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The Contempt Power v. the Concept of a Fair Trial*

By MORTON LANE**

An eminent authority has remarked, "the law is as untidy as life with which it deals. . . ."¹ Nowhere does this truism apply more forcefully than to the compartment of law designated as contempt of court. Consistency is not the outstanding characteristic of the judicial literature dealing with contempt. The untidiness, perhaps more accurately described as outright confusion, does not seem to have resulted primarily from judicial inefficiency nor from legislative indifference. Rather it seems that the uncertainty surrounding contempt litigation stems principally from an inherent conflict between two fundamental elements of Anglo-Saxon jurisprudence, namely, the contempt power and the aggregation of individual rights through which we seek to assure everyone of a fair trial.

Throughout history all courts have claimed and exercised the power to convict and sentence, sometimes without trial, those believed guilty of the offense called contempt of court. Two weighty considerations have justified the assumption of the contempt power by the judiciary. The efficacy of any judicial system, federal or state, depends upon the tribunal possessing sufficient power to maintain order in and about the courtroom so that proceedings may be conducted in accordance with the rules deemed most likely to produce a just result. Similarly, if courts are to be something more than sounding boards for the exposition of opposing viewpoints, they must have power to enforce obedience to judicial decrees or other orders. However compelling these reasons may be, the undoubted necessity for

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the existence of the contempt power cannot obscure the fact that any such power, essentially arbitrary in nature, inevitably results in some encroachment upon the rights generally accorded those charged with offenses which could result in fines or imprisonment or both. It is apparent that such a power contains potentialities for abuse probably unequalled in our governmental system.\(^2\)

From ancient times the maxim "no man shall be judge of his own case" has been utilized to express one aspect of our concern that every litigant, especially when threatened with a loss of personal liberty, is entitled to a fair trial before an impartial tribunal. Since most criminal contempt proceedings are initiated by or at the direction of the judge who determines the issue of guilt (sometimes simultaneously, sometimes subsequently), a conflict between judicial function and individual rights is inescapable. Those accused of contempt claim they are being tried by a judge lacking in impartiality since the latter acts not only as judge but, in effect, as prosecutor as well. Often it is contended that the judge's action in commencing contempt proceedings indicates that the issues have been pre-judged adversely to the alleged contemnor. The conflict between the contempt power and individual rights is presented in its most virulent form when the alleged contempt consists of derogatory remarks about the judge personally, \textit{e.g.}, charges that the judge is corrupt. In such situations even more important than the precise procedure by which the contempt issue is resolved is the question: by whom shall contempt cases be adjudicated to preserve so far as possible both the necessary power of judicial sanction and the concept of a fair and impartial trial?

During the past twenty years many cases have dealt with one or more phases of the conflict between these two equally important but often competing principles. An attempt will be made to analyze the cases, particularly those emanating from the Supreme Court, to determine what trends are discernible. It is impossible to reconcile the cases either by their results or by the reasoning contained therein. However, analysis of the varied and frequently complex situations which produce this clash be-

\(^2\) See generally State \textit{v.} Circuit Court, 97 Wis. 1, 72 N.W. 193 (1897).
between judicial power and individual rights reveals the possibility that the conflict could be rendered less violent than it has been in the past without engendering any unjustifiable erosion of either principle.

HISTORICAL BACKGROUND

The cases abound with statements that contempt proceedings are sui generis. As used in the cases, this designation simply expresses the conclusion that the procedures employed in contempt proceedings are indispensable to the proper functioning of the judicial branch of the government. Unique the proceedings may be, but labelling them as such does not contribute to a solution of the difficult problems presented.

Contempts have long been classified as being either civil or criminal. We deal here only with the latter variety, i.e., those actions undertaken to uphold the dignity of the judicial tribunal and to compel obedience to its orders rather than those instituted at the behest and for the benefit of a litigant.

Whether civil or criminal, contempts are further divided into two categories, direct and indirect or constructive. Generally, direct contempts consist of those actions committed or words spoken in the actual presence of the court or so near thereto as to constitute an obstruction of the proceedings. Frequently, but not always, the judge sees the actions or hears the actual words constituting the contempt, and in such cases the court may summarily impose punishment without a trial. The contemnor has no right to be heard, although in its discretion the court may grant a hearing. Indirect or constructive contempts are those committed outside the presence of the court. In such cases

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5 Ex parte Terry, 128 U.S. 289, 307-09 (1888); see generally 73 Harv. L. Rev. 353 (1959).


8 State v. Winthrop, 148 Wash. 526, 269 Pac. 793 (1928); 7 Hastings L.J. 312 (1950).
evidence must be heard and the accused is entitled to a full
hearing in accordance with all the safeguards afforded defend-
ants in criminal cases, except that the accused is not always
entitled to a jury trial. For the purposes of this discussion, we
accept as settled the proposition that the constitutional right of
jury trial does not extend to cases of criminal contempt.10

Except when courts punish summarily for contempts in
facie curiae, the defendant in criminal contempt proceedings is
entitled to reasonable notice and an opportunity to be heard;11
to the right of counsel;12 and to the presumption of innocence.13
Clear and convincing evidence is necessary for conviction.14
He may not be subjected to double jeopardy;15 nor may cruel and
unusual punishment be inflicted upon him.16 Actions for criminal
contempt, whether direct or indirect, have generally been held
to be subject to the statute of limitations.17

CONTEMPT AND JUDICIAL DISQUALIFICATION

The problem of judicial disqualification in contempt proce-
dings has always been productive of much litigation. Prior to
1940 this litigation was not generally believed to involve serious
constitutional issues. Thus the Supreme Court upheld the power

10 Green v. United States, 356 U.S. 165 (1958). So far as the federal
courts are concerned, Congress has seen fit to grant the right of jury trial: (1)
where the acts charged also constitute a criminal offense under federal or state
law, 18 U.S.C.A. § 3691 (1958); (2) where the contempt arises out of the
alleged violation of an injunction or restraining order issued under federal labor
laws, 18 U.S.C.A. § 3692 (1958); (3) in certain special cases under the Civil
Rights Act where the sentence is a fine in excess of $300 or imprisonment for
more than 45 days, then the accused may secure a new trial before a jury,
have held the right to jury trial inapplicable to contempt proceedings. State ex rel.
12 Ibid.
13 United States v. Fleischman, 339 U.S. 349, 363 (1950); see also Ex parte
Hudgings, 249 U.S. 378 (1919); Gompers v. Bucks Stove & Range Co., 221 U.S.
418 (1911).
14 Fox v. Capital Co., 96 F.2d 684 (3d Cir. 1938).
15 In re Bradley, 318 U.S. 50 (1943).
16 United States ex rel. Brown v. Lederer, 140 F.2d 136, 139 (7th Cir. 1944),
cert. denied, 322 U.S. 784 (1944).
17 Pendergast v. United States, 317 U.S. 412 (1943); see also Gompers v.
United States, 238 U.S. 604 (1913); Pate v. Toler, 190 Ark. 465, 79 S.W.2d 444
(1955); State v. Phipps, 174 Wash. 443, 24 P.2d 1073 (1933); Contra, Fonick
v. Owsey, 364 Mo. 544, 264 S.W.2d 832 (1954), cert. denied, 94 S. U.S. 822
(1954).
of a federal court to punish summarily for a contempt in facie curiae though the defendant had left the courtroom and was not present when found guilty of contempt. The contention that a court may be disqualified by virtue of having initiated contempt proceedings received short shrift at the hands of Mr. Justice Holmes. The asserted disqualification of the Supreme Court of Colorado from sitting in contempt proceedings based upon publications derogatory to that court was held by Mr. Justice Holmes not to involve constitutional issues. There the court had been charged with rendering decisions for political purposes rather than in accordance with the law, and the defendant publisher sought to establish as a defense the truth of the charges he had made.

A letter, delivered to the judge in chambers, which impugned his integrity in a case recently decided and urged his future disqualification in related proceedings was held contemptuous, but the Court ruled that due process was violated in the contempt proceedings, because the defendant was not afforded an opportunity to be heard and to have the assistance of counsel. In remanding the case, the Court directed that in view of the nature of the charges, the re-trial should take place before another judge. The removal or disqualification of the particular judge was obviously not based on constitutional grounds, since the Court recognized that a judge has jurisdiction to hear and determine contempt charges based upon contempts committed before him, even those involving him personally. Significantly, it cautioned that judges should not permit themselves to be driven from a case through the medium of contempts directed against the judge personally.

Two years later, although not in a contempt case, the Supreme Court first invoked the due process clause of the fourteenth

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18 Ex parte Terry, 128 U.S. 289 (1888).
20 Patterson v. Colorado, 205 U.S. 454 (1907). The holding that truth is not a defense to a charge of criminal contempt will be further discussed, infra, at 399. Because of his holding that truth would not be a defense, Mr. Justice Holmes found it unnecessary to determine whether the fourteenth amendment made applicable to the states the prohibition against abridging freedom of the press imposed upon the federal government by the first amendment. Subsequent Supreme Court decisions on this point are discussed, infra, at 364.
22 Id. at 517, 534, 539 (1925).
23 Ibid.
amendment as a basis for the disqualification of a state court judge.\textsuperscript{24} A defendant charged with violating a state prohibition act was held to have been denied due process when tried by the mayor of a village who received compensation for acting as a judge only when he convicted the defendant and in such event his compensation was a percentage of the amount collected from the defendant.\textsuperscript{25}

Before 1940 no court permitted one charged with direct contempt to urge the disqualification of the judge;\textsuperscript{26} nor could one so charged obtain a change of venue.\textsuperscript{27} While there is a disagreement as to whether legislative enactments providing for the disqualification of judges by reason of bias, interest, relationship, etc. are applicable to any contempt proceedings, such statutes have never been regarded as pertinent to direct contempt.\textsuperscript{28} Underlying the results in all of these cases is the feeling, sometimes expressed and sometimes implied, that any court without power to protect itself from direct insult could not discharge its functions.\textsuperscript{29}

Indirect or constructive contempts have been differently regarded. The power of the legislature to make change of venue statutes or general disqualification statutes applicable to this type of contempt proceeding has usually been sustained.\textsuperscript{30} Even in the absence of legislation, many cases have recognized the power of the judge to recuse himself;\textsuperscript{31} and some have required

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\item \textsuperscript{24} Tumey v. Ohio, 273 U.S. 510 (1927).
\item \textsuperscript{25} A further ground for the holding was the fact that the village whose affairs the mayor administered likewise received a substantial percentage of any funds collected from the defendant.
\item \textsuperscript{26} For a comprehensive annotation of the cases wherein judges in contempt proceedings were sought to be disqualified because the contempt involved the judge, see Annot., 64 A.L.R.2d 600 (1959). A specially appointed court in State ex rel. Short v. Martin, 125 Okla. 24, 256 Pac. 681 (1927), disqualified some of its members from sitting in a direct contempt proceeding but that decision was not followed by subsequent Oklahoma cases. See discussion, infra, at 358.
\item \textsuperscript{27} Connell v. State, 80 Neb. 296, 114 N.W. 294 (1907).
\item \textsuperscript{28} Annot., 64 A.L.R.2d 600, 607 (1959).
\item \textsuperscript{29} See Blodgett v. Superior Court, 210 Cal. 1, 290 Pac. 293 (1930); Lamberson v. Superior Court, 151 Cal. 458, 91 Pac. 100 (1907); Myers v. State, 46 Ohio St. 473, 22 N.E. 43 (1889).
\item \textsuperscript{30} Briggs v. Superior Court, 211 Cal. 619, 297 Pac. 3 (1931); In re Opinion of the Justices, 86 N.H. 597, 166 Atl. 640 (1933). But see Bloom v. People, 23 Colo. 416, 48 Pac. 519 (1897); Prine v. State, 143 Miss. 231, 108 So. 716 (1926).
\item \textsuperscript{31} Cornish v. United States, 299 Fed. 283 (6th Cir. 1924); Toledo Newspaper Co. v. United States, 237 Fed. 986 (6th Cir. 1916), aff'd, 247 U.S. 402 (1918); Back v. Nebraska, 75 Neb. 603, 106 N.W. 787 (1906); Ex parte Pease, 123 Tex. Crim. App. 49, 57 S.W.2d 575 (1933).
\end{itemize}
that this be done where the contempt consisted of a personal attack upon the judge.\footnote{In re Dingley, 182 Mich. 44, 148 N.W. 218 (1914); Snyder's Case, 301 Pa. 276, 152 Atl. 33 (1930). See also Cooke v. United States, 267 U.S. 517 (1925).}

One of the most colorful chapters in the history of contempt proceedings had its genesis in a controversy which rocked the State of Oklahoma in the 1920's. The cases which it produced illustrate, perhaps better than any others, the head-on clash between judicial powers and individual rights in many contempt cases. Inasmuch as the judges in those cases found themselves confronted with problems of extreme difficulty, with potent arguments having been adduced by both sides, the cases turned largely upon the premise from which each judge started. Those regarding the effective operation of the courts as being of paramount consideration had little or no difficulty in sustaining the court's power to deal by way of contempt proceedings with a disappointed litigant's attack upon the integrity of the court. An opposite result was reached by those judges who took as their text the proposition that every man is entitled to be tried by a tribunal impartial not only in fact, but impartial in appearance as well.

