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FREE PRESS AND FAIR TRIAL IN ENGLISH LAW

DONALD M. GILLMOR*

In England, the rights of free press and fair trial have not been in open conflict since Parliament and the courts have clearly given priority to fair trial, and, through the consistent and vigorous use of the contempt power, have greatly restricted press comment on judicial proceedings. All procedural and substantive changes proposed to balance better the values of free press and fair trial fall within the ambit of contempt of court, as it inheres in the common law or is defined in Parliamentary enactments. Existing as it does in a unitary judicial system in which the courts are unable to challenge the constitutionality of legislation, the English law of contempt is, in contrast to its American counterpart, exceedingly well settled.

But, except where specific statutory provisions have been made, contempt of court has not been precisely defined in English law. Existing definitions suggest a broad and somewhat arbitrary procedure which can be invoked whenever there is a *reasonable tendency* that the administration of justice will be impaired. The following definition reflects this imprecision:

To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties litigant or their witnesses during the litigation.¹

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This article is based upon a doctoral dissertation, "Trial by Newspaper": The Constitutional Conflict Between Free Press and Fair Trial in English and American Law (University of Minnesota, 1961).

¹Oswald, Contempt of Court 6 (3d ed. 1910). See Blackstone, Commentaries on the Law 866 (Gavit ed. 1941): "To this head of summary proceedings may also be properly referred the method, immemorially used by the superior courts of justice, of punishing contempts by attachment, and the subsequent proceedings thereon. The contempts that are thus punished are either direct, which openly insult or resist the powers of the courts or the persons of the judges who preside there, or else are consequential, which (without such gross insolence or direct opposition) plainly tend to create a universal disregard of their authority." And, Wharton, Criminal Pleading and Practice § 957 (9th ed. 1889): "It is a special contempt, punishable by the committal of the contemner, to misrepresent the proceedings of the court, to abuse the parties to the cause, or to attempt to prejudice the mind of the public against them before its cause is decided, or to publish

Contempt by publication is a criminal offense at common law, punishable by summary procedure.² The aggrieved party to a civil or criminal suit who thinks his right to a fair trial has been imperilled by published matter can make an affidavit setting out the circumstances, and apply by counsel to the court to order a *rule nisi* for attachment. This implies that the court thinks a *prima facie* case has been made that the matter complained of will prejudice a fair trial, and it orders the attachment (equivalent to committal to prison) of the publisher, editor, reporter or printer involved unless he comes before the court on a certain day and "shows cause" why the order should not be made absolute or final. On the appointed day, the persons against whom the *rule nisi* is directed, having sworn affidavits explaining, excusing or justifying the publication in question, attend and through their counsel offer the most profuse apologies or show by argument that no contempt has, in fact, been committed. The court can, in making the rule absolute, commit the offenders to prison, leaving them

anything the evident result of which would be to affect the administration of justice."

²Justification for the summary punishment of constructive or out-of-court contempt is credited to Blackstone, who depended for his opinion upon the authority of Justice Wilmot's undelivered opinion in *R. v. Almon* (1765) Wilm. 243 at 254, concerning a libel upon the Chief Justice, Lord Mansfield, by a bookseller. Wilmot believed the procedure to stand upon immemorial usage, to be coeval with the common law, and to be absolutely necessary to the authority of the courts. A clerical mistake in drawing up an attachment against Almon led to abandoning of the case and the 1765 judgment was never delivered, but it was published posthumously in 1802. Although these proceedings are not mentioned in the reports of that period, the case became a widely cited authority for the summary power to punish constructive contempts of court. Fox, *The History of Contempt of Court* 34-37 (1927), doubted the "immemorial" basis of Wilmot's rule and suggested that before Star Chamber this offense was tried on indictment and by a jury in the ordinary course of the law. The punishment of libels on the court by attachment, said Fox, was arbitrary and oppressive Star Chamber processes adopted in the courts of common law, and they clashed with the whole system of English law.

³ Holdsworth, *History of English Law* 392 (1923), says: "Through the medieval period, and long afterwards, the courts, though they might attach persons who were guilty of contempts of court, could not punish them summarily. Unless they confessed their guilt, they must be regularly indicted and convicted"; and that the assumption by the court of the right to deprive such persons of trial by jury was borrowed from the Star Chamber.

The last case of constructive contempt tried by jury on indictment was *R. v. Tibbits* [1902] 1 K.B. 77, in which the reporter and the editor of a Bristol newspaper were convicted of conspiring to prejudice the minds of members of the community, the magistrate, and the jurors through articles published during and after a trial. But much earlier in *R. v. Clement*, 4 B. & Ald. 218 (1821), the court had adopted the rationale of Justice Wilmot's undelivered opinion in the Almon case, and the summary punishment of criminal contempts committed out of court had become the law of the land.

subsequently to apply for release when they think they can convince the court that they have purged their contempt; or it can impose a fine; or both; or simply order the offenders to pay the costs. If the court is convinced that no contempt has been committed, the rule will be discharged.³

The court to which these applications are made is the one before which the proceeding which it is alleged will be prejudiced is to be tried, if it is to be tried in a superior court. All superior courts have the power to punish contempts against themselves. However, it has been established that the Queen's Bench Division shall deal with all applications for attachment for contempt in regard to criminal prosecutions, whether proceeding before the justices in the petty sessions or committed for trial to the assizes or quarter sessions; and with all applications relating to contempt of inferior courts, such as county courts,⁴ courts martial and consistory courts.⁵

If a judge has been the victim of an attack in the press, the Director of Public Prosecutions usually makes the application, although the court may initiate proceedings on its own motion. When the judge

³Dawson, *The Law of the Press* 101-02 (1947).

⁴In *R. v. Lefroy* [1873] L.R. 8 Q.B. 134, the High Court held that the jurisdiction of the judge of a county court was confined by § 113 (9 & 10 Vict c. 95) to contempts committed in court; and he had no power to proceed against a person for a contempt committed out of court. Chief Justice Cockburn said: "In the case of the Superior Court at Westminster, which represents the one supreme court of the land, this power was coeval with their original constitution, and has always been exercised by them. These courts were originally carved out of the one supreme court, and are all divisions of the *aula regis*, where it is said the king in person dispensed justice, and their power of committing for contempt was an emanation of the royal authority, for any contempt of the court would be a contempt of the sovereign.... No such power has ever been known to be exercised by an inferior court.... The power is therefore not inherent in the county courts as courts of record, and it is not given by the statutes, which only makes them courts of record and gives them limited power over contempt in court."

A similar rule was declared in *R. v. Brompton County Court Judge* [1893] 2 Q.B. 195 when it was decided that a county court judge has no jurisdiction under § 26 of the Solicitors Act of 1860 to commit for contempt a person who has acted as a solicitor in an action in the county court without being qualified. "The legislature," said the court, "decided... that it would not entrust such a general and unlimited power to county court judges."

Justice Wills in *R. v. Parke* [1903] 2 K.B. 442 said: "Many inferior tribunals are not Courts of record, and, therefore, have no means of checking practices of the kind with which we are dealing.... This Court exercises a vigilant watch over the proceedings of inferior Courts, and successfully prevents them from usurping powers which they do not possess, or otherwise acting contrary to law."

⁵In *R. v. Editor, etc., of Empire News and Davidson Ex parte The Bishop of Norwich* [1932] All E.R. 516, Lord Hewart stated that "the justification is an inherent one, and just as this court may correct an inferior court such as the consistory court, so also in proper circumstances it may protect such a court."

himself has been criticized, the practice is for him not to sit at the hearing.⁶

In the Queen's Bench Division, but not in the Chancery Division, all contempt actions are moved by a Law Officer or on the instructions of the Attorney-General. In recent years it has been suggested that all contempt proceedings be instituted in this manner to put an end to contempt actions designed solely to win costs.⁷

Before 1960 there was no right of appeal against any decision of punishment for criminal contempt, except on the acquiescence of the Attorney-General or the Director of Public Prosecutions, or in cases originating in the dominions or colonies.⁸ Recent legislation allows appeals in all cases of criminal contempt.⁹

PREJUDICING PENDING PROCEEDINGS

English lawyers do not hold press conferences or issue publicity releases. Once a person is arrested, newspapers, on pain of a contempt citation, carefully refrain from publishing pre-trial comment.¹⁰ And when a citation has been issued, English judges generally apply a

⁶*Daw v. Eley* [1868] L.R. 7 Eq. 49.

