). "There is certainly ground for belief that in early times even contempts committed *in facie* by strangers were punished, like other trespasses, only after trial in the ordinary course, and not by summary committment." Fox, *The Writ of Attachment*, 40 L.Q. REV. 43, 57 (1924).

18. It must be kept in mind at this point that Wilmot's judgment was in reference to a person accused of indirect, or constructive, contempt. His opinion, however, would seem to apply to both constructive and direct contempts, summary proceedings being applicable to both in order to keep a "blaze of glory" round the judge. "[T]he Principle upon which Attachments issue for Libels upon Courts, is of a more enlarged and important nature,—it is to keep a *blaze of Glory* around them, and to deter people from attempting to render them contemptible in the eyes of the public." Wilmot's Notes 243, 270 (1765), quoted in Frankfurter & Landis, *supra* note 8, at 1048. (Emphasis added.) Frankfurter and Landis *query*: "Can it be that 'the blaze of Glory' meet for Tory judges of George III is to be kept forever burning by the Constitution of the United States?" *Id.* at 1048.

19. Fox, *The Writ of Attachment*, 40 L.Q. REV. 43, 57 (1924).

20. See note 17 *supra*. Fox, however, says that at least some of these cases may be explained by the fact that the phrase, "in the presence of the justice," was broadly construed to mean "in the precinct of the court." Therefore, in many of these cases the contempt "in the presence of the justice" quite probably was within the judge's "constructive" presence, as opposed to his actual presence. Fox, *The Summary Process To Punish Contempt*, 25 L.Q. REV. 238, 244 (1909).

21. "By the reign of Henry VI a clear distinction was drawn between contempts committed in Court and out of Court." Fox, *supra* note 19, at 57.

22. Fox, *supra* note 20, at 244.

> books of any committal *in penam* by the Court of King's Bench in a summary manner, and without indictment, presentment, information, or arraignment for contempt, committed even in its presenee, up to a considerable period after the death [1413] of Henry IV.[23]

So it is apparent that sunmary punishment was not extant in England until the fourteenth or fifteenth century. From this period on, punishment for contempt in the presence of the court was dealt with summarily.

As for indirect contempt, the historical roots of summary proceedings are not so deep. With the advent of the Star Chamber[24] and its corrupt practices, the use of summary proceedings for contempts other than those committed in the presence of the court was begun.[25] In this court such "indirect" acts as "seditious libel"[26] were punishable summarily, often with great injustice. In addition, contempts of *other* courts were punishable here.[27] Though popular at first, the Star Chamber soon fell into general disfavor and was abolished in 1641.[28] But "the atmosphere of corrupt and arbitrary practices which it had generated partly survived."[29] The common law courts' procedure slowly became infused with the summary process, culminating in that most famous of undelivered opinions, *Rex v. Almon,* mentioned above.

B. United States

This decision has "bedevilled the law of contempt both in England and in this country ever since."[30] Though no specific provision in the federal

23. Solly-Flood, *The Story of Prince Henry of Monmouth and Chief-Justice Gascoign,* 3 TRANSACTIONS OF THE ROYAL HISTORICAL SOC'Y (n.s.) 47, 147-50 (1886). Speaking of the records of all the known cases of contempt which came before the King's Bench, except for the *Year-books,* Solly-Flood states that "from the time of Magna Charta *to the death of Henry* V. [1422], . . . not one [of these cases] was dealt with otherwise than according to the course of the common law, i.e. by action, information, presentment, or indictment." *Id.* at 147 n.1. (Emphasis added.) See at this same reference a chart of these contempt cases.

24. This court consisted of certain members of the King's Privy Council. It had extensive civil and criminal jurisdiction and sat without the intervention of a jury. Among its punishments were numbered imprisonment, fine, pillory, whipping, branding, mutilation, torture, but never death.

25. For a general discussion of the relation of the Star Chamber to summary proceedings, see Frankfurter & Landis, *supra* note 8, at 1045-47; Fox, *The King v. Almon,* 24 L.Q. REV. 266, 271-78 (1908).

26. Seditious libel is defined briefly as the publication of any words or document with a seditious intention; seditious intention is defined as "an intention to bring into hatred or contempt, or to exeite disaffection against the King [Queen] or the government and constitution of the United Kingdom . . . ." DICEY, THE CONSTITUTION 243-44 (9th ed. 1956). Such conduct is clearly not within the presence of the court and is exemplary of the expansion of the application of summary proceedings under this court.

27. Fox, *supra* note 25, at 272. This was another significant extension of the scope of conduct to which summary proceedings were applied.

28. Act for the Abolition of the Star Chamber, 16 Car. 2, c. 10.

29. Frankfurter & Landis, *supra* note 8, at 1045.

30. *Id.* at 1047.

constitution provides for summary proceedings in contempt cases,[31] the colonies were generally inclined to follow Blackstone's statement of the law.[32] The earliest direct mention of the contempt power is found in the Judiciary Act of 1789.[33] Under this act, the occasions for the exercise of the power thus conferred were not defined.[34] The discretion thereby left in the federal judge was at times abused. In 1824 and 1825, one Luke Lawless had prosecuted the claims of several hundred land claimants under the Louisiana Purchase. After Judge James H. Peck rendered an opinion fatal to the mass of unconfirmed claims, Lawless published in a newspaper an ingenuously contrived "concise statement." This statement subjected the court to contumely and promoted sympathy for the land claimants, making fair and impartial juries unobtainable in the case. After four days of heated argument with Lawless, Peck sentenced him to one day's imprisonment and suspended him from practice for eighteen months. Lawless immediately petitioned Congress for Peck's impeachment. The House of Representatives brought articles of impeachment against Peck, and the Senate, after a trial[35] which consumed the greater part of the session of 1830-31, voted 22-21 against conviction.[36] In order that this vote might not be improperly construed as favoring Peck's action, Congress then passed the Act of March 2, 1831. This statute permitted summary proceedings only in cases of disobeyance of a writ of the court; misbehavior in the face of the court, or so near thereto as to obstruct the administration of justice; or the misbehavior by officers of the court in their official transactions.[37]

31. See Comment, 57 MICH. L. REV. 258, 260-63 (1958).

32. See note 6 *supra*.

33. "*And be it further enacted*, that all the said courts of the United States shall have power to . . . punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same . . . ." Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83.

34. Frankfurter & Landis, *supra* note 8, at 1024; Savin, Petitioner, 131 U.S. 267, 275-76 (1889).

35. At this impeachment proceeding the prosecution and defense combined to give the most thorough and detailed exposition of the law, history and policy of contempt proceedings ever made. "In the whole history of the subject there has never . . . been a stronger case for punishment for a publication derogatory to the court than against Lawless, or a better defence of punishment than Judge Peck's." Nelles & King, *supra* note 8, at 547. For a full account and record of this proceeding, see STANSBURY, REPORT OF THE TRIAL OF JUDGE PECK (1833). For law review treatment of the incident, see Nelles & King, *supra* note 8, at 423-31; Frankfurter & Landis, *supra* note 8, at 1024, 1027. See also Nye v. United States, 313 U.S. 33, 45-48 (1941); THOMAS, *op. cit. supra* note 8, at 25-27.