The controversy was the aftermath of commonplace corporate litigation. A minority stockholders' action had charged waste and mismanagement by those controlling the Riverside Oil & Refining Company, including one Owens. After extended litigation, the Supreme Court of Oklahoma issued an opinion in which substantial issues were determined in favor of the plaintiffs. By means of newspaper advertisements and by a petition for rehearing, Owens charged fraud on the part of the court. He alleged, among other things, that the opinion rendered had not been written by the justice purporting to write it, but rather by counsel for the prevailing side; that the opinion had been handed down without consideration by any of the justices of the pleadings, evidence or briefs; and that an earlier opinion in said corporate litigation was prepared by a justice under the direction of the chief justice who was allegedly in conspiracy with plaintiffs' lawyers. Owens commenced an action against most of the judges, plaintiffs' lawyers and others charging conspiracy
and fraud. Based upon the charges made in the newspaper advertisement, Justice Riley filed a libel suit against Owens seeking $200,000 damages. Subsequent to the filing of these law suits and to the filing of the petition for rehearing, the court directed that contempt charges be brought against Owens and his attorney. Upon the filing of the contempt charges, both Owens and his attorney urged the disqualification of the court on the grounds of prejudice and interest. After overruling the attorney’s motion to disqualify, seven of the nine judges of the court nevertheless voluntarily certified their disqualification in the proceeding against the attorney and seven practicing attorneys were appointed by the governor as judges in that case. Thereupon the attorney sought a writ of mandamus to compel the disqualification of the two justices who had refused to disqualify themselves. Out of this involved factual situation emerged seven decisions by various courts. Some of the opinions are difficult to distinguish from political orations, and almost all might be charged with generating more heat than light.

1. In the mandamus proceeding the Supreme Court of Oklahoma (seven members specially appointed) in a five-to-four decision held that even in contempt cases it had the power to disqualify one or more of its members from participating in a case where the disqualification “is apparent on account of extraneous matters not connected with the contemptuous act itself.” The pending litigation affecting the challenged justices was held by the majority to be so intimately connected with the contempt proceeding as to render those two justices interested and therefore disqualified.

Justice Riley dissented, urging that he could not be deemed interested since the outcome of the contempt proceeding could not affect the pending litigation in which he was involved; that

33 State ex rel. Attorney Gen. v. Martin, 125 Okla. 24, 32, 256 Pac. 681, 687 (1927). In so ruling, the court said:

It is a maxim of common law, the wisdom and propriety of which will not be questioned, that no one should be a judge in his own case. When it is determined that a judge of a court of record is prejudiced in a cause, he is incompetent to sit in said cause, and the exercise of jurisdiction therein by him in adjudging the issues is beyond his power. Apart from authority, it is inconceivable that the people of the English race intended at any time to deprive their courts of the power to secure to every citizen an impartial trial before an impartial judge and an unprejudiced tribunal. Id. at 28, 256 Pac. at 684.

34 Id. at 38, 256 Pac. at 691.
no case in American jurisprudence ever held a judge otherwise qualified to be disqualified from disposing of a contempt committed before him or the tribunal of which he is a part; that no court except the one com¬

temned has the right to pass upon contempt proceedings. Justice Riley also said:

[I]n contempt cases a judge cannot, and should not, be recused for prejudice alleged or proven. This rule is different in civil and criminal matters. The word 'prejudice' cannot be said to apply to contempts committed after a litigant has accepted the forum. If so, when a litigant observed that an unfavorable decision to him was about to be rendered, he need but to strike the court, then allege that by reason of the blow the court and judge thereof were biased and prejudiced against him, and therefore the judge must stand aside, and continue such acts ad infinitum. Such should not be the law.

Among the numerous cases cited in support of this proposition, see Lamberson v. Superior Court, 151 Cal. 458, 91 Pac. 100 (1907), wherein the court said:

Nor is the judge disqualified from sitting in the contempt proceedings. Petitioner's theory in this regard, if we understand it, is that the judge is disqualified from hearing the proceedings in contempt, because the contempt itself consists in imputations upon his motives, and attacks upon his integrity. Such is not and never has been the law. The position of a judge in such a case is undoubtedly a most delicate one, but his duty is none the less plain, and that duty commands that he shall proceed. However willing he may be to forego the private injury, the obligation is upon him by his oath to maintain the respect due to the court over which he presides. As was said by the Chief Justice of this court In re Philbrook, 105 Cal. 471, 38 Pac. 511, 45 Am. St. Rep. 59 (1884). The law which in such cases makes us the judges of offenses against the court places us in an extremely delicate and invidious position, but it leaves us no alternative except to allow the court and the people of the state, in whose name and by whose authority it acts, to be insulted with impunity, or to exercise the authority conferred by law for the purpose of compelling attorneys to maintain the respect due to courts of justice and judicial officers. Were the rule otherwise so that it was required that another judge should be called in to sit in the proceedings, the recalcitrant and offending party would need only to insult each judicial officer in turn until the list was exhausted, and thus, by making a farce of legal procedure, go scatheless and unpunished. Id. at 461-62, 91 Pac. at 101.

State ex rel. Attorney Gen. v. Martin, 125 Okla. 24, 49-50, 256 Pac. 681, 701 (1927). The following excerpt from Judge Riley's opinion is typical of the verbal polemics produced. He said:

We are resolved that acts of a disgruntled litigant and of a vexatious and ill-informed counsellor shall not drive us from the path of duty, and we shall not prostitute ourselves by voluntarily accepting the easier way. We observe the historic words of Madame Roland when she said: 'Oh, liberty, how many crimes are committed in thy name!' And we are determined, in so far as our acts shall be effective, that the respondent cannot convert his own misdeeds into a shield against his own wrongs; that he should not be permitted to profit by his own perversity. Id. at 50, 256 Pac. at 702.
Justice Clark, whose disqualification was also sought, joined in the opinion of Justice Riley. Two of the appointed justices also dissented upon the ground that no precedent authorized the disqualification of a judge from hearing contempt proceedings arising out of a case properly before him.

Pursuant to the wishes of the majority, Justices Riley and Clark certified their disqualification and two special justices were appointed in their stead.

2. After extensive hearings the specially appointed court found Owens' attorney guilty and imposed a fine upon him.\(^{37}\) It held that the filing of the petition for rehearing constituted a direct contempt; that the charges therein made against the court were false, the only evidence of truth being the uncorroborated testimony of Owens which consisted, for the most part, of hearsay testimony, all of which was denied by all of the persons when Owens claimed to have been quoting; and that the attorney had not acted in good faith in relying on the unsupported charges made by his client without attempting to verify them.\(^{38}\)

3. In the contempt proceedings against Owens,\(^{39}\) the regularly constituted Supreme Court denied Owens' motion that the members (except one) disqualify themselves. One judge, however, voluntarily certified his disqualification. Owens was found guilty of contempt and sentenced to a year in prison. On the issue of disqualification the court held that in dealing with a direct contempt its members were not disqualified though the contempt consisted of charges against one or more individual members of the court; that, in ordering the institution of the contempt proceedings, the court did not thereby become disqualified; that no disqualification resulted from Owens' averment that the judges would be called as witnesses because a litigant "is not entitled to destroy the court which presides against

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\(^{38}\) Illustrative of the intense feelings characterizing these proceedings is the fact that, during the hearings, one of the regular justices of the Supreme Court of Oklahoma indulged in fisticuffs with one of Martin's attorneys and said Supreme Court justice was himself found guilty of contempt by the specially appointed Supreme Court. Notwithstanding his inability to control his emotions and his actions, he refused to disqualify himself in the contempt proceedings against Owens and, not surprisingly, voted to find Owens guilty.

\(^{39}\) State ex rel. Attorney Gen. v. Owens, 125 Okla. 66, 256 Pac. 704 (1927). The opinion was written by Justice Riley, who had instituted a libel action against Owens, said action being based upon the very statements which the court undertook to punish as contemptuous.
him by the subtle proposed use of the judges as witnesses in his behalf. The action of the court in denying the motion to disqualify had the effect of overruling, so far as the doctrine of stare decisis is concerned, that portion of the decision of the specially appointed court which upheld the right of one charged with direct contempt to urge the disqualification of one or more members of the court.

The court three times called upon Owens to produce any evidence he might have as to the truth of his charges and three times he stood mute, not even calling as witnesses the judges, who in his motion urging the disqualification of most of the members of the court, he had asserted would be called. The court then held the charges untrue and that they were made without probable cause.

4. Within a few minutes after having been convicted of contempt and sentenced by the Supreme Court of Oklahoma, Owens presented an application for a writ of habeas corpus to one of the judges of the Oklahoma Criminal Court of Appeals. While denying the application, the judge directed the sheriff detaining Owens to show cause why a writ of habeas corpus should not be issued. Thereupon the Supreme Court of Oklahoma issued a writ of prohibition against said judge and against the entire Criminal Court of Appeals prohibiting him and it from entertaining the petition for a writ of habeas corpus. Apparently the Supreme Court took this action on its own motion (in itself a most unusual step and one of doubtful legality). So far as here material, the Supreme Court justified its issuance of the writ of prohibition upon the ground that it and it alone had jurisdiction over the contempt proceedings, but even if it erred in so holding because of its ruling on the question of disqualification, its judgment would be voidable not void, and thus not subject to collateral attack; that where the right to urge the disqualification of a judge exists it is a personal privilege of the litigant as distinguished from a right enforced in all cases upon grounds of public policy; and that a ruling on such a claim of privilege whether correct or incorrect may not be collaterally attacked.

40 Id. at 69, 256 Pac. at 707.
5. Notwithstanding the writ of prohibition issued by the Supreme Court, the Oklahoma Criminal Court of Appeals heard Owens' application for a writ of habeas corpus, granted it and ordered him discharged. Among other things, that court held that Owens' allegations regarding fraud, prejudice, etc. must be taken as true since the sheriff failed to deny them (the sheriff was precluded from so doing by an injunction entered by the Supreme Court contemporaneously with its issuance of the writ of prohibition). It further held that a judgment in a criminal case by a disqualified judge was absolutely void, that contempt was a crime in Oklahoma, and that the justices of the Supreme Court were disqualified in the Owens case because of the pending libel suit of Justice Riley and because of the fact that all other justices might file similar suits. Numerous other grounds for its ruling were asserted in an extremely lengthy opinion but they are not pertinent to this inquiry.

6. After the decision by the Criminal Court of Appeals, the sheriff who had custody of Owens sought a writ of certiorari from the Supreme Court. That court issued the writ and quashed the judgment of the Criminal Court of Appeals upon the ground that the Criminal Court of Appeals had no authority to override the decision of the Supreme Court.

7. The last act of the lengthy drama saw Owens seeking a writ of habeas corpus from the federal district court. That court denied the writ and its order was affirmed by the Circuit Court of Appeals which held that no federal question was presented by the action of the state Supreme Court in construing the Constitution and statutes of that state.

The Oklahoma litigation highlights the dilemma, possibly insoluble, frequently confronting courts in contempt cases. When a disappointed litigant seeks to drive from the case a judge or judges responsible for his disappointment, whatever court passes upon the contempt proceedings arising from such efforts must balance their effect upon the proper functioning of the judiciary against the right to trial by an impartial tribunal possessed by all litigants, even those charged with contempt of court. It

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43 *Dancy v. Owens*, 126 Okla. 37, 258 Pac. 879 (1927).
seems strange that, prior to 1940, considerations of due process and the right to a fair trial played little or no part in the determination of direct contempt cases. The predominant emphasis was upon the judicial function rather than upon individual rights. In the past twenty years, as will be seen, the emphasis has shifted. The trend, although by no means a consistent one, has been toward placing contempt cases on the same footing as other litigation insofar as the rights of the defendant are concerned.

