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-

---

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.

sent significant differences from the typical situation. One court permitted a witness to describe the speed of a horse by the sound made on the purely mechanical reasoning that the law permits evidence of speed on the basis of sensual perceptions and that it does not discriminate between the various senses, such as visual and aural.[8] Another court admitted such evidence as to the speed of a train on the ground that, though to the ear minute distinctions in speed might not be discernible, it would be quite simple so to distinguish between rapidly and slowly moving trains.[9] Some courts, especially in train cases, have conditioned the admission of such testimony upon the laying of a foundation that the witness has been acquainted with the vehicle and its noise of operation before the instance in question.[10] Of the cases usually cited some are scarcely authority for admissibility inasmuch as both visual and aural perceptions were used as bases for the testimony.[11]

Opinion as to the speed of a motor vehicle based only on the sense of hearing has been refused admission unless the witness qualifies as an expert,[12] apparently on the ground that the mere sound of a motor[13] or of an exhaust[14] furnishes an insufficient basis for ascertaining the speed of an automobile. On the basis of precedents the consideration given the question in the present case seems to proceed on acceptance of inexact analogies drawn from train, horse, and street car cases.

In accordance with the modern trend to admit opinion evidence, subject to explanation, and to permit the jury to determine its weight,[15] at least two theories may be suggested by means of which such evidence might be brought within the principle of the cited cases. First, expert testimony is an established exception to the general rule that a witness may not testify as to speed on the basis of sound.[16] Second, the lay witness may well be qualified, on the basis of the above mentioned cases, to give such testimony if familiarity with the car, its noise of operation, and the road in question could be shown.[17] It is regrettable that the court in the instant case went no further in its discussion than simply to select, without analysis, the cases sustaining admission of the evidence in question, none of which were cases involving automobile accidents. C. J. D.

---

8. Nesbit v. Crosby (1902) 74 Conn. 554, 51 Atl. 550.
9. Van Horn v. Burlington C. R. & N. R. Co. (1882) 59 Iowa 33, 12 N. W. 752.
10. Lake Erie & W. R. Co. v. Moore (1912) 51 Ind. App. 110, 97 N. E. 203; Missouri Pacific Ry. Co. v. Hildebrand (1893) 52 Kan. 284, 34 Pac. 738.
11. Cargall v. Riley (1923) 209 Ala. 183, 95 So. 21; Hamilton v. De Camp (1926) 120 Kan. 645, 244 Pac. 105.
12. Kuhn v. Stephenson (1928) 87 Ind. App. 157, 161 N. E. 384; Campbell v. St. Louis & Suburban R. Co. (1903) 175 Mo. 161, 75 S. W. 86.
13. Challinor v. Axton (1932) 246 Ky. 76, 54 S. W. (2d) 600; Johnson v. Wilson (Ind. App. 1936) 200 N. E. 729, rev'd on other grounds (Ind. 1937) 5 N. E. (2d) 533; Wright v. Crain (1905) 142 Mich. 508, 106 N. W. 71.
14. Laubach v. Colley (1925) 283 Pa. 366, 129 Atl. 88.
15. McCormick, Tomorrow's Law of Evidence (1938) 24 A. B. A. J. 507.
16. See cases cited, supra, note 12.
17. See cases cited, supra, note 10.