36. Thomas relates that Peck's acquittal despite the strong opposition to his act may be explained by the judge's age and infirmities, the party and intra-party considerations of the day, and the hostility between President Jackson and House Manager Buchanan. THOMAS, *op. cit. supra* note 8, at 27.

37. "[T]he power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the mis-

This act therefore limited summary proceedings in criminal contempt cases to acts of direct contempt, plus acts in disobeyance of the court's writ. Subsequently, most of the states enacted their own statutes limiting the summary power,[38] generally in regard to out of court publications.

In 1918, in *Toledo Newspaper Co. v. United States*,[39] the Supreme Court construed the Act of 1831 to be merely declaratory of the common law power to punish for contempt;[40] therefore a federal judge was not prohibited from summarily holding a newspaper in contempt for an out-of-court statement attacking his official integrity. Justice Holmes dissented on the ground that such conduct did not call for a resort to summary proceedings.[41] In this way was born a new means by which the federal courts could sidestep legislation limiting their contempt power. Almost a quarter of a century later the Supreme Court overruled the *Toledo* case in *Nye v. United States*;[42] there it was held that the statute of 1831 was *intended to limit* the summary power of the federal courts in indirect contempt cases[43] and that this limitation was dependent upon the *geographical*, rather than the *causal* proximity of the contemptuous conduct.[44] Parenthetically, it must be kept in mind that the two cases were concerned with summary proceedings only as they were applicable to *indirect* contempts. The Court in both cases apparently assumed that such proceedings were entirely proper in cases of direct contempt. Summary proceedings in indirect contempt cases, however, were severely limited.

III. FEDERAL STATUTES ON CONTEMPT

In addition to the Act of 1831, several federal statutes have in varying degrees concerned themselves with the problem of summary proceedings in contempt cases.

The Clayton Act,[45] passed in 1914, guarantees the right to a jury trial

behavior of any of the officers 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." Act of March 2, 1831, ch. 99, § 1, 4 Stat. 487.

38. "So deeply did the Peck case stir the country that State after State copied the new Federal law." Frankfurter & Landis, *supra* note 8, at 1027.

39. 247 U.S. 402 (1918).

40. "[T]he provision conferred no power not already granted and imposed no limitations not already existing. In other words, it served but to plainly mark the boundaries of the existing authority resulting from and controlled by the grants which the Constitution made and the limitations which it imposed." *Id.* at 418.

41. Justice Holmes was not opposed to summary punishment per se. "I would go as far as any man in favor of the sharpest and most summary enforcement of order in Court and obedience to decrees, but when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts." *Id.* at 425-26.

42. 313 U.S. 33, 52 (1941).

43. *Id.* at 47-48.

44. *Id.* at 48.

45. Ch. 323, §§ 21, 22, 24, 38 Stat. 738, 739. These provisions of the Clayton Act

upon demand where the contemptuous act is also a crime under any federal or state law. The word "crime," meaning in this sense a common law or statutory crime, must be distinguished from "criminal contempt." That is, out of the broad expanse of criminal contempts, this statute carves out all those acts which would be a crime in themselves and declares that for such an act a jury trial may be obtained upon demand. This provision, however, applies only to indirect contempts, excluding direct contempts and contempts committed in any action brought by the United States.

Analogously, the Norris-LaGuardia Act,[46] passed in 1932, guarantees the right to a jury trial for contempts involving injunctions in labor disputes. Once again direct contempts are excluded.

One other pertinent statute is the Civil Rights Act of 1957.[47] By it, a judge has the discretion to try without a jury any criminal contempt arising

now partly appear as 18 U.S.C. §§ 402, 3691 (1958). "§ 3691. *Jury trial of criminal contempts.* Wherever a contempt charged shall consist in wilful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to a trial by jury, which shall conform as near as may be to the practice in other criminal cases. This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States." These provisions were upheld in Michaelson v. United States *ex rel.* Chicago, St. P., M. & O. Ry., 266 U.S. 42 (1924).

46. Ch. 90, § 11, 47 Stat. 72. This section is presently partly codified in 18 U.S.C. § 3692 (1958). "§ 3692. *Jury trial for contempt in labor dispute cases.* In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed. This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders or process of the court." In United States v. United Mine Workers, 336 U.S. 258 (1946), the Court held that this section was not intended by Congress to apply to disputes in which the Government was an employer-litigant. See also Green v. United States, 356 U.S. 165 (1958).

47. 71 Stat. 638, 42 U.S.C. § 1995 (1958). "In all cases of criminal contempt arising under the provisions of this Act, the accused upon conviction shall be punished by fine or imprisonment or both . . . *Provided further*, That in such proceeding for criminal contempt, at the discretion of the judge, the accused shall be tried with or without a jury: *Provided further, however*, That in the event such proceeding for criminal contempt be tried before a judge without a jury and the sentence of the court upon conviction is a fine in excess of the sum of $300 or imprisonment in excess of forty-five days, the accused in said proceeding, upon demand therefor, shall be entitled to a trial de novo before a jury, which shall conform as near as may be to the practice in other criminal cases. This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct, or disobedience, of any officer of the court in respect to writs, orders, or process of the court."

under the act. However, if a judge so sitting fines a person a sum in excess of $300 or imprisons him in excess of 45 days, the accused may demand a trial de novo by jury. This statute, consistent with those mentioned above, excludes from its provisions direct contempts and contempts committed "so near"[48] the court as to obstruct the administration of justice. Young in years, the statute has been but rarely cited in the books.[49] It has been said, however, that this statute applies only to "contempts growing out of civil rights cases respecting *the right to vote.*"[50]

Also applicable here is Rule 42 of the Federal Rules of Criminal Procedure.[51] Rule 42(a) allows the judge to punish summarily any contempts which he sees or hears and which are committed in the actual presence of the court. Rule 42(b) provides that other criminal contempts (here the term is no doubt used in the broad, generic sense) shall be prosecuted "upon notice," and gives the defendant the right to jury trial in any case "in which an act of Congress so provides." This rule is essentially a restatement of existing law;[52] it does not confer upon district judges any power greater than that which they possessed prior to March 21, 1946,[53] the date of the adoption of the Federal Rules of Criminal Procedure.[54]

IV. STATUS OF STATE LAW ON CONTEMPT

As mentioned above,[55] the passage of the Act of 1831 signaled the dawn-

48. See Nelles & King, *supra* note 8, at 529-32, for a discussion of this particular phrase.

49. For recognition of the existence of the statute, but no comment, see Gomillion v. Lightfoot, 270 F.2d 594, 607 (5th Cir. 1959) (dissent); Green v. United States, 356 U.S. 165, 187 n.19 (1958). See generally Murphy, *The Contempt Power of the Federal Courts*, 18 FED. B.J. 34, 47-54 (1958).

50. Smith, *Jury Trials in Contempt Cases*, 20 GA. B.J. 297, 304 (1958). (Emphasis added.)

51. "*Criminal contempt* (a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record. (b) *Disposition Upon Notice and Hearing.* [Other contempts require notice, hearing, reasonable time to prepare defence, and the notice given must state the essential facts with which the suspect is accused. Defendant is entitled to a trial by jury in any case in which an act of Congress so provides.] . . . If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent."