**INDIRECT CONTEMPT SINCE 1940**

During the past two decades the United States Supreme Court, more often than in any comparable period of its history, has had occasion to pass upon cases involving criminal contempt. In general these decisions have resulted in a limitation of the power of courts, both federal and state, to punish for contempt. In the federal courts, ever since the celebrated controversy centering around Judge Peck, the court's power to punish for contempt has been limited to "misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice..." and to two other categories not here material. Prior to 1941, the words "so near thereto" were held to include any misbehavior, no matter where it occurred, which actually obstructed or reasonably tended to obstruct the administration of justice. This holding was reversed in 1941 when the Court decided that the words "so near thereto" must be given a geographical rather than a causal meaning. In the 1941 case, the misbehavior consisted of the use of liquor to induce an illiterate and feebleminded person to abandon a wrongful death action then pending. The court held that such misbehavior could not be punished through the use of the contempt power because it occurred more than one hundred miles from the place where the district court sat.

Further limitations on the contempt power resulted from subsequent cases. The case of *In re Michael* added two new

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47 Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).
49 326 U.S. 224 (1945).
limitations. Perjury, standing alone, was held not to constitute a sufficient basis for punishment for contempt by a federal court.\textsuperscript{50} Although a court "officer" within the meaning of the contempt statute,\textsuperscript{51} the testimony before a grand jury of a trustee in bankruptcy was held not to be "an official transaction" within that statute.\textsuperscript{52} Despite the numerous Supreme Court and other decisions describing attorneys as officers of the court, an attorney was held not to be an "officer" as that term is used in the federal contempt statute and he therefore could not be tried for contempt because of alleged "misbehavior" in contacting members of a grand jury which had indicted his client.\textsuperscript{53}

In a series of cases the court has imposed far-reaching limitations upon the use of the contempt power to punish newspaper publishers and writers for their comments on pending litigation. No longer is it sufficient, as was true in 1941,\textsuperscript{54} that the published matter reasonably tend to obstruct the administration of justice. Freedom of the press, expressly protected from federal interference by the first amendment and protected from state interference by the due process clause of the fourteenth amendment, has now been held to justify all publications except those involving a clear and present danger to the administration of justice.\textsuperscript{55} In no case has the court yet found any such danger to have been present. Thus, in a five-to-four decision, a state court was denied the right to use its contempt power when a powerful newspaper attempted, through an editorial, to persuade a judge to deny probation to two men convicted of assault.\textsuperscript{56} Likewise, the majority opinion found no sufficient danger to the administration of justice from the publication of a telegram by an influential labor leader threatening a strike along the entire Pacific coast waterfront in the event of the enforcement of a particular judicial decision.\textsuperscript{57} A unanimous court—unanimous in voting but not in its reasoning—reversed

\textsuperscript{50} Id. at 228.
\textsuperscript{52} In re Michael, 326 U.S. 224 (1945).
\textsuperscript{53} Cammer v. United States, 350 U.S. 399 (1956). This limitation on the contempt power has been applauded. Luther, Recent Trends Curtailing the Summary Contempt Power in the Federal Courts, 8 Hastings L.J. 56 (1956).
\textsuperscript{54} Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).
\textsuperscript{55} Bridges v. California, 314 U.S. 252 (1941).
\textsuperscript{56} Id. at 272.
\textsuperscript{57} Id. at 276-78.
the state court contempt convictions based upon newspaper editorials and a cartoon depicting certain Florida courts as subservient to the criminal element.\textsuperscript{58} Specific state court findings that a clear and present danger to the administration of justice resulted from publications designed to prejudice and influence a court’s ruling on a pending motion for a new trial were disregarded and contempt convictions were reversed in a six-to-three decision wherein the majority by independent analysis found no such danger, even though conceding that the news articles were inaccurate and that the editorial constituted unfair criticism.\textsuperscript{59}

The foregoing limitations upon substantive aspects of the contempt power have been accompanied by actions in the procedural area apparently designed to make it more probable that contempt proceedings will be governed by the same standards of fairness applicable to other litigation. The Federal Rules of Criminal Procedure became effective in 1946. The right of a judge to punish summarily for direct contempts committed in his presence was re-affirmed.\textsuperscript{60} Substantial changes were made in the procedure governing cases where one charged with contempt is formally tried. Whenever a contempt involves “disrespect to or criticism of a judge,” the rules require that it be tried before some other judge unless the defendant consents to a trial by the offended judge.\textsuperscript{61} This provision is applicable to all indirect contempts and to those direct contempts which, for any reason, are not punished summarily. Before Rule 42(b) was promulgated, no hard and fast rule governed situations where contempt proceedings arose out of charges reflecting upon the judge himself. Chief Justice Taft had, in the \textit{Cooke} case,\textsuperscript{62}

\textsuperscript{58} Pennekamp v. Florida, 328 U.S. 351 (1946).
\textsuperscript{59} Craig v. Harney, 331 U.S. 367 (1947). It is not within the scope of this article to appraise the possible effects of this and similar decisions in creating a situation whereby “trial by newspaper” may become the rule rather than the exception. Possibly, the effect of newspaper comments is to be measured by different standards, depending upon whether the court is reviewing an ordinary criminal case or a contempt proceeding. See Irvin v. Dowd, 366 U.S. 717 (1961), where the court reversed a criminal conviction because newspaper publicity adverse to the defendant had created a situation where a fair trial was not possible.
\textsuperscript{60} Fed. R. Crim. P. 42(a). The manner in which the Court has apparently modified this provision is discussed, infra, at 382.
\textsuperscript{61} Fed. R. Crim. P. 42(b).
\textsuperscript{62} Cooke v. United States, 267 U.S. 517 (1925).
rendered certain advisory remarks for the guidance of federal judges in determining the propriety of their sitting in particular cases. In effect, Rule 42(b) converts that advice into an absolute rule mandatory upon all federal judges. The circumstances under which the contempt occurred are no longer material nor does Rule 42(b) concern itself with the motive of the contemnor, even though the statements might have been made in a palpable attempt to drive a particular judge from the case. Since the words "disrespect to or criticism of a judge" have not yet been definitively construed, it is difficult to appraise the probable effect of Rule 42(b). If the quoted words are by construction limited to situations wherein personal wrongdoing by the judge has been charged, then the rule would seem to be a good one. Indirect contempts seldom, if ever, create an emergency situation and the action of any trial judge in setting an alleged direct contempt down for trial rather than punishing it summarily is indicative of the absence of any emergency. Under these circumstances it seems desirable that a judge in no way personally affected by the allegedly contemptuous statements should determine the guilt or innocence of the accused.

Procedural limitations upon the contempt power have not been restricted to proceedings in federal courts. A witness before a Michigan "one-man grand jury" was held to have been denied procedural due process when the judge, in his capacity as grand juror and acting in secret, informed the witness that his testimony was false and evasive, summarily charged him with criminal contempt, convicted and sentenced him. Constitutional violations were found in the secrecy of the contempt proceedings and in the failure to afford the witness a reasonable opportunity to defend himself—notice, the right to counsel, the right to cross-examination of adverse witnesses, and the right to testify.

Thereafter a Michigan one-man grand juror who initiated contempt proceedings sought to comply with the Oliver ruling by proceeding in public and by affording the defendant a full trial. Nevertheless, the contempt conviction which resulted was held, in a six-to-three decision, to violate due process upon the ground

63 Id. at 539.
64 In re Oliver, 333 U.S. 257 (1948).
that the judge could not function both as prosecutor and as judge. Mr. Justice Black, speaking for the majority, said:

Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer. It is true that contempt committed in a trial courtroom can under some circumstances be punished summarily by the trial judge. See Cooke v. United States, 267 U.S. 517, 539. But adjudication by a trial judge of a contempt committed in his immediate presence in open court cannot be likened to the proceedings here. For we held in the Oliver case that a person charged with contempt before a 'one-man grand jury' could not be summarily tried.

The court further said:

Moreover, as shown by the judge's statement here, a 'judge-grand jury' might himself many times be a very material witness in a later trial for contempt. If the charge should be heard before that judge, the result would be either that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant. In either event the State would have the benefit of the judge's personal knowledge while the accused would be denied an effective opportunity to cross-examine. The right of a defendant to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized in such way.

In the Murchison case the due process clause of the fourteenth amendment was, for the first time, utilized by the court to prevent a particular state court judge from adjudicating a contempt case. (It will be remembered that the Tumey case dealt with ordinary criminal litigation, not with contempt). Obviously, the Murchison rule could have broad implications. Under the "one-man grand jury" system, the judge appointed to that position operates as investigator, prosecutor and grand juror. These are active functions, the discharge of which requires the formulation of opinions concerning factual situa-

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66 Id. at 137.
67 Id. at 138-39.
tions which may be material in subsequent litigation and also concerning the credibility of witnesses whose testimony may be essential. Few would quarrel with the *Murchison* ruling insofar as it holds that such functions are inconsistent with the later reassumption of the judicial role for the purpose of passing upon the contempt which originated before the judge while acting as a grand juror. Opinions formed or impressions gained while functioning as investigator or prosecutor are not apt to be disregarded merely because a person dons judicial robes to deal with an alleged contempt. Whether the judge formally appears as a witness or merely determines the issue upon the basis of his prior impressions, the defendant's rights would seem to be violated.

While *Murchison* dealt with a rather special situation, a one-man grand jury, some of the present justices of the court would apply the reasoning of that case broadly. They would deny federal judges (and the same reasoning would apply to state court judges) the right to try any indirect contempt cases arising out of disobedience of orders issued by that judge and based upon charges preferred pursuant to his direction. As yet, those finding a conflict akin to that of the *Murchison* situation have not been able to muster a majority of the court for the application of that doctrine to ordinary contempt situations. Thus, where a corporate official was convicted of criminal contempt under Rule 42(b) for having failed to produce documents called for by a subpoena in a criminal trial then pending, the majority in a five-to-four decision saw nothing wrong in the trial being held before the judge who initiated the proceedings since the contempt involved no "disrespect to or criticism of a judge." However, three members of the minority urged that the wrong judge had tried the case, Mr. Justice Black saying:

I believe that it is wrong in a Rule 42(b) proceeding for the same judge who issued the orders allegedly disobeyed and who preferred the charges of contempt on his own initiative and based on his own knowledge to sit in judgment on the accused. In essence, this allows a man who

already believes that another person has disobeyed his command to act as both prosecutor and judge in a proceeding to 'decide' formally whether that person disobeyed him and should be punished. It is contrary to elemental principles of justice to place such power in the hands of any man. At the very least, another judge should be called upon to try the contempt charges. Here, besides issuing the orders allegedly disobeyed and then citing petitioner for contempt, the trial judge was intimately involved in earlier proceedings from which the contempt charge developed and in which evidence relevant to that charge was presented. Under such circumstances he would have been superhuman not to have held pre-conceived views as to petitioner's guilt.\textsuperscript{71}

So, too, the majority in another five-to-four decision upheld the propriety of a judge, whose surrender order had been disobeyed by the contemnor, presiding over the subsequent trial for criminal contempt.\textsuperscript{72} In a vigorous dissent,\textsuperscript{73} Mr. Justice Black (joined by Chief Justice Warren and Mr. Justice Douglas), unsuccessfully sought to persuade his fellow justices that those charged with criminal contempt are constitutionally entitled to trial by jury. In the course of that opinion, he argued:

\begin{quote}
Summary trial of criminal contempt, as now practiced, allows a single functionary of the state, a judge, to lay down the law, to prosecute those who he believes have violated his command (as interpreted by him), to sit in 'judgment' on his own charges, and then within the broadest kind of bounds to punish as he sees fit. It seems inconsistent with the most rudimentary principles of our system of criminal justice, a system carefully developed and preserved throughout the centuries to prevent oppressive enforcement of oppressive laws, to concentrate this much power in the hands of any officer of the state. . . . 

When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge, he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the judge of his own cause. The defendant charged with criminal contempt is thus denied what I had always
\end{quote}

\textsuperscript{71} Id. at 402-03 (dissent).
\textsuperscript{73} Id. at 193 (dissent).
thought to be an indispensable element of due process of law—an objective, scrupulously impartial tribunal to determine whether he is guilty or innocent of the charges filed against him.74

Carried to their logical conclusion, the views espoused by Mr. Justice Black in the _Neloa_ and _Green_ cases would prohibit any judge from trying cases of indirect contempt based upon alleged violations of orders or decrees issued by that judge, particularly if, as is usually the case, the judge has also caused the contempt proceedings to be initiated. The due process clause should not, in my opinion, be extended that far, nor should the Supreme Court impose such restrictions upon inferior federal courts pursuant to its supervisory authority over them. Individuals (or corporations) may be accused of violating numerous types of laws, _i.e._, those established by legislative declaration (statutes), judge-made law as laid down by prior decisions, and rulings by judges or administrative agencies which in particular cases are binding upon specified individuals. The Black arguments implicitly assume that judges, for some undisclosed reason, are more vindictive and less judicial when it comes to enforcing the law represented by their own orders than they are when dealing with cases of violations of law laid down by others. No factual basis for such an assumption has ever been shown to exist.

