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Recent Decision Note

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the exercise of this power would also be an unconstitutional taking, unless a distinction can be made as to the taking involved. A distinction might possibly be drawn on the basis that obscene material is potentially more dangerous to public interests than is fraudulent advertising. Such a distinction would involve the recognition of a "constitutional" difference between the dissemination of obscene material and the perpetration of fraud. Under this theory protection of a paramount public interest would warrant the granting of summary, "emergency" power. Yet Congress has already indicated that the public is entitled to summary protection from fraudulent use of the mails. Both the Federal Trade Commission and the Securities Exchange Commission have limited jurisdiction of the mails in fraud cases.[35] If the interests of the public require it, these commissions are empowered to bring suit in a federal district court to enjoin alleged fraudulent use of the mails pending final administrative determination of actual fraud.[36]

In view of the possible far-reaching consequences of the instant decision, it cannot pass without criticism. A contradiction exists between the court's due process argument and its reasoning in denying that section 259 implicitly authorizes the issuance of interim impounding orders in fraud cases. Either the court did not see this contradiction or, in seeing it, made a distinction as to the taking involved in obscenity and fraud cases. If such a constitutional distinction exists, then the instant decision is sound. However, it is submitted that such a distinction is unwarranted. And, if this is so, then the constitutionality of section 259b has been placed in serious doubt. Congress should, therefore, act to expressly authorize the use of interim impounding orders by the Postmaster General in fraud order cases.

William R. Kennedy

NEWSPAPERS — CONTEMPT — IMPROPER COMMENTS ON PENDING JUDICIAL ACTION. — The Supreme Court of Colorado heard on appeal a tax dispute between the State Board of Equalization and Arapahoe County and, in announcing a decision in favor of the board, delayed publication of its formal written opinion for one week. At the time the decision was announced the opinion had been written, but had not been prepared for publication. Four days later respondent published an editorial in his newspaper attacking the decision,[1] suggesting that it was inspired by political rather than legal considerations,[2] and intimating that popular disapproval might result in a written opinion mitigating some of the decision's rigor.[3] Under Colorado procedure, the parties had time to file for rehearing. Two days after the editorial — six days after the decision — a thirty-two page opinion was printed. Two days after the publication the court, on its own motion, cited respondent for constructive criminal contempt. Respondent filed an answer to the citation and orally defended himself in an open hearing. *Held;* two of six participating justices dissenting: not guilty. *In Re Jameson,* 340 P.2d 423 (Colo. 1959).

Contempt by publication, the common law court's most effective cudgel in defending itself from journalists, has been curtailed, if not obliterated, by a solid phalanx of relatively recent United States Supreme Court decisions. Early opinions left de-

35 15 U.S.C. § 77e (2) (Supp. 1952) (SEC has jurisdiction of securities sent through the mails). 15 U.S.C. § 52 (1) (1952) (FTC).

36 15 U.S.C. § 77t (b) (Supp. 1952) (SEC). 15 U.S.C. § 53 (1952) (FTC).

1 "the court has chiseled away more of our vanishing local governmental rights." The Englewood Herald, Mar. 2, 1959; quoted in 340 P.2d 423, 424 (1959).

2 "Or could it be that the justices—they are elected state-wide, too — felt that the problem of getting politically powerful school teachers paid on time justifies the means used of issuing a quick ruling without legal opinion in its support?" *Ibid.*

3 "Could it have been that if the populace should rise up in wrath that the opinion could temper down the ruling, or, if it went almost unnoticed, the court could breathe easier and file an opinion backing up its ruling to the hilt?" *Ibid.*

termination of contempts largely up to state law,[4] holding that if the publication had "a reasonable tendency" to obstruct justice, freedom of speech and the press were not offended by summary punishment for contempt.[5] Since 1941, both federal[6] and state[7] courts have been limited in finding published contempt to those cases in which there is "a clear and present danger" to the administration of justice.

Using a test first applied in a World War I espionage case,[8] the court in *Nye v. United States*[9] denied to federal courts, and in *Bridges v. California*,[10] to state courts, the broad summary power traditionally exercised by English judges.