⁷British Section of the International Commission of Jurists (JUSTICE), *Contempt of Court* 34 (1959); *Contempt of Court*, 207 *The Law Times* 227 (1949).

⁸In its 1959 Report, *Contempt of Court*, op. cit. at 35, the British Section of the International Commission of Jurists (JUSTICE) severely criticized the lack of appeal from contempt convictions under English law and pointed to the fact that such was the case in no other country in Western Europe. The jurists thought the right of appeal particularly important in contempt cases, since the law of contempt is difficult to define; the question often arises as to whether what was done amounted to a contempt or not; and the conduct complained of should be weighed against other matters of public concern such as the right of free speech. Furthermore, in cases where an affront to the judge had been charged, appeals to the Privy Council from the colonies, India, and Ceylon, show that the right of appeal does rectify wrongs. See, *Re Special Reference from the Bahama Islands* [1893] A.C. 138; *McLeod v. St. Aubyn* [1899] A.C. 549; *Re Taylor* [1912] A.C. 347; *Ambard v. Attorney-General for Trinidad and Tobago* [1936] A.C. 322; *Perara v. The King* [1951] A.C. 482; and *Izuora v. The Queen* [1953] A.C. 327. In all these cases, in which an appeal was allowed, the contempt conviction was quashed.

⁹Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65, § 13.

¹⁰In one of the landmark cases in this area, *Re Read and Huggonson* (Roach v. Garvan), 2 Atk. 469 (1742)—also referred to as the St. James Evening Post case—Lord Hardwicke identified three kinds of constructive contempt: (1) scandalizing the court itself, (2) abuse of parties who are concerned in causes before the Bench, and (3) prejudicing mankind against a person before the cause is heard. He added: "It is a contempt of court to prejudice mankind against persons before the case is heard. There cannot be anything of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and to their characters."

"reasonable tendency" test in evaluating the effects of offensive publication. Mr. Justice Kekewich said in 1894:

"The true question was not whether the publication had interfered with the administration of justice, but whether it tended so to interfere: and if it tended to prejudice either the mind of the judge or any other person who would have to consider the case, then it was a publication that ought not to be allowed."¹¹

The rule would also seem to be that some degree of bad intent must be involved. In the leading case—*R. v. Payne*¹²—Lord Russell declared that applications for writs of attachment had become too frequent, and he added: "Every libel on a person about to be tried is not necessarily a contempt of Court; but the applicant must show that something has been published which either is clearly intended, or at least is calculated, to prejudice a trial which is pending." Three years later, Lord Justice Cotton, decrying the possible effect of publicity in biasing the minds of jurors, held nevertheless that the court would not exercise its extraordinary power of committal if the offense complained of was of a "slight or trifling nature," but only if it was likely to cause substantial prejudice to the parties to the action.¹³

The difficulties inherent in a jurisdiction based on a precept as broad and undefined as "reasonable tendency" are illustrated in an earlier case in which Mr. Justice Blackburn said in part: "I am greatly influenced by this, that though here they attempted to influence the people by what is called appealing to the public, though that in the present case is utterly ineffectual, yet it may very well occur in *future* times that there may be instances in which that would be far from ineffectual and inoperative."¹⁴ Anxious not to cast doubts upon his own fortitude or that of his colleagues, Blackburn found it necessary to vindicate the speedy summary power in terms of its deterring future at-

¹¹Re Pall Mall Gazette, *Jones v. Flower and Hopkinson* [1894] 11 T.L.R. 122.

¹²[1896] 1 Q.B. 577. Cf., *Powis v. Hunter* 2 L.J. Ch. 31 [1832]; *Ex parte Greene and Others* in the matter of *Robbins of the Press Association* [1891] 7 T.L.R. 411; *R. v. Parnell* [1880] 14 Cox, C.C. 474. The question of intent was clearly stated in *R. v. Odhams Press, Ltd.*, *Ex parte Attorney-General* [1956] 3 All E.R. 494. In *In re New Gold Coast Exploration Co.* [1901] 1 Ch. 860, the Court of Appeals also thought the contempt power was being applied far too frequently.

¹³*Hunt v. Clark* [1889] 58 L.J.Q.B. 490 (C.A.). Cf., *Ex parte The Standard, The Times*, January 28, 1907; *R. v. Daily Mail, The Times*, January 15, 1907; *Re De Beaujeu's Application for Writ of Attachment against Cudlipp* [1949] 1 All E.R. 439.

¹⁴*R. v. Castro, Skipworth's Case* [1873] 9 Q.B. 230. (Emphasis added.) Cf., *Grimwade v. Cheque Bank* [1897] 13 T.L.R. 305; *R. v. Dolan* [1907] 2 Ir. R. 260; *R. v. Parker, Ex parte John Bull Ltd.*, *The Times*, July 27, 1909.

tempts to influence other judges. The offending publication could never have been effectual there but had to be punished to protect future judges of lesser fibre. Defendant was fined 500 pounds and imprisoned for three months on these speculative grounds.

That where the question of intent is involved each case will be decided on its merits is suggested in a 1932 opinion. While a man was under remand on a charge of murdering his son, *News of the World* published, in addition to the formal evidence which had been given before the magistrates, the following statement: "It was suggested that he met his death in an accidental manner through the family dog, Prince, knocking over a fully loaded double-barrelled gun left against the barn door." Since the accused had made a similar statement to police some months before, the court could not consider the publication an interference with the fair course of justice.¹⁵

The most serious cases of contempt are those committed during the pendency of criminal or civil trials—though in the latter the court requires stronger evidence that the matter complained of does actually tend to prejudice the trial, and juries are less likely to be involved.

When is a case pending?¹⁶ A leading case on this question is *R. v.*

¹⁵ *R. v. News of the World (Editor, Printer and Publishers), Ex parte Kitchen* [1932] 48 T.L.R. 234. In libel actions in which the newspaper is itself the defendant a problem arises. Will a continued attack by the newspaper interfere with a fair trial? On the other hand, if the attacks are prohibited by the court as soon as a writ for libel has been served, the plaintiff has won immunity from further attacks in spite of the public interest that may be involved in further exposure. In *R. v. Daily Mail (Editor), Ex parte Factor* [1928] 44 T.L.R. 303, Jacob Factor had been exposed by the newspaper for allegedly selling worthless stocks. The court refused to commit for contempt saying that, "if half of what the Daily Mail had said were true, it was very much for the public benefit that his unmasking should not be delayed." But the court warned the newspaper not to go on with the articles if Factor should proceed with his libel action. The court said in *R. v. Blumenfeld, Ex parte Tupper* [1912] 28 T.L.R. 308, that if it is satisfied that the publication intends to justify what it has said about the plaintiff in a subsequent libel hearing, it will not restrain the publication before the action has begun.

¹⁶ Earlier cases do not serve to clarify the question of pendency. In *Metzler v. Gounod* [1874] 30 L.T. 264, a plaintiff obtained a verdict, leave being reserved to the defendant to move for a new trial. But the court would not consider the action to be still pending so as to allow an attachment for contempt against an agent for the defendant who distributed printed comments on the trial, even though those comments misrepresented the evidence which had been given. Cf., *R. v. Editor and Publishers of the Evening News, Ex parte Hobbs, The Times*, April 7, 1925, p. 5.

Compare, *Dallas v. Ledger, Re Ledger* [1888] 52 J.P. 328, where a trial jury found a verdict against a defendant in a libel action, and the defendant gave notice of motion for a new trial, and meanwhile presented an article in his news-

*Davies, Ex parte Delbert Evans.*¹⁷ A medical practitioner was convicted in the Central Criminal Court on charges of procuring abortions and was sentenced to five years penal servitude. Before an appeal was heard—although it was not clear to the court whether a notice of appeal had been formally filed or not—*News of the World* published an article stating that the police had been investigating the doctor's case for twenty years, and that he had made and concealed a fortune. Although the court decided that the article in question did not tend to interfere with the administration of justice and was therefore not a contempt of court, it laid down the rule that after a man has been convicted of a criminal offense, and before his appeal has been heard or the time for appeal has expired, the publication of comments¹⁸ on the case may constitute a contempt of court. Justice Humphreys noted that the Court of Criminal Appeals, because it may conduct retrials of indictments and make use of a jury, deals with more than questions of law "Therefore, any matter which is published between the date of the conviction and the date of the hearing by the Court of Criminal Appeals may be a matter which may come to the attention of a person who has to try the guilt or innocence of that indictment of that person or individual."