Mr. Justice Black and those who agree with him have not specified whether they believe that any impairment of judicial efficiency would result from a requirement that judges other than those whose orders have allegedly been disobeyed should preside over contempt hearings. An earlier Supreme Court specifically considered this matter,75 saying:

But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to his orders, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to

74 _Id._ at 198-99.
75 _In re_ Debs, 158 U.S. 564 (1895).
It seems indisputable that some loss of judicial efficiency would result from transferring to a new judge all indirect contempt cases, even those not involving personal disrespect to the judge who would ordinarily try the particular case. Whether the loss would be one-half as stated in the *Debs* case, or somewhat more or less, is impossible to say. At the very least, there would be a great duplication of judicial time and effort and substantial delay, because the new judge would have to familiarize himself with the background surrounding the issuance of the order allegedly violated and with the intent of the court issuing the order. Indiscriminate transfer, as proposed by Mr. Justice Black, could have other undesirable results. Particularly in those areas where a limited number of judges, sometimes only one, would be available to replace the disqualified judge, the doctrine of indiscriminate transfer might open the door to much "shopping around" by a disappointed litigant in an effort to secure a judge more likely to favor his viewpoint. To the extent that such shopping around resulted in delay, as would always be the case, or that different results would be obtained at the hands of the new judge, as would sometimes be the case, there would inevitably be a corresponding diminution of respect for and obedience to all judicial tribunals.

One can only speculate as to the eventual significance of the *Murchison* case. Only four years after that case, the court rendered a decision which, if not actually in conflict with *Murchison*, represents a broad step contrary to the whole trend of the past twenty years toward limiting the contempt power wherever possible. In *Brown v. United States*, a witness before a federal grand jury, which was investigating possible violations of the Interstate Commerce Act, refused to testify on grounds of possible self-incrimination. The grand jury sought the aid of the district judge who ruled that the witness would be granted an

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76 Id. at 594-95. There were, of course, no electronic computers at the time of the *Debs* decision and the court did not indicate by what mathematical process it arrived at the result that transfer of the duty to determine the question of disobedience would destroy half of a court's efficiency.

immunity from prosecution and directed him to answer the questions. After again refusing to answer, the witness was brought before the judge who, in the presence of the grand jury, repeated the questions. Upon his continued refusal to answer, the witness was summarily convicted of criminal contempt under Rule 42(a). In a five-to-four decision, the court affirmed the conviction.\[7\] For the majority, Mr. Justice Stewart upheld the procedure used upon the ground that, although the witness might have been proceeded against under Rule 42(b) for his refusal to answer before the grand jury, nevertheless his subsequent refusal in the judge's presence authorized action under Rule 42(a). He noted that the contempt was in no sense personal to the judge.

Chief Justice Warren dissented and was joined by Justices Black, Douglas and Brennan.\[7\] In his view, the witness should have been convicted only under Rule 42(b) where he might have presented a defense or demonstrated extenuating circumstances (possible fear of gangster reprisals). He said:

Rule 42(a) was not inserted in the Rules in order to ease the difficulties of prosecuting contempts. It was not meant to authorize the practice of having government prosecutors force persons who had already committed contempts outside of the presence of the court to repeat the action before the court and thus subject themselves to deprivation of their rights under Rule 42(b). Given the purpose of Rule 42(a) with its admittedly precipitous character and extremely harsh consequences, this court should not countenance a procedure whereby a contempt already completed out of the court's presence may be reproduced in a command performance before the court to justify summary disposition.\[80\]

Surprisingly, neither majority nor dissenting opinions referred to the *Murchison* case. The relationship seems clear cut. Any difference between the two is one of degree rather than of kind. In repeating the questions theretofore put to the witness by the grand jury, the judge in the *Brown* case in effect assumed the role of the grand jury and acted precisely as a Michigan

\[7\] *Ibid.*
\[7\] *Id.* at 53.
\[80\] *Id.* at 54.
one-man grand jury would have acted. The cases are, of course, distinguishable in that the judge in the *Brown* case simply took over the role of inquisitor. He did not assume an investigatorial function nor did he usurp the grand jury's right to determine whether or not to indict. Nonetheless, it cannot be denied that the judge in the *Brown* case temporarily merged the roles of prosecutor and judge. Since, in the *Murchison* case, the conviction was reversed although the recalcitrant witness received a full hearing and had an opportunity to present any available defense or any matter in mitigation, it seems beyond dispute that the Michigan judge-grand juror in that case could not have reconvened court and repeated the identical questions that the witness had refused to answer previously and then summarily convicted him. Clearly, this would have been prohibited by the *Oliver* case. Yet this is exactly what a federal judge was allowed to do in the *Brown* case. That witness, after being interrogated by the judge, was convicted and sentenced without any trial at all. The rule of the *Murchison* case should have been applied in the *Brown* case, at least to the extent of assuring the witness a full trial. Proper procedure would seem to have required that he be tried, not for his refusal to answer the questions put by the judge, but for his prior refusal to answer the questions put to him by the grand jury. Such a trial would have presented no question of judicial disqualification.

Furthermore, the *Brown* holding can hardly be reconciled with that in *Yates v. United States*. There, during her trial for conspiracy to violate the Smith Act, the defendant refused to answer questions on cross-examination designed to identify others as members of the Communist Party. During the course of the trial, in an effort to coerce answers to the questions, the defendant was imprisoned for civil contempt. When the trial was concluded, she was summarily convicted and sentenced for criminal contempt pursuant to Rule 42(a). The conviction was affirmed in a six-to-three decision. However, the Court held that the defendant had committed only one contempt, and that contempts may not be multiplied by the asking of related questions within an area in which the witness had already refused to

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answer. If, as there held, the multiplication of contempts dealing with the same subject matter is prohibited, then how can it be proper to compel a witness to repeat a contempt already committed before a grand jury in the presence of the judge, solely for the purpose of justifying summary proceedings under Rule 42(a)? Surely the rights of an alleged contemnor to a full and fair trial where one would ordinarily be held should be no less subject to abrogation by judicial sleight-of-hand than the right of an alleged contemnor not to be convicted more than once for what is essentially the same contempt.

The lack of consistency in the Court's approach to contempt problems is further evidenced by the case of Levine v. United States. The facts were identical with those of the Brown case. In another five-to-four decision, the Court upheld the power of the district court to proceed summarily under Rule 42(a) against a defendant compelled to repeat in front of the court a contempt originally committed before the grand jury. The issue actually determined was that the defendant's constitutional rights were not violated by the action of the court in excluding the public (other than defendant's counsel) from the courtroom. Contempt proceedings were held not to be criminal prosecutions within the meaning of the sixth amendment. It was held that the due process clause of the fifth amendment had not been violated because defendant's counsel, although requesting a trial under Rule 42(b), had not specifically objected to the exclusion of the public. In so ruling, it would seem that the majority confused the due process question with the possible waiver by the defendant of any violation of due process that might have occurred. While Mr. Justice Frankfurter, writing for the majority, called the case "wholly unlike" the Oliver case, the only recognizable difference between the two is that Levine was permitted to have counsel. Upon the secrecy issue, the cases are not distinguishable. It has never been held that federal judges have any more right to proceed secretly than do state court judges.

The tendency heretofore noted of recent Supreme Court decisions (other than the Brown and Levine cases) to limit the

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83 Id. at 619.
contempt power and, as exemplified by the *Murchison* case, to disqualify particular judges from hearing contempt cases has been followed by the various state courts. Almost all recent state court cases have required the disqualification of the judge when indirect contempt prosecutions have been based upon imputations of wrongdoing by the judge or comments or action otherwise personally disrespectful to him.84

One court has even gone so far as to reverse a contempt conviction upon the ground that the wrong judge heard the case where the issue of disqualification was never raised until the case reached the highest court in the state.85 In that case the defendant had been convicted for having represented to a correspondent in a divorce action that a favorable decision could be purchased through the defendant's intercession with the court reporter or the judge. Even though the defendant, by failing to object to the procedure, apparently indicated his willingness to have the judge alluded to try the contempt proceeding, the Supreme Court of New Jersey held it improper for him to have done so. This might be described as "automatic disqualification" since its application was not dependent upon timely action by the defendant. In this respect the rule goes further than the federal courts are required to do under Rule 42(b). In a federal case the defendant's consent to trial by the offended judge would undoubtedly be implied from his failure to object.

Where an indirect contempt consists of attacks upon the integrity of the judge, the rule of "automatic disqualification" laid down in the *Van Sweringen* case should be followed. If, as has often been stated,86 it is of basic importance that courts shall not only do justice but shall give the appearance of doing so, then it should be recognized that the appearance of injustice,

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84 Turkington v. Municipal Court, 85 Cal.App.2d 631, 193 P.2d 795 (1948); State *ex rel.* Moser v. District Court, 116 Mont. 305, 151 P.2d 1002 (1944); Ponder v. Davis, 233 N.C. 699, 65 S.E.2d 356 (1951). But see *In re White*, 340 Mich. 140, 65 N.W.2d 296 (1954), where the Supreme Court of Michigan held unconstitutional a statute providing for the disqualification of a judge from hearing contempt proceedings when the alleged contempt was committed before that judge acting as a one-man grand jury. This case, a companion case to *Murchison*, was reversed by the United States Supreme Court on grounds of procedural due process. 349 U.S. 133 (1955).


arising when a judge tries a contempt case where the allegations concern him personally, is equally great when the defendant does not urge judicial disqualification as when he does.

The past twenty years have, so far as indirect contempt is concerned, witnessed a tendency to resolve the conflict between judicial function and individual rights in favor of the latter. The outstanding development has been the elevation, in the *Murchison* case, of the problem of judicial disqualification into one of constitutional significance. Important though *Murchison* may be, the uncertainty that has long existed concerning the proper scope of the doctrine of judicial disqualification can hardly be said to have been removed simply because the problem has now been stated in constitutional terms. At this time it cannot be foretold whether *Murchison* represents the high-water mark of the trend toward disqualification or whether it represents merely a significant stepping stone in the evolution of a broad doctrine of judicial disqualification in all contempt cases. The *Brown* case and the majority opinions in the *Nilva* and *Green* cases seem to indicate that the scope of *Murchison* will be limited to those situations where the judge actively engages in some function inconsistent with a strictly judicial role or where there is a direct connection between the judge personally and the allegations which form the basis of the contempt charges. The dissenting opinions in the *Nilva* and *Green* cases presage the possibility that a future shift in the membership of the Supreme Court will bring about a very substantial extension of the doctrine of judicial disqualification in all cases of indirect contempt. The uncertainty is not limited to the field of indirect contempt. Contemporaneous developments disclose at least as much uncertainty in direct contempt situations.

**DIRECT CONTEMPT SINCE 1940**

Three recent decisions of the Supreme Court have produced some change in the law of direct contempt. Analysis of the cases suggests the possibility of further far-reaching changes, some of which are of questionable desirability.

In *Fisher v. Pace*, plaintiff's counsel repeatedly sought to

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87 336 U.S. 155 (1949).
set before the jury in a workmen's compensation action the number of weeks' compensation his client might receive and the rate thereof, although the jury was concerned only with special issues as to the extent and duration of the injury. An objection to counsel's argument was sustained. He was granted an exception and told not to argue the matter further with the court. After he again referred to the irrelevant subjects, the court instructed the jury to disregard counsel's statement and again admonished against further argument. When counsel persisted, a heated exchange between court and counsel ensued. During the colloquy the court said, "I'll declare a mistrial if you mess with me two minutes and a half, and fine you besides." The continuance of the colloquy saw the court imposing a fine of $25, then of $50, then a sentence of three days in jail, and finally the fine was increased to $100 and the sheriff was directed to remove counsel. The actions by the court brought forth from counsel such remarks as, "If that will give you any satisfaction," and, "You know you have all the advantage by you being on the bench." Upon an application for a writ of habeas corpus, the Supreme Court of Texas upheld the commitment.\footnote{Ex parte Fisher, 146 Tex. 328, 206 S.W.2d 1000 (1948).} In a five-to-four decision the United States Supreme Court affirmed the judgment.\footnote{Fisher v. Pace, 386 U.S. 155 (1949).} For the majority, Mr. Justice Reed held that the summary conviction and punishment did not violate due process and that the inability of the transcript to depict counsel's expression, manner of speaking, attitude, etc., necessitated reliance upon the fairness of the presiding judge.\footnote{Interestingly enough, Mr. Justice Reed laid stress upon the fact that the contemnor was "an officer of the court." Cf. Cammer v. United States, 350 U.S. 399 (1956), \textit{supra}, at 364. Surely the fact that the \textit{Fisher} case arose in a state court whereas \textit{Cammer} originated in a federal court has no real significance. A lawyer's status as "an officer of the court" and the duties accompanying such status hardly vary from court to court.} Three dissenting opinions were written in the \textit{Fisher} case. Mr. Justice Douglas (joined by Mr. Justice Black) dissented upon the ground that the attorney was entitled to reasonable freedom of speech in attempting to protect his client's rights. Mr. Justice Murphy thought the disagreement too petty to warrant the use of the drastic contempt process. Mr. Justice Rutledge contended the judge was obviously so angry as to be
unable to render the calm and unbiased action which due process requires in any judicial proceeding.

