1924

Case Note, *United States v. Grossman*

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the present plaintiff is concerned. The vice-president in this particular case brought in from the outside certain of the stolen bonds and attached them to this draft. The defendant bank did not own these bonds or really undertake to sell them. The vice-president was not really acting for the bank in the matter. He took advantage of his position, and the opportunities it afforded, to make a purely personal act appear as the act of the bank. If anyone had been misled by this appearance a suitable remedy could be had, but it is difficult to see how it harmed the plaintiff any more than the other transactions.[2]

A petition for certiorari was dismissed by the Supreme Court.

The most recent case in the Supreme Court of the United States is *Curtis, Collins & Holbrook Co.* v. *United States,*[3] which charged the principal with the knowledge of the agent through whom the benefits in question were acquired.[4]

FLOYD R. MECHEM.

CONSTITUTIONAL LAW—SEPARATION OF POWERS—POWER OF PRESIDENT TO PARDON CRIMINAL CONTEMPT.—The case of *United States* v. *Grossman,*[1] decided May 15, considers at large the mooted question of the power of an American executive to pardon a criminal contempt committed against a court of general jurisdiction. The precise point at issue was, of course, the power of the President, but, in the absence of controlling special provisions of state constitutions, the same considerations seem applicable to the power of a governor, and this was assumed by Judge Carpenter who wrote the opinion (Wilkerson, J., concurring). On a bill filed by the United States an order authorized by the Volstead Act had been issued by the court, temporarily restraining the defendant from selling liquor in violation of the act. For disobedience of this order the defendant was found guilty of contempt, fined $1,000, and ordered imprisoned for a year. The President having pardoned the imprisonment, the court denied that he had this power.

Judge Carpenter's opinion is strong and elaborate. Its outline is as follows: The power expressly given to the President by the Constitution[2]—"to grant reprieves and pardons for offenses against the United States, except in cases of impeachment"—is confined to offenses declared to be such by Congress. Offenses against the federal courts, punishable as contempts (even though classified as "criminal" contempt as contrasted with "civil" contempt whose

2. Cases cited from the state courts, upon the "sole actor" rule, were *Cook* v. *American Tubing Co.* 28 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.) 193; *First Nat. Bank* v. *Burns* 88 Ohio St. 434, 103 N. E. 93, 49 L. R. A. (N. S.) 764; *Smith* v. *Mercantile Bank* 132 Tenn. 147, 177 S. W. 72; *Tatum* v. *Commercial Bank* 193 Ala. 69 So. 508, L. R. A. 1916C, 767.

3. 262 U. S. 215, 43 Sup. Ct. 570.

4. There is elaborate discussion in the opinion and notes in *Brookhouse* v. *Union Publishing Co.* 73 N. H. 368, 62 Atl. 219, 2 L. R. A. (N. S.) 993, 111 Am. St. R. 623, 6 Ann. Cas. 675.

1. (N. D. Ill. E. Div. 1924) ... Fed. ....

2. (Art. II Sec. 2.)

purpose is remedial for litigants), are not offenses against the United States within the meaning of any of the constitutional provisions concerning methods of punishing crime, and, under the doctrine of separation of powers, cannot be held to be included within the pardoning power of the President. Contempts against the legislature, for instance, could not be pardoned by the executive, as this would tend to deprive the legislature of effective power to discharge its duties when interfered with by offenders.[3] Similarly the punishment of contempts against the courts cannot be interfered with by the executive without jeopardizing the independence of the judiciary in securing obedience to and respect for their proceedings. Various opinions of the attorney general upholding the presidential power to pardon contempt[4] are held erroneous, and several state decisions supporting a similar gubernatorial power are also distinguished or condemned.[5] Against the power to pardon are cited *Taylor* v. *Goodrich*,[6] and strong, fully reasoned dicta in Re *Nevitt*,[7] and *State* v. *Verage*.[8] From the two later cases extensive quotations are made with approval, and their reasoning is in the main adopted by Judge Carpenter, especially that of the Wisconsin case that the power to pardon properly extends only to offenses against laws which the pardoning power has a duty to execute. The executive has a duty to prevent ordinary crime ("to see that the laws be executed") and so may pardon it; but he owes no duty to administer justice, to keep order in the court room, to compel the attendance of witnesses and jurors, or to enforce obedience to orders of the court. The courts alone are charged with these, they alone declare in contempt persons who interfere with these duties, and alone should be allowed to remit the punishment for such contempts.

