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CONTEMPT—THE QUESTIONABLE EXISTENCE OF INHERENT CONTEMPT POWER

After a temporary escape, the police of Manchester, New Hampshire apprehended a motorcyclist, Jon L. Houghton, and his passenger, Joseph R. Moquin, for the violation of six motor vehicle laws. During interrogation, apparently in an effort to salvage Houghton's already clouded driving record, license, and police record, the two men led the police to believe that Moquin was the driver. To the ensuing complaints in the Municipal Court of Manchester Moquin responded *nolo contendere*; and he then paid the imposed fines. Later Moquin went to the law office of the judge who had heard the complaints and related that in fact he had not been the operator of the motorcycle at the time alleged in the complaints. The next day similar complaints were issued against Houghton who pleaded guilty to the offenses charged. Before imposing fines the judge called both men to the bench where upon questioning both admitted their previous switch. Later, after a *capias* was issued to "show cause," the court found that the defendants had perpetrated a fraud upon the court, that their conduct constituted an obstruction of justice, and that they were guilty of contempt. In response to the reserved and transferred questions of law: whether the Municipal Court had jurisdiction over such contempt proceedings; whether the judge had authority to try the respondents in the contempt proceedings; and whether the Court had authority to impose the fines contemplated, the Supreme Court of New Hampshire answered affirmatively and remanded the cause. *State v. Moquin*, 191 A.2d 541. (N.H. 1963).

Two issues of importance are raised by this decision, first whether the Municipal Court of Manchester had the power to proceed as it did, second whether, assuming the power to have been in the Court, the acts of the defendants were properly punished as contempt of court. This note is written to examine these issues in detail.

Mr. Justice Lampron, author of the majority opinion, apparently was satisfied that other jurisdictional questions were not raised, and wrote: "The power to punish for contempt is inherent in the very organization of all courts and is essential to the functioning of our judicial system."¹ He cites several cases to support this idea. One of these cases concerns justices of the peace.² The case of *State v. Matthews*³ supports the idea expressed. A search back through the authorities leads to a paraphrase of William Blackstone that ". . . as power, therefore, in the supreme courts of justice

¹ 191 A.2d 541, 543 (N.H. 1963).

² *State ex rel. Welsh v. Towle*, 42 N.H. 540, 546 (1861), holding "that as to justices of the peace . . . the power is expressly conferred by statute."

³ 37 N.H. 450 (1859).

to suppress such attempts (to condemn the courts) by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every judicial tribunal."⁴ Next, as also do the dissenting Justices, the court cites *Opinion of the Justices*.⁵ Here the Justices, in response to legislative inquiry as to the Constitutional questions raised by proposed legislation, after giving a scholarly recital of the old chestnut about necessity begetting summary contempt power,⁶ stated that "as before pointed out, it is the law in this state that the power to punish for contempt is an essential attribute of a court of general jurisdiction." The other citations, from other jurisdictions, support the view taken.⁷

This examination of local authorities becomes important in view of the complex question of a court's power to punish for contempt.⁸ Forty-seven of the fifty states have had reported cases touching upon this point.⁹ Excluding New Hampshire for the moment, in sixteen states contempt power is said to inhere in all courts.¹⁰ In twenty-eight states contempt power is said to inhere in courts of general or superior jurisdiction,¹¹ or in

⁴ I BLACKSTONE, COMMENTARIES 286*, paraphrased in *Tenny's Case*, 23 N.H. 162, 166 (1851).

⁵ 86 N.H. 597, 602, 166 Atl. 640, 646 (1933). (Emphasis added.)

⁶ See generally Goldfarb, *The History of the Contempt Power*, 1961 WASH. U.L.Q. 1.

⁷ *State v. Jackson*, 147 Conn. 167, 158 A.2d 166 (1960); *Wood v. Georgia*, 370 U.S. 375 (1962).

⁸ See generally, Annots., 8 A.L.R. 1543; 54 A.L.R. 318; 73 A.L.R. 1185.

⁹ No cases have been found for Alaska, Arizona, or Delaware.