Solidifying its position in *Bridges*, the court in the last eighteen years has applied the "clear and present danger" test with an unanimous record of reversals of state convictions for contempt by publication.[11] Both courts and legal scholars now generally recognize the test as controlling.[12] State courts occasionally show a tendency to use other standards,[13] but the tightening of contempt power has been general, extending even to English-speaking courts outside the United States.[14]

The Supreme Court's use of the fourteenth amendment as a virtual roadblock to punishment for contempt by publication has escaped neither opposition nor ambiguity. None of the leading cases has been decided without dissent[15] and no dependable definition of the "clear and present danger" rule has emerged from the half dozen discussions of it since *Bridges*.[16] It remains to conjecture whether the court would be as rigorous in cases involving juries as it has been in appeals from cases tried solely to the court,[17] but there is apparently no permissable distinction to be drawn between elected and appointed judges.[18]

Constructive contempt is a criminal offense punishable summarily without a jury trial.[19] It is ordinarily instituted by the offended court on its own motion and is considered to be aimed at vindication of a public, as distinguished from a private, wrong.[20] Usual procedural safeguards are not required, as they are in civil contempt proceedings.[21] The offense is predicated on the act and the tendency of the act;

4 Patterson v. Colorado, 205 U.S. 454 (1907).
5 Toledo Newspaper Co. v. United States, 247 U.S. 403 (1918).
6 Nye v. United States, 313 U.S. 33 (1941).
7 Bridges v. California, 314 U.S. 252 (1941).
8 Schenck v. United States, 249 U.S. 47 (1919), construing the Espionage Act, 40 Stat. 217, 219 (1917).
9 313 U.S. 33 (1941).
10 314 U.S. 252 (1941).
11 Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946).
12 See People v. Goss, 10 Ill. 2d 533, 141 N.E.2d 385 (1957), and comment, 24 BROOKLYN L. REV. 123 (1957); Note, *The Contempt Power in Montana: A Cloud on Freedom of the Press,* 18 MONT. L. REV. 68 (1956). *But cf.* the test set forth in THAYER, LEGAL CONTROL OF THE PRESS 489, 505-07 (3d ed., 1956). Thayer regards the old *Toledo Newspaper* test of "reasonable tendency" and the *Bridges* test as alternatively valid.
13 The Florida court, possibly risking another *Pennekamp,* recently concentrated on a litigant's right to fair trial to the exclusion of the *Bridges* yardstick. Brumfield v. State, 108 So.2d 33 (Fla. 1959).
14 See, *e.g.,* John Fairfax & Sons Pty. Ltd. v. McRae, 93 Commw. L.R. 351 (Austl. 1955), and Consolidated Press Ltd. v. McRae, 93 Commw. L.R. 325 (Austl. 1955). *Cf.* Comment, 7 RES JUDICATAE 195 (1955).
15 "I shall remain unreconciled, as long as I live, to the notion that the right of talking takes precedence over the duty to conduct trials in the only way they can be conducted fairly." Frankfurter, J., commenting during oral argument in *In Re* Sawyer, 360 U.S. 622 (1957); see U.S.L. WEEK 3331, 3332 (1958).
16 Justice Reed used six definitions in Pennekamp v. Florida, 328 U.S. 331, 333 (1946). See Communications Assn. v. Douds, 339 U.S. 382, 398 (1950); Whitney v. California, 274 U.S. 357, 376 (1927).
17 No constructive criminal contempt by publication involving a jury case has been before the court since *Bridges.*
18 Craig v. Harney, 331 U.S. 367, 377 (1947).
19 Bullock v. United States, 265 F.2d 683 (6th Cir. 1959).
20 MacNeil v. United States, 236 F.2d 149 (1st Cir. 1956).
21 Quezada v. Superior Court, 340 P.2d 1018 (Cal. Dist. Ct. App., 2d Dist., 1959). See Green v. United States, 356 U.S. 165 (1958).

intention to obstruct justice is important, but not strictly necessary, and disclaimer of intent is probably not a valid defense.[22]

The case out of which the publication arises must be pending in a real, and not merely technical, sense;[23] but exact determination of the meaning of "pending" is still apparently a question of local law.[24] At least one state retains a statute punishing "contemptuous" statements concerning past judicial acts.[25] A state court has upheld the statute,[26] but its survival under the "clear and present danger" test before a federal court is at best dubious.