In a more recent case, Lord Parker, the present Chief Justice of England, declared that although a case might be considered *sub judice* until all possibilities of appeal had been exhausted, the significant

paper commenting adversely upon the conduct of the jury, it was held that such comment did not amount to a contempt of court.

Contra, Re Labouchere, Ex parte Columbus Co., Ltd., [1901] 17 T.L.R. 578, in which the proprietors of *Truth* commented on the reliability of a witness in a civil suit after the jury had disagreed but before a motion for a new trial had been filed; they were fined 50 pounds and costs for contempt. In delivering the opinion of the court, Mr. Justice Bruce said that the only question was whether the publication of the article tended to interfere with the due administration of justice. The jurisdiction of the court, he said, existed not only to prevent the mischief in that particular case, but also to prevent similar mischief arising in other cases—a preventive purpose antithetical to the American doctrine of clear and present danger. Cf., *R. v. Freeman's Journal* [1902] 2 Ir. R. 82, in which the court held that where a prosecution for seditious libel had taken place but the jury had disagreed, and it was intended (though not formally stated) that a new jury would be empanelled, the proceeding was still pending and it was a contempt of court to criticize the action in a newspaper.

¹⁷[1945] 2 All E.R. 167 (D.C.).

¹⁸English editors must take pains to distinguish between news reporting and commentary. All preliminary and interlocutory proceedings, if publicly heard, can be fully reported, but comment must be reserved until after the trial has taken place and final judgment delivered. Usually, an inaccurate or misleading account of a trial is not contempt, if the mistake is not purposeful, *Birch v. Walsh* 10 Ir. Eq. R. 93 (1846).

consideration was "whether the article when published... was in all the circumstances calculated really to interfere with the hearing of an appeal, should one be brought."¹⁹ The case, then, rested more on its particular facts than on any binding legal rule; and in this instance the trial had concluded and an appeal had been lodged when there appeared a rather vitriolic article asserting the guilt of the accused and condemning him as a man of violence. The article was ineffectual, said the Lord Chief Justice, and:

"Even if a judge who eventually sat on the appeal had seen the article in question and had remembered its contents, it is inconceivable that he would be influenced consciously or unconsciously by it. *A judge is in a very different position to a jurymen.* Though in no sense superhuman, he has by his training no difficulty in putting out of his mind matters which are not evidence in the case...."²⁰

Nevertheless, Lord Parker concluded, newspapers continue to publish such articles at their peril. It would therefore seem wise for newspaper editors to reserve comments on a trial until after the issue has been dealt with by the appellate court, especially in light of the fact that an appeal may result in an order for a new trial before a jury. Although the courts have not spoken clearly on the matter, an appeal is generally not pending until formal written notice of appeal has been served.²¹ Where the issue has been settled beyond the possibility of an appeal, judicial proceedings are over and a contempt citation is no longer possible.²²

¹⁹R. v. Duffy [1960] 2 Q.B. 188 at 197-98.

²⁰Ibid. (Emphasis added.) Contra, R. v. Davies, Ex parte Delbert Evans, supra, in which Justices Humphreys and Oliver suggested that judges are not immune to the effects of outside information. This issue is argued in American terms in *Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. Florida*, 328 U.S. 331 (1946); and *Craig v. Harney*, 331 U.S. 368 (1947).

²¹In R. v. Daily Mail, Ex parte Farnsworth [1921] 2 K.B. 733, a reporter used information as to the sentence before it was confirmed and the court fined his editor for contempt.

²²In *Dunn v. Bevan, Bodie v. Bevan* [1922] 1 Ch. 276, certain members of a trade union brought an action against the officials of the union. After the action was heard and judgment given, the plaintiffs issued and distributed among the membership a circular containing what the defendants alleged to be unfair statements regarding the proceedings. A motion was brought for an injunction to restrain the plaintiffs from so injuring the defendants, but was dismissed with costs. The court relied on *Oswald*, supra note 1, at 97: "Proceedings are pending immediately the writ is issued, and as long as any proceedings can be taken. But when the cause is dead or has been ended, comments may be made; and the fact that a new trial has been moved for makes no difference." The general rule was stated earlier in *Re De Souza*, *The Times*, December 3, 1888.

Sometimes a trial judge does not give his judgment immediately after the jury returns its verdict; in a criminal case sentence is occasionally postponed, and in a civil action the judge often desires to hear legal arguments on the effect of the jury's findings. When this occurs, comment should be reserved until the judge has dealt with the matter, although, since the jury has discharged its duties and a judge is presumed to be less susceptible to the influence of publicity, the effect of such comment will be much less serious than if made at an earlier stage²³ In cases where the jury disagrees, it may be assumed that a new trial will be held.

The most severe punishment ever imposed upon an English newspaper came in the 1949 case of *R. v. Bolam, Ex parte Haigh*,²⁴ at the termination of which an editor of less than a month, Sylvester Bolam, was sentenced to Brixton Prison for three months, and the publishers of the *London Daily Mirror* were fined 10,000 pounds. The case arose when one Haigh was charged with the acid bath murders of wealthy acquaintances. The offending stories included front page references to a "Vampire" and its habit of drinking pulsing blood from live victims. On an inside page was printed a picture of John George Haigh, 39, who had been charged the day before with the murder of an elderly woman. A day later, the *Mirror* headlined a page one story: "The Vampire Man Held," and on page two appeared a feature story with a drawing of a vampire bat. There was no direct reference to Haigh, but a dapper man was described as the killer, and the description could appear to fit Haigh—quite enough evidence under English law.²⁵ Haigh's arrest had been preceded by a wave of sensational stories in even the conservative British newspapers, most of which had described how such a monster might prey on wealthy people and then chemically destroy their bodies.

The conduct of the *Mirror*, said the court, was a disgrace to English journalism and violated every principle of justice and fair play which it had been the pride of that country to extend to the worst of criminals. And it appeared that the newspaper had ignored a warning from the Commissioner of Police not to embark upon a recounting of the details of the case. Speaking for the court, Lord Chief Justice Goddard declared:

²³Dawson, *supra* note 3, at 96.

²⁴[1949] 93 Sol. J. 220 (D.C.).

²⁵London Paper is Fined \$40,000; Editor Jailed for 'Vampire' Stories, E & P, April 2, 1949.

"In the long history of the present class of cases there had never, in the opinion of the Court, been one of such a scandalous and wicked character. It was of the utmost importance that the Court should vindicate the common principles of justice and, in the public interest, see that condign punishment was meted out to persons guilty of such conduct. In the opinion of the Court what had been done was not the result of an error of judgment but was done as a matter of policy in pandering to sensationalism for the purpose of increasing the circulation of the newspaper."

And as an ominous warning:

"If for the purpose of increasing the circulation of their paper they should again venture to publish such matter as this, the directors themselves might find that the arm of that Court was long enough to reach them and deal with them individually. The Court had taken the view that there must be severe punishment."²⁶

And *The Times* closed a denunciatory editorial with this caution: "This melancholy episode is a reminder of high responsibilities which are not invariably discharged with even fidelity."²⁷

In a 1956 case, crime reporters had gathered damaging information on one Micallef who was allegedly engaged in the business of purveying vice and managing prostitutes. The headline over an article in a widely circulated daily exclaimed, "Arrest This Beast." What those responsible for the article did not know was that the man whom they had so diligently tracked had been arrested three weeks earlier and had already been committed for trial. On motions for writs of attachment against the proprietors of the newspaper, its editor, and the reporter responsible for the article, the Attorney-General accepted the plea that none of the respondents knew that criminal proceeding against Micallef were underway. But the Divisional Court of the Queen's Bench Division, Lord Chief Justice Goddard presiding, held that whether or not those responsible knew of the arrest was immaterial to the question whether a contempt had been committed, since the plea of *mens rea*—a guilty mind—was not a necessary element of contempt. The test of guilt, said the Court, was whether the matter complained of was calculated to interfere with the course of justice, not whether that result was intended. The truth or falsity of the reports was not at issue. The court noted that the offending article gave in a sensational manner details of the accused's relationships with per-

²⁶R. v. Bolam, *supra* note 24, at 220.