¹⁰ Arkansas, *Pace v. State*, 177 Ark. 512, 7 S.W.2d 29 (1928); but see *Ex parte Patterson*, 110 Ark. 94, 161 S.W. 173 (1913). Connecticut, *State v. Jackson*, 147 Conn. 167, 158 A.2d 166 (1960); but see *McCarthy v. Hugo*, 82 Conn. 262, 73 Atl. 778 (1909). Illinois, *People v. Siegal*, 400 Ill. 208, 79 N.E.2d 616 (1948). Louisiana, *State ex rel. Collins*, 237 La. 111, 110 So.2d 545 (1959). Mississippi, *Melvin v. State*, 210 Miss. 132, 48 So.2d 856 (1950). Montana, *State ex rel. Renkin v. District Court*, 58 Mont. 276, 191 Pac. 772 (1920). New Mexico, *State ex rel. Bliss v. Greenwood*, 63 N.M. 156, 315 P.2d 223 (1957). North Carolina, *In re Deaton*, 105 N.C. 59, 11 S.E. 244 (1890). Oklahoma, *Brown v. State*, 89 Okla. Crim. 443, 209 P.2d 715 (1949). Oregon, *Taylor v. Gladden*, 377 P.2d 14 (Oregon 1962). Pennsylvania, *Marco Industries v. United Steelworkers*, 401 Pa. 299, 164 A.2d 205 (1960). Tennessee, *Loy v. Loy*, 32 Tenn App. 470, 222 S.W.2d 873 (1949). Vermont, *In re Consolidated Rendering Co.*, 80 Vt. 55 (1907). Virginia, *Nichols v. Commonwealth*, 186 Va. 315, 42 S.E.2d 306 (1947). Wisconsin, *Appeal of Chicon*, 227 Wis. 62, 278 N.W. 1 (1938). Wyoming, *Application of Stone*, 77 Wyo. 1, 305 P.2d 777 (1957).

¹¹ California, *People v. Clemmons*, 208 A.C.A. 756, 25 Cal. Repr. 467 (1962). Florida, *Ducksworth v. Boyer*, Fla., 125 So.2d 844 (1960). Indiana, *La Grange v. State*, 238 Ind. 689, 153 N.E.2d 593 (1958). Massachusetts, *New England Novelty Co. v. Sandberg*, 315 Mass. 739, 54 N.E.2d 915 (1944). Minnesota, *In re Cary*, 165 Minn. 203, 206 N.W. 402 (1925). Missouri, *Zeitinger v. Mitchell*, 244 S.W.2d 91 (Mo. App. 1951). Nebraska, *Kasperek v. May*, 174 Neb. 732, 119 N.W.2d 512 (1963). North Dakota, *State v. Markuson*, 5 N.D. 147, 64 N.W. 934 (1895). Ohio, *In re Shelton*, 103 Ohio App. 436, 145 N.E.2d 673

courts of record,¹² or in constitutional courts.¹³ Two states look to the statutes only.¹⁴

The recognition of inherent power to punish for contempt in "ranking" courts by the twenty-eight jurisdictions above mentioned does not preclude the recognition of inherent power in other "inferior" courts, but the pronouncements as given do clearly avoid the sweeping recognition given in the first mentioned states. Indeed the issue raised here will not arise in many states in the face of statutes giving contempt powers broad enough for all practical work to all or most of the courts.¹⁵ The issue has otherwise been skirted by deeming a court, of whatever rank in the judicial hierarchy, in which cases are docketed, judgements recorded, etc., to be of record, thus possessing inherent contempt power.¹⁶

In a few cases the contempt powers of courts similar to the Municipal Court of Manchester have been considered.¹⁷ The contempt power of a "court for the trial of small causes" was questioned in *Rhinehart v. Lance*,¹⁸ and the court declared: "Such a power is not a necessary incident of a court of justice, and therefore is not granted by implication. It can only be derived from the common law or by a legislative grant of such a power." The "Criminal Court of Memphis" had asserted contempt power in *State v. Galloway*,¹⁹ only to learn on appeal that "the inferior courts of Tennessee have no power to punish as contempts, the acts or omissions of

(1957). South Carolina, *State v. Goff*, 228 S.C. 17, 88 S.E.2d 788 (1955). South Dakota, *Evans v. Unruh*, 107 N.W.2d 917 (1961). Texas, *Ex parte Densser*, 30 Tex. App. 566, 173 S.W. 1111 (Crim. App. 1891). Utah, *In re Evans*, 42 Utah 282, 130 Pac. 217 (1913).

