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NOTES

Judicial Independence and Freedom of The Press

Two basic concepts in our system of jurisprudence are freedom of the press¹ and the independence of the judiciary.² While basic they are sometimes incompatible and when a conflict arises there must be a compromise; neither always survives as an absolute. The conflict arises when the press³ publishes an article which encroaches upon judicial independence and to preserve that independence, the judiciary cites the press for contempt. The aroused defense cries "freedom of the press."⁴ Faced with the same problem, it is interesting to note how the courts of this country and those of England have reached different conclusions in the resolution of this conflict.⁵

CONTEMPT IN GENERAL

Rules for preserving discipline essential to the administration of justice came into existence with the law itself, and contempt of court has been a recognized phrase in English law from the twelfth century to the present time.⁶

Contempt can be broadly categorized as civil and criminal. A civil contempt is a disobedience to express orders of the court and a wrong of private nature as between parties to a suit. A criminal contempt is a wrong

¹ Protected by the common law in England and guaranteed in the United States by the First Amendment to the United States Constitution.

² "It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the law's administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit." John Adams, Article XXIX of the Declaration of Rights of the Constitution of Massachusetts, 1780.

³ Press in the sense of any medium of mass communication including newspapers, radio, etc.

⁴ The essential nature of the conflict is epitomized in *Baltimore Radio Show, Inc. v. Maryland*, 193 Md. 300, 67 A.2d 497 (1949), cert. denied, 338 U.S. 912, 70 Sup. Ct. 252 (1950), where in the lower court the American Civil Liberties Union, on the side of the free press, was opposed by the Maryland Civil Liberties Committee, fighting the battle with the judiciary.

⁵ *Free Speech vs. The Fair Trial in the English and American Law of Contempt by Publication*, 17 U. OF CHI. L. REV. 540 at pp. 540-541 (1950). "The contrast is striking between the English law of contempt by publication, which is both clear and consistently enforced, and the heterogeneous law and practice in America. The English courts very strictly curtail all comment regarding a pending trial, save only a fair and accurate report of the proceeding."

⁶ FOX, THE HISTORY OF CONTEMPT OF COURT (1927).

against the state itself and consists of any act which interferes, hinders, or prejudices the administration of justice or which strikes at the discipline and efficiency of judicial authority. Criminal contempts can be broken down into direct contempts, which are contempts committed in the presence of the court, and constructive contempts, which include all acts not committed in the presence of the court which interfere with the independence of the judiciary. Contempts by publication fall under this latter category.⁷

THE LAW IN ENGLAND

In the year 1742, one Mrs. Reade, the printer of a newspaper which characterized witnesses in a chancery proceedings as "affidavit men" was committed to jail in the earliest English case involving contempt. Lord Hardwicke's opinion has been the classic source of the law in this field:

Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard. . . .

There are three different sorts of contempt. One kind is scandalizing the court itself. There may be likewise a contempt of this court, in abusing parties who are concerned in causes here. There may also be a contempt of this court, in prejudicing mankind against persons, before the cause is heard.⁸

Since the above case, down to the present date, the English decisions have been consistent in holding that courts have the inherent power to punish for contempt those publications which violate the rule as laid down by Lord Hardwicke.⁹ Thus, contempt has been found where an editor published the photograph of an accused person when it was still doubtful whether the question of identity might not be in issue;¹⁰ where the news

⁷ Some state courts have held that a publication which interferes with the independence of the judiciary in rendering a decision may be held somewhat analagous to a direct contempt despite the fact that the publishing agency may be remote from the place the trial is being held. *People v. Wilson*, 64 Ill. 195 (1872); *Dale v. State*, 198 Ind. 110, 150 N.E. 781 (1926); *Myers v. State*, 46 Ohio St. 473, 22 N.E. 43 (1889); *State v. Frew*, 24 W. Va. 416 (1884).

⁸ *Roach v. Garden*, 2 Atk. 469 (Ch. 1742).

⁹ Prejudicing the jury has been the most common form of contempt cited by the English courts and it is immaterial whether the jury is sitting in a civil or criminal case. As Lord Ellenborough said in *Rex v. Fisher*, 11 R.R. 799 (K.B. 1811), "If any thing is more important than another in the administration of justice, it is that jurymen should come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced. Is it possible they should do so, after having read for weeks and months before ex parte statements of the evidence against the accused, which the latter had no opportunity to disprove or to controvert. . . ."