It is expected that this decision will be reviewed by the Supreme Court in habeas corpus proceedings at the October term, 1924. It may not be improper, meanwhile, to suggest some reasons for differing with the view of the lower court. Whatever weight may be given to historical and technical arguments, the strongest objection to the pardoning power of the executive must be one of policy—that it tends to deprive the courts of a power needed to protect their work and preserve their prestige, and so should be denied to the executive within the American doctrine of separation of powers. Obviously the strength of this argument depends upon the purposes sought by contempt proceedings. These may be of at least three classes: (1) To secure private rights in litigation. (2) To protect the courts in the process of adjudication. (3) To assist in the administration of public law, criminal or administrative.

3. Quoting the argument to this effect in *Story* "Comm. on Const." (5th ed.) II sec. 1503.
4. (1841) 3 Op. Atty. Gen. 622; (1845) 4 ibid. 458; (1852) 5 ibid. 579.
5. See *Sharp* v. *State* (1899) 102 Tenn. 9; Ex parte *Hickey* (Miss. 1845) 4 Sm. & Marsh. 751; *State* v. *Sauvinet* (1872) 24 La. Ann. 119.
6. (1897) 25 Tex. Civ. App. 109.
7. (8th C. A. 1902) 117 Fed. 448.
8. (1922) 177 Wis. 295.

Class 1—to secure private rights in litigation—includes (*a*) so-called civil contempt, where the coercion is remedial and the defendant may at any time purge himself by obedience, as well as (*b*) that branch of criminal contempt where the court punishes disobedience of a remedial order, when the defendant is unable to restore the *status quo ante*. The executive, of course, may not pardon civil contempt for the same reason that he may not interfere with other *remedial* processes of courts—it is an interference with private rights and remedies outside of his jurisdiction as a public executive. A non-purgeable punitive order for disobedience of a remedial order stands on a somewhat different footing. Its execution benefits a private plaintiff only indirectly as an example to deter future disobedience of remedial orders, and it may be argued that in part, at least, it is designed to vindicate the public authority of the court. The principal case would hold it not pardonable by the executive for this reason. Mr. Justice Blatchford of the Federal Supreme Court, on circuit, held otherwise in Re *Mullee*[9]—not cited by Judge Carpenter; and the same was held in *State* v. *Sauvinet*.[10]

Class 2—to protect the courts in the process of adjudication—is the one for which the most appealing arguments may be made against the executive pardoning power. Unless courts can keep order in or about their places of sitting, command sufficient public respect to assure fair hearings, compel the attendance of witnesses and jurors, and require from parties, witnesses, attorneys, and court officers generally the performance of those duties appropriate to the conduct of litigation, they lack the power of self-preservation advanced by Chief Justice White in *Marshall* v. *Gordon*[11] as the real basis of the "inherent" power to commit for contempt. The reasons for denying the executive power to pardon contempts of this character seem as persuasive as those given by Story, supra, against pardoning legislative contempts, and it may well be that the executive power does not extend to this class of contempts. *Taylor* v. *Goodrich*[12]—where the power to pardon was denied—was of this character. Ex parte *Hickey*,[13] contra, semble, is distinguishable.

Class 3—to assist in the administration of public law, criminal or administrative—is the one to which the Grossman case belongs. The considerations involved here are wholly different from those in classes 1 and 2. An act that is criminal is forbidden by a court order obtained under public authority, and disobedience is punished as contempt. This may be done in a limited class of cases without a statute—e. g., public nuisances; and more widely by statute—e. g., *Eilenbecker* v. *Plymouth County*[14] (Iowa liquor law enforcement);

9. (1869) 7 Blatch. 23.
10. (1872) 24 La. Ann. 119.
11. (1917) 243 U. S. 521, 541-43.
12. (1897) 25 Tex. Civ. App. 109.
13. (Miss. 1845) 4 Sm. & Marsh. 751.
14. (1890) 134 U. S. 31.