¹² Alabama, *Ex parte Stephenson*, 34 Ala. App. 1, 40 So.2d 713 (1947). Colorado, *People ex rel. Connor v. Stapleton*, 18 Colo. 568, 33 Pac. 167 (1893). Idaho, *McDougall v. Sheridan*, 23 Idaho 191, 128 Pac. 954 (1913). Iowa, *Harding v. McCullough*, 236 Iowa 556, 19 N.W.2d 613 (1945). Kansas *Ex parte Gambrell*, 161 Kan. 4, 165 P.2d 760 (1946). Kentucky, *Young v. Knight, Ky.*, 329 S.W.2d 195 (1959). Maine, *Charles Cushman Co. v. Mucksay*, 135 Me. 490, 200 Atl. 505 (1938). Maryland, *Hitzelberger v. State*, 173 Md. 435, 196 Atl. 288 (1938). Michigan, *In re Scott*, 342 Mich. 614, 71 N.W.2d 71 (1955). New Jersey, *Board of Health v. N.Y. Central R.R.*, 10 N.J. 284, 90 A.2d 736 (1952). Rhode Island, *In the Matter of Jenckes*, 6 R.I. 18 (1859).

¹³ Georgia, *Hewitt v. State*, 12 Ga. App. 168, 76 S.E. 1054 (1913). Hawaii, *Application of Balucan*, 44 Hawaii 271, 353 P.2d 631 (1960). Nevada, *State v. District Court*, 52 Nev. 270, 286 Pac. 418 (1930). Washington, *State v. Estill*, 55 Wash.2d 576, 349 P.2d 210 (1960).

¹⁴ New York, *People ex rel. Clarke v. Truesdall*, 79 N.Y.S.2d 413 (1948). West Virginia, *State ex rel. McNinch v. Porter*, 105 W. Va. 441, 143 S.E. 93 (1928).

¹⁵ E.g. DEL. CODE ANN. tit. 11 (1953).

¹⁶ *Board of Health v. N.Y. Central R.R.*, 10 N.J. 284, 90 A.2d 736 (1952).

¹⁷ See generally MUNICIPAL COURT OF CHICAGO, A BRIEF ON CONTEMPT OF COURT IN ILLINOIS (circa 1920).

¹⁸ 43 N.J.L. 311, 320, 39 Am. Rep. 592, 599 (1881).

¹⁹ 45 Tenn. 326, 98 Am. Dec. 404 (1868).

parties and persons, other than such acts and omissions as are prescribed by the Code or other statutory enactments." The "Municipal Court of Texarkana" was held to have been created as a court of record in *Turquette v. State*.²⁰ In *Goodhart v. State*,²¹ the court said: "The City Court of New Haven is a court of record, and it is unquestionable that in this state such a court has the inherent right . . ." The city charter was interpreted to give the contempt power in *Faircloth v. City of Macon*.²² There have been cases in which contempt power was based on statutes clearly giving it, or readily implying it.²³

It is of more than academic interest to note that the very existence of a summary contempt power at common law is in serious doubt.²⁴ In the reports of the House of Commons in the *Case of Sir Francis Burdett: Cases of Commitments for Contempt by Courts of Justice*,²⁵ the committee of the House of Commons endeavored to collect cases in support of recommending a summary punishment of Sir Francis. The committee found but five reported cases decided before 1765.²⁶ The Report included these five cases and two later reported cases, including the so-called "foundation"²⁷ case, *Rex v. Almon*,²⁸ wherein this language is found: "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 necessary incident to every Court of Justice, whether of record or not to fine and imprison for a contempt of the Court, acted in the face of it. . . . "I have examined very carefully to see if I could find out any vestiges or trace of its introduction, but can find none. It is as ancient as any other part of the common law. . . ."

