ORIGINAL

IN THE SUPREME COURT OF FLORIDA

THOMAS D. STEINER,

Petitioner,

vs.

THE HONORABLE E. RANDOLPH BENTLEY as Circuit Judge of the Tenth Judicial Circuit,

Respondent.

Case No. 86,903

DISCRETIONARY REVIEW OF DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

On January 9, 1995, Laurie L. Steiner filed a Petition For Injunction For Protection Against Domestic Violence in the circuit court of the tenth judicial circuit. (App. 1-2) The Respondent, the Honorable E. Randolph Bentley, Circuit Judge, considered the petition and entered a Temporary Injunction For Protection Against Domestic/Repeat Violence on the same date. A Notice Of Hearing attached to the temporary injunction scheduled a hearing on January 18, 1995, for the Respondent to consider whether to continue the injunction for a period not to exceed one year. (App. 3-5)

Following the hearing on January 18, 1995, an Injunction For Protection Against Domestic/Repeat Violence pursuant to Section 741.30, Florida Statutes (Supp. 1994), was entered by the Respondent. (App. 6-9)

On January 31, 1995, Laurie L. Steiner filed a Motion For Contempt alleging that Petitioner had violated the above-described injunction. (App. 10) A second Motion For Contempt was filed by Laurie L. Steiner on February 6, 1995, in which she alleged that Petitioner had violated the above-described injunction by engaging in certain acts after she had filed her original Motion For Contempt. (App. 11-12) The Respondent considered the motions and issued an Order To Appear And Show Cause Re: Indirect Criminal Contempt on February 8, 1995. (App. 13) The Respondent ordered Petitioner to appear on February 15, 1995, to show cause why he should not be found in indirect criminal contempt of court. The Respondent further ordered that the State Attorney be appointed

pursuant to Fla. R. Crim P. 3.840(a)(4) as "prosecuting attorney regarding this charge."

Pursuant to order, Petitioner appeared on February 15, 1995. He refused a court-appointed attorney; and the matter was continued for evidentiary hearing until March 15, 1995. (App. 14) On March 15, 1995, Petitioner again appeared before the Respondent. At that time Laurie L. Steiner advised the Respondent that she wished to have the injunction dropped. (App. 15) Assistant State Attorney Margot Osborne advised the Respondent that the State Attorney did not want the injunction dropped. The Respondent did not dismiss the injunction. Instead, the case was continued until March 29, 1995; and the Public Defender, Tenth Judicial Circuit, was appointed to represent Petitioner. (App. 16-17)

On March 29, 1995, Petitioner was once again before the Respondent. Petitioner was served in open court with a copy of an Amended Order to Appear which had been prepared by the Office of the State Attorney. Assistant Public Defender Howard L. Dimmig, II, advised the Respondent that while Petitioner had executed an affidavit of insolvency on March 15, 1995, (App. 17) the Respondent had not signed the order appointing counsel. Instead, the Respondent had signed an order purporting to confirm and approve a waiver of counsel which Petitioner had never executed. (App. 16) The Respondent determined this to be a scrivener's error and reconfirmed the appointment of the Public Defender, Tenth Judicial Circuit. Assistant Public Defender Howard L. Dimmig, II, objected to the appointment of the Public Defender on the grounds that the

Respondent had no authority to proceed in indirect criminal contempt but, rather, was restricted to civil contempt proceedings in which the alleged contemnor is not entitled to court-appointed counsel. (App. 18) The objection was denied. At that time Petitioner stood mute and the Respondent entered a plea of not guilty on Petitioner's behalf. (App. 18) Evidentiary hearing was scheduled for April 19, 1995.

On April 18, 1995, Petitioner filed a Petition for Writ of Prohibition in the Second District Court of Appeal arguing that Respondent should be restrained from engaging in any further proceedings in the nature of indirect criminal contempt. Petitioner argued that section 741.30, Fla. Stat. (Supp. 1994), took the power of indirect criminal contempt away from the trial court when injunctions for protection against domestic violence are issued pursuant to section 741.30, Fla. Stat. (Supp. 1994).

On October 25, 1995, the Second District Court of Appeal issued an opinion denying the writ. In doing so it relied on its opinion in Walker v. Bentley, 20 Fla. L. Weekly D2019 (Fla. 2d DCA Aug. 30, 1995) (attached as Appendix B), and Lopez v. Bentley, 20 Fla. L. Weekly D2147 (Fla. 2d DCA Sept. 13, 1995) (attached as Appendix C).

SUMMARY OF THE ARGUMENT

The word "shall" in §741.30 (8) (a), Fla. Stat. (Supp. 1994), should be interpreted as mandatory because it is clear from the statute that the legislature wished to place the handling of violations of domestic violence injunctions in county court as opposed to circuit court. In doing so the legislature did not encroach on the power of the judiciary. The regulation of domestic violence overlaps the constitutional domain of the legislature and the judiciary, and taking this regulation away from the judiciary's indirect criminal contempt power did not deprive the courts of any essential power. Thus, the legislature did not unconstitutionally encroach on the judiciary's powers by enacting this statute. Because there is no encroachment, the courts must honor the unambiguous statute.

ARGUMENT

ISSUES

IS THE WORD "SHALL" AS USED IN SECTION 741.30 (8) (A), FLORIDA STATUTES (SUPP. 1994), TO BE INTERPRETED AS MANDATORY RATHER THAN AS PERMISSIVE OR DIRECTORY?

IF INTERPRETED AS MANDATORY, IS SECTION 741.30 (8) (a), FLORIDA STATUTES (SUPP. 1994), AN UNCONSTITUTIONAL ENCROACHMENT ON THE CONTEMPT POWER OF THE JUDICIARY IN VIOLATION OF ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION?
(Certified Questions from Second District Court's Walker opinion)

The issue in Mr. Steiner's case and the Walker case is whether the legislature statutorily took away the power of the trial court to proceed with indirect criminal contempt action when an injunction has been issued pursuant to the domestic violence statute--§741.30, Fla. Stat. (Supp. 1994) The next issue, if the first issue is answered in the affirmative, is whether the legislature can do this without encroaching on the authority of the judiciary. Mr. Steiner's case is the same as the Walker case in that they both involve the domestic violence statute.

The Second District Court addressed the Walker case first and issued a lengthy opinion on these two issues. It specifically found the domestic violence statute valid, but issued the following two questions as being of great public importance:

> IS THE WORD "SHALL" AS USED IN SECTION 741.30 (8) (a), FLORIDA STATUTES (SUPP. 1994), TO BE INTERPRETED AS MANDATORY RATHER THAN AS PERMISSIVE OR DIRECTORY?

IF INTERPRETED AS MANDATORY, IS SECTION 741.30 (8) (a), FLORIDA STATUTES (SUPP. 1994), AN UNCONSTITUTIONAL ENCROACHMENT ON THE CONTEMPT POWER OF THE JUDICIARY IN VIOLATION OF ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION?

Because the Second District relied on its opinion in Walker, it has adopted the same certified questions set forth in the Walker opinion. Those same issues are at issue in Mr. Steiner's case. Therefore, Mr. Steiner adopts the same arguments set forth in the Walker brief filed in this Court,[1] which consists mainly of Judge Altenbernd's dissent in the Walker opinion.

Petitioner notes that Judge Altenbernd's dissent in this case is thoroughly researched and very well reasoned in setting forth Petitioner's position. Petitioner cannot improve on Judge Altenbernd's dissenting opinion and adopts it in almost its entirety. Petitioner does not believe that the entire statute would be unconstitutional merely because the nonrefundable civil fine is unconstitutional, as suggested in subsection V. That portion can be struck and still leave the rest in tact. For the convenience of this Court, that dissenting opinion has been retyped exactly as it appears in the dissent (double spaced for easier reading) and placed on disc. It is set forth below. Petitioner does add that Judge Fulmer's concern that there was no sanction under the new statute to punish the offender who violates a domestic injunction by committing a prohibited "non-criminal" act seemed to be, in reality, a concern for acts of future contact--letters, calls, visits, etc.--that needed to be prohibited in

[1] Walker v. Bentley, Case No. 86,568

domestic violence cases. Due to the creation of the anti-stalking statute, Judge Fulmer's concerns have already been answered. See §784.048, Fla. Stat. (Supp. 1992).

The remainder of this brief is Judge Altenbernd's dissenting opinion:

ALTENBERND, Acting Chief Judge, Dissenting.

The majority opinion is well researched and persuasively presented.[9] Nevertheless, I would grant this petition and issue a writ of prohibition. Domestic violence in our homes and on the streets of our communities is a serious social problem, but it is one within the overlapping constitutional domain of the legislature and the judiciary. Indirect criminal contempt is not an express constitutional power granted to the judiciary, but rather an implied power. As a result, the courts must honor this unambiguous statute unless the legislature's action unquestionably deprives the courts of a contempt power essential to the existence of the judicial branch or to the orderly administration of justice. I agree that the legislature used poor judgment when it revised the enforcement procedures for this statutory injunction. Poor judgment is not unconstitutional. During this one-year experiment,

[9] I concur in the certified questions. Although this statute had a short duration, the majority's opinion will allow citizens throughout Florida to be prosecuted for indirect criminal contempt despite a statute expressly forbidding such prosecutions. As explained in the last section of this dissent, the supreme court also needs to clarify whether Florida courts are permitted to impose nonrefundable monetary assessments in civil contempt proceedings.

the legislature's enforcement mechanism for misconduct outside the courtroom did not deprive the courts of any essential power. See In re Robinson, 23 S.E. 453 (N.C. 1895) (upholding statutory limitations on indirect contempt because such power was not "absolutely essential" to the judiciary).

I. A CLEAR INTRUSION INTO AN ESSENTIAL JUDICIAL POWER MUST EXIST BEFORE A COURT INVOKES SEPARATION OF POWERS AS A SWORD AGAINST THE LEGISLATURE IN A DOMAIN SHARED BY BOTH

> A clear violation of the constitutional provisions dividing the powers of government into departments should be checked and remedied; but where a reasonable doubt exists as to the constitutionality of a statute conferring power, authority, and duties upon officers, the legislative will should be enforced by the courts to secure orderly government and in deference to the Legislature, whose action is presumed to be within its powers, and whose lawmaking discretion within its powers is not reviewable by the courts.

State v. Atlantic Coast Line R.R., 56 Fla. 617, 47 So. 969 (1908). See also State v. Johnson, 345 So. 2d 1069 (Fla. 1977; 16 Am. Jur. 2d Constitutional Law §297-299 (1979).

In this case, the legislature did not confer added power to the circuit court, but rather conferred additional power to the county court and limited a power of the circuit court. Even in this context, we should defer to the will of the legislature unless this allocation of power violates separation of powers beyond a reasonable doubt.

Separation of powers is not a doctrine comparable to res judicata, respondeat superior, or other well-established rules used

to determine the outcome of a lawsuit. It is a political doctrine applicable to all three branches of government.

> At the bottom of our problem lies the doctrine of the separation of powers. That doctrine embodies cautions against tyranny in government through undue concentration of power. The environment of the Constitution, the debates at Philadelphia, the writings in support of the adoption of the Constitution, unite in proof that the true meaning which lies behind "the separation of powers" is fear of the absorption of one of the three branches of government by another. As a principle of statesmanship the practical demands of government preclude its doctrinaire application. The latitude with which the doctrine must be observed in a work-a-day world was steadily insisted upon by those shrewd men of the world who framed the Constitution and by the statesman who became the great Chief Justice.
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> * * * *
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> In a word, we are dealing with what Sir Henry Maine, following Madison, calls a "political doctrine," and not a technical rule of law. Nor has it been treated by the Supreme Court as a technical legal doctrine. From the beginning that Court has refused to draw abstract, analytical lines of separation and has recognized necessary areas of interaction.

Felix Frankfurter & James M. Landis, Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts -- A Study in Separation of Powers, 37 Harv. L. Rev. 1010, 1012-1014 (1924).

Although Justice Frankfurter was discussing separation of powers under the United States Constitution, I see no reason to conclude that the Floridians who expressly included separation of powers within our state constitution were less shrewd or less practical. This constitutional clause serves the major political purpose of deterring undue concentration of power in any one branch

of government.[10] As discussed by Professor Tribe, the objective is to balance the "independence and integrity of one branch" against "the interdependence without which independence can become domination." Laurence H. Tribe, American Constitutional Law § 2-2 (2d ed. 1988).

Most of the Florida precedent discussing separation of powers concerns the allocation of power between the legislative and executive branches of government. When the judiciary arbitrates such a separation of powers dispute, it performs its usual task of constitutional judicial review. By contrast, when the judiciary invokes the separation of powers doctrine to declare that the legislative or executive branch is powerless to alter a judicial function, it performs the same review--but with a vested interest. This conflict of interest may be unavoidable, but it should compel courts to proceed with great caution and conservatism. In this political context, if there is any reasonable doubt concerning the constitutionality of legislation that curbs judicial power, then judges should defer to the wisdom of the elected representatives. If the judiciary can honor the policy of the legislature with no substantial harm to its existence or operation, then it should not override the duly enacted policy or change a clear legislative "shall" into a judicial "may."

II. THE PUNISHMENT FOR VIOLATIONS OF THESE STATUTORY INJUNCTIONS IS AN OVERLAPPING CONSTITUTIONAL DOMAIN

[10] See also 16 Am. Jur. 2d Constitutional Law §296 (1979); John E. Nowak, et al., Constitutional Law 135-37 (2d ed. 1983).

The prevention and deterrence of domestic violence in places other than the courtroom are not matters exclusively within the powers of either the judicial or legislative branch of government. The overlap of power in this case has several dimensions.

First, the legislature created the injunction for protection against domestic violence because the existing judicial injunctive remedies were too slow and cumbersome to combat this social problem. The courts may have alternative nonstatutory theories upon which an injunction could be entered in some of these cases, allowing for enforcement through indirect criminal contempt. But if the court's order relies upon a statutory basis for an injunction, I see no constitutional reason why the court cannot limit its penalties to those mandated by statute.

Second, the legislature obviously has constitutional authority to enact statutes defining criminal offenses. The restrictions in chapter 94-134 prevent problems of double jeopardy. See Dixon, 113 S.Ct. 2849, 125 L. Ed. 2d 556; Fierro v. State, 653 So. 2d 447 (Fla. 1st DCA 1995); State v. Miranda, 644 So. 2d 342 (Fla. 2d DCA 1994); Richardson v. Lewis, 639 So. 2d 1098 (Fla. 2d DCA 1994); Hernandez v. [State], 624 So. 2d 782 [(Fla. 2d DCA 1993)]. The 1994 amendments established first-degree misdemeanors to punish a broad spectrum of acts that violate the statutory injunction.[11]

[11] 741.31 **Violation of an injunction for protection against domestic violence.**--A person who willfully violates an injunction for protection against domestic violence, issued pursuant to s. 741.30, by:
(1) Refusing to vacate the dwelling that the parties share;
(2) Returning to the dwelling or the property that the parties share;

There is a legitimate concern that a circuit court judge who exercises indirect criminal contempt authority could bar a county court judge from subsequently punishing the misdemeanor. The legislature has decided that a person whose conduct is a serious violation of a domestic violence injunction should have a criminal record. Such a conviction would clearly establish a "prior record" on any subsequent guidelines scoresheet. These decisions fall within the legislative domain. If its penalty structure is not perfect or should include more crimes, we should trust the legislature to change it.

Third, the judicial concept of indirect criminal contempt overlaps with legislative and executive functions. Indirect criminal contempt allows a judge considerable flexibility in deciding the elements of an offense against a victim for acts occurring outside the presence of the judge. The judge also determines who should be prosecuted, and then tries, convicts, and punishes. I do not suggest that this combination of legislative, executive, and judicial functions is prohibited by article II, section 3, of the Florida Constitution. See Johnson, 345 So. 2d 1069. Nevertheless, if separation of powers is intended to discourage a concentration of power in one branch, this political

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(3) Committing an act of domestic violence against the petitioner; or

(4) Committing any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to the petitioner, coupled with an apparent ability to do so, and through doing some act that creates a well-founded fear that such violence is imminent is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

doctrine should discourage the avoidable use of indirect criminal contempt when the legislature provides alternative criminal and civil remedies. See Edward M. Dangel, Contempt, §42A (1939).

III. IN A SEPARATION OF POWERS ANALYSIS, "INHERENT POWERS" MUST BE LIMITED TO ESSENTIAL POWERS

Article V of the Florida Constitution expressly creates many judicial functions the legislature cannot limit or regulate. For example, the legislature cannot assume the power given to the supreme court in article V, section 2, to adopt rules of practice and procedure. See Haven Fed. Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730 (Fla. 1991). Likewise, the power to discipline lawyers that was deemed an inherent contempt power in State ex rel. Oregon State Bar v. Lenske, 407 P. 2d 250 [(Or. 1965)], is an express power in article V, section 15, of the Florida Constitution.

No constitutional provision expressly gives circuit courts the power of indirect criminal contempt. As a result, we are forced in this case to delve into the judiciary's "inherent powers." With a smile, one might suggest that these are the powers that we judges would have included in the constitution if it had been our job to write it. Because it was not our job, we should tread even more cautiously when invoking the separation of powers doctrine to exclude an inherent power from legislative regulation in an overlapping domain.

The phrase "inherent power" or "inherent judicial power" seems to have at least two distinct definitions for use in two different

applications. There are times when courts need to exercise power but can find no express authority in the statutes or constitution. In these circumstances, courts invoke an inherent power "reasonably necessary for the administration of justice." See, e.g., State ex rel. Gentry v. Becker, 174 S.W. 2d 181, 183 (Mo. 1943). The supreme court drew upon this definition of "inherent power" to establish the integrated bar. Petition of Florida State Bar Ass'n, 40 So. 2d 902 (Fla. 1949); see also State, Dep't of Health & Rehab. Servs. v. Hollis, 439 So. 2d 947 (Fla. 1st DCA 1983). I fully agree that courts have certain inherent powers that arise from their very existence as constitutional institutions.

The fact that courts have "reasonably necessary" powers implied in the constitution does not automatically forbid the legislature from regulating or limiting those implicit powers. See e.g., State ex rel. Robeson v. Oregon State Bar, 632 P. 2d 1255 (Or. 1981). A Florida court has the "reasonably necessary" inherent power to sanction for disobedience of its orders, but "it is beyond question that the legislature has the power to determine how and to what extent the courts may punish criminal conduct, including contempt." A.A. v. Rolle, 604 So. 2d [813] at 815 [(Fla. 1992)].

Thus, the issue in this case is not resolved by the "reasonably necessary" definition of "inherent power." Instead, it involves a more restrictive definition. There are cases that define "inherent powers" to include powers that are "essential" to the court's existence or to the due administration of justice. In

re Robinson, 23 S.E. 453 (N.C. 1895); Ex parte Wetzel, 8 So. 2d 824 (Ala. 1942); 21 C.J.S. Courts §31 (1990). This is the scope of the judiciary's "inherent powers" that should be employed when evaluating the checks and balances between the legislature and the courts. The judiciary should rarely, if ever, find a need to shield its inherent powers from duly enacted legislation unless the legislation threatens to undermine the existence of the court or its due administration of justice. I am not convinced that the majority opinion has employed this narrower definition of inherent powers.

IV. ALTHOUGH INDIRECT CRIMINAL CONTEMPT IS A REASONABLY NECESSARY POWER OF THE COURTS, IT IS NOT AN ESSENTIAL POWER IN THIS CONTEXT

The majority opinion admits that the legislature can define a penalty for contempt, but apparently rules that the legislature cannot eliminate the court's ability to impose any type of contempt under any circumstance. I am inclined to agree that the legislature cannot eliminate the court's power to find a direct contempt. I am not convinced that the legislature is powerless to limit findings of indirect contempt, at least in the context of domestic violence injunctions. Indirect criminal contempt is not an essential judicial power in this context for at least three reasons.

First, indirect criminal contempt is sufficiently similar to typical criminal law that the legislature should have the constitu-

tional power to substitute criminal offenses for indirect criminal contempt to address specific problems. Conduct outside the courtroom is typically regulated by criminal statutes enacted by the legislature. Only rarely is such conduct a challenge to the authority and dignity of the court. As a result, it is easier for a permissible constitutional overlap of the two branches to occur in the context of an indirect contempt than with direct contempt. In North Carolina, for example, an enactment in 1871 that eliminated certain judicial power over contempt was approved in cases of indirect or constructive contempt, but not approved in cases of direct contempt. See In re Robinson, 23 S.E. 453; Ex parte Schenck, 65 N.C. 353 (1871) (quoted in Ex parte McCown, 51 S.E. 957 (N.C. 1905)). [These cases have been placed in the appendix for this Court's benefit.]

Second, a violation of this statutory injunction is more in the nature of traditional indirect civil contempt than indirect criminal contempt. "Indirect" contempt is "an act done, not in the presence of a court or of a judge acting judicially, but at a distance under circumstances that reasonably tend to degrade the court or the judge as a judicial officer, or to obstruct, interrupt, prevent, or embarrass the administration of justice by the court or judge." Ex parte Earman, 95 So. [755] at 760 [(Fla. 1923)]. "Civil" contempt "consists in failing to do something ordered to be done by a court or judge in a civil case for the benefit of the opposing party therein." Id. This is in contrast to "criminal" contempt, which is "conduct that is directed against

the authority and dignity of a court or of a judge acting judicially, as in unlawfully assailing or discrediting the authority or dignity of the court or judge or in doing a duly forbidden act." Id.

There is no question that these statutory injunctions normally result in "indirect" violations. While it can be argued that an act of domestic violence is directed against the authority and dignity of the court, such act is normally directed against the opposing party for whose benefit the injunction has been entered by a judge in a civil proceeding. The judge receives, at most, a glancing blow in these domestic battles. The legislature should be authorized to treat such violations as matters of civil contempt because these violations best fit within that legal category.

Third, the legislature has not eliminated all penalties for violations of these statutory orders. Concerning criminal penalties, the legislature has merely determined that these cases should be filed and litigated in a county criminal court and not in a circuit civil court. Indeed, it may be possible for the circuit judge simply to act as a county judge. See, e.g., Bollinger v. Honorable Geoffrey D. Cohen, 656 So. 2d 205 (Fla. 4th DCA), review dismissed, No. 85,902 (Fla. July 18, 1995). The court's existence and its due administration of justice are not threatened by a statute that simply moves the proceeding to a different room in the courthouse.

Moreover, the statute does not prevent the use of indirect criminal contempt for orders entered in addition to or subsequent

to the statutory injunction. It does not deprive the court of direct criminal contempt for misconduct in the presence of the judge. It applies to only one specific order that is designed to accomplish a particular legislative goal.

The legislature did not deprive the courts of civil contempt remedies. The power to impose compensatory fines should not be underestimated. Equally important, civil coercive fines, assessed for every day of noncompliance, are still available to compel actions required by the statutory injunction. See Habie v. Habie, 654 So. 2d 1293 (Fla. 4th DCA 1995).[12] Admittedly, it is more difficult to use jail as a sanction in civil contempt, particularly for some aspects of these injunctions, but the sanction can still be used in appropriate cases.[13] It is difficult for me to accept that when the legislature created new criminal offenses in county court and preserved a significant civil penalty for use by the circuit court, it deprived the courts of a constitutionally essential power.

I recognize that the supreme court in Ducksworth [v. Boyer, 125 So. 844 (Fla. 1960),] described punishment for contempt as an inherent judicial power. It did so in a case of civil contempt. If the legislature can constitutionally eliminate incarceration for

[12] For example, a spouse who refused to participate in treatment could be fined $100 every day until he or she actually participated.