²⁷E & P, *supra* note 25.

sons of bad character and previous convictions, the number of which were exaggerated tenfold. Publishers, editor and reporter were assessed heavy fines.²⁸

The decision did not set well with English journalists or with some segments of the legal profession. Brian Inglis, writing in *The Spectator* noted that defense attorneys had cited 1889 and 1906 precedents in which the judge had decided that knowledge is an essential element of contempt. But in its opinion the High Court dismissed these, basing its decision instead on 1806 and 1742 cases in which the judges had decided that knowledge was *not* an essential ingredient of contempt. Inglis suggested that precedents before the 1820's, at the earliest, be handled gingerly, since the press was not then in any sense a fourth estate, and judges largely took their orders from the Government.²⁹

The British Section of the International Commission of Jurists took a similar view, stating: "We consider that in general it should be a defense to any charge of contempt in relation to matter alleged to prejudice any judicial proceeding that the alleged contemner neither knew nor had any reason to know or suspect that such proceeding had begun."³⁰ Recent legislation has incorporated this recommendation.³¹

Not unrelated to the foregoing case was the 1957 case of *R. v. Griffiths*³² in which the importers and distributors of *Newsweek* magazine, which contained an article prejudicial to Dr. John Bodkin Adams, were convicted of contempt. Neither lack of knowledge of the contents of the offending article nor lack of intent was acceptable as a defense.

²⁸*R. v. Odhams Press, Ltd., Ex parte Attorney-General* [1956] 3 All E.R. 494. The court relied in part on an opinion by Lord Chancellor Erskine in *Ex parte Jones*, 13 Ves. 237 (1806) in which he said that it is no excuse that the printer was ignorant of the contents, lack of intention or knowledge being no excuse, although it may have a bearing on punishment. "The test is whether the matter complained of is calculated to interfere with the course of justice."

²⁹Inglis "Contempt of Court," *The Spectator*, January 17, 1958, pp. 68-69.

³⁰JUSTICE, *op. cit.* supra note 7, at 9.

³¹Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65, § 11(1): "A person shall not be guilty of contempt of court on the ground that he has published any matter calculated to interfere with the course of justice in connection with any proceeding pending or imminent at the time of publication if at that time (having taken all reasonable care) he did not know and had no reason to suspect that the proceedings were pending, or that such proceedings were imminent, as the case may be."

³²[1957] 2 All E.R. 379. The distributors had relied upon the defense of innocent defamation based on *Emmens v. Pottle* (1885) 16 Q.B.D. 654. But, "cases of contempt," said the court, "by the publication of matters tending to prejudice a fair trial stand in a class of their own and are not truly analogous to cases of defamation."

Again, liberal elements in the legal profession viewed the decision as imposing a real hardship on distributors of news, and an obstacle, contrary to the public interest, to the importation of news and views from abroad. Recognizing, nevertheless, that accused persons should not be put in jeopardy by publications for which those responsible cannot be reached, the British Section of the International Commission of Jurists recommended that, in general, it be a defense to such a charge against a distributor to prove that "he had not examined the contents of" any publication distributed by him "and had no reasonable cause to suspect that" it contained matter in contempt of court.³³ Again Parliament obliged and relieved distributors of this onerous burden—at least to a degree.³⁴

Speech as well as the printed word may lead to a contempt citation.³⁵ Where a newspaper published a supposed confession while the suspect was in custody under a warrant but had not been brought before a magistrate, the court levied a heavy fine: "Even if a confession had really been made," said Mr. Justice Darling, "it might still have been contempt to publish it; it might have been of such kind as to be inadmissible in evidence."³⁶ And he added that English courts were determined not to substitute "trial by newspaper" for trial by jury.

A newspaper was held in contempt for publishing articles describing as a "crank" and a person regarded by the police as a "harmless lunatic nursing a grievance" one Hutchison, then under arrest for the unlawful possession of firearms.³⁷ Mr. Justice Swift stressed that it was essential that when a criminal charge was made against a person,

³³JUSTICE, *op. cit.* *Supra* note 7, at 10.

³⁴Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65, § 11(2): "A person shall not be guilty of contempt of court on the ground that he has distributed a publication containing such matter as is mentioned in subsection (1) of this section if at the time of distribution (having taken all reasonable care) he did not know that it contained any such matter as aforesaid and had no reason to suspect that it was likely to do so."

³⁵*R. v. Gossip*, *The Times*, February 18, 1909. A trade union secretary was held in contempt and ordered to pay costs for a speech "calculated to diminish the chance of a fair trial by discouraging the attendance of necessary witnesses and possibly by influencing a jury which might be drawn from that part of London." In referring to an action pending between two tailors and their employers' Gossip cautioned his trade union audience not to lose sight of the fact that "judges are drawn from the capitalist class." The rule was made absolute in spite of a sincere and humble apology and the contention by the defendant that he did not know the action was pending.

³⁶*R. v. Clarke*, *Ex parte Crippen* [1910] 103 L.T. 636.

³⁷*R. v. Editor, Printers and Publishers of the Evening News*, *The Times*, July 30, 1936, p. 4, col. 3 (K.B.).

there should be no tampering of any sort or kind with those who would ultimately have to decide the matter.³⁸

The editor of the *Daily Worker* was convicted of contempt for alleging that the forthcoming trial of a defendant was a "frameup" and that he was a class-war prisoner.³⁹ A newspaper may be held in contempt for publishing beforehand what is said to be the defense of the accused.⁴⁰ A prejudicial cartoon may constitute a contempt of court.⁴¹ A newspaper may be guilty of contempt for publishing a photograph of an accused person, if identification becomes an issue in the case, and if there is any possibility of the photo influencing the minds of witnesses.⁴²

³⁸For comment upon a pending criminal case, the author of the following paragraph was fined 100 pounds and costs: "Another rare rogue in the shape of Jabez Balfour was a good deal before the courts last month. He will appear at the Old Bailey, and then we may expect to hear no more of him for some time to come. Nemesis has leaden feet, but even justice comes to him who knows how to wait. Unfortunately the waiters sometimes die before they come to their own." Speaking of the contemner, Mr. Justice Wills said: "He assumed that the man was such a rogue that it did not matter what was said against him. The English Press in this respect has been singularly deficient in decency, taking it for granted that Mr. Balfour would be convicted.... The writer here had thrown his contribution into the stream of prejudice against the person to be tried, and was anticipating the result of the trial...." *R. v. Balfour, Re Stead* [1895] 11 T.L.R. 493.

In *R. v. Parke* [1903] 2 K.B. 432, a newspaper editor was fined 50 pounds for the publication of derogatory comments about the character of a defendant in a forgery case—who was subsequently convicted of murder. In the course of his opinion, Justice Wills suggested that proceeding by criminal information or indictment in such cases was cumbersome and would give rise to great delay. A similar conclusion was reached in *R. v. Davies* [1906] 1 K.B. 32, where a woman charged with abandoning an infant child, but not yet committed for trial for attempted murder of the child, was referred to in a newspaper article as having practiced wholesale baby farming and as having been convicted of fraud. Relying on his opinion in the Parke case, Mr. Justice Wills said: "We adhere to the view we expressed in that case that the publication of such articles is a contempt of the Court which ultimately tries the case after committal, although at the time when they are published it cannot be known whether there will be a committal or not. Their tendency is to poison the stream of justice in that Court, though at the time of their publication the stream had not reached it. . ."

³⁹*R. v. Mason*, *The Times*, December 7, 1932, p. 4, (K.B.).

⁴⁰*R. v. News of the World; Ex parte Kitchin* [1932] 48 T.L.R. 234.

⁴¹*R. v. Editor of the Evening News*, *The Times*, October 27, 1925.

