

# SOME ASPECTS OF THE LAW OF CONTEMPT OF COURT IN CANADA, ENGLAND, AND THE UNITED STATES

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If, as Mr. Justice Wilmot claimed in his celebrated opinion in *The King v. Almon*,<sup>1</sup> the power of the courts to punish contempts committed against their dignity and authority is coeval with their very first foundations,<sup>2</sup> it is no less true that the exercise of that power gives rise to many problems, some of which affect basic democratic liberties and few of which are easy to solve. It is hoped in this essay to discuss several of these problems which have assumed increasing importance in recent years and have been productive of much doubt and controversy in the past. Necessarily, however, because of limitations of space, much that is important and of interest in this branch of the law must be either severely condensed or even ignored entirely.

## I — CONSTRUCTIVE CONTEMPTS OF COURT

A basic distinction is usually drawn between contempts committed in the face of the court, and those not committed within its view. Little need be said about contempts of the first type, because it is conceded by even the sternest critics of the contempt power<sup>3</sup> that courts must be free to maintain order and dignity in their proceedings, to ensure obedience to lawful commands, to discipline their own officers, and to prevent abuse of the process of the court.

Of contempts not committed in the face of the court the most important consist of utterances having a tendency to interfere with the fair disposition of proceedings in issue, and those calculated to lower the esteem of the courts in the eyes of the public. There is, in principle, nothing to connect these two forms of constructive contempt, each having a different rationale, and it will be convenient therefore to deal with them separately.

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<sup>1</sup>(1765), *Opinions & Judgments of Chief Justice Wilmot*, 243; 97 E.R. 94. The opinion was not published until 1802.

<sup>2</sup>97 E.R. 94, at p. 99.

<sup>3</sup>*Passim*, Nelles & King, "Contempt by Publication in the United States", (1928), 28 Col. Law Rev. 401, 525; the speeches of the managers in the impeachment proceedings against Judge Peck: Arthur J. Stamsbury, *Report of the Trial of James H. Peck* (Boston, 1833); Harold Laski, "Procedure for Constructive Contempt in England", (1928), 41 Harv. Law Rev. 1031.

**A. Publications and other utterances interfering with the impartial administration of justice.<sup>4</sup>**

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

wrote Lord Hardwicke in the *St. James Evening Post* case.<sup>5</sup> More recently, Mr. Justice Frankfurter of the United States Supreme Court has explained the public policy underlying this necessary restraint on freedom of speech.

A trial is not a 'free trade in ideas', nor is the best test of truth in a courtroom 'the power of the thought to get itself accepted in the competition of the market.' A court is a forum with strictly defined limits for discussion. It is circumscribed in the range of its inquiry and in its methods by the Constitution, by laws, and by age-old traditions. Its judges are restrained in their freedom of expression by historic compulsions resting on no officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions.<sup>6</sup>

Until the second half of the nineteenth century, however, cases of constructive contempts by publication, at any rate in relation to criminal trials, were practically unknown.<sup>7</sup> The reason for their rarity was that until the passing of the Law of Libel Amendment Act of 1888,<sup>8</sup> it was generally considered unlawful to publish reports of preliminary proceedings before magistrates, on account of their supposed tendency to interfere with a fair trial, so that newspapers "were not likely to go to the further length of announcing and commenting upon supposed facts, to the prejudice of a prisoner, which had not even come before the magistrates."<sup>9</sup> "Trial by newspaper", then, is a modern phenomenon scarcely more than sixty years old. But in that short period of time it has grown to an alarming extent and would, no doubt, constitute a serious threat to the fair conduct of criminal trials in England and Canada, were it not for the strict vigilance of the courts in these countries.

In relation to criminal trials the source of prejudice to the accused arising out of such publications may assume one of many forms. It may consist in the printing of hearsay evidence about the crime or even in the fabrication of

<sup>4</sup>The writer has come across some 28 cases in Canada between 1877 and 1958 involving publications of this alleged nature, 12 of which related to civil proceedings and 16 to criminal. 2 of the cases are unreported. Most of them are referred to hereafter. An accurate report of judicial proceedings is not, of course, a contempt, although, especially in criminal cases involving preliminary hearings, it may be seriously prejudicial to the accused. See Note in (1956), 34 Can. Bar Rev. 206.

<sup>5</sup>(1742), 2 Atk. 469, at p. 469; 26 E.R. 683.

<sup>6</sup>*Bridges v. State of California; Times-Mirror Co. v. Superior Court of State of California in & for the County of Los Angeles*, (1942), 86 L. Ed. 192, at p. 214. (Citations omitted).

<sup>7</sup>*R. v. Davies* [1906], 1 K.B. 32, per Wills J. at p. 38.

<sup>8</sup>51 & 52 Vict., c. 64.

<sup>9</sup>[1906] 1 K.B. 32, at p. 38.

non-existent testimony; in alleged confessions which were either never made by the accused or are held not to be admissible at the trial; in anticipating the accused's defence or speculating on his guilt; or in printing his picture when the question of identification may be in issue. Some publications of this nature which have in the past decade come before the courts in England and Canada may now briefly be referred to.

In a 1954 decision, *R. v. Bryan*,<sup>10</sup> the American publishers of three "detective" magazines were fined three thousand, five thousand and four thousand dollars respectively, and the editor of one of the magazines two thousand dollars, for printing hearsay evidence about a pending murder case which would not have been admissible at the trial. This case created a new precedent — thus anticipating a similar English decision by three years<sup>11</sup> — in that the local distributor for one of the publications was sent to prison for ten days, Chief Justice McRuer pointing out that,

Even if he did not know the contents of the magazines, the responsibility for their circulation still remains on him. He received them directly from abroad. If the local distributor is not to be held responsible in such cases I doubt if there is anyone within the jurisdiction of this Court that can be held responsible in the absence of an appearance before the court of the foreign distributor or the foreign publisher.<sup>12</sup>

A particularly flagrant example of comment prejudicial to the accused came before a divisional court in England in *R. v. Bolam*.<sup>13</sup> There a London newspaper with a country-wide circulation had called the accused, who was on trial for his life, a "vampire", and had imputed to him murders beyond the one with which he was charged. The editor was sentenced to three months' imprisonment and the publishers were fined ten thousand pounds. In imposing a term of imprisonment Lord Goddard was following an earlier precedent, set by his court in 1902,<sup>14</sup> where, for a similar type of offence, the editor and reporters had received a six weeks' sentence each.

Two unreported Ontario decisions also deserve to be noted.<sup>15</sup> In *R. v. Sullivan*,<sup>16</sup> an Ottawa newspaper printed a report that the accused, who was on trial for murder, was going to tell "[her] own story of how her husband came to his death"; and in *R. v. Meek*<sup>17</sup> the offending newspaper falsely reported that the accused, likewise on trial for his life, had voluntarily given himself up to the police, whereas in fact he had been arrested. In both cases only fines were imposed.

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<sup>10</sup>[1954] O.R. 255; 108 C.C.C. 209.

<sup>11</sup>See *R. v. Griffiths* [1957] 2 Q.B. 192.

<sup>12</sup>[1954] O.R. 255, at p. 265.

<sup>13</sup>(1949), 93 Sol. Journ. 220.

<sup>14</sup>*R. v. Tibbitts & Windhurst* [1902] 1 K.B. 77; cf. *R. v. Clarke* (1910), 103 L.T. (N.S.) 636, per Darling J. at p. 640.

<sup>15</sup>See Note by F. A. Brewin in (1952), 30 Can. Bar. Rev. 614.

<sup>16</sup>February 13, 1951. (McRuer C.J.)

<sup>17</sup>March 10, 1952. (Aylen J.)

One of the direct evils resulting from prejudicial comments of the aforementioned character is that the trial court, when its attention is drawn to them, is always confronted with the difficult decision of whether to order a new trial or not. In *R. v. Dorion*,<sup>18</sup> for example, a new trial was ordered after it was proven that the jury had seen the newspaper report of a *voir-dire* proceeding in which a document was held not to be admissible. In *R. v. MacDonald*,<sup>19</sup> on the other hand, the Ontario Court of Appeal refused to order a new trial because it was not shown that any member of the jury had read the offending article and also because accused's counsel had agreed to the trial judge admonishing the jury to disregard the publication. The sufficiency of such warnings may, however, be seriously doubted, since it is difficult to eliminate the seeds of prejudice when once they have been sown.

The examples that have been cited so far reflect efforts by sensational newspapers to boost their circulations by catering to vulgar tastes. To increase sales rather than to secure a conviction is their aim. Unhappily, however, instances are also not wanting where publishers, carried away by political passions, have sought to usurp the functions of the public prosecutor as well. The danger is particularly great when the accused is a member of an unpopular minority party or religious sect. In *R. v. Editor of Evening News*,<sup>20</sup> for example, after a number of men had been charged with seditious libel the "Evening News" published a cartoon showing three allegorical figures in a car being arrested, who were labelled "communism", "sedition", and "mutiny". The editor was fined a hundred pounds. In *R. v. Wallbridge*,<sup>21</sup> on the other hand, McKay J. was not satisfied that the publication in question could interfere with the fair trial of the accused and refused to find the paper in contempt of court. The facts were that during a strike by unemployed men in Toronto the accused were charged with the kidnapping of a reeve. While they were awaiting trial the "Globe and Mail" published reports about alleged plans by communists to foment violence and suggested that the kidnapping of the reeve had been part of their plot.

It is often said that comments relating to criminal proceedings are proscribed because of their tendency to prejudice the minds of the jury, but that where a judge is sitting alone he may ignore such publications from the detached height of his Olympian aloofness.<sup>22</sup> Such a view, if erected into an inexorable dogma, presupposes that judges are merely "the habitations of bloodless categories

<sup>18</sup>(1953), 10 W.W.R. (N.S.) 379 (Man.).

<sup>19</sup>[1939] 4 D.L.R. 377; 72 C.C.C. 351 (Ont. C.A.).

<sup>20</sup>London *Times*, October 27, 1925 (K.B.D.), cited by A.L. Goodhart in (1935), 48 Harv. Law Rev. 885 at p. 891.

<sup>21</sup>[1936] O.R. 482; 67 C.C.C. 89.

<sup>22</sup>See *In re William Thomas Shipping Co.* [1930] 2 Ch. 368, *per* Maugham J. at p. 373; *In re North Renfrew Election* (1904), 9 O.L.R. 79 (C.A.), *per* Garrow J. A. at p. 84; *Meriden Britannia Co. v. Walters* (1915), 34 O.L.R. 518 (Boyd C.).

of the law which pursue their predestined ends."<sup>23</sup> Mr. Justice Jackson of the United States Supreme Court expressed himself bluntly when he wrote,

I do not know whether it is the view of the Court that a judge must be thick-skinned or just thickheaded, but nothing in my experience or observation confirms the idea that he is insensitive to publicity.<sup>24</sup>

The sentiments of a wellknown English criminal judge will also no doubt find a ready echo in most judges' hearts. Mr. Justice Humphreys in *Delbert-Evans v. Davies-Watson*,<sup>25</sup> writes:

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 am not saying for a moment that it is likely that any judge would give a decision which he would not have given but for information which had been improperly conveyed to him, it is embarrassing to the judge that he should be told matters which he would much rather not hear and which would make it much more difficult for him to do what is his duty . . .

It is impossible to be dogmatic about the question and to assert categorically, on the one hand, that a judge must always be a man of fortitude whose tranquil mind nothing can ever disturb, or to suggest, on the other, that his judicial mechanism is of so delicate a character that the least outside comment will throw it hopelessly out of gear. A balance has to be struck between these extreme views. As there is bound to be a difference of opinion, however, where the line ought to be drawn beyond which comment on a pending case may not go, and whether it has been transgressed in any particular case, some fluctuation in the decisions is almost inevitable. Certain generalizations about them, however, are permissible.

First, comment that a judge is not impartial, that his mind is poisoned against one of the litigants, that the decision is a foregone conclusion, or that his mind will be influenced by non-legal considerations is invariably treated as a contempt. Thus, during the famous Tichborne trial one Skipworth was sentenced to three months' imprisonment for declaring at a public meeting that "Lord Chief Justice Cockburn was not the fit person to try anything in connection with the case."<sup>26</sup> In an old Upper Canada case, *R. v. Wilkinson*,<sup>27</sup> the defendant was more fortunate. He, having made a full apology to the court, no fine but only costs were imposed. His offence consisted in publishing a letter in which he predicted that one W. "was as certain to be convicted as a libeller ever was before his trial."<sup>28</sup> Yet it may be suggested with some diffidence that such comments, made as they often are in the course of a heated public controversy, ought only to be punished in the most extreme cases and then

<sup>23</sup>*Craig v. Harney* (1946), 91 L. Ed. 1546, per Frankfurter J. at p. 1560.

<sup>24</sup>*Ibid.* at p. 1562.

<sup>25</sup>[1945] 2 All E.R. 167 at p. 172 (K.B.D.).

<sup>26</sup>*R. v. Castro, Skipworth's Case* (1873), L.R. 9 Q.B. 230.

<sup>27</sup>(1877), 41 U.C.Q.B. 42.

<sup>28</sup>See also *Stoddard v. Prentice* (1898), 6 B.C.R. 308, 5 C.C.C. 103; *R. v. McInroy* (1915), 9 W.W.R. 846, 25 C.C.C. 49 (Alta.); *Levesque v. Rawley* [1955] Que. S.C. 36.

only because of their tendency to embarrass the judge in trying the case and not because they libel him.