[13] A trial judge may be able to jail a spouse who refused to participate in treatment until the spouse was willing to comply. Likewise, a spouse with ability to pay temporary support, who refused to pay, could be jailed until he or she complied with the support provision of the injunction.

juveniles who commit direct contempt of court, I find it hard to explain how the legislature violates separation of powers by proscribing incarceration for adults who commit indirect contempt in this context. See A.A. v. Rolle, 604 So. 2d 813.

V. THE CONFUSION CREATED BY NONREFUNDABLE CIVIL FINES

At the same time that the legislature restricted the circuit court's contempt penalties, it created nonrefundable civil monetary assessments. The relevant portion of chapter 94-134, Laws of Florida, states:

> (8)(9)(a) The court shall enforce, through a civil or indirect criminal contempt proceeding, a violation of an injunction for protection which is not a criminal violation under s. 741.31. The court may enforce the respondent's compliance with the injunction by imposing a monetary assessment. The clerk of the court shall collect and receive such assessments. On a monthly basis, the clerk shall transfer the moneys collected pursuant to this paragraph to the State Treasury for deposit in the Displaced Homemaker Trust Fund established in s. 410.30 proceedings compliance by the respondent with the injunction, which enforcement may include the imposition of a fine. Any such fine shall be collected and disbursed to the trust fund established in s. 741.01.

The legislature passed this provision based on Johnson v. Bednar, 573 So. 2d 822 (Fla. 1991), which expressly permits such coercive assessments in civil contempt. If Bednar is correct, then Judge Fulmer's legitimate concerns for the effective enforcement of these injunctions should not be a major factor in this discussion.

The United States Supreme Court's decision in Bagwell may have implicitly overruled the portion of Bednar that authorizes these nonrefundable monetary assessments. See Marc Rohr, Revisiting Florida's Law of Civil Contempt, Fla. B. J., May 1995, at 22. This court must follow Bednar until the Florida Supreme Court determines its viability after Bagwell. If the supreme court recedes from Bednar, then at least a portion of the above-quoted 1994 amendment would probably be unconstitutional because it includes a nonrefundable civil fine. If it declares the entire subsection of the statute unconstitutional for this reason, then presumably the law would return to the pre-amendment condition and circuit courts would have indirect criminal contempt power. See Henderson v. Antonacci, 62 So. 2d 5 (Fla. 1952). Thus, despite the extensive discussion of separation of powers both in the majority opinion and in this dissent, the supreme court may have the option to avoid the separation of powers issue and reinstate indirect criminal contempt for a much simpler reason.

CONCLUSION

Based on the foregoing argument and authorities, this Court should grant Petitioner's Writ of Prohibition.

APPENDIX

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

OCTOBER 25, 1995

THOMAS D. STEINER,

Petitioner(s),

v.

HON. E. RANDOLPH BENTLEY, Circuit Judge, etc.,

Respondent(s).

Case No. 95-01376

BY ORDER OF THE COURT:

Cir. No. GCF95-0131

Upon consideration, it is ordered that Petitioner's Petition for Writ of Prohibition is denied on the authority of Lopez v. Bentley, 20 Fla. L. Weekly D2147 (Fla. 2d DCA Sept. 13, 1995) and Walker v. Bentley, 20 Fla. L. Weekly D2019 (Fla. 2d DCA Aug. 30, 1995).

FULMER, A.C.J., and QUINCE and WHATLEY, JJ., Concur.

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Office of the
Public Defender's Office

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

WILLIAM A. HADDAD, CLERK

c: Howard L. Dimmig, II, A.P.D.
Attorney General
Honorable E. Randolph Bentley
Margot Osborne, Esq.

/DM

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mother was guilty of severe and continuing abuse or neglect of A.C. and that she had also engaged in egregious abuse of A.C.

The mother testified that A.C.'s father was at work at the time A.C. suffered the skull fracture. A physician who testified at the hearing opined that the right frontal hemorrhage to A.C.'s brain was two to four weeks old at the time A.C. was admitted to the hospital. The physician testified that as a result of this injury, a caretaker would have been alerted by the child's distress. The trial court, however, rejected this testimony and found that there was an absolute dearth of testimony to indicate the father was in a position to be aware of A.C.'s injuries. The mother and father have continued in their relationship since the time of A.C.'s injuries. In its adjudication order, the trial court held: "pursuant to its reading of Florida Statute 39.464, it is not appropriate for this court to terminate parental rights when, as in this case, the severe and continuing abuse or neglect and/or the egregious abuse or neglect is found to have been committed by only one parent."

Section 39.464, Florida Statutes (Supp. 1992), sets forth the grounds for termination of parental rights. Subsections (3) and (4) of that provision permit a petition for termination of parental rights under the following circumstances:

> (3) SEVERE OR CONTINUING ABUSE OR NEGLECT. The parent or parents have engaged in conduct towards the child or towards other children that demonstrates that the continuing involvement of the parent or parents in the parent-child relationship threatens the life or well being of the child regardless of the provision of services.
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> . . . .
>
> (4) EGREGIOUS ABUSE. The parent or parents have engaged in egregious conduct that endangers the life, health, or safety of the child or sibling, or the parents have had the opportunity and capability to prevent egregious conduct that threatened the life, health, or safety of the child or sibling and have knowingly failed to do so.
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> . . . .
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> For the purposes of this subsection, "egregious abuse" means conduct of the parent or parents that is deplorable, flagrant, or outrageous by a normal standard of conduct. "Egregious abuse" may include an act or omission that occurred only once, but was of such intensity, magnitude, or severity as to endanger the life of the child.

We disagree with the trial court's interpretation of section 39.464. As noted by the First District in *In the Interest of S.F.*, 633 So. 2d 120 (Fla. 1st DCA 1994), chapter 39 does not preclude instituting termination proceedings against one parent where the other natural parent would be a satisfactory placement. Sections 39.464(3) and (4) allow a petition for termination where the *parent or parents* have engaged in severe or continuing abuse or neglect or egregious abuse. By this plain language, the legislature has provided a means for termination of parental rights based upon the conduct of one or both parents. *See Lamont v. State*, 610 So. 2d 435 (Fla. 1992) (where language of statute is clear and unambiguous, language must be given its plain meaning). Thus, the trial court had the authority to grant the petition for termination of parental rights as to the mother if it found the requirements of chapter 39 had been met, even if it denied the petition as to the father.

This court must avoid a construction of the statute that would lead to an absurd or unreasonable result. *State v. Webb*, 398 So. 2d 820 (Fla. 1981). The purpose of chapter 39 is to provide for the care, safety, and protection of children. § 39.001, Fla. Stat. (1991). While it seems absurd to terminate one parent's rights where the parents continue their relationship as a family, it would be more absurd, given the purpose of chapter 39, to restrict the court's ability to terminate a parent's rights if necessary to protect the child from life-threatening injuries. The evidence clearly supports the application of section 39.464 as to the mother in this case. *See In the Interest of D.J.*, 553 So. 2d 378 (Fla. 1st DCA 1989). We, therefore, remand for the trial court to reconsider, in light of this opinion, whether the mother's parental rights should have been terminated. The other points raised on appeal are without merit.

Reversed and remanded for further proceedings. (DANAHY and BLUE, JJ., Concur.)

* * *

Injunctions—Domestic violence—Legislature has no authority under doctrine of separation of powers to limit circuit court in exercise of its constitutionally inherent power of contempt—To extent that statute would limit circuit court's jurisdiction to use of civil contempt to enforce compliance with domestic violence injunction, it is violative of doctrine of separation of powers—Fact that legislature has amended statute to restore criminal contempt power to circuit courts to enforce domestic violence injunctions does not render issue moot—Statutory directive that domestic violence injunctions "shall" be enforced by civil contempt construed as permissive rather than mandatory—Questions certified: Is the word "shall" as used in section 741.30(8)(a), Florida Statutes (Supp. 1994), to be interpreted as mandatory rather than as permissive or directory? If interpreted as mandatory, is section 741.30(8)(a), Florida Statutes (Supp. 1994), an unconstitutional encroachment on the contempt power of the judiciary in violation of Article II, Section 3 of the Florida Constitution?

ROBERT JAMES WALKER, Petitioner, v. HONORABLE E. RANDOLPH BENTLEY, as Circuit Judge of the Tenth Judicial Circuit, Respondent. 2nd District. Case No. 95-01084. Opinion filed August 30, 1995. Petition for Writ of Prohibition. Counsel: James Marion Moorman, Public Defender, and Howard L. Dimmig, II, Assistant Public Defender, Bartow, for Petitioner. Thomas C. MacDonald, Jr. of Shackleford, Farrior, Stallings & Evans, P.A., Tampa, for Respondent.

(LAZZARA, Judge.) The petitioner, Robert James Walker, seeks a writ of prohibition restraining the respondent circuit judge from exercising jurisdiction in an indirect criminal contempt proceeding initiated to punish him for an alleged violation of a domestic violence injunction issued pursuant to section 741.30, Florida Statutes (Supp. 1994). He contends that the provisions of section 741.30(8)(a), Florida Statutes (Supp. 1994), specifically limit the respondent's jurisdiction to the use of civil contempt to enforce compliance with such an injunction. Because this statute purports to divest the respondent of the jurisdiction to use the power of indirect criminal contempt, prohibition is the appropriate remedy. *See Department of Agric. & Consumer Servs. v. Bonanno*, 568 So. 2d 24 (Fla. 1990). Accordingly, we have jurisdiction.

We deny the writ because, as will be discussed, the legislature has no authority under the doctrine of the separation of powers embodied in article II, section 3 of the Florida Constitution, to limit the jurisdiction of a circuit court in the exercise of its constitutionally inherent power of contempt. Furthermore, although we construe section 741.30(8)(a) in a manner consistent with the constitution, we certify two questions of great public importance regarding its interpretation and constitutionality.

ANALYSIS OF DOMESTIC VIOLENCE LEGISLATION

In 1984, the legislature substantially revised section 741.30, Florida Statutes (1983), by creating a simplified, expedited procedure for obtaining from a circuit court an injunction for protection against domestic violence. *See* Ch. 84-343, § 10, at 1987-1990, Laws of Fla. (codified at section 741.30, Fla. Stat. (Supp. 1984)). Such an injunction could now "be obtained directly, quickly, without an attorney's help, and at little monetary cost." *Office of State Attorney v. Parrotino*, 628 So. 2d 1097, 1099 (Fla. 1993). The legislature also provided that the court issuing the injunction was required to enforce compliance through "contempt proceedings." § 741.30(9)(a), Fla. Stat. (Supp. 1984).

In 1986, the legislature again amended the statute by providing that the court issuing the injunction "shall enforce"

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compliance through "civil or indirect criminal contempt proceedings." *See* Ch. 86-264, § 1, at 1973, Laws of Fla. (codified at § 741.30(9)(a), Fla. Stat. (Supp. 1986)). It also created a statute which criminalized specifically defined willful violations of a domestic injunction and provided that the penalty for such a violation was to be in addition to any penalty imposed for contempt. *See* Ch. 86-264, § 2, at 1974, Laws of Fla. (codified at § 741.31, Fla. Stat. (Supp. 1986)).

During the 1994 legislative session, the legislature again revised the statutes relating to domestic violence. *See* Ch. 94-134, §§ 1-6, at 384-391, Laws of Fla. The revised statutes took effect July 1, 1994, and apply to offenses committed on or after that date. *See* Ch. 94-134, § 36, at 405, Laws of Fla.[1]

In making these revisions, the legislature specifically determined that domestic violence was to "be treated as an illegal act rather than a private matter, and for that reason, indirect criminal contempt may no longer be used to enforce compliance with injunctions for protection against domestic violence." § 741.2901(2), Fla. Stat. (Supp. 1994) (revision underscored). To effectuate this policy change, it provided that "[t]he state attorney in each circuit shall adopt a pro-prosecution policy for acts of domestic violence[ ]" and that "[t]he filing, nonfiling, or diversion of criminal charges shall be determined . . . over the objection of the victim, if necessary." *Id.* (revision underscored). The legislature also expanded the incidents giving rise to a criminal prosecution for violating a domestic violence injunction and increased the penalty for such a violation from a misdemeanor of the second degree to a misdemeanor of the first degree. *Compare* § 741.31, Fla. Stat. (1993) *with* § 741.31, Fla. Stat. (Supp. 1994). It eliminated, however, the provision that the penalty for such a criminal violation was to be in addition to any penalty imposed through contempt proceedings. *Id.*

With respect to the judiciary's role in the enforcement process, the legislature manifested a clear intent that a circuit court could now only "[e]nforce, through a civil contempt proceeding, a violation of an injunction for protection against domestic violence which is not a criminal violation under s. 741.31." § 741.2902(2)(g), Fla. Stat. (Supp. 1994). It substantively codified this intent in section 741.30(8)(a), which provides in part that "[t]he court *shall* enforce, through a civil contempt proceeding, a violation of an injunction for protection which is not a criminal violation under s. 741.31." (Emphasis added.) This revision purported to divest the circuit courts of their previous statutory authority to use an indirect criminal contempt proceeding as one of the methods to enforce compliance with *any* violation of a domestic violence injunction. *See* § 741.30(9)(a), Fla. Stat. (1993).[2]

We glean from these revisions the legislature's clear intent to prosecute and punish substantive violations of domestic violence injunctions through traditional means of criminal prosecution in the county courts rather than through the use of indirect criminal contempt proceedings by the circuit courts that issue the injunctions. We also perceive the legislature's intent to limit circuit courts to the use of civil contempt as the means of punishing violations that do not fall within the criminal ambit of section 741.31. *See In re Report of the Comm'n on Family Courts*, 646 So. 2d 178, 180 (Fla. 1994). While such a legislative approach to combat an ongoing societal problem may be laudable, we conclude that to the extent it infringes on the time-honored and well-recognized constitutional authority of a circuit court to punish by indirect criminal contempt an intentional violation of a court order, it violates the doctrine of the separation of powers embodied in article II, section 3 of the Florida Constitution. Our conclusion is based on the following analysis.

PRELIMINARY COMMENTS

We initially note that in *In re Report*, the Florida Supreme Court addressed the "administrative Frankenstein" created by chapter 94-134, pointing out that "it has placed the violation of some provisions of domestic injunctions in the jurisdiction of the criminal division of county courts while the violations of other provisions in the injunction remain in the family law divisions of the circuit courts." 646 So. 2d at 180. One interesting aspect noted by the court was the possibility that the circuit court judge who issued the injunction may have to appear as a prosecution witness in the county court criminal proceeding. Significantly, although not addressing the issue, the court foresaw that "[a] separation of powers issue exists as to whether the legislature has the authority to completely eliminate the judicial power of indirect criminal contempt to punish those who violate judicial orders." *Id.* at n.1.

The legislature may have foreseen this separation of powers problem because, in the recently concluded 1995 session, it once again purported to restore the criminal contempt power to a circuit court to enforce a violation of a domestic injunction occurring on or after July 1, 1995. *See* Ch. 95-195, § 5, at 1400, Laws of Fla. Notwithstanding this legislative change of mind, however, the separation of powers issue inherent in section 741.30(8)(a), Florida Statutes (Supp. 1994), remains viable for offenses, such as petitioner's, occurring between July 1, 1994, and July 1, 1995. Accordingly, the doctrine of mootness does not preclude us from addressing that issue in this case because our decision will not only affect the rights of the petitioner, it will also affect a significant number of other individuals who occupy the same status as petitioner, thereby determining a question of great public importance in the realm of a pressing social problem. *See State v. Kinner*, 398 So. 2d 1360 (Fla. 1981).

CONTEMPT POWER ANALYSIS

We begin our substantive analysis by noting that many years ago the Florida Supreme Court made it clear that under the power vested in the judicial branch of government by article V, section 1 of the Florida Constitution, courts of this state "are by the law protected from insult and interference, for the purpose of giving them their due weight and authority in performing their judicial functions in the interest of orderly government." *Ex parte Earman*, 85 Fla. 297, 313, 95 So. 755, 760 (1923). Thus, it concluded that under our constitutional form of government, the judiciary has the "*inherent power* by due course of law to appropriately punish by fine or imprisonment or otherwise, any contempt that in law constitutes an offense against the authority and dignity of a court or judicial officer in the performance of judicial functions." *Id.* (emphasis added). The court then defined the various species of contempt punishable by this "inherent power" to be "direct or *indirect* or constructive, or *criminal* or civil, according to their essential nature." *Id.* (emphasis added).

Under *Earman*, therefore, circuit courts established under the provisions of article V of the Florida Constitution have inherent constitutional authority to invoke the power of indirect criminal contempt under appropriate circumstances. Of course, in invoking this power in the modern era, courts must now strictly comply with the procedural requirements of Florida Rule of Criminal Procedure 3.840 governing the prosecution of indirect criminal contempts,[3] as well as scrupulously afford the alleged contemnor the full panoply of constitutionally mandated protections applicable to criminal proceedings. *See, e.g., International Union, United Mine Workers of America v. Bagwell*, __ U.S. __, 114 S. Ct. 2552, 2556-2557, 129 L. Ed. 2d 642 (1994); *Aaron v. State*, 284 So. 2d 673, 677 (Fla. 1973).

The supreme court subsequently observed that the power to punish for contempt exists independently of any statutory grant of authority as essential to the execution and maintenance of judicial authority. *Ducksworth v. Boyer*, 125 So. 2d 844, 845 (Fla. 1960); *see also In re Hayes*, 72 Fla. 558, 568, 73 So. 363, 365 (1916) (recognizing inherent power of supreme court, independent of statutory authority, to punish for contempt of court). The court later determined, in reliance on *Earman* and *Ducksworth*, that a juvenile court had the inherent authority to invoke

its power of indirect criminal contempt to punish a juvenile for willful disobedience of its order. *R.M.P. v. Jones*, 419 So. 2d 618, 620 (Fla. 1982), *receded from on other grounds*, *A.A. v. Rolle*, 604 So. 2d 813 (Fla. 1992); *see also T.D.L. v. Chinault*, 570 So. 2d 1335, 1337 (Fla. 2d DCA 1990), *approved*, 604 So. 2d 813 (Fla. 1992) (inherent power of court to punish for contempt not extinguished because offender is a juvenile).

More important, in *State ex rel. Franks v. Clark*, 46 So. 2d 488 (Fla. 1950), the court made it abundantly clear that because the legislature has statutorily conferred the general power of contempt on the judiciary does not mean it has the corresponding authority to later withdraw that power. As the court stated:

> We take notice of [section 38.22, Florida Statutes (1949)] but do not construe it inasmuch as we are able to uphold the order without the benefit of the legislative act. A grant of power to a court is tempting but the acknowledgment of it presupposes the authority to withdraw same.

46 So. 2d at 489.[4] *See also A.A. v. Rolle*, 604 So. 2d 813, 820 (Overton, J., dissenting) (legislature without authority to eliminate inherent power of contempt from constitutionally created circuit court).

In view of this analysis, it is readily apparent that although the legislature at one point purported to vest the circuit courts with the power of indirect criminal contempt to enforce compliance with a domestic violence injunction, its attempt to do so constituted mere statutory surplusage because such courts already had the inherent constitutional authority, independent of any specific statutory grant, to invoke this power for willful disobedience of any of their orders. It follows, therefore, that the legislature had no authority at a later point to withdraw the power of indirect criminal contempt because a power the legislature cannot confer in the first instance cannot be taken away. *See State ex rel. Franks v. Clark*, 46 So. 2d 488; *see also* M.C. Dransfield, Annotation, *Legislative Power to Abridge, Limit, or Regulate Power of Courts with Respect to Contempts*, 121 A.L.R. 215, 216 (1939) (stating general rule "that the legislature cannot abridge or destroy the judicial power to punish for contempt, since a power which the legislature does not give, it cannot take away."). Accordingly, the respondent's use of section 741.30 as the sole basis for issuing the injunction did not limit him to the use of the species of contempt provided for in the statute because, as noted, the legislature had no authority in the first instance to control the type of contempt to be used in enforcing compliance with such an injunction.

We are aware, however, that early in Florida's history the supreme court recognized the legislature's authority, for the protection of personal liberty, to limit and restrict the "omnipotent" common law powers of the courts in terms of the punishment to be imposed for the class of contempts described as punitive in character. *Ex parte Edwards*, 11 Fla. 174, 186 (1867).[5] In continuing recognition of this concept, the court, relying on *Edwards*, recently held that "the *sanctions* to be used by the courts in punishing contempt may properly be limited by statute." *A.A. v. Rolle*, 604 So. 2d 813, 815 (Fla. 1992) (emphasis in original). In reaching this conclusion, however, it carefully pointed out that the issue to be decided was not the inherent power of a court to adjudicate for contempt, but how and to what extent the legislature intended the contempt to be punished. Thus, the court continued to adhere to the fundamental proposition that courts have inherent power to make a finding of contempt. *Id.*[6]

We construe *Edwards* and *Rolle* to mean that the legislature has the authority to prescribe the punishment a court may impose *after* it exercises its inherent power of contempt. We do not construe them to hold, however, that it has the authority to bar the use of the contempt power altogether. We perceive, in that regard, a substantive difference between the legislature's authority to determine the sanctions to be imposed for contempt and a circuit court's inherent constitutional power to determine the species of contempt it chooses to use to enforce its orders and vindicate its authority. We conclude, therefore, that the legislature's authority to restrict the *sanctions* which courts may impose after a finding of contempt does not give it the concomitant authority to completely eliminate the power itself. *See State ex rel. Franks v. Clark*, 46 So. 2d 488.

We note that Florida is not alone in espousing this fundamental doctrine. Other states with constitutionally created courts also recognize this concept. *See, e.g.*, *State ex rel. Oregon State Bar v. Lenske*, 243 Or. 477, 495, 407 P. 2d 250, 256 (Or. 1965) (and cases and authorities cited) (holding that "the power of a constitutionally established court to punish for contempt may be regulated within reasonable bounds by the legislature but not to the extent that the court's power is *substantially impaired or destroyed.*"), *cert. denied*, 364 U.S. 943, 86 S. Ct. 1460, 16 L. Ed. 2d 541 (1966) (emphasis added). Significantly, even in the federal system, where the inferior courts are established by Congress,[7] the United States Supreme Court recently reaffirmed that "while the exercise of the contempt power is subject to reasonable regulation, 'the attributes which inhere in that power and are inseparable from it can neither be *abrogated nor rendered practically inoperative.*' " *Young v. United States ex rel. Vuitton Fils S.A.*, 481 U.S. 787, 799, 107 S. Ct. 2124, 2133, 95 L. Ed. 2d 740 (1987) (quoting *Michaelson v. United States*, 266 U.S. 42, 66, 45 S. Ct. 18, 20, 69 L. Ed. 162 (1924)) (emphasis added).

Finally, the fact that the legislature has created criminal sanctions for specifically-defined violations of a domestic injunction does not deprive a circuit court of its inherent power to punish these same violations by indirect criminal contempt. We find support for this conclusion in *Baumgartner v. Joughin*, 105 Fla. 335, 341, 141 So. 185, *rehearing denied*, 107 Fla. 858, 143 So. 436 (1931), in which the facts clearly demonstrate that the defendant was found in *indirect criminal contempt* for jury tampering and sentenced to a term of imprisonment. In denying the petition for writ of habeas corpus, the court stated:

> The fact, also, that jury tampering is by statute (Comp. Gen. Laws 1927 § 7483) made an indictable offense, for which the accused may be prosecuted criminally, does not deprive the court of its *inherent power* to punish the guilty party for contempt.

105 Fla. at 341, 141 So. at 188 (emphasis added). We recognize, however, that given the *judicial* evolution in the law since *Baumgartner*, the Double Jeopardy Clause may now prohibit the imposition of dual punishments in such a factual setting. *See United States v. Dixon*, __ U.S. __, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993).