Power to punish for contempt is inherent in a court of law; statutes may modify it procedurally,[27] but every legislative attempt to take it away entirely has been jealously spurned.[28] It is usually said that the court must have had jurisdiction in the matter out of which the contempt arose.[29]

The modern decisions on the subject make it crystal clear that the essential purpose of contempt power is the assurance of a fair trial to litigants, rather than protection of judicial dignity.[30] As the Indiana court once colorfully put it, "whatever may bring the law into contempt is a public calamity which, if continued, will eventually lead to anarchy and Bolshevism." [31]

In any event, fair trial considerations must be viewed in the context of the "clear and present danger" test.[32] This often necessitates a continuance or new trial in cases where a litigant's rights are put in peril even though no contempt arises under the modern rationale.[33] To complicate the problem, defendants in criminal actions have a right to a public trial, which presumably includes some amount of publicity.[34]

A court hearing a constructive criminal contempt action which originated during previous litigation in the same forum faces the delicate choice of finding the publisher guilty, and thereby admitting that it was influenced by the offending words,[35] or vindicating its judicial impartiality and dismissing the citation. The

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22 State v. Schumaker, 200 Ind. 623, 163 N.E. 272 (1928); Ray v. State, 186 Ind. 396, 114 N.E. 866 (1917); Regina v. Odhams Press Ltd., 3 W.L.R. 796 (1956). For discussion of elements of the offense, see THAYER, *op. cit. supra,* note 12, at 498, and DANGEL, CONTEMPT 168, 169-70 (1939).

23 See concurring opinion, Frankfurter, J., in Pennekamp v. Florida, 328 U.S. 331, 369 (1946); Craig v. Hecht, 263 U.S. 255 (1923); Nixon v. State, 207 Ind. 426, 193 N.E. 591 (1935).

24 A determination not without its problems. See State v. District Court, 99 Mont. 33, 43 P.2d 249 (1935), *following* Grice v. District Court, 37 Mont. 590, 97 Pac. 1032 (1908).

25 VA. CODE ANN. § 18-255 (1950).

26 Weston v. Commonwealth, 195 Va. 175, 77 S.E.2d 405 (1953).

27 Wyatt v. People, 17 Colo. 261, 28 Pac. 961 (1892); *cf.* Commonwealth v. Hoffman, 152 A.2d 726 (Pa. 1959), construing PA. STAT. tit. 42, § 1080 (1936).

28 *Ex parte* Shuler, 210 Cal. 377, 292 Pac. 481 (1930); Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 52 N.E. 445 (1899); *In Re* Assignment of Huff, 352 Mich. 402, 91 N.W.2d 613 (1958); State v. Goff, 288 S.C. 17, 88 S.E.2d 788 (1955).

29 Lane v. Bradley, 339 P.2d 583 (Cal. Dist. Ct. App., 1st Dist. 1959); Harvey v. Prall, 97 N.W.2d 306 (Iowa 1959); State v. Olsen, 340 P.2d 171 (Wash. 1959).

30 See, *e.g.,* Tribune Review Publishing Co. v. Thomas, 153 F. Supp. 486 (W.D. Pa. 1957).

31 Coons v. State, 191 Ind. 580, 134 N.E. 194 (1922).

32 Baltimore Radio Show v. State, 193 Md. 300, 67 A.2d 497 (1949).

33 A continuance was granted in United States v. Dioguardi, 147 F. Supp. 421 (S.D.N.Y. 1956), but denied in United States v. Hoffa, 156 F. Supp. 495 (S.D.N.Y. 1957) and Irvin v. Dowd, 153 F. Supp. 531 (N.D. Ind. 1957). Whether or not a continuance is called for is a matter within the discretion of the trial court. Sundahl v. State, 154 Neb. 550, 48 N.W.2d 689 (1951); Commonwealth v. Richardson, 392 Pa. 528, 140 A.2d 828 (1958); Commonwealth v. Harrison, 137 Pa. Super. 279, 8 A.2d 733 (1939). But interference with a fair trial by the press is a constitutional ground for reversal. Shepherd v. Florida, 341 U.S. 50 (1951).

