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CONTEMPT AND EXECUTIVE POWER TO PARDON

By PAUL BUTLER

A great deal of attention has been given by the press in this country during the past two years to the prolonged fight of Edward S. Shumaker, superintendent of the Anti-Saloon League of Indiana, to escape the 60 day sentence to the Indiana State Farm imposed upon him for his indirect contempt of the Supreme Court of Indiana. But, notwithstanding the publicity given the case, there has been little discussion of the law involved and of the questions raised in the successive and futile efforts to evade the punishment.

At the outset, a brief recital of the facts will lend comprehension to a now meager understanding of the subsequent proceedings. The verified information, as originally filed and subsequently amended by the Attorney General of Indiana, alleged that Shumaker, as superintendent and directing head of the league's activities in the state, was guilty of an indirect contempt of the Supreme Court in having "prepared, printed, published, circulated, and distributed" throughout the state a pamphlet, containing "misleading, false and defamatory statements of and concerning the Supreme Court, its judges and decisions in respect to violations of the liquor laws of the state". The pamphlet, later reprinted in the league's official organ—"The American Issue"—purported to be the annual report of the state superintendent.

Excerpts from the article, upon which the alleged contempt is based, are as follows:

> The Supreme Court of Indiana has "held that a defective search warrant should operate to let a guilty person go free.----------
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> "This court in the Callender case from Elkhart, and more particularly in the Flum case from Beach Grove in Marion County, and these reinforced by a number of later decisions, has held that no matter how guilty a person may be of violating the prohibition law, even though he might

have as many as three stills in his home and be engaged in manufacturing a white mule that is poisonous and deadly in its effects, should there be any mistake in the search warrant, such a person must be turned free. We think that such rulings, coupled with the splitting of judicial hairs in many cases coming before our Supreme Court whereby substantial justice has been defeated repeatedly, has been to a great degree responsible for the great increase in the appeals of criminal cases to our state's highest judiciary.----------

"One of its (the Supreme Court of Indiana) members is said to be bitterly hostile to prohibition, and, if he had it in his own power, would wipe all prohibition laws from the statutes.----------

"We well remember how the late Colonel Eli F. Ritter, pioneer attorney for the temperance forces in Indiana, used to say to us that when the liquor interests could no longer control the legislative or executive branches of our government they would then turn their attention to our courts and seek to control them. I think there is no doubt that this is true today in a bigger sense than ever before, and that the law-abiding people of our state will have to strive for the nomination and election of judges of such high "judicial equipment and such a sense of honor and loyalty to the Constitution and the laws enacted thereunder that they will give judicial decisions carrying out in full and effective manner both the letter and the spirit of our Constitution and laws enacted thereunder. ----------

"If the entire state can be thus aroused between this and the time of the primaries, we hope to be able then after the election in November to present again a solid dry delegation both in the Senate and in the House of Representatives, from Indiana.----------And we trust that the next election will give us a Supreme Court that will be dry and not wet."

In a complete and exhaustive opinion,[1] written by justice Myers and concurred in by Chief Justice Travis and Justice Willoughby, the Supreme court held the respondent Shumaker

1 State v. Shumaker, 157 N. E. 769.

guilty of an indirect contempt, on the theory that "any act, conduct or directing agency pertaining to pending proceedings 'intending to play on human frailty, and to deflect and deter the court from the performance of it's duty, and to drive it into a compromise with its own unfettered judgment, by placing it, through the medium of knowingly false assertion, in a wrong position before a public which has little opportunity to investigate the facts and ascertain the truth', regardless of results, 'clearly constitutes "an obstruction to the administration of justice",' and is contemptuous and within the inherent power of the court to punish". The court held that the preparation, printing, publication, circulation and distribution of the pamphlets containing the "report" constituted such conduct, and thereupon fined the adjudged contemner and sentenced him to serve 60 days at the Indiana State Farm.

After exhausting every effort to escape the judgment of the court, Shumaker finally, after more than eighteen months, submitted to imprisonment. At the moment of his entrance, however, the contemner received a pardon from Governor Ed Jackson, and once again the league superintendent was free. But it was not long before the attorney general set in motion proceedings before the Supreme Court to recommit the prisoner, notwithstanding the governor's pardon.