To this case it has been said that "the present law of contempt in this country has been founded . . . upon the statements of Blackstone in his Commentaries and Sir John Eardley-Wilmot in *King v. Almon* which

²⁰ 174 Ark. 875, 298 S.W.15 (1927).

²¹ 84 Conn. 60, 62, 78 Atl. 853 (1911).

²² 122 Ga. 795, 50 S.E. 915 (1905).

²³ *Ex parte Pescaira*, 17 Puerto Rico 706 (1911); *Ex parte Hubbard*, 63 Tex. 516, 140 S.W. 451 (1911); *Rothman v. Rosmore*, 155 Misc. 781, 281 N.Y.S. 637 (1935).

²⁴ *Bridges v. California*, 314 U.S. 252 (1941); see generally STANSBURY, *THE TRIAL OF JAMES S. PECK*, 372-425 (1833); THOMAS, *PROBLEMS OF CONTEMPT OF COURT* (1934); FOX, *HISTORY OF CONTEMPT OF COURT* (1927); Goldfarb, *The History of the Contempt Power*, 1961 WASH. U.L.Q. 1; Frankfurter and Landis, *Power of Congress*, 37 HARV. L. REV. 1010 (1924).

²⁵ 8 HOWELL, *STATE TRIALS* 1349 (Appendix E, 1810).

²⁶ This was noted by Commissioner Storrs in the trial of Judge Peck. See STANSBURY, *supra* note 23, at 379.

²⁷ For a general discussion, see Fox, *King v. Olmon*, 24 L.Q. REV. 184 (1908).

²⁸ Wilmot's Ops. 243, 254, 97 Eng. Rep. 94 (1765).

concerned a contempt by publication. Oddly enough, neither of these authorities forms a legal precedent, for the opinion of Justice . . . Wilmot was never delivered, as the case was dismissed. . . .²⁹ It also appears that in all probability the statements made by Blackstone merely represented the views of Judge Wilmot, and that it may be said that the present scope of the summary power is due almost exclusively to the opinion of one man."³⁰

The Report of the House of Commons also includes "file" cases (unreported), five in number, which mostly concerned interference with service of process by such extra-legal means as throttling the sheriff.

Mr. Storrs, Commissioner, used the above mentioned report in the trial for the impeachment of Judge James H. Peck before the United States Senate,³¹ with the able assistance of James Buchanan, later President of the United States and soon to be draftsman of legislation concerning Federal contempt powers.³² Commissioner Storrs, in a very scholarly manner, tried to discredit the *Almon* and other cases enumerated in the Report. He found that the only satisfactory explanation of the later growth of contempt power must be that "Every action or word that was offensive to the Stuart Kings or the political functionaries who supported their doctrines or their designs, was swept into the star chamber under some frivolous or refined pretext under the name of *Contempt*."³³

The order and dignity of the great Superior Courts of England (and indeed of the special courts) were maintained by the usual proceedings such as indictment or information, with trial by jury, except when the offender confessed, or the offense, a common law crime—usually a libel, was committed in the actual view of the court as a matter of public record.³⁴ Thus as before mentioned the historical standing of summary contempt power, especially in the jurisdictions that rely on the common law as the source of the power, is in serious doubt.

The power of the Municipal Court of Manchester, New Hampshire,

²⁹ See 97 Eng. Rep. 94, note (a).

³⁰ Thomas, *supra* note 24, at 5; see also Deutsch, *United States v. Major General Andrew Jackson*, 46 A.B.A.J. 966 (1960); Green v. United States, 356 U.S. 165, 202 (1958).

³¹ Judge Peck was discharged by a vote of the Senate. See STANSBURY, *supra* note 23, at 372 *et seq.*

³² 1 Stat. 83 (1789); see 4 Stat. 487 (1831); *Ex Parte Robinson*, 19 Wall. (86 U.S.) 505 (1873); Frankfurter and Landis, *supra* note 23, at 1027: "So deeply did the Peck case stir the country that State after State copied the new Federal law."

