

ARGUMENT IN BEHALF OF THE DEFENDANTS IN CONTEMPT CASE BY J. S. BOGART

James A. Bogart, of the firm of Bogart & Hasbrouck, associated with John J. Plowhead of Caldwell in the contempt case against R. S. Sheridan and C. O. Broxon in the supreme court of the state, yesterday delivered a strong argument in favor of a free press.

His remarks were not transcribed by the stenographer in time for publication yesterday in connection with the account of the proceedings, but they are given herewith as follows:

Should Not Show Weakness.
"I realize the importance of this action and want to say that I have the highest respect for this court and the deepest regard for the individual members thereof, but I appear here today, feeling that possibly a great injury may be done not only to the defendants in this case, but to the supreme court of the state of Idaho and to the press. I believe that this case must be adjudicated in a solemn, thoughtful manner; that we must not be carried off by prejudice or by hatred but we must go into this case without any regard to our personality or our personal feelings in the matter. Now, if the court please, we are at a disadvantage in this case for the reason we have not had time to draw up a brief in the case and lay before you all the authorities that apply.

Articles Come After Opinion.
"If the court please, I will show you what Judge Steele says regarding that, which I believe is the proper theory. If we eliminate the proposition that this case is pending when the rehearing came up, then you have got down to the proposition that this contempt, if any, was had after this decision had been passed and handed down by this court and all the authorities submitted—almost all the authorities submitted by counsel for the state apply to decisions or to matters that are then pending before the court and matters in which the court has not passed on and I will agree with him, if any article was published with the intention of influencing the court when it was trying the case, then I believe that article is contemptuous, but after this court has passed down its opinion, I don't believe that this court can be influenced, and the dignity of this court would be such that it could not be influenced by any article criticizing that decision.

Must Enlarge Limits
"Regardless of the fact that counsel says this is a cause for criminal contempt, he has not quoted any statute. He goes back to the inherent power of the court; back to Blackstone and it is an open fact, if the court please, that all the different states of the United States have gotten away from the old theory of Blackstone. The

courts of the United States stand on a higher plane than those of the old countries. In the old country, at one time, merely because of an article reflecting on the decision of a judge, made months prior to the time, it was a subject for contempt. We don't ask for that. The courts of Idaho ask for criticism; they ask for fair criticism. If the court please, here is the only statute I see under which this prosecution is brought, the publication of a false or grossly inaccurate report of the proceedings of the court; you must get outside of that; you must enlarge on the limits set down by the statute before you can possibly come into this court with a cause of action. You must take and abridge the constitution of the state of Idaho, in order to get in.

"I am taking the position there was no matter pending before this court at the time these articles were written and I think the court will bear me out even in that great case in the state of Colorado against the News-Times, which I say to the prosecuting attorney I would be ashamed to put before any court as the law of this state, they held that during a rehearing and as the counsel stated, even should you want to reconsider the thing, any publication or criticism adverse to them—while that is in your hands—is contempt.

Can Be Criticized.
"When this court has handed down its opinion in a case and thrown it open to the world for criticism, has invited the newspapers to publish that opinion, and then because this court may allow a rehearing, shall it hold that any criticism by the newspapers or individuals while there is a possible chance for a rehearing to be had—will this court hold that those criticisms are subject to contempt, to constructive contempt? I do not believe this court desires to be placed in the position, that having invited criticism, it will say that we are not sure of the opinion that we handed down and your remarks may influence us in arriving at a subsequent opinion; we would thereby show a weakness which would be more disastrous to public good than any criticism, no matter how stringent it might be on the opinion that you originally handed down. I am going to quote extensively from the dissenting opinion of Judge Steele of Colorado in this case I have heretofore mentioned against the News-Times.

Contradicts Theory Advanced.
Counsel says that this court has an inherent power on account of being judges to punish those who are brought before it. I will call the court's attention to the fact that the governor of the state of Idaho has certain judicial functions or quasi-judicial functions by which if the newspapers of this state would criticize his action, he, then extending his power to the extent that counsel would have it done, would have the power to immediately bring that publication or the owners of it before him for contempt. He passes judicial or quasi-judicial action on the pardons of this state; why, if they criticize the pardons and the pardon board, wouldn't they have the power, under that theory as laid down by counsel for the state to bring the owners of the publication up for contempt?

One Justice a Candidate.
"If the court please, the court must realize that all these articles as published and considered contemptuous were published in the heat of the campaign. The court also must take recognition of the fact that one of the benches was a candidate before the people for that position that he now holds. You must take into consideration that while he was a candidate for that office for which he aspired,

they had a right to criticize any action—they had a right to put before the people anything upon which he passed in order that if possible, they might carry out their desire for the election of the one they were supporting. Should they have exceeded the rights than an individual has, then that judge has the same power to have them tried for libel, but not for contempt.

No Reflection on Justice.
"It must be further understood that that squib in the paper that counsel read, that the majority of the court might know they were wrong when they agreed with Justice Sullivan—I want to say I don't see any reflection there on Judge Sullivan. If it was anything, it was a joke, granting that you are going to take it seriously you can take the position of Justice Harland of the supreme court of the United States, who has a reputation over the whole world, of hardly ever being in harmony with the balance of the court on decisions. He generally dissents and yet, would anybody imply that his motives were not pure—that his understanding was not being right? No, it is just merely that that simple article is not contempt in any sense of the word.

Contempt Citation Limited.
"If the court please, the great majority of the authorities holds that you have not—or you should not take upon yourselves that inherent power to punish for contempt that is not direct, and I will admit that counsel's authorities are correct when it comes to any attorney of this court or any witness before any court in the state or any juror that refuses to act on the process of the court. I believe if there is any order sent out from the court not immediately complied with, then you should bring them in for contempt.