52. "This rule is substantially a restatement of existing law, Ex parte Terry, 128 U.S. 289; Cooke v. United States, 45 S.Ct. 390, 267 U.S. 517, 534, 69 L.Ed 767." *Notes of Advisory Committee on Rules*, 18 U.S.C.A., rule 42 (1961). "Rule 42(a) was not an innovation." Offutt v. United States, 348 U.S. 11, 13 (1954).

53. Offutt v. United States, 348 U.S. 11, 13 (1954).

54. Federal Rules of Criminal Procedure—Effective March 21, 1946, 327 U.S. 821 (1945). For a general discussion of all the statutes referred to above, see Smith, *supra* note 50.

55. See note 38 *supra.*

ing of a new era with respect to summary proceedings in contempt cases. The pulse of the general public had been quickened by the publication given the Peck impeachment proceedings; by 1860, 23 states had passed acts limiting the power of the courts to try contempt cases summarily.[56] This "honeymoon," however, was soon over. The case that set the new trend and ended the era was *State v. Morrill.*[57] This important decision construed a typical statute of the day (similar to the Act of 1831) to be, at best, only declaratory; furthermore, whatever the intention of the legislature, the court could not be ousted of its summary power over contempt by publication.[58] The case had a tremendous influence on the budding liberalism of many courts in regard to indirect contempt, especially contempt by publication. Much of the ground that summary proceedings had lost in indirect contempt cases was recouped. One writer summarized the situation as follows:

> The judiciary as a whole . . . has failed to recognize the necessity for reform, and continues to apply the autocratic views set forth by Blackstone and Wilmot. Consequently there have been frequent demands upon the legislatures of the couutry for the passage of remedial legislation, and a number of statutes have been passed as a result of this pressure. The judiciary, however, has in many instances questioned the authority of the legislature to regulate, limit or define the power to punish contempts of court, upon the theory that, because of the doctrine of the separation of powers, the legislature cannot constitutionally interfere with the power of a coordinate branch of the government.[59]

Despite the disfavor of the courts, the great majority of the states have statutes regulating summary proceedings in contempt cases.[60] Other

56. THOMAS, PROBLEMS OF CONTEMPT OF COURT 49 (1934).

57. 16 Ark. 384 (1855) (publication accused judge of taking a bribe).

58. The court based its holding on Blackstone, *Rex v. Almon,* and the "inherent" right of courts to punish for such contempts. Stating that "the Legislature may regulate the exercise of, but cannot abridge the express or necessarily implied powers, granted to this court by the [state] coustitution," the court intimated that had the legislature so intended, the act would have been unconsitutional. This theory has found wide acceptance in other jurisdictions where the courts are faced with limiting statutes. See THOMAS, *op. cit. supra* note 56.

59. *Id.* at 47. See Ford v. State, 69 Ark. 550, 64 S.W. 879 (1901) (legislature exceeded its powers in passing a statute not *specifically* allowed by state constitution); *In re* Fite, 11 Ga. App. 665, 76 S.E. 397 (1912) (as to courts created by state constitution, legislature cannot take away right to define contempt).

60. *Alabama.* ALA. CODE tit. 13, § 2 (1958). Definition of contempt is similar to Arkansas statute *infra.* All contempts so defined are summarily punishable whether in or out of court. *Arizona.* ARIZ. REV. STAT. §§ 12-861 to -863, 13-341 (1956). One who by committing a criminal offense also disobeys a court order, etc., must be given notice and an opportunity to show cause; a jury trial is mandatory upon request. "Criminal offense" is defined to include substantially the same contempts listed in the Arkansas statute *infra. Arkansas.* ARK. CONST. art. 7, § 26. ARK. STAT. ANN. §§ 34-901, -903 (1947). The Arkansas statute on criminal contempt is roughly similar to the statutes of several other states, and is herein quoted in full as exemplary of them. "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 di-

states' legislatures have ignored the problem, thereby retaining by implication the common law system. When compared these statutes exhibit a myriad of differences. Some statutes expressly define contempt, excluding all else. Some recognize the distinction between direct and indirect contempt; others do not. A few provide for summary proceedings in all cases of contempt, whether direct or indirect; others limit summary proceedings to direct contempt. A very few either forbid summary proceedings in practically all cases or severely limit the punishment in such cases.

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rectly 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. Wilful disobedience of any process or order, lawfully issued or made by it. Fourth. Resistance, wilfully 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." "Contempts committed in the immediate view and presence of the court, may be punished summarily; in other cases, the party charged shall be notified of the accusation, and have a reasonable time to make his defense." *California.* CAL. CIV. CODE ANN. §§ 1209, 1211-12 (Deering 1953). Contempt is defined similarly to the Arkansas statute. Summary punishment may be levied for direct contempt. For indirect contempt an affidavit of facts must be presented to the judge. *Colorado.* For specific situations involving contempt of court, see the following sections of COLO. REV. STAT. ANN. (1953): § 12-1-17 (unlicensed attorneys); § 153-1-11 (refusal to appear for deposition); § 80-9-7 (disobedience of subpoena by witness); § 78-2-12 (juror's failure to appear). *Connecticut.* CONN. GEN. STAT. § 51-33 (1949). "Any court may punish by fine and imprisonment any person who in its presence behaves contemptuously or in a disorderly manner." Contempts not committed in the presence of the court are to be ascertained and punished according to the common law. Huntington v. McMahon, 48 Conn. 174, 196 (1880). *Delaware.* DEL. SUPER. CT. (CRIM.) R. 42. "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. . . . [Any other] criminal contempt . . . shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and sball state the essential facts constituting the criminal contempt charged and describe it as such." Any contempt other than direct contempt which involves criticism or disrespect of a judge disqualifies that judge from presiding at the trial in absence of defendant's consent. *Florida.* FLA. STAT. ANN. §§ 38.22-.23 (1943). Florida's statute is rather vague on its face. It defines contempt as a refusal to obey "any legal order, mandate or decree, made or given by any judge either in term time or in vacation relative to any of the business of said court, after due notice thereof . . . ." However, it further provides that "nothing said or written, or published, in vaeation, to or of any judge, or of any decision made by a judge, shall in any case be construed to be a contempt." State *ex rel.* Grebstein v. Lehman, 100 Fla. 481, 129 So. 818 (1930), provides that the court, upon commission of a direct contempt, may act upon view and summarily inflict punishment. See Comment, 9 MIAMI L.Q. 281, 282 (1955). *Georgia.* GA. CONST § 2-120. GA. CODE ANN. § 24-105 (1959). The Georgia statute is similar to the Arkansas statute *supra.* *Hawaii.* HAWAII REV. LAWS § 269-1 (1955). Every judicial tribunal may summarily punish persons guilty of contempt, but punishment is limited to $100 and 10-60 days imprisonment. *Idaho.* IDAHO CODE ANN. §§ 7-603, -604 (1948). Summary punishment is allowed if the contempt is in the presence of the court. Otherwise, an attachment may issue upon an order to show cause or notice. *Illinois.* For specific situations involving contempt of court, see the following sections of ILL. ANN. STAT. (Smith-Hurd 1961): c. 13, § 1 (unlicensed attorneys); c. 110, § 101.19-12 (compelling obedience to discovery proceeding subpoena); c. 78, § 15 (juror's failure to appear); c. 38, § 735 (witness's

Almost all of the above-mentioned statutes have been subjected to some mitigating construction. Thomas, in his work on contempt, gives the following summary of the fate of these statutes:

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failure to obey subpoena); c. 38, § 580(a) (witness's refusal to testify despite immunity from prosecution). *Indiana.* IND. ANN. STAT. §§ 3-901, -907, -908 (Burns 1946). Court may punish direct contempt summarily. Notice and opportunity to show cause are required in indirect contempt proceedings. *Iowa.* IOWA CODE ANN. §§ 665.2-.8 (1946). Iowa's statute is similar to Arkansas's. Unless the contempt is in the immediate view of the court, "or comes officially to its knowledge," an affidavit of the contemptuous transaction and a notice to show cause are required. *Kansas.* KAN. GEN. STAT. ANN. § 20-120 (1949). Only contempts committed in presence of the court or in the judge's chambers may be punished summarily. All other contempts require notice and hearing to show cause. *Kentucky.* KY. REV. STAT. ANN. §§ 432.230, .260 (1955). "A court shall not impose a fine of more than thirty dollars or imprison for more than thirty hours for contempt without the intervention of a jury." *Louisiana.* LA. CONST. art. 19, § 17. LA. REV. STAT. ANN. §§ 15:11, :12 (1951). "Every court has the inherent power to . . . punish, as being a contempt, every interference with or disobedience of its process or orders, as well as every act interrupting or tending to interrupt its proceedings, or impairing the respect due to its authority." Maximum punishment for contempt is a fine of $100 and/or ten days imprisonment. *Maine.* ME. REV. STAT. ANN. c. 106, § 16, c. 147, § 1 (1954). "The superior court may . . . punish for contempt . . . ." "No person shall be held to answer in any court for an alleged offense, unless on an indictment found by a grand jury, except for contempt of court . . . ." *Maryland.* MD. ANN. CODE art. 26, § 4 (1957), art. 26, § 5 (Supp. 1960). Contempt is defined substantially the same as in Arkansas. *Massachusetts.* MASS. ANN. LAWS c. 275. §§ 5, 14 (1956). "Whoever, in the presence [of the court] . . . makes an affray, or threatens to kill or beat another, or to commit any violence or outrage against the person or property of another, or contends with hot and angry words, to the disturbance of the peace, may be ordered, without process or any other proof, . . . to keep the peace . . . for not more than three months [or] . . . be committed . . . ." to jail. *Michigan.* MICH. STAT. ANN. §§ 27.511-.513 (1938). Contempt is defined similarly to the Arkansas statute. Direct contempt may be summarily punished. Other acts of contempt are punishable only after notice and a reasonable time to reply. *Minnesota.* MINN. STAT. ANN. §§ 588.01-.04 (1947). Direct contempt (which consists of disorderly, contemptuous, or insolent behavior toward the judge while holding court, or a breach of the peace, boisterous conduct, or violent disturbance) is summarily punishable. Other contempt proceedings require notice and opportunity to show cause. *Mississippi.* MISS. CODE ANN. § 1656 (1942). "The Supreme, circuit, chancery and county courts shall have power to fine and imprison any person guilty of contempt of the court while sitting . . . ." But the punishment can not exceed $100 or thirty days imprisonment. *Missouri.* MO. ANN. STAT. §§ 476.110-.130 (Vernon 1952). Contempt is defined similarly to the Arkansas statute. Contempt in presence of the court is punishable summarily. Other contempts require an affidavit showing contemptous acts to be presented to the court. *Montana.* MONT. REV. CODES ANN. §§ 93-9801, -9803 (1947). Contempt is defined similarly to the Arkansas statute. Contempt in presence of court is punishable summarily. Other contempts require an affidavit showing contemptous acts to be presented to the court. *Nebraska.* NEB. REV. STAT. §§ 25-2121, -2122 (1943). Contempt is defined similarly to the Arkansas statute. Direct contempt is summarily punishable. Other contempts require notice of accusation, reasonable time to make a defence *Nevada.* NEV. REV. STAT. §§ 22.010, .030 (1957). Contempt is defined similarly to the Arkansas statute. Direct contempt is summarily punisbable. In all other cases an affidavit of facts is required. "In all cases of contempt arising without the immediate view and presence of the court, the judge of such court in whose contempt the defendant is alleged to be shall not preside at such trial over the objection of the defendant." *New Hampshire.* N.H. REV. STAT. ANN. § 547.11 (1955). *New Jersey.*

(1) Statutes which mainly affect procedural matters (such as appeal, necessity of a written verdict) are usually held to be in harmony with the state constitution.

N.J. STAT. ANN. § 2A:10-1 (1952). Contempt consists of misbehavior in actual presence of the court, misbehavior of an officer of the court, disobedience by anyone of the court's order. No statutory distinction between direct and constructive contempt. *New Mexico.* N.M. STAT. ANN. § 16-1-2 (1953). Court may "preserve order and decorum" by punishing for contempt, "being circumscribed by the usage of the courts of the United States." *New York.* N.Y. JUDICIARY LAW §§ 750, 751, 755. N.Y. PEN. LAW § 600. Contempt is defined similarly to the Arkansas statute. Direct contempt is summarily punishable. Other contempts require notice and reasonable time to make a defence. *North Carolina.* N.C. GEN. STAT. §§ 5-1, -5, -7 (1953). Statute is similar to the Arkansas statute. Direct contempt is summarily punishable. Indirect contempt requires an order to show cause. *North Dakota.* N.D. CODE ANN. §§ 27-10-01, -06, -07 (1960). Statute is similar to the Arkansas statute. *Ohio.* OHIO REV. CODE. ANN. §§ 7705.01, .02 (Baldwin 1960). Contempt is defined similarly to the Arkansas statute. *Oklahoma.* OKLA. CONST. art. 2, § 25. OKLA. STAT. ANN. tit. 21, §§ 565, 567 (1958). Contempt is defined similarly to the Arkansas statute. Summary punishment may be levied for direct contempt. In indirect contempt proceedings, the accused shall be notified in writing of the accusation, have a reasonable time for defense, and, upon demand, have a trial by jury. *Oregon.* ORE. REV. STAT. §§ 33.010, .030, .040 (1955). Contempt is defined similarly to the Arkansas statute. Summary punishment may be levied for direct contempt; indirect contempt proceedings require affidavit of facts, opportunity to show cause. *Pennsylvania.* PA. STAT. ANN. tit. 17, §§ 2041-42 (1930). Contempt is defined as follows: official misconduct of officer of court; disobedience by officers, parties, jurors, and witnesses to lawful process of court; misbehavior of any person in presence of court. Summary punishment may be levied for any of the above contempts committed "in open court"; contempts committed in any other manner may be punished by fine only. *Rhode Island.* R.I. GEN. LAWS ANN. § 8-6-1 (1956). "The supreme and superior courts shall have power to . . . . punish, by fine or imprisonment, or both, all contempts of their authority." *South Carolina.* S.C. CODE §§ 15-12, -13 (1952). Any person committing any misbehavior, "by word or gesture," in any court of the state, may be fined a maximum of $50 and imprisoned until payment. For striking or using violence in the presence of the court, the court has discretion as to the amount of the fine. For any breach of peace "within the hearing . . . of the court," the court may direct the sheriff to bring the offenders before the court, and the court "shall make such order thereon as may be consistent with law, justice and good order." *South Dakota.* S.D. CODE §§ 33.3701-03 (Supp. 1960). Statute is similar to the Arkansas statute. *Texas.* TEX. CONST. art. 5, § 8. TEX. CIV. STAT. ANN. art. 1911 (Vernon 1949). "The district court may punish any person guilty of contempt . . . ." by a fine not to exceed $100 and/or imprisonment not to exceed three days. *Utah.* UTAH CONST. art. I, § 12. UTAH CODE ANN. §§ 78-32-1, -3, -4 (1953). Statute is similar to the Arkansas statute. For indirect contempts, the accused has a right to notice, hearing and counsel. *Vermont.* VT. STAT. ANN. tit. 12, §§ 122, 123 (1959). Court may enter contempt proceedings when a party violates a lawful order of the court. *Virginia.* VA. CODE ANN. § 19.1-292 (1950). *Washington.* WASH. REV. CODE §§ 7.20.010, .030, .040 (1961). Statute is similar to Arkansas statute. *West Virginia.* W. VA. CODE ANN. § 6024 (1955). Summary punishment may be given only for certain types of direct contempt, plus disobeyance of a court order. The court may impanel a jury to determine the amount of punishment (either by fine or imprisonment); in absence of jury, the amount of punishment the judge can levy is limited. *Wisconsin.* WIS. STAT. ANN. §§ 256.03, .04 (1957). Statute is similar to the Arkansas statute. *Wyoming.* WYO. STAT. ANN. §§ 1-668, -670 (1957).