In the second place, the courts react strongly to coercion or intimidation in the form of suggestions that they ought to try a dispute in a particular manner or that a convicted prisoner deserves to receive a particular punishment. Sensational newspapers masquerading as the defenders of public morals are especially inclined to this form of comment. Thus in the New Zealand case of *A. G. v. Tonks*,<sup>29</sup> after the accused had pleaded guilty to an indecent assault on a little girl but before he had been sentenced, the defendant's newspaper demanded that he should meet "with the utmost rigour of the law when he comes up for sentence." Threats of a more blatant type are happily rare, but not entirely unknown.<sup>30</sup> The public policy which requires curtailment of such comments is obvious. It may be placed on two grounds. First, if a heavy sentence is in fact imposed there is a danger that the impression may gain ground that the court has yielded to external pressure; in the second place, the public interest may be injured in that the court, in its anxiety to prove its independence from outside influence may inflict a much lighter sentence than the offender actually deserved to receive.<sup>31</sup>

In the third class of cases fall those comments in which the courts have been divided in their opinion as to whether they constitute a legitimate ground for complaint. They are generally cases in which one side to a pending lawsuit has heaped ridicule or cast unfair reflections on the other. Election and libel cases in Canada in particular have produced a crop of such incidents.<sup>32</sup> But, as Moss C.J.A. pointed out on one occasion, "In election cases great latitude must be allowed to public journalists in the language of comments for the making of which any opportunity presents itself",<sup>33</sup> and there is no sound reason why the courts should have to dissipate their energies adjudicating the merits of party polemics.

But though injurious reflections on a party to a lawsuit may not influence the court in its decision, yet it may, in extreme cases, deter that party from continuing with the litigation for fear of being held up to public obloquy, and if the comment is of such a character the court will intervene to protect him.

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<sup>29</sup>[1939] N.Z.L.R. 533. See also *R. v. Thomas* [1952] O.R. 22, 102 C.C.C. 257.

<sup>30</sup>In *Express Traffic Ass'n v. Cities of Montreal et al.* (1919), 25 C.R.C. 61 at p. 109 *et seq.* Sir Henry Drayton points that the Board had received numerous threatening letters from members of the public and unofficial committees.

<sup>31</sup>*Cf. Times-Mirror Co. v. Superior Court* (1942), 86 L. Ed. 192, *per* Frankfurter J. at 223.

<sup>32</sup>In *re Lincoln Election* (1878), 2 O.A.R. 353; *In re Bothwell Election Case* (1883), 4 O.R. 224; *R. v. Woodworth* (1886), 19 N.S.R. 186; *In re North Renfrew Election* (1904), 9 O.L.R. 79; *R. v. Bonmar* (1903), 14 Man. R. 481 (appl'n dismissed); *Guest v. Knowles* (1908), 17 O.L.R. 416 (appl'n dismissed); *Staples v. Isaacs & Harris* [1939] 4 D.L.R. 556 (B.C.) (appl'n dismissed); *Sommers v. Sturdy* (1956), 19 W.W.R. (N.S.) 583 (B.C.) (appl'n dismissed).

<sup>33</sup>*In re Lincoln Election* (1877), 2 O.A.R. 353 at p. 369.

Such judicial protection was extended in the *St. James Evening Post*<sup>34</sup> case, and in other cases decided since 1742.<sup>35</sup> It is possible, however, to suggest difficult cases. Not every one, for example, agrees with all the activities of the Lord's Day Observance Society. If the Society, for example, seeks to prosecute the organizers of a charity show for staging a performance on a Sunday, must criticism of their unpopular action be stilled until after the conclusion of the hearing?<sup>36</sup> In an English case<sup>37</sup> the applicants for a committal order had objected to certain slum clearance orders of the Ministry of Health, and had entered an appeal against them. While the appeal was pending the defendant newspaper published articles suggesting that the applicants were hindering the progress of housing in the borough. The Divisional Court held, however, in a very brief judgment, that these articles could not reasonably be construed as calculated to deter the applicants from proceeding with their appeal, and the application to commit was refused.

When are proceedings pending? As, generally, it is of the essence of the offence that proceedings should be pending when the allegedly prejudicial comments are published it is important to determine this question. "When a case is pending", the salutary principle has been laid down by an American judge,<sup>38</sup> "is not a technical, lawyer's problem, but is to be determined by the substantial realities of the specific situation." In the case of a criminal prosecution the exigencies of a fair trial demand that all comment be suppressed as soon as the accused has been arrested or charged, even though he has not yet been committed for trial.<sup>39</sup> And if an arrest is imminent but has not yet been effected comment may also be prejudicial to the accused, since "it is possible very effectually to poison the fountain of justice before it begins to flow."<sup>40</sup>

<sup>34</sup>2 Atk. 469.

<sup>35</sup>See, for example, *In re William Thomas Shipping Co.* [1930] 2 Ch. 368; *Hutchinson v. Amalgamated Engineering Union*, *The Times*, August 25, 1932, cited by Dr. Goodhart in (1935), 48 Harv. Law Rev. 885, at p. 895; *R. v. McInroy* (1915), 9 W.W.R. 846, 25 C.C.C. 49; cf. *Staples v. Isaacs & Harris*, *ante*, footn. 32. Kingsley Martin recalls that when Harold Laski issued a writ for libel during the general election of 1945 against various newspapers the then Lord Chancellor (Lord Simon) suggested that he had only taken this step "to stop people's mouths" and that he would bet that "as soon as this election is over you won't hear anything more about these writs." The Lord Chancellor subsequently apologised publicly about these remarks: Kingsley Martin, *Harold Laski*, (1953), p. 165.

<sup>36</sup>My example, I hasten to add, is quite hypothetical and is not related to any case of which I am aware.

<sup>37</sup>*In re South Shields (Thomas Street) Clearance Order 1931* (1932), 173 L.T. 76.

<sup>38</sup>*Times-Mirror Co. v. Superior Court* (1942), 86 L. Ed. 192, *per* Frankfurter J. at p. 225.

<sup>39</sup>*R. v. Parke* [1903] 2 K.B. 432; *R. v. Clarke* (1910), 103 L.T. 636; *R. v. Solloway* [1936] O.R. 469, 67 C.C.C. 77.

<sup>40</sup>*R. v. Parke*, *ante*, *per* Wills J. at p. 437; *R. v. Daily Mirror* [1927] 1 K.B. 845, *per* Lord Hewart at p. 851.

But even in relation to civil proceedings the English courts have held<sup>41</sup> that the *ex parte* publication of a statement of claim may constitute an interference with a fair trial, and it is possible that the Canadian courts may adopt the same attitude, although the question appears so far not to have called for a definitive answer.<sup>42</sup>

It is, however, in relation to appeals that the courts have experienced the greatest difficulty. If it is right to insist on newspapers and other public media of mass communications exercising restraint in their comments during the pendency of a trial, it is no less important that there should not be an endless series of moratoria on public discussion of matters of public interest: for it must be recognized that "public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist."<sup>43</sup> Mr. Justice Field, in *Dallas v. Ledger*,<sup>44</sup> explained the issues involved when he remarked,

Mr. Murphy, with his usual fairness, admitted that if the article had been published before the notice of an application for a new trial, it could not have been complained of. But surely the liability of the writer could not depend upon a notice having been given of an application for a new trial? Suppose the new trial refused by the Court, and an appeal brought. Suppose an appeal carried to the House of Lords. Is the right of the public writer to be in suspense for two or three years? The case would by that time have lost all interest. In that view the right of comment would not be of much value.

Consequently, in civil cases, the consensus of judicial opinion in both England and Canada inclines in favour of the view that once the trial is over comment is to be freely permitted.<sup>45</sup> It is important, however, to appreciate the rationale

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<sup>41</sup>*R. v. Astor* (1913), 30 T.L.R. 10, *per* Scrutton L.J. at pp. 12-13; *Cheshire v. Strauss* (1896), 12 T.L.R. 291, *per* Day J. at p. 291.

<sup>42</sup>An affirmative attitude was taken by McPhillips J. in *Granger v. Brydon-Jack* (1918), 25 B.C.R. 526, at p. 528; *R. v. Robinson & Co.* (1954), 34 M.P.R. 257 (Nfld) is an unusual case. A newspaper and radio station were there committed for publishing *ex parte* affidavits filed by the Newfoundland government in connection with civil proceedings brought against a person who at the time of publication was awaiting trial on a criminal charge involving facts similar to those in issue in the civil proceedings. The defendants in the committal proceedings put forward the defence that the accused's solicitor had consented beforehand to the publication of the affidavits, but this objection was held by Dunfield J. to be irrelevant; *sed quaere*. Can his decision be justified on the ground that public policy does not allow an accused person to barter away his right to an impartial trial?

<sup>43</sup>*Times-Mirror Co. v. Superior Court* (1942), 86 L. Ed. 192, *per* Black J. at p. 206.

<sup>44</sup>*Dallas v. Ledger* (1888), 4 T.L.R. 432 at p. 433.

<sup>45</sup>*Dunn v. Bevan* [1922] 1 Ch. 276; *Glasgow Corp. v. Hedderwick & Sons* [1918] S.C. 639; *In re O'Brien* (1889), 16 S.C.R. 197, *per* Gwynne J. at p. 229. A similar question arises where a motion for a new trial is pending or a new trial is likely because of the disagreement of the jury. The English cases on this point are difficult to reconcile. *In re Labouchere* (1901), 17 T.L.R. 578 and in *R. v. Freeman's Journal* [1902] I.R. 82 it was held that a contempt had been committed, but the opposite conclusion was reached in *Dallas v. Ledger* (1888), 4 T.L.R. 432 and *Metzler v. Goumod* (1874) 30 L.T. 264.

behind this rule. It is based on the reasoning that, in civil cases at least, the appeal court is not likely to be influenced by such comments. But in criminal cases the risk is very much greater, and it is on this ground, *inter alia*, that a divisional court in England held in 1945<sup>46</sup> that reports on the criminal activities of a prisoner whose period for appealing had not yet expired might be held to be in contempt of court.

### B. Publications and other utterances libelling the courts.

By publications libelling the courts or a particular judge is meant those publications, not necessarily referable to any pending proceedings, which tend to bring the administration of justice into hatred or contempt or lower the courts in the esteem of the public — in other words, disrespectful criticism of the judiciary.<sup>47</sup> To those familiar with the history of seditious libel in England<sup>48</sup> it will be apparent that this definition is the same as the one that was, and perhaps strictly speaking still is, applied in England to seditious libels affecting the administration of justice,<sup>49</sup> so that the question whether there was any substantial distinction between these two forms of libel (apart from the procedural aspects and the question of intent which will be dealt with later) was at best of academic interest. Now, however, that four of the five judges constituting the majority of the Supreme Court of Canada appear to have decided in *Boucher v. The King*<sup>50</sup> that a libel on the courts, without more, is not seditious, the distinction becomes of great importance because if it is the case that historically no real distinction was drawn between these two offences — assuming they were two — then a cogent argument can be made out that a libel on the courts in Canada should no longer be punishable as a contempt of court either. In what follows I make no attempt to answer the historical question definitively, but desire merely to draw attention to a few points which I believe justify the question being raised.

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<sup>46</sup>In *Delbert-Evans v. Davies & Watson* [1945] 2 All E.R. 167. See also *R. v. Solloway* [1936] O.R. 467.

<sup>47</sup>Dr. Goodhart defines it as "hostile criticism of the judge as judge": (1935), 48 Harv. Law Rev. 885 at p. 898. See also *Oggers on Libel & Slander*, 6th ed., p. 431.

<sup>48</sup>Stephen, *History of the Criminal Law of England*, Vol. II, ch. XXIV; Chafee, *Free Speech in the United States*, (1946), ch. I.

<sup>49</sup>Stephen, *A Digest of the Criminal Law*, 7th ed., articles 123-126. Referring to Stephen's definition Locke J. in *Boucher* points out that the words 'hatred or contempt against the administration of justice' "must necessarily, I think, include the manner of its administration by individual judges or others discharging judicial functions." [1951] S.C.R. at p. 317. See also Dicey, *The Law of the Constitution*, 7th ed., p. 240.

<sup>50</sup>[1951] S.C.R. 265. The four were Kerwin C.J. and Locke, Kellock & Estey JJ. The fifth member, Rand J., did not find it necessary to deal with the question. See [1951] S.C.R. 265, at pp. 286-7.

During the Middle Ages libels as an offence appear to have been unimportant. Coke cites only two cases in which persons were indicted for libelling the King or other important persons of the realm.<sup>51</sup> Stephen writes,

[t]here is no reason to doubt that practically libels attracted comparatively little attention till the Court of Star Chamber was at the height of its power, by which time the invention of printing, and the great intellectual movement of which it was one symptom, had given an importance to political writings which they did not possess before. It must, however, be remembered, that for a long time the offences which were afterwards treated as seditious libels were dealt with in a different manner and with much greater severity, for though words were not regarded as overt acts of treason by themselves, writings were (1 Hale P.C. 112), if they were considered to display a treasonable intention, so that what would now be regarded at most as libels may in earlier times have been punished as treason.<sup>52</sup>

Moreover, from the time of Edward III onwards down to the reign of James I many statutes creating new felonies and misdemeanours dealt specifically with the discussion of religious and political subjects. It will also be recalled that the system of licensing of books was not allowed to fall into abeyance until 1694, and so long as that system prevailed it was not likely that licences would be granted to those whose views were suspect or that those who received them would be likely to abuse their privilege.