³³ STANSBURY, *supra* note 23, at 390.

³⁴ See generally, Frankfurter and Landis, *supra* note 23; see also *Republica v. Oswald*, 1 Dall. (Pa.) 319 (1788); LIVINGSTON, SYSTEM OF PENAL LAW PREPARED FOR THE STATE OF LOUISIANA, tit. V, ch. XI, 51-52 (1824).

must now be examined. Clearly the court's powers are limited.³⁵ It is furthermore clear that no statutory enactment gives contempt power in such a motor vehicle case.³⁶ The local precedent as to the scope of the contempt powers, as deemed inherent, is not clear.³⁷ As pointed out by Justice Kenison,³⁸ the latest pronouncement of the Supreme Court of New Hampshire limited the words used to "courts of general jurisdiction."³⁹ The probate courts have their contempt powers granted by statute.⁴⁰ The court in question and others of its class have been given express powers to punish for contempt in certain specified instances which in no way touch upon the instant case. The legislative attention given to these matters would indicate that the absence of a contempt statute for such a motor vehicle case would be conscious and deliberate on the part of these lawmakers.⁴¹

In view of the cases involving city courts, in which no blanket recognitions of contempt powers appear, the weak historical background,⁴² the great distrust by many for rationalizations based on necessity such as could admit improper things to our law, and of course these last observations, the recognition by the Supreme Court of New Hampshire of contempt power in all courts rests on a view which is not only a minority opinion but is of a somewhat doubtful background.⁴³

It remains of interest to see what the Supreme Court, having thus recognized contempt power, considers within its scope. Contempt has been defined as: "disregard of, or disobedience to, the rules or orders of a . . . judicial body, or an interruption of its proceedings by disorderly behavior or insolent language in its presence, or so near thereto as to disturb the proceedings or impair the respect due to such a body."⁴⁴ The mention in this case of "acts or conduct which tend to obstruct or interfere with the due and orderly administration of justice"⁴⁵ shows an approval of a formula which has found its way into a number of decisions.⁴⁶

³⁵ New Hampshire Revised Statutes Annotated, Ch. 502 and elsewhere; hereinafter cited as R.S.A.

³⁶ This was pointed out by Kenison, C.J., dissenting, in *Moquin* at 544.

³⁷ Refer to previous discussion.

³⁸ Note 36, *supra*.

³⁹ Opinion of the Justices, 86 N.H. 597, 602, 166 Atl. 640, 641 (1933).

⁴⁰ R.S.A. 592-A:15; Laws 1957, C. 244, n. 8; R.S.A. 165:19; R.S.A. 169:5; R.S.A. 169:35; Laws 1957, C. 214, s. 1; as noted by Kenison, C.J., dissenting, in *Moquin* at 544.

⁴¹ Such a conclusion would result, at least in the abstract, from accepted canons of construction.

⁴² See previous discussions.

⁴³ Note 56, *infra*.

⁴⁴ DANGEL, CONTEMPT, 2 (1939); see note 50, *infra*.

⁴⁵ 191 A.2d 541, 543 (1963).

⁴⁶ See WORDS AND PHRASES, "Contempt," for a compilation of such cases.

The Supreme Court of South Carolina recently held that a court's contempt power was limited in application thus:⁴⁷

Every act which tends to frustrate the mandates of a Court of justice is a contempt of its authority; however it [the initiation of contempt proceedings] can only issue in cases where the court which issues it has awarded some process, given some judgment, made some legal Order, or done some act which the party against whom it issues or on whom it is binding, has either neglected to obey, contumaciously refused to submit to, incited others to defeat by artifice or force, or treated with terms of contumely and disrespect in the face of the court.