For a list of leading cases on contempt from each state see Annot., *Contempt of Court*, 75 L. Ed. 185 (1930).

(2) Likewise constitutional are statutes which fix maximum penalties either by fine or imprisonment (provided sufficient punishment is left to make the contempt power effective).

(3) Statutes attempting to meet the demand for jury trial for indirect or constructive contempts are, for the most part, unconstitutional.

(4) Statutes which exhaustively enumerate the contempts punishable have been rendered ineffective by the courts' liberal construction.

(5) Statutes which enumerate certain acts as contempts and declare that no other acts shall constitute contempt have been declared unconstitutional.[61]

Interestingly enough, all contempt statutes on the books today fall, at least in part, under one or the other of the classifications which Thomas declared generally to have been found constitutional.[62]

In the state statutes of the present day a few similarities stand in contrast to the background of dissimilarities. Many statutes recognize a distinction between direct and indirect criminal contempt. Furthermore, most of these statutes provide for summary proceedings in cases of direct contempt and for notice, hearing and sufficient time to prepare a defence in indirect contempt proceedings. A slightly smaller number of states expressly define certain acts as contempt, and the Arkansas statute gives a fair representation of the acts defined as contempt in most states.[63] So it might be assumed that if a statute were to be passed today combining the above mentioned characteristics, it would have an excellent chance of being declared constitutional.

V. Tennessee Law on Contempt

The Tennessee statute,[64] with one exception,[65] is similar to a plurality of other states' statutes. As is true in most states, the Tennessee courts have

61. Thomas, *op. cit. supra* note 56, at 50-52.

62. See note 60 *supra*.

63. *Ibid.*

64. Tenn. Code Ann. § 23-902 (1956). "The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases: (1) The wilful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice. (2) The wilful misbehavior of any of the officers of said courts, in their official transactions. (3) The wilful disobedience or resistance of any officer of the said courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of said courts. (4) Abuse of, or unlawful interference with, the process or proceedings of the court. (5) Wilfully conversing with jurors in relation to the merits of the cause in the trial of which they are engaged, or otherwise tampering with them. (6) Any other act or ommission declared a contempt by law."

65. Tenn. Code Ann. § 23-902(6) (1956), *supra* note 64, is not found in most of the other state statutes.

dug a moat of judicial construction around the statute; the case law therefore is of primary importance. In *State v. Galloway*,[66] the Tennessee Supreme Court laid the foundation for case law on contempt. The court there held that the inferior courts could punish as contempt only that conduct set forth in the first five subsections of the act.[67] Furthermore, the court determined that subsection (6) ("Any other act or ommission declared a contempt by law") did not include any acts other than those *specifically* listed in the statute.[68] This construction was reaffirmed in *In re Hickey*.[69] In addition, the *Galloway* case set forth the rule that the court should and would give the statute a "liberal application to the cases which may arise in the exigencies of the Courts."[70] The *Hickey* case set forth the basic rule that publications charging that a judge is unfit or incapacitated to hold court is not a contempt under subsection (1) of the statute.[71] This subsection refers only to direct contempts committed in the presence of the court or "so near thereto as to amount to the same thing."[72] This holding, made in 1923, is anticipatory of the decision of the Supreme Court in *Nye v. United States*.[73]

The scope of summary procedure in contempt cases in Tennessee was raised in *State ex rel. May v. Krichbaum*[74] and *Pass v. State*.[75] In *Krichbaum* a city court judge was charged with being mercernarily motivated in the conduct of his cases; this charge was made directly to the judge in an interim period between cases. Such an act constituted contempt, said the court; in addition, since the offense was committed in the face of the court, it could "proceed upon its own knowledge of the facts, and punish the offender without further proof, and without issue or trial in any form."[76] The *Pass* case, decided in 1944, would seem to extend this power of the court, though to what degree is not clear.[77]

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66. 45 Tenn. 326 (1868).

67. *Id.* at 329.

68. *Ibid.*

69. 149 Tenn. 344, 373, 258 S.W. 417, 425 (1923). "Subsection 6 adds nothing to the other five subsections nor does it make the common law with respect to contempt applicable."

70. 45 Tenn. at 339.

71. 149 Tenn. at 374-80, 258 S.W. at 425-27.

72. *Id.* at 374, 258 S.W. at 425.

73. 313 U.S. 33, 52 (1941).

74. 152 Tenn. 416, 278 S.W. 54 (1925).

75. 181 Tenn. 613, 184 S.W.2d 1 (1944).

76. 152 Tenn. at 423, 278 S.W. at 55.

77. See 181 Tenn. at 616-18, 184 S.W.2d at 2-3. The difficulty with this case is that it consists mostly of quotations from other sources. One wonders therefore whether the court meant to adopt all the statements made in the quotations, some of which are rather extreme.

VI. Reasons Given for Summary Proceedings in Direct Contempt Cases

At least from the time of Wilmot the courts of both England and the United States have staunchly underpinned the proposition that the contempt power of the courts is coeval with the founding of the courts; such power is indispensable to the proper functioning of the courts, particularly in direct contempt cases. Several different reasons for this view have been given. Perhaps the oldest is that without this power the courts "would be contemptible."[78]

One writer has stated another reason as follows: "[T]he truth, stripped of metaphysical buncombe as to *inherence*, is simply that summary power as to various contempts is expedient . . . ."[79] This hits closer to the truth than the "contemptible" argument, for whatever the validity of the latter, it is obvious that summary proceedings do move with greater speed than the ofttimes infuriatingly slow orthodox procedure. This statement, however, is only descriptive of one characteristic of summary proceedings, and the question still must be proposed: Why is expedience necessary?

Some have said that contemptuous acts *must* be punished instantly, and that in most cases this must be done by the judge himself.[80] "The danger of harshness on the part of the judge is a less evil than the danger of a complete suppression of the functions of justice by permitting an uproar to continue unchecked."[81] This reason—facilitating the smooth flow of the trial—seems to have merit.