¹⁰ *Rex v. Daily Mirror*, 1 K.B. 845 (1927).

of a pending civil and criminal proceeding pertaining to the same transaction was published together;¹¹ for referring to accused as a "rogue," or to suggest that he may soon be compulsorily absent for a considerable length of time;¹² the printing of allegorical cartoons representing accused as crimes with which they had been charged;¹³ a publication presenting the case of a woman mortgagor, with three children, whose husband had deserted her in such a manner as to arouse sympathy;¹⁴ for publishing of a statement of a claim made bona fide and without knowledge, before a hearing;¹⁵ for commenting upon a pending insurance action suggesting arson;¹⁶ or to describe the popularity of a merry-go-round during the pendency of an action to restrain its operation.¹⁷

From this short synopsis it can be seen that the English law values the independence of the courts and the right of fair trial above the freedom of the press to report everything which has news value. In these contempt by publication cases the Crown does not have to show that the publication actually caused the feared perversion of justice, but merely that it has a tendency to do so,¹⁸ for it

is most important that the administration of justice in this country [England] should not be hampered as it is hampered in some other countries.¹⁹

The English approach to constructive contempt is calculated to do away with conviction or acquittal by newspaper. They feel that since the trial is open, and the press has a right to report fairly on the proceedings as they occur, that there is sufficient guarantee of open and fair administration of justice.²⁰

¹¹ *Rex v. Astor*, 30 T.L.R. 10 (K.B.D. 1913). (Held contemptuous because the jury trying the criminal case might have had their attentions called to the civil proceedings with which they were not concerned.)

¹² *Regina v. Balfour*, 11 T.L.R. 492 (Q.B.D. 1895).

¹³ *Rex v. Editor of the Evening News*, 2 K.B. 158 (1925).

¹⁴ *Hatfield v. Healy*, 18 W.L.R. 512 (1911).

¹⁵ *Re Campbell v. Kennedy*, N.Z.L.R. 8 (1884).

¹⁶ *Herring v. British & Foreign Marine Ins. Co.*, 11 T.L.R. 345 (1895).

¹⁷ *Fielden v. Sweeting*, 11 T.L.R. 534 (1895). For a comprehensive review of English cases collected by Mr. Justice Frankfurter see the Appendix to *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 70 Sup. Ct. 252 (1950).

¹⁸ *Rex v. Tibbits and Windust*, 1 K.B. 77 (1902).

¹⁹ *Rex v. Clarke*, 103 L.T.R. (NS) 636 (K.B.D. 1910).

²⁰ Goodhart, *Newspapers and Contempts of Court Law*, 48 HARV. L. REV. 885 (1935). At least one writer feels that English law goes too far in protecting the judiciary from comment, that while the rule is just as applied to pending cases, once the proceeding has been disposed of there should be greater freedom of comment allowed to the press. He says that it is one thing to make the judiciary secure so it can dispense proper justice and quite another to protect it from just comment by the citizen-body. Laski, *Procedure for Constructive Contempt in England*, 41 HARV. L. REV. 1031 (1928).

THE AMERICAN VIEW—FEDERAL COURTS

Prior to the Act of March 2, 1831²¹ the American view was very similar to the English. Under Section 17 of the Judiciary Act of 1789²² the federal courts were empowered with discretion to punish by fine or imprisonment all contempts of authority of said courts. Under this act any publication which reflected on the court or tended to influence it in a pending action was punishable.²³

This was the status of the law until the famed case of Judge Peck, a federal judge in Missouri, who cited for contempt a lawyer for criticizing in a newspaper article the soundness of one of his decisions. The furor created resulted in the judge's impeachment before the House of Representatives, which acquitted him. To forestall future abuse of the summary power Congress passed the Act of March 2, 1831²⁴ which essentially restricted contempt proceedings to those actions which took place "in or near" the courtroom.²⁵

During the early years of the Act it served the purpose for which it was passed, because the Act was construed to bar the court from proceeding against one publishing a newspaper article tending to prejudice or affect the rights of parties to a suit or trial in such court.²⁶ The constitutionality of the Act was upheld in 1873 by the Supreme Court.²⁷

Over the years a split developed in the courts over the interpretation of the "in or near" clause of the Act; some courts adhered to the geographical interpretation and construed "in or near" geographically as pertaining to that kind of misbehavior calculated to disturb the order of the court, such as noise or disorderly conduct, and to prevent its proceeding in the course of its business.²⁸

Other courts gave "in or near" an expanded scope construing it to mean close enough to obstruct the administration of justice. These courts discarded the "physical distance" test for the "probable effect" test.²⁹

²¹ 4 Stat. 487 (1831) defining contempts of the courts of the United States. This act has been embodied in our code today, essentially unchanged, 18 U.S.C. §§ 401, 402, 1503.

²² 1 Stat. 73 (1789).

²³ *Hollingsworth v. Duane*, 12 Fed. Cas. 358 (C.C. Pa. 1801).