Coke's report under the heading of *The Case de Libellis Famosis*<sup>53</sup> contains possibly the earliest general reference to the law relating to libels on judges. According to Coke the Star Chamber resolved in that case, as to such libel, that

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<sup>51</sup>*Third Institute*, 174, *sub. nom.* "Libels and Libellers". The two are, first, one of 10 Edw. III (1337) in which Adam de Ravensworth was convicted for calling Richard of Snowshull "Roy de Ravensers"; the other of 18 Edw. III (1345) in which John de Northampton, an attorney, wrote a letter to Ferrers, one of the King's Council, saying that neither the judges of the Court of King's Bench nor their clerks "any great thing would do by the commandment of our lord the king, nor of Queen Philip (Philippe) in that place more than of any other of the realm." Sir John Fox was able to trace only four recorded instances of convictions for libels on the court up to the year 1600, of which John de Northampton's case (*supra*) was one: see Sir John Fox, *Contempt of Court*, Appendix, items (41), (42) and (71). In *Wraynham's ease* (A.D. 1618), 2 How. St. Tr. 1064, which was a proceeding before the Star Chamber for a libel on Lord Bacon by accusing him of having done injustice, Lord Hobart C.J.C.P. at p. 1080 refers as precedents to cases involving *inter alia*, libels on non-judicial members of the government. Thus it would seem that neither he nor Lord Coke regarded libels on the judiciary as falling into a special legal category. *Odgers on Libel & Slander*, 6th ed., after referring to the three remedies for contempt of court (indictment for misdemeanour, injunction and summary punishment) refers (*ibid.* 432) under the heading of "information or indictment" to page 426 of his work wherein he deals with seditious libels on the administration of justice, thus apparently regarding an indictment for seditious libel and an indictment for contempt of court as being one and the same.

<sup>52</sup>Stephen, *History*, Vol. II, p. 302.

<sup>53</sup>Coke's Rep., Vol. III, 254.

If it be against a magistrate, or other public person, it is a greater offence; for it concerns not only the breach of the peace, but also the scandal of government; for what greater scandal of government can there be than to have corrupt or wicked magistrates to be appointed and constituted by the King to govern his subjects under him? And greater imputation to the state cannot be, than to suffer such corrupt men to sit in the sacred seat of justice, or to have any meddling in or concerning the administration of justice.<sup>54</sup>

It will be observed that Coke draws no distinction between libels on judges and libels on other officers of state holding high office, nor does he suggest that there are different kinds of possible libels on the judiciary, that is to say, one known as "contempt of court" and another as "seditious libel". After *De Libellis Famosis* and before 1762 there were a number of indictments for libels on the courts and so far as we have been able to discover no such distinction appears to have been drawn in them.<sup>55</sup> The task of determining whether a distinction was deemed to exist is made the more difficult by the rule — for which *R. v. M'Hugh*, [1901] 2 I.R.569 is clear authority — that an indictment or information for seditious libel need not use the word "seditious".

Then, did *The King v. Almon* purport to draw such a distinction? If such was Mr. Justice Wilmot's intention, no hint of it will be found in his judgment. The burden of it was simply to establish the proposition that libels on the courts were from time immemorial punishable summarily as well as by indictment and information. Accurate historical scholarship, however, has now shown this view to be untenable and has established the fact that before the 18th century and after the abolition of the Star Chamber libels on judges published out of court, in so far as the common law courts at least were concerned, were always tried by the regular methods of trial and never summarily.<sup>56</sup> Neither does any such distinction appear to have been adverted to in a number of reported trials involving libels on the courts held subsequent to *The King v. Almon* and prior to *Boucher's* case.<sup>57</sup>

The four members of the Supreme Court in *Boucher v. The King* who held that a libel on the administration of justice was not seditious unless there was also an incitement to disobey the lawful orders of the courts were faced with an obvious difficulty, for they could not ignore the fact that in England and Ireland trials for libels on the courts had been reported in which no such incitement had been proved or alleged. These cases therefore had to be distinguished in one of the following three ways: (1) on the ground that they

<sup>54</sup>*Ibid.* at p. 255.

<sup>55</sup>E.g., *Jeffes' case* (1630), Cro. Car. 175; 79 E.R. 753; *Radley's case* (1679), 7 How. St. Tr. 701; *R. v. Smith* (1680), 7 How. St. Tr. 931; *R. v. Carr* (1681) 7 How. St. Tr. 1114.

<sup>56</sup>Fox, "The Summary Process to Punish Contempts", 25 Law Quar. Rev. 238, 354; *ibid.*, *The King v. Almon*, 24 Law Quar. Rev. 184, 266.

<sup>57</sup>E.g., *R. v. Gordon* (1787), 22 How. St. Tr. 177; *R. v. Watson* (1788), 2 T.R. 199; *R. v. White & Hart* (1808), 30 How. St. Tr. 1131, 1193; *R. v. M'Hugh* [1901] 2 I.R. 569.

were not binding on the Supreme Court and that our more enlightened democracy called for the fewest possible restraints on freedom of speech. Although the judges were quick to point out the different political conceptions of the relationship between a government and its people prevailing in the twentieth as compared with the eighteenth and earlier centuries, with the possible exception of Kerwin J., they were not prepared to write the law anew, as it were, and to ignore previous decisions entirely; (2) on the ground that these cases were wrongly decided; or (3) on the ground that the indictments or informations in these cases charged the offence of "contempt of court" and not of "seditious libel". Kerwin J. held that *R. v. M'Hugh*<sup>58</sup> should not be followed.<sup>59</sup> Kellock J. adopted the third ground.<sup>60</sup> Estey J., although he agreed with the majority, did not refer to them and therefore had no need to distinguish them.<sup>61</sup> Locke J. adopted both the second and the third ground.<sup>62</sup> He distinguished Coke's *De Libellis Famosis*,<sup>63</sup> *R. v. Tutchin*,<sup>64</sup> and *R. v. Francklin*<sup>65</sup> on the ground that they were based on the now invalid reasoning that judges being appointees of the Crown a libel on them was a libel on the King. As for *R. v. White and Hart*,<sup>66</sup> he did not regard the case as an indictment for seditious libel, and in his opinion *R. v. Sullivan*<sup>67</sup> and *R. v. M'Hugh*<sup>68</sup> were bad law. Mr. Justice Rand, who formed the fifth member of the majority, found it unnecessary to express any opinion since he held that the publication before the court was in any event nothing more than a legitimate airing of grievances by a minority which felt itself oppressed.

Of the dissenting members of the court, Rinfret C. J. did not deal with libels on the administration of justice. Cartwright J., on the other hand, delivering the judgment of himself and Fauteux J.<sup>69</sup> (and with whose opinion on this point Taschereau J. concurred)<sup>70</sup> held that, while an intent to stir up ill-will between different sections of the community was not seditious without an accompanying incitement to violence, a mere intention to bring the administration of justice into hatred or contempt, without more, sufficed to make it seditious. The learned judge justified the distinction on the ground that a libel on the administration of justice must of necessity lead to an interference with lawfully constituted authority, whereas, in his opinion, a libel on another

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<sup>58</sup>[1901] 2 I.R. 569.

<sup>59</sup>[1951] S.C.R. 265 at p. 283.

<sup>60</sup>*Ibid.* at p. 303.

<sup>61</sup>*Ibid.* at p. 315.

<sup>62</sup>*Ibid.* at pp. 318-27.

<sup>63</sup>77 E.R. 250.

<sup>64</sup>(1704), 14 How. St. Tr. 1095.

<sup>65</sup>(1731), 17 How. St. Tr. 626.

<sup>66</sup>(1808), 30 How. St. Tr. 1131, 1193.

<sup>67</sup>(1868), 11 Cox C.C. 44.

<sup>68</sup>[1901] 2 I.R. 569.

<sup>69</sup>[1951] S.C.R. 265, at pp. 344-5.

<sup>70</sup>*Ibid.* at pp. 283-4.

section of the community would not necessarily have this effect. He appears also<sup>71</sup> to have assumed that there is a clear difference between a seditious libel and a libel that is merely a contempt of court, but unfortunately neither he nor any of the other learned judges who made the same assumption explain what this difference is.

It may be said, however, that there is at least one important distinction between the two offences: in the case of seditious libel an intention to bring the administration of justice into hatred or contempt must be proved, whereas in the case of a contempt of court intention is quite irrelevant. There are two aspects to this question: the first is whether ignorance of the contents of the offending publication affords a defence to either misdemeanour, and the second is whether the accused can give evidence that his intent was not to bring the courts into ill-repute but was of a more praiseworthy character.

As to the first, it is no doubt true, as *R. v. Griffiths*<sup>72</sup> shows, that ignorance of the contents of an article which comments prejudicially upon a pending trial will not excuse the publishers or distributors. Whether the same stringent rule will be applied to libellous comments upon a judge is less certain, but the answer is probably in the affirmative. In *McLeod v. St. Aubyn*,<sup>73</sup> for example, the Privy Council held that the appellant who had innocently lent a copy of the paper containing the libel to a friend without knowledge of its contents was neither constructively nor necessarily guilty of contempt of court. The Judicial Committee indicated, however, that the position would have been different if a printer or publisher had been charged, because "a printer and publisher intends to publish, and so intending cannot plead as a justification that he did not know the contents."<sup>74</sup> The same rule, however, applied before Fox's Libel Act and "was for many years after the Libel Act acted upon without the smallest question or difficulty."<sup>75</sup> In *R. v. Cuthell*,<sup>76</sup> for example, a bookseller was convicted of seditious libel even though he had not read the pamphlet and had *bona fide* assumed it to be on a non-political subject. Whether this anomalous rule would still be applied in Canada today, in the case of seditious libels, is doubtful.

Turning now to the second point, the question of the evidence of intent, Stephen has shown in his *History*<sup>77</sup> that prior to Fox's Libel Act it was not necessary to show any *mens rea* on the part of the accused in a prosecution for seditious libel, although pleaders frequently confused the issue by gratuitously imputing malicious intentions in the verbose indictments that were then popular. The reason for the rule was that the intentional publication of written blame

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<sup>71</sup>*Ibid.* at p. 344.

<sup>72</sup>[1957] 2 W.L.R. 1064.

<sup>73</sup>[1899] A.C. 549.

<sup>74</sup>*Ibid.* at p. 562.

<sup>75</sup>Stephen, *History*, Vol. II, p. 361.

<sup>76</sup>(1799), 27 How. St. Tr. 641.

<sup>77</sup>Vol. II, ch. XXIV.

on any public man was considered *mala per se*, so that proof of any further intention, such as an intention to hold that person up to contempt, was quite unnecessary.<sup>78</sup> The Libel Act did not expressly change this rule but it has generally been supposed that the Act assumes proof of a *mens rea* to be necessary.<sup>79</sup> What of a libel which is punished as a contempt of court? Can the accused today give evidence that his intention was not to undermine the authority of the courts but, let us say, to urge reforms or to correct judicial error? No certain answer can be given to this question, since we cannot recall any contempt proceedings where the outcome turned upon the admissibility of such evidence. It is submitted, however, in the light of Lord Atkin's judgment in *Ambard v. A. G. of Trinidad & Tobago*,<sup>80</sup> and other judgments to the same effect, that the question of the defendant's intention is now as material in a contempt proceeding as it is in an indictment for seditious libel. If written criticism of the courts *per se* is no longer a contempt of court then the tribunal must be satisfied that the defendant's intention was to undermine the authority of the court. Generally speaking, the publication will speak for itself and betray the author's intention, but in principle it should be open to the accused to show that his words bear some other construction and were not intended to bring about the mischievous result which might otherwise be attributed to them. Whether the court accepts his explanation is another matter. But even if this submission is not accepted as sound law, there is no reason to doubt that at least until 1792 no distinction was drawn between a contempt of court and a seditious libel in so far as the question of intention was concerned.

Assuming, however, for the purposes of argument, that historically a clear distinction was drawn between the two offences, what can be said in favour of punishing libels on the courts today in respect of comments published after the conclusion of a case? The very question would have seemed impertinent in the days of Lord Mansfield and Lord Kenyon, for the notion that any man was free to criticise and to impute blame was alien and repugnant to their theories of government. Baron Wood echoed a widely accepted sentiment of the day when he said in the course of his address to the jury in the prosecution of one Drakard for printing an article on the amount of flogging in the British army:

It is said that we have a right to discuss the acts of our legislature. That would be a large permission indeed. Is there, gentlemen, to be a power in the people to counteract the acts of the parliament and is the libeller to come and make the people dissatisfied with the government under which he lives? This is not to be permitted to any man — it is unconstitutional and seditious.<sup>81</sup>

Since the turn of the 19th century, however, theories as to the relationship between the rulers and the people have undergone a radical change, and it

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<sup>78</sup>*Ibid.* pp. 353-4.

<sup>79</sup>*Ibid.* pp. 358-9.

<sup>80</sup>[1936] 1 All E.R. 704, esp. at p. 709. (P.C.).

<sup>81</sup>(1811), 31 How. St. Tr. 495 at p. 535.

would be doing a grave injustice to our latter day judges to suggest that they have failed to accommodate themselves to the more democratic temper of our times. The modern view, indeed, as expressed by Lord Atkin in 1936 is that "Justice is no cloistered virtue, she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."<sup>82</sup> The sting, however, lies in the qualifying word "respectful", for who is to determine what is "respectful" and what is "hostile" criticism? These are elusive and subjective criteria in the application of which honest men will differ widely.

Those who defend the power of the courts to protect themselves against unfair and scandalous attacks may point to the fact that during the last fifty years or so there are only three reported cases in England<sup>83</sup> in which the courts have exercised the power and that only nine or so reported applications for attachment, not all of which have been granted, have come before the courts in Canada between 1877 and 1958,<sup>84</sup> and that therefore it cannot be said that the power has been abused. The first proposition proves little, for what matters is the fact that the power is potentially there and may always be exercised in restraint of criticism deserving of public expression. In the year 1954 alone there were two reported convictions in Canada for libels on the court,<sup>85</sup> thus showing the vitality of the power and, if one may say so, the pertinacity with which the courts appear to cling to it.

