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CONSTITUTIONAL LAW - POWER OF STATE LEGISLATURE TO PROVIDE FOR JURY TRIAL IN PROCEEDINGS FOR CONTEMPT OF COURT

CONSTITUTIONAL LAW — POWER OF STATE LEGISLATURE TO PROVIDE FOR JURY TRIAL IN PROCEEDINGS FOR CONTEMPT OF COURT — The defendants, an independent union, and members thereof, were cited for contempt before a court of common pleas for the violation of an injunction restraining them from interfering with the operation of the plaintiff's mines. The alleged contumacious acts took place some ten miles from the court house and consisted of gathering about automobiles containing employees of the plaintiff company, throwing stones at them, breaking windows of the cars, and injuring some of the occupants. The contempt proceedings arose on petition of the company and were before the same judge who granted the injunction. The defendants claimed that under a Penn-

sylvania statute they were entitled to bail and jury trial,[1] but the court found the statute unconstitutional and adjudged them guilty of contempt. The Superior Court reversed the holding,[2] and the plaintiff appealed to the state supreme court. *Held*, that the state constitution authorizes the legislature to regulate the chancery powers of the courts of common pleas,[3] and the statute is "clearly constitutional." *Penn Anthracite Mining Co. v. Anthracite Miners*, (Pa. 1935) 178 A. 291.

Constitutional objection to the legislative control of incidents of the judicial function arises out of the doctrine of separation of powers.[4] While legislatures can and do regulate the procedure and practice of courts,[5] the power is not unlimited and any attempts to seriously curb or take away existing judicial powers have always been met with disfavor.[6] In the contempt field the legislative license has been closely confined against the bulwark of "inherent judicial power."[7] Enactments concerned with procedural detail and the maxima of penalties alone

[1] PA. PUB. LAWS (1931), No. 925; PA. STAT. ANN. (Purdon 1934), tit. 17, §§ 2047, 2048. The act provides in effect that in all proceedings for indirect, criminal contempt for violation of an injunction or restraining order issued by a court the accused shall enjoy (a) the same rights to admission to bail accorded to persons accused of crime; (b) right to be notified of the accusation and a reasonable time to make a defense; (c) right to a jury trial.

[2] Penn Anthracite Mining Co. v. Anthracite Miners of Pa., 114 Pa. Super. Ct. 7, 174 A. 11 (1934).

[3] "The several courts of common pleas, besides the powers herein conferred, shall have and exercise within their respective districts, subject to such changes as may be made by law, such chancery powers as are now vested by law in the several courts of common pleas . . . or as may hereafter be conferred upon them by law." PA. CONST. (1874), Art. V, § 20.

[4] 1 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 173-178 (1927). Larremore, "Constitutional Regulation of Contempt of Court," 13 HARV. L. REV. 614 (1900).

[5] Scruggs v. Heiskell, 95 Tenn. 455, 32 S. W. 386 (1895); Johnson v. Taylor, 106 Ind. 89, 5 N. E. 732 (1885), and other cases collected in DURFEE, CASES ON EQUITY 83-84 notes (1928), upholding as constitutional or accepting without question statutes requiring jury trial in equity cases on demand of parties or in particular kinds of cases. Shanfeld, "The Scope of Judicial Independence of the Legislature in Matters of Procedure and Control of the Bar," 19 ST. LOUIS L. REV. 163 (1934).

[6] State ex rel. Sorenson v. Farmers' State Bank, 121 Neb. 532, 237 N. W. 857 (1931), discussed 30 MICH. L. REV. 773 (1932); Brown v. Kalamazoo Circuit Judge, 75 Mich. 274, 42 N. W. 827 (1889) (statute requiring jury trial in equity cases); Callanan v. Judd, 23 Wis. 343 (1868) (same); Epstein v. State, 190 Ind. 693, 127 N. E. 441, 128 N. E. 353 (1920), 34 HARV. L. REV. 424 (1921); State v. Cannon, 196 Wis. 534, 221 N. W. 603 (1928) (power of legislature to control admission to the bar). There are many cases holding that courts cannot be deprived of power to control proceedings, methods of work, officers and attendants, and surroundings. State ex rel. Hovey v. Noble, 118 Ind. 350, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. Rep. 143 (1889); In re Headnotes, 43 Mich. 641, 8 N. W. 552 (1881); and other cases collected in HALL, CASES ON CONSTITUTIONAL LAW 81-82 notes (1926).