²⁴ 1 Stat. 73 (1789).

²⁵ For a full discussion of the Judge Peck episode see Nelles and King, *Contempt by Publication in the United States*, 28 COL. L. REV. 401 at pp. 423-430 (1928).

²⁶ *Ex parte Poulson*, 19 Fed. Cas. 1205 (C.C. Pa. 1835).

²⁷ *Ex parte Robinson*, 19 Wall. 505 (U.S. 1873).

²⁸ *Hillmon v. Mutual Life Ins. Co.*, 79 Fed. 749 (C.C. Kans. 1897); *Ex parte Schulenberg*, 25 Fed. 211 (C.C. Mich. 1885).

²⁹ *In re Brule*, 71 Fed. 943 (D.C. Nev. 1895); *McCauley v. United States*, 25 App. D.C. 404 (1905); *In re Independent Publishing Co.*, 228 Fed. 787 (D.C. Mont. 1915) at 788: "So long as jury and judge are engaged in a trial, it is of no moment

The latter view was adopted by the Supreme Court in *Toledo Newspaper Co. v. U.S.*³⁰ in 1918. This decision not only rejected the geographical limitation on the "in or near" clause but, in ruling on the freedom of the press aspect of the case, it laid down the "reasonable tendency doctrine." This doctrine proceeds on the theory that freedom of the press as guaranteed by the Constitution is not absolute and is subject to "restraints which separate right from wrongdoing." It established the right of the court to cite a newspaper for contempt when the act complained of had a "reasonable tendency" to bring about the feared harm of obstructing the administration of justice. In 1941 the Supreme Court overruled its decision in the *Toledo* case as to the interpretation of the "in or near" clause and returned to the geographical, physical nearness interpretation.³¹ Thus, the power of the federal courts to reach constructive contempts by publication is non-existent.

FREEDOM OF THE PRESS AND THE STATE COURTS

In an early appeal from the decision of a state court citing for contempt on the basis of a publication Mr. Justice Holmes said, "What constitutes contempt . . . is a matter of local law."³² Eighteen years later the Supreme Court held that freedom of speech and of the press

which are protected by the First Amendment from abridgement by Congress . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states.³³

This cleared the way for the Supreme Court to review a state court's finding, in a contempt by publication case, on its facts, so as to preserve the constitutional rights of the applicant.³⁴

In 1941 a conviction in California for contempt by publication was appealed on the grounds of "freedom of the press" to the Supreme Court.

that the improper influence extended over them was miles away from the courtroom rather than adjoining it. The effect is the same, the consequences the same, the evil as great, and it is the effect, consequences, and evil the law guards against."

³⁰ 247 U.S. 402, 38 Sup. Ct. 560 (1918). Mr. Justice Holmes dissented using the traditional geographical approach to the "in or near" clause.

³¹ *Nye v. United States*, 313 U.S. 33, 61 Sup. Ct. 810 (1941).

³² *Patterson v. Colorado*, 205 U.S. 454, 27 Sup. Ct. 556 (1907). Mr. Justice Harlan based his dissent on the grounds that the Fourteenth Amendment to the United States Constitution guaranteed the First Amendment of that Constitution to the states enabling the court to act on its own if it felt the decision on the local level interfered with any constitutional right of freedom of the press.

³³ *Gitlow v. New York*, 268 U.S. 652, 45 Sup. Ct. 625 (1925).

³⁴ After the *Toledo* case, *supra* note 31, many state courts adopted the "reasonable tendency" rule of the federal courts although they were, as yet, not required to do so in this field.

In reversing the conviction³⁵ the Court applied the "clear and present danger doctrine" to contempts by publication.³⁶ Now, unless there is a clear and present danger that the publication will bring about a disorderly or unfair administration of justice, it cannot be cited for contempt.³⁷ The working principle is that the substantive evil must be serious and the degree of imminence extremely high before such publications may be cited.

In *Pennekamp v. Florida*³⁸ a definitive state statute was invoked to sustain a prosecution for contempt by publication. The Court ruled it would accept the findings of fact by the state court as to the violation of the state statute but that the Court still had the right to judge the constitutional issue raised by those facts, namely, whether they satisfied the "clear and present danger doctrine." The Court characterized its approach in these contempt cases as a balance between the desirability of free discussion and the necessity for fair adjudication free from interruption in its processes.³⁹

The pendulum in the United States has swung to the side of unbridled license of the press to publish what it sees fit. Although technically newspapers can still be cited under the "clear and present danger" doctrine, there is not one instance where the Supreme Court has found the requisite "clear and present danger" to sustain a conviction since the doctrine was adopted in the publication area.⁴⁰

CONCLUSION

It would seem in the solution of the contempt by publication problem the English courts utilize the far more practical approach in assuring a

³⁵ *Bridges v. California*, 314 U.S. 252, 62 Sup. Ct. 190 (1941).

