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Power of Congress to Require Jury Trial in Certain Cases of Criminal Contempt

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have accorded if the risk had on the particular occasion been voluntarily assumed.

The Harter Act and bills of lading which permit assistance to vessels in distress affect the shipper only in relation to his carrier. They do not work a surrender to salvaged vessels of any right which may arise against them by reason of the fact that damage to a salvaging vessel's cargo turns out to have been the price of their safety.

FREDERICK GREEN.

CONSTITUTIONAL LAW—SEPARATION OF POWERS—POWER OF CONGRESS TO REQUIRE JURY TRIAL IN CERTAIN CASES OF CRIMINAL CONTEMPT.—[United States.] The case of *Michaelson v. United States*,¹ decided by the Supreme Court on October 20, 1924, brings to a satisfactory conclusion a controversy over the constitutionality of a provision of the Clayton Act² which has divided professional opinion for a decade. This Act (dealing with certain trade practices in interstate commerce) is enforced, in part, by the issuance of orders from certain federal courts, and further provides:

"Sec. 21. That any person who shall wilfully disobey [such lawful orders], . . . if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided. . . ."

"Sec. 22. . . . In all cases within the purview of this Act such trial may be by the court, or, upon the demand of the accused, by a jury, . . ."

"Sec. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful . . . order . . . entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States. . . ."³

It having been held that this part of the Clayton Act applied to cases arising under the federal anti-combination laws generally, as well as to those specifically dealt with by the Act,⁴ certain striking employees of a railroad in Wisconsin were proceeded against by bill in equity for conspiring to interfere with interstate commerce by certain tortious acts. For a violation of the injunction granted in this case contempt proceedings were taken against Michaelson and others. Their application for a jury trial was denied by the District Court, and a judgment of guilty was affirmed by the Circuit Court of Appeals (7th Circuit) on the ground of the unconstitutionality of the jury trial provision.⁵ On certiorari to the Supreme Court this decision was reversed in the present case, it appearing that the acts

1. (1924) 45 S. Ct. 18.

2. (1914) 38 St. L. 730.

3. (1914) 38 St. L. 738-40.

4. *Cavoe Creek Coal Co. v. Christinson* (1922) 281 Fed. 559; *McGiboney v. Lancaster* (1923) 286 Fed. 129.

5. *Michaelson v. United States* (1923) 291 Fed. 940.

of which defendants were adjudged guilty were crimes under the statutes of Wisconsin,⁶ where they were committed.

The opinion of the court upon this point, by Mr. Justice Sutherland, is brief and unanimous. Its grounds sufficiently appear in the following quotations:

"But it is contended that the statute materially interferes with the inherent powers of the courts and is therefore invalid. That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior federal courts are concerned, however, it is not beyond the authority of Congress;⁷ but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. That it may be regulated within limits not precisely defined may not be doubted. The statute now under review is of the latter character. It is of narrow scope, dealing with the single class where the act or thing constituting the contempt is also a crime in the ordinary sense. It does not interfere with the power to deal summarily with contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, and is in express terms carefully limited to the cases of contempt specifically defined. Neither do we think it purports to reach cases of failure or refusal to comply with a decree—that is, to do something which a decree commands—which may be enforced by coercive means or remedied by purely compensatory relief. If the reach of the statute had extended to the cases which are excluded, a different and more serious question would arise. But the simple question presented is whether Congress may require a trial by jury upon the demand of the accused in an independent proceeding at law for a criminal contempt which is also a crime. In criminal contempts, as in criminal cases, the presumption of innocence obtains. Proof of guilt must be beyond reasonable doubt and the defendant may not be compelled to be a witness against himself.⁸ The fundamental characteristics of both are the same. Contempts of the kind within the terms of the statute partake of the nature of crimes in all essential particulars. 'So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure,⁹ and that at least in England it seems that they still may be and preferably are tried in that way.'¹⁰

"The proceeding is not between the parties to the original suit, but between the public and the defendant. The only substantial difference between such a proceeding as we have here, and a crim-

6. Wis. R. S. 1921 sec. 4466c.

7. *Ex parte Robinson* (1873) 19 Wall. 505, 510-11; *Bessette v. W. B. Conkey Co.* (1904) 194 U. S. 324, 326.

8. *Gompers v. Buck's Stove and Range Co.* (1911) 221 U. S. 418, 444.

9. (1885) *Transactions of Royal Historical Soc.* (N. S.) 3:147.