Standing alone, the Fisher case represents no change. It is illustrative of a typical direct contempt proceeding where, immediately upon the occurrence of the contemtuous acts, the court acts promptly and summarily in order to maintain control of the courtroom proceedings. No case has ever held a judge disqualified from acting in this type of situation. Of the dissenters, only Mr. Justice Rutledge urged disqualification.

The most interesting vote in this case was that of Mr. Justice Frankfurter. He voted with the majority although he has since become one of the most outspoken advocates of judicial disqualification in contempt cases. Neither the summary nature of the proceedings, nor the fact that the contempt was adjudicated by a judge who had been "involved" in an acrimonious colloquy with the contemnor seemed improper to Mr. Justice Frankfurter in 1949. Apparently, Mr. Justice Frankfurter had not yet adopted the views subsequently expressed by him in Sacher v. United States91 and in Offutt v. United States.92

Sacher v. United States93 presented a direct contempt situation where the trial judge deferred punishing allegedly contemptuous attorneys until the completion of the main case, a nine-month trial involving alleged Smith Act violations by eleven Communist Party leaders. After receiving the jury's verdict, the trial judge filed a certificate, pursuant to Rule 42(a), finding defendants' counsel and one defendant who acted as his own counsel guilty of criminal contempt on numerous grounds and imposing jail terms up to six months. The Circuit Court of Appeals affirmed the contempt convictions and sentences although it reversed some specifications of contempt.94 The Court limited its review to the question of whether the contempt charge was properly determined by the trial judge under Rule 42(a) rather than by some other judge under Rule 42(b). By a five-to-three vote, it held that the trial judge was authorized to proceed under Rule 42(a). Justices Frankfurter, Black and Douglas dissented.

91 343 U.S. 1 (1952).
93 343 U.S. 1 (1952).
94 United States v. Sacher, 182 F.2d 416 (2d Cir. 1950).
The behavior punished consisted of breaches of decorum and disobedience of the judge's orders by defendants' attorneys, all of which took place in the presence of the trial judge. Mr. Justice Jackson wrote the majority opinion and held that a trial judge must have discretion to determine whether to punish direct contempt immediately or at the conclusion of the trial, that he need not punish "while smarting under the irritation of the contemptuous act,"\(^9\) that the trial judge properly heard the case, and that he was not required to assign it to some other judge and become merely the accusing witness. The opinion states:

> It is almost inevitable that any contempt of a court committed in the presence of the judge during a trial will be an offense against his dignity and authority. . . . It cannot be that summary punishment is only for such minor contempts as leave the judge indifferent and may be evaded by adding hectoring, abusive and defiant conduct toward the judge as an individual. Such an interpretation would nullify, in practice, the power it purports to grant.\(^9\)

Mr. Justice Black dissented, joined by Mr. Justice Douglas, and urged, so far as here material, that another judge should have passed on the charges because the trial judge's impartiality was necessarily impaired by his belief that defendants' counsel had conspired to break down his health.\(^9\) Mr. Justice Frankfurter dissented upon the ground that summary action is improper when the judge finds it unnecessary to punish during the trial and upon the further ground that another judge should have heard the contempt charges to preclude the trial judge from acting as both accuser and judge.

Two years later, in *Offutt v. United States*,\(^9\) the Court again reviewed a situation where a trial judge punished an attorney for direct contempt at the conclusion of the trial rather than when the contempt was committed. During a criminal trial in which the charge was abortion, defense counsel and the judge continually argued with one another. Defendant's counsel had

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\(^{96}\) Id. at 12.

\(^{97}\) He also argued that the contemnors should have been given notice and an opportunity to defend themselves, and that they were entitled to a jury trial.

persisted in asking, without proper foundation, questions which the court regarded as manifestly improper and prejudicial. He was repeatedly warned of the consequences of his disregard of the court's rulings. The judge's resentment of the attorney's tactics was evidenced by his statement that counsel had "forfeited your right to be treated with the courtesy that this court extends to all members of the Bar" and when discharging the jury the court referred to the attorney's "disgraceful and disreputable performance." The conviction in the principal case was reversed upon the ground that the court had excessively interfered with the examination of witnesses and that its comments toward defendant's counsel reflected bias and hostility, all of which prevented a fair trial. The contempt conviction, however, was affirmed by the Circuit Court of Appeals, but the punishment was reduced from 10 days to 48 hours. The Supreme Court reversed this conviction by a vote of five-to-three and remanded the matter for trial before a different judge. Mr. Justice Frankfurter wrote the majority opinion and described the judge as "involved," "personally embroiled," and the contempt charge as "entangled with the judge's personal feeling against the lawyer." While not disputing the guilt of the attorney he ruled, relying upon the Cooke case, that the trial judge should not have determined the contempt charge. Justices Reed, Burton and Minton dissented.

The Offutt case did not purport to overrule Sacher, the majority opinion stating that the court would not "retrace" the ground covered in Sacher. While the court may have regarded the two cases as distinguishable, no such distinction is apparent. The Offutt opinion made no comparison of the degree of judicial "involvement" in the two cases. If anything, it would seem that the judge in the Sacher case was more personally involved. He believed the contemptuous acts and statements were part and parcel of a conspiracy to break down his health and thus cause a mistrial. He further believed that the contemnors frequently

99 Id. at 17.
100 Ibid.
101 Peckham v. United States, 210 F.2d 693 (D.C. Cir. 1953).
102 Offutt v. United States, 208 F.2d 842 (D.C. Cir. 1953).
lied to and about him. The *Offutt* case disagreements between court and counsel pertained to counsel's tactics in seeking to defend his client, tactics which the judge thought reprehensible but which had no direct connection with him as an individual. The absence of any substantial distinction between *Sacher* and *Offutt* was noted by Chief Justice Warren who, in his dissent in the *Brown* case, referred to *Offutt* as an instance where the viewpoint of the dissenter in a prior case *Sacher* had been adopted.

It is entirely possible that the different results in *Sacher* and *Offutt* can be accounted for only by the changes in the personnel of the court during the two years between the cases. No justice who voted with the majority in *Sacher* supported the majority opinion in *Offutt*. In *Sacher* the majority consisted of Justices Jackson, Vinson, Reed, Burton and Minton. During the time interval between *Sacher* and *Offutt*, Mr. Justice Warren became Chief Justice in place of Mr. Chief Justice Vinson and Mr. Justice Jackson died but his successor had not been appointed when *Offutt* was decided. The *Offutt* majority consisted of Justices Frankfurter, Warren, Black, Douglas and Clark.

Whatever may have been the reasons for the court's shift between *Sacher* and *Offutt*, the effect of the *Offutt* case could well be substantial. For the first time, the doctrine of disqualification (although not specifically so labelled) has been utilized to prevent a trial judge from punishing contemptuous acts committed in his presence during the actual trial of the case. This represents an expansion of the rule enunciated in the *Cooke* case where the contempt had reference to one matter as to which the trial had already been completed and to other related matters not yet on trial. Nor is it likely that the *Offutt* rule will be limited to the peculiar factual situation there presented. While *Offutt* dealt with a situation where punishment for the contempt was deferred until after the close of the trial in progress, the time of punishment apparently played no part in the court's determination. The rationale concerning judicial "involvement" is equally applicable to a situation where the judge punishes the contempt immediately. The future extension of the *Offutt* rule to

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cover that situation seems fairly predictable. As an example of
the Court’s exercise of supervisory authority over inferior federal
courts Offutt is not, strictly speaking, binding upon state courts.
However, where the degree of judicial “involvement” by a state
court is such that the Court would intervene if the case had
originated in a federal court, it seems likely that the Court will
hold that the judicial “involvement” transgresses the due process
clause. 107

In effect Offutt has written into the Federal Rules of Criminal
Procedure a new limitation upon the power of a trial judge to
punish for contempt. Before that case, a trial judge might punish
any direct contempt occurring in his presence. Offutt requires
that in proceedings under Rule 42(a) the contempt must not only
have occurred in the judge’s presence but the circumstances must
have been such as to indicate that the judge was not “involved.”

The Court’s interpretation of Rule 42(a) seems to vary from
case to case. In Sacher it was applied as written. In Offutt, how-
ever, the Court engrafted onto the rule a limitation not fairly
inerrable from its text. Yet, several years later the court per-
mitted an extension of Rule 42(a). In Brown v. United States, 108
what was essentially an indirect contempt was converted into a
direct contempt by the judge’s action in assuming the role of
inquisitor. This conversion enabled summary punishment to be
inflicted upon the contemnor, bypassing the hearing procedure
required by Rule 42(b). While there may be no conflict between
the actual holdings in Offutt and Brown, it seems impossible to
reconcile the two entirely different approaches to Rule 42(a)
revealed by those cases. 109

Though the Offutt holding may be criticized by reason of the
fact that it is inconsistent with other Supreme Court decisions
and because it rewrote Rule 42(a), its major vice is far more

107 Cf. In re Murchison, 349 U.S. 133 (1955); In re Oliver, 333 U.S. 257
(1948). If, as held in Murchison, due process requires an impartial judge, then
it would seem immaterial whether the judicial “involvement” arises out of the
judge’s exercising a dual function such as judge and prosecutor or whether it
arises in some other way. It is the involvement that is important rather than
the source thereof.


109 As already noted, supra, at 374, Levine v. United States, 362 U.S. 610
(1960), extends the inconsistency still further. The majority opinion in that
case several times cited the Offutt case with approval. Actually the Levine case
further modifies Rule 42(a) by sanctioning the practice of summary contempt
convictions in a court room from which the public has been barred.
fundamental. It is noteworthy that there was no charge that the judge had been “fixed,” nor was it contended that he was disqualified due to interest or relationship. Instead, the so-called “involvement” in that case arose solely out of the judge’s resentment of counsel’s tactics. Under those circumstances, the arguments advanced by Mr. Justice Frankfurter in his opinion and in his dissent in the Sacher case are far from conclusive. It seems probable that the rule there announced will create more difficulties than it solves and it could well undermine the effectiveness of judicial control of courtroom procedures.

The majority opinion in Offutt contains neither a definition of “involvement,” nor any criteria by which to determine the degree thereof necessary to disqualify a particular judge. Unless the term “involvement” be limited to situations of personal dishonesty on the part of the judge, or to those rare cases where extraneous circumstances affirmatively demonstrate personal bias, it seems impossible to define the term in any way that will afford guidance to judges in future cases. This is not a problem of semantics but rather one of practical appraisal of the nature of our judicial system and the setting out of which contempt charges most frequently arise. Courtroom contempts may occasionally be described and dealt with as desperate efforts to divert the course of justice, but by no means always. In large part, such contempts are a product of the adversary system upon which we rely so heavily in our quest for truth. That system necessarily engenders hotly contested situations where emotions run high and where neither actions nor words can always be the result of careful consideration. To keep contests within reasonable bounds and properly directed toward an impartial determination of the issues, the presiding judge must have authority to control them. As pointed out by Mr. Justice Frankfurter in his concurring opinion in Green v. United States,\(^{110}\) ever since 1789 all Supreme Court justices have recognized this power as essential for the proper functioning of any judicial system. Even those justices who have urged (unsuccessfully) that contemnors are constitutionally entitled to trial by jury have recognized the necessity for an exception for contempts in facie curiae.\(^{111}\)


The manner in which such control may be exercised obviously varies from judge to judge depending partly upon the temperament of any particular judge, but it is certainly neither unusual nor improper for judges to engage in colloquy with counsel. Among the many justifications for such action is the desire to define more precisely the point at issue, to explain a ruling or the reasons therefor, or to indicate the permissible boundaries within which the controversy may proceed. *Offutt* seems to require that, in any case where the judge has been something more than a mere automation grinding out rulings on motions or objections to evidence, he refrain from using the contempt power upon which, in the final analysis, his control of the proceedings depends. Precisely at the point where control may be most necessary, *Offutt* commands a judge to abandon his judicial role and to limit his further participation, if any, to that of an accusing witness before some other judge.

