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CONSTITUTIONAL LAW-DUE PROCESS-PUNISHMENT FOR DIRECT CONTEMPT OF COURT

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CONSTITUTIONAL LAW—DUE PROCESS—PUNISHMENT FOR DIRECT CONTEMPT OF COURT—Opposing counsel's objection to material in petitioner's opening statement to the jury was sustained. When petitioner rephrased his statement, the trial court, feeling that he was still trying to get inadmissible material before the jury, threatened to "declare a mistrial if you mess with me two minutes and a half, and fine you besides."[1] Petitioner took an exception to the conduct of the court, and was immediately fined $25. His protests led to successive increases in penalty, culminating in a $100 fine and three days in jail. The Supreme Court of Texas denied habeas corpus on the ground that the evidence supported the judgment of the trial court.[2] The United States Supreme Court granted certiorari on the question of violation of the Fourteenth Amendment. *Held,* affirmed, four justices dissenting. Since the acts charged constituted direct contempt, petitioner was not deprived of his liberty without due process of law. *Fisher v. Pace,* (U.S. 1949) 69 S.Ct. 425.

Firmly imbedded in our law is the power of a court to inflict punishment without formalities of charge or trial for acts committed in open court which tend to derogate from the dignity of the court or amount to an obstruction of administration of justice.[3] It is regarded as inherent in the judicial authority, springing from the necessity of maintaining an orderly and efficient tribunal and preventing perversion of the judicial process.[4] Because the usual requirements of due process need not be observed, the class of direct contempts has been closely restricted, both

[1] Principal case at 426.

[2] In habeas corpus proceedings before the Texas Supreme Court, the petitioner will not be heard to deny the facts set forth in the order of contempt, that court reviewing only jurisdiction. However, the trial court has jurisdiction to punish only if the acts charged in fact constitute a contempt. Ex parte Norton, 144 Tex. 445, 191 S.W. (2d) 713 (1946); Ex parte Fisher, 146 Tex. 328, 206 S.W. (2d) 1000 (1947).

[3] Ex parte Terry, 128 U.S. 289, 9 S.Ct. 77 (1888); Anderson v. Dunn, 6 Wheat. (19 U.S.) 204 (1821); Rust v. Pratt, 157 Ore. 505, 72 P. (2d) 533 (1937), app. dism., 303 U.S. 621, 58 S.Ct. 648 (1937). This procedure is an anomaly in our law, existing apart from due process. Blankenburg v. Commonwealth, 272 Mass. 25, 172 N.E. 209 (1930), cert. den., 283 U.S. 819, 51 S.Ct. 344 (1931).

[4] Michaelson v. United States, 266 U.S. 42, 45 S.Ct. 18 (1924); Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390 (1925).

by statute[5] and by decision,[6] to those acts committed in the presence of the court and actually tending to obstruct justice. All other actions are classified as indirect contempts. The chief danger in both classes is that the question of guilt and the severity of punishment are determined by the offended judge, whose attitude may fall short of impartiality and fairness.[7] This has found recognition in the Supreme Court's admonition that the judge "must banish the slightest personal impulse to reprisal. . . ."[8] More recently this feeling of distrust has manifested itself in the field of indirect contempts, where the "clear and present danger" test has been laid down by the Court in cases of contempt by publication.[9] Such cases as *Bridges v. California*[10] and *Craig v. Harney*[11] demonstrate the Court's tendency to inspect more closely the disciplinary actions of the state courts in the interests of freedom of speech and the press. However, this movement has not been without criticism; dissenters in both the *Bridges* and the *Craig* cases felt that the Court was treating the cases as if appealed from the federal courts rather than as raising a question of state power, and was guilty of an unwarranted disregard of the express findings of the state courts. The influence of these dissents is plain in the majority opinion in the instant case, perhaps indicating that close supervision on constitutional grounds will be limited to the contempt by publication field. In the principal case the Texas Supreme Court expressly found that petitioner's conduct rendered him liable for contempt. The majority opinion, though considering the facts, gives considerable weight to this finding, and notes that the local court is in a better position to evaluate the contemnor's conduct than one sitting far removed from the actual situation. While it is certainly arguable that the trial judge overstepped the limits of propriety, the clear necessity for the power of summary punishment in these cases makes it doubtful that it should be subjected to constitutional restrictions in the absence of very clear proof of abuse. In light of the traditional freedom and discretion of trial courts in direct contempt proceedings, it would seem more proper that occasional arbitrary actions should be corrected on the grounds of abuse of discretion by a court of general appellate jurisdiction, rather than on the grounds of limitation of state powers through application of the due process clause.

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[5] 28 U.S.C. §385 (1947); (Supp. 1948) 28 U.S.C.A. §385.

[6] In re Michael, 326 U.S. 224, 66 S.Ct. 78 (1945); People v. Sherwin, 353 Ill. 525, 187 N.E. 441 (1933); In re Oliver, 333 U.S. 257, 68 S.Ct. 499 (1948).

[7] This is the principal reason for the dissent of Justice Rutledge in the instant case, in which he points out "Whatever the provocation, there can be no due process in trial in the absence of calm judgment and action, untinged with anger, from the bench." Principal case at 431.

[8] Cooke v. United States, 267 U.S. 517 at 539, 45 S.Ct. 390 (1925). See also People v. Richardson, 328 Ill. App. 69, 65 N.E. (2d) 467 (1946).

[9] Freedom of discussion requires that comment be considered constructive contempt only when it constitutes a clear and present danger to the orderly administration of justice. Bridges v. California, 314 U.S. 252, 62 S.Ct. 190 (1941); Pennekamp v. Florida, 328 U.S. 331, 66 S.Ct. 1029 (1946); Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249 (1947).

[10] 314 U.S. 252, 62 S.Ct. 190 (1941).

[11] 331 U.S. 367, 67 S.Ct. 1249 (1947).