COMMENT ON RECENT DECISIONS

CONTEMPT OF COURT—EDITORIAL COMMENT ON PENDING CASES—[California].—Newspaper editorials commending convictions of sit-down strikers and of a politician charged with soliciting bribes were published before sentence had been passed. Another editorial opposed probation of two labor union members. Contempt charges were filed against the newspaper by the Los Angeles Bar Association. Subsequently the newspaper printed two editorials supporting its right to comment. Because of this discussion of the pending contempt trial, a second action was brought and consolidated with the first. *Held*, that the newspaper was guilty of contempt, as the publications were such as might influence the court and thus hinder the free administration of justice.[1]

Editorial comment on judicial proceedings presents a dual problem. First, the impartial administration of justice must be unobstructed. Second, the greatest possible freedom of the press must be preserved as a safeguard against decisions of poor quality or arbitrary nature.

The instant case is of interest not only for the question of law involved but also for the adverse criticism it has evoked from the press.[2] An editorial in a St. Louis paper objected that under such a ruling comment on a case would be impossible until it was certain that no appeal would be taken or until after final adjudication by the Supreme Court of the United States.[3] Some courts have held libelous publications contempts although the case was fully determined,[4] but the general rule is that comment on judicial proceedings is not ground for contempt when the case is no longer pending.[5] In this connection the courts disagree as to what constitutes a "pending" cause. The rule in most jurisdictions is probably to the effect that a case is "pending" when it is still open to modification, appeal, or rehearing, and until the final judgment has been rendered on the appeal.[6] Another view would seemingly permit comment upon a case although an appeal might subsequently be taken, on the principle that a "comment upon

1. In re Times-Mirror Co. (Cal. Super. Ct. for Los Angeles Cty., 1938) 5 U. S. L. Week 1530.

2. A further interesting consideration is the fact that the publications held in contempt in the instant case do in some of the editorials express hearty approval of the court's action. Usually the offense punished is of an opposite character.

3. St. Louis Post-Dispatch, August 29, 1938, p. 2C: 2. See Chicago Daily Tribune, August 29, 1938, p. 10: 1.

4. State v. Morill (1855) 16 Ark. 384; see State v. Shepherd (1903) 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624.

5. Rapalje, *Contempt* (1890) 70, sec. 56.

6. Ex parte Craig (C. C. A. 2, 1921) 274 Fed. 177; Ex parte Nelson (1913) 251 Mo. 63, 157 S. W. 794; In re Chadwick (1896) 109 Mich. 588, 67 N. W. 1071; State v. Faulds (1895) 17 Mont. 140, 42 Pac. 285 (case pending although judgment had been rendered in appellate court because remittitur had not yet issued); State v. Tugwell (1898) 19 Wash. 238, 52 Pac. 1056, 43 L. R. A. 717 (opinion rendered but time still open to apply for modification thereof). For further examples see Note (1905) 68 L. R. A. 261.

the behavior of the court in cases fully determined in the particular court is unrestricted."[7] The Missouri Supreme Court has held that a publication scandalizing the court, even after the case has been determined, amounts to contempt but that comments directed at the parties or likely to influence the court in the particular action are in contempt only as to a pending cause.[8] Publication may be in contempt although the judge or the court-room has not been influenced thereby[9] or, indeed, has not even seen it.[10] The aptitude of the publication to divert the course of justice is not to be tested by its probable influence on the particular judge; the criterion should be the "reasonable tendency of the acts done."[11]

During the first half of the last century, public sympathy in favor of freedom of the press resulted in legislation in many states setting up limitations on the summary power to punish for contempt.[12] These statutes have been held unconstitutional as depriving courts of inherent power,[13] dismissed as declaratory of the common law,[14] or construed away.[15] Today they are upheld in only a few states.[16]

The problem of the courts is to reconcile the interests in freedom of speech and in the right to a trial by an impartial judge and jury. The courts should neither refuse to punish any publication as contempt,[17] nor should they punish every publication. It is self-evident that a prejudgment of the facts or decision of a pending case likely to become obstructive in fact should not be tolerated. It being doubtful whether any paramount interest is served by preventing criticism until after final determination by a court of last resort, it is submitted that it would be desirable to permit comment on cases "fully determined in the particular court" involved.[18]

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7. People v. Albertson (1934) 242 App. Div. 450, 275 N. Y. S. 361. The language of Taft, C. J., in Craig v. Hecht (1923) 263 U. S. 255, 278, would seem to indicate the acceptance of much the same view.

8. State v. Shepherd (1903) 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624.

9. People v. News-Times Publishing Co. (1906) 35 Colo. 253, 84 Pac. 912, 956.

10. U. S. v. Toledo Newspaper Co. (D. C. N. D. Ohio 1915) 220 Fed. 458, aff'd (C. C. A. 6, 1916) 237 Fed. 986.

11. Sinclair v. U. S. (1929) 279 U. S. 749.

12. For a comprehensive table setting forth the pertinent statutes, past and present, of each state see Nelles and King, Contempt by Publication in the United States (1928) 28 Col. L. Rev. 554-562.