"I want to say I don't believe, if the court please, there is any contempt proceeding that will ever raise the respect of the people of Idaho for the court and I believe that respect must come from the affection of the people, from their personal like for you and from the ability shown by this court in passing on those opinions. I don't believe that the people of the state of Idaho pass upon the opinions of this court on a newspaper articles printed in a campaign; I don't believe the articles printed in this campaign reflect on the integrity, honesty or ability of this court. I believe they were published and published only to help out the Progressive ticket.

Position is Sustained.
"If the court please, the contention I have taken in this has been sustained by the Central Law Journal, by Wisconsin, Michigan, Illinois, Massachusetts, Nebraska, Ohio, South Dakota, Missouri, the supreme court of the United States, West Virginia, Mississippi and Maryland; and also the great text writers, Copley, Lord Erskine and Lord Campbell.

"Why take some isolated cases? Why join in with three or four states in the union and add to our laws another statute, because this court must read into the statutes of the state of Idaho this law by which you can punish for constructive contempt; there is no law in the state of Idaho that gives you that power. If you do that, then I want to say that you have given an additional—there will be an addition to the laws of the state of Idaho, another court made law. You go back then to the old Blackstone—go back and dig up the old archives, saying under this you have an inherent right to punish any man that criticizes any decision you make after it has been handed down. Don't pay any attention to this proposition of the rehearing. We can't afford to have the court of Idaho say that we will show the weakness that comes under this proposition, that you must wait for a length of time that is necessary for us to rehear or, should you criticize adversely and should anything in your publication be so as to influence us, we might change our opinion. Under the law of rehearing it must be some new matter that you will pass upon, not the old; you have passed on that; so, then, what difference would it make; what do these criticisms have to do with the opinion of this court? No, I hope, if the court please, there will not be written in the laws of the state of Idaho—that there will not be placed down in the state library—any law which says that the press of the state of Idaho will not have the right under the constitution to express their opinions about any opinion that may be handed down by this court or any other court in this state. I say no, let us throw out to the people of this state the right to criticize this court; the right to criticize your personality; the right to criticize your life, your everyday life; let that be an open book; let the people of Idaho say even in the face of all criticism that we honor and esteem our supreme court; that we believe their integrity is unimpeachable."

"The general rule is, that to constitute any publication a contempt, it must have reference to a matter then pending in court, and be of a character tending to the injury of pending proceedings upon it, and of the subsequent proceedings. *Rapallo Contempts*, 56.

"While the phraseology of the section of the statute in question is, possibly, in that respect, somewhat obscure, it contains nothing, as we construe it, changing that general rule. It follows therefore that comments, however stringent, which have relation to proceedings which are passed and ended, are not in contempt of the authority of the court to which reference is made. Such comments may constitute a libel upon the judge, or some other officer of the court, but cannot be treated as in contempt of its authority. (Citations: *Dunham v. State*, 6 Iowa, 245; *State v. Anderson*, 40 Iowa, 207; *Stewart v. People*, 3 Scam., 395; *People v. Wilson*, 64 Ill., 195; s. c., 16 Am. Rep., 258; *Story v. People*, 79 Ill., 45; s. c., 22 Am. Rep., 158; *Bayard v. Passmore*, 3 Yates, 438; *In re Bronson*, 13 Johns, 480; *Respublica v. Oswald*, 1 Dall., 319.)

"At common law the courts possessed the power of punishing, as for a contempt, libelous publications upon their proceedings, whether pending or past, but in this country the courts are more circumscribed in their jurisdiction in that respect, and their power to punish is confined to publications concerning pending cases. Citation: (*State v. Morrill*, supra.)"

BIG IMPROVEMENTS AT THE NATATORIUM

Plans for the remodeling of the Natatorium at a cost of between \$12,500 and \$15,000 have been completed by Nisbet & Paradice and work on the structure will begin within a few days. A definite decision to remodel the bathing resort was reached last evening at a conference of local officers of the company with William Mainland, chief stockholder of the company, who is here in connection with the work now being done, and who authorized starting the remodeling work within a few days.

The plunge is to be re-lined with a white water proof substance and at the deep end a set of submarine lights will be installed which will make the bottom perfectly visible from the top and so light that any object, no matter how small, can be seen on the bottom. A good inlet and outlet will also be provided so that patrons can see the supply constantly going in and out of the plunge. A shower bath room will be provided for both men and women and all will be compelled to take a shower bath before entering the plunge.

The steam bath rooms will be remodeled, the building is to be painted inside and out and a concrete floor laid about the plunge. The work is to be so arranged that the Natatorium will be operated the same as before while the improvements are going on. Manager Dicke of the Idaho Traction company, also announced today that the work on the bench loop through South Boise would be held up until after Dec. 15 as the rails on a part of the old Boise Valley line would be taken up at that time and used on the loop line, but that it would probably be ready for operating not later than the middle of January.

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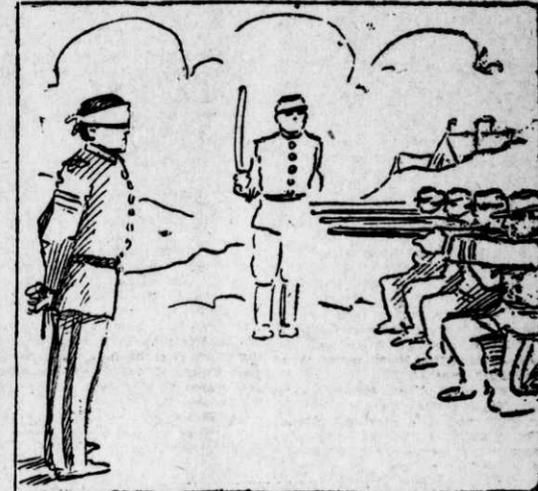
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