

Pardon Board. Contempt Cases.

Where a person is punished for contempt under Sections 2170 to 2183, Code of Civil Procedure, the governor has no authority to grant pardon or remit the fine imposed, as it is not an offense against the criminal laws of the state within the meaning of Section 9, Article 7 of the Constitution.

Helena, Montana, March 13, 1906.

Hon. Joseph K. Toole, Governor, Helena, Montana.

Dear Sir:—Pursuant to your request for an opinion of this office as to your authority to remit a fine imposed by the Hon. George M. Bourquin, Judge of the Second Judicial District, upon one E. H. Bruce for contempt of the authority of said court by delaying, hindering and obstructing the due and proper execution of the legal process thereof, we respectfully submit the following:

It appears that said E. H. Bruce hindered, delayed and obstructed the service of process issued out of said court, whereupon affidavits showing the facts were presented to said court, an order made directing the said Bruce to show cause, if any he had, why he should not be punished for contempt of court, and upon a hearing thereafter had on November 18th, 1905, before the judge of said court, he was adjudged guilty of contempt, fined \$175.00 and committed to the custody of the Sheriff until the same

was paid or served out in jail at the rate of two dollars per day.

Section 9, Article 7 of the State Constitution provides that: "The governor shall have the power to grant pardons, absolute or conditional, and to remit fines and forfeitures, and to grant commutation of punishments and respites after conviction and judgment for any offenses committed against the criminal laws of this state:"

The question to determine is whether a fine imposed by the court or judge for a contempt of court under Sections 2170 to 2183 of the Code of Civil Procedure is for an "offense committed against the criminal laws of this state" within the meaning of said Section 9, Article 7 of the State Constitution and, therefore, one in which the pardoning power of the governor may be invoked.

There are two methods provided by law for the punishing of contempts of court.

1. Under Sections 2170 to 2183, Code of Civil Procedure, where the court or judge may, without a trial by jury, punish for contempt committed in the immediate view and presence of the court or judge at chambers, or, if not committed in the immediate view or presence of the court or judge at chambers, upon affidavit presented to the court or judge showing the facts constituting the contempt.

2. Under Section 293 of the Penal Code, every person guilty of contempt of court of any of the kinds therein mentioned is declared to be guilty of a misdemeanor.

Where the contempt is prosecuted as a misdemeanor under Section 293 of the Penal Code, it is a "criminal offense" within the meaning of Section 8, Article 3 of the Constitution, which provides that criminal offenses of which justice courts have jurisdiction must be prosecuted by complaint, and criminal actions in the district court, except those on appeal, shall be prosecuted by information or indictment and the accused entitled to a trial by an impartial jury. When contempt is prosecuted in this manner it is perfectly clear that the pardoning power of the governor may be invoked after conviction and judgment.

But where a person guilty of contempt of court is punished by the court under the summary proceedings prescribed by Sections 2170 to 2183, it is simply the exercise of the necessary and inherent power of the court to enforce its orders and protect its dignity. In such a case the court does not rely upon Section 293 of the Penal Code and, therefore, the court by acting upon the authority under the Code of Civil Procedure, declines to treat the contempt as an offense committed against the criminal laws of the state and treats it instead as an offense against the authority and dignity of the court.

These two methods of procedure in punishing for contempt are distinctly recognized by our codes.

See Sec. 11 and Sec. 1223, Penal Code.

State ex rel Flynn v. Dist. Ct., 24 Mont. 33.

Under the summary proceeding prescribed by the Code of Civil Procedure, contempts are held to be quasi-criminal.

They are not "criminal offenses" or "offenses committed against the criminal laws of the state" within the meaning of those terms as used in

the constitution or codes, nor are they civil actions within the strict meaning of that term.

As was said by the court in *State ex rel B. & M. Co. v. Clancy et al*, 30 Mont. 198, "Contempt Proceedings are *Sui Generis*."

We are, therefore, clearly of the opinion that where a person is punished for contempt under the summary proceedings prescribed by Sections 2170 to 2183, Code of Civil Procedure, that the pardoning power of the governor cannot be invoked to relieve him from the punishment imposed.

If the governor had such authority under Section 9, Art. 7 of the constitution, it would, as a matter of law, deprive the judicial department of our government of the power to effectively enforce its orders and protect its dignity, and thus make this separate and distinct department of the government subordinate to the authority of the executive department.

A very full and able discussion of this question is found in *Taylor v. Godrich*, 40 S. W. (Tex.) 522, in which the court, in construing a constitutional provision very similar to ours, held that the governor did not have authority to grant pardons in contempt cases where the punishment was imposed by the court under similar proceedings such as are prescribed by the code of civil procedure. In that case the court said:

"The moment you admit that a governor has the power to cripple a court in the performance of its duties, in the way noticed, then it virtually follows, as a sequence, that the courts, in the administration of justice, are under the control of the governor, and, while he cannot influence their judicial acts and conduct, he may control them. It is not believed that the constitution of this state intended to invest him with any such power. And it is believed, as before said, that the term "criminal cases, as there used, was intended to be understood as meaning those cases and crimes provided for in the criminal code, for which a conviction must be had in the manner provided by law for the trial of criminal cases."

Furthermore, it appears from the judgment of the court that E. H. Bruce was fined \$175.00 on November 18, 1905, and committed to the custody of the sheriff of this county for imprisonment until said fine is paid, or until such imprisonment has continued one day for every two dollars of said fine * * * that execution hereof be stayed three days," etc.

Therefore, it is apparent that the said Bruce is now entitled to his discharge from custody by reason of having been imprisoned in the county jail one day for every two dollars of said fine and that a pardon at this time is not necessary.

Very respectfully,

ALBERT J. GALEN,

Attorney General.