13. State v. Morill (1855) 16 Ark. 384.

14. State v. Shumaker (1927) 200 Ind. 623, 157 N. E. 769, 58 A. L. R. 954.

15. U. S. v. Toledo Newspaper Co. (D. C. N. D. Ohio 1915) 220 Fed. 458; State v. Tugwell (1898) 19 Wash. 238, 52 Pac. 1056, 43 L. R. A. 717.

16. "In four states only—Pennsylvania, New York, South Carolina, and Kentucky—do statutes prescribing or limiting summary punishment for publications seem established beyond possibility of attenuation or attrition." Nelles and King, Contempt by Publication in the United States (1928) 28 Col. L. Rev. 543.

17. Such a view was taken in Seltzer v. State (1930) 31 Ohio L. Rep. 394.

18. This view is based on the idea that "libelous publications which bear upon the proceedings of a court while they are pending may in some way

At any rate, the power should be sparingly exerted so as to avoid antagonizing the press or throttling potentially valuable criticism.[19] Requiring cases of constructive contempt to be heard by a different judge from the one offended might be advisable as tending to diminish opposition to exercise of the power.[20] J. M. F.

EVIDENCE—TESTIMONY OF SPEED OF AUTOMOBILE BASED ON AURAL PERCEPTIONS—[Federal].—In a recent case testimony that an automobile was "moving fast" based only on aural perceptions was admitted along with other evidence to show negligence on the part of the driver and thereby authorize recovery from him for death in a collision. *Held*, that especially in view of the sufficiency of the other testimony to sustain the verdict, admission of such testimony was not reversible error.[1]

It is settled law that a person of ordinary intelligence, who has had an opportunity for observation, is competent to render opinion as to speed[2] of an animal,[3] a train,[4] a street car,[5] or an automobile.[6] The courts have been reluctant, however, to admit such evidence as to speed when it is based on what the witness heard rather than on what he saw; and by the decided weight of authority such evidence is regarded as inadmissible.[7] On examination, most of the cases which have been ostensibly regarded as contrary pre-

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affect their correct determination and are properly the subject of contempt proceedings. On the other hand such publications or oral utterances of entirely retrospective bearing come within the sphere of authorized comment unless they affect a judge personally, when he has his remedy in an action of libel or slander as any other individual thus offended against." People v. Albertson (1934) 242 App. Div. 450, 275 N. Y. S. 361, 363.

19. The instant case would be in contempt under either of the views set forth as being a publication on a case still pending in the court concerning which the comment is made. See cases cited supra, notes 6 and 7.

20. This requirement has been recommended by the United States Supreme Court. Cooke v. U. S. (1925) 267 U. S. 517, 539; Toledo Newspaper Co. v. U. S. (C. C. A. 6, 1916) 237 Fed. 986, 988. It is also obligatory in several states. See for instance Ind. Burns' Ann. Stats. (1933) tit. 3, secs. 911, 912.

1. Smith v. Doyle (App. D. C. 1938) 98 F. (2d) 341.

2. See Notes (1930) 70 A. L. R. 540 and (1935) 94 A. L. R. 1190.

3. 4 Wigmore, *Evidence* (2d ed. 1923) sec. 1977; Nesbit v. Crosby (1902) 74 Conn. 554, 51 Atl. 550; Chicago City R. R. Co. v. Matthieson (1904) 212 Ill. 292, 72 N. E. 443.

4. Alabama G. S. R. Co. v. Hall (1895) 105 Ala. 599, 17 So. 176; Overtoom v. Chicago & E. I. R. Co. (1899) 181 Ill. 323, 54 N. E. 898; Hoppe v. Chicago, M. & St. P. Ry. Co. (1884) 61 Wis. 357, 21 N. W. 221.

5. Chicago City Ry. Co. v. Bundy (1904) 210 Ill. 39, 71 N. E. 28; Johnston v. Bay State Ry. Co. (1916) 222 Mass. 583, 111 N. E. 391.

6. Denver Omnibus and Cab Co. v. Krebs (C. C. A. 8, 1919) 255 Fed. 543; Galloway v. Perkins (1916) 198 Ala. 658, 73 So. 956; Waltring v. James (1920) 136 Md. 406, 111 Atl. 125.

7. Note, L. R. A. 1918A, 662; Williams v. Kansas City S. & M. R. Co. (1888) 96 Mo. 275, 9 S. W. 573; Campbell v. St. Louis & Suburban R. Co. (1903) 175 Mo. 161, 75 S. W. 86; Parsons v. Syracuse B & R. Co. (1909) 133 App. Div. 461, 117 N. Y. S. 1058.