SEPARATION OF POWERS ANALYSIS

Against this backdrop, we note the fundamental proposition espoused in this state that " 'the courts have authority to do things that are absolutely essential to the performance of their judicial functions[.]' " *Makemson v. Martin County*, 491 So. 2d 1109, 1113 (Fla. 1986), *cert. denied*, 479 U.S. 1043, 107 S. Ct. 908, 93 L. Ed. 2d 857 (1987) (quoting *Rose v. Palm Beach County*, 361 So. 2d 135, 137 (Fla. 1978)). An essential corollary to the preservation of this judicial authority is the principle that "[a]ny legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional." *Simmons v. State*, 160 Fla. 626, 628, 36 So. 2d 207, 208 (Fla. 1948) (quoting 11 Am. Jur. 908). These precepts have their genesis in the doctrine of the separation of powers, which has as its goal the preservation of the inherent powers of the three branches of government and the prevention of one branch from infringing on the powers of the others to the detriment of our system of constitutional rule. *Daniels v. State Rd. Dep't*, 170 So. 2d 846 (Fla. 1964).

The citizens of this state have expressly codified this doctrine in article II, section 3 of the Florida Constitution, thereby adopting one of the doctrine's fundamental prohibitions that "no

branch may encroach upon the powers of another." *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260, 264 (Fla. 1991). To achieve this constitutional goal of separation of governmental powers, the courts of this state are charged with diligently safeguarding the powers vested in one branch from encroachment by another. *Pepper v. Pepper*, 66 So. 2d 280 (Fla. 1953).

Given our analysis of the law of contempt in conjunction with this constitutional framework, we conclude that the legislature's attempt by the use of the word "shall" in section 741.30(8)(a), to limit the judiciary's authority to civil contempt proceedings for the enforcement of domestic violence injunctions contravenes article II, section 3 of the Florida Constitution. Such a restriction, if given mandatory effect, would constitute an unconstitutional infringement on a court's inherent power, historically rooted in our constitution, to carry out the judicial function of punishing by indirect criminal contempt an individual who has intentionally violated an order of the court. *See Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985); *see also Fernandez v. Kellner*, 55 So. 2d 793 (Fla. 1951) (court's power and authority to punish by contempt a willful violation of an injunction cannot be questioned), *appeal dismissed*, 344 U.S. 802, 73 S. Ct. 40, 97 L. Ed. 925 (1952).

CONSTITUTIONAL ANALYSIS OF SECTION 741.30(8)(a), FLORIDA STATUTES (SUPP. 1994)

We are mindful, however, of the basic principles of statutory analysis that we are to presume that the legislature intended to enact a constitutionally valid law and that we have a duty to interpret a statute so that it withstands constitutional scrutiny. *E.g.*, *State v. Deese*, 495 So. 2d 286 (Fla. 2d DCA 1986). At first blush, such a task seems insurmountable because the legislature has manifested a clear intent within the context of the revised statutory scheme to ascribe a mandatory connotation to the use of the word "shall" in section 740.30(8)(a). *See, e.g., S.R. v. State*, 346 So. 2d 1018 (Fla. 1977). Thus, although we recognize our duty to give effect to the legislature's intent, nevertheless, to uphold the constitutionality of the statute, we must look to the rule of law that when the legislature uses the word "shall" in prescribing the action of a court in a field of operation where the legislature has no authority to act, the word is to be interpreted as permissive or directory, rather than mandatory. *Rich v. Ryals*, 212 So. 2d 641 (Fla. 1968); *Simmons*, 160 Fla. 626, 36 So. 2d 207.

In reliance on this principle, we conclude that the legislature's use of the word "shall" in section 741.30(8)(a), Florida Statutes (Supp. 1994), must be interpreted to mean "may" and, as such, is merely directory. *See State ex rel. Harrington v. Genung*, 300 So. 2d 271 (Fla. 2d DCA 1974). Given this interpretation, we specifically hold that a circuit court has the inherent authority, if it so chooses in its discretion, to enforce compliance with a domestic violence injunction issued pursuant to section 741.30, Florida Statutes (Supp. 1994), by means of an indirect criminal contempt proceeding. We further hold that the fact the alleged violation of the injunction may also constitute a criminal offense under section 741.31, Florida Statutes (Supp. 1994), does not preclude the use of the power of indirect criminal contempt. In making this determination, however, the court must be mindful of the implications of the Double Jeopardy Clause. *See, e.g.*, *Hernandez v. State*, 624 So. 2d 782 (Fla. 2d DCA 1993).

CONCLUDING COMMENTS AND CERTIFIED QUESTIONS

Like the supreme court, we too "recognize the extreme importance of having domestic violence issues addressed in an expeditious, efficient, and deliberative manner[ ] [and] . . . do not want these important issues to become bogged down in an administrative morass[,]" which may be occurring as a consequence of the 1994 statutory revisions. *In re Report of Comm'n on Family Courts*, 646 So. 2d at 182. Accordingly, because our decision has statewide significance in an area involving how to best address one of the most serious problems confronting our society—violence within the domestic context—we certify the following questions of great public importance:

IS THE WORD "SHALL" AS USED IN SECTION 741.30(8)(a), FLORIDA STATUTES (SUPP. 1994), TO BE INTERPRETED AS MANDATORY RATHER THAN AS PERMISSIVE OR DIRECTORY?

IF INTERPRETED AS MANDATORY, IS SECTION 741.30(8)(a), FLORIDA STATUTES (SUPP. 1994), AN UNCONSTITUTIONAL ENCROACHMENT ON THE CONTEMPT POWER OF THE JUDICIARY IN VIOLATION OF ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION?

Petition denied. Questions certified. (FULMER, J., Concurs specially with opinion. ALTENBERND, A.C.J., Dissents with opinion.)

(FULMER, Judge, Concurring specially.) Although I find the reasoning and weight of authority set forth in the dissent persuasive, I concur with Judge Lazzara because I believe the statute that we are examining reached too far and imposed an impermissible restriction on the inherent power of the court.

If all violations of domestic violence injunctions were criminal offenses, I would be inclined to concur with Judge Altenbernd because I agree that the legislature is not barred by the separation of powers doctrine from substituting one sanction available to punish conduct falling within the definition of indirect criminal contempt for another. I would also be inclined to agree that the courts should defer to the legislative scheme created by chapter 94-134, Laws of Florida, for dealing with domestic violence. After all, the legislature created this specialized injunctive relief in response to the growing problem of domestic violence in our communities. It is only because of the legislature's response to the pleas for help that the courts have become active in addressing the needs of victims and families involved in abusive relationships. Both branches of government are now working together to solve this societal problem. Nevertheless, even though I agree that the legislative branch is best equipped to debate and decide public policy issues, I believe the question we are addressing is one of separation of powers, not one of public policy.

I am sure that the legislature did not intend to create a separation of powers question when it amended the statutes relating to domestic violence during the 1994 session. The declaration of intent language set forth in section 741.2901(2), Florida Statutes (Supp. 1994), makes it clear that the focus of the amendment was, understandably, on threats and acts of violence. However, the provision that "indirect criminal contempt may no longer be used to enforce compliance with injunctions for protection against domestic violence" applies not only to violations that would now be deemed misdemeanor offenses, but also to noncriminal violations as well. This legislative intent is implemented in section 741.30(8)(a), Florida Statutes (Supp. 1994), which provides in part that "[t]he court shall enforce, through a civil contempt proceeding, a violation of an injunction for protection which is not a criminal violation under s. 741.31." Herein lies the separation of powers problem that most concerns me.

Domestic violence injunctions are typically orders that both command certain acts (e.g., leave the residence; pay child support; attend counseling) as well as forbid others (e.g., have no contact of any kind with the petitioner; do not go on or near the residence or place of employment of the petitioner). Civil contempt may only be used to coerce compliance with a specific directive in a court order. It may not be used to punish past violations. *See Bagwell*, 114 S. Ct. 255. Thus, the only violations of domestic violence injunctions that may be addressed by the use of civil contempt are those where a required act has not been performed, such as a failure to participate in court-ordered counseling.

Even in those cases where civil contempt could be lawfully used, it would rarely provide realistic sanctions. I suspect that few judges would incarcerate a party in order to coerce attendance at counseling if the incarceration would cause a loss of employment that would then result in the termination of child support payments. A civil contempt fine would be useful only if it really coerced compliance. Based on my experience as a trial judge, I do not believe the imposition of a daily fine would even be available in many cases to coerce compliance because most of the parties who appear in court for enforcement proceedings have a limited ability to pay such a fine and purge themselves of the contempt. Of course, if they do not have the present ability to pay the fine imposed, the fine becomes punitive and unlawful. *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985). Even in those cases where financial ability is not a factor, the use of coercive fines would require the implementation of yet another enforcement program that would severely impact the already burgeoning caseloads of the judiciary.

Finally, and perhaps more important, the most common violations of domestic violence injunctions are those where prohibited acts are committed and not those where a compelled act has not been performed. Civil contempt is not available to sanction such violations. A general prohibition against future acts (e.g., have no contact of any kind) does not lend itself to enforcement through civil contempt since no single act, or the cessation of a single act, can demonstrate compliance and thereby operate as the purge that is required in all civil contempt coercive sanctions. *See Bagwell*, 114 S. Ct. 2552.

Thus, as a result of the 1994 amendments, no sanction is available to punish the offender who violates a domestic violence injunction by committing a prohibited non-criminal act. In the circuit court, I found that this type of violation was a large and significant class of cases. For example, I saw many partners in abusive relationships who were terrified or tormented by receiving a greeting card or letter in the mail that would otherwise appear harmless or even loving. Even though such communication may be prohibited as part of a domestic violence injunction, an intentional violation of this provision does not constitute a criminal offense under the 1994 statute. Therefore, no criminal prosecution is available and civil contempt offers no sanction to punish this past wrongdoing. By removing the criminal contempt sanction, the legislature eliminated the only means of punishing these violations which often signal the continuation or escalation of abusive behavior. Eliminating the ability of the court to punish such non-criminal violations with criminal contempt sanctions not only impinges upon the inherent power of the court, but also actually undermines the protective purpose of the legislation. This supposedly unintended result may be part of the reason that the legislature again amended the statute in 1995 to restore the court's use of criminal contempt as an available sanction against violations of domestic violence injunctions. The recent amendments also add the very types of previously non-criminal acts that are so often the basis of the violations to the list of acts that are now deemed a misdemeanor.[8]

I do appreciate the fact that at common law the contempt powers were much more narrow than the contempt powers exercised in the courts of modern America. And, I am tempted by Judge Altenbernd's suggestion that we should be most cautious about invoking our inherent powers to safeguard a contempt power that is not expressly recognized in our constitution and that did not exist at common law. Nevertheless, because the indirect criminal contempt power of our circuit courts does not derive from the legislature, it may not be totally removed by the legislature. *Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry.*, 266 U.S. 42, 45 S. Ct. 18, 69 L. Ed. 162 (1924); *Ex parte Earman*, 85 Fla. 297, 95 So. 755 (1923). Unlike the legislation involved in *Rolle*, the 1994 amendments do not just prescribe "how and to what extent the courts may punish criminal conduct, including contempt." *Id.* at 815. Rather, they purport to remove the authority of the court to use indirect criminal contempt to punish *any* violation of a domestic violation injunction. Therefore, I concur with Judge Lazzara because I believe the legislature is without authority to eliminate the inherent power of indirect criminal contempt which our constitutionally created circuit courts possess.

(ALTENBERND, Acting Chief Judge, Dissenting.) The majority opinion is well researched and persuasively presented.[9] Nevertheless, I would grant this petition and issue a writ of prohibition. Domestic violence in our homes and on the streets of our communities is a serious social problem, but it is one within the *overlapping* constitutional domain of the legislature and the judiciary. Indirect criminal contempt is not an express constitutional power granted to the judiciary, but rather an implied power. As a result, the courts must honor this unambiguous statute unless the legislature's action unquestionably deprives the courts of a contempt power essential to the existence of the judicial branch or to the orderly administration of justice. I agree that the legislature used poor judgment when it revised the enforcement procedures for this statutory injunction. Poor judgment is not unconstitutional. During this one-year experiment, the legislature's enforcement mechanism for misconduct *outside* the courtroom did not deprive the courts of any essential power. *See In re Robinson*, 23 S.E. 453 (N.C. 1895) (upholding statutory limitations on indirect contempt because such power was not "absolutely essential" to the judiciary).

I. A CLEAR INTRUSION INTO AN ESSENTIAL JUDICIAL POWER MUST EXIST BEFORE A COURT INVOKES SEPARATION OF POWERS AS A SWORD AGAINST THE LEGISLATURE IN A DOMAIN SHARED BY BOTH

> A clear violation of the constitutional provisions dividing the powers of government into departments should be checked and remedied; but where a reasonable doubt exists as to the constitutionality of a statute conferring power, authority, and duties upon officers, the legislative will should be enforced by the courts to secure orderly government and in deference to the Legislature, whose action is presumed to be within its powers, and whose lawmaking discretion within its powers is not reviewable by the courts.

State v. Atlantic Coast Line R.R., 56 Fla. 617, 47 So. 969 (1908). *See also State v. Johnson*, 345 So. 2d 1069 (Fla. 1977); 16 Am. Jur. 2d *Constitutional Law* §§ 297-299 (1979).

In this case, the legislature did not confer added power to the circuit court, but rather conferred additional power to the county court and limited a power of the circuit court. Even in this context, we should defer to the will of the legislature unless this allocation of power violates separation of powers beyond a reasonable doubt.

Separation of powers is not a doctrine comparable to *res judicata*, *respondeat superior*, or other well-established rules used to determine the outcome of a lawsuit. It is a political doctrine applicable to all three branches of government.

> At the bottom of our problem lies the doctrine of the separation of powers. That doctrine embodies cautions against tyranny in government through undue concentration of power. The environment of the Constitution, the debates at Philadelphia, the writings in support of the adoption of the Constitution, unite in proof that the true meaning which lies behind "the separation of powers" is fear of the absorption of one of the three branches of government by another. As a principle of statesmanship the practical demands of government preclude its doctrinaire application. The latitude with which the doctrine must be observed in a work-a-day world was steadily insisted upon by those shrewd men of the world who framed the Constitution and by the statesman who became the great Chief Justice.
>
> . . . .
>
> In a word, we are dealing with what Sir Henry Maine, following Madison, calls a "political doctrine," and not a technical

rule of law. Nor has it been treated by the Supreme Court as a technical legal doctrine. From the beginning that Court has refused to draw abstract, analytical lines of separation and has recognized necessary areas of interaction.

F[illegible] Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1012-14 (1924).

Although Justice Frankfurter was discussing separation of powers under the United States Constitution, I see no reason to conclude that the Floridians who expressly included separation of powers within our state constitution were less shrewd or less practical. This constitutional clause serves the major political purpose of deterring undue concentration of power in any one branch of government.[10] As discussed by Professor Tribe, the objective is to balance the "independence and integrity of one branch" against "the interdependence without which independence can become domination." Laurence H. Tribe, *American Constitutional Law* § 2-2 (2d ed. 1988).

Most of the Florida precedent discussing separation of powers concerns the allocation of power between the legislative and executive branches of government. When the judiciary arbitrates such a separation of powers dispute, it performs its usual task of constitutional judicial review. By contrast, when the judiciary invokes the separation of powers doctrine to declare that the legislative or executive branch is powerless to alter a judicial function, it performs the same review—but with a vested interest. This conflict of interest may be unavoidable, but it should compel courts to proceed with great caution and conservatism. In this political context, if there is any reasonable doubt concerning the constitutionality of legislation that curbs judicial power, then judges should defer to the wisdom of the elected representatives. If the judiciary can honor the policy of the legislature with no s[illegible]antial harm to its existence or operation, then it should not o[illegible]ride the duly enacted policy or change a clear legislative "shall" into a judicial "may."

II. THE PUNISHMENT FOR VIOLATIONS OF THESE STATUTORY INJUNCTIONS IS AN OVERLAPPING CONSTITUTIONAL DOMAIN

The prevention and deterrence of domestic violence in places other than the courtroom are not matters exclusively within the powers of either the judicial or legislative branch of government. The overlap of power in this case has several dimensions.

First, the legislature created the injunction for protection against domestic violence because the existing judicial injunctive remedies were too slow and cumbersome to combat this social problem. The courts may have alternative nonstatutory theories upon which an injunction could be entered in some of these cases, allowing for enforcement through indirect criminal contempt. But if the court's order relies upon a statutory basis for an injunction, I see no constitutional reason why the court cannot limit its penalties to those mandated by statute.

Second, the legislature obviously has constitutional authority to enact statutes defining criminal offenses. The restrictions in chapter 94-134 prevent problems of double jeopardy. *See Dixon*, 113 S. Ct. 2849, 125 L. Ed. 2d 556; *Fierro v. State*, 653 So. 2d 447 (Fla. 1st DCA 1995); *State v. Miranda*, 644 So. 2d 342 (Fla. 2d DCA 1994); *Richardson v. Lewis*, 639 So. 2d 1098 (Fla. 2d DCA 1994); *Hernandez*, 624 So. 2d 782. The 1994 amendments established first-degree misdemeanors to punish a broad spectrum of acts that violate the statutory injunction.[11] There is a legitimate concern that a circuit court judge who exercises indirect criminal contempt authority could bar a county court judge [illegible]n subsequently punishing the misdemeanor. The legislature has decided that a person whose conduct is a serious violation of a domestic violence injunction should have a criminal record. Such a conviction would clearly establish a "prior record" on any subsequent guidelines scoresheet. These decisions fall within the legislative domain. If its penalty structure is not perfect or should include more crimes, we should trust the legislature to change it.

Third, the judicial concept of indirect criminal contempt overlaps with legislative and executive functions. Indirect criminal contempt allows a judge considerable flexibility in deciding the elements of an offense against a victim for acts occurring outside the presence of the judge. The judge also determines who should be prosecuted, and then tries, convicts, and punishes. I do not suggest that this combination of legislative, executive, and judicial functions is prohibited by article II, section 3, of the Florida Constitution. *See Johnson*, 345 So. 2d 1069. Nevertheless, if separation of powers is intended to discourage a concentration of power in one branch, this political doctrine should discourage the avoidable use of indirect criminal contempt when the legislature provides alternative criminal and civil remedies. *See* Edward M. Dangel, *Contempt*, § 42A (1939).

III. IN A SEPARATION OF POWERS ANALYSIS, "INHERENT POWERS" MUST BE LIMITED TO ESSENTIAL POWERS

Article V of the Florida Constitution expressly creates many judicial functions the legislature cannot limit or regulate. For example, the legislature cannot assume the power given to the supreme court in article V, section 2, to adopt rules of practice and procedure. *See Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730 (Fla. 1991). Likewise, the power to discipline lawyers that was deemed an inherent contempt power in *State ex rel. Oregon State Bar v. Lenske*, 407 P.2d 250, is an express power in article V, section 15, of the Florida Constitution.

No constitutional provision expressly gives circuit courts the power of indirect criminal contempt. As a result, we are forced in this case to delve into the judiciary's "inherent powers." With a smile, one might suggest that these are the powers that we judges would have included in the constitution if it had been our job to write it. Because it was not our job, we should tread even more cautiously when invoking the separation of powers doctrine to exclude an inherent power from legislative regulation in an overlapping domain.

The phrase "inherent power" or "inherent judicial power" seems to have at least two distinct definitions for use in two different applications. There are times when courts need to exercise power but can find no express authority in the statutes or constitution. In these circumstances, courts invoke an inherent power "reasonably necessary for the administration of justice." *See, e.g., State ex rel. Gentry v. Becker*, 174 S.W.2d 181, 183 (Mo. 1943). The supreme court drew upon this definition of "inherent power" to establish the integrated bar. *Petition of Florida State Bar Ass'n*, 40 So. 2d 902 (Fla. 1949); *see also State, Dep't of Health & Rehab. Servs. v. Hollis*, 439 So. 2d 947 (Fla. 1st DCA 1983). I fully agree that courts have certain inherent powers that arise from their very existence as constitutional institutions.

The fact that courts have "reasonably necessary" powers implied in the constitution does not automatically forbid the legislature from regulating or limiting those implicit powers. *See e.g., State ex rel. Robeson v. Oregon State Bar*, 632 P.2d 1255 (Or. 1981). A Florida court has the "reasonably necessary" inherent power to sanction for disobedience of its orders, but "it is beyond question that the legislature has the power to determine how and to what extent the courts may punish criminal conduct, including contempt." *A.A. v. Rolle*, 604 So. 2d at 815.

Thus, the issue in this case is not resolved by the "reasonably necessary" definition of "inherent power." Instead, it involves a more restrictive definition. There are cases that define "inherent powers" to include powers that are "essential" to the court's existence or to the due administration of justice. *In re Robinson*, 23 S.E. 453 (N.C. 1895); *Ex parte Wetzel*, 8 So. 2d 824 (Ala. 1942); 21 C.J.S. *Courts* § 31 (1990). This is the scope of the judiciary's "inherent powers" that should be employed when evaluating the checks and balances between the legislature and the courts. The judiciary should rarely, if ever, find a need to

shield its inherent powers from duly enacted legislation unless the legislation threatens to undermine the existence of the court or its due administration of justice. I am not convinced that the majority opinion has employed this narrower definition of inherent powers.

IV. ALTHOUGH INDIRECT CRIMINAL CONTEMPT IS A REASONABLY NECESSARY POWER OF THE COURTS, IT IS NOT AN ESSENTIAL POWER IN THIS CONTEXT

The majority opinion admits that the legislature can define a penalty for contempt, but apparently rules that the legislature cannot eliminate the court's ability to impose any type of contempt under any circumstance. I am inclined to agree that the legislature cannot eliminate the court's power to find a direct contempt. I am not convinced that the legislature is powerless to limit findings of indirect contempt, at least in the context of domestic violence injunctions. Indirect criminal contempt is not an essential judicial power in this context for at least three reasons.

First, indirect criminal contempt is sufficiently similar to typical criminal law that the legislature should have the constitutional power to substitute criminal offenses for indirect criminal contempt to address specific problems. Conduct outside the courtroom is typically regulated by criminal statutes enacted by the legislature. Only rarely is such conduct a challenge to the authority and dignity of the court. As a result, it is easier for a permissible constitutional overlap of the two branches to occur in the context of an indirect contempt than with direct contempt. In North Carolina, for example, an enactment in 1871 that eliminated certain judicial power over contempt was approved in cases of indirect or constructive contempt, but not approved in cases of direct contempt. *See In re Robinson*, 23 S.E. 453; *Ex parte Schenck*, 65 N.C. 353 (1871) (quoted in *Ex parte McCown*, 51 S.E. 957 (N.C. 1905)).

Second, a violation of this statutory injunction is more in the nature of traditional indirect civil contempt than indirect criminal contempt. "Indirect" contempt is "an act done, not in the presence of a court or of a judge acting judicially, but at a distance under circumstances that reasonably tend to degrade the court or the judge as a judicial officer, or to obstruct, interrupt, prevent, or embarrass the administration of justice by the court or judge." *Ex parte Earman*, 95 So. at 760. "Civil" contempt "consists in failing to do something ordered to be done by a court or judge in a civil case for the benefit of the opposing party therein." *Id.* This is in contrast to "criminal" contempt, which is "conduct that is directed against the authority and dignity of a court or of a judge acting judicially, as in unlawfully assailing or discrediting the authority or dignity of the court or judge or in doing a duly forbidden act." *Id.*

There is no question that these statutory injunctions normally result in "indirect" violations. While it can be argued that an act of domestic violence is directed against the authority and dignity of the court, such act is normally directed against the opposing party for whose benefit the injunction has been entered by a judge in a civil proceeding. The judge receives, at most, a glancing blow in these domestic battles. The legislature should be authorized to treat such violations as matters of civil contempt because these violations best fit within that legal category.