[7] Larremore, "Constitutional Regulation of Contempt of Court," 13 HARV. L. REV. 614 (1900); Frankfurter and Landis, "Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers," 37 HARV. L. REV. 1010 (1924).

have been generally upheld.[8] Legislative declarations of what acts amount to contempts have been generally held not conclusive on the courts.[9] Attempts to secure to the defendant in contempt proceedings the right to demand jury trial have been quite uniformly declared invalid interferences with the judiciary;[10] so, too, have statutes providing for disqualification of the judge on objection of the defendant.[11] In the federal courts the case history of congressional regulation of the judiciary has been very different. Abuses of an early date resulted in an act limiting and defining the judicial power to punish for contempt by summary process which was upheld as to "inferior" federal courts some forty years later.[12] Likewise declared valid was the provision of the Clayton Act guaranteeing jury trial to contempt defendants in a limited class of cases.[13] By the recent Norris-La Guardia Act this guarantee has been extended to include civil contempts.[14]

[8] Penalties: Ex Parte Garner, 179 Cal. 409, 177 P. 162 (1918); Richardson v. Commonwealth, 141 Ky. 497, 133 S. W. 213 (1911). Procedure: In re Coulter, 25 Wash. 526, 65 P. 759 (1901); State ex rel. Rankin v. Dist. Court, 58 Mont. 276, 191 P. 772 (1920).

[9] Crow, State ex inf. v. Sheperd, 177 Mo. 205, 76 S. W. 79 (1903); Ford v. State, 69 Ark. 550, 64 S. W. 879 (1901); Hale v. State, 55 Ohio St. 210, 45 N. E. 199, 36 L. R. A. 254 (1896). But see People ex rel. Munsell v. Court of Oyer and Terminer, 101 N. Y. 245, 4 N. E. 259 (1886), where court was held restricted by legislative enumeration.

[10] Carter v. Commonwealth, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310 (1889); Walton Lunch Co. v. Kearney, 236 Mass. 310, 128 N. E. 429 (1920); and cases collected, note, 36 L. R. A. 254 (1897). Under the Oklahoma Constitution the accused is now entitled to a jury trial where an order of injunction or restraint has been violated and the violation is an indirect contempt. See Blanchard v. Bryan, 83 Okla. 33, 200 P. 444 (1921).

[11] Smith v. Speed, 11 Okla. 95, 66 P. 511, 55 L. R. A. 402 (1901); State ex rel. Boston, etc., Co. v. Clancy, 30 Mont. 193, 76 P. 10 (1904).

[12] 4 STAT. 487 (1831), upheld in Ex parte Robinson, 19 Wall. (86 U. S.) 505 (1873). But see Toledo Newspaper Co. v. United States, 247 U. S. 402, 38 S. Ct. 560 (1918). For a discussion of the history of the act and the famous impeachment of Judge Peck, see Frankfurter and Landis, "Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts — A Study in Separation of Powers," 37 HARV. L. REV. 1010, 1024 et seq. (1924).

[13] Michaelson v. United States, 266 U. S. 42, 45 S. Ct. 18 (1924); 36 HARV. L. REV. 1012 (1923); 10 CORN. L. Q. 215 (1925); 23 COL. L. REV. 375 (1923); 23 MICH. L. REV. 516 (1925); 9 MINN. L. REV. 368 (1925). The act included indirect contempts for violations of injunction in labor disputes which also amounted to crimes and was construed by the court to apply only to criminal contempt proceedings as defined by Gompers v. Bucks Stove & Range Co., 221 U. S. 418 at 441, 31 S. Ct. 492 (1911).

[14] 47 STAT. 70 (1932); 29 U. S. C., §§ 101-115. The object of the act "is to limit the powers of federal courts at law and in equity, and chiefly to regulate the grant of federal injunctions in labor disputes." 30 MICH. L. REV. 1257 (1932). It is to be noted that the character of the proceedings, not of the acts, determines whether or not it is a criminal or civil contempt, the distinction being between coercive and punitive proceedings. See Beale, "Contempt of Court, Criminal and Civil," 21 HARV. L. REV. 161 (1908); Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 441, 31 S. Ct. 492, 498, 55 L. Ed. 797 (1911). The constitutionality of this part of the act has not yet