10. *Gompers v. United States* (1914) 233 U. S. 604, 610-11.

inal prosecution by indictment or information is that in the latter the act complained of is the violation of a law, and in the former the violation of a decree. In the case of the latter, the accused has a constitutional right of trial by jury; while in the former he has not. The statutory extension of this constitutional right to a class of contempts which are properly described as 'criminal offenses' does not, in our opinion, invade the powers of the courts as intended by the Constitution or violate that instrument in any other way."¹¹

The good sense of all this is apparent, and has abundant justification in the records of English legal history. Until early in the eighteenth century common-law contempts not committed in the presence of the court or by court officials were punished in England only after trial by jury,¹² and the propriety of doing otherwise was perhaps not beyond doubt there until after the decision of Lord Lyndhurst in *Ex parte Van Sandau* in 1844.¹³ The preferable practice in England even now is said to be to call a jury in such cases.¹⁴ An undelivered opinion of Mr. Justice Wilmot in *King v. Almon*¹⁵ (an unfinished political prosecution growing out of the Wilkes controversy of the mid-eighteenth century), first published in 1802, and the authority of Blackstone who gave currency to Wilmot's then unpublished views in his Commentaries¹⁶ were chiefly responsible for the growth of the present optional practice in England and the more rigorous denial of juries altogether in criminal contempt cases in America. There is, therefore, no sound reason why the legislature may not restore the older practice, at least in the narrow, closely limited class of cases included in section 21 of the Clayton act, where the acts done are crimes as well as contempts and thus well within the general policy of using juries to find facts in criminal proceedings.

On logical as well as historical grounds the decision seems sound. The theoretical basis for the American constitutional doctrine of the separation of powers is a dual one: (1) One department of government should be somewhat checked by the others to lessen the danger of oppression present when widely varied powers are exercised by a single hand; and (2) each department should be protected in the exercise of its essential functions from the encroachments of the others. Obviously, reason (1) has no application to the present case, nor can it be fairly said that reason (2) has more than a colorable relation to it. The jury trial provision of the Clayton Act falls far short of being a substantial interference with

11. (1924) 45 S. Ct. at p. 20.

12. *Sir John Charles Fox* "The King v. Almon" (1908) Law Quar. Rev. 24: at pp. 191 and 268-70. The first recorded instance was the case of one Wilkes in 1720.

13. (1844) 1 Phillips 445, 454. See *Fox* "The King v. Almon" (1908) Law Quar. Rev. 24: at p. 184; and "The Summary Process to Punish Contempt" (1909) *Ibid.* 25: at pp. 238-40.

14. See *Gompers v. United States* (1914) 233 U. S. 604, 611 and citations there given.

15. (1765) *Wilmot* "Opinions" 243.

16. *Blackstone* "Commentaries" (1769) IV: c. 20, sec. III, commented on by *Fox* in (1909) Law Quar. Rev. 25: at pp. 247-48, and 253, n. (k).

any of the powers necessary to the proper functioning of a court, if this may be thought to be the *judicial* equivalent of the "power of self-preservation" referred to by Chief Justice White in *Marshall v. Gordon*¹⁷ as the real basis of the "inherent" *legislative* power to commit for contempt. See the comment on *United States v. Grossman*¹⁸ in (1924) ILLINOIS LAW REVIEW 19:176. For a valuable series of essays by Sir John Charles Fox upon historical aspects of the judicial power to punish contempts, with and without a jury, see the note below.¹⁹

JAMES PARKER HALL.

EVIDENCE—LEGISLATIVE POWER TO COMPEL TESTIMONIAL DISCLOSURE.—[Federal] In *Ex parte Dougherty*¹ we have a ruling on the Senate's power to compel disclosure of documents from the ordinary citizen, in aid of a resolution of inquiry. The ruling is based on the following grounds: (1) Congress's power generally to compel testimony is doubtful; (2) the power of the Senate or the House alone to exercise such a general power; if it exists, is doubtful; (3) either branch has the specific power to compel testimony in aid of impeachment proceedings at the proper stage, or of an election contest, or of interrogation of federal officers personally, by virtue of express constitutional clauses committing such subjects to Congress; but the present demand for testimony did not fall within any of these specific powers; (4) the present demand was made upon a third person in an attempt virtually to try for crime the then attorney-general, and was therefore an attempted exercise of general judicial power, and was not authorized, because of propositions (1) and (2) above.

1. To dispose of this weighty subject in terms of "judicial power" seems unsound. Such indeed was the theory in *Kilbourn v. Thompson*,² a case almost on all-fours, and the only controlling precedent in the federal Supreme Court annals. And such is the tempting, simple solution, viz., the legislative, judicial, and executive powers being sharply separated in the Constitution, it follows that Congress has no judicial power, unless by implication in a subject specifically granted, and the proceeding to compel testimony is an exercise of the judicial power.

2. The fallacy lies in the latter proposition. The compulsion to give testimony is a detail of the judicial power,—but not of the

17. (1917) 243 U. S. 521, 541-43.

18. (1924 N. D. Ill. E. D.) ... Fed.

19. These essays, under various titles, are published in (1908) Law Quar. Rev. 24: 184, 266; (1909) *Ibid.* 25: 238, 354; (1920) *Ibid.* 36: 394; (1921) *Ibid.* 37: 191; (1922) *Ibid.* 38: 185; (1924) *Ibid.* 40: 43. Some of them are cited above in this case-note. Their content, in part, is digested and commented upon by Professor Felix Frankfurter in an article on "The Power of Congress over Criminal Contempts in Inferior Federal Courts" (1924) Harv. L. Rev. 37: at 1042-52, to which the writer acknowledges indebtedness.

1. 299 Fed. 620 (May 31, 1924, D. C. S. D. Ohio).

2. 103 U. S. 168.