Third, the legislature has not eliminated all penalties for violations of these statutory orders. Concerning criminal penalties, the legislature has merely determined that these cases should be filed and litigated in a county criminal court and not in a circuit civil court. Indeed, it may be possible for the circuit judge simply to act as a county judge. *See, e.g., Bollinger v. Honorable Geoffrey D. Cohen*, 656 So. 2d 205 (Fla. 4th DCA), *review dismissed*, No. 85,902 (Fla. July 18, 1995). The court's existence and its due administration of justice are not threatened by a statute that simply moves the proceeding to a different room in the courthouse.

Moreover, the statute does not prevent the use of indirect criminal contempt for orders entered in addition to or subsequent to the statutory injunction. It does not deprive the court of direct criminal contempt for misconduct in the presence of the judge. It applies to only one specific order that is designed to accomplish a particular legislative goal.

The legislature did not deprive the courts of civil contempt remedies. The power to impose compensatory fines should not be underestimated. Equally important, civil coercive fines, assessed for every day of noncompliance, are still available to compel actions required by the statutory injunction. *See Habie v. Habie*, 654 So. 2d 1293 (Fla. 4th DCA 1995).[12] Admittedly, it is more difficult to use jail as a sanction in civil contempt, particularly for some aspects of these injunctions, but the sanction can still be used in appropriate cases.[13] It is difficult for me to accept that when the legislature created new criminal offenses in county court and preserved a significant civil penalty for use by the circuit court, it deprived the courts of a constitutionally essential power.

I recognize that the supreme court in *Ducksworth* described punishment for contempt as an inherent judicial power. It did so in a case of civil contempt. If the legislature can constitutionally eliminate incarceration for juveniles who commit *direct* contempt of court, I find it hard to explain how the legislature violates separation of powers by proscribing incarceration for adults who commit indirect contempt in this context. *See A.A. v. Rolle*, 604 So. 2d 813.

V. THE CONFUSION CREATED BY NONREFUNDABLE CIVIL FINES

At the same time that the legislature restricted the circuit court's contempt penalties, it created nonrefundable civil monetary assessments. The relevant portion of chapter 94-134, Laws of Florida, states:

> (8)~~(9)~~(a) The court shall enforce, through a civil ~~or indirect criminal~~ contempt proceeding, a violation of an injunction for protection which is not a criminal violation under s. 741.31. The court may enforce the respondent's compliance with the injunction by imposing a monetary assessment. The clerk of the court shall collect and receive such assessments. On a monthly basis, the clerk shall transfer the moneys collected pursuant to this paragraph to the State Treasury for deposit in the Displaced Homemaker Trust Fund established in s. 410.30 ~~proceedings compliance by the respondent with the injunction, which enforcement may include the imposition of a fine. Any such fine shall be collected and disbursed to the trust fund establish in s. 741.01~~.

The legislature passed this provision based on *Johnson v. Bednar*, 573 So. 2d 822 (Fla. 1991), which expressly permits such coercive assessments in civil contempt. If *Bednar* is correct, then Judge Fulmer's legitimate concerns for the effective enforcement of these injunctions should not be a major factor in this discussion.

The United States Supreme Court's decision in *Bagwell* may have implicitly overruled the portion of *Bednar* that authorizes these nonrefundable monetary assessments. *See* Marc Rohr, *Revisiting Florida's Law of Civil Contempt*, Fla. B. J., May 1995, at 22. This court must follow *Bednar* until the Florida Supreme Court determines its viability after *Bagwell*. If the supreme court recedes from *Bednar*, then at least a portion of the above-quoted 1994 amendment would probably be unconstitutional because it includes a nonrefundable civil fine. If it declares the entire subsection of the statute unconstitutional for this reason, then presumably the law would return to the pre-amendment condition and circuit courts would have indirect criminal contempt power. *See Henderson v. Antonacci*, 62 So. 2d 5 (Fla. 1952). Thus, despite the extensive discussion of separation of powers both in the majority opinion and in this dissent, the supreme court may have the option to avoid the separation of

powers issue and reinstate indirect criminal contempt for a much simpler reason.

[redacted]cause the basis of the motion for contempt in this case was an incident o[redacted]ng after July 1, 1994, the revised statutory scheme applies to the proceeding pending before the respondent.

[2]Such legislative action seems curiously ironic in light of the expressed intent to treat domestic violence as an affront to public law. Traditionally, one of the well-recognized purposes of criminal contempt proceedings is "to punish conduct offensive to the *public* in violation of a court order." *Adirim v. City of Miami*, 348 So. 2d 1226, 1227 (Fla. 3d DCA 1977) (emphasis added).

[3]*See, e.g., Giles v. Renew*, 639 So. 2d 701 (Fla. 2d DCA 1994) (failure to comply with rule 3.840 fundamental error).

[4]It is obvious from the facts of *Clark* that the petitioner Franks was adjudged in *indirect criminal contempt* for jury tampering and sentenced to a term of incarceration without a purge provision.

[5]Edwards was found in contempt for violating a temporary restraining order and incarcerated, subject to a purge provision. He sought a writ of habeas corpus, contending that his length of imprisonment had exceeded the thirty day incarcerative sanction then prescribed by the legislature for contempt.

[6]As previously noted, *Rolle* receded from *R.M.P. v. Jones*, 419 So. 2d 618, but only "to the extent that it may suggest conflict with the established principle that the legislature is responsible for determining the punishment for crimes." 604 So. 2d at 815, n.7.

[7]U.S. Const. art I, § 8, cl. 9; art. III, § 1.

[8]Section 741.31(4)(e), Florida Statutes (1995), now provides that a person who violates a domestic violence injunction by "[t]elephoning, contacting, or otherwise communicating with the petitioner directly or indirectly, unless the injunction specifically allows indirect contact through a third party" is guilty of a misdemeanor of the first degree.

[9]I concur in the certified questions. Although this statute had a short duration, the majority's opinion will allow citizens throughout Florida to be prosecuted for indirect criminal contempt despite a statute expressly forbidding such prosecutions. As explained in the last section of this dissent, the supreme court also needs to clarify whether Florida courts are permitted to impose nonrefundable monetary assessments in civil contempt proceedings.

[10]*See also* 16 Am. Jur. 2d *Constitutional Law* § 296 (1979); John E. Nowak, et al., *Constitutional Law* 135-37 (2d ed. 1983).

[11] 741.31 Violation of an injunction for protection against domestic violence.—A person who willfully violates an injunction for protection against domestic violence, issued pursuant to s. 741.30, by:

(1) Refusing to vacate the dwelling that the parties share;

(2) Returning to the dwelling or the property that the parties share;

(3) Committing an act of domestic violence against the petitioner; or

(4) Committing any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to the petitioner, coupled with an apparent ability to do so, and through doing some act that creates a well-founded fear that such violence is imminent is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

[12]For example, a spouse who refused to participate in treatment could be fined $100 every day until he or she actually participated.

[13]A trial judge may be able to jail a spouse who refused to participate in treatment until the spouse was willing to comply. Likewise, a spouse with ability to pay temporary support, who refused to pay, could be jailed until he or she complied with the support provision of the injunction.

* * *

Contempt—Guardianship—Trial court could not hold guardian in civil contempt for refusing to comply with court order requiring timely filing of proper accounting or for violating a restraining order prohibiting contact with ward on basis of a contempt motion filed by ward pursuant to rule 1.380, which deals only with discovery violations—Even if contempt finding had been based on guardian's act of terminating deposition, trial court could have achieved rule's objective of obtaining compliance with discovery rules by granting some or all of the relief requested in ward's motion without sentencing guardian to serve time in jail with no purge provision—Trial court could not sua sponte hold guardian in indirect criminal contempt without following procedural safeguards—Guardianship fees—Error to refuse to award fees to guardian where evidence presented to court established right to at least some fee for services provided to ward—[redacted]rdian's services in establishing guardianship for ward, who happened to be guardian's daughter, filing annual accountings, successfully thwarting an attempt to terminate the guardianship, and performing other services that were beyond the normal duties a mother would perform for a daughter were compensable

IN RE: THE GUARDIANSHIP OF JENNIFER ANN NEHER. SHARON LYNN NEHER, Appellant/Cross-Appellee, v. JENNIFER ANN NEHER, Appellee/Cross-Appellant. 2nd District. Case No. 94-01707. Opinion filed September 1, 1995. Appeal from the Circuit Court for Collier County; William L. Blackwell, Judge. Counsel: Richard A. Kupfer of Richard A. Kupfer, P.A., West Palm Beach, and Charles P. Erickson of Paulich, O'Hara & Slack, P.A., Naples, for Appellant/Cross-Appellee. Cathy S. Reiman and William J. Hazzard of Cummings & Lockwood, Naples, for Appellee/Cross-Appellant.

(SCHOONOVER, Acting Chief Judge.) The appellant, Sharon Lynn Neher, challenges several orders entered in a guardianship proceeding involving her daughter, Jennifer Ann Neher. The successor guardian for Jennifer Neher, Margaret Losleen, has filed a cross-appeal contending that the trial court erred when it did not order Sharon Neher to reimburse the guardianship for certain unapproved payments that were made. We find that the trial court erred in finding that Sharon Neher was in indirect criminal contempt of court and by not awarding her any fees for her services as Jennifer Neher's guardian, but affirm the trial court in all other respects.

Jennifer Neher, the natural daughter of Sharon Lynn Neher, and the adopted daughter of Dr. John Neher, was born in 1970 with a birth defect. Shortly thereafter she developed staphylococcal meningitis and encephalitis which was evidently not properly treated. In addition to several conditions which developed in the early weeks of her life, she later contracted osteomyelitis which resulted in her having thirty-nine operations. After Dr. Neher, a medical doctor, reviewed his daughter's medical records, conducted independent research, and consulted with other doctors, a medical malpractice action was filed on Jennifer Neher's behalf. All parties have agreed that without Dr. Neher's expertise and efforts a malpractice action would not have been filed, nor any settlement received. In March of 1989, Jennifer Neher was found to be incompetent and Dr. and Mrs. Neher were appointed co-guardians. In 1991, shortly before the malpractice action was settled for $2.85 million, Dr. Neher resigned as one of Jennifer Neher's guardians.

Jennifer Neher resided with her parents after the malpractice action was settled. However, in January of 1993 she moved out of the family home because the relationship began to deteriorate. During 1993, Jennifer employed an attorney to have her capacity restored or, in the alternative, to have her mother removed as guardian and the parties began to litigate.

Throughout this period, an "Interim Plenary Guardian" was appointed. Although Sharon Neher was not removed as guardian at that time, a restraining order prohibiting her from having any contact with her daughter was entered, and she subsequently agreed to resign as guardian after the court made a decision concerning Jennifer's incompetency.

Shortly before trial, Sharon Neher filed an amended inventory which contained a claim for reimbursement of her expenses, Dr. Neher's expenses incurred on behalf of the ward after the guardianship was created, attorney's fees, litigation expenses, and guardian fees for her and Dr. Neher. The other parties sought reimbursement of their attorneys' fees from the guardianship estate.

At trial, Jennifer Neher changed her position concerning the guardianship of her person and property and agreed to the appointment of a guardian of her property and to a limited guardianship in relation to her person. The rest of the issues mentioned above were tried.

At the conclusion of the proceedings, the trial court entered several orders which are pertinent to this appeal. First, the court restored certain rights to Jennifer Neher and delegated certain other rights to the new guardian which the court also appointed at the conclusion of the proceedings.

Next, the court entered a judgment finding that Sharon Neher was in indirect criminal contempt of court for not following an order concerning an accounting and for contacting the ward with a written communication in violation of the restraining order that had been entered.

It is also important to consider that an insurance carrier has no right of subrogation against its own insured. *Ray v. Earl*, 277 So. 2d 73 (Fla. 2d DCA), *cert. denied*, 280 So. 2d 685 (Fla. 1973). When USAA pays an underinsured motorist claim involving a solvent tortfeasor, it typically receives subrogation rights from its insured against the tortfeasor. *See* § 627.727(6), Fla. Stat. (1993). If the "underinsured" tortfeasor is construed to include the insured on the policy, then the subrogation right cannot exist. Without a subrogation right, there is nothing to distinguish this theory of underinsured motorist coverage from liability coverage. Thus, the result is a policy that provides twice the disclosed limit of liability coverage for the claims of passengers. *See Millers Casualty Ins. Co. v. Briggs*, 665 P.2d 891 (Wash. 1983).

It is helpful to remember that uninsured and underinsured motorist coverage evolved from unsatisfied judgment insurance. *See Mullis*, 252 So. 2d. at 233; Widiss, *supra*, § 1.9. The goal of this coverage was to assure that families had protection to satisfy judgments or claims when the negligent operator of a car did not comply with financial responsibility laws. Although this coverage was added to the family automobile policy as the most convenient location for this coverage, it could have been issued as a separate policy or even as a portion of a homeowner's policy.[9] The resident family members are intended to be protected by this coverage when an accident has no logical connection to the family car. For example, they are protected as pedestrians or as passengers in other cars.[10]

By placing this coverage in the family auto policy, the legislature gave free protection to nonfamily passengers as class II insureds. There is some merit to this approach, but a family might logically choose to buy less coverage, rather than more coverage, for the class II insureds. By placing class II uninsured motorist coverage both in Florida's family auto and commercial auto policies, we have created the possibility of several overlapping policies providing uninsured motorist coverage. The strong policies that compelled the legislature to protect the Florida family from unsatisfied claims do not have the same force when applied to class II insureds who have greater protection under the family's liability coverage, and also have the option of purchasing adequate uninsured motorist coverage on their own family auto insurance policy.

The interpretation of section 627.727 in *Warren* creates statutory requirements never disclosed to the insurance carriers or to the families who have purchased the coverage. If such class II coverage is a desired public policy, the legislature should give the insurance companies notice of the change so that they can increase their premiums to cover the risk. Likewise, before the legislature requires Florida's families to pay the premiums necessary to double protection for class II insureds, this issue should be debated by the legislature.

Affirmed. (PARKER, A.C.J., and WHATLEY, J., Concur.)

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[1]Class I includes the named insured and resident family members. Class I uninsured motorist coverage protects the family of the person who purchased and paid for the policy. If Ms. Bulone has uninsured motorist coverage as a class I insured on another policy, that fact is not disclosed in the record.

Class II includes persons occupying an insured vehicle. These passengers do not pay for this uninsured motorist coverage, but receive its protection, essentially as third-party beneficiaries to the family policy, because a family member permitted them to occupy the family car. *See Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So. 2d 229, 238 (Fla. 1971); *Quirk v. Anthony*, 563 So. 2d 710, n.2 (Fla. 2d DCA 1990), *approved*, 583 So. 2d 1026 (Fla. 1991). In other jurisdictions, these two classes are described as clause A and clause B insureds. *See* Alan I. Widiss, *Uninsured and Underinsured Motorist Coverage* § 4.1 (2d ed. 1992).

[2]This is not true in all states. *See* Janet Boeth Jones, Annotation, *Uninsured Motorist Coverage: Validity of Exclusion on Injuries Sustained by Insured while Occupying "Owned" Vehicle Not Insured by Policy*, 30 A.L.R. 4th 172 (1984).

[3]*See National Union Fire Insurance Co. v. Reynolds*, 889 P.2d 67 (Ha. App. 1995) (upholding validity of comparable clause, with holding restricted to this context).

[4]Although the differences among state statutes make other states' cases merely persuasive, the Second District cases are similar to cases from other states. *See Quinn v. Allstate Ins. Co.*, 655 A.2d 787 (Conn. App. 1995); *Millers Casualty Ins. Co. v. Briggs*, 665 P.2d 891 (Wash. 1983); Widiss, *supra*, §§ 5.8, 33.8, 35.5.

[5]*Travelers Insurance Co. v. Chandler*, 569 So. 2d 1337 (Fla. 1st DCA 1990), was actually decided on policy language more generous than the statutory requirements. The opinion explains that Chandler should receive underinsured motorist coverage because he was "covered" under the bodily injury liability policy. Chandler was a passenger and not a permissive user. He was *not* covered by the liability policy as a potential tortfeasor, but merely collected benefits under that coverage as a claimant. The cases relied upon by the *Chandler* court involve a separate issue of coverage for class I insureds.

[6]Interestingly, the statutory definition of "uninsured motor vehicle" has never expressly defined that term, but has been used to expand the term to include underinsured motor vehicles or vehicles whose owners present particular collectibility problems.

[7]As a postscript, it is interesting to view the legislative response to *Brixius v. Allstate Insurance Co.*, 589 So. 2d 236 (Fla. 1991). In *Brixius*, the supreme court ruled that a class I insured, injured as a passenger in his or her own car, was not entitled to receive uninsured motorist coverage on the family auto policy when liability coverage was unavailable for the driver, who was a permissive user. Thus, the named insured who had paid for liability coverage to protect permissive users and had also paid for uninsured motorist coverage received no benefits. The legislature quickly rectified this situation in chapter 92-318, Laws of Florida, by adding section 627.727(3)(c). The solution does not stack underinsured motorist coverage on top of liability coverage for the class I insured, but simply provides uninsured motorist coverage when a non-family permissive user is not a covered driver for liability insurance purposes.

[8]As explained in footnote 7, even the 1992 amendment superseding *Brixius* only affected claims involving nonfamily tortfeasors. Thus, the fact that a policy denies liability coverage for an intrafamily claim does not statutorily invoke uninsured motorist coverage.

[9]The decision to market this coverage as a part of an automobile insurance policy, while allowing for class II coverage, effectively denies coverage to some citizens who are at risk from uninsured motorists, but who do not live in families with cars. An elderly couple, who no longer drive and rely on taxis and public transportation, may have a need for class I coverage, but will have no reason to buy automobile liability insurance.

[10]Because uninsured motorist coverage has been sold with auto liability coverage, there has been a tendency to decide that a person is insured as a claimant for uninsured motorist benefits because the person would be an insured as a defendant under the liability coverage. This analysis has severe limitations, even for class I insureds. *See World Wide Underwriters Ins. v. Welker*, 640 So. 2d 46 (Fla. 1994); *Government Employees Ins. Co. v. Douglas*, 654 So. 2d 118 (Fla. 1995). For example, from a practical perspective, a five-year-old child will never be an insured for liability coverage because the child cannot drive, but the child has need for uninsured motorist coverage both as a passenger in the family car and elsewhere. Whether it is good policy to provide Ms. Bulone with both liability coverage as a *claimant* and underinsured motorist coverage as a class II claimant is not answered by deciding whether she might be insured as a *defendant* if the Moellers ever let her drive their truck.

* * *

Injunctions—Contempt—Trial court has authority to enforce an injunction for protection against "domestic/repeat violence" through indirect criminal contempt proceeding

CRISELDA LOPEZ, Petitioner, v. THE HONORABLE E. RANDOLPH BENTLEY as Circuit Judge of the Tenth Judicial Circuit, Respondent. 2nd District. Case No. 95-01430. Opinion filed September 13, 1995. Petition for Writ of Prohibition. Counsel: James Marion Moorman, Public Defender, and Howard L. Dimmig, II, Assistant Public Defender, Bartow, for Petitioner. Thomas C. MacDonald, Jr., of Shackleford, Farrior, Stallings & Evans, P.A., Tampa, for Respondent.

(PARKER, Acting Chief Judge.) Criselda Lopez filed a petition for writ of prohibition to this court seeking to prohibit the trial court from proceeding with a hearing in which Lopez is charged with indirect criminal contempt of a court order entered one month earlier. The earlier order, styled "Injunction for Protection Against Domestic/Repeat Violence," entered pursuant to section 784.046(9)(a), Florida Statutes (Supp. 1994), enjoined Lopez from abusing, threatening, or harassing the petitioner[1] named in the order. We rely upon this court's opinion in *Walker v. Bentley*, No. 95-01084 (Fla. 2d DCA Aug. 30, 1995) [20 Fla. L. Weekly D2019] and deny the petition.

Walker involved an alleged violation of a domestic violence injunction filed pursuant to section 741.30, Florida Statutes (Supp. 1994), which is a statute enacted specifically for domestic violence cases. Pursuant to section 741.2901(2), Florida Statutes (Supp. 1994), indirect criminal contempt may no longer be used

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to enforce compliance with injunctions for protection against domestic violence. Instead, a state attorney intake system for prosecuting domestic violence by filing criminal charges shall be uti[illegible]d. The majority in *Walker* concluded that the trial court has the inherent power to enforce compliance with section 741.30 by indirect criminal contempt because the legislature has no authority under the doctrine of separation of powers to limit the trial court's jurisdiction to exercise its inherent power of contempt.

Turning to the statute in this case, section 784.046(9)(a), Florida Statutes (Supp. 1994), provides for filing and hearing procedures for victims of repeat violence. This statute provides that the trial court shall enforce a violation of an injunction under this statute through a civil contempt proceeding. Unlike section 741.2901(2), there is no legislative prohibition against a trial court exercising its indirect criminal contempt powers to enforce an injunction for protection against repeat violence under section 784.046(9)(a). Because of *Walker*, a trial court in this district retains its constitutional inherent powers of indirect criminal contempt under section 741.30, even when section 741.2901(2) specifically denies those powers to the trial court. Clearly if the trial court has those inherent powers to enforce an injunction against domestic violence, we conclude that the trial court has those same inherent powers to enforce an injunction for protection against repeat violence.

The petition for writ of prohibition is denied. (PATTERSON and LAZZARA, JJ., Concur.)

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[1]The petitioner's relationship to Lopez, if any, is not disclosed in the order.

* * *

Criminal law—Costs—Discretionary costs imposed under sections 939.01, 943.25(13), and 27.56, Florida Statutes (1993), are stricken because they were not announced at sentencing

TIMOTHY EARL WALKER, Appellant, v. STATE OF FLORIDA, Appellee. 2[illegible]strict. Case No. 94-03445. Opinion filed September 13, 1995. Appeal fr[illegible]e Circuit Court for Collier County; Hugh D. Hayes, Judge. Counsel: James Marion Moorman, Public Defender, and Jeffrey M. Pearlman, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Tonja R. Vickers, Assistant Attorney General, Tampa, for Appellee.

(PATTERSON, Acting Chief Judge.) The appellant challenges his judgment and sentence for possession of cocaine. We find no error as to the appellant's conviction and therefore affirm as to that conviction. However, we strike certain costs imposed upon the appellant since they are discretionary costs which were not announced at sentencing. Specifically, we strike the $50 cost imposed under section 939.01, Florida Statutes (1993); the $2 cost imposed under section 943.25(13), Florida Statutes (1993); and the $200 cost imposed under section 27.56, Florida Statutes (1993), for public defender fees. *See Reyes v. State*, 655 So. 2d 111, 117 (Fla. 2d DCA 1995).

Accordingly, we affirm the conviction and sentence and strike the improperly imposed costs. On remand, the state may seek reimposition of the costs with proper notice to the appellant. *See Fortt v. State*, 20 Fla. L. Weekly D1722 (Fla. 2d DCA July 26, 1995). (ALTENBERND and FULMER, JJ., Concur.)

* * *

Dissolution of marriage—Error to secure payment of attorney's fees and costs by establishing lien on former husband's home which was homestead property

JAMES ROBERT LOUTH, Appellant, v. MARIELLEN WILLIAMS, f/k/a MARIELLEN POWER LOUTH, Appellee. 2nd District. Case No. 94-00927. Opinion filed August 2, 1995. Appeal from the Circuit Court for Hillsborough County; Claudia R. Isom, Judge. Counsel: James Robert Louth, pro se. Simson Unterberger, Tampa, for Appellee.

(PER CURIAM.) The former husband, James Robert Louth, [illegible]enges an order awarding attorney's fees and costs to his former wife, Mariellen Williams. The order, dated December 3, 1992, ordered Mr. Louth to pay attorney's fees and costs and attempted to secure the payment of those amounts by placing a lien on Mr. Louth's home. We reverse that portion of the order which attempted to establish a lien on Mr. Louth's home, but affirm in all other respects.