⁴²Edgar William Smith had been charged with the attempted murder of a policeman. On the day he was to stand in the police line-up for identification, the *Daily Mirror* and the *Daily Mail* published photographs of him, and referred to him as the man accused of shooting the policeman. The only witness to identify him had a copy of the *Daily Mail* in his pocket. In his opinion for the court, Lord Chief Justice Hewart noted that: "The phrase 'contempt of Court,'... consists not in some attitude or supposed attitude to the Court itself, but the prejudice to an accused person. It is not something which affects the status of the Court,

The *Daily Herald* was convicted of contempt for publishing a poster containing the words "Another Blazing Car Murder" which, although relating to another case, came at a time when an accused stood committed for trial on the charge of murdering a man in a car and then burning the vehicle.⁴³

During a royal procession in London, a revolver fell close to His Majesty's horse. It appeared that it was either thrown by or knocked out of the hand of a man who was subsequently charged with being in unlawful possession of firearms. A news film—part of a theatre news reel—shown with the caption, "Attempt on the King's Life," was held to be in contempt of court in that it was liable to prejudice the accused's fair trial. The court would make no distinction between newspapers and news film.⁴⁴

English courts have been particularly sensitive to newspapers which employ amateur detectives or their own reporters to investigate the facts of a crime and publish their results. This "perilous enterprise" is considered by the courts to be the very worst form of "trial by newspaper." In the first notable case of this kind, the *Evening Standard* hired detectives to investigate the murder and dismemberment of young girl in Eastbourne. The results were published in a series of articles and photographs which included an account of the married life of the accused. The newspaper also interviewed a prospective witness who had been warned by police not to make a statement. In citing the editor for contempt, the court noted that it would not have been possible even for the most ingenious mind to have anticipated with certainty what were to be the real issues in the case, to say nothing of the more difficult question of what was to be the relative importance of different issues in the trial which was about to take place.⁴⁵

but something which may profoundly affect the rights of citizens." Lord Hewart felt that the newspapers should have anticipated the question of identity arising. (*R. v. Daily Mirror, Ex parte Smith* [1927] 1 K.B. 845). The court relied on *R. v. Haslam* [1925] 19 Cr. App. R. 60: "It cannot be right that when a witness, or a possible witness, is being called on merely to identify a person who is already arrested, that the witness, before the identification, should be shown a photograph of the accused person. . . . A person who has seen a photograph of the accused person may identify him simply because he has seen a photograph of him. . . . If a newspaper publishes a photograph in such circumstances it runs a grave risk—a risk which in one sense affects the accused person, and in another sense affects those responsible for the newspaper."

⁴³*R. v. Editor, Printers and Publishers of the Daily Herald* [1931] 75 Sol. J. 119 (K.B.).

⁴⁴*R. v. Hutchison, Ex parte McMahon* [1936] 2 All E.R. 1514.

⁴⁵*R. v. Evening Standard (Editor), Ex parte Director of Public Prosecutions, R. v. Manchester Guardian (Editor), Ex parte Director of Public Prosecutions,*

Civil actions are no less protected by the contempt power of the courts. In a case involving a bankrupt shipping firm, two Liverpool newspapers were judged guilty of contempt for quoting the managing director of the company as saying that the plaintiff's action had "smashed up in a day" the goodwill of the business and its immense organization on the continent. The court held that to publish injurious misrepresentations directed against a party to an action is liable to affect the course of justice, because it may, in the case of a plaintiff, cause him to discontinue the action from fear of public dislike, or it may cause the defendant to come to a compromise to which he would otherwise not come.⁴⁶ The *Daily Worker* was held in contempt for threatening a litigant who was pursuing an action in court and for the adverse effect the published statement would have on the ability of the plaintiff to gather witnesses on his behalf.⁴⁷ It is a contempt of court to publish in a newspaper, after the affidavits in a cause have been filed, but before the hearing, an article attributing falsehood to the persons who have made the affidavits.⁴⁸ It is a contempt also to publish prematurely the results of an interview of a defaulter by a company in liquidation.⁴⁹ It is dangerous for newspaper

R. v. Daily Express (Editor), Ex parte Director of Public Prosecutions [1924] 40 T.L.R. 833, 835. Chief Justice Hewart sternly rejected the idea that it was the duty of newspapers to elucidate the facts in criminal cases. The Evening Standard was fined 1000 pounds. The Daily Express and the Manchester Guardian, which had also printed the story—the Guardian because the victim was a Manchester girl—each paid 300 pounds and costs. During the 50-year editorship of C. P. Scott of the Guardian, this was the only contempt of court citation brought against his newspaper. Cf., R. v. Tibbits and Windust [1902] 1 K.B. 77, where an editor and his "special crime investigator" were sentenced to six weeks' imprisonment for attempting to interfere with the course of justice through the publication of prejudicial matter which was inadmissible as evidence.

⁴⁶Re William Thomas Shipping Co., Ltd., Dillon (H.W.) & Sons, Ltd. v. William Thomas Shipping Co., Ltd., Re Sir Robert Thomas [1930] 2 Ch. 368. The court relied on Oswald, op. cit. supra note 1, at 87: "Any conduct by which the course of justice is perverted, either by a party or a stranger, is a contempt; thus the use of threats, by letter or otherwise, to a party while his suit is pending, even if the threatening letter is marked 'Private'; or abusing a party in letters to persons likely to be witnesses in the cause, have been held to be contempts." And id. at 91: "All publications which offend against the dignity of the Court, or are calculated to prejudice the course of justice will constitute contempts... anything which tends to excite prejudice against the parties in litigation while it is pending."

⁴⁷Hutchinson v. Amalgamated Engineering Union, *The Times*, August 25, 1932, p. 4 (K.B.).

⁴⁸Felkin v. Herbert [1864] 33 L.J. Ch. 294. In order to purge his contempt, said the court, a publisher must express his regret and contrition to the court, but is not obliged to apologize to the person to whom the falsehood has been imputed.

⁴⁹Re American Exchange in Europe, *American Exchange in Europe v. Gillig* [1889] 58 L.J. Ch. 706.

editors to publish statements from affidavits sworn in an interlocutory proceeding in a civil action before the trial.⁵⁰

English courts have always considered contempt committed by a party to a pending proceeding as more serious than that committed by a third party: editors therefore must use extreme caution in permitting reference in their papers to libel actions which have been instituted against themselves or their employers.⁵¹

English judges have had as much difficulty as American judges in deciding what may or may not constitute prejudice. In 1943, the Court of Criminal Appeal quashed a conviction for larceny where a list of prior convictions had been read before the magistrates to enable them to decide how to deal with the case, and a local newspaper, in its report of the preliminary proceedings, had published the list.⁵² On the other hand, in 1951, where a person had been sentenced at Surrey Quarter Sessions to four years' corrective training for larceny and his previous convictions had been mentioned before trial in the Surrey newspapers, the same court declined to infer either that

⁵⁰In *R. v. Astor, Ex parte Isaacs, R. v. Madge, Ex parte Isaacs* [1913] 30 T.L.R. 10, the *Pall Mall Gazette* and the *Globe* were assessed court costs for publishing two items of news, the first relating to private proceedings in a pending action in connection with a share transaction, and the second giving a report of criminal proceedings (not yet finished) relating to the same transaction. The court held that the publication tended to prejudice the jury trying the criminal case and that a newspaper ought not, before a case comes on for trial, to publish in full the private proceedings, such as the statement of claim or an affidavit charging fraud. Mr. Justice Scrutton said that if a paper took upon itself to mix up together the reports of criminal proceedings and of civil proceedings relating to the same share transaction, he could come to no other conclusion than that it might tend to prejudice the jury trying the case, who were not trained lawyers able to distinguish the exact relevance of a charge of that kind. Cf., *Re Finance Union, Yorkshire Provident Assurance Co. v. Review Publishers* [1895] 11 T.L.R. 167, where a publication tended to show that the plaintiff's case in a civil action was untenable; *Re O'Connor, Chesshire v. Strauss* [1896] 12 T.L.R. 291, where it was held to be contempt to publish a copy of the statement of claim in a pending action.