The second proposition is unfortunately not borne out by the cases. It is difficult, for example, to find any justification for the committal of a newspaper publisher for criticising the inequality of sentences, as happened in *Ambard v. A. G. Trinidad & Tobago*.<sup>86</sup> The fact that the Privy Council there reversed

<sup>82</sup>*Ambard v. A.G. of Trinidad & Tobago* [1936] 1 All E.R. 704 at p. 709.

<sup>83</sup>*R. v. Gray* [1900] 2 Q.B. 36, criticised by Hughes in 16 Law Quar. Rev. 292; *R. v. Editor of New Statesman* (1928), 44 T.L.R. 301, which forms the background for Laski's article in (1928), 41 Harv. Law Rev. 1031; and *R. v. Colsey*, May 9, 1931, noted in (1931), 47 Law Quar. Rev. 315.

<sup>84</sup>*In re Wallace* (1866), L.R. 1, P.C. 283; *In re Hawke* (1888), 28 N.B.R. 391; *In re O'Brien* (1889), 16 S.C.R. 197, rev'g 14 O.A.R. 184; *Stoddard v. Prentice* (1898), 6 B.C.R. 308 (appl'n dismissed); *R. v. Bonnar* (1903), 14 Man. R. 481 (appl'n dismissed on other grounds); *In re Ivens* [1920] 1 W.W.R. 747, 32 C.C.C. 358; apropos the Winnipeg General Strike of 1919 with which this case is intimately connected, see Carl Wittke, *A History of Canada*, 3rd ed. (1941), p. 330, and *passim* Harold A. Logan, *The History of Trade Union Organizations in Canada* (1928). For the trial judge's summing up in Russell's case which, *inter alia*, prompted Ivens to describe him as "a poisoned judge", see [1920] 1 W.W.R. at p. 637. *In re Miller* (1921), 54 N.S.R. 529; *R. v. Vancouver Province* (1954), 12 W.W.R. (N.S.) 349 (B.C.); *R. v. Western Printing & Publishing Ltd.* (1954), 34 M.P.R. 129, 111 C.C.C. 122 (Nfld). See also *R. v. Wilkinson, re Brown* (1877), 41 U.C.Q.B. 47, *per* Harrison C.J. at p. 63. In some of the above cases the publications were also treated as tending to interfere with pending trials.

<sup>85</sup>*R. v. Vancouver Provinces*, and *R. v. Western Printing & Publishing Ltd.*: see previous footnote.

<sup>86</sup>[1936] 1 All E.R. 704.

the conviction by the British West Indies court, as indeed they have reversed other contempt findings by colonial courts,<sup>87</sup> is surely proof enough that the power has been abused in the past and may be abused again in the future. Then again, what was so wicked about the newspaper article that commented on a judgment by a former Labour Attorney-General in the following terms: "Lord Justice Slessor, who can hardly be altogether unbiased about legislation of this type, maintained that really it was a very provisional order or as good a one as can be expected in this vale of tears"?<sup>88</sup> Or for that matter about the more outspoken editorial of "The New Statesman & Nation" which claimed that "an individual owing to such views as those of Dr. Stopes cannot apparently hope for a fair hearing in a court presided over by Mr. Justice Avory — and there are so many Avorys"?<sup>89</sup> Is it really to be assumed that judges are always free from perhaps unconscious bias or prejudice, especially in those cases involving controversial political, social or religious issues? What is true of the judgments in England and her colonies applies with equal force to the Canadian decisions. Eric Nicols' column in "The Vancouver Province" to which Clyde J. took exception in 1954<sup>90</sup> may have been unfair to him and to the jury and a gratuitous slur on those who were discharging an unpleasant duty, but here, as in *Boucher v. The King*,<sup>91</sup> the writer was expressing sincere convictions which he should have been entitled to express, subject to the ordinary laws of libel. Restrained and scrupulously fair comments will rarely be found when feelings run high.

But, the protagonists of the contempt power further argue, if judges are to be exposed to the scurrilous abuse of every writer their position becomes impossible. They cannot be expected to desert their official duties in order to bring libel actions to safeguard their reputations. Politicians, they point out, can excoriate their opponents with as much zest as their opponents villify them, but judges, by historic compulsions and by the nature of their office, are prevented from joining in the *mêlée* of public debate. It is only fair, therefore, it will be concluded, to extend to them a measure of protection commensurate with their enforced silence. Moreover, it is said, if a judge has erred there are traditional means for correcting his faults, even to the extent of having his conduct scrutinized by Parliament.<sup>92</sup>

There is undoubted merit in some of these arguments and one would not wish, I am sure, to encourage irresponsible or malicious criticism of the judiciary, but as is so often the case it is a question of weighing and choosing

<sup>87</sup>See *In the matter of a Special Reference from the Bahamas Islands* [1893] A.C. 138; *McLeod v. St. Aubyn* [1899] A.C. 549.

<sup>88</sup>*R. v. Colsey*, *ante*, footn. 83.

<sup>89</sup>*R. v. Editor of New Statesman*, *ante*, footn. 83.

<sup>90</sup>*R. v. Vancouver Province*, *ante*, footn. 84.

<sup>91</sup>[1951] S.C.R. 265.

<sup>92</sup>See A.L. Goodhart in (1935), 48 Harv. Law Rev. at p. 903, and the argument of Mr. Wirt, one of the counsel for Judge Peck, in Stansbury, *op. cit.*, at pp. 520-1.

between important and cherished values, and when that is done I think it will be found that the disadvantages of the power greatly outweigh its possible justification. Moreover there is a basic fallacy in the supposition that respect for the judges can be compelled in the same manner as an order of the court can be enforced. It was a wise judge who said,

My duty as a Judge is to administer the law as I find it, but if I am at liberty to express any personal opinion upon the expediency of exercising the power of the Court to summarily punish contempts of court not committed in its presence, and not calculated to obstruct the course of justice, but by the publication of libellous matter unfairly criticising or impugning the action of the Court or imputing impure or corrupt motives to its members, I would venture to say that in such cases the exercise of this arbitrary power would be a questionable remedy, either for maintaining respect for the Court itself or vindicating the characters of its members.<sup>93</sup>

And, in more forceful language, Mr. Justice Black of the United State Supreme Court was expressing a truism not restricted to his own country when he pointed out that,

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt, much more than it would enhance respect.<sup>94</sup>

Judges are not the only public servants who must suffer criticism in silence; civil servants are subject to the same restraint. The fact that a judge's decision can be appealed from is not sufficient, for it may be the appeal court's conduct that is itself challenged, and the criticism may stem from a stranger who is not a party to the action and therefore has no right of appeal. Moreover, the strictures may be upon the judge's conduct at large, and may not be referable to any case in particular. Many provincial legislatures in Canada only sit for three or four months of each year (assuming they are empowered to discuss judicial behaviour), and no member may be sufficiently interested to air some local or private grievance. In any event it is a questionable doctrine which preaches in the 20th century that only the legislature can question the fitness of a judge to sit on the bench.<sup>95</sup>

The most important criticism, however, to be levied against the power of the state to punish disrespectful criticisms of the court — whether it be

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<sup>93</sup>*R. v. Wilkinson, re Brown* (1877), 41 U.C.Q.B. 47, per Morrison J. at p. 124.

<sup>94</sup>*Times-Mirror Co. v. Superior Court* (1942), 86 L.Ed. 192, at p. 207.

<sup>95</sup>Even members of a parliament may be prevented from commenting upon judicial affairs. The Capetown correspondent of the *Manchester Guardian* reported in 1955 that after the South African government announced its decision to appoint five new appeal court judges to resolve the constitutional deadlock, the Opposition felt it virtually impossible to comment upon this news without impugning the impartiality of the judges and thereby possibly committing a contempt of court. See *Weekly Manchester Guardian*, March 31, 1955, page 2. Whether the correspondent was right in his interpretation of the law matters less than the fact that comment upon a matter of such great public importance should hang under the threat of a judicial veto.

exercised summarily or by indictment is of secondary importance — is that those who justify its exercise misconceive the nature of freedom of speech. The cherished right to speak one's mind freely on all topics of public interest is founded in the belief that men are fallible beings, and judges no less so, and that only a vigorous stream of criticism "expressed with candour however blunt" can ensure that those who are entrusted with immense power and great responsibilities do not abuse their privileged position.<sup>96</sup> History and the occasions on which libels on the courts have been punished give substance and justification for this belief.

### C. Constructive contempts of court — the American position.<sup>97</sup>

The law relating to contempts of court in the United States has from the earliest beginnings of the Republic had a chequered and controversial career. Attempts were made by the Pennsylvania and New York courts in three cases decided between 1788 and 1809<sup>98</sup> to introduce to the New World the Blackstonian doctrine of the inherent powers of the courts to vindicate their authority and dignity, but public opinion was so aroused by what was regarded as a judicial usurpation of power that the Pennsylvania legislature in 1809, and the New York legislature in 1829, enacted legislation confining the summary power of punishment by the courts to (a) official misconduct by officers of the court; (b) disobedience to the orders of the court; and (c) misconduct in the actual presence of the court actually obstructing the administration of justice. The power to punish summarily for constructive contempts of court was expressly declared illegal, but acts and publications out of court tending to obstruct the administration of justice were made punishable on indictment.<sup>99</sup>

The strength of early American feeling against the power summarily to punish constructive contempts may further be gauged from the celebrated trial, in

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<sup>96</sup>"Comment on what a judge has done — criticism of the judicial process in a particular case after it has exhausted itself — no matter how ill-informed or irresponsible or misrepresentative, is part of the precious right of the free play of opinion. Whatever violence there may be to truth in such utterances must be left to the correction of truth": *Craig v. Harney* (1946), 91 L. Ed. 1546, *per* Frankfurter J. at p. 1558. It is important to note this further restraint on freedom of speech, namely, that justification cannot be pleaded to a charge of libelling the courts: *Archbold's Criminal Pleading* 34th ed., p. 1309; *R. v. M'Hugh* [1901] 2 I.R. 569.

<sup>97</sup>For the account that follows, up to 1940, I have relied heavily on two excellent articles by Messrs. Nelles & King, "Contempt by Publication in the United States", (1928), 28 Col. Law Rev. 401 and 525, and to a much lesser extent on Harold W. Sullivan's monograph on *Contempts by Publication*, 2nd ed. (1942), for the loan of which I acknowledge my indebtedness to the University of Washington law library. Other sources are indicated in subsequent footnotes.

<sup>98</sup>*Respublica v. Oswald* (1788), 1 Dallas 319 (Pa.); *Bayard & Petit v. Passmore* (1802), 3 Yeates 439 (Pa.); *Case of J.V.N. Yates* (1807), 4 Johns, 316 (N.Y.).

<sup>99</sup>Nelles & King, *op. cit.*, p. 415 and pp. 418-22.

1831, of Judge Peck in an impeachment by the House of Representatives.<sup>100</sup> Judge Peck was a federal district court judge in Missouri at a time when the territory had only recently been annexed by the United States and land speculation was at its height. An attorney by the name of Lawless, who represented many such speculators, had strongly criticised one of Peck's adjudications which adversely affected many of his clients' claims. The judge thereupon had him attached for contempt of court, sentenced him to a day's imprisonment, and also suspended him from practice for a lengthy period. Lawless' political friends made several attempts to have Articles of Impeachment drawn up against the judge, one of which eventually succeeded, and in the ensuing trial before the United States Senate, Peck, by the narrow margin of one vote, just escaped impeachment. One of the results of the trial, however, was that Congress in the same year enacted a federal contempts statute. This act was a synthesis of the earlier Pennsylvania and New York legislation, and, like them, expressly restricted the power of the federal courts to inflict summary punishment for misbehaviour committed in the presence of the court, "or so near thereto".<sup>101</sup> All three acts are still on the statute books.

The reasons that would appear to account for the strength of this early American feeling against the contempt power are both numerous and complicated.<sup>102</sup> The American Constitution had guaranteed to every one the right to trial by jury "as heretofore", and the summary power appeared to the contemporaries as an unjustifiable invasion of this fundamental right. The judges were also suspect for their political leanings — some of the early cases had a political background — and with memories of the English and American sedition trials and of the memorable struggle in England, which culminated in Fox's Libel Act of 1792, for the right of the jury in sedition trial to return a general verdict, still fresh in the public mind, the right to a trial by one's peers assumed an enhanced importance for the safeguarding of republican liberties. Moreover, "trial by press" was still an unknown evil. Some of the early cases were also blemished by the fact that the attachment proceedings had taken place before the very judge whose susceptibilities had been injured by the offending publication.

It would seem, moreover, that these misgivings about the way the judges might have exercised their summary powers if given a free hand were justified by the course of subsequent events. In 1860, twenty-three out of the thirty-three states of the Union had statutes limiting the summary powers of the courts, in 1928 thirty-four out of forty-eight states.<sup>103</sup> But in 1855 a sharp set-back was

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<sup>100</sup>See Arthur J. Stansbury, *Report on the Trial of James H. Peck* (Boston, 1833).

<sup>101</sup>Nelles & King, *op. cit.*, pp. 430-1.