It is undisputed that Mr. Louth's home constituted homestead property and, therefore, absent certain exceptions not present in this case, the property is not subject to forced sale. Art. X, § 4, Fla. Const. *See Cain v. Cain*, 549 So. 2d 1161 (Fla. 4th DCA 1989).

We, accordingly, reverse and remand with instructions to strike that portion of the trial court's order which attempts to establish a lien on Mr. Louth's property.

Affirmed in part, reversed in part, and remanded. (SCHOONOVER, A.C.J., and PATTERSON and QUINCE, JJ., Concur.)

* * *

Licensing—Driver's license—Appeals—Order dismissing as untimely a petition for writ of certiorari in circuit court challenging cancellation of restricted driver's license is quashed—Thirty-day period for filing petition in circuit court did not commence on date of Department of Highway Safety and Motor Vehicles form order of cancellation, but rather on date of subsequent letter of cancellation that followed administrative hearing—Under statutes and rules in effect at the time, the form order was not a final order of the Department

WILLIAM WAYNE DAVIS, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, STATE OF FLORIDA, Respondent. 1st District. Case No. 94-2908. Opinion filed September 18, 1995. An appeal from Petition for Writ of Certiorari - Original Jurisdiction. Counsel: William Fisher, IV, of Merritt & Ratchford, Pensacola, for Petitioner. Enoch J. Whitney, General Counsel; Rafael E. Madrigal, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, Tallahassee, for Respondent.

(BENTON, J.) When William Wayne Davis sought judicial review of an administrative decision cancelling his (already restricted) driving privilege, the circuit court declined to reach the merits of his petition for writ of certiorari on grounds "the petition was not filed in a timely manner and the Court has no jurisdiction to rule on this matter." We conclude that the petition for writ of certiorari Mr. Davis filed in circuit court was not late under the law in effect at the time. We therefore grant the subsequent petition for writ of (common law) certiorari he filed in this court, quash the order dismissing the original petition, and remand for a determination of the merits of the original petition.

Common Law Certiorari

Although original in form, a certiorari proceeding in circuit court to review administrative action is "appellate in character in the sense that it involves a limited review of an inferior jurisdiction." *Haines City Community Dev. v. Heggs*, 20 Fla. L. Weekly S318, S319 (Fla. July 6, 1995). Review of such circuit court decisions is available in a district court of appeal, if at all, only by petition for writ of common law certiorari. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982). After appellate consideration in circuit court, there is no right to a second appeal to a district court of appeal.

"[C]ertiorari jurisdiction of the district court may be sought to review final orders of circuit courts acting in their review capacity." *Vaillant*, 419 So. 2d at 626. The standard of review in common law certiorari proceedings in a district court of appeal "when it reviews the circuit court's order under Florida Rule of Appellate Procedure 9.030(b)(2)(B) . . . has only two discrete components." *Education Dev. Ctr., Inc. v. City of West Palm Beach Zoning Bd. of Appeals*, 541 So. 2d 106, 108 (Fla. 1989) (emphasis omitted). "The inquiry is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law." *Heggs*, 20 Fla. L. Weekly at S320; *Combs v. State*, 436 So. 2d 93 (Fla. 1983).

While not every legal error is of sufficient magnitude to warrant correction on petition for writ of common law certiorari, an erroneous refusal to exercise jurisdiction does constitute "the commission of an error so fundamental in character as to fatally infect the [circuit court's] judgment," *State v. Smith*, 118 So. 2d 792, 795 (Fla. 1st DCA 1960), making relief by writ of common law certiorari appropriate.

W. A. BLACKBURN ET AL. v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY.

Trial—Evidence—Admissions by Pleadings.

1. It is not error to exclude evidence as to a fact admitted in the pleadings; hence:

2. Where, in an action by plaintiffs (husband and wife) to recover on a fire policy, it was alleged and admitted by the answer that the wife owned the property insured and that the husband was the assignee of the policy by defendant's consent, and on the trial the only issues were, "Did the plaintiffs conspire to burn the property"? and, "Did the husband wilfully burn it"? it was not error to exclude, as evidence offered by defendant, the assignment on the policy, it having been admitted by the pleadings.

ACTION tried before *Robinson, J.*, and a jury, at December Term, 1895, of Buncombe.

There was judgment for the plaintiffs, and defendant appealed. The facts are stated in the opinion of *Chief Justice Faircloth*. (For former appeal, see 116 N. C., 821).

J. H. Merrimon, C. M. Stedman and Moore & Moore for (532) *plaintiffs.*

Burwell, Walker & Cansler and A. M. Fry for defendant.

FAIRCLOTH, C. J. At the last term (116 N. C., 821) the judgment in this case was affirmed in all respects, except that a new trial was granted only as to the 8th and 9th issues, to-wit: "Did plaintiffs agree, conspire and confederate together to burn the hotel and furniture?" "Did W. A. Blackburn wilfully burn or cause to be burned the hotel and furniture described in the complaint?"

On the trial of these issues, from which this appeal comes, the defendant conceded that the burden of proving the affirmative of the issues was upon it, and offered in evidence the assignment on the policies, without stating for what purpose. The court excluded the evidence, and the defendant offered no other evidence. The court directed the jury, as the defendant had introduced no evidence, to answer each issue "No," which they did.

In this Court the defendant excepts because the evidence offered was ruled out, insisting that that would constitute a basis of an argument as to the motions of the plaintiffs bearing on the 8th and 9th issues.

The fact appearing from the assignment, to-wit, that W. A. Blackburn was the assignee of the policies (by consent of the defendant) and that C. A. Blackburn was the owner of the property insured, was distinctly alleged and admitted in the pleadings, and was relied upon in the former trial as a main ground of defense, and was so argued in this Court. There was then no need to prove a fact agreed upon or admitted in the record, and the rejection of the evidence offered for that purpose was not error. No reason appears why a judgment *non obstante veredicto* should have been rendered in favor of the defendant, as urged by it. This Court could consider no (533) argument except on questions arising out of the last trial. All other matters were *res judicata*. *Gordon v. Collett*, 107 N. C., 362. Affirmed.

IN RE FRANK E. ROBINSON.

Contempt of Court—Publication of Court Proceedings—Trial for Contempt.

1. The power of a court to punish summarily for contempt, for an act committed in its presence or so near its sittings as to disturb its proceedings, or that is calculated to disturb the business of the court, impair its usefulness or to bring it into contempt, cannot be taken away from the court by legislation.

2. The power of the courts, which existed at common law, to punish for contempt offenders committing acts not in the presence of the court, but calculated and intended to impair the usefulness of the courts and to bring them into disrespect, may be regulated by legislation.

3. Where, in a proceeding for contempt in publishing a report of a case tried in court, the respondent in his answer to the rule stated that he believed the statement published by him to be correct and that it was not made to bring the court into contempt, he was entitled to have the issue tried, not by a jury but by the court, if there was nothing on the face of the publication to show that it was grossly incorrect or calculated to bring the court into contempt.

4. As to the intent with which a publication was made, the sworn answer of the respondent is conclusive.

PROCEEDINGS to punish for contempt Frank E. Robinson, editor of *The Asheville Citizen*, heard before *Ewart, Judge* of the Western Criminal Circuit Court, at July Term, 1895, of the Criminal Court of BUNCOMBE.

His Honor issued the following order:

"It is ordered by the court that the following notice shall (534) be issued *instanter* and served on Frank E. Robinson, editor, etc., of *The Asheville Daily Citizen*, and is in words and figures as follows: In *The Citizen*, an afternoon paper published in the City of Asheville, under date, 24 July, 1895, appears an editorial entitled 'The Removal.' In this appears the following:

"'The reasons that *Judge Ewart* gave for the removal of the cause were founded on the unintentional error, corrected by the context, which *The Citizen* made in reporting the testimony of John Sumner, and the affidavits of men from various parts of the county, stating that in their opinion Sumner could not obtain an impartial trial in Buncombe. The error was corrected the next day; but if it had gone uncorrected it could have misled no man who had sufficient intelligence to read and comprehend the report of the testimony; the mistake is too shallow and too flimsy to deserve the consideration *Judge Ewart* seems to have given it.

"'If *Judge Ewart* be justified in removing the case, any case of importance can always be removed, for anyone of standing can always get friends to say that in their opinion the county wherein the crime is committed is not the proper place to try the accused.

"'*Judge Ewart* knows very well that it is far beyond the power of the Lance family, or of any other family, or of an unintentional error in *The Citizen*, to so mould the public sentiment of Buncombe County as to make it impossible for one of her citizens to obtain justice in a trial for his life.

"'The statute requires the court to be satisfied that justice cannot be done before a case can be removed. How can an intelligent citi-

zen come to the conclusion that in this case this court was satis- (535) fied on this point? It is now *Judge H. G. Ewart's* work to

satisfy the people of Buncombe that he has acted wisely in this matter.

"'The removal of the case to Henderson is unnecessary, expensive, and a reflection on the intelligence of Buncombe County.'

"It appearing to the court this publication is a grossly inaccurate report of the proceedings of this court had in this cause, to-wit, the case of State against Jesse Sumner, and was made with intent to misrepresent this court and to bring it into contempt and ridicule, it is ordered that a rule issue against Frank E. Robinson, editor of *The Citizen*, to appear before this court on Saturday next at 9 A. M. and show cause why he should not be attached for a contempt of this court. This 25th of July, 1895."

The defendant answered as follows:

"1. Frank E. Robinson, answering the above-entitled rule served upon him, after being duly sworn, says:

"That he admits that he is the editor of the *Daily Citizen*, as alleged in said rule, and he further says the he published the article and publication which appeared in the said *Daily Citizen* under date 24 July, 1895, entitled 'The Removal.'

"2. That, as affiant is informed and believes, the said publication is not a grossly inaccurate report of the proceedings of this court had in the case of the State against Jesse Sumner, and that he makes this denial on information and belief for the reason that he was not in court when said proceedings were had, and wrote said publication in good faith from information received by him from persons who were present and in whom this affiant had and now has great confidence, and that he then believed and now believes said publication contains a true, full and fair report of the proceedings had in said case with reference to its removal, and that said article and publication was written and made in the exercise of the constitutional rights of the press to fairly, justly and in good faith inform the pub- (536) lic of the acts and doings of public officers; and fairly, justly and in good faith to criticise the action of public officers; and that said article and publication does not contain any comment as applied to a public elective office not allowed by the freedom of the press, as understood by this affiant, and as defined, as affiant is advised and believes, in the Constitution of the United States and the State of North Carolina.

"3. Affiant states that said publication was not made with intent to misrepresent this court or to bring this court into contempt and ridicule."

The following is the judgment of the court in this case, and is in these words and figures, as follows:

"STATE OF NORTH CAROLINA,
"Buncombe County.

Criminal Circuit Court, July Term, 1895.

"State
v. } Rule to Show Cause.
"Frank E. Robinson,

"This proceeding having been brought before the court for hearing upon the answer of the respondent, Frank E. Robinson, to the rule issued against him,

"His Honor entered the following judgment:

"It is considered that the answer is not responsive to the rule.

"Whereupon it is adjudged by the court that the respondent, Frank E. Robinson, is guilty of a contempt of this court, and is hereby adjudged to pay a fine of two hundred and fifty dollars, and further, that he be imprisoned in the common jail of Buncombe County for the space of thirty days, and that he pay the cost of this proceeding, to be taxed by the Clerk."

From the foregoing judgment the respondent, Frank E. Robinson, after exception appealed.

(537) *Moore & Moore, Locke Craig and J. S. Adams for respondent.*
W. W. Jones and J. M. Moody contra.

FURCHES, J. It is a delicate matter for a court to sit in judgment when it is in any way connected with the matter under consideration. It is contrary to the spirit of our institutions, and should only be done when the public good and the public service demand it; then it should be done promptly, firmly and without personal consideration.

Our courts constitute one of the co-ordinate departments of our government, established by the Constitution and the legislation thereunder. They are not only a part of the government, but are necessary to the enforcement of the law and the protection of the lives, the liberty and the property of our citizens. This they cannot do without the power to protect themselves by enforcing order and respect for the court and obedience to its mandates. To this end it is clothed with inherent power to punish summarily for any act committed in its presence or so near its sittings as to disturb the proceedings of the court in violation of its rules or orderly conduct, or that is calculated to disturb the business of the court, or to impair its usefulness, or to bring it into disrespect and contempt. *S. v. Mott*, 40 N. C., 449; *Ex parte Schenck*, 65 N. C., 353; *Ex parte Moore*, 63 N. C., 397; *In re Deaton*, 105 N. C., 59, and case cited.

These powers, it is conceded, cannot be taken from the courts by legislation. But at common law there were many other acts, not committed in the presence of the court, which were considered (538) as calculated and intended to impair the usefulness of the courts and to bring them into disrespect, and which the courts treated as contempts and punished the offenders. And it is held that this class of contempt may be regulated and prescribed by legislation. *Ex parte Schenck, supra*, and cases cited in the argument in that case.

The case we are now considering falls under this class, and whatever may have been the law before, the act of 4 April, 1871, governs this

case. *Ex parte Schenck, supra*. It is contended that respondent violated section 648, subsection 7 of The Code in publishing the article set out in the rule to show cause, and is on that account guilty of contempt. This section is as follows: "The publication of grossly incorrect reports of the proceedings in any court, about any trial or other matter pending before said court, made with intent to misrepresent or to bring into contempt the said court; but no person can be punished as for contempt in publishing a true, full and fair report of any trial, argument, decision or proceedings had in court."

The only part of the article complained of that seems to undertake to give a report of the proceedings of the court is as follows: "The reasons that Judge Ewart gave for the removal of the cause were founded on the unintentional error, corrected by the context, which *The Citizen* made in reporting the testimony of John Sumner, and the affidavits of men from various parts of the county, stating that in their opinion Sumner could not obtain an impartial trial in Buncombe." The respondent, in his answer to the rule, says this statement is not grossly incorrect and that he believes it is a full and true report of the proceedings of the Sumner case.

There is nothing inherent in this statement that shows that it is grossly incorrect; the respondent says that, as he is informed and believes, it is correct. The answer makes the issue as to (539) whether it is correct or not, and while we do not agree with the counsel for respondent that he was entitled to have it tried by a jury (if he had demanded a jury, which he did not), yet we are of the opinion that he was entitled to have this issue tried by the court, unless the court chose to submit it to a jury; because, if it was a correct statement of the facts, then under the statute it was no contempt to make the publication. It does not appear that the matter was tried in any way, the court simply holding that respondent's "answer was not responsive to the rule," and adjudged him guilty of contempt.

We do not see that that part of the publication purporting to give an account of the proceedings, of itself, is calculated to produce disrespect and contempt for the court; but, if it had been found to be grossly incorrect, pointed as it is by the comments that followed, we do not say it would not amount to contempt under the statute.

But we must hold that, under the statute of 1871, the respondent cannot be punished for contempt for the language used in his comments upon the court, that we think were calculated and must have been intended to bring the court into ridicule and contempt only as they might point and furnish evidence of the intent with which the misrepresentations as to the trial were made, if it had been found they were grossly erroneous.

It is our duty to declare the law as we find it, and it is not within our province to say whether it is wise or not. There are two sides to it—one one side the protection of the citizen, on the other the usefulness and efficiency of the courts. The most of our citizens and many of our newspaper men recognize the delicate position a judge occupies—

that his position neither allows him to defend himself physically (540) nor through the public press against false and slanderous charges, and these do not consider it manly to make such charges—and no judge ought to object to just and fair criticism by the press.

But respondent also puts his defense on another ground; he says, under oath: "3. Affiant states that said publication was not made with intent to misrepresent this court or to bring this court into contempt and ridicule."

It is not for the court to judge whether this was false or true; the law made him his own judge—his own trier—and as to how well he did this he will answer at another bar; we must take his verdict. *Ex parte Biggs*, 64 N. C., 202.

There is error in the judgment.

Error.

Cited: In re Briggs, 136 N. C., 129; *In re Parker*, 177 N. C., 468.

(541)

R. A. HAVENER v. WESTERN UNION TELEGRAPH COMPANY.

Telegraph Company—Delay in Delivering Telegram—Negligence—Damages—Mental Anguish.

1. Where the nature and importance of a telegraphic message appear on its face and, through negligence of the telegraph company, the message is not delivered in a reasonable time, damages may be recovered for the mental anguish caused thereby.

2. Where, in an action for delay in delivering a telegram to plaintiff that his mother was not expected to live and to come at once, the allegation was "that by reason of said gross negligence and wilful conduct of the defendant in the failure to deliver the message within said reasonable time this plaintiff has suffered great damages, both in body and mind, to-wit, the sum of $2,000," and the evidence was conflicting as to whether plaintiff could have reached his mother's bedside before her death, even if the telegram had been promptly delivered, but

the jury found that plaintiff was injured by defendant's negligence: *Held*, that the pleading was sufficiently broad to cover any damages, and the court properly refused an instruction to the jury that in no event could plaintiff recover more than nominal damages.

ACTION for damages, tried before *Shuford, J.*, and a jury, at August Term, 1894, of BUNCOMBE.

There was a verdict for the plaintiff, by which he was awarded $600 in damages, and from the judgment thereon defendant appealed. The material facts appear in the opinion of *Chief Justice Faircloth*.

Moore & Moore and F. A. Sondley for plaintiff.
Jones & Tillett and Strong & Strong for defendant.

FAIRCLOTH, C. J. "Lincolnton, N. C., 13 October, 1892. R. A. Havener, Asheville, N. C.: Your mother not expected to live. Come at once. Answer. "A. B. HAVENER."

This is an action for damages for failure to deliver the above message within a reasonable time. The usual route was by railroad from Asheville to Newton, and then into the country near Lincolnton. It was shown that the message was not delivered until 3 o'clock on the same day, four or five hours after it was received at Asheville, where the sendee lived, and also that the last train on that day left the latter place at 2:30 P. M., and that there was no other train until 9 A. M. next day. Newton is more than 100 miles from Asheville. The defendant alleged that it made every reasonable effort to find the sendee and deliver the message. His Honor instructed the jury "That if they shall find that the defendant, after receiving the message, placed it in the hands of a carrier, and the carrier called and inquired of the hotels and of citizens as to the place of Havener's business or his whereabouts and did not consume unreasonable time in so doing before asking a better address, and after such inquiry failed to find him or his place of business in time for the plaintiff to take the 2:30 (542) train for Newton, the defendant exercised reasonable diligence in delivering the message, and the failure to find the plaintiff or his place of business in time for the train was not negligence, and the plaintiff cannot recover." This was a proper charge, and was as much of the defendant's request as it was entitled to. The finding of the jury on this question was against the defendant, so that negligence in the delivery is established.

The plaintiff arrived next day, some time after the death of his mother. The evidence was conflicting as to whether he could have ar-

opinion of *Mr. Justice Hoke*, that the principle laid down in *Rowell's* and *Akard's case* and approved in *Sparkman's case*, is not sound. I am unable to see why a breach of assumed duty to perform an act, the purpose of which is to relieve mental anguish, does not confer a right of action upon the same principle that a similar breach of duty causes mental anguish. I wish to emphasize the necessity on the part of judges to use extreme caution in defining to juries the range within which they are permitted to move in assessing damages in this class of cases. In all cases, the original or primal cause of the suffering must be distinguished from the suffering caused by the breach of duty by the defendant. How far, in practice, it is possible for juries to do so must cause anxious consideration to courts. The entire subject is so fraught with obscurity and difficulty that one may well hesitate to enter upon its consideration. I note as an indication of the progress being made that *mental anxiety* is substituted for *mental anguish*. This case, like many others, shows gross and inexcusable negligence for which the law should give both redress and impose punishment.

EX PARTE McCOWN.

(Filed September 26, 1905).

Habeas Corpus—Contempts—Summary Punishment—Powers of Court, Under the Statutes and at Common Law.

1. The writ of *habeas corpus* can never be made to perform the office of a writ of error or appeal. The investigation is confined to the question of jurisdiction or power of the judge to proceed as he did, and the merits of the controversy are not passed upon.

2. In *habeas corpus* proceedings, this court is bound by the judge's findings of fact which were spread upon the record as required by the statute.

3. The power to attach for a certain class of contempts being inherent in the courts and essential to their existence and the due performance of their functions, the Legislature cannot, as to them, deprive the courts of this power or unduly interfere with its exercise.

4. The Act of 1871, as brought forward in The Code, sections 848-854, is, in respect to the law of contempt, as broad and comprehensive in its scope and meaning as the common law itself, so far as it relates to those "inherent powers of the courts, which are absolutely essential in the administration of justice."

5. Where the respondent visited the judge at his boarding house, during a recess of the court, before the adjournment for the term, and assaulted the judge in consequence of a sentence pronounced at that term, *held*, that within the meaning of the statute, Code, sections 848-854, the conduct of the respondent was a direct contempt of the court as much so as if the assault had been made when the judge was sitting on the bench in open court.

6. At common law, the conduct of the respondent constitutes a contempt of court, and if the statute, Code, sections 848-854, does not embrace this case and in terms repeals the common law applicable to it, this court would not hesitate to declare the statute in that respect unconstitutional.

7. In direct contempts, the proceedings are generally of a summary character and there is no right of appeal, the facts being stated in the committal, attachment or process and reviewable by *habeas corpus*, while in indirect contempts the proceedings are commenced by citation or rule to show cause, with the right to answer and to be heard in defense, and also with the right of appeal.

The petitioner, M. E. McCown, was attached for contempt by His Honor, *Judge G. W. Ward*, at the August Term, 1905, of the Superior Court of DURHAM County. He was adjudged in contempt and ordered to be imprisoned in the county jail for thirty days and fined two hundred dollars. Having no right to appeal from the decision (*State v. Mott*, 49 N. C., 449, *In re Davis*, 81 N. C., 72), he applied to the writer of this opinion as a justice of this court for a writ of *habeas corpus*, which was issued and made returnable before him on Monday, the 4th day of September, 1905. At the hearing, as counsel wished to avoid the necessity of two arguments of the case and it was also desired, owing to the great importance of the question and the peculiar circumstances of the case, that when the matter was heard in the Supreme Court all the justices should sit, it was agreed that argument should be waived and the matter should be decided upon the papers and an appeal entered so that the case could be heard at once in this court by a full bench—all defects and irregularities in the manner of bringing the case before this court for review being waived. An order was thereupon made remanding the petitioner to the custody of the sheriff in further execution of *Judge Ward's* sentence, and the whole matter has been brought into this court by exception and appeal for full hearing and consideration, argument of counsel being made here for the first time. If a direct contempt was committed, it is conceded that the respondent was properly committed and fined and that the judgment is unassailable. *Judge Ward's* findings of fact are as follows: "On Friday, September 1, 1905, one Allen Haskins was put on trial for

murder in the second degree in the Superior Court of Durham County, over which the undersigned judge was presiding. The jury, on Saturday afternoon in the same week, rendered a verdict finding the defendant guilty of manslaughter, and at the same time recommended the defendant to the mercy of the court. Judgment was prayed by the solicitor. It appeared to the court that the defendant had already been confined in the common jail of Durham County for more than ten months awaiting trial. After due and careful consideration of the case, the court, in view of all the evidence, the recommendation of the jury, and the length of time that the prisoner had already been imprisoned in jail, sentenced the prisoner to fifteen months at hard labor upon the public roads of Durham County. There being still unfinished business of the court, the court between four and five o'clock p. m., announced that it would not adjourn court *sine die*, as there was other business to transact, and told the court crier to announce that the court was adjourned until further notice from the judge, which the crier accordingly did, and the court was left open for the transaction of further business. The judge then left the court room and went to his room at his boarding house near by. In a short while thereafter, to-wit, about six o'clock p. m., the respondent, M. E. McCown, came to the room of the judge and called him out on a porch adjoining his room. The judge responded and went on the porch to meet the respondent, whom he found perfectly rational, and who at once accosted him in a very angry and menacing manner, complaining of the judgment rendered in the case of State v. Allen Haskins, and demanded that the judge at once should impose a longer term than the one already announced, or turn the prisoner out of jail. The judge listened to the statement, and respectfully considered it, as the respondent stated that he was there to see him about this case. He then asked the respondent in a quiet and mild manner if he was accustomed to speaking to the judge in that

way, adding that in the course of the case he had exercised his best judgment and discretion in the matter. Whereupon the respondent began to curse the judge violently, using most offensive language and following it up with an assault on the person of the judge. The minutes were not signed, and the judge intended to return and sign the same, and did sign them later. The court was a one week term, and for the trial of criminal cases only, and all the jurors had been discharged before the assault by respondent was committed. The judge had transacted no other business after the adjournment, as above stated, before taking up this matter with the respondent on the porch, except to change the sentence of one defendant, and adjust a matter of cost in another case, which he did before he left the court room, but after the crowd had left.

