

In the Supreme Court of the Hawaiian Islands.

BEFORE JUDD, C. J., M'CALLY, BICKERTON AND DOLE, JJ.

IN THE MATTER OF JOHN E. BUSH.

OPINION OF THE COURT BY JUDD, C. J., M'CALLY, J., dissenting.

On the sworn information of the Attorney-General the respondent was cited to appear before the Court to show cause why he should not be adjudged guilty of a contempt of Court for the publication of an article in a newspaper published in Honolulu called "Ka Leo o Ka Lahui," in its issue of February 5th instant.

On the 11th of February respondent moved that the rule be discharged on the grounds:

"1. The act complained of in the petition upon which said rule is based, is not in law, a contempt of Court for which this Court has power to punish this respondent.

"2. This Court cannot legally punish as for a contempt a publication of the nature of that herein complained of made in a newspaper and not done in the immediate presence of the Court.

"3. No publication out of Court in relation to the Court or to any of its individual members amounts, in law, to a contempt and the same cannot be punished as such.

"4. It is nowhere alleged or intimated in said petition or in the rule issued in pursuance thereof, that said publication was made while this Honorable Court was sitting as such, nor that said publication was designed, or calculated, or had any tendency to obstruct, embarrass or prevent the due administration of justice.

"5. If this respondent were in fact the publisher of, or legally responsible for said publication, which he doth in no wise admit to be true, then such fact and offense involved therein, are matters concerning which this respondent is by the Constitution and the statute law entitled to a trial by a jury of his peers."

BY THE COURT.

The Legislature of 1888 enacted that thereafter constructive contempts should not be punishable as such. It is claimed by the attorney for the respondent that the publication of the article in question, if a contempt at all, is a constructive contempt and is therefore not punishable.

Contempts are generally divided by jurists into the classes of direct and constructive; direct being those committed in the presence of the Court and constructive being those acts which the Court would have to construe by some process of reasoning to be equivalent to a direct contempt. But the authorities agree in the main that in order to sustain the character of a constructive contempt, the publication must have a tendency to obstruct or hinder the progress of justice in some particular case.

Were we to proceed alone upon the common law, the contention of the counsel for respondent would seem to be sustained by authority.

But we have a statute which, so far as we have learned, is peculiar to this country, and which describes and enumerates certain acts and circumstances as contempts and makes them punishable upon indictment and conviction by a jury and also summarily. These acts are not classified in the statute as direct and constructive contempts. Some of these acts would fall under one head and some under the other as generally classified. By our penal law, however, they are all contempts and punishable either summarily or upon indictment or in both ways.

The Legislature in enacting the law of 1888 had in mind, without doubt, the then recent cases decided by this Court in which certain publications, avowedly not of the character enumerated in the Penal Code as contempts, were construed by the Court to be contempts, and these the Legislature declared to be no longer punishable as such. The first and third sections of the act of 1888 strengthen this view.

The publication in question declares in substance that certain Justices of this Court now in office are guilty of an unexpated crime, and are therefore unworthy to sit in judgment upon others, thus attacking the Justices in the exercise of their judicial functions. This language fits exactly the words of the statute. It is "publishing of malicious invectives against a Court tending to bring such Court (and) or the administration of justice into ridicule, contempt, discredit or odium." We overrule the motion to discharge the Rule.

Respondent to answer. Attorney-General Peterson for Rule; C.W. Ashford for Respondent. Honolulu, Feb. 25, 1891.

Dissenting Opinion of M'CALLY, J.

The statute authority for treating this publication as a contempt of Court is the clause in Section 18 of Chapter 29 of the Penal Code. Quoting from the semi-colon it reads thus: "... or by knowingly publishing an unfair report of the proceedings of a court, or malicious invectives against a court or jury tending to bring such court or jury or the administration of justice into ridicule, contempt, discredit or odium, shall be punished," etc.

It is contended by the Attorney-General and it is the view of the Court that these words, the latter part particularly, apply to the article published by the defendant, in that it tends to bring the court and the administration of justice into contempt, etc. But in my view they cannot be considered to apply to

libelous words published in respect to the justices of the court charging them with unfitness to hold office and try cases, in a general way and not with reference to a pending case. Bishop on Crim. Law, Sec. 245, Vol. 2, gives this summary of doctrine: "According to the general doctrine any publication, whether by parties or strangers, which concerns a cause pending in court, and has a tendency to prejudice the public respecting its merits and to corrupt the administration of justice, or which reflects on the tribunal or its proceedings or on the parties, the jurors, the witnesses or the counsel, may be visited as a contempt." This language is cited by Lawrence, C.J., in the People vs. Wilson, 64 Ill., p. 213, as the common law definition. See also Bishop, Sec. 253 of Vol. 2. It is necessary in order to bring the case at bar within our statute to hold that it goes beyond the common law doctrine and beyond the usual statutes based upon the common law. But these statutes have never extended the power of courts and judges in regard to contempts but have rather limited power.