<sup>102</sup>Nelles & King, *op. cit.*, pp. 407 *et seq.*, p. 533 *et seq.*; Sullivan, *op. cit.*, pp. 122-3, 185 *et seq.*

<sup>103</sup>Nelles & King, *op. cit.*, pp. 533, 536.

given to many of these enactments by the decision in *State v. Morill*.<sup>104</sup> The Arkansas court in that case held that the enactment purporting to limit its power was unconstitutional, on the theory that the state courts derived their powers from the state's constitution, that one of those powers was the inherent power to punish summarily for contempts of court, and that one arm of government was impotent to restrict the powers of any other. The courts of half of the American states have followed the Arkansas decision, and those of many others have been affected by it, with the result that "Of the forty-eight States of the Union, there are only six in which we find neither positive adjudication of summary punishability nor indications or judicial tendency in that direction".<sup>105</sup>

The federal courts also did much to loosen the original and natural meaning of the federal statute until finally, in 1915, the Supreme Court in *Toledo Newspaper Co. v. U.S.*<sup>106</sup> held that the "so-near" clause justified a lower court's summary conviction of the petitioner who had published articles out of court charging the judge with favouring one of the litigants to a public utility dispute.

What is particularly significant, however, is the way in which the American courts have exercised their re-assumed summary powers. In only fifteen out of fifty-eight reported decisions between 1831 and 1928 did the case relate to a jury trial, and only five of the fifteen were of a character likely to interest the sensational press. Moreover, thirty of the fifty-eight cases appear to have had some political complexion, and many of the so-called contempts were really scandals on the courts.<sup>107</sup>

An Anglo-Canadian lawyer may well wonder why the American courts have exercised their powers so sparingly in cases where it was most urgently needed, that is to say, in connection with criminal trials, for the "trial by press" phenomenon in these cases is an acknowledged shortcoming of the American administration of justice. The celebrated *Hauptman* trial provides a vivid example of what can happen in practice.<sup>108</sup> There was nation-wide discussion, both before and during the trial, of the merits of the prosecutor's case, including open avowals of the guilt of the accused. Hauptman's previous convictions were freely publicised, and counsel on both sides gave frequent press interviews, published statements, and even made broadcasts. Photographs of the court scene were taken during the trial, and when the court was not in session placards were placed throughout the court-room to show sight-seers where

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<sup>104</sup>(1885), 16 Ark. 384, referred to with approval by the Chief Justice in *Re Gerson* [1946] S.C.R. 538, affirmed [1946] S.C.R. 547.

<sup>105</sup>Nelles & King, *op. cit.*, p. 543.

<sup>106</sup>(1917), 247 U.S. 402, 62 L.Ed. 1187, reversed in *Nyc v. U.S.* (1940), 313 U.S. 33, 85 L.Ed. 1172.

<sup>107</sup>Nelles & King, *op. cit.*, pp. 544-5, 548-9.

<sup>108</sup>See Robbins, "The Hauptman Trial in the Light of English Criminal Procedure", (1935), 21 Am. Bar Ass'n Journ. 301.

the principals were sitting. During the trial, more than once there was applause from the public galleries when one of the state witnesses scored a point against defence counsel.<sup>109</sup>

Following the *Hauptman* trial a special committee of the criminal section of the American Bar Association put forward a series of recommendations to redress the many abuses which were committed during the trial,<sup>110</sup> and other committees have made more recent efforts in the same direction.<sup>111</sup> The most sincere admirer of the American administration of justice would not claim, however, that any of these efforts have been conspicuously successful. The evil of "trial by press" in the United States appears to be as widespread as ever. The courts there, it is said, will not exercise their undoubted powers for fear of arousing the hostility of powerful newspapers and thus of jeopardising the judges' chances of re-election.<sup>112</sup>

Such in any event was the position up to 1942 when the Supreme Court of the United States began to deliver the first of the trilogy of its important opinions on the constitutionality of the contempt power. Until that year, with two possible exceptions,<sup>113</sup> the legality of punishing publications which tend to interfere with pending proceedings appears never to have been seriously questioned. Only the legality of the *summary* method of punishment was challenged. The managers of the impeachment proceedings in Judge Peck's trial had indeed expressly recognized the legitimacy of abridging the freedom of the press where such comment was concerned,<sup>114</sup> as by implication did also the majority of the Supreme Court in the *Toledo Newspaper* case.<sup>115</sup>

The reason for this belated attempt to invoke the Constitution appears to be this. Until Mr. Justice Holmes first enunciated the "clear and present danger" test in 1919, in *Schenck v. U.S.*,<sup>116</sup> (subsequently more fully developed by him in his celebrated dissent in the *Abrams*<sup>117</sup> case), the furthest limits of the First Amendment which declared it unlawful for Congress to make any law abridging, *inter alia*, the freedom of the press had not yet been explored. Later, in 1925,<sup>118</sup> the Supreme Court still further extended the

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<sup>109</sup>See also Perry, "The Courts, the Press, and the Public," (1931), 30 Mich. Law Rev. 228, at p. 231 *et seq.*

<sup>110</sup>Recommendations of Special Committee on ways of curbing excessive publicity in connection with criminal trials, (1936), 22 Am. Bar Ass'n Journ. 79; (1936), 20 Journ. Am. Judic. Soc. 83.

<sup>111</sup>See Edwin M. Otterbourg, "Fair Trial and Free Press: A New Look in 1954", 40 Am. Bar Ass'n Journ. 838.

<sup>112</sup>Perry, *op cit.*, *ante* footn. 109, p. 234; Sullivan, *op. cit.*, pp. 122-3.

<sup>113</sup>*Ex p. Hickey* (Miss.), 4 Smed. & Marsh, Append., cited by Sullivan, *op. cit.*, p. 122, footn. 14; *Toledo Newspaper v. U.S.* (1917), *ante*, footn. 106.

<sup>114</sup>Stansbury, *op. cit.*, pp. 91, 291, 293, 382, 400.

<sup>115</sup>(1917), 247 U.S. 402, *per* White C.J. at p. 419.

<sup>116</sup>(1919), 247 U.S. 47, 63 L. Ed. 470.

<sup>117</sup>(1919), 250 U.S. 616, 63 L.Ed. 1173.

<sup>118</sup>*Gitlow v. New York*, 268 U.S. 652, 69 L.Ed. 1138.

scope of the First Amendment by its holding that the restriction imposed in it upon the powers of Congress applied equally, via the medium of the Fourteenth Amendment, to limit the power of the states.

The first of the three cases to come before the Supreme Court in which the contempt power was challenged consisted of two consolidated petitions. In the first of these, *Times Mirror Co. v. Superior Court of Los Angeles*,<sup>119</sup> a decision of the Supreme Court of California was attacked which affirmed a lower court's conviction of the publishers of the Los Angeles Times for committing a contempt of court. The newspaper had published an editorial which was designed to influence a judge in a sentence he was shortly to impose on two members of a trade union who had been convicted of assaulting non-union truck drivers. Their counsel had applied to the court for a sentence of probation, and while that application was still pending the petitioners published an editorial which declared that "Judge A. A. Scott will make a serious mistake if he grants probation to Mathew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."

The second of these consolidated petitions, *Bridges v. California*,<sup>120</sup> also concerned an appeal from conviction by a California court. An injunction had been granted against a C.I.O. union in a dispute between it and an A.F. of L. union, and while a motion for a new trial was pending, Bridges, who was an officer of the C.I.O., caused to be published or acquiesced in the publication of a telegram which he had sent to the Secretary of Labor. The telegram referred to the judge's decision as "outrageous", said that attempted enforcement of it would tie up the port of Los Angeles and involve the entire Pacific Coast, and concluded with the announcement that the C.I.O. union did not "intend to allow state courts to override the National Labor Relations Board." Both convictions were set aside by the Supreme Court by the narrow vote of five to four.<sup>121</sup>

The gist of the majority opinion, which was delivered by Mr. Justice Black, was to the effect that the California courts had subordinated the liberty of the press to the independence of the judiciary. Although the Court recognized that "free speech and fair trials are two of the most cherished policies of our civilization" and that "it would be a trying task to choose between them",<sup>122</sup> it held nevertheless that an abridgment on the freedom of the press was only permitted by the Constitution when there was "a clear and present danger" that the offending publication would actually interfere with a fair and impartial trial. The majority opinion rejected the "reasonable tendency" test which had

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<sup>119</sup>(1942), 86 L.Ed. 192.

<sup>120</sup>*Ibid.*

<sup>121</sup>For the majority opinion were Justices Black, Reed, Douglas, Murphy and Jackson; dissenting were Chief Justice Stone, and Justices Roberts, Byrnes and Frankfurter.

<sup>122</sup>(1942), 86 L. Ed. 192, at p. 201.

been applied by the lower courts, and still is the yardstick by which such publications are measured in England and Canada. To satisfy the "clear and present danger" test, the learned justice wrote,

...the substantive evil must be extremely serious and the degree of imminence high before utterances can be punished.<sup>123</sup>

He also rejected the contention that contempts of court belonged to a special category which had been marked off by history and to which the criteria of constitutional immunity from punishment used where other types of utterances were concerned was not applicable.<sup>124</sup> His opinion considers the effect on liberty of a general embargo on all types of comment during the pendency of a case. It points out that

...public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist.<sup>125</sup>

There was no suggestion in the Constitution, he thought, that the freedom there guaranteed for speech and the press "bears an inverse ratio to the timeliness and importance of the ideas seeking expression."<sup>126</sup>

The majority judgment then turned to consider in detail<sup>127</sup> whether the editorial and the telegram respectively satisfied the "clear and present danger" test. The Court thought not. The anti-union views of the newspaper were wellknown, said the Court, and its strictures if a lenient sentence were imposed on the two convicted men only to be expected. So also with the telegram. "If there was electricity in the atmosphere, it was generated by the facts; the charge added by the Bridges telegram can be dismissed as negligible."<sup>128</sup> Mr. Justice Black concluded by adopting as his own<sup>129</sup> the words of Mr. Justice Holmes in the *Toledo Newspaper Co.* case:

I confess that I cannot find in all this or in the evidence in the case anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words.<sup>130</sup>

To do justice to the powerful and eloquent dissent of Mr. Justice Frankfurter would require more space than is available here. In his opinion, the majority judgment was in effect giving constitutional sanctity to trial by newspapers.<sup>131</sup> Whilst fully admitting that "the channels of inquiry and thought must be kept open to new conquests of reason, however odious their expression

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<sup>123</sup>*Ibid.* at p. 203.

<sup>124</sup>*Ibid.* at pp. 203-5.

<sup>125</sup>*Ibid.* at p. 206.

<sup>126</sup>*Ibid.* at p. 206.

<sup>127</sup>*Ibid.* at p. 208 *et seq.*

<sup>128</sup>*Ibid.* at p. 211.

<sup>129</sup>*Ibid.* at p. 211.

<sup>130</sup>(1917), 62 L.Ed. 1187, 247 U.S. 407, at pp. 424-5.

<sup>131</sup>(1942), 86 L.Ed. at p. 212.

may be to the prevailing climate of opinion",<sup>132</sup> he did not think that free speech was "so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights."<sup>133</sup> The Constitution also guaranteed the right to an impartial trial. And since the courts were the ultimate resorts for vindicating the Bill of Rights, a state might surely authorize appropriate historic means to assure that the process for such vindication be not wrenched from its rational tracks "into the more primitive *mêlée* of passion and pressure." "The need is great", the learned justice wrote,<sup>134</sup> "that courts be criticised but just as great that they be allowed to do their duty." He carefully distinguished, however, between comments made in the course of a trial from those made after its conclusion. He agreed with the majority opinion that no restriction must be suffered on the latter type of comment.<sup>135</sup>

The dissenting judgment then deals with the "clear and present danger" test.<sup>136</sup> The phrase itself, Mr. Justice Frankfurter thought, was an expression of tendency and not of accomplishment, and the literal difference between it and "reasonable tendency" not of constitutional dimension. Even if it was true that threats, by discussion, to untrammelled decisions by courts are the most natural expressions when public feeling runs highest, it did not follow that states were left powerless to prevent their courts from being subverted by outside pressures when the need for impartiality and fair proceeding was greatest. The learned justice concluded,<sup>137</sup>

To say that the framers of the Constitution sanctified veiled violence through coercive speech directed against those charged with adjudication is not merely to make violence an ingredient of justice; it mocks the very ideal of justice by respecting its form whilst stultifying its uncontaminated exercise."

All this was but a prelude, albeit an essential prelude, to what in substance was the most essential difference between the majority and minority views of the members of the Court — their respective interpretations of the likely impact of the offending utterances on the mind of a judge. In the opinion of the dissenting justices the editorial in the Los Angeles Times-Mirror was hardly an exercise in futility. "If it is true of juries," Mr. Justice Frankfurter observed,<sup>138</sup> "it is not wholly untrue of judges that they too may be 'impregnated by the environing atmosphere.'" As to the Bridges telegram, he felt that

<sup>132</sup>*Ibid.* at p. 213.

<sup>133</sup>*Ibid.* at p. 213.

<sup>134</sup>*Ibid.* at p. 215.

<sup>135</sup>*Ibid.* at p. 216: "Such foolishness has long since been disavowed in England, and has never found lodgment here." Both statements, with great respect, appear to be inaccurate. For a recent conviction by a state court for a libel upon a court, see *Lancaster v. State* (1946), 186 S.W.2d 673 (Ark.). Cf. *Sullens v. State* (1941), 4 So.2d 356 (Miss.).

<sup>136</sup>*Ibid.* at p. 221 *et seq.*

<sup>137</sup>*Ibid.* at p. 221-2.