The respondent was present in court in person, and represented by attorneys, Messrs. Guthrie & Guthrie and Fuller & Fuller, and the court was represented by the solicitor. The respondent filed no answer in writing, his counsel waiving the same after suggesting to the court other facts, which it included in the findings above."

Fuller & Fuller and *Guthrie & Guthrie* for the respondent.
Robert D. Gilmer, Attorney-General, and *A. L. Brooks, contra.*

WALKER, J., after stating the case: This matter, as now presented to us, really involves the correctness of the ruling of *Judge Ward* in the proceedings which resulted in the commitment of the respondent and the imposition of a fine upon him for contempt of court. If upon the facts, as found by the judge, a contempt was committed within the meaning and intent of the law upon that subject, or to express the same idea in somewhat different words and as it is usually stated, if the judge was in the exercise of a rightful juris-

diction in the particular case, his decision cannot be reviewed in a collateral way by the writ of *habeas corpus*. This court is bound by the judge's findings of fact, which were spread upon the record as required by the statute. *In re Deaton*, 105 N. C., 59; *Ex Parte Terry*, 128 U. S., 289. We cannot decide whether there was any merely erroneous ruling of the court or any irregularities in respect to judgment and procedure, as the writ of *habeas corpus* can never be made to perform the office of a writ of error or of an appeal. We are confined in our investigation to the question of jurisdiction or power of the judge to proceed as he did and cannot otherwise pass upon the merits of the controversy. There must have been a want of jurisdiction over the person or the cause or some other matter rendering the proceedings void, as this is the only ground of collateral attack. The law in this respect has been definitely settled, we believe, by all the courts. *Ex Parte Terry, supra; Ex Parte Savin*, 131 U. S., 267; Rapalje on Contempts, section 155. In *Ex Parte Reed*, 100 U. S., 13, the doctrine is thus clearly and concisely stated: "A writ of *habeas corpus* cannot be made to perform the functions of a writ of error. To warrant the discharge of the petitioner, the sentence under which he is held must be not only erroneous, but absolutely void." The range of our inquiry, therefore, is narrowed to the question of jurisdiction and the validity of the order of *Judge Ward*. That the court had general jurisdiction of the subject of contempt cannot be denied; but do the facts stated in the record constitute a contempt within the meaning of the law? This is precisely the question now before us. We would have had less difficulty in deciding this case, if by the Act of 1871 (Code, sections 648 to 657), the Legislature had not defined contempts of court and declared that no other acts or conduct not mentioned therein should be "the subjects of contempt" and repealed the common law, in so far as it recognized as contempts other acts or conduct not specified in the statute. We

are satisfied that at common law the acts and conduct of the petitioner, as set out in the case, constitute a contempt of court, and if the statute does not embrace this case and in terms repeals the common law applicable to it, we would not hesitate to declare the statute in that respect unconstitutional and void, for reasons which we will now state. That courts have inherent power to punish summarily for any direct contempt has unquestionably been settled by the authorities. Blackstone (vol. 4, 283,) says that the method of punishing contempts by attachment has been immemorially used by the Superior Courts of Justice. Contempts that are thus punished are either direct, which openly insult or resist the powers of the court or the persons of the judges who preside there, or else are consequential, which (without such gross insolence or direct opposition) plainly tend to create universal disregard of their authority, and, after enumerating specially contempts which fall within the two descriptions, he says generally that they may be committed by anything, in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people, and he proceeds to say that the process of attachment for these and the like contempts must necessarily be as ancient as the laws themselves, for laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory. The power therefore to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments and must be an inseparable attendant upon every superior tribunal and has been actually exercised as early as the annals of our law extend, and as such, is confirmed by the statute of Magna Charta, and, hence, he concludes that the power is not derived from any statute, not even Westminster II. (13 Edward I.), chapter 39, which was merely declaratory of the law of the land.

Bishop, in his work on Criminal Law (8th Ed.), volume 2, sections 242 and 243, lays down substantially the same doctrine in these words: "It is not possible for any judicial tribunal to fulfill its functions without the power to preserve order, and to enforce its mandates and decrees. And the common and apparently only practical method of doing these things is by the process of contempt. Therefore the power to proceed thus is incident to every such tribunal, derived from its very constitution, without any express statutory aid. The doctrine is generally asserted in these broad terms, and is believed to be sound; the narrower doctrine, about which there is no dispute, is that this power in inherent in all courts of record. As explained in the first volume, it is a common law offense to obstruct any course of the government or its justice. When, therefore, a man does anything which interferes with the judicial tribunal in the conduct of a cause, he commits an obstruction of a criminal nature. This is a common form of contempt of court."

In *King v. Almon*, 8 State Trials, 53, *Wilmot, C. J.*, says: "The power which the courts in Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt of the court, acted in the face of it (1 Vent., 1), and the issuing of attachments by the Supreme Courts of justice in Westminster Hall, for contempts out of court, stands upon the same immemorial usage as supports the whole fabric of the common law; it is as much the *lex terrae*, and within the exception of Magna Charta, as the issuing any other legal process whatever. I have examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none; it is as ancient as any other part of the common law; there is no priority or posteriority to be discovered about it, and therefore it cannot be said to invade the common law, but to act in alliance and

friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society." "Every court of record," says Bacon in his Abridgement (Courts, E), vol. 2, pages 633-634, "as incident to it, may enjoin the people to keep silence, under a pain, and impose reasonable fines, not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the court, as by giving opprobrious language to the judge, or obstinately refusing to do their duty as officers of the court, and may immediately order them into custody. The courts of record, as incident to them, have a power of protecting from arrest, not only the parties themselves, but also all witnesses *eundo et redeundo;* for since they are obliged to appear by the process of the court, it would be unreasonable that they should be molested whilst paying obedience to it." 1 Hawkins's Pleas of Crown (8th Ed.), p. 63. *McKean, C. J.*, forcibly summarized the doctrine more than a century ago (1788), in *Respublica v. Oswald*, 1 Dal. (Pa.), 319, when he said: "Some doubts were suggested, whether, even a contempt of the court was punishable by attachment; but, not only my brethren and myself, but likewise all the judges of England think that without this power, no court could possibly exist—nay, that no contempt could, indeed, be committed against us, we should be so truly contemptible. The law upon the subject is of immemorial antiquity; and there is not any period when it can be said to have ceased or discontinued. On this point, therefore, we entertain no doubt." It was held in *Cartwright's case*, 114 Mass., 230, that the right summarily to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts as being essential to the exercise of their jurisdiction, to the execution of their powers and to the maintenance of their authority. It is therefore a part of the fundamental law within the meaning and intent of Magna Charta

and the Declaration of Rights in our Constitutions against depriving any person of life, liberty or property, except by the judgment of his peers or the law of the land, and is not contrary to any guarantee of trial by jury or due process of law. The language of the court in *Cooper's case*, 32 Vt., 257, is peculiarly applicable to the facts of our case. "The power to punish for contempt," says the court, "is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied, because it is necessary to the exercise of all other powers. It is indispensable to the proper transaction of business. It represses disorder, violence and excitement, and preserves the gravity, tranquility, decorum and courtesy that are necessary to the impartial investigation of controversy. It secures respect for the law by requiring respect and obedience to those who represent its authority. Its exercise is not merely personal to the court and its dignity; it is due to the authority of law and the administration of justice. The power to punish for contempt is indispensable to the proper discharge of their duties by magistrates. Without it the magistrate would be in a pitiable condition, compelled to hold court, to investigate controversies, examine witnesses and listens to arguments and yet powerless to secure order in his proceedings, to enforce obedience to his decisions, to repress turbulence, or even to protect himself from insult. The mere power to remove disorderly persons from his court room would be wholly inadequate to secure, either the proper transaction and dispatch of business, or the respect and obedience due to the court and necessary for the administration of justice." In *Ex Parte Terry*, 128 U. S., 289, where most of the authorities are collected, the court, affirming the rulings to be found in its earliest decisions, holds that certain implied powers result to courts of justice from the very nature of their constitution, and thus they possess the power to fine for contempt, imprison for contumacy and enforce the observance of

order. "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates. The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice." The moment that courts are called into existence and vested with jurisdiction over any subject, they become invested with this power. This doctrine of the law is well stated in *Clark v. People*, Breese (Ill.), 340, which is also reported in 12 Am. Dec., 177, where will be found a valuable note collating the principal cases on the subject. Rapalje, in his work on Contempts (section 1 and notes), says: "It is conclusively settled by a long line of decisions that at common law, all courts of record have an inherent power to punish contempts committed in *facie curiae*, such power being essential to the very existence of a court as such and granted as a necessary incident in establishing a tribunal as a court." The doctrine has been fully recognized by this court. In *State v. Woodfin*, 27 N. C., 199, *Ruffin, C. J.*, for the court, says: "The power to commit or fine for contempt is essential to the existence of every court. Business cannot be conducted unless the court can suppress disturbances, and the only means of doing that is by immediate punishment. A breach of the peace in *facie curiae* is a direct disturbance and a palpable contempt of the authority of the court. It is a case that does not admit of delay, and the court would be without dignity that did not punish it promptly and without trial. Necessarily there can be no inquiry *de novo* in another court, as to the truth of the fact." *Ex Parte Summers*, 27 N. C., 149; *Ex Parte Schenck*, 65 N. C., 366; *Pain v. Pain*, 80 N. C., 322; *In re Oldham*, 89 N. C., 23; *Kane v. Haywood*, 66 N. C., 1. From this doctrine so firmly established

and from the reasoning of the authorities cited in its support, it must necessarily follow that, as the power to attach for a certain class of contempts is inherent in the courts and essential to their existence and the due performance of their functions, the Legislature cannot, as to them, deprive the courts of this power or unduly interfere with its exercise. The Constitution provides for a distinct separation of the three coordinate branches of the government and vests the judicial power in the several courts mentioned in Article IV., section 2. It further provides that the General Assembly shall not deprive the judicial department of any power or jurisdiction which rightfully pertains to it. Article IV., section 12. If the power to attach for a direct contempt is inherent in the courts and necessary to their vitality and usefulness, any interference with its exercise which prevents the courts from proceeding against contumacious or disorderly persons must needs be a deprivation of the power. But argument is not required to establish so plain a proposition. Rapalje, at page 13, section 11, says: "In the absence of a constitutional provision on the subject, the better opinion seems to be that legislative bodies have not power to limit or regulate the inherent power of courts to punish for contempt. This power being necessary to the very existence of the court, as such, the Legislature has no right to take it away or hamper its free exercise. This is undoubtedly true in the case of a court created by the Constitution. Such a court can go beyond the provisions of the statute, in order to preserve and enforce its constitutional powers, by treating as contempts acts which may clearly invade them. On the other hand, the Circuit and District Courts of the United States, being the creatures of Congress, their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction." In *Ex Parte Schenck*, 65 N. C., 366, a case which has frequently been cited with approval, and a case, too, in which the validity of

the Act of 1871 was recognized to a certain extent, it is said: "Courts of justice are established by the Constitution, and are invested with certain inherent powers, which are essential to their existence, and of which they cannot be deprived by the Legislature. Their province is to construe existing laws and to administer justice, and they must necessarily have the power by summary remedies to preserve order during their sessions, control the action of their officers, and enforce their mandates and decrees. If the courts could be deprived by the Legislature of these powers, which are essential in the direct administration of justice, they would be destroyed for all efficient and useful purposes." In *Holman v. State*, 105 Ind., 515, the court states what it declares to be the principle settled by the words of the Constitution as well as by actual decision: "The power," says the court, "to punish for direct contempts is inherent in all courts of superior jurisdiction. This power is not conferred by legislation, but is an inherent power residing in all Superior Courts. It is a power that the Legislature can neither create nor destroy. It is as essential to the preservation of the existence of courts as is the natural right of self-defense to the preservation of human life. The judicial is a co-ordinate department of the government, and courts are not the mere creatures of the Legislature, for, if they were, the judicial department would be a subordinate one, dependent for existence and power upon the will of the Legislature. This is not, as the Constitution expressly declares and the united voice of the courts affirm. As it is a co-ordinate branch of government, and as judicial power can only live in the courts, it must follow that courts possess inherent powers which they do not owe to the Legislature, and among these powers is that of the right to punish direct contempt. This subject has been many times discussed, and the doctrine often affirmed, without diversity of judicial opinion, that courts do possess power to punish contempts independent of legislation, and that this power is one that the Legislature

can neither destroy nor abridge." This court said in *Deaton's case*: "So inherent is the power to attach for contempt, that the Legislature would have no power to deprive the courts of its exercise." And in *Herndon v. Insurance Co.*, 111 N. C., 384, it was held that the Supreme Court was created by and derives its power and jurisdiction from the Constitution. Its mandate comes from the people and the source of its authority is the same as that of the legislative and executive departments. "The same organic law which gives the Legislature power to make rules and regulations for the orderly and regular dispatch of business in its sessions, free from the control or interference of the executive or of this court, gives the like power over its own procedure to this court, free of interference from either of the other co-ordinate branches of government. Neither body has shown any disposition to encroach upon the constitutional prerogatives of this court." The power of the Legislature to require this court to rehear a case otherwise than is prescribed by its own rules of practice and procedure was denied in that case. The Superior Court, being a constitutional body, must be governed by the same law as this court, and is under the same protection from legislative interference, so far at least as its inherent rights and powers are concerned, which are specially shielded by the Constitution against infringement. *In re Woolley*, 74 Ky., 98; *People v. Wilson*, 64 Ill., 196; *State v. Morrill*, 16 Ark., 384; *State v. Kiser*, 20 Oregon, 56. See also *Scott v. Fishblate*, 117 N. C., 265, in which the inherent power to punish summarily for contempt was said to reside even in a mayor of a town as being necessary to the very existence of the court. The validity of the Act of 1871 was settled by *Ex Parte Schenck*, "with certain savings in respect to the inherent rights of the court," said this court by *Pearson, C. J.*, in *Kane v. Haywood*, 66 N. C., 31. That is, its operation was restricted to those contempts which are constructive and the right to attach for which is not essential to

the full and free exercise of the powers and jurisdiction conferred upon the courts by the Constitution. It would be useless to multiply authorities in support of this reasonable and necessary doctrine that the Legislature cannot deprive the courts of any of their vital powers, such as are requisite for their preservation and for their protection from unlawful interference in the exercise of their jurisdiction and the performance of their judicial functions. The doctrine is recognized as perfectly sound and well settled in all the cases we have cited, and is a logical deduction from the other proposition that the power to attach for contempt is inherent. If, therefore, the Legislature by the Act of 1871 (Code, sections 648-654), had attempted to destroy or abridge this power, it would become our duty to declare the act to that extent void and of no effect.

The Legislature has the same inherent power to preserve order and to attach for any act which tends to interrupt its deliberations and proceedings or which is committed in contempt of its authority, as is vested in the courts. Rapalje, section 2. With the lawful exercise of this undoubted power, the judiciary will not interfere. It is recognized as being necessary to the proper and orderly transaction of its business and is clearly implied from the other powers conferred and duties imposed upon that honorable body, under the elementary and familiar rule that, when a power is given, every other power necessary to its execution is to be considered as also granted. As we will not attempt to restrict or regulate the exercise of this power, and it would not be seemly to do so, we will not assume that the Legislature intended to trench upon the right which inherently belongs to the courts to protect themselves, by punishing those who unlawfully obstruct their proceedings or act in contempt or defiance of their authority.

But fortunately we are relieved from the necessity of deciding the question by the fact that this court has construed

that statute, and held that it "does not take away any of the inherent powers of the courts, which are absolutely essential in the administration of justice, and is not such an encroachment upon the rights of the judicial department of the government as to warrant us in declaring it to be unconstitutional and void." *Dick, J.*, in *Ex Parte Schenck*, 65 N. C., 368. In view of what the court had before said in that case, which we have already quoted, it must be taken as settled that the Act of 1871, as brought forward in The Code, sections 648-654, is, in respect to the law of contempt, as broad and comprehensive in its scope and meaning as the common law itself, so far as it relates to those "inherent powers of the courts, which are absolutely essential in the administration of justice."

With these observations as to the power of the courts, let us now inquire whether the facts found by the judge and "specified on the record" show that the petitioner has committed a contempt, within the meaning of the Act of 1871 and the common law, for which he could be summarily punished. There is no case to be found precisely like this one in all of its facts and circumstances. Insults to judges and assaults upon them, while in the discharge of their official duties, in resentment for some imagined grievance growing out of their official action have been so rare, be it said to the credit of a law-abiding and law-respecting people, that it is difficult to find an exact precedent for our ruling in this matter, but authority is abundant in support of the principle upon which our decision must rest. If the respondent has not committed a contempt of court for which he can be summarily punished, we might well join with *Lord Langdale* in his assertion that without such a power in the court, "it will be impossible that justice can be administered. It would be better (in such circumstances) that the doors of justice were at once closed." *Littler v. Thompson*, 2 Beavan, 129. He was there speaking of an attack upon a party to a cause then

pending. How much more aggravated is one made upon the presiding judge of the court. The same idea is advanced in *Ex Parte McLeod*, 120 Fed. Rep., 130, a case much like ours in its facts, if it does not fully cover the very question here involved. It there appeared that a commissioner had been assaulted by a party of whom he had required an appearance bond. With reference to these facts, it was substantially said that, as courts can exercise judicial functions only through their judicial officers, an assault upon such an officer because he has discharged a required duty is necessarily an attack upon the court for what it has done in the administration of justice. It is vital to the welfare of society that courts, which pass upon the life, liberty and property of the citizen, be free to exercise their reason and conscience unawed by fear or violence; and the highest considerations of the public good demand that the courts protect their officers against revenges induced in consequence of the performance of their duties, as well as violence while engaged in the actual discharge of duty. It is a high contempt of court to seek to punish a judicial officer for his official act, elsewhere than before a constitutional tribunal of impeachment. The evil is that the judge has been held to accountability for his judicial acts and punished contrary to the law because he has performed them. That acts like this, which degrade the judicial office, unfit the incumbents for calm deliberation, awe them in the exercise of their functions, and undermine their independence, must recoil fearfully on the orderly and decent administration of justice, cannot be denied. Who would have any respect for the authority of a court whose judge, the moment he left the court house, could be subjected with impunity to insult and assault because of acts done in his judicial capacity while on the bench? Is it in the power of any person, by insulting or assaulting the judge because of official acts, if only the assailant restrains his passion until the judge leaves the court building, to compel the judge to

forfeit either his own self-respect and the regard of the people by tame submission to the indignity (without summarily arraigning the culprit), or else set in his own person the evil example of punishing the insult by taking the law into his own hands? If he forbears for the time and resort to the criminal law, the remedy is hardly better than the wrong, since then he must become a private prosecutor in some other court and depend on it to vindicate the independence of his own.

We will now refer to a case which at least one eminent judge has pronounced to be "the ablest case on the law of contempts to be found in the books." *Hammond, J.*, in 120 Fed. Rep., at p. 772. It is the case of *Commonwealth v. Dandridge*, 2 Va., cases 408. The respondent who was interested in the event of the suit, then pending in the court over which the judge presided, met the latter on the steps of the court house as he was returning from his chambers to open court and grossly insulted him, charging him with corruption in the trial of the case. The court was not actually in session but in recess. It was adjudged to be a contempt for which summary punishment could be inflicted. "Judicial independence," says the court by *Dade, J.*, "has been an object of constitutional care in this country. In the origin of this government it was thought expedient to make that department independent even of the executive and legislative branches, who are not presumed to do wrong; and shall it be said that it is wholly unnecessary to make it independent of the passions and prejudices of all who may conceive themselves injured by its legitimate proceedings? Shall a judge be called independent who is unavoidably placed in a situation in which he comes in conflict with the jealousies and resentment of those upon whose interests he has to act, and be reduced to the alternative of either submitting tamely to contumely and insult, of resenting it by force or resorting to the doubtful remedy of an action at law? In such a state

of things it would rest in the discretion of every party in court to force the judge, either to shrink from his duty or to incur the degradation of his authority, which must unavoidably result from the adoption of either of the above alternatives. To assume that the personal character of the judge would be a sufficient guarantee against this, is to imagine a state of society which would render the office of the judge wholly unnecessary." In another part of the opinion, this able and scholarly judge said: "When I see the juror and the witness protected from insult for what they may have said or done in court, I ask whether it is more necessary to defend these characters, who may perhaps never be again called into a court of justice, than the judge, who must be so often exposed to similar trials. When in all these cases I find the great object to be the preservation of the authority, dignity, impartiality and independence of the judiciary, without which it has been said it could not exist, or if existing would be a curse rather than a blessing, I cannot feel justified in excepting a case which is in all its particulars in direct hostility to this principle, because I cannot back my opinion by a reported case." After citing Blackstone and numerous other authorities he proceeds: "With this array before our eyes, can it be credited that it should be so highly penal to assault or abuse a judge in court for his judicial proceedings, and no offense to do the same thing to him the moment after his leaving the bench, on account of the same provocation? Can it be considered a matter of so much consequence to protect the person of the suitor, the lawyer, the witness, the juror and the jailer, and none to defend the judge? Not that I mean to arrogate any higher personal privilege for the judge than for the humblest of these, but because it is obvious that the principle which suggests the necessity for protecting them rises with the grade of the officer, and that the majesty of the laws may be more degraded in the person of the highest than of the lowest officer

intrusted with their administration." *Judge White*, who wrote a separate concurring opinion, answers the argument there made by the respondent's counsel, and now advanced in this case, in very forceful words: "It is contended that in general and upon principle no contempt can be committed in any court unless it be in session at the time, and the contempt be committed in its face. And that no contemptuous words spoken to or of a judge, during the recess or vacation of his court, however deeply they may implicate his judicial conduct, can be thus punished. The argument upon this point was specious and imposing. Whether it was substantially correct, and whether the result endeavored to be produced by it be in accord with either the public good or the great principles of law long since established (not for the private gratification of the judges, but to insure the well being of society) is another question—a question of solemn import to every man who looks to the laws of his country for the preservation of all he holds dear. We cannot prostrate the courts of the country at the feet of every disappointed suitor who may happen to lose his cause, or whose conduct may necessarily elicit from a judge observations unpleasant to his feelings, without the most fatal consequences. Nay, destroy the protection which the law now gives to your court, unloose the hands and tongues of such persons, expose your magistrates to their abuse, contumely and vituperation for their judicial conduct without any immediate and efficacious means of restraint, and instead of that happy, dignified and peaceful state of society which we now enjoy, we shall soon find that we have neither laws nor magistrates; and let it be remembered that in this country we ought not to have, we have not, any privileged order of men. If one man is restrained from such conduct, every man must be subject to a like restraint. If one man is at liberty to pursue it, every other man must enjoy the same liberty."