⁵¹*Dawson, supra note 3, at 94. Cf., R. v. Bottomley, Ex parte Attorney-General, The Times, December 16, January 19, 1909; R. v. J. G. Hammond & Co., [1914] 30 T.L.R. 491. In Birmingham Vinegar Brewery v. Henry [1894] 10 T.L.R. 586, a newspaper published an article relating to proceedings against its editor for libel, attacking certain witnesses whom it was known would be called at the trial by the plaintiff. Mr. Justice Wills said that there was a great and mischievous tendency to publish articles of that sort "and if it went on it would lead to trial by newspaper instead of by the proper tribunals." In *Higgins v. Richards* [1912] 28 T.L.R. 202, a contempt by a defendant-editor in a libel action was regarded as so serious that he was imprisoned for six weeks. It was pleaded on the editor's behalf that the attacks on the plaintiff, a local police chief, had no reference to the subject matter of the libels sued on in the action, but the court thought otherwise.*

⁵²*R. v. Dyson* [1943] 169 L.T. 237.

the jury had read the report, or, if they had, that they were biased.⁵³

At the end of a long trial, during the Autumn 1957 assizes at Newcastle upon Tyne, of two men who had escaped from prison a year before, and were found guilty of conspiracy to defraud, Justice Barry observed that on the first day of the trial, a local newspaper had issued a statement "which would seem at least to constitute a very serious contempt of court." Hesitant to use the procedural remedies, such as change of venue, continuance or mistrial, which American judges are using with greater and greater frequency, Justice Barry concluded that in other circumstances publication might have given rise to discharge of the jury and the retrial elsewhere with the attendant expense of a long case.⁵⁴ However, on November 6, 1957, at Exeter City Assizes, Mr. Justice Salmon stopped the trial of John Henry Walter Oliver who had pleaded not guilty to a charge of murdering his wife. On the first day of the trial, three newspapers and the Press Association, which carried the story, published reports which the court believed might have been grossly prejudicial to a fair trial. Humble apologies were tendered and the media admitted the inaccuracy of the report which an otherwise reliable reporter had obtained from two of his colleagues.⁵⁵ In the news story, what purported to be a part of the opening speech of the Crown counsel was actually part of the speech made by counsel at the preliminary hearing in Magistrate's court.⁵⁶ Justice Salmon deplored the fact that two witnesses would have to

⁵³R. v. Armstrong (1951) 2 All E.R. 219.

⁵⁴This case was reported in *The Times*, October 18, 1957 and cited in Webber, *Trial by Newspaper*, in Keeton and Schwarzenberger, eds., 11 *Current Legal Problems* 39 (1958).

⁵⁵Inaccuracy can be expensive in English journalism. In *R. v. Evening Standard Co., Ltd.* [1954] 1 Q.B. 578, the *Evening Standard* was fined 1,000 pounds and costs for a contemptuous article under the headline, "Trunk Trial Story of Marriage Offer—Husband is Accused." During the course of the trial, in which the accused was charged with the murder of his wife whose body had been found in a trunk, the reporter left the courtroom to telephone his newspaper and missed a crucial point of evidence. The result was an inaccurate story which the court said might have interfered with the course of justice. Since neither the reporter nor the editor appeared to have intentionally misrepresented the proceedings of the court, no separate penalties was imposed upon them. The accused was subsequently acquitted. Lord Chief Justice Goddard said that the summary jurisdiction of the court should only be invoked and would only be exercised "in cases of real and serious moment;" a motion to attach was deprecated where there had not really been "a serious interference with justice." *Id.* at 584. The court rejected the view that the editor and proprietor could not be vicariously liable, relying instead on earlier principles laid down by Lord Hardwicke, Lord Russell of Killowen, and Justice Wills.

⁵⁶*The Times*, November 6, 1957, p. 6; November 7, 1957, p. 7.

undergo the harrowing experience of giving their evidence all over again, and much public time and money would be wasted.

PRELIMINARY HEARINGS AND IN CAMERA PROCEEDINGS

There has been a good deal of discussion in England as to whether preliminary proceedings should be held in camera to protect the defendant from prejudiced jurymen. Proceedings in a police court or petty sessions preliminary to a committal for trial deal only with the evidence of the prosecution, not all of which may be admissible at the trial itself. In 1865, Chief Justice Lefroy ruled that a fair and accurate report of such proceedings does not constitute a contempt of court for "it is of the utmost importance for the public to know that the magistrates do their duty impartially and without influence of any sort, and that they exercise their duty fairly and correctly according to the evidence brought before them—not only to prevent them from making unfair orders against the prisoners, but also to prevent them from undue influence which might be ascribed to them as officers appointed by the Crown."⁵⁷ Similarly, in a 1925 case, it was decided that a fair and accurate report of a Recorder's charge to the grand jury was privileged so as to render the publishers immune from contempt proceedings.⁵⁸

Long-standing doubts as to the wisdom of these judgments came into sharp focus during the sensational murder trial of Dr. Adams in 1957. Details concerning the deaths of a number of his patients, presented at the preliminary hearing to illustrate a system of criminal action, were vividly reported in the press, although at the trial itself, the prosecution restricted itself to one act of alleged murder. Adams' counsel had asked that such evidence be given in a closed hearing, but the request was refused.

In summing up at the Old Bailey, Lord Devlin urged that proceedings in the magistrate's court in such cases be held in private in the future, since it seemed impossible that an unprejudiced jury could be assembled after such a "disgraceful" and "scandalous" performance by the press. Lord Devlin regarded it as a matter of major importance that a case could be built up against a man in such a form as to prejudice his chances of acquittal, even before a charge had been made. While we were still some way from lynch law, he believed the conduct of the press in the Adams case perilously close to "trial by news-

⁵⁷R. v. Gray [1865] 10 Cox C.C. 184 (Q.B.).

⁵⁸R. v. Editor and Publisher of the Evening News, Ex parte Hobbs [1925] 2 K.B. 158.

paper."⁵⁹ To counteract these potential evils, the English jurist advocated that magistrates have the power, while sitting in open court, to prohibit the press from publishing reports in whole or in part of proceedings before them.⁶⁰

⁵⁹Conduct of the Prosecution in the Adams Case, *The Times*, May 2, 1957, p. 4.

⁶⁰Devlin found legal precedent in *R. v. Clement*, 4 B. & Ald. 218 (1821): Several persons being successively on trial for treason (the Cato Street conspiracy) on similar evidence, the court issued an order that no report of the trials should be published until all of them had been concluded. Ignoring the order, a newspaper editor was held in contempt. But criminal trials in England must be public and except in a few statutory cases, the judge has no power to forbid the publication of evidence given publicly. See Goodhart, *Newspapers and Contempt of Court in English Law*, 48 *Harv. L. Rev.* 904 (1935).

English law is not uncomplicated in this area. A controlling case until the middle of the 19th century was *R. v. Fisher*, 2 Camp. 563 (1811), in which Lord Ellenborough declared: "But these preliminary examinations have no such privilege. Their only tendency is to prejudice those whom the law still presumes innocent, and to poison the sources of justice." The Law of Libel Amendment Act of 1888 clearly gave the press the privilege of reporting preliminary hearings, subject to the contempt power. Section 4(2) of the Magistrate's Court Act of 1952 (15 & 16 Geo. 6 and 1 Eliz. 2, c. 55) essentially affirmed the provision of an 1884 act (*Jervis's Acts*, 11 & 12 Vict., p. 54, Archbold ed. 2d ed. 1849) specifying that magistrates were not obliged to sit in open court, though hearings, somewhat paradoxically, routinely continued to be held in public, with the exception of cases involving the national interest, cases in which there was fear of witness intimidation, or cases involving hospital patients or individuals similarly incapacitated. Until the Adams case there had been few protests against this procedure. See Geis, *Preliminary Hearings and the Press*, 8 *U.C.L.A.L. Rev.* 400-01 (1961).