An additional reason advanced for this extraordinary proceeding is that further disturbances in the case before the court are discouraged.[82] The quick removal of an agitator from the courtroom will have a sobering effect on the remaining spectators, as well as the parties, witnesses, attorneys, and jurors. Analogously, "misconduct in *other* cases is deterred by knowledge of the judge's great power."[83] That is, the *quick commitment* of a contemnor in a prior case would have a greater deterrent effect than other methods on persons contemplating such conduct in later cases.

An oft-repeated reason is the promotion of the dignity of the court; this is a corollary to the "contemptible" argument mentioned above. It is nothing more than what Wilmot had in mind when he spoke of the "blaze of glory"[84] which should be kept shining round the court. In keeping with this reason—that the courts have need of the summary contempt power in

78. Respublica v. Oswald, 1 U.S. (1 Dall.) 318, 329 (1788).
79. Nelles & King, *Contempt by Publication in the United States*, 28 Colum. L. Rev. 524, 548 (1928).
80. Beale, *Contempt of Court, Criminal and Civil*, 21 Harv. L. Rev. 161, 172 (1908).
81. *Ibid.*
82. See Note, 2 Stan. L.R. 763, 766 (1950).
83. *Id.* at 766-67. (Emphasis added.)
84. See note 18 *supra*.

order to keep and hold the respect of the public—the courts have extended the use of summary contempt proceedings even to indirect contempt. One further reason *why* the courts have stood by summary proceedings for so long—a reason never mentioned in the opinions—is what Thomas calls the "natural inclination of men to extend their power."[85] "[J]udges, being human, are subject to anger like other men,"[86] and when this anger is upon them, they like other men desire no limit to their power.

Such an unusual proceeding, dangerously lacking in the processes which have militated against arbitrary trials, has at times produced miscarriages of justice. Two examples will suffice as illustrative of the dangers.

In *Fleming v. United States*,[87] the court of appeals upheld a commitment for direct contempt by defendant. Defendant, in asking for a change of venue, presented to the court an affidavit charging that the lower court judge was biased, had connived with plaintiff in bringing the action, was interested in the outcome of the litigation, and had had the charge pressed so as to hide his (the judge's) responsibility for the crime of embezzlement. The upper court, in a statement which treats rather lightly the defendant's right to a fair trial, said:

> But the defendant contends that the proceeding lacked due process of law in that no proof was taken of the untruth of the charges contained in his affidavit. In order to punish the defendant's contempt *it was not necessary to take the testimony of witnesses to show that the charges made by the defendant were untrue. The punishment was lawfully imposed in the exercise of the court's power to preserve its dignity and decorum in the administration of justice.*[88]

The question might be posed: Just what could the defendant do, assuming these facts to be true? If he does nothing except defend on the merits, he will be at a tremendous disadvantage and will surely lose his case. If he tries to obtain a change of venue so as to have a fair trial, he cannot show his real reasons for asking for such a change. Should he try the case, lose, and attempt to get a reversal at the appellate level, carrying the burden that the losing party always has? In the court's statement as to its power to maintain its "dignity and decorum" we see the ghosts of Wilmot and the Star Chamber approvingly contemplating a hapless defendant flaming brightly in the court's "blaze of glory."

In *Fisher v. Pace*,[89] the Supreme Court of the United States upheld by a single vote the committal of a Texas lawyer for contempt. The anger and bias of the judge are clearly shown from the record,[90] but the Court re-

85. THOMAS, *op. cit. supra* note 56, at 8.
86. Beale, *supra* note 80, at 172.
87. 279 Fed. 613 (9th Cir. 1922).
88. *Id.* at 615. (Emphasis added.)
89. 336 U.S. 155 (1949) (Reed, J.).
90. The following is a short excerpt from the lower court record which gives some indication as to the degree of the judge's "hair trigger" temper:

fused to overturn the case on the theory that the conduct of the attorney was sufficient to allow the court to so use its power.[91] The majority admits that the judge's language was "mildly provocative,"[92] but feels that the contemnor's conduct was worse. But should a judge be allowed to be even "mildly provocative"? Justice Douglas, in his dissent, answers in the negative: "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 crowd."[93] Here is a situation where both parties were no doubt in the wrong, and yet the attorney *alone* was punished, that punishment being levied by his provoker.

VII. The Constitution and Summary Proceedings in Direct Contempt Cases

Though these two situations are by no means typical of all contempt cases, it is obvious that dangers abound here. What then is the position and status of summary proceedings (especially as to direct contempt) in light of the Constitution? The Supreme Court has said:

> [T]he power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.[94]

In trying a contempt committed *in facie*, the federal courts have power to inflict immediate punishment, without trial, notice, explanation of contemnor's motives, or jury. This type of procedure is not a violation of due process, and the contemnor has no constitutional right to trial by jury:

> This [summary proceedings, at least in direct contempt cases], then, is due process of law in regard to contempts of courts; was due process of law at the time the Fourteenth Amendment of the federal Constitution was adopted; and nothing has ever changed it except such statutes as Congress may have enacted for the courts of the United States, and as each State may have enacted for the government of its own courts.[95]

"By the Court: I will declare a mistrial if you mess with me two minutes and a half, and fine you besides.

"By Mr. Fisher: That is all right. We take exception to the conduct of the Court.

"By the Court: That is all right; I will fine you $25.00." 336 U.S. at 166.

91. *Id.* at 160-61.

92. "We cannot say, however, 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.* at 163.

93. *Id.* at 166.

94. *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873).

95. Eilenbecker v. District Court, 134 U.S. 31, 38 (1890).

Thus we see that, as to direct contempts, the Supreme Court has proclaimed summary proceedings to be fully constitutional in all their ramifications.[96]

VIII. REJECTIONS OF SUMMARY PROCEDURE IN DIRECT CONTEMPT CASES

Throughout this paper it may be noted that the general inclination of the courts is to favor and support the use of summary proceedings in direct contempt cases. A few dissents, scattered but strong, have been raised to this proposition. As was shown, the research of both Solly-Flood and Fox has revealed that there was once a time, though long past, when the judges wielded not the summary power, even as to *in facie* contempts.[97] One wonders what those ancient judges would have said if told that their system of jurisprudence would break down without the summary power.

Less remote to us in time is the work of Edward Livingston, who has been called "a truly great lawyer" by eminent modern authorities.[98] One of the first true liberals, Livingston set forth his ideas on contempt in his proposed penal code of Louisiana.[99] This code provided that if anyone wilfully made a clamor or noise in court which obstrueted the proceedings of such court, or refused to obey an order of the court made for the promotion of decorum and order, the judge might cause the sheriff to remove the offender from the building. If the offender repeatedly returned and disturbed the court, the judge was empowered to imprison the disturber for the rest of the court session during that day, and such party would be charged with a misdemeanor, triable by jury. As to the use of any indecorous, contemptuous, or insulting expressions to the court, with intent to insult the court, Livingston said that such acts should also be made a misdemeanor, with the intent of the defendant and the impropriety of his statements to be determined by a jury. For violence or threats of violenee to the court or persons involved in the litigation, Livingston proposed that these offenses should be "tried by indictment, or information in the usual form." Livingston's basic premise was that the *need* for the summary contempt power for *in facie* acts, universally used by the courts in defending their power, was no longer imperative:

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96. As to indirect contempts, the courts may be limited in their powers by (1) statutes, see notes 45-54 *supra* and accompanying text; (2) due process, Cooke v. United States, 267 U.S. 517 (1925); (3) freedom of speech and press, Bridges v. California, 314 U.S. 252 (1941); Note, 23 ALBANY L. REV. 61 (1959). See generally Note, 10 VAND. L. REV. 831 (1957).