<sup>138</sup>*Ibid.* at p. 223.

a vague undetermined possibility that a decision of a court may lead to a serious manifestation of protest was one thing. But the impact of a definite threat of action to prevent a decision was a wholly different matter.<sup>139</sup> These contrasting opinions on the psychology of judges were to clash again in the second and third of the trilogy of cases that remain to be considered.

In the second case that came before the Supreme Court, *Pennekamp v. State of Florida*,<sup>140</sup> the Court unanimously came to the conclusion that the newspaper editorial for which the petitioner had been convicted did not constitute such a clear and present danger to the administration of justice as to constitute a contempt of court. The offending articles in question consisted of an editorial which intimated bias on the part of certain Florida courts towards those who were charged with crime, with specific reference to cases where indictments had been insufficient, and to the dismissal of "padlock" suits to close alleged gambling places. There was also a cartoon which depicted the editorial sentiments in pictorial form. Although the Florida courts had held that the cases were still pending at the time of the publication of the editorials, since re-indictments had been prepared, in truth the question of pendency did not loom large in their decisions. This appears to be substantially the ground on which Mr. Justice Frankfurter concurred in the decision to quash the conviction, because, as he pointed out, "the petitioners offended the trial court by criticising what the court had already put into the scales, not by attempting themselves to insert weights."<sup>141</sup>

The opinion of the Court, however, delivered through Mr. Justice Reed, dealt with the appeal on the supposition that the defendants had been punished for seeking to influence the judge in his disposition of the pending cases. The Court could not concede that there existed such a danger and Mr. Justice Reed wrote:

Comment on pending cases, may affect judges differently. It may influence some judges more than others. Some are of a more sensitive fiber than their colleagues. The law deals in generalities and external standards and cannot depend on the varying degrees of moral courage or stability in the face of criticism which individual judges may possess any more than it generally can depend on the personal equations or individual idiosyncracies of the tort-feasor.<sup>142</sup>

The Court again sharply divided in the last of the three cases, which was decided in 1947. In *Craig v. Harney*,<sup>143</sup> while a motion for a new trial was pending, the petitioner had published newspaper articles which unfairly reported

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<sup>139</sup>*Ibid.* at p. 224-5.

<sup>140</sup>(1946), 328 U.S. 331, 90 L.Ed. 1295.

<sup>141</sup>*Ibid.* at p. 1315.

<sup>142</sup>*Ibid.* at p. 1304. He adds the qualification, however, that "it does not follow that public comment of every character upon pending trials or legal proceedings may be as free as a similar comment after complete disposal of the litigation . . . Courts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action": *ibid.* at p. 1303.

<sup>143</sup>(1947), 331 U.S. 367, 91 L.Ed. 1546.

the facts of a civil trial in which the jury had at first refused to conform to the judge's direction of a verdict for the plaintiff, and had stated that certain organizations were planning to submit petitions calling on the judge to grant a new trial. There was also an editorial which criticised in intemperate language the judge's conduct of the trial, calling it "high-handed", "a travesty of justice", and as giving the defendant, who was a veteran, "a raw deal" which properly brought down "the wrath of public opinion" upon the judge's head, and deplored the fact that the judge was a layman and not a competent attorney.

In quashing the conviction of the Texas court the majority opinion of the Supreme Court adumbrates no new principals but merely re-iterates its view of the judge as "a man of reasonable fortitude" whose mind could be expected to maintain equilibrium under even the worst storms of adverse criticism. The dissenting members of the Court,<sup>144</sup> which again included Mr. Justice Frankfurter, vigorously challenged this assumption as to the nature of the judicial mind. Some extracts from their opinions have already been cited earlier.<sup>145</sup>

These three judgments of the Supreme Court have been frequently followed or cited by state courts,<sup>146</sup> and one of their by-products appears to be that the institution of "trial by newspaper" is more firmly entrenched in the United States than ever before. Although none of the Supreme Court cases involved sensational criminal trials — indeed Mr. Justice Reed expressly reserved his opinion on the propriety of newspaper comment in such cases<sup>147</sup> — they have in practice been interpreted to sanction the most glaring type of prejudicial comment even in this type of case. In *Baltimore Radio Show v. State*, (1949),<sup>148</sup> for example, a negro had been arrested on a charge of murdering an eleven year old girl. While he was awaiting his trial a local radio station broadcast a United Press report that the accused had confessed his guilt and also revealed the fact that he had a previous criminal record. Nevertheless, the highest court of Maryland held<sup>149</sup> that there was no such "clear and present

<sup>144</sup>The Chief Justice, Justices Jackson and Frankfurter.

<sup>145</sup>For discussion of these Supreme Court decisions, see M. Radin (1942), 36 Ill. Law Rev. 599; E. Hanson, (1942), 27 Cornell Law Quar. 165; W.N. Seymour (1948), 71 N.Y.S.B.A. Bull. 206; Note in (1950), 17 Univ. of Chicago Law Rev. 540; Thomas Luscher, (1956), 40 Marq. Law Rev. 313.

<sup>146</sup>*Baltimore Radio Show v. State* (1949), 67 Atl. 2d 497 (Maryl) cert. denied (1950), 94 L.Ed. 562; *Turkington v. Municipal Court* (1948), 193 P.2d 795 (Calif.); *Robinson v. City Court* (1947), 185 P.2d 256 (Utah); *Kirkham v. Sweetring* (1945), 160 P.2d 435 (Utah); *Bates v. State* (1946), 197 S.W.2d 45 (Ark.); *Graham v. Jones* (1942), 7 So.2d 688 (La.). See also *Hoffman v. Perrucci*, (1955), 222 F.2d 709.

<sup>147</sup>See *ante*, footn. 142.

<sup>148</sup>See *ante*, footn. 146.

<sup>149</sup>The court reasoned (67 Atl.2d 497, at pp. 508-9) that a jury was capable of the same firmness and impartiality as a judge and that hence the Supreme Court decisions were as applicable to trials by jury as to trials without them.

danger" of the jury being prejudiced by such *ex parte* disclosures as to justify a finding of contempt of court in the defendant radio station.<sup>150</sup>

An even more terrible example of the evil of "trial by newspaper" is to be found in *Shepherd v. State of Florida*, (1951).<sup>151</sup> Four negroes had been charged with the rape of a white girl, and were sentenced to death. Before their trial various newspapers published as a fact that the accused had confessed to the crime, although no confession was ever put into evidence at the trial. A mob gathered before the jail in which the accused were kept and demanded that they be turned over to it. Another mob burned the parents' home of one of the accused, and negroes were removed from the community to prevent their being lynched. Every detail of these events was reported by the press under provoking headlines, and a cartoon was published while the grand jury were considering the charge picturing four electric chairs and headed "No compromise — Supreme penalty." In a *per curiam* opinion the Supreme Court of the United States reversed the state court conviction of the negroes upon the sole ground that the method of selecting the grand jury discriminated against the negro race. This, Mr. Justice Jackson pointed out in a separate concurring opinion, stressed the trivial and ignored the important.<sup>152</sup> And he observed that the case presented "one of the best examples of one of the worst menaces to American justice."<sup>153</sup>

What valid lessons can Canadian lawyers draw from American experience in the regulation of constructive contempts of court? We would be reinforced, I think, in our impression that "trial by newspaper" is a very great evil and that the American courts, for one reason or another, have been very reluctant to face the problem squarely. Their attitude towards comments on pending cases not involving juries is also much more lenient than that of the English and Canadian courts, and we would prefer, I think, to continue to follow the "reasonable tendency" test, as espoused in the dissenting judgments of Mr. Justice Frankfurter, in contrast to the "clear and present danger" doctrine favoured by the majority of the Supreme Court. Finally, we would be divided, I imagine, on the question whether Canadian courts should be freely exposed to unbridled criticism at the conclusion of a case, as the American courts

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<sup>150</sup>In his opinion accompanying the Supreme Court's denial of the petition for a writ of certiorari, (1950), 94 L.Ed. at 563, Mr. Justice Frankfurter points out that denial of a petition merely means that fewer than four judges, on any number of possible grounds not necessarily touching the merits of the appeal, deemed it desirable to review the lower court's decision. But that he himself did not approve of it may readily be gathered from the fact that he thought it sufficiently important to append to his opinion a summary of the relevant English decisions dealing with prejudicial comments published during criminal trials.

<sup>151</sup>341 U.S. 50, 95 L.Ed. 740.

<sup>152</sup>95 L.Ed. 740, at p. 744.

<sup>153</sup>*Ibid.* at p. 744. See also *Strobie v. California*, 343 U.S. 181, 96 L.Ed. 872; *U.S. v. Leviton* (1951), 193 F.2d 848.

now are. But whatever our opinion on this constitutional question may be we should welcome the salutary reminder brought us by the Supreme Court decisions that in limiting criticism of the judiciary we are imposing an important restriction on freedom of speech. May it not fairly be said that we have been too prone to accept this restriction as self-evident, which it is not? There is need in Canada, it is felt, for a more conscious evaluation of the important and conflicting values competing for recognition in this branch of the law.

## II. — THE SUMMARY POWER OF PUNISHMENT

The summary power of the courts to inflict punishment for contempts of court is today so much an accepted rule of law that the very phrase "contempt of court" is generally used as being synonymous with its exercise. Yet it is a fact that this power, in the case of constructive contempts of court, is of comparatively recent origin, nor does it appear to be always appreciated that even today criminal contempts constitute a misdemeanour at common law which are punishable on indictment.<sup>154</sup> The Criminal Code, moreover, has not only codified these common law offences,<sup>155</sup> but appears to have gone

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<sup>154</sup>In addition to the examples of indictments and informations for libels on the courts collected *ante*, footn. 55 and 57, see also the following cases: *R. v. Gurney* (1867), 10 Cox C.C. 550 (sending money to a J.P. to influence him in his decision); *R. v. Revel* (1719), 1 Str. 420 (Calling a J.P. to his face "a liar and a rogue"); *R. v. (Lady) Lawley* (1730), 2 Str. 904; *R. v. Hall* (1776), 2 W. Bl. 1110; *R. v. Steventon* (1802), 2 East 862; *R. v. Loughran* (1839), 1 Cr. & D. 79: all these were cases of interfering with witnesses; *R. v. Jolliffe* (1791), 4 T.R. 285 (circulating leaflets before trial attacking prosecutor); *R. v. Fisher* (1811), 2 Camp. 563 (*ex p.* publication of preliminary proceedings before magistrate); *R. v. Fleet* (1818), 1 B. & A. 379 (*ex p.* publication of evidence before coroner's jury accompanied by prejudicial comment); *R. v. Williams & Romney* (1823), 2 L.J. (O.S.) K.B. 30 (putting on theatrical exhibition before trial depicting alleged facts of murder); *R. v. Tibbits & Windhurst* [1902] 1 K.B. 77 (prejudicial comment pending criminal trial); Oswald, *op. cit.*, pp. 6-7; Halsbury, 3rd ed., Vol. 8, p. 3.

<sup>155</sup>Old Code

### Section 180:

- "Every one is guilty of an indictable offence and liable to 2 years imprisonment who
- (a) dissuades or attempts to dissuade any person by threats, bribes or other corrupt means from giving evidence in any cause or matter, civil or criminal; or
  - (b) influences or attempts to influence by threats or bribes or other corrupt means, any jurymen in his conduct as such, whether such person has been sworn as a jurymen or not; or
  - (c) accepts any bribe or other corrupt consideration to abstain from giving evidence, or on account of his conduct as a jurymen; or
  - (d) wilfully attempts in any other way to obstruct, pervert or defeat the course of justice."

Subs. (d) is apparently a catch-all. At any rate it has not been interpreted *eiusdem generis* with the preceding subsections. See, *R. v. Lake* (1906), 11 C.C.C. 37

a step further by making civil contempts indictable as well where no other machinery for dealing with such contempts exists.<sup>156</sup>

The early history of the summary method of procedure has been exhaustively traced by Sir John Fox in a series of learned articles in the *Law Quarterly Review*,<sup>157</sup> and his conclusions are summed up in the following passage:

Originally the superior courts of common law had jurisdiction to punish disobedience to the King's writ summarily by fine and imprisonment upon attachment, and probably also a disciplinary jurisdiction over their own officers exercisable summarily. The Court of King's Bench had jurisdiction on indictment or bill to punish contempts *in facie*, obstructions to the service of process, other obstructions to the administration of justice, as by libelling the Court or a judge or assaulting a party on his way to the Court, and deceit or collusion in connection with pending proceedings. In later times — perhaps in or after the Tudor period — the common law courts gradually established a summary jurisdiction over most of those contempts which had been formerly the subject of indictment or bill, but this did not extend to libels on the Court or judges which were still punished by indictment or by proceedings in the Star Chamber, and upon abolition of that Court, by information or indictment in the King's Bench. The Council, or the Star Chamber as representing the Council, had always exercised a concurrent jurisdiction to punish contempts of other Courts, and as the Star Chamber records show, had exercised it largely. Upon the abolition of that Court a large portion of its jurisdiction devolved upon the King's Bench, and libels, including libels upon Courts or judges, were punished by information or indictment down to the early part of the eighteenth century. In 1720 is to be found the earliest recorded case of libel or slander on the Court or a judge by a stranger, unconnected with the service of process, being punished by attachment.<sup>158</sup>

Apart from the *St. James Evening Post*<sup>159</sup> case, which was a decision in Chancery, *The King v. Almon*<sup>160</sup> is generally regarded as the most conspicuous

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(Alta.); *R. v. Kadin*, (1937), 68 C.C.C. 318 (B.C.); *R. v. Gravelle*, (1952), 103 C.C.C. 250 (Ont); *R. v. Snider*, (1953), 106 C.C.C. 175.