The Press Council gave the following reasons for its opposition to such a suggestion: (1) the injustice of gossip and rumor would be a poor substitute for publicity, (2) witnesses are sometimes prompted to come forward—and not necessarily for the defense—with valuable evidence, and the accused learns at least in outline the charges he has to face, (3) if the general public is admitted to preliminary hearings but press reports are prohibited, inadequate and misleading reporting by word of mouth will take their place, (4) faith in trial by jury rests upon the proved ability of juries to respond to the directions of the judge and come to their verdict on the evidence they have heard, and that evidence alone, disregarding what they have heard or read elsewhere, (5) it is important that the work of Justices of the Peace be done within the full knowledge of the public, and, (6) magistrates should have no more power than they possess already to hear in private evidence relating to indictable offenses. See *Court Secrecy Opposed*, *The Times*, May 2, 1957, p. 7.

These objections were disputed by Gower, *Publicity in Judicial Proceedings*, 20 *Modern L. Rev.* 388 *passim* (1957). Gossip and rumor, he said, based on the one-sided account of the prosecution, would be given much wider distribution and stimulation by the press. There are better ways of gathering witnesses than by advertising for them in the press. The grapevine, said Gower, does not travel as far as a press report, and unless such a report is verbatim, it may be no less inadequate and therefore misleading. The alleged "proved ability" of jurors to reach verdicts dispassionately has been pretty conclusively disproved. Investigation of the behavior of juries has shown that the one way of ensuring that a piece of evidence is indelibly imprinted on their minds is for the judge to direct them

As a result of Devlin's remarks on the Adams trial, the Home Secretary in June, 1957 appointed the Tucker Committee to review the question of preliminary hearings. Press reaction was immediate, condemning strongly anything suggestive of secret court hearings and questioning whether justices were qualified to decide whether or not hearings should be open to the public.⁶¹ The Institute of Journalists, pointing to the time lag between committal and trial, recommended that there be no general ban on press reporting but that magistrates have the power to direct that certain parts of the testimony not be published.⁶² At that same time, the Howard League for Penal Reform thought that committal proceedings should receive no publicity except at the request of the defense counsel or where no case had been found.⁶³

The Tucker Committee viewed preliminary hearings as primarily for the benefit of the accused in safeguarding him against the inconvenience of a trial based on frivolous or malicious prosecution. But the committee did not favor a more extensive use of *in camera* proceedings, though it did recommend that the newspapers be restricted to publishing only the bare essentials of the charge and the committal court's decision, the full account waiting until the trial had been concluded. Nevertheless, more lawyers are asking for and more courts are granting closed preliminary hearings.

The matter is far from settled. Lord Denning suggests that "the importance of having all judicial proceedings in public outweighs . . . all the suggested disadvantages," for the press is "the watchdog of justice."⁶⁴ And Justice Fitzgerald said in *R. v. Gray*:

"It has been said, and said truly, that possibly in particular cases there may be inconvenience to individuals from the early publication of evidence or of statements with respect to matters that are subsequently to be tried more solemnly; but it has been well observed, too, that this inconvenience to individuals is infinitesimal in comparison to the great public advantage given by that publicity."⁶⁵

In the leading case on the question, the House of Lords made it clear that, apart from statutory authority, a judge can only order a

to forget it. Since the work of Justices of the Peace is subject to review by a higher court, it is not important that their work be scrutinized by the public.

⁶¹Reporting of Committals, *The Times*, September 25, 1957; Secret Courts Condemned, *The Times*, October 24, 1957, p. 7.

⁶²*The Times*, October 25, 1957.

⁶³*The Times*, September 24, 1957.

⁶⁴Denning, *The Road to Justice* 73 (1955).

⁶⁵*R. v. Gray*, 10 Cox Crim. Cas. 184 (Q.B. 1865).

trial to be held in camera to prohibit the publication of reports thereof, when, owing to the special circumstances of the case, justice could not be done if the trial was a public one. The mere fact that a case involved the giving of evidence of an indecent nature, as in that nullity suit, did not justify an order for a private hearing. Lord Loreburn added:

“Courts of justice in this country must administer justice in public. To justify an order for a hearing in camera it must be shown that the paramount object of securing that justice should be done would be rendered doubtful of attainment if such order were not made. It cannot be dealt with by the presiding Judge as a matter resting in his individual discretion as to what is expedient.”⁶⁶

But if the proceedings have been properly heard in camera, and an order has been made that no report be published, it will be a contempt to disobey this order by reporting the hearing, although its general conclusion can be announced.⁶⁷ The one settled rule of law in this area would seem to be that in cases involving wards of the court—infants and persons of unsound mind—the judge has a complete discretion to allow or to forbid publication of the proceedings.⁶⁸

On the other hand, Lord Devlin would have defense counsel de-

⁶⁶Scott v. Scott [1913] 82 L.J.R. 75. A woman bringing a petition for nullity of marriage because of her husband's impotence, sent copies of the trial transcript to her relatives to justify herself in their eyes. She was held for contempt by the Court of Appeals, but the House of Lords reversed.

⁶⁷In re Martindale [1894] 3 Ch. 193, the full report of a private examination of a witness in a company bankruptcy was held to be a contempt.

⁶⁸Re De Beaujeu's Application for Writ of Attachment Against Cudlipp [1949] 1 All E.R. 439. This is bulwarked by the Children and Young Person's Act of 1933, 23 & 24 Geo. 5, c. 5, § 47(2); 30 Halsbury's Laws of England 566 (3d ed. 1959), which allows the courts to exclude the general public from ordinary courts when a person under 17 is giving evidence in any case involving a charge of indecency. The general public is not now admitted to juvenile courts but bona fide representatives of the press may remain on condition that their reports do not in any way identify those before the court.

The Judicial Proceedings Act of 1926, 16 & 17 Geo. 5, c. 61; 30 Halsbury's Laws of England 556-57 (3d ed. 1959), and subsequent legislation, require that reports of proceedings for divorce, nullity of marriage, judicial separation, restitution of conjugal rights or guardianship of infants, whether heard in the divorce court or a magistrate's court, must contain no more than (a) names, addresses, and occupations of the parties and witnesses; (b) a concise statement of the charges, counter-charges and defenses in support of which the evidence is given; (c) submissions and decisions upon points of law; and, (d) the judge's summing up, the jury's findings, and the judgment and observations made by the judge. No report of the evidence or of counsel's speeches (except purely legal arguments) can be given. Anyone violating these laws is subject to a fine of 500 pounds and four months imprisonment.

cide what is too objectionable to the cause of his client to be publishable.⁶⁹

"In an important case of public interest, the jury is bound to have some preconceived notions based upon the opening statement made by the prosecution in the preliminary proceedings and upon the evidence which, in such a case, is normally reported with great particularity. The defendant normally reserving his defence, inevitably the report becomes one-sided. Is it not contrary to human nature to expect that each member of the jury—even after a strong and clear direction—will be able effectively and entirely to divest his mind or hers of every memory of that opening statement? That the opening statement before the magistrate should not be reported, seems obviously right."⁷⁰

Others have proposed legislation which would close all preliminary hearings to the public. As it is, some segments of the legal profession⁷¹ and the press in general are disturbed by the fact that a great many proceedings in chambers are final in their effect and never result in a court trial. "Only a fraction of civil proceedings," says *The Times*, "now ever sees the light of day, yet, if one constitutional principle has been firmly established in the past, it is that there should be no undue secrecy about any judicial proceedings—whether heard in public or in private, publication of them may occasionally be delayed but never entirely suppressed."⁷² Some lawyers urge that there be no kind of restraint on giving publicity to proceedings in chambers, or in camera—following the dicta of the Law Lords in *Scott v. Scott*.⁷³ But they would abide by the rule that wards of the court, lunatics and secret processes be excepted. Where interlocutory proceedings are concerned, they would apply the same argument since many of these actions never come to trial, and possible prejudice of the pending case can be met by the court.⁷⁴

A THIRD LINE OF DEFENSE

Fair trial in England is further bulwarked by the hypersensitivity of judges to criticism. Although theoretically anyone can criticize a judge after a case has been concluded and no appeal is pending, pro-

⁶⁹Devlin, *Trial By Jury* (1956).

⁷⁰Cited in Webber, *supra* note 54, at 60.

⁷¹JUSTICE, *supra* note 7, at 18.

⁷²Heard in Camera, *The Times*, May 15, 1957, p. 11.

⁷³*Scott v. Scott*, *supra* note 66.