In my view the context of our statute does not support a construction that publications charging a general unfitness or a general corruption of the persons holding the judicial office can be treated as contempts of court. And this view is confirmed by what I have quoted above as the common law doctrine, for I do not believe that a modern statute would have been allowed to extend a power somewhat odious. The section (18) refers in the beginning to a judge or justice in the lawful exercise of his judicial functions; every other clause in it refers to proceedings in or of a court in pending business unless the latter part of the clause first cited and relied upon in this case can be detached from all the rest of the section, and it closes by the proviso that every judicial tribunal acting as such, and every magistrate acting by authority of law in a judicial capacity may summarily punish for contempt. In the clause in question the term used is court (or jury) by which can only be understood the tribunal and not the personal judge, and that it is a malicious invective upon its proceeding and tending to bring the administration of justice in a case (for only in cases as they occur do courts administer justice) into contempt, ridicule, discredit or odium. It would certainly require some explicit distinction from the other provisions of the section in which it is incorporated to show that it intends a distinct province of contempt.

This article refers to no case and to no court in the exercise of its judicial functions. February 25, 1891.

Provisions of the Pacific Cable Bill Considered in Senate Committee.

The bill now before the Senate Committee on Foreign Relations provides for a cable between San Francisco and Honolulu, and via Samoa to Auckland. The bill names as the incorporators of the company William Alvord, Samuel T. Alexander, Charles R. Bishop, Hugh Craig, William H. Dimond and Edward B. Pond, of San Francisco; Asabel Bush, James B. Montgomery and David P. Thompson, of Oregon; Admiral W. R. Shufeldt and Alfred T. Hartwell.

The bill provides that for the term of fifteen years after the opening of the line the United States shall pay to the company a yearly sum of \$200,000, for which consideration all messages of the United States navy shall be transmitted free of charge and have priority of all others. An officer of the United States navy shall be a member of the Board of Directors, and in case of war the government may assume entire control of the line.

The Hawaiian government has agreed to grant the company valuable concessions and a subsidy of \$25,000 per year. The estimated cost of the line from San Francisco to Honolulu is \$3,500,000. The promoters of the enterprise claim it will be impossible to realize a percentage upon their investment without government aid for a few years and until the line is extended. The first extension proposed is via Samoa to Auckland, where connection would be made with the cable now in operation between Auckland and Australia.—[N. Y. Herald.

Joe Burks, of Panther Creek, N. C., is an enthusiast upon the subject of egg eating. He lacks one inch of being seven feet high, and claims a record of having eaten 130 eggs at one meal.

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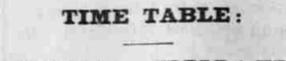
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Advertisements.

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TIME TABLE: STMR. KINAU,

Table with columns for departure and arrival times for the Steamer Kinau, including dates and times for various days.

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Table with columns for departure and arrival times for the Steamer Claudine, including dates and times for various days.

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Hotel Street near Fort, Fine Columbus Buggy Co.'s Phaetons and Carriages. For Sale Cheap! Warranted to Wear!

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AN 1190 TON STEAMER, schooner rig; nearly new and in first-class condition. Dimensions: Length 87 feet; breadth 22 feet; depth of hold 8 1/2 feet. Suitable for Passengers or Freight. Speed nine knots.

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HAMBURG - BREMEN Fire Insurance Company. The undersigned having been appointed Agents of the above Company, are prepared to insure risks against fire on Mills and Brick Buildings, and on Merchandise stored therein, on the most favorable terms.

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General Advertisements.

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ROYAL INSURANCE CO LIVERPOOL, Capital and Funds - \$29,000,000 UNION—New Zealand, Capital, - - - \$10,000,000

JOHN S. WALKER, 1823-1/2 Agent for Hawaiian Islands.

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The Liverpool and London and Globe Insurance CO [ESTABLISHED 1866.] Assets.....\$40,000,000 Net Income.....\$2,070,000 Claims Paid.....112,569,000

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Celebrated Billiard Tables Benson Smith & Co. JOBBING AND MANUFACTURING PHARMACISTS

Pure Drugs. MEDICAL PREPARATIONS, AND PATENT MEDICINES AT THE LOWEST PRICES.

FRUITS OF PASSION By MAI FAI. DEDICATED TO ELLEN WHEELER WILSON. Containing Nevada Christmas Story of 1879.

For sale at the Pacific Home Supply Co.'s office, Central House, Alakoa street; and at the Hawaiian Hotel.