#### *New Code*

##### *Section 119:*

Subs. (d) of former s. 180 has been elevated into a separate subs. (1); new subs. (d) & (e) deal with payments to and receipts by bondsmen; "in any cause or matter, civil or criminal" in former subs. (1) has been replaced in new subs. (2) by "in a judicial proceeding."

#### <sup>156</sup>*Old Code*

##### *Section 165:*

"Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any lawful order, other than for the payment of money, made by any court of justice . . . unless some penalty is imposed, or other mode of proceeding is expressly provided, by law." For an example of "other mode of proceeding . . . expressly provided by law," see *R. v. Clement*, (1940), 90 C.C.C. 284 (Que.).

#### *New Code*

##### *Section 108:*

Only one material alteration; maximum punishment has now been increased to 2 years' imprisonment.

<sup>157</sup>See *ante*, footn. 56, and see also by the same writer, "The Writ of Attachment", 40 *Law Quar. Rev.* 43.

<sup>158</sup>24 *Law Quar. Rev.* at pp. 276-7.

<sup>159</sup>*Ante*, footn. 5.

16097 *E.R.* 94.

landmark in the history of the transition from procedure by indictment or information to the summary method of attachment and committal in the case of utterances out of court constituting a contempt. In *Almon's* case an order *nisi* was served on the printer Almon calling upon him to show cause why he should not be attached for publishing a pamphlet in which he accused Lord Mansfield of having acted "officiously, arbitrarily, and illegally" in allowing an amendment to an information that had been laid against Wilkes. One of the objections taken by Almon's counsel was that his client should have been proceeded against by way of an information or indictment and not by attachment. Mr. Justice Wilmot, as he then was, in a prepared judgment that was in fact never delivered, rejected this contention asserting that, "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 fabrick of the common law . . ." <sup>161</sup> He cited no authority, however, to substantiate his claim, and Sir John Fox's researches have proved him to be wrong. Nevertheless, *The King v. Almon* has been approved and followed in an almost unbroken line of English and Canadian cases, <sup>162</sup> and it is much too late in the day to challenge its authority. Moreover, the Criminal Code itself has now impliedly sanctioned the use of the summary power by providing an appeal from conviction and/or sentence in the case of all contempts of court not committed in the face of the court. <sup>163</sup>

The assumptions underlying Mr. Justice Wilmot's judgment have, however, been challenged on many occasions, <sup>164</sup> and during the nineteenth century many efforts were made, none of which succeeded, to bring forward in the British Parliament bills defining the extent of the summary power and limiting the maximum punishment imposable for contempts of court. <sup>165</sup> The American federal and state legislation concerning this subject and its judicial interpretation have already been noted. The Anglo-Canadian courts, while insisting that they

<sup>161</sup>97 E.R. 94 at p. 99.

<sup>162</sup>For a list of the cases, see 24 Law Quar. Rev. 184. The only unfavourable criticism of the decision is made by Fletcher J. in *Taaffe v. Downes*, an Irish decision of 1813 reported in a note in 3 Moore P.C. at pp. 48, 72.

<sup>163</sup>Section 9.

<sup>164</sup>Stansbury, *op. cit.* 92, 316; *passim*, Nelles & King, *op. cit.*; H. Laski, (1928), 41 Harv. Law Rev. 1031; Fox, "Eccentricities of the Law of Contempt of Court", (1920), 36 Law Quar. Rev. 394.

<sup>165</sup>See Hansard, 3rd series, Vol. 277, col. 1611, 1615 (1883); Hansard, 4th series, Vol. 155, col. 814 (1906); Vol. 185, col. 1424 (1908); Vol. 155, col. 579. Bills for the amendment of the law of contempt of court were brought forward in 1883, 1892, 1894, 1896, and 1908. For further details, see 36 Law Quar. Rev. 394 at p. 395. A very limited bill, introduced by Lord Shawcross, and which does not interfere with the summary method of procedure, is at the present time before the House of Lords: see, "A Bill intituled An Act to amend the law relating to contempt of court," (1960), 8 Eliz. 2.

have never abused their summary powers,<sup>166</sup> have themselves recognized the potentialities for its abuse, and many dicta will be found laying it down that this extra-ordinary power is only to be used where the contempt is clear and beyond doubt.<sup>167</sup>

Nevertheless, when the smoke and the dust raised by these perennial controversies has cleared, and the issues involved viewed in a more dispassionate light, it will be found that many of the assumptions made by partisans on both sides are ill-founded, and that the picture is not quite as simple as either side would have us believe.

One may dispose, first, of those situations which even the sternest critics concede justify the summary intervention of the courts — I mean those contempts committed within the actual view of the court. It is obvious that the judges must have power to deal immediately with disturbances in the courtroom, to suppress unseemly behaviour, and to curb insulting and abusive language. Should the summary power be limited, however, to ordering the removal of the offender? It is certainly true that an aroused judge may inflict punishment of excessive severity, and it would, no doubt, be desirable to impose a moratorium between the moment of the offence and the time of its punishment to allow passions to cool. It may be suggested, however, that substantially the same objective can be gained by limiting the amount of punishment that may be imposed and by providing facilities for appeal. The Criminal Code now makes provision for an appeal *from sentence only* for contempts committed in the face of the court,<sup>168</sup> and this goes a long way to meeting most of the objections to the exercise of the summary power in such cases. Section 9(1) of the Code, it is true, does not directly impose a maximum punishment, but the knowledge that an excessive sentence may be reduced on appeal should operate at least as a psychological restraint on a judge who might otherwise be inclined to allow his outraged feelings to get the better of him.

This brings us to the most controversial aspect of the summary power — its use in the case of contempts not committed in the presence of the court. Mr. Justice Wilmot attempted to justify it on two grounds. First, because the arraignment of the justice of the judges excites in the minds of the people a general dissatisfaction with all judicial determination, and indisposes their minds to obey them. This, he thought, was the most fatal and dangerous obstruction to justice, and therefore called out for “a more rapid and immediate

<sup>166</sup>E.g., *Ex p. Fernandez* (1861), 10 C.B. (N.S.) 3, 142 E.R. 349, *per* Erle C.J. at p. 363, and Byles J. at p. 370.

<sup>167</sup>*Queen v. Payne* [1896] 1 Q.B. 577, *per* Lord Russell, C.J. at p. 580; *Hunt v. Clarke* (1889), 58 L.J. (Q.B.) 490, *per* Cotton L.J. at p. 493 and Fry L.J. at p. 494; *In re Clement*, 46 L.J. (Ch.) 375, *per* Jessel M.R. at p. 383.

<sup>168</sup>Section (9) ss. (1): “where a court, judge, justice, or magistrate summarily convicts a person for contempt of court committed in the face of the court and imposes punishment in respect thereof, that person may appeal against the punishment imposed.” For the history of section 9, see (1955), 33 Can. Bar Rev. 27-29.

redress than any other obstruction whatsoever . . ."<sup>169</sup> His second ground was based on the supposed antiquity of the power.<sup>170</sup> The first ground is the one that has been most generally adopted by judges in later cases. In *Skipworth's case*<sup>171</sup> Blackburn J. said,

...if we are to wait for that punishment to be done by ordinary criminal process and an ordinary trial, there might be great mischief done, because that process is slow, and before that process could come into train the mischief would be done by the due administration of justice being hampered and thwarted.<sup>172</sup>

How much truth is there in these assertions in the light of present day conditions? At the outset it may be observed that it is not always the case that summary proceedings are speedier than a trial by jury. In *Ellis v. The Queen*,<sup>173</sup> for example, a rule *nisi* against the defendant was issued in Easter Term 1887, and was made absolute in Hilary Term 1888. The writ of attachment then issued and the defendant was arrested and brought into court, whereupon he was released on bail. Interrogatories were administered to him and finally, on August 13th, 1889, more than two years after the original proceedings had been initiated, the court found him guilty of contempt of court.<sup>174</sup> That no doubt was an extreme case, but delays of substantial lengths appear to be not uncommon. But even if it were true that the courts in all cases always act with the greatest promptitude it is a strange doctrine which preaches that a traitor, a murderer, and one who incites the violent overthrow of a government is entitled to the time-honoured right of trial by jury, but that public policy demands that a printer or a distributor who may not even have read the document for whose publication he is held responsible shall be deprived of the protection of a trial by his peers. It has not been suggested, for example, that in those parts of the United States where the courts have been successfully deprived of their summary powers the administration of justice has been impaired proportionately.

Granting, however, that reasonable despatch in punishing those guilty of interfering with the due processes of the law is desirable, especially in the case of sensational criminal trials, in order to deter others from following in their footsteps, it is no longer true that procedure by indictment or information is so much slower a process than the summary method. The grand jury has now been abolished in England and most of the Canadian provinces, and as in large cities the assizes are almost in continuous session there is no reason why a contempt of court indictment could not be brought before a jury within a matter of a few weeks. There are, after all, numerous English

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<sup>169</sup>*The King v. Almon* (1765), 97 E.R. 94 at p. 100.

<sup>170</sup>*Ibid.*, at p. 101.

<sup>171</sup>(1873), L.R. 9 Q.B. 230.

<sup>172</sup>*Ibid.*, at p. 233.

<sup>173</sup>(1894), 22 S.C.R. 7.

<sup>174</sup>*Ibid.*, at pp. 8-9.

precedents in which contempts were tried before a jury, without any visible damage to the fabric of the law.<sup>175</sup>

The argument against the use of the summary power rests on the objection that, in cases of contempts constituting a libel on the court, the judge is both the prosecutor, judge and jury, that it deprives a man of his ancient common law right to a trial by his peers, and attention is drawn to the fierce struggle in England during the second half of the eighteenth century to let juries decide the general verdict on a charge of seditious libel. Many of these objections, it is submitted, are no longer valid today.

In the first place, the objections only touch a limited number of constructive contempts of court (albeit of an important character); they do not affect the use of the summary power to punish other forms of constructive contempts and especially publications prejudicially commenting on pending proceedings. Secondly, the practice of the judge affected by the offending publication himself hearing the application to commit, which appears to be fairly widespread in the United States<sup>176</sup> and has unhappily even caught a foothold in Canada<sup>177</sup> on occasion, has no current sanction in England. The practice there, on the King's Bench side of the High Court, is for most types of contempt to be tried before a divisional court composed of at least two judges.<sup>178</sup> In the third place, experience does not prove that a jury always protects the rights of an individual better than does a judge: "seditious prosecutions went on with shameful severity in England after Fox's Libel Act had given the jury power to determine criminality."<sup>179</sup> Both Ivens and Boucher, to take two Canadian examples, did not noticeably fare better with a jury than they would have done at the hands of a single judge. "The essential question is not", as Professor Chafee has pointed in connection with trials for seditious libels,<sup>180</sup> "who is judge of the criminality of an utterance, but what is the test of its criminality." This observation, it is submitted, applies with equal force to trials by indictment for contempt of court.

But there are also two further reasons for questioning the need for a jury in contempt proceedings. The first of these is that, in England and Canada, the trend in this century has been to restrict trial by jury to the most serious criminal cases, and few contempts qualify being placed in this category. Sentences of imprisonment for contempts of court appear to be reserved for

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<sup>175</sup>See *ante*, footn. 154.

<sup>176</sup>The practice was mildly criticised by the U.S. Supreme Court in *Cooke v. U.S.* (1924), 267 U.S. 517, 69 L.Ed. 767, but continues to persist: see *Turkington v. Municipal Court* (1948), 193 P.2d 795 (Calif.).

<sup>177</sup>As, for example, in *R. v. Vancouver Province* (1954), 12 W.W.R. (N.S.) 349 (B.C.).

<sup>178</sup>See Halsbury's Laws of England, 3rd ed., Vol. 8, p. 34.

<sup>179</sup>Chafee, *Free Speech in the United States* (1946), p. 22; cf. Dicey, *The Law of the Constitution*, 7th ed., p. 240.

<sup>180</sup>Chafee, *op. cit.*, p. 23.

the most serious cases, and even when imposed rarely exceed period of from three to six months. The second, and more important, reason is that questions of fact are seldom in issue in contempt cases. The question usually is, not whether so-and-so published this paper or wrote that article, but whether the publication tends to interfere with a fair and impartial trial. That is an issue on which even experienced judges may disagree, especially in civil cases; it must be an infinitely more difficult question for a body of laymen to answer.

To sum up then. The power to punish libels on the courts not connected with pending proceedings should be seriously reviewed and preferably abolished altogether, except perhaps in a very limited number of cases. In any event the defendant should at least have the right to elect a trial by jury, and under no circumstances (except perhaps where the defendant consents) ought the judge against whom the libel is directed be permitted to preside over the contempt hearing.<sup>181</sup> As for the other types of constructive contempts of a criminal character no powerful reason exists for displacing the summary jurisdiction of the courts. The English practice, on the King's Bench side, of trying such cases before a divisional court appears to work very well and might perhaps be copied with advantage elsewhere.

### III — THE DISTINCTION BETWEEN CIVIL AND CRIMINAL CONTEMPTS OF COURT

The problem of how to distinguish between civil and criminal contempts of court raises difficult problems which the courts have not yet succeeded in solving satisfactorily. Yet the distinction is not unimportant, for at least seven, and possibly eight, consequences flow from it. They are as follows: (1) the Parliament of Canada and the Provinces have perhaps a concurrent jurisdiction to legislate on matters involving the law of criminal contempt,<sup>182</sup> but in the case of a conflict between the federal and the provincial legislation it is a fair assumption that the federal legislation would prevail by virtue of section 91(27) of the British North America Act; (2) it is true in England still today,<sup>183</sup> and was true in Canada until the new Criminal Code was introduced, that there is no appeal from summary conviction for a criminal contempt; and even though, in Canada, the Code does now allow an appeal<sup>184</sup> the distinction is still

<sup>181</sup>In *Boucher v. The King* [1951] S.C.R. 265 at p. 343, Cartwright J. expresses the opinion that libels on the courts should "preferably" be tried before a jury.