⁷⁴JUSTICE, *op. cit.* *supra* note 7, at 19-20. This rule is incorporated in the Administration of Justice Act of 1960, *op. cit.* *supra* note 34.

vided that the criticism is framed in respectful terms and does not imply that the judge was motivated by partiality or corruption, English editors must fulfill this social obligation with the utmost caution.⁷⁵

In the Birmingham Spring Assizes of 1900, Justice Darling warned the press not to give a detailed account of an obscenity trial since there could be no protection for the publication of objectionable, obscene and indecent matter. The editor of the *Daily Argus* criticized the Judge for his "defense of decency." Such publication, said the court, was scurrilous personal abuse of a judge and a contempt of court punishable on summary process—even though the attack came after the termination of the judicial proceeding.⁷⁶

In *R. v. New Statesman (Editor), Ex parte Director of Public Prosecutions*,⁷⁷ an editor was held liable for publishing criticism of a judge who presided in a libel case involving an apostle of birth control. An excerpt from the offending article follows:

"We cannot help regarding the verdict given this week in the libel action brought by the Editor of the *Morning Post* against Dr. Marie Stopes as a substantial miscarriage of justice. We are not at all in sympathy with Dr. Stopes' work or aims, but prejudice against those aims ought not to be allowed to influence a court of justice in the manner in which they appeared to influence Mr. Justice Avory in his summing up. . . . The serious point in this case, however, is that an individual owning

⁷⁵An exception would appear to be the members of the Privy Council who from their high places have seemed singularly unimpressed with the rationalizations of scandalized judges, and have seen fit to reverse judgments brought to them on appeal from colonial and dominion courts. *Supra* note 8. In *Ambard v. Attorney-General for Trinidad and Tobago* [1936] A.C. 322, 335, Lord Atkin made the following significant statement:

"But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

And in *McLeod v. St. Aubyn* [1899] A.C. 549, 561, Lord Morris said that "commitments for contempt of Court by scandalizing the Court itself had become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them."

⁷⁶*R. v. Gray* [1900] 2 Q.B. 36.

⁷⁷[1928] 44 T.L.R. 301.

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.”

The attorney-general argued that to say a judge was so steeped in prejudice and bias that he could not try a case of a certain kind was worse than to say that on a particular occasion he had deliberately allowed his private views to influence him. Lord Chief Justice Hewart accepted this argument and only the most effusive apologies by the editor and his counsel prevented the respondent from paying more than the costs of the proceeding.

Thomas Colsey, editor of *Truth*, in commenting upon an earlier decision of the Court of Appeals relating to proposed institution of a Trade Board for the catering business, wrote the following sentence: “Lord Justice Slessor, who can hardly be altogether unbiased about legislation of this type, maintained that really it was a very nice provisional order or as good a one as can be expected in this vale of tears.” In spite of an expression of deep regret and the acceptance by the court of a plea of lack of intention, the authority of the judge had been lowered and the editor paid a fine of 100 pounds and costs.⁷⁸

In 1930, the Communist *Daily Worker* criticized Mr. Justice Swift for the sentence he had imposed upon a Communist Party member and alleged that he was animated by “strong class bias—the bewigged puppet and former Tory M. P. chosen to put Communists away in 1926.” The comment was held by the court to be a “gross and outrageous contempt” and those responsible for the article were sentenced to terms of from five to nine months imprisonment.⁷⁹

The rationale for this seemingly unlimited judicial power has been stated succinctly by Lord Denning, a jurist known for his liberalism: “The judges must of course be impartial but it is equally important that they should be known by all people to be impartial. If they should be libelled by traducers, so that people lose faith in them, the whole administration of justice would suffer.”⁸⁰ But the question may be asked, where can the criticism of a judge or his judicial acts begin? And if his competence can be questioned with impunity, how can one safely distinguish between innocent imputation and dangerous allegations of partiality or corruption? As Harold

⁷⁸R. v. Colsey, Ex parte Director of Public Prosecutions, *The Times*, May 9, 1931.

⁷⁹R. v. Wilkinson and Others, Ex parte The Attorney-General, *The Times*, July 16, 1930.

⁸⁰Denning, op. cit. supra note 64, at 73.

Laski observed many years ago: "Every ground which exists for entrusting power to a body of men is a ground also for erecting safeguards against their abuse of the authority confided to them."⁸¹

Surely judges must be independent and secure, but it can be argued that they must not be made secure from just criticism. Nor should a judge be allowed himself to decide what is just and what is unjust criticism; for there can be little doubt that a great deal of reasonable criticism of the administration of justice in England is thereby discouraged.⁸²

CONCLUSIONS

Ubiquitous to the free press-fair trial issue in England is the law of contempt. The law is set in motion by out-of-court publications having a "reasonable tendency" to obstruct or impair the proper administration of justice, whether before a judge or a jury, or to influence or prejudice either litigants or witnesses to a cause; by violation of the rules with respect to pendency, which may begin before a suspect is arrested and continue until all possibilities of appeal have been exhausted; by the illegal coverage of preliminary examinations; and by criticism of a judge which may "lower his authority."

English journalists complain that the law is ill-defined so as to be capricious and arbitrary; the penalties so severe that they are intimidating, the maximum punishment being life imprisonment, an unlimited fine or both. The court is at once the aggrieved victim, judge, and jury. The following editorial comment from *The Times* may be typical:

"The pattern of case after case today is as familiar as it is squalid. The dominating consideration for the defense is to keep the editor who is alleged to have erred out of prison. With this

⁸¹Laski, Procedure for Constructive Contempts in England, 41 Harv. L. Rev. 1031 (1928).

⁸²JUSTICE, op. cit. supra note 7, at 6: "It appears to us desirable, in considering whether such an act is contempt, to balance, on the one hand, the effect it might have on the litigation and, on the other, the interest of the nation in free discussion." Cf., Steed, *The Press* 178 (1938): "This method of procedure is calculated to deter, and does deter, newspapers from offering reasonable criticism upon so important a matter of public interest as the administration of justice." Inglis, op. cit. supra note 29: But the major damage which the present contempt does, in fact, is "in silencing criticism of the Courts and the judiciary, of decisions (where there appears reason to believe that they have been unfair) and of judges (where they have been behaving in a manner deserving of criticism)." Fox, op. cit. supra note 2, at 37: "No Judge has a right by the power of attachment to shut a man's mouth to prevent his pen from censuring what he thinks erroneous in the distribution of public justice."

object the case begins with an abject apology by him. The point of law is then put rather than pressed—the wrath of the court must be averted at all costs; *a man already grovelling is hardly in the best position to defend a constitutional principle.*⁸³

There is no “trial by newspaper” in England. But where the rights of free press and fair trial come into conflict, the English have failed to weigh in the balance the interest of the nation in free discussion.

What is instructive in the English experience is the vigor of the legislature in acting to redress the sometimes delicate balance between free press and fair trial. Cries for reform were met substantially in the Administration of Justice Act of 1960,⁸⁴ which, although reflecting government consciousness of the evil of “trial by newspaper,” still had the effect of “appeasing a majority of the critics,”⁸⁵ both lawyer and journalist. Existing laws were changed to permit the press to plead innocent in cases where it neither knew nor had any reason to know or suspect that a judicial proceeding had begun; to relieve distributors of the onerous burden of being liable for the contents of all their publications; to affirm the right of the press to cover proceedings in chambers or in camera; and to provide in all contempt cases a right of appeal to the Court of Appeal, and then, with leave, to the House of Lords.

In America, the scales are tipping in the other direction and some would welcome legislative rectification of the resulting wrongs.

⁸³New Muzzle for Free Press, *The Times*, June 17, 1958, p. 11. (Emphasis added.) See Hughes, *Contempt of Court and the Press*, 16 *Law Quarterly Review* 293 (1900); Laski, *op. cit. supra* note 81, and Laski, *Legal Restrictions on the British Press*, 72 *U.S.L. Rev.* 568 (1938).

⁸⁴*Op. cit.*, *supra* notes 9, 31, 34, 74.

⁸⁵Letter from Col. W. C. Clissitt, Secretary of the General Council of the Press, to the author, London, March 24, 1961.