The stenographic transcript will, if accurate and complete, always show what words have been spoken; but courtroom contempts do not consist only of spoken words. Actions, which may or may not appear in the record, and offensive mannerisms, including the manner of speech which never appears in the record, may also constitute contempt. Necessarily, as noted in the majority opinion in the *Fisher* case, the trial judge is in the best position to pass upon such contempts.\(^\text{112}\)

The untoward effects of the *Offutt* ruling and its probable extensions seem almost limitless. They would not, as some might assume, affect only the contempt proceeding but would reverberate throughout the remainder of the trial of the principal case and possibly throughout any future proceedings involving some or all of the participants in the contempt proceeding.

In the trial of the contempt proceeding before another judge,\(^\text{113}\) the original presiding judge would ordinarily be the chief accusing witness. Having assumed that role, he would then be subjected to what might reasonably be expected to be an intensive cross-examination—particularly if some of the elements of the allegedly

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\(^{113}\) That the hearing before a second judge cannot be summary, even though the charge be direct contempt, but must accord the defendant full rights of defense is demonstrated by what happened on the remand of the *Offutt* case. *Offutt* v. United States, 232 F.2d 69 (D.C. Cir. 1956), *cert. denied*, 351 U.S. 988 (1956).
contemptuous conduct were such as might be observed by the trial judge but would not necessarily appear in the record. Often and obviously so, it is extremely difficult to portray by words a course of conduct that might in fact have been highly contemptuous. Thus, in many cases, the outcome of the contempt proceedings would depend more upon a judge's skill as a witness than upon the intelligence and discretion which he applied to the discharge of his judicial duties. Where the judge-witness regarded the contemnor's manner of speaking and demeanor as contemptuous and where this was disputed during the contempt proceedings, it is only natural that the cross-examiner would employ the weapons of ridicule and sarcasm in an effort to demonstrate that the judge-witness was either mistaken, or that he acted maliciously against the alleged contemnor. Given that situation, Mr. Justice Frankfurter's remarks in his dissent in the Sacher case\textsuperscript{114} concerning the ability of the second judge to control the cross-examination of the judge-witness seem unsound.\textsuperscript{115} There is no reason why a judge appearing as a witness should be accorded greater immunity from cross-examination than any other witness. Indeed, any artificial limitation of the scope of cross-examination should be held to violate due process.\textsuperscript{116}

A contempt proceeding tried before another judge can, when viewed realistically, hardly escape the appearance of being just as much a trial of the accusing judge as that of the alleged contemnor. Under these circumstances some judges might refrain from instituting contempt charges because they believe the resulting trial would, irrespective of its result, be detrimental to the dignity of the judiciary and the respect in which it should be held or because they believe it more important not to abandon their other judicial duties. Other judges might cause the contempt charges to be brought but deprive the proceedings of much of their force by not appearing as a witness.\textsuperscript{117}

\begin{itemize}
  \item \textsuperscript{114} Sacher v. United States, 343 U.S. 1 (1952) (dissent).
  \item \textsuperscript{115} Similar sentiments were expressed by the Court of Appeals for the District of Columbia in reversing the second Offutt conviction for contempt. Offutt v. United States, 232 F.2d 69 (D.C. Cir. 1956), cert. denied, 351 U.S. 988 (1956).
  \item \textsuperscript{116} Cf. In re Murchison, 349 U.S. 133 (1955).
  \item \textsuperscript{117} While the reason for his non-appearance does not appear, it is a fact that the trial judge did not testify in the second contempt proceeding against Offutt. Offutt v. United States, 232 F.2d 69 (D.C. Cir. 1956), cert. denied, 351 U.S. 988 (1956).
\end{itemize}
tious judge is likely to be deterred from bringing contempt charges by the possibility that as judge-witness he might find himself standing alone, this possibility should not be overlooked when appraising the overall effect of the Offutt rule. It is notoriously difficult to procure medical testimony in malpractice cases, no matter how aggravated a particular case may be. Similar considerations might impel lawyers not to testify against other lawyers accused of contempt. It is not lightly to be presumed that the axiom, "There, but for the Grace of God, go I" affects only the medical profession.

If, notwithstanding the numerous reasons which might dissuade a judge from initiating contempt charges which could only be held before another judge, a judge did institute contempt charges and particularly if he forsook his other judicial duties in order to testify, there is little doubt but that his future judicial efficacy would be impaired in the event that the contempt charges were not sustained by the judge who ruled thereon. The situation then presented would in no way be comparable to the ordinary reversal of a judge for an error of law or for a mistake in weighing the evidence. Whether the adverse result in the contempt proceedings were attributed to honest mistakes by the judge-witness or to a general lack of credibility, it seems most unlikely that in the future that judge could, and possibly he would not even try to, maintain the same degree of control over courtroom proceedings. Nor is it clear that the results of trying a contempt proceeding before a second judge would be accorded any more respect. In the event of a conviction, those willing to substitute suspicion for proof would argue that judges always "stick together."

The undesirable results would not be confined to the contempt proceeding. Among other things, they would affect the principal case out of which the alleged contempt arose. Suppose, in Offutt, instead of waiting until the close of the abortion trial, the judge (being blessed with foresight and thus able to anticipate the Supreme Court theory of "involvement") had informed defense counsel during the trial that his remarks and conduct were deemed contemptuous and that charges would be filed against him and heard by some other judge upon the conclusion of the principal case. At that point, would not counsel have been justified in seeking a mistrial of the abortion case upon the ground that the
judge was so "involved" as to render him lacking in impartiality?\textsuperscript{118}

For that matter, once the judge had become "involved" by engaging in colloquy with the defense counsel and by expressing adverse opinions as to counsel's tactics, would he not then have been disqualified irrespective of whether or not he cited defense counsel for contempt either immediately or at the close of the trial? Would the judge's "involvement" with counsel ever be separable from his assumed attitude towards counsel's client? If, somehow, these obstacles were overcome, numerous others would remain.

Whatever the outcome of the contempt proceeding or of the principal case, future complications would inevitably arise. Few witnesses enjoy being subjected to a rigorous cross-examination. Most witnesses resent the cross-examiner and the tactics he uses. That resentment might reasonably be expected to linger for a considerable period. Whenever the lawyer who had conducted the cross-examination of the judge-witness had a case pending before that judge or whenever the defendant in the contempt proceeding was active in another case, would not either or both be entitled to urge disqualification upon the "personal involvement" theory? When would the "involvement" cease? What, if any, action might the "involved" judge take to purge himself of the "involvement"? These questions, always inherent in the situation created by this judge made rule of disqualification suggest, and perhaps compel, the conclusion that the majority in the Offutt case addressed itself to the wrong question entirely.

As a human being, it is only natural that the more aggravated the contemptuous acts or words, the more likely it is that the judge whose responsibility it is to maintain the dignity of the courtroom will be irritated and even angry. It is submitted that the real question which the Court should have decided was whether or not Offutt had been guilty of contempt. The majority did not dispute the findings of the trial judge on the issue of guilt and the affirmance thereof by the Circuit Court of Appeals. Among the lower court findings upheld by the Circuit Court were

\textsuperscript{118}The fact that the conviction of Offutt's client was subsequently reversed because of excessive judicial interference seems immaterial in this connection. There is nothing in Mr. Justice Frankfurter's opinion, either by way of definition or discussion, to indicate that "involvement" exists only when the trial court's conduct has already permeated the case with reversible error.
those finding counsel guilty of "insolent, insulting and offensive remarks to the court"; that in spite of admonitions from the court he had persisted in repeating questions previously excluded by the court; that without foundation he had asked highly prejudicial questions, such as asking the victim of the abortions, "When were you arrested in this case?," although said victim had never been arrested; and that he had sought to create an episode that would lead to a mistrial. All of these findings were buttressed by numerous record references.

Whether the contemptuous outbursts left the judge angry or indifferent would seem to have been irrelevant. If the record disclosed sufficient evidence of guilt, the conviction should have been affirmed as was urged by the dissenters. If, on the other hand, the record disclosed insufficient evidence of guilt and indicated that the trial judge had substituted anger for proof, then the conviction should have been reversed. The third possibility is that the record might have left the matter in doubt. In that event, the conviction should have been reversed and the case remanded for reconsideration by the trial judge. In any ordinary case, other than those involving statutory grounds of disqualification or for a change of venue, errors of law or rulings contrary to the weight of the evidence result in reversal of the cause and in its being remanded for retrial, not before a different judge but before the same judge. It is never assumed that a prior error, no matter what its nature, will prevent a judge from giving proper consideration to the matter on retrial. No reason is apparent why a different rule should have been invented for use in contempt proceedings.\(^9\)

In our judicial system, situations involving the possible wrongful deprivation of individual liberty have always caused grave concern, and rightly so. Despite many procedural and substantive safeguards, we have not been able to devise a foolproof system. Occasional miscarriages of justice do occur. It is always possible that, in violation of his oath, the judge will decide a case upon some basis other than the evidence and the law. The possibility of a miscarriage of justice in contempt cases does not seem appreciably greater than in other types of cases. With the exception of those situations wherein the contempt consists of

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\(^9\) Throughout this discussion, those special situations involving charges against the judge personally are omitted. Those are discussed infra, at 994.
charges of misconduct by the judge himself, there seems to be no reason for believing that "personal involvement" would result in any more arbitrary and unjust decisions than would the ever-present but unproven possibility that a particular case has been decided because of the judge's prejudice for or against a person's race or creed. Certainly, the possibility of wrongful action where a judge has not deemed himself disqualified does not seem to be sufficiently great to warrant embarkation upon a substantial alteration of the delicate judicial mechanism. If, as most of the present justices are willing to assume, our trial judges are men (and women) of sufficient hardihood to withstand the expressed or implied commands of powerful newspapers commenting upon pending cases, then surely they are equally capable of withstanding any emotional pressures arising out of colloquy between court and counsel concerning legal matters not relating to the judge personally. In the *Cooke* case, upon which Mr. Justice Frankfurter relied so much in the majority *Offutt* opinion, there were charges of judicial wrongdoing. Not only were there no such charges in *Offutt* but no publicized opinion reveals any indication that the alleged contemnor challenged the qualification of the judge. Unless the Court chooses to limit the *Offutt* case to its own factual situation, the theory of "personal involvement" there enunciated seems likely to dilute or possibly to render completely ineffective judicial control of courtroom proceedings.

The difficulties of applying the *Offutt* rule of "personal involvement" are well illustrated by the most recent contempt proceeding passed upon by a federal appellate tribunal. At the conclusion of the trial of an anti-trust case, the court had, pursuant to Rule 42(a), summarily adjudged plaintiff's counsel guilty of direct criminal contempt. During the trial there had been marked differences of opinion between counsel and the court concerning the propriety of the court's action in ordering, over counsel's objection, a separate trial of one issue. Further differences had arisen concerning the manner in which plaintiff's counsel might offer proof about matters excluded by the court. In reviewing the conviction, the Circuit Court referred to the "turbulence" under which the respondents were required to act in protecting their

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client's rights.\textsuperscript{122} Notwithstanding its characterization of the atmosphere of the trial, the Circuit Court held that the judge was not so "involved" as to require application of the \textit{Offutt} rule because the record showed that the judge was not "actuated by personal enmity" toward either of the lawyers held in contempt.\textsuperscript{123} Whether the five justices who comprised the \textit{Offutt} majority would agree with the Circuit Court is highly problematical. The uncertainty as to whether they would or should agree demonstrates the unworkable nature of the test of "involvement."

Though the "involvement" theory has little merit, except as hereinafter pointed out when applied to situations of alleged personal wrong-doing by the offended judge, it does not follow that attorneys, litigants or others are defenseless against a court's arbitrary action in its utilization of the contempt power. It cannot be overstressed that we deal here only with the possibility of arbitrary action, not with the probability.