<sup>182</sup>See *The Copeland-Chatterton Co. v. Business Systems Co.* (1908), 16 O.L.R. 481 (C.A.), per Meredith J. A. at p. 489.

<sup>183</sup>The Criminal Appeal Act of 1907 (7 Edw. VII, c. 23) only provided for appeals from conviction on indictment or information (ss. 3, 20), but the Bill now before the House of Lords (see *ante*, footn. 165) would give a right of appeal from conviction for a criminal contempt of court. (section 1).

<sup>184</sup>Section 9, subs. (1): see *ante*, footn. 168;

subs. (2): "where a court or a judge summarily convicts a person for a contempt of court not committed in the face of the court

important because different rules of appeal continue to apply for civil and criminal contempts of court; (3) there is no privilege from arrest for solicitors and members of Parliament in cases of criminal contempt;<sup>185</sup> (4) the sheriff may break open an outer door in executing the process of arrest in a criminal contempt, and perhaps may execute it on a Sunday;<sup>186</sup> (5) the order from discharge from custody in criminal contempts may be made conditional on the payment of costs;<sup>187</sup> (6) in criminal contempts the court has power to impose either a fine or a term of imprisonment: in civil contempts, it would seem, the court's jurisdiction is limited to imposing a sentence of imprisonment, definite or indefinite;<sup>188</sup> (7) the prerogative of the Crown extends to remission of sentence from criminal contempts, but the Crown, *semble*, never interferes in the case of a civil contempt;<sup>189</sup> (8) it appears to be an open question whether the power of the court to move *ex mero motu* to attach a person for the commission of a criminal contempt extends equally to that of a civil character. In the British Columbia case of *Canadian Transport (U.K.) Ltd. v. Alsbury*,<sup>190</sup> O'Halloran J. A. who dissented did not expressly deal with the point but thought a judge must be cautious in initiating contempt proceedings and carrying them on himself, (since in so doing he becomes "Attorney-General, prosecutor, jury and Judge").<sup>191</sup> Mr. Justice Bird<sup>192</sup> apparently shared the view of Mr. Justice Sydney Smith<sup>193</sup> that it extended equally to both types of contempts, at least where the maintenance of the court's dignity and prestige was concerned. In the Supreme Court of Canada (where the case is reported *sub. nom. Tony Poje v. A. G. of British Columbia*),<sup>194</sup> Kellock J., who delivered the judgment of himself, the Chief Justice and Mr. Justice Rand, held the contempt was of a criminal character and stated that it was "immaterial" by what means the appellants were in court.<sup>195</sup> Mr. Justice Kerwin, in a separate concurring judgment, said that he could find no merit in any of the objections raised to the procedure adopted by the trial court,<sup>196</sup> and Estey J. confined himself to stating that the trial

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and punishment is imposed in respect thereof, that person may appeal (a) from the conviction; or (b) against the punishment imposed."

<sup>185</sup>*In re Freston* (1883), 11 Q.B.D. 545; *Wellesley v. Duke of Beaufort* (1831), 2 Russ. & My. 639.

<sup>186</sup>Halsbury, *op. cit.*, 3rd ed., Vol. 8, p. 4.

<sup>187</sup>*Ibid.*

<sup>188</sup>Fox, 36 Law Quar. Rev. 394 at p. 399.

<sup>189</sup>*In re Bahamas Islands* [1893] A.C. 138 (P.C.)

<sup>190</sup>[1953] 1 D.L.R. 385.

<sup>191</sup>*Ibid.*, at pp. 393-4.

<sup>192</sup>*Ibid.*, at pp. 419-20.

<sup>193</sup>*Ibid.*, at p. 409.

<sup>194</sup>[1953] 1 S.C.R. 515.

<sup>195</sup>*Ibid.*, at p. 527.

<sup>196</sup>*Ibid.*, at p. 528.

court had had jurisdiction to hear the motion,<sup>197a</sup> and he found it unnecessary to determine the nature and character of the contempt with which the defendants were charged.<sup>197</sup>

What, then, is the distinction between civil and criminal contempts of court? Halsbury states a widely accepted distinction when it defines a "criminal contempt" as consisting of words or acts obstructing, or tending to obstruct, the administration of justice, as distinguished from a "civil contempt" (designated by Halsbury as "contempt in procedure"), which consists of disobedience to the judgments, orders, or other process of the court, and involves a private injury.<sup>198</sup> Does it follow, then, that breach of an order of the court can never constitute a criminal contempt?

The Anglo-Canadian courts have advanced four different answers to this question at one time or another. First, it has been said that, for the purposes of appeal, only those contempts are of a criminal character which arise out of a criminal cause or matter.<sup>199</sup> This distinction appears to turn upon a particular construction of section 47 of the English Judicature Act, 1873, and has been criticised on the ground that contempt proceedings have no necessary connection, other than a chronological one, with the 'cause or matter' in the course of which they may occur.<sup>200</sup> The second view is one that has enjoyed a great deal of judicial popularity and has at least the merit of clarity and simplicity. It appears to hold that no breach of an order or judgment in a civil proceeding can ever constitute a criminal contempt.<sup>201</sup> The fallacies inherent in this point of view were vigorously exposed in the judgment of Mr. Justice Sydney Smith in the *Alsbury* case. He said,

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<sup>197a</sup>But it is submitted that, in principle, the power of the court to move *ex mero motu* should be confined to criminal contempts. To hold that a contempt is civil and yet to confer the power upon the court is a contradiction in terms. If a court takes action to vindicate its authority — as distinct from exerting its power in aid of execution — then the contempt in question ought to be classified as criminal. To hold otherwise would be in effect to create two types of court contempts, i.e., one of a procedural character and the other of a punitive character but used only when disobedience to the order of a court is involved and presumably governed by most of the rules applicable to criminal contempts. Such a dichotomy, with respect, is as unnecessary as it is bound to confuse an already sufficiently confused situation.

<sup>197</sup>*Ibid.*, at p. 528.

<sup>198</sup>3rd. ed., Vol. 8, p. 3, but see the subsequent qualification, *ibid.*, at pp. 20-1, para. 38.

<sup>199</sup>*R. v. Barnado* (1889), 23 Q.B.D. 305, *per* Cotton L.J. at p. 308; cf. *O'Shea v. O'Shea* (1890), 15 P.D. 59; *Scott v. Scott* [1913] A.C. 417, *per* Earl Loreburn at pp. 443-4; *Canad. Transport (U.K.) Ltd. v. Alsbury* [1953] 1 D.L.R. 385, *per* O'Halloran J.A. at p. 389.

<sup>200</sup>Fox, 30 Law Quar. Rev. 56 at pp. 58-9.

<sup>201</sup>*A. G. v. Kissane* (1893), 32 L.R.Ir. 220 (C.A.); *Scott v. Scott* [1913] A.C. 417, *per* Lord Atkinson at p. 462; *Alsbury's case* (*supra*) [1953] 1 D.L.R. 385, *per* O'Halloran J.A. at p. 389 and Bird J.A. at p. 417.

In reading textwriters' ideas on what should be classed as criminal contempts and what civil or procedural contempts, it seems to me they show a curious want of proportion. To say, firstly, that it is a criminal contempt to libel a party to a pending action, to insult a witness or juror, or a solicitor out of Court, or to advertise for witnesses; but that secondly, breach of an injunction cannot amount to anything but a civil wrong, does not carry conviction. The former offences are treated as criminal because it is said that they "interfere with the administration of justice." The inference is that breach of an injunction cannot interfere with the administration of justice. But does it not? The Courts are solicitous to ensure that the parties get a fair trial; that can only be with a view to getting them the judgment they are entitled to. But can the Courts say: 'Our only concern is to see you get your judgment; we are indifferent as to whether you can enforce it.' If disobeying an interim injunction is not interfering with justice, disobeying a final injunction must be equally pardonable. I cannot see how it is rational to treat one interference with justice differently from the other. In fact it would seem to me far more serious to flout express prohibitions of the Court than merely to infringe general principles covering litigation.<sup>202</sup>

The anomalous consequences that flow from the rigid distinction referred to by the learned judge may be seen in the following example. A person who is named in an injunction order commits a breach of the order with the aid and assistance of a stranger, neither his servant nor agent, who is not named in the order. The principal apparently would be guilty only of a civil contempt, whereas the stranger might be proceeded against as for a criminal contempt.<sup>203</sup> The courts are also not consistent in their application of this test, because it appears to be the practice to regard disobedience to a court order committed in the face of the court as criminal in character. Thus a witness who fails to appear in court in response to a subpoena commits only a civil contempt,<sup>204</sup> but if he does appear and then refuses to be sworn or to answer questions he is guilty of a criminal contempt.<sup>205</sup> The explanation given for this distinction is that his contumacious conduct in the presence of the court constitutes an interference with the administration of justice, but that if committed out of its view it falls into the category of a contempt in procedure.

The third view is more rational than the second, but is also more difficult to apply in practice. This view recognizes the potentially dual character of contempt proceedings for disobedience to a court order, but stops short of saying that every wilful disobedience constitutes a criminal contempt as well

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<sup>202</sup>[1953] 1 D.L.R. 385 at p. 403.

<sup>203</sup>This distinction appears to have been drawn by Lindley M.R. in *Seaward v. Paterson* [1897] 1 Ch. 545 at p. 555, as interpreted by Lord Atkinson, and the latter thought that it was "almost inconceivable that the law should tolerate such an anomaly as this": [1913] A.C. 417 at pp. 456-7. See also *Poje's case* [1953] S.C.R. 516, *per Kellock J.* at pp. 519-20.

<sup>204</sup>Halsbury, *op. cit.*, 3rd ed., Vol. 8, p. 28, para. 51 (*sub. nom.* "Contempt in procedure"); Blackstone, *Commentaries*, Vol. IV, 284; *Scholes v. Hilton* (1842), 10 M. & W. 15; *R. v. Daye* [1908] 2 K.B. 33.

<sup>205</sup>Halsbury, *op. cit.*, p. 5, para. 6 (*sub. nom.* "Criminal contempt"); 2 Hawk. P.C., 8th ed., c. 22, s. 35; Blackstone, *Commentaries*, Vol. IV, 284; *Hemnegal v. Evance* (1806), 12 Ves. 201; *Ex p. Fernandez* (1861), 10 C.B. (N.S.) 3.

as a civil contempt.<sup>206</sup> "The line, then, which I draw is this;" says Lord Brougham, L.C. in an old case,<sup>207</sup> "that against all civil process privilege protects; but that as against contempts for not obeying civil process, if that contempt is in its nature or by its incidents criminal, privilege protects not." But, it may well be asked, when does disobedience to a court order partake of a "criminal" character? Apart from a number of special cases involving attorneys and wards of the court there is very little precedent of a general character to guide us. The Supreme Court of Canada in *Poje's* case held that the "public" nature of the defiance of the order of the court transferred the conduct in question from the realm of a mere civil contempt, such as an ordinary breach of an injunction with respect to private rights in a patent or trade-mark, into the realm of a public depreciation of the authority of the court tending to bring the administration of justice into scorn.<sup>208</sup> If read literally this test would lead to the conclusion that a clandestine disobedience, however wilful, could never amount to a criminal contempt.

The most satisfactory answer to the problem, it seems to this writer, is that tendered by Mr. Justice Sydney Smith. Every wilful disobedience to an order of the court is a challenge to its authority and is therefore infected with a criminal as well as a civil character. This proposal gains support from section 108 of the Criminal Code which makes it an indictable offence wilfully to disobey the lawful order of any court of justice in Canada. It is true that this section only applies where no other mode of proceeding is expressly provided by law, and rules of court do generally provide other means of enforcement, but the section is at least indicative of a rational approach to a troublesome problem. This does not of course mean that it is either possible or desirable to abolish the distinction between civil and criminal contempts itself, but it does mean that in every case of wilful disobedience proceedings for criminal contempt — preferably designated as such in the motion for attachment or committal — can be taken, if thought desirable, without protracted litigation over the question whether the contumacious conduct in fact exhibited the requisite element of "criminality."

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<sup>206</sup>Halsbury, *op. cit.*, pp. 20-1, para. 38; *McWilliams'* case, 1 Sch. & Lef. 169, *per* Lord Redesdale at p. 174; *Wellesley v. Duke of Beaufort* (1831), 2 Russ. & My. 638, *per* Lord Brougham at p. 665; *In re Freston* (1883), 11 Q.B.D. 545, *per* Brett M. R. at pp. 552-3 and Fry L.J. at p. 557; *O'Shea v. O'Shea* (1890) 15 P.D. 59, *per* Lindley L.J. at p. 64; *Copeland-Chatterson Co. v. Business Systems Co.* (1908), 16 O.L.R. 481, *per* Meredith J.A. at pp. 489-90; *Alsbury's* case (*ante*), footn. 199, *per* Smith J.A. at p. 403 *et seq.*; *Poje's* case [1953] 1 S.C.R. *per* Kellock J. at p. 517 *et seq.* See also, *U.S. v. U.M. of A.* 91 L. Ed. 884, and Moskowitz in (1943), 43 Col. Law Rev. 780.

<sup>207</sup>*Wellesley v. Duke of Beaufort* (1831), 2 Russ. & My. 638, at p. 655.

<sup>208</sup>[1953] S.C.R. 516 at p. 527.