³⁶ *Schenck v. United States*, 249 U.S. 47, 39 Sup. Ct. 247 (1919). This was an espionage case and dealt specifically with freedom of speech. The *Bridges* case, *supra* note 35, equated out-of-court publications with speech and brought them under the "clear and present danger" doctrine. This seems a logical development as both rights are now construed as being guaranteed by the First and Fourteenth Amendments to the United States Constitution.

³⁷ The *Bridges* case, *supra* note 35, also categorically discarded disrespect for the judiciary as grounds for contempt by publication in a state court.

³⁸ 328 U.S. 331, 66 Sup. Ct. 1029 (1946).

³⁹ Mr. Justice Frankfurter in a concurring opinion explained, "Every time a situation arises in the Supreme Court it is the duty of the Court to determine whether the state court went beyond the allowable limits of judgment in holding that conduct which has been punished as a contempt was reasonably calculated to endanger a state's duty to administer impartial justice in the pending controversy." The position of the Supreme Court is set out in the *Bridges*, *supra* note 35, and *Pennekamp*, *supra* note 38, cases. *Craig v. Harney*, 331 U.S. 367, 67 Sup. Ct. 1249 (1947) completes the trio of cases which establish the Court's "clear and present danger" approach to the problem of contempts by publication.

⁴⁰ In two recent cases, although they did not involve contempt proceedings, the Court has commented on the extreme "freedom" allowed the press. Justice Jackson in

fair trial. That the publication of evidence which would be inadmissible in a court of law; of one-sided accounts appealing to the baser passions of the readers; of theories and conjectures of the laymen, do not have their effect on judges⁴¹ and on the prospects of picking an unprejudiced jury and keeping it that way,⁴² is the present view of our country. This view contrasts sharply with the English view, which feels that judges are, after all, human beings.⁴³ It would seem that the legal rights of anyone are better trusted to an independent judiciary free from outside pressures than to the press, whose primary concern, in many instances, is influenced by the monetary considerations of circulation and advertising rates.

In re-evaluating our position it would be well to keep in mind that "freedom of the press" does not stand for "unbridled power." In the words of Justice Frankfurter, "A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press," and

Without a free press there can be no free society. Freedom of the press . . . is not an end in itself but a means to the end of a free society. . . . The independence of the judiciary is no less a means to the end of free society, and the proper functioning of an independent judiciary puts the freedom of the press in its proper perspective.⁴⁴

Shepherd v. Florida, 341 U.S. 50, 71 Sup. Ct. 549 (1950): "This court has gone a long way to disable a trial judge from dealing with press interference with the trial practices." *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952): "So far as the federal courts are concerned there are important limitations upon the power to punish summarily for contempt. More fundamentally, it has been thought that this modern phenomenon of 'trial by newspaper' is protected to a considerable degree by the constitutional right of freedom of the press." Summed up, the "in or near" doctrine followed by the federal courts effectively bars the traditional contempt for publication proceedings and the "clear and present danger doctrine" which gives the Supreme Court the power to review convictions in state courts to see if there has been any violation of a federal constitutional right, seems effectively to hamper those state courts.

⁴¹The cases in the United States indicate that the judges are above being influenced by newspaper and radio accounts of legal proceedings (and of surrounding circumstances), that they are made of "sterner stuff" than the common layman. *Craig v. Harney*, 331 U.S. 367, 67 Sup. Ct. 1249 (1947); *Bridges v. California*, 314 U.S. 252, 62 Sup. Ct. 190 (1941).

⁴²This view, equating the jurors with judges in being able to remain above the publicity a case gets, was inherent in *Baltimore Radio Show, Inc. v. Maryland*, 67 A.2d 497 (Md. App. 1949), in which the Supreme Court denied certiorari, 338 U.S. 912, 70 Sup. Ct. 252 (1950), carefully pointing out, however, that the denial did not mean they were adopting or approving the Maryland decision.

⁴³*Humphrey, J.*, in *Rex v. Davies*, 1 K.B. 435 (1945), at p. 441: "I think it is a fallacy to say or to assume that the presiding judge is a person who cannot be affected by outside information. He is a human being and while I do not suggest that it is likely that any judge, as the result of information which had been improperly conveyed to him, would give a decision which otherwise he would not have given, it is embarrassing to a judge that he should be informed of matters which he would much rather not hear and which make it much more difficult for him to do his duty. . . . No one has the right to publish matter which will have that effect."

⁴⁴*Pennekamp v. Florida*, 328 U.S. 331, 66 Sup. Ct. 1029 (1946).