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# CRIMINAL LAW AND PROCEDURE-CONTEMPT OF COURT-SHERIFF ALLOWING FEDERAL PRISONERS TO ESCAPE FROM COUNTY JAIL

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CRIMINAL LAW AND PROCEDURE—CONTEMPT OF COURT—SHERIFF ALLOWING FEDERAL PRISONERS TO ESCAPE FROM COUNTY JAIL—Information was filed against a sheriff for contempt in negligently permitting the escape of federal prisoners from his county jail. *Held*, the sheriff was guilty of contempt of the federal committing court. *United States v. Fanning*, (D. C. W. Va. 1934) 6 F. Supp. 412. Affirmed, *Fanning v. United States*, (C. C. A. 4th, 1934) 72 F. (2d) 929.

I.

Is the sheriff an officer of his state courts? Under the West Virginia statute, "every circuit court, county court, and other court of record of

any county shall be attended by the sheriff of the county in which it is held, who shall act as *officer thereof*." [1] And independently of this statute, the common law holds the sheriff an officer of the court. In *Blackstone's Commentaries* the rule is stated that contempts "committed by *sheriffs*, bailiffs, jailers, and *other officers* of the court; by abusing the process of the law, or deceiving the parties, by any acts of oppression, extortion, collusive behavior, or culpable neglect of duty," are punishable by summary proceedings.[2] Following this statement, it is clear that the sheriff is an officer of the court, and that he may be punished for contempt of court for the violation of any duty owed to such court. Does he, then, owe the duty to keep safely prisoners committed to his custody by such court?

2.

At common law the sheriff did owe such duty to keep prisoners safely. "In his ministerial capacity the sheriff is bound to execute all process issuing from the king's court of justice. . . .

"Jailers are . . . servants of the sheriff, and he must be responsible for their conduct. Their business is to keep safely all such persons as are committed to them by lawful warrant; and if they suffer any such to escape, the sheriff shall answer it to the king. . . ." [3] The sheriff was made answerable for a violation of this duty by himself or by his servant.

This is illustrated by the case of *Rex v. Beardmore* [4] which states that it is "at the sheriff's peril, to execute the rule of the Court in a proper manner." The sheriff had failed to lock his prisoner in the pillory in an adequate manner, which offense the court says "is of the most pernicious tendency; nothing being of worse consequence, than that an officer of the Court should combine with a criminal to frustrate the sentence of the Court."

Most states, as has West Virginia,[5] have statutes declaratory of this common law duty. But even in the absence of such statute, there is still this common law duty as set out in the case cited above, and the sheriff is guilty of contempt when he disobeys the orders of the court or willfully or intentionally neglects his duties.[6] In the instant case the sheriff was negligent in the appointment of a jailer, in the employment of trusties, in permitting without search visits to federal prisoners of desperate character after discovery of saws in their cells, and in failing to

[1] W. Va. Code (1931), § 51-3-5. (Italics the writer's.)
[2] 4 WENDELL, BLACKSTONE'S COMMENTARIES 283 (1854). (Italics the writer's.)
[3] 1 WENDELL, BLACKSTONE'S COMMENTARIES 344-345 (1854).
[4] Rex v. Beardmore, 2 Burr. 792, 97 Eng. Rep. 564 at 565, 566 (1759).
[5] W. Va. Code (1931), § 7-8-2.
[6] 1 BAILEY, HABEAS CORPUS 397 (1913).

test bars. It is not charged that the sheriff intentionally allowed the escape, but that he intentionally did the acts or omitted to do the acts which permitted the escape; and the law implies that he intended the consequences of his acts.[7] But even were there no such intention on his part, it was found by the court that his acts were gross negligence amounting to willful neglect of duty, and consequently he still comes under this common law rule and has violated such duty — at least as to his state courts. But does the sheriff owe this same duty to the federal courts?

3.

It has been urged [8] that the sheriff is not an officer of the United States, and that he has no such relation to a federal court as would warrant an attachment for official misconduct. But the court holds that this proposition is not supported by law, and cites Justice Story: "For certain purposes, and to certain intents, the state jail *lawfully used* by the United States, may be deemed to be the jail of the United States, and that keeper to be the keeper of the United States." [9] It follows that the only question is, is it a lawful use to commit the prisoners of the United States to the state jails?

Now it is true that states may refuse commitment of persons convicted in federal courts,[10] and where they do so, the United States may not lawfully commit. But Congress, by a resolution passed September 23, 1789,[11] recommended that the several states pass laws making it the duty of the keeper of their jails to receive and safe-keep prisoners committed under authority of the United States, under like penalties as in the case of prisoners committed under the authority of such states respectively. West Virginia complied with this request as have many of the other states of the United States,[12] and adopted such a statute,[13] under which this case was decided. Under such statutes, the federal

[7] In re O'Rourke, (D. C. Mont. 1918) 251 F. 768. No intent to violate writ of commitment, but intent to do those acts, the natural result of which was such violation. Sheriff was not excused.

[8] In re Birdsong, (D. C. Ga. 1889) 39 F. 599.

[9] Randolph v. Donaldson, 9 Cranch. (13 U. S.) 76 at 86 (1815). (Italics the writer's.)