97. See notes 20-23 *supra*.

98. Frankfurter & Landis, *supra* note 52, at 1044 n.118. "He was a very learned man and deeply rooted in the common law." *Ibid.* Livingston defended Andrew Jackson in the latter's famous contempt trial. See Deutsch, *The United States Versus Andrew Jackson*, 46 A.B.A.J. 966 (1960).

99. Frankfurter & Landis, *supra* note 98.

> In the present improved state of the human intellect, people do not so readily submit to the force of this word (necessity) as they formerly did. They inquire—they investigate—and in more instances than one, the result has been, that attributes heretofore deemed necessary for the exercise of legal power, were found to be only engines of its abuse. Not one of the oppressive prerogatives of which the crown has been successively stripped, in England, but was in its day defended on the plea of necessity.[100]

To Livingston, the power *to remove* the offender from the court was sufficient for the protection of the court; the power *to punish*, he felt, was not indispensable to the judge and should be left to the state after trial by jury.

Still later, in the period between *State v. Morrill*[101] and *Toledo Newspaper Co. v. United States*,[102] the Supreme Court of New Jersey boldly asserted that the power to commit summarily persons who, by disorderly conduct, interferred with the business of the court was not necessarily an incident of a court of justice. Speaking in general of the minor state courts, the court had the following to say:

> In the present case, the justice might have caused the plaintiff to be removed from his court-room. He might have required of him bail for his appearance at court to answer to a criminal charge, and as security for good behavior. He might have committed the plaintiff into custody until the cause on trial was concluded, before he gave him a hearing; and if the plaintiff refused or was unable to give bail, he might have committed him to jail in default of bail.
>
> These powers, which are inherent in the judicial office, in the exercise of official duties, are amply sufficient to secure order and decorum in these courts, and to vindicate their authority.[103]

This case is the only one found which bridges the long gap from Livingston to the twentieth century. In this century, several state court judges have opposed summary proceedings in direct contempt cases. In *State v. Buddress*,[104] the Washington Supreme Court in a 3-2 decision held that a lower court had the power to try a contemnor summarily for contempt. No better example of direct contempt may be found, as the accused was cited for using "boisterous, angry, insulting, vicious language," followed by a fistfight in the presence of the court. The remarkable aspect of this case is that if one judge of the majority had switched his position to the side of the minority, there would have been at least one state which denied summary proceedings in direct contempt cases. Although this point seems at first sight rather insignificant, the continued functioning of the Washington courts *without the summary power* would have gone far toward belying

100. EDWARD LIVINGSTON, COMPLETE WORKS 264 (1873), quoted in Nelles & King, *supra* note 79, at 419 n.102.
101. 16 Ark. 384 (1855).
102. 247 U.S. 402 (1918).
103. Rhinehart v. Lance, 43 N.J.L. 311, 320 (Sup. Ct. 1881).
104. 63 Wash. 26, 114 Pac. 879 (1911).

the "necessity," "expedience," and "order and dignity of the courts" arguments. The short dissent of the minority is worthy of quotation.

> Notwithstanding the forceful argument made by [the majority] and the pertinency of the cases cited in the opinion, 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 inconveniences suggested in the majority opinion *may* arise, but the considerations I have mentioned are paramount. I am therefore compelled to dissent.[105]

Other more powerful and respected voices have found reason to question such proceedings. Rumblings have been heard from the Supreme Court of the United States, casting doubt on the constitutionality of summary proceedings in direct contempt cases. The interesting dissents of Justices Black and Douglas in *Sacher v. United States*,[106] *Isserman v. Ethics Committee*[107] and *Offutt v. United States*[108] appear to breach, at the highest judicial level, the almost universal wall of approval of summary proceedings in direct contempt cases. In the *Sacher* case[109] Black based his dissent on three premises: (1) Trial judge Medina was shown to be biased against the defendants from the record.[110] (2) The determination of defendant's guilt, summarily and without notice, hearing, or opportunity to defend, was in violation of due process of law: "Before sentence and conviction these petitioners were accorded no chance at all to defend themselves. They were not even afforded an opportunity to challenge the sufficiency or the accuracy of the charges. Their sentences were read to them but the full charges were not. *I cannot reconcile this summary blasting of legal careers with a fair system of justice.*"[111] Black also points out that this unfairness at the trial level was carried to the appellate level; the 13,000 pages of evidence forced the appellate courts to examine only the excerpts which the trial judge had incorporated into his charges. Furthermore, in using the record of the *client's* case in determining the *lawyer's* guilt the appellate courts are apt to judge the lawyer according to the merits of the client's case—"guilt by association." This tendency is especially dangerous in situations where the client's case is highly unpopular or un-

105. 114 Pac. at 883. (Emphasis added.)

106. 343 U.S. 1, 14-23 (1952). See generally Edises, *Contempt of Court and the Lawyer: The Unequal Combat*, 18 LAW. GUILD REV. 49 (1958); 6 VAND. L. REV. 120 (1952).

107. 345 U.S. 927 (1953).

108. 348 U.S. 11 (1954), 8 VAND. L. REV. 643 (1955).

109. This case involved an appeal from the contempt commitment of one of the lawyers for the eleven Communist defendants in Dennis v. United States, 341 U.S. 494 (1951).

110. This premise is outside the pale of this note except as buttressing for the proposition that summary proceedings should not obtain even in direct contempt cases.

111. 343 U.S. at 18. (Emphasis added.)

orthodox, as here. (3) The defendants were denied their right to a jury trial. Citing article III, section 2 of the Constitution ("The Trial of all Crimes . . . shall be by Jury"), and the fifth amendment ("No person shall be held to answer for a capital, or otherwise infamous crime unless on presentment and indictment of a Grand Jury . . . ."), Black argues for jury trial. Although making the reservation that in some instances summary proceedings might be necessary, Black states that the defendants should not be conclusively presumed guilty on the theory that the judge's observation and inferences are always infallible. This view, it is submitted, might be extended to all contempts.

In the *Isserman* case a federal district court judge had summarily committed an attorney for contempt. The findings of the judge were used by the ethies committee in permanently disbarring the attorney from practice of law in that state. Black, joined by Douglas, states in a short memorandum decision that the petitioner was denied due process of law under the fourteenth amendment. This is an extension of Black and Douglas' views to state court proceedings. The opinion apparently tacitly assumes that jury trials are not compelled by the Constitution in state court contempt proceedings; rather, the holding is grounded solely on the fact that the attorney was denied an opportunity to confront witnesses against him and to deny, explain, or extenuate the charges against him.