Assuming arguendo that a court has acted arbitrarily in convicting someone of contempt, checks and balances comparable to those found throughout our governmental system exist and could be used to eliminate or at least to minimize the occasional arbitrary or excessive use of the contempt power.\textsuperscript{124}

Most judges are not insensitive to the possibility that, being human, they may on occasion act arbitrarily. When dealing with direct contempts, courts are not obliged to grant the contemnor a

\textsuperscript{122} \textit{Id.} at 313.
\textsuperscript{123} \textit{Id.} at 316.
\textsuperscript{124} It should not be overlooked that the possibility of arbitrary and unwarranted action is not limited to lower courts. See \textit{State ex rel. Hall v. Niewoehner}, 116 Mont. 437, 155 P.2d 205 (1944). There an attorney was held guilty of direct contempt of the Supreme Court of Montana for having presented to that court a motion seeking to have its records amended to show that one of the justices had been absent on specific days. The attorney was really seeking to publicize the fact that this justice and, on a prior occasion, another justice of that court had served on the National Railroad Adjustment Board and had been paid for so doing, while having been paid for the same period by the State of Montana. Whatever might be said about the clumsy manner in which the attorney sought to publicize these facts, and whether from a technical standpoint the propriety of Montana justices serving on the National Railway Adjustment Board was material to the attorney's motion or to the subsequent contempt proceedings, the court's decision, nevertheless, seems little short of outrageous. Apparently there was no question concerning the truth of facts asserted by the attorney. How the publication of such a truth could be contemptuous surpasses understanding. Truth as a defense is discussed more fully \textit{infra}, at 399. It goes without saying that there is less likelihood for the correction of arbitrary action by courts whose actions are not subject to review by higher courts. Neither the "involvement" theory, nor any other can provide complete protection against this possibility.
It is, however, within the power of a court to grant a hearing even in such cases.\(^1\)

Those judges, and it is safe to assume that this means the overwhelming majority of judges, who are anxious to minimize the possibility of their having acted arbitrarily, will grant a hearing, except in those aggravated situations where a hearing could serve no useful purpose.

After having been convicted of direct contempt, with or without a hearing, a contemnor may then file a motion to vacate the judgment of conviction. Under some circumstances, it has been held that the court is obliged to grant a hearing on such a motion.\(^2\) Whether or not required to grant a hearing, most judges would give such a motion serious consideration. It seems likely that any "involvement" because of anger or for any other reason which may have influenced the judge when he entered the judgment would have abated and would no longer be a factor in passing upon the motion to vacate. Of course, it is always possible that a judge, having arbitrarily (we assume) convicted someone of contempt, would just as arbitrarily adhere to that decision. But countervailing factors are present, factors which would probably have controlling influence in most cases. Foremost is the desire of the overwhelming majority of judges to do justice in accordance with their oaths of office. Also present is the natural disinclination of any judge to have one of his rulings reversed by an appellate tribunal.

As a matter of probability, few would question the assumption of good faith and pure motives on the part of judges who enter judgments of conviction for contempt. However, it would be naive to believe that such probability or the normal self-restraint of judges of such re-examination as they might undertake when considering a motion to vacate would avert all arbitrary or other-

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\(^{125}\) Ex parte Terry, 128 U.S. 239 (1888); People v. Hassakis, 6 Ill.2d 465, 129 N.E.2d 9 (1955); In re Willis, 94 Wash. 180, 169 Pac. 38 (1917).


\(^{127}\) Widger v. United States, 244 F.2d 103 (5th Cir. 1957).
wise wrongful contempt convictions. In this field, as in all other fields of human endeavor, there will be errors, and the possibility of occasional arbitrary action cannot be excluded.

Obviously, strict appellate supervision of contempt convictions affords the best opportunity for minimizing the possibility of arbitrary action, particularly in those situations where the offended court has proceeded summarily without granting the contemnor a hearing.

Virtually all jurisdictions require adjudications of direct contempt to contain findings of fact sufficiently detailed to enable an appellate court to determine whether a contempt has really been committed. Descriptions of the contemnor's behavior as "improper," or "boisterous," or "menacing," or by other words which really state conclusions are generally held insufficient. The requirement of detailed findings of fact affords a small measure of protection against arbitrary action. Unfortunately, most appellate tribunals content themselves with merely determining whether the facts set out in the findings are sufficient to show a contempt. In other words, they accept as conclusive the findings made by the trial judge and pass only upon their sufficiency. Criticism of this doctrine should not be made without an understanding of the dilemma confronting appellate tribunals in such situations. Where a contempt consists of the manner in which words have been spoken rather than of the words themselves, or where it consists of actions or the general attitude and the demeanor of the speaker, neither the record nor any specific degree of detail in the findings of fact can put an appellate tribunal in as good a position to pass upon the conduct in question as was the trial judge. His findings may have been completely justified, though neither the record nor his descriptive powers can adequately convey the situation that actually existed. Given a situation where an attorney has actually sneered at the court, how is the court to describe such conduct? Must the findings contain a

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129 Id. at 1239. See also Parmelee Transp. Co. v. Keeshin, 294 F.2d 310 (7th Cir. 1961); Parmelee Transp. Co. v. Keeshin, 292 F.2d 806 (7th Cir. 1961); People v. Hassakis, 6 Ill.2d 468, 129 N.E.2d 9 (1955).
130 Fisher v. Pace, 336 U.S. 155 (1949); Bloom v. People, 23 Colo. 416, 48 Pac. 519 (1897); In re Cary, 165 Minn. 203, 206 N.W. 402 (1925); Appeal of Levine, 372 Pa. 612, 95 A.2d 222 (1953), cert. denied, 346 U.S. 858 (1953); In re MacDonald, 110 Pa. Super. 352, 168 Atl. 521 (1933); In re Willis, 94 Wash. 180, 162 Pac. 38 (1917).
listing of the facial muscles and the manner in which they are exercised in order to produce the expression recognized as a sneer?131 If an attorney has, by laughing at the court, demonstrated his contempt and defiance, by what method can the trial judge adequately inform the reviewing court of this situation with which he was confronted?132 Must the findings specify the physiological method by which a human being produces the facial expression and the sounds generally characterized as laughter? Even if the findings were that specific, would the reviewing court as a practical matter be in any better position to pass upon an appeal?133 There probably is no pat solution to this dilemma but it is not satisfactory that the difficulty of affording effective appellate review should serve as an excuse for “rubber stamping” all contempt actions of a trial judge.

An intelligent approach has been made by the California courts. There a trial court found that the contemnor made statements “in a loud, insolent, aggressive, belligerent, boisterous, harsh, offensive and contemptuous tone of voice, and with a sneering and contemptuous expression on his face and a threatening demeanor toward said court and the judge thereof. . . .”134 These findings were held insufficient to support the contempt conviction. That the foregoing findings might properly have been called conclusions is undoubtedly true. But it is equally true that there is virtually no way by which the court might have described the contemnor’s conduct so as to avoid the objection. The majority stressed that the words themselves which had been used were not contemptuous and that at no time had the judge remarked about or cautioned the contemnor for his demeanor, expression, etc. This “warning” requirement seems to be desirable. Its natural tendency will be to restrain impetuous action.

131 A finding of “sneering” was held sufficient in Parmelee Transp. Co. v. Keeshin, 292 F.2d 306 (7th Cir. 1961).
132 A finding that an attorney was guilty of contempt by laughing at the court was reversed as being merely a conclusion. Ibid.
133 These considerations weigh equally heavily against the “involvement” theory of the Offutt case. In a trial before another judge, whenever any judge—witness or, for that matter, any witness attempted to portray by testimony contemptuous conduct such as sneering or laughing, there would be the same difficulty as there is in making findings which are not subject to the objection that they are mere conclusions. Witnesses are not permitted to state conclusions—any more than are judges making findings of fact. Thus, the application of the “involvement” theory in no way tends to solve this most difficult problem.
that might otherwise be taken by the judge. Nevertheless, the "warning" requirement is not a panacea. "Warnings" can be the subject of arbitrary action equally as much as can actual contempt convictions.

No general rule can or should be formulated in attempting to meet the difficulties inherent in this type of situation. It does seem reasonable, however, to expect that appellate tribunals, in addition to the bare assertion that contempt convictions are not entitled to the benefit of the presumption accorded other judgments, should carefully scrutinize the entire record in all cases of contempt convictions to determine as best they can whether the record fairly supports the findings of fact of the trial judge. The presence or absence of "warnings" is one criterion but not the only one. While no cold record can thoroughly recreate the atmosphere of a trial, the record can give some idea as to the circumstances under which the allegedly contemptuous actions occurred or the contemptuous words were spoken. When the reviewing court blindly accepts the findings of the trial judge or when it arbitrarily rejects those findings as conclusions, the litigants have had appellate review in name only. The dangers of arbitrary action on the one hand or loss of judicial effectiveness on the other hand cannot be averted by an abdication of appellate responsibility.

ATTACKS UPON JUDICIAL INTEGRITY—TRUTH AS A DEFENSE

Prior comments upon the "judicial involvement" rule laid down in the Offutt case excluded those situations where the allegedly contemptuous words or conduct constituted a personal attack upon the judge. Attacks upon judicial integrity, i.e., charges that the judge has been "fixed," or claims that a particular judge improperly sat in a given case because of interest in the outcome or relationship to one or more of the parties, present a situation markedly different from that in Offutt where the so-called "involvement" arose solely out of the judge's emotional reaction to counsel's tactics. In the former type of situation, the "involvement" of the attacked judge is apparent, so much so that

135 Platnauer v. Superior Court, 32 Cal. App. 463, 163 Pac. 237 (1941); People v. Tavernier, 384 Ill. 389, 51 N.E.2d 528 (1943); Ex parte Shull, 221 Mo. 623, 121 S.W. 10 (1909).
the maxim "no one should be a judge in his own cause" would seem to be both applicable and controlling. Extended argument is unnecessary to demonstrate the futility of expecting any person to pass impartially upon the truth or falsity of charges that he has betrayed his judicial oath of office.

However shocking it may seem, those accused of direct contempt because of their attacks upon the integrity or impartiality of the judge have, with but one exception, been uniformly unsuccessful in their efforts to disqualify that judge or to secure a change of venue. Only in *State v. Martin* has any court permitted the alleged contemnor to urge successfully the disqualification of the offended judge or judges. Whether based upon common law grounds or upon statutory grounds permitting the disqualification of particular judges or allowing a change of venue, pleas of disqualification have been brushed aside as being inapplicable to cases of direct contempt. Throughout the many cases dealing with this problem, necessity appears to be the sole justification for the rule of non-disqualification. Again and again it is asserted, in one form or another, that any other rule would permit contemnors to escape punishment by attacking the integrity of every judge on the bench. Vain is the search for justification of the rule of non-disqualification on the ground that it is fair or equitable. Nor is it defensible as being conducive to the maintenance of the dignity of the courts. Popular confidence in judicial integrity can hardly be enhanced when judges adjudicate their own virtue. Neither the public nor the legal profession can be satisfied with the bland assertion that judges act impersonally in passing upon contempt cases, and this is so despite the fact that so distinguished a source as Mr. Justice Holmes may be cited in support thereof. Unedifying is a mild word when used to describe the spectacle of a judge adjudicating a person guilty of direct contempt for having made charges which formed the basis for a libel action already instituted by that judge against the alleged contemnor.

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130 125 Okla. 24, 256 Pac. 681 (1927).
137 Lamberson v. Superior Court, 151 Cal. 458, 460, 91 Pac. 100, 101 (1907); *State ex rel. Short v. Martin*, 125 Okla. 24, 256 Pac. 681, 698 (1927) (dissenting opinion by Riley, J.).
139 *State ex rel. Short v. Owens*, 125 Okla. 66, 256 Pac. 704 (1927).
The fear that, unless the offended judge sat in judgment upon direct contempt charges, there might be no judge available and possessed of authority to punish a contemnor, may have loomed large in some jurisdictions due to the insufficiency of statutory provisions dealing with judicial disqualification or recusal. The doctrine that no court can or will punish contemptuous acts committed before another tribunal has contributed to that fear. These considerations, it is submitted, should not be decisive for the indefinite future. Properly drawn statutory provisions can obviate the possibility that pending contempt proceedings will remain undetermined because of the lack of a qualified judge. As is obvious from the *Martin* case, Oklahoma had such a statute. Other jurisdictions have similar provisions.

The justification of the rule of non-disqualification by advert- ing to the possibility of an assault upon the integrity of every judge is an example of the use of the logicians' device familiarly known as *reductio ad absurdum*. It is, of course, indisputable that this tool of reasoning may some times be properly used to reveal the unsoundness of a particular argument or asserted principle. However, every problem cannot be resolved by the indiscriminate application of this type of argument or, for that matter, of any other form of abstract logic. There is no easy substitute for a thorough analysis of the problem before the court and of the effects of every course of action available to the court.