[10] Ex parte Shores, (D. C. Iowa 1912) 195 F. 627. For other cases see "Prisons," AM. DIG., 2d Dec. Ed.; ibid., 3rd Dec. Ed.

[11] 1 Stat. L. 96.

[12] Cal. Pen. Code, §§ 1601, 1602; Ariz. Rev. Code, §§ 397-398; Wyo. Rev. Stat. (1931), c. 29, § 424; Wash. Comp. Stat. (1927), § 10209; Wis. Stat. (1931), c. 55, § 11. See the various other state statutes.

[13] W. Va. Code (1931), § 7-8-8—"Federal Prisoners.—The jail of any county may be used for the confinement of persons committed thereto under the laws of the United States. The jailer thereof shall receive, keep and discharge such persons pursuant to the commitment, as provided in the laws of the United States."

courts can lawfully commit to state jails, which gives rise to the same duty [14] in the state sheriff to the federal courts as he owes to his own state courts.[15] And in the absence of such statute, the federal court cannot entrust prisoners to state sheriffs — having no common law right to do so — and consequently the question of contempt for allowing them to escape does not arise.

4.

Even though the sheriff owes federal courts such a duty, have federal courts power to punish for its violation? It is true that the courts of the United States, except the Supreme Court, are creatures of Congress, and have no common law jurisdiction of crimes against the United States, and that the legislature must first make an act a crime before federal courts can take jurisdiction of the offense.[16] But independently of statute, the courts of the United States have power to fine for contempts and to enforce obedience to their orders—even for criminal contempt.

> "Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt, . . . inforce the observance of order, etc., are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute. . . ." [17]

Now the same act which created the inferior federal courts says, "said courts . . . shall have power . . . to punish by fine or imprisonment . . . all contempts of authority in any cause or hearing before the same." [18] But even without this statute, the power to punish for contempt is inherent in all courts: "its existence is essential to the preserva-

[14] *Duty* is used here in the sense of obligation (1 BOUVIER'S LAW DICTIONARY), although not necessarily a legal obligation which can always be enforced by the law. If duty is defined as having a corresponding power to enforce, it has not yet been shown that there is a duty, but even by this definition, part 4 of this article shows that there is such a duty.

[15] In re Kays, (D. C. Cal. 1888) 35 F. 288, says it is the duty of the sheriff to receive and keep in the county jail, until legally discharged, any prisoner committed thereto by process or order issued under authority of the United States. The sheriff is made answerable for his safe-keeping in the courts of the United States according to the laws thereof. In re Birdsong, (D. C. Ga. 1889) 39 F. 599, to the same effect states that the sheriff, "commanded as he is, to receive them by the law of Georgia and of the United States . . . is a jailer of the United States."

[16] Servis v. Marsh, (C. C. Ill. 1889) 38 F. 794; United States v. Hudson & Goodwin, 7 Cranch. (11 U. S.) 32 (1812) (the first case to bring up the question of the power of exercise of criminal jurisdiction by inferior federal courts in common law cases).

[17] United States v. Hudson & Goodwin, 7 Cranch. (11 U. S.) 32 at 34 (1812).

[18] 1 Stat. 83, § 17.

tion of order in judicial proceedings, and to the enforcement of judgments, orders, and writs of the court, and consequently to the due administration of justice." [19] It follows that the moment the courts of the United States are called into existence by Congress and invested with jurisdiction over any subject, they become possessed of this power. And it is not necessary that this power to punish for contempt be declared in an act of Congress.

5.

But since the courts owe their existence to Congress, Congress can define and limit such power,[20] and has limited the power of the circuit and district courts of the United States to the following three classes of cases: (1) where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; (2) where there has been misbehavior of any officer of the court in his official transactions; and (3) where there has been disobedience or resistance by any officer, party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the courts.[21] Even so, there can be no argument but that the power to punish for violation of the duty to keep prisoners according to the writ of commitment comes in this classification.[22]

In summary, (1) a sheriff both by common law, and by statute in this jurisdiction, is an officer of his state courts; (2) as such officer, he owes a common law duty to his own state courts to keep prisoners safely, and such duty has been declared by statute in many states; (3) a sheriff owes such duty to the federal courts if his jail has been lawfully used in commitment by federal courts (there is no common law right so to use state prisons, but by statute in many states such right has been established); (4) in the cases where a sheriff owes such duty to the federal courts, such courts have an inherent right from the time they come into existence to punish in contempt proceedings a violation of such duty, in order to carry out the due administration of justice; and (5) consid-

[19] Ex parte Robinson, 19 Wall. (86 U. S.) 505 at 510 (1873).

[20] Ibid.

[21] 4 Stat. 487 at 488.

[22] Considering the sheriff as an officer of the court, he comes under either (2) or (3) of this classification. If, as stated in Ex parte Shores, (D. C. Iowa 1912) 195 F. 627 at 630, the keepers of the jails, "though not strictly officers of the United States, are keepers for the United States," still, according to this case, they are subject to punishment for contempt for disobedience or disregard of the orders committing such prisoners to their custody, and though not considered officers of the court, as keepers they come under (3) of the classification for disobedience by *other* person to any lawful writ. (Here the writ of commitment.)

ering the limitations Congress has placed on this power, still it includes the power to punish a sheriff for the violation of the duty to keep prisoners committed to his jail, according to the writ of commitment.

N. E.