In re JOHN MOORE.

ARGUED JANUARY 14, 1913. DECIDED JANUARY 29, 1913.

Toliver, C. J., McCants-Stewart and Johnson, JJ.

1. The power to determine whether a contempt has been committed, and to punish for it, is inherent in a constitutional court, and such power can not be limited by statute.

2. Obedience to a restraining writ commences from the time a party has knowledge that such writ has been ordered to be issued, or that it is issued.

3. To render a person amenable to a restraining writ it is not necessary that he should have been a party to the suit in which the writ was issued.

4. A justice of a constitutional court presiding in chambers has power to dispose of matters of contempt, subject to appeal from his decision to the court in *bane.*

Per Curiam:

Contempt—Disobedience of Writ. This matter arose out of proceedings for a writ of certiorari in the case of *Peakeh v. Gbannie,* now awaiting decision at this term. On making the writ absolute, counsel for the petitioner raised the issue as to whether petitioner, in paying all accrued costs, should be required to pay the costs incident to his arrest and imprisonment, which was made after the order for a writ of certiorari was granted and issued. The justice presiding in chambers ordered an inquiry to ascertain whether or not the writ was disobeyed; and it was found that the respondent John Moore, who was serving in the capacity of bailiff to the judge of the Monthly and Probate Court, arrested the petitioner in certiorari under a writ of attachment issued by said judge, and brought his prisoner up to the office of the clerk of this court, where he was told by counsel for petitioner, and impliedly by the clerk, that a writ of certiorari was granted and that such writ stayed all further proceedings. He was told to report this fact to the judge under whose writ he was holding petitioner in certiorari. But he admitted upon the inquiry that he made no

report to said judge, but proceeded under a writ of commitment to incarcerate petitioner in certiorari in the county prison, where he was detained for several hours. Under this state of facts he was cited to show cause before this court why he should not be punished for contempt.

On the argument, counsel for respondent contended that respondent should not be punished for contempt for the following reasons : (1) respondent is not guilty of statutory contempt; (2) the cause was not pending in this court until this writ of certiorari was served; (3) respondent, was not an officer, but merely an attendant in the Monthly and Probate Court, and notice to him by the attorney for the petitioner in certiorari was not notice to the proper officer interested. Counsel also argued that to punish a person for disobedience, he must be a party to the cause, and submitted that the matter of contempt should have been disposed of by the justice presiding in chambers.

We shall now proceed to consider these objections. Contempt of court in a general sense may be said to be a disregard of, or disobedience to, a court, or a judge acting in his judicial capacity, by conduct or language in or out of its or his presence, which disturbs or tends to disturb the administration of justice, or impairs or tends to impair the respect due the court or judge.

It should be borne in mind that there is a radical difference between a constitutional and a statutory court. This court is established by direct constitutional provision, and the Legislature is limited in its right to make laws concerning it. But the Legislature has full power over the statutory courts, as they are its creatures, the exercise of such power being reviewable by this court as to its constitutionality. It has been settled by many authorities, that when the court is created by the Legislature, its powers and duties are dependent upon the act calling it into existence, and by that act, or by subsequent acts of the Legislature, what constitutes contempt of it may be defined, and how it may punish therefor may be prescribed.

But this is not the case with a constitutional court. The power to punish for contempt, as well as to determine whether a contempt has been committed, is inherent in all constitutional courts; and cannot be limited by statute. In *Ex Parte Robinson* (19 Wall. 505) Mr. Justice Field in delivering the opinion of the Supreme Court of the United States, intimated that an act of Congress limiting the power to punish for contempt could not limit the authority of the Supreme

Court. Blackstone declares, that this power and authority have been exercised by the supreme courts of justice as early as the annals of our law extend. (4 Bl. Com. 286 :) It seems clear, therefore, that the first objection raised by respondent's counsel is unsound. We do not have to examine the statute to discover whether or not respondent has committed a contempt of this court, and the claim that he should not be punished because he was not guilty of a statutory contempt falls to the ground.

We come now to consider the objection that the cause under writ of certiorari was not pending in this court until the writ was served, meaning that a party owes no obedience to a restraining writ until it is served. There can be no issue as to the fact that a writ of certiorari stops all further proceedings. (Rule IV, subsection 5.) The contention simply is, that obedience to such writ arises from the time of its service and not before.