We might well stop here and rest our decision upon the

reasoning in that case and the deduction of that able court that in such a case as the one there and here presented, an attachment for a direct contempt will lie and punishment can be summarily imposed. But we are impressed and the court was in that case, with the great importance of the question which induces if it does not require us, especially in view of the ability and zeal with which counsel have argued before us, to investigate fully this doctrine of attachment for contempt and deliberately and maturely weigh the reasons for and against it, aided by the learning we find in the books, to the end that our conclusion may be formed after the most careful thought and deliberation, and with due regard for the maintenance of the rightful powers of the courts as well as the preservation of the personal liberty of the citizen. If, in an attempt to do this, more time is consumed than we could wish, an apology will be found in the desire we have to reach a just and safe conclusion.

When we use the term "attachment for contempt" it must be understood that we refer to the summary proceeding and not to the remedy by citation or rule to show cause when the contempt is indirect or constructive and the offense can now be punished only "as for a contempt," as provided by the statute, Code, section 654. With this explanation of a term we proceed to the further discusison of the authorities.

In *U. S. v. Anonymous*, 21 Fed. Rep., 761, where the question here involved is examined at great length in a well considered opinion by *Judge Hammond*, who reviews the cases with marked discrimination and sustains his views by the most cogent reasoning, it is held that "where the act or conduct takes the form of an assault upon an officer, as when he was beaten and made to eat the process and its seal, the impediment to the efficient administration of justice may be quite as direct in its operation to that end, happen where it may, as if the party had ridden his horse to the bar of the court and dragged the judge from the bench to beat him.

Be this as it may, wherever the conduct complained of ceases to be general in its effect, and invades the domain of the court to become specific in its injury, by intimidating or attempting to intimidate, with threats or otherwise, the court or its officers, the parties or their counsel, the witnesses, jurors and the like, while in the discharge of their duties as such, if it be constructive because of the place where it happens, yet, because of the direct injury it does in obstructiong the workings of the organization for the administration of justice in that particular case, the power to punish it has not yet been taken away by any statute, however broad its terms may apparently be." This is a very important case and a strong authority, as in it the court construes the Act of Congress of 1831 upon the subject of contempts, which greatly limited the power of the Federal Courts to punish summarily for contempts and confined it to misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice, and misbehavior of the officers of the court and disobedience or resistance to its process. The act, if anything, is more restricted in its provisions that our statute, Code, sections 648-654, and yet it was held in the case cited that it was not necessary that the offensive act should have been committed in the immediate presence of the court while actually sitting in the court house with the judge on the bench, but though merely constructive because of the place where it is committed, it becomes a thing done *in facie curiae* within the meaning of the statute, if it affects an officer in the discharge of his duty and directly tends to obstruct the proceedings of the court or the administration of justice. It is generally understood that the object of the act of Congress was to enlarge the liberty of criticism by the press and others by curtailing the power to punish adverse comments upon the Federal Courts, their officers and proceedings. *U. S. v. Anonymous*, 21 Fed. Rep., at p. 768; *Ex Parte Poulson*, 19 Fed. Cases No. 11,350; *Cuyler v. Railroad* (*In re Daniels*),

131 Fed. Rep., 95. In other respects the common law prevails as it did under the Act of 1789, as to all contempts committed in the presence of the court. Cases *supra*.

In *U. S. v. Patterson*, 26 Fed. Rep., 509, where it appears the respondent had assaulted an attorney in the court room during the recess of the court, it was held that he could be attached for contempt, the court assigning the following reason: "The mistake of the respondent was in assuming that when the judge left the bench, he might, so far as the court was concerned, proceed to accomplish his purpose of making the assault, supposing that it was only when the judge was on the bench that any question of contempt could arise. But it must be apparent to every one that this is a misconception, and far too restricted to admit of approval anywhere. The court would deserve the contempt of public opinion if it permitted so narrow a view of its prerogatives to prevail, and could not complain if during its recess the court room should be used for a cock pit or a convenient place to erect a prize ring. That is the logic of the false assumption that was made in this case. But wholly aside from this consideration, there is a principle of protection to all who are engaged in and about the proceedings of a court that requires preservation against misbehavior of this kind. The defendant in court whose attorney was attacked is entitled to the protection of the court against any personal violence towards its attorney, while he is in attendance on the court. Otherwise, atttorneys might be driven from the court or deterred from coming to it, or be held in bodily fear while in attendance, and thereby the administration of justice be obstructed. This principle might be pressed beyond reasonable limits, to be sure, but it certainly is not going beyond the true confines of the doctrine to apply it here. It protects parties, jurors, witnesses, the officers of the court and all engaged in and about the business of the court even from the service of civil process while

in attendance, and certainly should protect an attorney at the bar from the approach and attack of those who would do him a personal violence. A former ruling of this court on that subject has been especially approved by very high authority."

Lord Cottenham committed to the Fleet for contempt a barrister who was also a member of Parliament and who had threatened a master in Chancery with a view of inducing him to reverse his decision, upon the ground that his conduct tended to pervert the course of justice and to obstruct its due administration. This ruling was approved by the House of Commons upon the report of its Committee of Privileges, and the claim to be discharged by reason of privilege was disallowed. A like decision was made by *Lord Eldon*, when a witness was interfered with, in *Ex Parte King*, 7 Vesey (ch.) 315; and also in *Ex Parte Burrous*, 8 Vesey (ch.) 535, when violence was committed in one of the offices of the court, though not in its immediate presence. The Court of Chancery in *Williams v. Johns*, 2 Dickens, 477, attached the defendant for having compelled the officer, who had served him with a subpœna, to eat the same and otherwise ill treating him. In each of these cases the offense was regarded as a criminal contempt by reason of its direct tendency to thwart the administration of justice, as much so as if it had been committed in the very "face of the court." It was held in *State v. Garland*, 25 La. Ann., 532, that the use of abusive language towards a member of the court and an assault upon him during a recess, and in the court room, under the pretext of resenting what he had said or done when on the bench, was a direct and aggravated contempt of the court for which he could be summarily punished, and in *Baker v. State*, 82 Ga., 776, it was held that a court was not dissolved by a mere recess or necessary adjournment from one day to the next, and misbehavior affecting public justice in the court room and in the immediate presence of the judge

during such a recess, and whilst he is attending there to resume business but before the hour of recess has expired, was a contempt committed in the presence of the court and punishable summarily. The court, by *Bleckley, C. J.*, said: "What right did he, the respondent, have to discuss his case if the court was not in session? And what right did he have to do it in an improper manner if it was in session? It was urged in the argument before us that he was merely complaining to the judge, and in so doing was in the exercise of a legal right. But what law confers on a suitor the right to converse about his case with the judge out of court? Are the State's judges to be questioned by suitors about their cases and listen to complaints elsewhere than in court? We think not. The office of judge would be intolerable to the holder and degrading to the State, were the incumbent subjected by law to personal and private approach, questioning and harassment at the will of anxious and discontented suitors. The only place for intercourse with a judge, touching business pending in court, is the place where the court sits, and the only time for it is during the sitting."

In *People v. Wilson*, 64 Ill., 195, it is held that the power to punish for contempts is an incident to all courts of justice, independent of any statutory provision. Referring to the statute of that State attempting to restrict the power of the courts in this respect, it was further held that if the statute should be regarded as a limitation upon the power of the court to punish for any other contempts than those committed in its presence, yet in this power would necessarily be included all acts calculated to impede, embarrass or obstruct the court in the administration of justice, and such acts would be considered as done in the presence of the court. See also on the subject of contempts not committed in the court room, *Ex Parte Savin*, 131 U. S., 267; *In re Cuddy*, *ibid.*, 280; *In re Healey*, 53 Vt., 694; *Littler v. Thompson*, 2 Beavan, 129; *In re Bury* (note), 10 Fed. Rep., 630; *Wellesley's case*, 2 Rus. & Mylne, 639. In *Rex v. Wigley*, 7 Car. & P., 4 (32 E. C. L., 415), it appeared that a witness in a prosecution, tried at the King's Bench sittings, struck the defendant after the trial was over, when both were in the lobby of the court. The witness being brought to the bar and evidence given of these facts, the judge (*Coleridge*) committed him to the custody of the marshal for three days for this contempt of the court. So in the case of *In re Pryor*, 18 Kan., 72, the facts were that an attorney had sent to a judge, out of court, a letter of an insulting character and containing an imputation upon his integrity with reference to a cause which was being tried before him, and it was held to be a contempt of court and one which could be summarily punished. "If the language or conduct of the attorney is insulting or disrespectful," says the court by *Brown, J.*, "and in the presence, real or constructive, of the court, and during the pendency of certain proceedings, we cannot hold that the court exceeded its power by punishing for contempt." In *Savin's case* and in *Cuddy's case, supra*, the offense was not committed in the immediate presence of the court, but in a room in another part of the court house, which was held to be within the precincts of the court and in its constructive presence and the offender therefore subject to summary punishment. 131 U. S., 267 and 280.

A case more like ours perhaps than any other is that of *State v. Steube*, 3 Ohio C. C., 333, first heard below and then on appeal, the full report of which is not accessible to us. The facts appear to have been that, during a recess of the court, the prosecuting attorney was without provocation assaulted by a witness in a criminal case then pending, he being also a defendant in a like case not yet called for trial. The assault was made at a place about five blocks from the court house and grew out of the attorney's conduct in the pending case. The statute of Ohio provides that a person, guilty of misbehavior in the presence of a court, or of a judge

at Chambers, or so near as to interrupt the proceedings or to obstruct the administration of justice, may be punished summarily. It was held that the case was within the terms of the statute and the respondent was properly punished in a summary manner. Another case very similar in its facts is *In re Brule*, 71 Fed. Rep., 943, in which it appeared that the respondent had bribed a witness at the latter's residence. The court held that, even within the words of the act of Congress, it was a direct and not a constructive contempt for which summary punishment could be meted out. It cites and relies on *Savin's* and *Cuddy's cases*, among others, and pertinently inquires "if it is a contempt to bribe a witness in front of the court house, is it not a contempt to attempt to do the same thing on the street opposite the court building or even four blocks away? Is not the result the same? Is not the motive of the accused the same?" How, we ask, can the mere element of distance change the character of the act or take from it the quality of being a direct offense against the authority of the court and a palpable obstruction to the administration of justice? A ruling which would ignore the complete identity of the two kinds of offenses would sacrifice the substance to the form. *Qui haeret in litera haeret in cortice.* In *Ex Parte Summers*, 27 N. C., 149, an officer had refused obedience to an order to return process in his hands, and accompanied his refusal with an insolent message to the court. Commenting on these facts, the court, by *Ruffin, C. J.*, said: "But had there been no legal default, and admitting that this person might have insisted before the court, on the delay of the return to the next day as his absolute right, yet the message to the court, in its terms and manner, *and while he was in the verge of the court* (italics ours), was as offensive and disrespectful as it could be, and in itself justified the fine."

We have thus reviewed at much length the authorities bearing either directly or indirectly upon the important and

delicate questions under consideration and have found abundant support, as we think, for the conclusion we have reached, that within the meaning of our statute, Code, sections 648-654, the conduct of the respondent was a direct contempt of the court, as much so as if the assault had been made when the judge was sitting on the bench in open court. The insult was given and the assault made "within the verge of the court," as aptly expressed by *Chief Justice Ruffin* in *Summer's case*.

It may well be doubted if the case of *In re Gorham*, 129 N. C., 481, is not in conflict with that of *In re Oldham*, 89 N. C., 23, and does not virtually overrule it, though it may not in terms have done so. Indeed we doubt if the *Oldham case* can well be sustained in view of the principles herein stated and the authorities relied on. The court, in that case, held that there was no contempt at all and that the offense could only be punished by indictment, while in *Gorham's case* it was held that the attempt to corrupt a juror could be punished as for a contempt, it being an unlawful interference with the proceedings of the court in an action, which tended to defeat, impair, impede or prejudice the rights of a party thereto, within the meaning and intent of The Code, section 654, subsection 3, and section 656, the only difference between the two cases being that, in *Oldham's case*, the offense consisted in handing to a person summoned as a juror printed circulars containing matter calculated to prejudice the jurors against the defendant, in a cause then pending, with a request that he would distribute them among the jurors during the term, while in *Gorham's case*, the offense was committed during the term, though in the recess of the court. We perceive no practical difference between the two cases. Indeed, we think that in both cases, if the respondents were not guilty of a contempt, under section 648 of The Code, which could have been punished summarily, because of the direct interference with the proceedings of the court and contempt of its

authority, continuing to the very moment of the trial of the cases, Oldham, as well as Gorham, was at least guilty under section 654, subsection 3, and section 656, upon the facts found and stated in the record. What difference can there be, under the latter section, between corrupting jurors during the term of the court and unlawfully influencing one of their number before the term, with the understanding that he will in turn influence his fellows during the term to decide a particular way? *Qui facit per alium, facit per se.* Does not the one as directly tend to pervert or defeat the administration of justice as the other, and is not the one as much a contempt of the authority and dignity of the court as the other?

In both classes of contempts, the punishment is of the same kind, a fine not to exceed two hundred and fifty dollars and imprisonment not to exceed thirty days, but in direct contempts, the proceedings are generally of a summary character and there is no right of appeal, the facts being stated in the committal, attachment or process and reviewable by *habeas corpus*, while in indirect contempts the proceedings are commenced by citation or rule to show cause, with the right to answer and to be heard in defense, and also with the right of appeal.

The statute provides (section 648) that direct contempts shall consist in "disorderly, contemptuous or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court and directly tending to interrupt its proceedings, or to impair the respect due to its authority," and "any breach of the peace or noise or other disturbance tending to interrupt the proceedings of any court," and these and other acts and neglects, not necessary to be here mentioned, are declared to be the only acts and neglects which shall be the subjects of contempt of court. Tested by reason and authority, we think the statute must be so construed as to embrace the case presented in this record. If we thought otherwise and that resort to the common law

is necessary to protect the judge from insult and to shield him against assault for his judicial acts, we would not permit the statute to stand in our way. As said by the present Chief Justice in his concurring opinion in the case of *In re Gorham*, 120 N. C., 491, with reference to this very statute: "It cannot be justly imputed to the General Assembly that it passed an act intended or so worded as to justly mean that the administration of justice can be defeated, impaired and impeded. Were it possible that such an act had been passed, it would be our duty to declare it unconstitutional and with as great reason as the court has ever done so in any case." And in this connection, other words of his in that opinion are equally applicable to the facts of this case as they were to the case then being decided: "The contempt," he says, "could not be more direct or palpable if a band of armed men had followed the jury to the court house with threats of violence if their verdict was unfavorable, and had stood just outside the door to execute punishment if disappointed. It is equally a contempt of court whether a man meets a juror just outside the court house with a bribe or a bludgeon in his hand. If the court cannot prevent either because not done within the court room, the administration of justice is no longer free. The independence of the judiciary no longer exists." While this court will always be disposed to safeguard the personal liberty of the citizen and enforce all constitutional guarantees in his favor even to the extreme limit, it must at the same time look to its own preservation, as the power of the court to protect itself is a part of the supreme law, and the corresponding duty plainly enjoined to exercise this power, whenever necessary, is as imperative if not as mandatory as any other obligation resting upon it under the Constitution. The courts derive their authority and jurisdiction from the people through the organic law, and the respect of the people for and their confidence in their judges are absolutely essential to the maintenance of that

power and authority. They are the foundation upon which the whole fabric rests, and whoever impairs either of the former to that extent threatens the very existence of the latter. In *Durham v. State*, 6 Iowa, 254, it is well said that the power given to the courts to punish for contempts is not alone for their own protection, but also for the safety and benefit of the public. The life, liberty and property of every citizen are preserved and the true welfare of society insured and promoted in the preservation of this power in its proper vigor and efficiency.

We conclude the discussion with the language of *Chancellor Kent*, when speaking of the exemption of a judge from civil liability for his judicial acts, which is peculiarly applicable to this case, as the prosecution of a judge for a wrong, alleged to have been committed in the execution of his office, is assuredly less harmful than an unprovoked assault upon his person. "Whenever," said the chancellor, "we subject the established courts of the land to the degradation of private prosecution, we subdue their independence and destroy their authority. Instead of being venerable before the public, they become contemptible, and we thereby embolden the licentious to trample upon everything sacred in society and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty." *Yates v. Lansing*, 5 Johns, 282.

The cases cited by the petitioner's counsel are not in point. *Delafield v. Construction Co.*, 115 N. C., 31; *Hinton v. Ins. Co.*, 110 N. C., 22. The judge had not left the bench for the term, as in those cases it appeared he had done, but by express direction the court was kept open for the transaction of other business, the signing of the minutes and some unfinished matters.

Having disposed of the legal questions involved, we cannot take leave of the case without commending the able and fearless judge who presided in the Superior Court for the

perfect control and complete mastery of himself, which he exhibited under most trying and exasperating circumstances. His subordination of self, in deference to the dignity of his high office, is worthy of the highest praise and must command at once for him the respect, confidence and admiration of all. It was the best tribute he could have paid to the judiciary and the most perfect example he could have presented to the people of one of their chosen representatives in judicial station, who, tested by the severest ordeal, admirably sustained its dignity and by his own submission and self-restraint enhanced the respect due to the power and the majesty of the law. Guided by the same spirit which prompted Lord Coke's simple but impressive answer to his king, when he was asked by him out of court and in advance, what his opinion, as Chief Justice, would be concerning the extent of the royal prerogative, we can safely expect that whenever occasion requires "he will always do that which shall be fit for a judge to do." In the proceeding before him, and he was the proper and indeed the only judge to initiate it, he was fully within the pale of his jurisdiction, and in all respects has proceeded in accordance with the law and in a most exemplary manner has vindicated the dignity and authority of his court.

The opinion in this case is not intended, nor must it be construed, as approving what is said in the authorities cited, where they go beyond what is actually necessary for the decision of this case. Whether it is a direct contempt to insult or attack a judge for any of his official acts after the court has adjourned for the term, is a question which, with others of a like character, is not presented and not within the scope of this decision. We pass upon what is now before us; nothing more.

We have not discussed the questions raised below as to the proper method of bringing a decision in *habeas corpus* proceedings into this court for review, whether by direct appeal

or writ of *certiorari*, as all irregularities have been fully waived. *In re Briggs*, 135 N. C., 118. The matter is mentioned in the hope that the law upon this subject may be made clear by legislative enactment, as there seems to be no speedy and at the same time adequate remedy in such a case. In some instances, although they may be rare, it might be proper to allow bail, but this is a matter which addresses itself to the wisdom of the Legislature and does not fall within our province.

There is no error. The petitioner will pay the costs of the proceeding, including the costs of this court.

No Error.

CORPORATION COMMISSION v. RAILROAD.

(Filed September 26, 1906).

Corporation Commission, Powers and Rules of—Carriers—Track Scales—Evidence.

1. The Legislature has the power to supervise, regulate and control the rates and conduct of common carriers, and this regulation may be exercised either directly or through a commission.

2. Under the act creating the Corporation Commission, it has the power to require a railroad to put in track scales at such points as the quantity of business may justify it.

3. This power cannot be unreasonably exercised, and such orders are subject to review by the Superior Court and by this court.

4. The court or the jury, upon proper instructions, as the case may be, should pass upon the reasonableness and necessity of an order of the Corporation Commission requiring track scales to be put in.

5. Where there was evidence that the defendant had put in track scales at other points where fewer car loads were shipped, and that the petitioner paid annually $30,000 in freight and that the defendant offered to put them in if the petitioner would pay higher rates (amounting annually to $950, nearly the full cost of scales and of putting them in,) than was paid by shippers at points where scales had been put in, *held*, that the evidence was sufficient to be submitted to the jury, on the reasonableness and necessity of the order.

6. The fact that the petitioner would cut and ship lumber only two more years from that point does not *per se* make the order unreasonable, when the petitioner had already shipped from that point for five years and had ten years' cutting at another station on the defendant's road, to which the scales could then be moved.

7. It is not the number of shippers, but the number of car loads to be weighed which is the test whether it is reasonable to have facilities for weighing car loads upon track scales at a station, and it is immaterial that the petition affected only one point and one shipper.

ACTION by State *ex rel* North Carolina Corporation Commission against the Atlantic Coast Line Railroad Company, heard by *Judge M. H. Justice* and a jury, at the November Term, 1904, of the Superior Court of WAKE County. From the judgment rendered, the plaintiff appealed.

Attorney-General and *F. A. Woodard* for the plaintiff.
Junius Davis and *Pou & Fuller* for the defendant.

CLARK, C. J. A petition was filed before the Corporation Commission by the Dennis Simmons Lumber Company, whose plant is located at Elm City, asking that the defendant be required to put in track scales for weighing lumber shipped in car load lots from that point. It was in evidence that the defendant had such scales at twenty-one other points on its North Carolina and Virginia division, at which there were saw mills, among them Weldon, Tillery, Parmelee,

JUNE TERM, 1871.

Ex-parte DAVID SCHENCK.

1. The Act of 4 April, 1871, declaring that no attorney who has been duly licensed to practice law shall be disbarred or deprived of his license and right to practice, except upon conviction for a criminal offense, or after confession in open court, is constitutional.

2. The aforesaid act does not take away any of the inherent rights which are absolutely essential in the administration of justice:

3. *Therefore*, where a Judge, after the ratification of the aforesaid act, attempted to debar an attorney from practicing his profession in his Judicial District, who had not theretofore been convicted of any criminal offense, or who had not confessed himself guilty thereof in open court: *Held*, that such action was unauthorized, and in violation of law.

CONTEMPT OF COURT by David Schenck, an attorney of this State, adjudged by *Logan, J., at* Spring Term, 1871, of GASTON Superior Court.

On the first day of the term of said Court his Honor made the following order, and had the same entered on the minute docket of said Court, to-wit:

"The Court being informed of a certain libelous publication directly tending to impair the respect due to the Hon. G. W. Logan, Judge of the Superior Court of the Ninth Judicial District of the State of North Caro- (354) lina, and to the authority of the Court, which appeared in the *Daily Patriot*, a newspaper published in the City of Washington, D. C., on 25 April last, and is headed 'Letter from North Carolina—Photograph of a Radical Judge; Lincolnton, N. C., 21 April, 1871; Hon. Francis Blair,' etc. (a copy of which is spread upon the records), purporting to be signed by D. Schenck, an attorney of said Court:

"It is therefore ordered by the Court that the said D. Schenck be disabled from hereafter appearing as an attorney and counselor in said Court, unless he shall apply on Saturday, 13 May, inst., and show cause to the contrary.

"It is further ordered that a copy of this order be served on the said D. Schenck immediately, with a copy of the aforesaid letter."

The letter referred to in the foregoing order, as taken from the records of said Court, is as follows:

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LETTER FROM NORTH CAROLINA.

Photograph of a Radical Judge.

LINCOLNTON, N. C., 21 April, 1871.

HON. FRANCIS BLAIR.

Dear Sir:—I write to inform you that the communication read by Senator Nye on the 13th from Judge (?) Logan, is a base and unmitigated falsehood, made out of the whole cloth to bear upon the Ku Klux bill. I, with the whole bar, attended Cleveland Court. On Monday there was a rumor that one Biggerstaff, a pliant tool of Logan's, had been whipped by parties who retaliated upon him for shooting at his own brother, and endeavoring to assassinate him. There was no politics in it—purely a family feud; but Logan summoned 300 men, and had them armed and paraded around his house, and arrested some forty persons, not one of whom, as every one knows, had anything to do with it.

At the same time he dispatched his man "Friday," one Carpenter, to report to Washington, and he remained at home and the report was circulated that he was afraid to leave home for Cleveland Court. The citizens of Cleveland at once held a public meeting, assuring him of protection, and sent their sheriff to escort him to Shelby. Mark his reply. "He was not at all afraid, but was staying to investigate the whipping, and that he would come when he got through." Thus leaving Court and people to lose time and money, while he was doing magistrate's duty at home.