The greater freedom in legislative treatment sanctioned by the federal courts may be explained by the distinction suggested in the cases between "statutory" and "constitutional" courts.[15] The majority opinion in the principal case aligns the Pennsylvania situation with the federal one by placing its decision squarely on the fact that under the state constitution, construed in light of the peculiar history of chancery courts in Pennsylvania, the chancery powers of the common pleas courts are statutory.[16] This seems regrettable and the concurring opinion of Justice Maxey, ignoring the logical distinction between kinds of courts, the preferable view.[17] The concept of separation of powers is a changing one; it is not a technical rule of law, but a political doctrine.[18] While it is necessary to guarantee the courts, whatever their mode of creation, the authority necessary in the strict sense to their functions, there is no good reason why the phrase "inherent judicial power" should be mechanically applied to prevent reasonable regulation of the judicial process.[19] The required use of a jury, as a fact finding agency, and other criminal procedure in contempt cases does not threaten the integrity or existence of the courts.[20] But it does provide a salutary check on the

been decided, but the implication of the decision in Michaelson v. United States, 266 U. S. 42, 45 S. Ct. 18 (1924), was that jury trial could not be required in civil contempts. Actually a contempt proceeding is usually both criminal and civil and any distinction made for this purpose artificial and unnecessary. See 12 N. Y. UNIV. L. Q. REV. 101 at 103 (1934).

[15] Ex parte Robinson, 19 Wall. (86 U. S.) 505 (1873); Bradley v. State, 111 Ga. 168, 36 S. E. 630, 50 L. R. A. 691 (1900). But cf. Michaelson v. United States, 266 U. S. 42, 45 S. Ct. 18 (1924).

[16] "While the legislature may not abolish the common pleas, it may abolish or change any or all chancery powers conferred on those courts. In short, it may deal with chancery powers to any extent consistent with maintaining the integrity of the courts of common pleas." Linn, J., in the principal case, 178 A. 291 at 296.

[17] "The only '*inherent* judicial power' that is entitled to recognition here is that power which is inherent in the sense of being necessarily implied in an express grant of power. Measured by this reasonable standard, the power to adjudge a person guilty of an act of contempt committed away from the court is *not* an implied power necessary to the complete exercise of the judicial power expressly granted. . . . In the light of this opinion [Michaelson v. United States] the difference between constitutional courts and courts created by statute *is of no materiality in a question of the kind now before us*. . . ." Maxey, J., concurring in the principal case, 178 A. 291 at 297.

[18] Pound, "Spurious Interpretation," 7 COL. L. REV. 379 (1907); Frankfurter and Landis, "Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts — A Study in Separation of Powers," 37 HARV. L. REV. 1010 at 1012 et seq. (1924).

[19] The statute in the principal case by its terms applies only to indirect criminal contempts and it expressly provides that the requirements of a reasonable time for a defense and jury trial shall not apply to contempts committed in the immediate presence of the court or so near thereto "as to interfere directly with the administration of justice." PA. PUB. LAWS (1931), No. 925; PA. STAT. ANN. (Purdon 1934), tit. 17, § 2047. See note 17, supra.

[20] At common law down to the eighteenth century contempt proceedings were conducted with a jury. The later adoption of the summary procedure was due to the subtle influence of the court of Star Chamber. But this fact had been forgotten by courts until a recent series of articles by Sir John Charles Fox, "The King v. Almon," 24 L. Q. REV.

arbitrary exercise of judicial prerogative, by reducing the influence of the personal equation, and gives the defendant some of the protection he would be accorded in a criminal prosecution for the same offense.[21] The sweeping character and generous grant of injunctions in labor disputes has been frequently noticed and criticized.[22] These considerations alone would seem to provide ample grounds for any state court to say with the Pennsylvania court that in view of the small restriction on the judiciary involved the act is "clearly constitutional."

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184, 266 (1908); "The Summary Process to Punish Contempt," 25 L. Q. REV. 238 (1909); "Eccentricities of the Law of Contempt of Court," 36 L. Q. REV. 394 (1920); "The Practice in Contempt of Court Cases," 38 L. Q. REV. 185 (1922); "The Writ of Attachment," 40 L. Q. REV. 43 (1924).

[21] "Unless we have a jury trial in these contempt cases, *one individual* acts as lawyer, judge, *and* jury. The judge issues the injunction . . . then tries him who is accused of its disobedience. What security has a citizen against a judge armed with this unrestrained power to condemn and who perhaps has a prejudice against the man he thinks has been contemptuous toward his command?" Maxey, J., concurring, in the principal case, 178 A. 291 at 300.

[22] Great Northern Ry. v. Brosseau, (D. C. N. D. 1923) 286 F. 414; Taliaferro v. United States, (C. C. A. 4th, 1923) 290 F. 906; Norris, "Injunctions in Labor Disputes," 16 MARQ. L. REV. 157 (1932); Brissenden, "The Labor Injunction," 48 POL. SCI. Q. 413 (1933); FRANKFURTER and GREENE, THE LABOR INJUNCTION, 199 et seq. (1930).