The variety of acts punished as contempt tests the imagination of man,⁴⁸ but in almost all the cases the acts had been directed to a court before which proceedings were pending or in consequence of the actions of such a court. Such was true in the case cited by the majority for a "take-the-rap" scheme.⁴⁹

The case of *State v. Treon* cited by the majority offers no holding in point, the relevant words being:

The fact is that the acts and conduct of this defendant and those associated with him were contemptuous, probably constituting indirect contempt.⁵⁰ We are not called upon to pass upon that question.⁵¹

In *State v. Jaffrin*,⁵² the defendant, because she had given money to a "fixer," did not show up for the court appearance noted on the back of her traffic ticket, necessitating an arrest warrant, to which she immediately submitted. She was punished for contempt. In this case no questionable conduct occurred while the court was in any way entertaining the case. From this case the next logical step could well be contempt punishment for any failure to appear. This is perhaps the only precedent for punishing as contempt behavior coming entirely before the court commenced proceedings.

The only conduct of the defendants in this case is related by the majority opinion:⁵³

Moquin further aided this predetermined deception and obstruction of justice by pleading to these complaints in open court and Houghton, who was present,

⁴⁷ *Long v. McMillan*, 226 S.C. 598, 609, 86 S.E.2d 477, 482 (1955).

⁴⁸ See generally DANGEL, CONTEMPT, ch. XI, 115-71 (1939).

⁴⁹ *Berlandi v. Commonwealth*, 316 Mass. 424, 50 N.E.2d 210 (1943); see majority opinion in *Moquin*, at 543.

⁵⁰ The classifications of contempts into direct and indirect, civil and criminal, and the resulting consequences, are beyond the scope of this note. See generally Goldfarb, *The Varieties of the Contempt Power*, 13 SYRACUSE L. R. 44 (1961).

⁵¹ 188 N.E.2d 308, 318 (Ohio App. 1963); see majority opinion in *Moquin*, at 543.

⁵² 136 N.E.2d 436 (Ohio App. 1956).

⁵³ Majority opinion in *Moquin*, at 543-44.

was equally a participant by his silence which constituted a tacit approval of Moquin's action.

On previous occasion the Supreme Court of New Hampshire, in the case of *State v. La Rose*,⁵⁴ described the plea of *nolo contendere* and its implications:

Under the plea of *nolo*, the defendant does not confess or acknowledge the charge against him as upon a plea of guilty . . . but waiving his right to contest the truth of the charge against him, submits to punishment. The plea is in the nature of a compromise between the state and the defendant—a matter not of right, but of favor. Various reasons exist why a defendant conscious of innocence may be willing to forego his right to make defense if he can do so without acknowledging his guilt. Whether in a particular case he should be permitted to do so, is for the court.

This holding in no way hinted that a defendant conscious of innocence so pleading is contemptuous of the court, much less his tacit approver. The New Hampshire Supreme Court in *Moquin* may have meant to adopt the convenient fiction of an old Illinois case:

The court will punish all acts calculated to impede, embarrass, or obstruct the court in the administration of justice. Such acts would be considered as done in the presence of the court.⁵⁵

In conclusion, the recognition of contempt power beyond the statutory grants, as inherent because of necessity, rests on questionable grounds.⁵⁶ It is submitted that the acts of the defendants, no matter how reprehensible they might appear, were not contempt of court.

⁵⁴ 71 N.H. 435, 439, 52 Atl. 943, 945 (1902).

⁵⁵ *Stuart v. People*, 3 Scam. (4 Ill.) 395, 405 (1842).

⁵⁶ A contrary argument could be made, if summary contempt powers were used during Colonial and early Statehood days in New Hampshire, in light of the New Hampshire Constitution (of 1784), Part II, Article 93, adopting, as the law of the land, "all the laws which have heretofore been adopted, used, and approved. . ."; but from realization of the need for caution in interpreting the article, as urged by *State v. Rollins*, 8 N.H. 550 (1837), (applying the article to common law crimes), from not wanting to reach the conclusion suggested by a critic of this work—but witchburning might thus find Constitutional approbation, and from an unavailability of the necessary materials for study, the matter was summarily dropped.

CONTRACTS—ENFORCEABILITY OF A PROMISE OF A CONDITIONAL GIFT

Marie Bredemann was employed by Vaughan Mfg. Company from 1929 to 1954 as a biller and traffic manager. In 1943, Mr. Vaughan, then president of the company, commended Mrs. Bredemann for her loyalty and told her not to worry because "we intend to—I intend to see that you