Sherman Anti-Trust Act,[15] Clayton Act,[16] Volstead Act.[17] Or, without criminal sanctions, certain conduct, being required in a public administrative proceeding, may by statute be demanded through a court order, positive or negative, and disobedience punished as contempt—e. g., *Interstate Commerce Comm.* v *Brimson*[18]; and similar acts for the benefit of many recent federal boards and commissions—e. g., Federal Reserve Board and Trade Commission,[19] Tariff Commission,[20] Railway Labor Board,[21] Federal Power Commission.[22]

In the criminal cases the help of the court is invoked solely to secure a more speedy or effective administration of the criminal law, injunctions are issued against acts that are crimes and punishable as such, and their violation is punished, not primarily to vindicate the authority of the court nor to protect its processes of adjudication, but to deter the repetition of conduct that the legislative policy of the state has declared criminal. The reasons of policy that support executive pardons for crimes are as applicable to their punishment by contempt procedings as to their punishment by ordinary criminal proceedings, whenever the *purpose* of the former is solely or primarily to secure the better enforcement of the criminal law. This is the avowed object of the equitable enforcement provisions of the Volstead Act, copied in policy and substance from various state prohibition acts in force for a generation or more; and, without denying the force of Judge Carpenter's argument against executive pardons for contempts of class 2 above, and possibly those of class 1, (*b*), it seems that at least the criminal enforcement contempts of class 3 might rationally and properly be distinguished. A violation of an injunction issued to prevent crime, as such, is no more necessarily a flouting of the authority of the court that issues it than of the legislature that has also forbidden it, nor is the sole control of the punishment for it in any fair sense necessary to preserve the court as an effective instrument of adjudication.

Our theory of the executive pardoning power is, in part, that there may exist reasons for remitting the punishment of crime that judges, administering somewhat precise and rigid rules, may not be at liberty freely to consider; and that the executive may give effect to public opinion in regard to the punishment of certain offenses in a way that would be improper in a judge. These reasons may be as potent when crime is punished by an equity judge in contempt proceedings as when it is punished by a common law judge after conviction by a jury. That the executive should be able to pardon both seems logically consistent and socially desirable, nor does it

15. (1890) 26 St. L. 209, sec. 4.
16. (1914) 38 St. L. 736-38, secs. 15-19.
17. (1919) 41 St. L. 306, 314, secs. 4, 22, 23.
18. (1894) 155 U. S. 3.
19. (1914) 38 St. L. 734-5, sec. 11.
20. (1916) 39 St. L. 797, sec. 706.
21. (1920) 41 St. L. 472, sec. 310b.
22. (1923) 42 St. L. 1448, sec. 3.

seem any greater blow to the just prestige of a court that the executive should pardon a defendant's commitment for contempt than that he should remit his sentence for crime—both being imposed for the same criminal act, and perhaps by the same judge sitting first in an equity and then in a criminal term of the court.

It remains to be added that, if the executive cannot pardon criminal contempt, it is by no means certain that anyone else can, which would be a grave inconvenience. The *Grossman* decision probably assumes that the court punishing contempt may withdraw or alter its order at any time, under the general continuing power of a court of equity to control and modify its decrees. This may be so—it is to be hoped that it is, if the present decision be sound—but there are some decisions, federal and state, denying that a court can alter a judgment or penalty for criminal contempt after the term of court when imposed, likening it in this respect to an ordinary criminal judgment.[23] These decisions, if correct, strengthen the impression of the validity of the *Grossman* pardon.

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ILLINOIS CASES

CONFLICT OF LAWS—VALIDITY OF CONTRACTS—USURY.—In *George* v. *Haas*[1] the court decided that a promissory note payable in another country, signed and deposited for transmission in the mails in this state, even if it was to be deemed to be a contract completed in this state, was controlled with respect to usury, by the laws of the place of payment, according to which the contract was not usurious, though under Ilinois law it would be usurious. With the result reached it would be difficult to disagree. But some of the language of the opinion seems to conflict with prior pronouncements of the court Thus in the case of *Burr* v. *Beckler*[2] holding that a note payable in Illinois executed by a wife while temporarily in Florida, and void by the laws of that state for want of capacity, was void, the court said: *"It is a universal rule of law that the validity of a contract is to be determined by the law of the place where made,* and if it is not valid there it will not be enforced in another state in which it would have been valid if made there." In the instant case the court says: "If a contract is executed in one state, to be performed in another state or country, the *law of the place where the contract is to be performed will determine its validity and the nature and extent of the obligation."* These two utterances (both by the same judge) appear to be mutually contradictory. The earlier case is not referred to in the later one. Both cases, to a considerable extent, cite the same authorities.

These two conflicting statements of the law present another and striking illustration of the confusion prevailing as to the law ap-

23. *Fischer* v. *Hayes* (1881) 6 Fed. 63, by Blatchford, J.; *State* v. *Meyer* (1912) 86 Kan. 793.

1. 311 Ill. 382.
2. 264 Ill. 230.