It has been settled by a long and unbroken chain of authorities that obedience to a restraining writ, whether it is a writ of injunction or otherwise, commences from the time a party charged with contempt had knowledge of the fact that an order is made for the issuance thereof. In 16 Amer. & Eng. Enc. Law, 436, it is said : "It is altogether immaterial how the defendant (and this term applies to any respondent in contempt proceedings) acquires the information of the existence of the injunction (and this term applies to any restraining order) ; when once he has been apprised of the fact he is legally bound to desist from what he is restrained and inhibited from doing." In *Osborne v. Tenant* (14 Ves. Jr. 136) Lord Eldon, fixing the time for disobedience even before the order is made, held: "If these parties, by their attendance in court, were apprised that there was an order, that is sufficient; and I cannot attend to a distinction so thin, as that persons, standing here until the moment the Lord Chancellor is about to pronounce the order, which from all that passed, they must know will be pronounced, can by getting out of the hall at that instant, avoid all the consequences." And in *Ulman v. Ritter* (72 Fed. Rep. 1000) Jackson, J. said : "I hold the unquestioned law to be, that an injunction (any restraining writ) becomes operative from the time the order was made, and effective upon the party from the time he has notice of its existence. It is a matter of no moment how the defendant acquired the information of its existence. When once he has been apprised of the fact, he is legally bound to desist from doing what he is restrained and inhibited from doing. If this were not the rule, often great injury could be inflicted in numberless cases though the mandate of the court

was in existence."

Now, counsel contended that respondent could not be punished because he is not a party to the writ of certiorari, nor an officer of the court, although he admitted that he was serving in the capacity of bailiff, and did not deny that he had served for several years in such capacity. We do not think this is a sound contention.

In 7 Amer. & Eng. Enc. Law, 44 (7), it is said substantially: A frequent exercise of the power to punish for contempt is applied to the officers of and the attendants upon courts, such as attorneys, jurors, clerks; sheriffs, marshals and bailiffs. It is erroneous to contend that a person sought to be punished for contempt must be a party to the record. Property in the hands of a receiver is *in custodia legis,* and any person disturbing the possession of such receiver is guilty of a contempt of court. Held in England *(Angel v. Smith,* 9 Ves. Jr. 335, and other cases) ; and in American Federal Courts *(Visser v. Blackstone,* 6 Blatchf. 235, and other cases) ; and by the Supreme Courts of Illinois, Kentucky, New York, Pennsylvania, and Vermont.

In the case cited in the brief of counsel appearing as *amicus curiae* from the opinions of the Supreme Court of the United States of America, namely, *In re Lennon* (166 U. S. 548). The principle is clearly set forth, that to punish a party for contempt, he need not be a party to the suit. The petitioner in this case arising under a writ of habeas corpus, prayed to be discharged from imprisonment for contempt on several grounds, among which was the ground that the court committing him had no jurisdiction of the person of the petitioner, because he was not a party to the suit. Mr. Justice Brown, delivering the opinion of the court denying the petitioner's application, held: "The fact that petitioner was not a party to such suit * * * nor, was served by the officers of the court with such injunction, is immaterial so long as it was made to appear that he had notice of the issuing of an injunction by the court. To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice."

Respondent got notice of the order for a writ of certiorari in the office of the clerk of this court, both from counsel for the petitioner and impliedly from the

clerk, while the latter was putting the writ in due form. Now, it is unnecessary to consider the question as to whether respondent was bound to release his prisoner; but we hold that it was his duty to report this information with reference to the writ of certiorari to the court in whose service he was acting. Failing to do so and taking to jail the petitioner in certiorari, who was then under the protection of this court, he assumed full responsibility for his conduct in the premises. In *Aldinger v. Pugh* (132 N. Y. 403) punishment of an agent for contempt was upheld, where he disobeyed an order having knowledge of its service upon his principal.

Counsel for the respondent submitted on the argument that the justice presiding in chambers had the power to dispose of this matter, and by implication submitted, that he should have done so.

There is no doubt as to the right of a justice in chambers, to protect the orders of the court and preserve the administration of justice from any who would assail them by direction or indirection, subject to an appeal to the court *in bane* upon such terms as he may fix. But a justice may waive the exercise of this right and send the matter to the court, as proceedings for contempt involve the very existence of the court. Blackstone says: "Laws without a competent authority to secure their administration from disobedience and contempt would be in vain and nugatory." (4 Bl. Com. 286.) It is for this reason, namely, the preservation of the integrity of the courts and the orderly administration of justice, that there have been so few attempts on the part of executives to exercise the pardoning power in cases of contempt; and an issue has never arisen here as to whether the pardoning power given the executive applies to matters of contempt, or is limited to remission of forfeitures and penalties and the granting of reprieves and pardons resulting after convictions for criminal offenses.

The respondent is adjudged guilty of contempt and should be punished therefor; but because of the scarcity of money at this time, and because respondent is not a person of a very high order of intelligence, we feel that the ends of justice will be reached by the imposition of a fine of five dollars ; and respondent should pay the costs amounting, under a taxation already had by us, to the sum of fourteen dollars and ninety-seven cents, making a total sum of nineteen dollars and ninety-seven cents; respondent should pay said sum within ten days from the date of the judgment herein, and if he should fail so

to do, he shall be confined in the county jail until such sum is paid, or until released by order of a justice of this court.

And it is so ordered.

L. A. Grimes, and *T. W. Haynes, amicus curiae.* *Arthur Barclay,* for respondent.