In the *Offutt* case the judge had engaged in a heated argument with the contemnor. The majority of the court remanded the case to the lower court, with the provision that a different judge sit in the contempt proceeding. Black and Douglas, in a seven line concurring opinion agree in part with the majority; they argue, however, that petitioner should be accorded a jury trial on the basis of the reasons in the *Sacher* and *Isserman* cases.[112]

The most pertinent and argumentative proposals as to the propriety of summary proceedings for direct contempts are to be found in Judge Cameron's concurring opinion in *Ballantyne v. United States*.[113] The contemnor had refused to answer a question propounded to him by a grand jury; having been brought before the federal district court and having refused a second time to answer the question, he was convicted of contempt of court. On appeal, the conviction was reversed. The majority based their reversal on the fact that a truthful answer to the judge's question might have been incriminating to the defendant. Cameron concurs with the majority that the case should be reversed, but takes issue with the majority's intimation that the contemnor was not entitled to a jury trial. "It is abhorrent to Anglo-Saxon justice as applied in this country that one man, however lofty his station or venerated his vestments, should have the power of taking another man's liberty from him."[114] Granted, he argues,

112. 348 U.S. at 18.
113. 237 F.2d 657, 666-70 (5th Cir. 1956).
114. *Id.* at 667.

that contempt has been traditionally dealt with summarily; nevertheless, such proceedings are gradually being curbed. Cameron cites several Supreme Court cases which he feels evince both a general intention of the Court to treat with wariness the use of the contempt power and a desire to limit it wherever possible.[115] He also cites the Constitution, the Clayton Act, the Norris-LaGuardia Act and the Federal Rules of Criminal Procedure as being indicative of his arguments. Finally, he sums up the feelings of several commentators in this field by saying:

> It transcends recognized frailties of human nature to suppose that a judge can be free from the inclinations arising from natural pique which would be engendered by a direct refusal by the accused to obey an order freshly made by him, and the temptation to strike back which inevitably accompanies ruffled pride.[116]

IX. CONCLUSION

The courts are prone to avow their belief in the sanctity and indispensability of summary procedure in direct contempt cases (all that is said here as to direct contempt would apply *a fortiori* to indirect contempts). As the functioning institution most directly concerned with the administration of justice, they are entitled to great deference. But, as Livingston said, the argument of "necessity" has sustained even the most arbitrary practices in the past.[117] Possibly, therefore, a study is in order on the actual need for summary procedure in contempt cases.[118] If no need can be shown to counterbalance the dangers inherent in such a procedure, it would seem that it should be abolished. Since only a scientific examination of the problem could show the actual need, and since the courts have frequently set forth their own reasons for supporting such procedure, the following statements will be devoted to a discussion of the arguments against summary proceedings in direct contempt cases.

The argument most often voiced against this type of proceeding is that it opens wide the door for the expression of the court's bias, anger, or impatience. This door is never completely closed in any judicial proceeding where a man sits in judgment of other men.[119]

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115. *Id.* at 668 n.22.

116. *Id.* at 669.

117. See notes 98-99 *supra* and accompanying text.

118. Will the judges take it upon themselves to make such a study? In an analogous situation, Thomas points out that "the judiciary have been so well pleased with their summary powers that they seem never to have undertaken a searching investigation into the history of the contempt power." THOMAS, PROBLEMS OF CONTEMPT OF COURT 5 (1934).

119. How often, one wonders, have the judges mixed the vindication of the authority of the court with the vindication of their own personal feelings, conduct decried centuries ago by Jehesophat who warned his judges: "Take heed what ye do: for ye judge not for man, but for the Lord [the State], who is with you in the judgment." 2 *Chronicles* 19:6.

The judge who manages to keep most of his personal feelings out of his decisions may be victimized by another less obvious flaw of the summary procedure: the fact that the judge, striving for impartiality and fearful of his own prejudice, may be unnecessarily lenient with the contemnor. This then is a paradox—the very proceedings which were established for the promotion of the dignity of the courts may subject the guilty to less punishment than a more orthodox procedure.

A third argument is grounded on the ability of some courts to function without the use of the summary power. The most common example is the justice of the peace. In many states this minor judicial officer is forbidden to imprison and fine a contemnor; he can only remove the contemnor from court, or extract from him a bond to insure his cooperation. In addition, as mentioned, the courts of England had little or no summary power prior to the fifteenth century—but managed to survive.[120] Analogously, Congress has limited itself by prohibiting the use of the summary power in its investigatory functions. United States Code title 2, sections 192 and 194 provide that all prosecutions for certain contempts of Congress must be by indictment or information, and trial must be under the usual safeguards of ordinary criminal procedure.

At this point some objection should be raised to the contention that normal criminal proceedings would be less effective than summary procedure. It is often argued that if the jury were to try contempts, it might fail to vindicate the authority of the court because of prejudice against the judge and for the underdog contemnor. But is the judge any *less* likely to be biased than the jury, especially as to conduct which almost always constitutes a personal affront? Furthermore, as Holmes said, "Universal distrust creates universal incompetence."[121] If the courts are to be presumed to be fair and just,[122] why should not the jury?[123] If the jury is not to be trusted, then it should be thrown down from its high place in our system of jurisprudence. If it is to be trusted, what better function could it have than to act as an impartial, truth-seeking buffer between judge and contemnor?

Quite properly it may be asked: What are the alternatives to summary proceedings? Several answers present themselves. For the purpose of facilitating the progress of a trial, the contemnor might be removed bodily from the courtroom. If this failed to deter him, a peace bond might be

120. See notes 20-23 *supra*.

121. Graham v. United States, 231 U.S. 474, 480 (1913).

122. "[D]oubts . . . should be resolved in favor of the competence of the District Courts . . . ." Sullivan v. Behimer, 363 U.S. 351, 369 (1960) (Frankfurter, J., dissenting).

123. "In the courts of the United States the judge and jury are assumed to be competent to play the parts that always have belonged to them in the country in which the modern jury trial had its birth." Graham v. United States, *supra* note 121, at 480 (Holmes, J.).

levied; in the last resort, the contemnor might be imprisoned until the end of the trial. As for problems of future deterrence and vindication of the authority of the courts, these might be solved by regular criminal proceedings with notice, counsel and jury. After all, this has been the traditional, and successful, method by which the authority of the State has been vindicated as to the more ordinary crimes.

Is there a "trend"[124] toward doing away with summary proceedings in direct contempt cases? Possibly so, though as yet it has gained little momentum. The ideas of Livingston, the brief smattering of state court cases, the Act of 1831 which through *Nye v. United States* restricted summary proceedings for contempt by publication in federal court cases, the Clayton Act which allows jury trials where the contemptuous act is a true crime, the Norris-LaGuardia Act and Civil Rights Act of 1957 which provide for jury trials in certain specific instances, the procedure used for contempt of Congress, the dissents of Black, Douglas and Cameron,—all these are indicative of some sort of movement toward extending the scope of jury trials in direct contempt cases. What this movement means, and where it is leading is unfathomable at present—only time will tell.

THOMAS R. ALLEN

124. See generally Comment, *Recent Trends Curtailing the Summary Contempt Power in Federal Courts*, 8 HASTINGS L.J. 56 (1956). In a fairly recent ease, Cammer v. United States, 350 U.S. 399, 404 (1956) (Black, J.), the Supreme Court reaffirmed the statement made in the *Toledo* case that the contempt power should be limited to "the least possible power adequate to the end proposed."