Attacks upon the validity of taxes or licenses have given rise to the use of the *reductio ad absurdum* device probably most familiar to lawyers and laymen alike. Innumerable times have we been told "the power to tax involves the power to destroy." But the limitations upon this slogan were enunciated in unfor- gettable terms by Mr. Justice Holmes when he said, "The power to tax is not the power to destroy while this Court sits."
Just as the *reductio ad absurdum* maneuver does not provide an automatic solution in taxing and licensing situations, so too, it is highly doubtful that it offers a complete or even a satisfactory answer to the very difficult problem presented in direct contempt cases involving personal attacks upon the judge. There is a vast difference between a good faith attack upon the integrity or impartiality of one judge or tribunal and a broad-scale vendetta against an entire judicial system in order to avoid punishment or to avoid the imposition of civil liability. It does not follow either logically or practically that efforts to assure a fair trial for those accused of offenses against the judiciary necessarily result in depriving the judiciary of the power to deal with the rare situation presented by a completely unscrupulous party or attorney.

Significantly, the *reductio ad absurdum* type of reasoning has been utilized only in cases of direct contempt. Although it would seem to have equal application to cases of indirect contempt, it has not been so employed. So far as this writer has been able to ascertain, no court has questioned the propriety of judicial recusal in a case of indirect contempt whether the recusal resulted from action taken on the court's own motion or on the motion by one of the parties. Indeed, there has in recent years been a marked tendency on the part of appellate courts to require the recusal of the offended judge where personal attacks upon the judge form the basis of indirect contempt charges.\(^4\) No court has attempted to explain why the argument of necessity relied upon in cases of direct contempt does not apply with equal force to cases of indirect contempt. Conversely, the courts have failed to explain why those considerations which are sufficient to bring about the recusal of the offended judge in indirect contempt cases should not produce the same results in direct contempt cases. Apparently no court has gone further than to recognize the delicacy of the situation in which the rule of non-disqualification places the offended judge.\(^5\) This concern for the sensibilities of the offended judge is touching but hardly persuasive. It might be argued that such concern is completely irrelevant. Fundamentally, the question to be decided is whether the effective functioning of the judiciary can be preserved only by the stringent limitations upon

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\(^{145}\) See cases cited note 84 *supra*.

\(^{146}\) *Lamberson v. Superior Court*, 151 Cal. 458, 91 Pac. 100 (1907).
individual rights presently imposed in direct contempt proceedings. It is one thing to permit summary procedures in direct contempt cases where the alleged contempt does not consist of some form of adverse reflection upon the judge personally and where consequently there is no reason to believe that the judge in whose presence the offense takes place cannot dispense justice in an impartial manner. It is, however, quite another thing where the contemptuous words or conducts are directly related to the judge who would ordinarily pass upon the contempt charges. In the absence of some overpowering emergency requiring immediate action by the offended judge, the emphasis would properly seem to be placed upon the flagrant denial of the basic rights of the person accused of contempt than upon the sensibilities of the offended judge. In the event of a hearing, what chance does the accused have for any sort of a fair trial at the hands of the judge accused of misconduct? Even if guilty, what chance would the contemnor have of receiving punishment commensurate with the offense when the punishment was measured by the insulted judge?

The Supreme Court has never determined whether in a direct contempt proceeding the presiding judge is disqualified by reason of the fact that the alleged contempt consists of adverse reflections upon the judge himself. Since, in Offutt, the judge was deemed too “involved” to pass upon a direct contempt which was in no way a reflection upon him, it seems highly probable that the “involvement” theory would be applied to “personal” contempts. Such application of the “involvement” theory would, in this writer’s opinion, be justified.147

Safeguards for the rights of those accused of crime dominate our criminal jurisprudence. Part of the price that we willingly pay for minimizing the chance of conviction of an innocent person is the occasional escape from punishment of a guilty person. There is little likelihood that a breakdown of the judicial system would result from an application of similar considerations to cases of direct contempt, just as they are applied to cases of indirect contempt and to all other forms of offense against the government, be they denoted “crimes” or otherwise. Barring an emergency,

147 See generally United States v. Bradt, 294 F.2d 879 (6th Cir. 1961).
no judge should sit in any direct contempt case where his ruling will in effect constitute an adjudication of his own integrity.

Unless an alleged contemnor is permitted to plead and prove truth as a complete defense to the pending charges, any discussion of the propriety of the offended judge sitting in judgment is of little more than academic interest. Proof of the making or publishing of defamatory statements would suffice. Despite the many cases involving contempt charges based upon accusations against a judge, the availability of truth as a defense has received remarkably little consideration. Only once has the Supreme Court expressed itself on this subject.148 There, contempt charges against a publisher were based upon the assertion that the Supreme Court of Colorado had acted in pending cases pursuant to a scheme to seat Republican candidates in place of lawfully elected Democrats and that two of the judges of the court had obtained their seats upon the bench as part of the scheme. The truth of the publication was pleaded as one of the defenses which the publisher sought to interpose but, without passing thereon, the Supreme Court of Colorado found the publisher guilty of contempt. In a seven-to-two decision, the United States Supreme Court dismissed a writ of error upon the ground that no federal constitutional question was presented.

Mr. Justice Holmes, writing for the majority, found it unnecessary to consider whether the conviction for contempt infringed upon freedom of the press since, in his view, the publications, even if true, were nonetheless contemptuous. He said:

In the next place, the rule applied to criminal libels applies yet more clearly to contempts. A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be nonetheless a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.149

149 Id. at 462.
With profound deference to the views of the distinguished author of the Patterson opinion, it is by no means clear that the rule prohibiting truth as a defense in criminal libel proceedings should be applied to criminal contempt proceedings. It is not within the scope of this article to discuss the shortcomings of the ancient libel rule, nor the modern tendency to abolish or ameliorate that harsh doctrine. Nevertheless, irrespective of what the rule should be in a criminal libel proceeding, elementary justice would seem to require that in contempt proceedings the alleged contemnor should be permitted to establish the truth of his charges against the judiciary. The adversary system which we have evolved as the best means for determining the truth of disputed matters can function only when the tribunal, whose responsibility it is to adjudicate the dispute, is itself free from suspicion. If, in fact, the judge in any pending case has been "fixed" or has engaged in other conduct inimical to the rendering of an impartial decision based solely upon the evidence and the law applicable thereto, the cornerstone for the entire judicial system has been undermined. The exposure of such facts can in no sense be regarded as an obstruction of justice. Those facts, if true, conclusively establish that under the circumstances prevailing no justice can or will be administered.

The example cited by Mr. Justice Holmes in support of the proposition that truth should not be a defense to criminal contempt charges is valid enough but hardly comparable with the publication actually involved in the Patterson case. Our system of jurisprudence requires that matters such as the credibility of witnesses or the weight of the evidence be determined solely upon the evidence adduced and the fact finder's appraisal of the demeanor of the witnesses. Explanation may be furnished only by the court's instructions to the jury and arguments may be addressed to it only by counsel. An obstruction of the operation of such a judicial system results from any outside attempt to influence the judicial proceedings and its character as an obstruction does not change simply because the comment consists of truthful statements. The comments themselves constitute the offense and their truth or falsity is immaterial. Such comments are punishable because of their tendency to cause litigation to be

160 Ray, Truth a Defense to Libel, 16 Minn. L. Rev. 43, 47 (1931).
determined in a manner not authorized by the rules. Punishment does not result, as in the case of criminal libel, from a general policy of punishing all defamatory statements whether true or false.

Accusations against a judge should be placed in a different category. If true, such charges are clearly material. Far from seeking to influence litigation in a non-authorized manner, such publications seek the opposite. By pointing out that the judge's derelictions are such that there is no chance that the pending litigation will be determined by an impartial and unprejudiced tribunal in accordance with the basic concepts of our judicial system, such charges should be considered as seeking to assure that justice will be dispensed pursuant to the established rule.

State courts have, on the whole, recognized that truth should be a defense in contempt proceedings.\(^{151}\) Some cases have, without discussing the matter, proceeded on the assumption that truthful statements are not contemptuous. For example, there would have been no point to the lengthy hearings in the Oklahoma cases hereinbefore discussed if the truth of the charges was immaterial.\(^{152}\) Similarly, in the case against Owens,\(^{153}\) the court's reference to its having called upon the alleged contemnor three times to produce any evidence that he had in support of his charges and its further reference to the fact that three times Owens stood mute was meaningful only if the truth of the charges was relevant.

While contempt proceedings may not be the ideal vehicle for the determination of charges of judicial misconduct, when that misconduct either has caused harm to a litigant or imminently threatens such harm, the litigant or his attorney may have no choice but to make the charges during the pending litigation. Almost inevitably, the making of such charges will result in the filing of contempt proceedings. It is difficult to imagine a grosser miscarriage of justice than that which would result from giving a litigant or his attorney the unenviable choice between suffering

\(^{151}\) Lamberson v. Superior Court, 151 Cal. 458, 463, 91 Pac. 100 (1907); In re Dingley, 182 Mich. 148 N.W. 218 (1914); Ex parte Pease, 123 Tex. Crim. App. 57 S.W.2d 575 (1933); Ex parte O'Fiel, 93 Tex. Crim. App. 214, 246 S.W. 664 (1923); But see State ex rel. Giblin v. Sullivan, 157 Fla. 496, 26 So.2d 509 (1946).

\(^{152}\) State ex rel. Short v. Martin, 125 Okla. 51, 256 Pac. 667 (1927).

\(^{153}\) State ex rel. Short v. Owens, 125 Okla. 66, 256 Pac. 704 (1927).
in silence while pending litigation was disposed of by a “fixed” judge or risking conviction and punishment for criminal contempt for exposing the truth. Such a choice can be avoided only if truth be recognized as a valid defense to contempt charges.

CONCLUSION

The importance of the right to a fair trial by an impartial tribunal and of the other rights bestowed upon those accused of offenses against any branch of government cannot be emphasized too strongly. However, it must be recognized that those rights are not self-enforcing. In the absence of a judicial system with power to safeguard them, individual rights would degenerate into meaningless abstractions. Devotion to the maintenance of individual rights to be effective must necessarily include devotion to a judiciary possessed of power sufficient to permit its effective functioning.

If the judiciary operated in a vacuum, there would be little difficulty in determining the scope of the contempt power necessary to enable it to discharge its duties. Considered in isolation, it seems almost absurdly easy to effectuate a guarantee of a fair trial. Unfortunately, human conduct does not lend itself to such fragmentation. Unusual is the situation that can be soundly analyzed by considering only the impact of one particular set of principles rather than the inter-play between and accommodation of competing principles. When fundamental principles come into conflict, as they do so frequently in contempt cases, the difficulties of affording each its proper scope cannot be dissolved by the application of any trick formula, logical device or abstract generalization. While some aspects of the conflict cannot be resolved at all, the impossibility of an ideal solution is no justification for ignoring the problem as so many of the cases in this area have done.

The problems inherent in direct contempt cases strikingly illustrate the inadequacy of abstract logic as an infallible yardstick. Neither of the principles with which we are here concerned can be applied to their logical extreme without bringing about an undue curtailment of the other principle. The power to punish direct contempt summarily when the circumstances so require has always been recognized as indispensable to any judicial system.
No modern development has obliterated the need for such power. Undeniably the contempt power, like any governmental or private power, may be abused but this is hardly a valid argument for abolishing that power. Every person, whether he be behind the wheel of an automobile or performing some governmental function, has the potentiality for exercising the power with which he may be possessed wisely or foolishly, reasonably or arbitrarily. In direct contempt cases the dangers undoubtedly are magnified because adequate appellate review is difficult to attain. In view of these dangers, no one would dispute the need for caution in the exercise of the contempt power. The necessity for such exercise should not blithely be assumed, but neither should the undoubted necessity for the existence of the contempt power be overlooked because of overzealous concentration upon theoretical infringements of individual rights which might occur. Nebulous notions of "involvement," as exemplified by the Offutt decision, endanger an effective judiciary. Where, however, direct contempt charges result from attacks upon judicial integrity, the considerations are not nebulous. The threat to individual rights is apparent and immediate. The great weight of authority to the contrary notwithstanding, an exception to the rule of non-disqualification in direct contempt cases is, in this writer's opinion, required in those comparatively rare situations. The importance of public confidence in the judiciary demands that no judge sit in a case where his integrity has been impugned. Furthermore, every alleged contemnor should be granted an opportunity to establish the truth of his charges as a complete defense. Suppression of the truth can never provide either a solid or an acceptable foundation for the judicial edifice.
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