Thereafter the Supreme Court recommitted Shumaker to the state farm for the sixty day imprisonment,[2] and upon application to the United States District court a writ of habeas corpus issued. On final hearing, however, the temporary order was vacated and the defendant was remanded to the custody of the sheriff of the State Supreme Court. The United States District court based its decision not only on the proposition that it had no right to interfere with the action of a state supreme court in the proceedings of a citation for contempt, but also upon the theory that the pardon of a state governor to a contemner could be invalidated by that state's supreme court. After contemplating an appeal to the United States Supreme court, and deciding against it, Shumaker submitted to imprisonment.

Blackstone says[3] that contempts may be committed "by speaking or writing contemptuously of the court or judges acting

2 State v. Shumaker, 164 N. E. 408.
3 4 Cooley, Blackstone Comm. 285.

in their judicial capacity,----------and by anything, in short, that demonstrates a gross want of that regard and respect which, once courts of justice are deprived of, their authority is entirely lost among the people."

The power of a court to punish for a contempt of its authority or its dignity is a necessary adjunct to the exercise of the powers conferred upon it.[4] Such a power is, and has been, exercised upon the theory that it becomes the duty of the court, where contemptuous acts have been committed so as to interfere with its "orderly administration of justice," or to degrade the dignity of the court and the majesty of the law, "to assess proper and adequate punishment to the end that the court may maintain its standing, dignity, and unrestrained enforcement of its lawful powers in an orderly manner."[5]

Contempt is usually classified as direct or indirect, and civil or criminal.

Direct Contempt is "an open insult committed in the presence of the court to the person of the presiding judge, or a resistance or defiance in his presence to its powers or authority, or improper conduct so near to the court as to interrupt its proceedings."[6]

Indirect Contempt, or a constructive contempt, is "an act done, not in the presence of the court, but at a distance, which tends to belittle, to degrade, or to obstruct, interrupt, prevent or embarrass the administration of justice."[7]

Civil Contempt is the failure "to do something ordered to be done by a court in a civil action for the benefit of the opposing party therein, and is, therefore, not an offense against the dignity of the court, but against the party in whose behalf the violated order is made."[8]

Criminal Contempt is "conduct that is directed against the dignity and authority of the court,"[9] either in criminal or civil actions or special proceedings, or "an act committed against the

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4 In re Yates (1809) 4 Johns. (N. Y.) 317; United States v. Hudson, (1812) 11 U. S. 32; State v. Tipton, (1822) 1 Blackf. (Ind.) 166; Clark v. People, (1830) 12 Am. Dec. (Ill.) 177; Holcomb v. Cornish, (1831) 8 Conn. 379.

5 State v. Shumaker, 157 N. E. 769-774.

6 13 Corpus Juris 5; Dodge v. State, 140 Ind. 284; Stewart v. State, 140 Ind. 7.

7 13 Corpus Juris 5; Ex parte Wright, 65 Ind. 504; Whittem v. State, 36 Ind. 196.

8 13 Corpus Juris 6; Rooker v. Bruce, 171 Ind. 86.

9 13 Corpus Juris 6; In re Kahn, 204 Fed. 581.

court as "an agency of the government", which may "consist in 'speaking or writing contemptuously of the court or judges acting in their judicial capacity'."[10]

It follows from the definitions cited, that the particular act involved in the Shumaker case is to be classified as an indirect or constructive criminal contempt, if it is to be concluded, as it was by the Supreme Court, that such an act constituted a contempt.

There have been numerous decisions in practically every jurisdiction in which these fundamental principles of the law of contempt have been adopted and approved. The question of executive power to pardon a contemner, who has been adjudged guilty of contempt of court, however, is not a common one and presents an interesting question to the students of political science,—particularly to those who take an especial interest in the problem of interference with, or restriction placed upon, the action of one governmental branch by another. Has the executive branch of national or state government the power and authority to interfere with the action of the judicial branch in the preservation of its authority and dignity by the pardon of a contemner of a certain court of the judicial department?

(To be continued.)

[10] In re Fite, 76 S. E. (Ga.) 397.