The Solicitor, a Republican, strongly denounced him, and wrote him an urgent letter to come. The very day that Senator Nye read Logan's letter in the Senate, saying he, *Logan*, was afraid to come to Cleveland, Logan came without escort or molestation, and held Court as peacefully, if not more peacefully, than ever one was held before.

This *Logan* is an ignorant, vile, corrupt man, whom no one respects, and for whom the whole bar have a sovereign contempt.

Yours truly and gratefully,

D. SCHENCK.

Upon the day mentioned for the return of said rule, and after service of notice thereof upon the said attorney, *he* filed the following plea, verified by affidavit:

GASTON COUNTY—In Superior Court:

In the matter of DAVID SCHENCK.

This respondent having been served, on the 8th inst., with a copy of an order rendered by the Court on that day (here reciting the order mentioned heretofore), now on this 13 May, in open Court appears, and for cause to the contrary shows:

"1. That having been duly licensed to practice law as an attorney of said Court, he has the lawful right to continue so

to practice in said Court without restraint or impediments, for that he has not been convicted, or in open (356) Court confessed himself guilty of any criminal offense showing him unfit to be trusted in the discharge of the duties of his profession according to the provisions of the statute in such case made and provided.

"2. This respondent affirms that he has never been convicted, or in open Court confessed himself guilty of any criminal offense showing him to be unfit to be trusted in the discharge of his profession, and therefore denies that this Court has the power to lawfully make the order temporarily disabling him from practicing his profession, and further denies that it has any jurisdiction in the premises to continue and enforce it.

"Wherefore, he insists that said order be discharged, and respondent be permitted to exercise his right as an attorney and counselor, agreeable to the Constitution and the laws of the land. D. SCHENCK."

Upon the coming in of the foregoing plea, and after argument of counsel, his Honor was of opinion that no answer had been filed so as to entitle respondent to be heard upon the rule, and ordered that said rule be made absolute, from which ruling the respondent prayed an appeal to the Supreme Court, which was declined by the Court, upon the ground that respondent had failed to answer the rule as required by the provisions of the Statute of 10 April, 1869.

At the present term of this Court respondent filed a petition for a *certiorari*, which was granted, and made returnable on 19 June.

The transcript having been returned to the effect above:

Moore, with whom were *Gatling, Wilson, Bragg & Strong*, in behalf of respondent, argued as follows:

1. Unless the letter was written for publication, the Judge could not notice it as a contempt of Court. For there can be no contempt of Court if the act be not so intended, unless the act be a contempt *per se*. Thus, to say to (357) an intimate friend confidentially that a certain Judge is a *felon*, is not a contempt of the Court in which that Judge presides, although the friend should publish it. So, if a writer intending his composition for an after age, should lose

it and, without his consent, it should get into the press, he is not responsible for the effects of its publication, any more than if the composition should be swept away by a tornado and be found and published in another kingdom. 2 Gr. Ev., secs. 326, 414.

2. The Judge had before him no legal evidence of even the writing of the letter by the defendant, much less of its publication by his consent. The printed name of the subscriber furnishes no evidence of the writer, unless it be shown that he has acquiesced in the charge of authorship. This may be done by showing that he has had notice of the publication, and has omitted, after opportunity to do so, to deny it. 2 Gr. Ev., sec. 416.

3. But conceding the publication to have been intended, it is no contempt of Court, under our law, though it were so at common law, because our statutes expressly forbid the courts so to treat it.

To this it is replied, on behalf of the Judge, that the statutes are unconstitutional—that the powers of courts over contempts are *inherent*, and that when the courts exist by virtue of the Constitution, the inherent powers become constitutional provisions.

We admit that there is in all courts an *inherent* power to preserve order while discharging their business. This power is incidental to the office, inseparably attached to it, and cannot be taken away by legislative authority while the Court exists by virtue of the Constitution.

Every Judge invested with the power to hear and determine cases must be endowed with all the powers which, as *Chief Justice Nash* says, "are necessary to the proper trans-
(358) action of the business before him." "If it were not in the power of the Court to punish individuals who by noise or otherwise interrupt its proceedings, its business would be impeded, the majesty of the law defied and the Court ultimately brought into contempt."

Such powers as are clearly necessary for this purpose are *inherent*. To deny them would annihilate courts of justice. The judicial department exists by virtue of the Constitution, and stands upon the same base with the legislative and executive. The legislative department has the same constitutional

power to destroy the judicial by the sword as it has by allowing a lawless mob to interrupt its officers in the discharge of their judicial functions.

It may sometimes be difficult to determine precisely where the line shall be drawn between the *inherent* powers of a court and those which are subjects of legislative regulations. That the common law recognized many acts as contempts, which are the subjects of legislative control, is manifest from the wide distinction drawn between Judges of Superior and Judges of inferior courts, in respect to language deemed contempts of the former, but not of the latter, and in no respect disturbing the official proceedings of either.

But the power of the Legislature over contempts of Court, to the extent which Congress and this State have exercised it, must be conceded to be now settled too firmly to be upset. The Constitution of every State establishes the three great departments of government as independent of each other. Not one of these constitutions expressly subjects the law regulating contempts of Court to the control of the Legislature. They are all silent upon the subject. Yet the Legislature of every State has regulated contempts of Court, both in defining and punishing them, as this State and the United States have done; and the constitutional power to do so has never been questioned.

A brief review of the legislation and decisions upon (359)
this subject is offered to illustrate and sustain our position.

(1) The Act of Congress of 24 September, 1789, ch. 20, establishing the Judicial Courts of the United States, provides by sec. 17 that the courts thereby established shall have power "to punish by fine or imprisonment all contempts of authority in any cause before the same, and to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States."

The courts thus created existed as fully by virtue of Art. III of the Constitution of the United States as if they had been named and created and their powers prescribed by that article. The powers over contempts, thus specially conferred, were declared by the Supreme Court of the United States (in

U. S. v. Henderson, 7 Cr., 32-4) to be necessary to the Court, and that they would have existed independently of the act of Congress.

It will be observed that none of the powers mentioned in the act, and by the Court declared to be necessary, extended to the case of a defamatory letter or speech about a Judge or Court, which did not disturb the order of the Court or obstruct it in the discharge of its business. The power as expressed was over "contempts of authority," and the usual and universal punishment—fine or imprisonment (and not *striking from the rolls*) had ever been the only punishment in England—was prescribed by the act of Congress.

(2) In 1830 James H. Peck, a District Judge of the United States, undertook to punish the writer (over the signature of "A Citizen") of an article published in a newspaper, publicly calling attention to many supposed errors, as the writer alleged, in a judicial opinion of the Judge just before published by himself. The Judge, deeming the article disrespectful to him as a Judge, attached the editor of the paper to answer for contempt of Court. In the course of examination before Court Mr. Lawless, an attorney, avowed himself the author, (360) whereupon he was attached and sentenced to imprisonment and suspension from practice. Judge Peck was impeached for this before the Senate of the United States, and was acquitted by a vote of 22 against 21. Whether the acquittal was on the ground that he had exercised only the powers belonging to the Court, or because if he had transcended them he had done so without corrupt intent, does not appear. But in the course of the debate such vast and undefined powers of construing acts into contempt of Court were claimed in his defense as incidental to judicial authority, unless expressly limited by law, that Congress deemed it an imperative duty to pass the law of 2 March, 1831, entitled, "An act declaratory of the law of contempts of Court."

The law was passed without dissent or further debate upon the subject, with an amendment defining and specifying the *punishment* as well as the *acts* of contempt.

(3) It enacts "that the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of Court shall not be construed to

extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said Court, party, juror, witness or any other person or persons, to any lawful writ, process, order, rule, decree or command of the said courts."

This law has existed unchanged for forty years, and for thirty-six years since the full and able judicial construction given to it in 1835, by *Mr. Justice Baldwin*, a very learned and distinguished Judge of the Supreme Court of the United States. It applies to the Supreme Court, as well as to the Circuit and District Courts of the United States; is cited as the law by Brightly in his digest of Federal Cases, and by Conkling in his "Treatise," 16. *Mr. Justice Baldwin*, in *Ex-parte Poulson*, 15 Haz. Pa. Reg., 380, says: "It (361) is in the discretion of the legislative power to confer upon courts a summary jurisdiction to protect their suitors, or itself, by summary process, or to deny it; it has been thought proper to do the latter, in language too plain to doubt of the meaning of the law, or if it could be doubted by any ordinary rule of construction, the occasion and circumstances of its enactment would most effectually remove them."

"It would ill become any court of the United States to make a struggle to retain any summary power the exercise of which is manifestly contrary to the declared will of the legislative power. * * * Neither is it proper to arraign the wisdom or justice of a law to which a court is bound to submit, nor to make an effort to move in relation to a matter when there is an insuperable bar to any efficient action."

"The law prohibits the issuing of an attachment, except in certain cases, of which the present is not one; it would, therefore, be not only utterly useless, but place the Court in a condition beneath contempt, to grant a rule to show cause why an attachment should not issue when an exhibition of the Act of 1831 would show most conclusive cause. The Court is disarmed in relation to the press: it can protect neither itself nor its suitors; libels may be published upon either without stint."

(4) In 1846, ch. 62 (Rev. Code, ch. 34, sec. 117), an act was passed by this State entitled "An act concerning contempts of Court." This act has *its* history as well as that of Congress. It was written by the late George E. Badger, and was introduced into the Legislature by the late Judge Gilliam. The language of this act is almost identical with that of Congress. That of this State underwent a slight change of expression when revised in 1854, but none in meaning or force of language. Under the act of Congress there has been one judicial opinion uniformly acquiesced in. Under that of this State there has been one also, made in 1855: *Weaver v. Hamilton*, 47 N. C., 343. In this case the Court,
(362) composed of *Nash, C. J.*, and *Justices Pearson* and *Battle*, through the Chief Justice, says: "The doctrine of contempts is regulated in this State by statute. Before the year 1846 they were undefined, and left very much to the discretion of the Court presiding.

"Under such circumstances, it is not at all to be wondered at that many acts were considered as contempt, and punished as such, which in the eyes of the public were looked upon as harmless in themselves, but as exhibiting an arbitrary spirit in judicial offenses.

"The necessity of this power, however, is felt and acknowledged by every one who values the independence of the judiciary or its wholesome action. If it were not in the power of the Court to punish individuals who, by noise or otherwise, interrupt its proceedings, its business would be impeded, the majesty of the law defied, and the Court ultimately brought into contempt.

"Needful, then, as the power to punish for contempt is to every court, it is proper and right that the courts should have, as far as possible, some sure guide to regulate their course.

"No well-minded Judge desires to be burthened with discretionary powers—at least no further than is necessary to the proper transaction of business before him."

(5) The Act of Assembly of 10 April, 1869, ch. 177, sec. 1, is, to all intents, the Act of 1846, except by the addition in the former of sec. 7, relating to the publication of proceedings in Court.

4. It is certain that *Judge Logan*, had he been a Justice of the Supreme Court of the United States, would have been disarmed of all power to protect *himself or the respect due to the authority of his Court* from the effects of the alleged libel.

It is contended, however, that *Ex-parte Moore*, 63 N. C., 397, overrules this interpretation.

But it is insisted, on behalf of Mr. Schenck, that whatever of doubt might have existed upon the question, whether the Act of 1869 excluded his case from contempt of Court, none can exist since the Act of 4 April, 1871. (363)

This last act as to contempts of Court,

(1) Expressly repeals every part of the common law which is not recognized in the provisions of the Act of 1869;

(2) Specifies and defines expressly or by reference to sec. 1 of that act every act of contempt which a court can lawfully notice;

(3) Confines courts to the punishments prescribed in sec. 2 of the Act of 1869, in an unmistakable manner;

(4) Forbids expressly the disbar of an attorney at law, and depriving him of his license to practice, *until after he may be convicted of, or may confess in open Court, some criminal offense showing "him to be unfit to be trusted in the duties of his profession."*

5. If there be any power in legislation over the doctrine of contempt we may now assume as certain,

(1) That for a mere contempt of Court, which the Court itself may find and declare, the only punishment is fine or imprisonment, or both. This is the law of Congress also;

(2) That no attorney shall be disbarred, except for some offense which he shall confess in open Court, or of which he shall be duly convicted according to course of law. The Court is forbidden to try the fact charged;

(3) That the criminal offense thus ascertained shall be such an one as shall deprive him of a moral *status*, and "shall show him to be unfit to be trusted in the duties of his profession."

6. But if the foregoing objections to the sentence of *Judge Logan* were all out of the way there still remains one which cannot be removed. He deprived Mr. Schenck of his privilege or office to practice law, *without giving him a day in*

Court, contrary to natural justice and the express inhibition of sec. 17, Art. I, of the State Constitution, that *no person ought to be deprived of his freehold, liberties or privileges, but by the law of the land.* This sacred principle of liberty, the birthright alike of our English ancestors and (364) ourselves, has been often proclaimed and enforced by the courts of England, and by those of our own and sister States, as the great shield of freedom.

"It is a principle never to be lost sight of, that no person should be deprived of his property or rights without notice and an opportunity of defending them. This right is guaranteed by the Constitution. Hence it is that no court will give judgment against any person, unless such person have an opportunity of showing cause against it. A judgment entered up otherwise would be a mere nullity." *Hamilton v. Adams*, 6 N. C., 161.

"That is not a law of the land which deprives a citizen of his office without trial." *Hoke v. Henderson*, 15 N. C., 1.

"The Constitution and laws of the country guarantee the right that no freeman shall be divested of a right by the judgment of a court, unless he shall have been made a party to the proceeding in which the judgment shall be obtained." *Armstrong v. Harshaw*, 13 N. C., 87.

"It would violate one of the first principles of justice secured to us by sec. 10 (now 17) of our Bill of Rights, that any man should be condemned, in his person or property, without a hearing or an opportunity to be heard." *Otey v. Rogers*, 26 N. C., 534.

Before an attorney can be struck from the rolls of Court "he must have notice of the charges against him, and an opportunity to make his defense." 1 Cal., 188; *Ex-parte Bradley*, 7 Wall., 364; *In re Pollard*, 2 Eng. Priv. Coun. Cases, 106 (1868).

Lord Coke, in *Baggs' case*, 11 Rep., 93, says that if a citizen be removed from his office "without hearing him answer to what was objected, or that he was not reasonably warned, such removal is void and shall not bind the party, and such removal is against justice and right," *"because he who decides a case without hearing both parties, though his decision may be just, is himself unjust."* 1 Bl. Com., 282. "At-

torneys and counselors hold their office during good (365) behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the Court after opportunity to be heard has been afforded." *Ex-parte Garland*, 4 Wall., 333.

7. The sentence expelling Mr. Schenck from the bar is that pronounced when the Judge first took action upon the subject; it is still in force, and is the only one ever passed. His subsequent proceeding, after notification to Mr. Schenck, was no revocation of the illegal sentence, but merely an affirmation that he would not disturb it. It stands now by virtue of its first entry, and therefore is void.

8. The letter of Mr. Schenck, though harsh and passionate, and manifesting a want of respect for *Judge Logan*, does not authorize a deprivation of his license as attorney, even if the Acts of 1869 and 1871 were silent on the question. By the rules of the common law there must be clear evidence of a want of moral *status* in the accused. *Ex-parte Brounsall*, 2 Com., 489; *Baggs' case, ante; Ex-parte Bradley*, 7 Wall., 364; 1 Ch. Cr. Law, 660; 1 Tidd, 89; the *King v. Southerton*, 6 East, 143; *Jerome's case*, Cr. Ch., 74; *Ex-parte Stokes*, 28 E. C. L., 303, and notes (Ed. of 1856); *In re Wallace*, 1 Eng. Priv. Council Cases, 283; *Ex-parte Burr*, 9 Wheat., 529.

9. In our view of the case, the Judge violated the Constitution and laws in the following particulars:

(1) He assumed, without any proof by affidavit or otherwise, that Mr. Schenck was the writer of the letter, contrary to the rule in 4 Bl. Com., 286, and uniformly recognized. *Ex-parte Burr, ante; In re Judson*, 3 Bl. C. C., 148; 3 Atk., 219; 2 Str., 1068; 28 E. C. L., 154.

(2) He assumed that it was written for publication, without any evidence to that effect.

(3) He punished before trial or opportunity to be heard.

(4) He punished for an assumed contempt of Court with a punishment not allowed for contempts, contrary to the Acts of 1869 and 1871, and equally forbidden by the common law. *Ex-parte Bradley, ante; In re Wallace*, 1 (366) Priv. Council Cases, *ante*.

(5) He punished an act which was not the subject of punishment by him.

(6) He imposed punishment upon Mr. Schenck without any conviction in due course of law, or confession by him in open Court, contrary to the plain letter and the manifest meaning of the Act of April, 1871.

Phillips & Merrimon and *Blackmer & McCorkle, contra.*

DICK, J. Courts of justice are established by the Constitution, and are invested with certain inherent powers, which are essential to their existence, and of which they cannot be deprived by the Legislature.

Their province is to construe existing laws and to administer justice, and they must necessarily have the power by summary remedies to preserve order during their sessions, control the action of their officers, and enforce their mandates and decrees.

If the courts could be deprived by the Legislature of these powers, which are essential in the direct administration of justice, they would be destroyed for all efficient and useful purposes.

The government is composed of three coördinate branches, and the Constitution wisely declares that, "The Legislative, Executive, and Supreme judicial powers of the government, ought to be forever separate and distinct from each other." The Constitution is the fundamental law of the State, and contains the principles on which the government is founded. It regulates the division of the sovereign powers, between the coördinate departments, and directs the manner in which they are to be exercised. Each department has appropriate functions; and each is in some degree a check upon the others, so as to prevent hasty and improvident action.

(367) If either department encroaches upon the inherent rights of the others, this wise equilibrium of power will be disturbed and the several departments cannot operate together in harmony, and thus accomplish the objects of good government.

The Legislature, as the law-making power, may within constitutional limits prescribe rules by which the authority of the judiciary is to be exercised. The judiciary cannot pass upon the wisdom and policy of particular legislation; but

they can declare an act of the Legislature to be unconstitutional. This power ought to be exercised with great caution, and in no case unless there is a plain violation of the fundamental laws of the State. To preserve harmony in the government, each department, while it is jealous of its own rights, ought to keep as far as possible in its own appropriate sphere. The common-law power of the courts upon the subject of contempts has been restricted in this State by statute. Rev. Code, ch. 34, sec. 117; Acts of 1868-'69, ch. 177. The whole subject has recently been elaborately considered by this Court, and needs no further discussion. *Moore, ex-parte*, 63 N. C., 397; *Biggs, ex-parte*, 64 N. C., 202.

Since the discussion of these cases the Legislature has seen proper to impose other restrictions upon the discretion and power of the courts, by the acts ratified 4 April, 1871. The necessity and propriety of such acts may well be questioned, as unduly restricting the powers of the courts for the efficient administration of justice. There were already sufficient safeguards against "judicial tyranny." A person under process of contempt, for an offense committed in the presence of the Court, or which tended to obstruct the administration of justice, was entitled to have the particulars of the offense spread upon the records of the Court.

If the offense alleged occurred out of the presence of the Court, and consisted of an act or statement which the Judge regarded as libelous, and done with the intention of bringing the Court into contempt, the respondent might "try himself" upon his own affidavit; or he might join issue as to the facts, and justify by showing the truth of the alle- (368) gations which the Court regarded as libelous, and for which he was held in contempt. If a Judge refused to perform his duty, or acted in defiance of established facts, he would not only meet the indignant condemnation of public opinion, but he would be answerable at the bar of the High Court of Impeachment. The recent act above referred to does not take away any of the inherent powers of the courts, which are absolutely essential in the administration of justice, and is not such an encroachment upon the rights of the judicial department of the government as to warrant us in declaring it to be unconstitutional and void.

It is a law of the land and ought to be observed. It is unnecessary for us to pass upon the facts involved in this matter.

The plea of the respondent was sufficient in law, and his Honor ought to have discharged the rule.

There was error.

PER CURIAM. Order reversed and rule discharged.

Cited: *Kane v. Haywood*, 66 N. C., 31; *Oldham, in re*, 89 N. C., 26; *Robinson, in re*, 117 N. C., 537; *Gorham, in re*, 120 N. C., 487.

(369)

STATE v. SAMUEL A. SMITH.

1. Special courts for cities and towns are not put by the Constitution upon the same footing as the Court for the trial of impeachments, the Supreme Court, the Superior Courts and Courts of Justices of the Peace.

2. These latter courts are established by the Constitution, and owe their existence to that instrument *alone*, and are in nowise dependent upon an act of the Legislature.

3. Special courts for cities and towns are creatures of the legislative will and discretion, and owe their origin to the expression of such legislative will and discretion by constitutional permission.

4. Such discretion is not exhausted by an act erecting such courts, but may be directed as well to their abolition.

5. The Judge of such a court has not a "vested right" in his office within the meaning of the Constitution, as that principle only applies where the office remains.

6. The Act of 30 March, 1871 (Act 1870-'71, ch. 160), had the effect to abolish the office of Judge of the Special Court for the city of Wilmington. The cases of *Hoke v. Henderson*, 15 N. C., 1, and *Cotton v. Ellis*, 52 N. C., 345, cited and approved, and distinguished from this case.

THIS was an appeal from the judgment of *Hon. Edward Cantwell*, professing to act therein as Judge of a Special Court for the city of Wilmington.

The defendant was tried by Edward Cantwell on 12 June, 1871, on the charge of assault and battery, Mr. Cantwell claiming to have the right to try him by virtue of his office of Judge for the Special Court for the city of Wilmington. The transcript showed that the defendant by plea denied the

jurisdiction and existence of said Court, and the office and power of Mr. Cantwell as asserted, but his plea was overruled, and after hearing evidence, he was found guilty of the charge and fined the sum of one dollar.

From this judgment the defendant appealed to this Court, and the only question presented for the consideration of this Court was whether the Legislature possessed the power to abolish the Special Court for the city of Wilmington, and the office of Judge of said Court, which had (370) been established by the Act of 3 February, 1870, which it had professed to do by the Act of 3 March, 1871.

Attorney-General, for the State.

No counsel for defendant.

PEARSON, C. J. This case was filed after *State v. Walker*, *post*, 461, had been decided. In that case a preliminary point excluded a decision of the question whether the General Assembly, in 1870, had power to abolish the Special Court established in the city of Wilmington by the Act of 1868. In this case, a determination of the question becomes necessary for the purpose of this decision; and we must decide it in a collateral way, although it would have been more in accord with the course of the Court to have had it presented directly, in a proceeding in the name of the Attorney-General, in the nature of a *quo warranto* against his Honor, *Judge Cantwell*, for usurping functions as Judge of a Special Court of the city of Wilmington, after the Act of 30 March, 1871.

It is not true, as assumed by the learned argument of Judge Cantwell, that special courts in cities and towns are put by the Constitution on the same footing as the Court for the trial of impeachments, the Supreme Court, the Superior Courts and Courts of Justices of the Peace. The fallacy of his reasoning and his wrong conclusions grow out of this erroneous assumption. These judicial tribunals are established by the Constitution, owe their existence to that instrument alone, are in nowise dependent upon an act of the General Assembly, whereas in respect to special courts, the Constitution simply provides that the General Assembly shall establish such courts in cities and towns *"where the same may be necessary,"* leaving it for the General Assembly in its wisdom to

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Thomas C. MacDonald, Jr., Shackleford, Farrior, Stallings & Evans, P.A., P.O. Box 3324, Tampa, Florida 33601 (813) 273-5000 on this 8th day of April, 1996.

Respectfully submitted,

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