34 People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954).

35 This admission lies at the core of the dissent in the instant case. 340 P.2d 423, 438 (1959). It becomes no less delicate when an appellate court considers the contempt conviction: "To say that [the words] had the effect of intimidating, coercing or influencing the judge from

Colorado court, in other words, had either to admit that Jameson's editorial disturbed it enough to present an obstacle to justice or deny the effect of his words and release him. If the publisher has merely attempted to influence, but has not succeeded, he has, by the Colorado court's reasoning, not committed a contempt.[36]

Contempt, of course, is a weapon peculiar to the judicial arsenal which does not foreclose use of more common weapons. A judge may certainly resort to the courts for damages in cases involving libel; and the instant opinion implies that Jameson may be liable for both criminal and civil libel.[37] The court may give an offending publisher a severe tongue-lashing and release him without risking reversal on constitutional grounds.[38] Indicating the availability of extra-legal pressures, the instant court suggested that the newspapermen of Colorado should have been able to prevent Editor Jameson's irresponsible journalism.[39]

The Colorado court's decision is probably in accord with the judicial temperament since 1941. But future contempt cases, particularly those involving juries, may of necessity retreat from a situation in which "the power theoretically possessed by the State is largely paralyzed."[40]

Thomas L. Shaffer

PROCEDURE — TRIAL BY JURY — UNLESS INADEQUACY OF LEGAL REMEDIES CAN BE SHOWN LEGAL ISSUES MUST BE TRIED BY JURY PRIOR TO COURT TRIAL OF THE EQUITABLE ISSUES. — Plaintiff brought action to enjoin the defendant from instituting an antitrust suit against the plaintiff, requesting also a declaration that a grant of clearance, whereby plaintiff was allowed to show first-run movies before any other theater, was not in violation of the antitrust laws. The defendant counterclaimed for treble damages under the antitrust laws and requested a trial by jury. Upon affirmance by the court of appeals of the trial judge's decision to try the equitable issues to the court prior to jury determination of the antitrust violations charged in the counterclaim, and of his denial of defendant's demand for a jury

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his course of duty is to fail to accord him the strength of character and judicial fortitude . . . so vividly exemplified by the long record of his judicial acts." Smotherman v. United States, 186 F.2d 676 (10th Cir. 1950).

36 Contrast the instant decision, for instance, with the import of the following exchange at the hearing:

"MR. JUSTICE DAY: Didn't you in fact say that as a result of public clamor, including your own opinion, that this opinion might be withdrawn and otherwise be reversed on that particular ground? Would you say that, that you were part of the clamor?
"MR. JAMESON: If you please, I would rather not answer the clamor.
"MR. JUSTICE DAY: You used something about the public rising up.
"MR. JAMESON: Yes, there's a reference to that sort of thing.
"MR. JUSTICE DAY: And you were part of the rising up against us, were you not, the public rising up against us, and you inferred if it was loud enough, that the opinion would be either tempered down or withdrawn, and that if it went unnoticed, then the opinion would stand, that these were the things that determined it, isn't that what you said?
"MR. JAMESON: I will let the editorial speak for itself.
"MR. JUSTICE HALL: You chose your words advisedly?
"MR. JAMESON: Yes, sir, I did." COLORADO PRESS ASSOCIATION, SPECIAL LEGISLATIVE AND LEGAL BULLETIN, Mar. 20, 1959, p. 12.

37 Editorial referred to as "defamatory," 340 P.2d 423, 427, 428; liability for libel is discussed at 429.

38 This is an alternative not to be discounted. The instant court resorted to it, as the Colorado Press Association predicted it would. COLORADO PRESS ASSOCIATION, CONFIDENTIAL BULLETIN, March 26, 1959, p. 1. The procedure has been followed in earlier cases. People v. Stapleton, 18 Colo. 568, 33 Pac. 167 (1893); State v. Faulds, 17 Mont. 140, 42 Pac. 285 (1895); State v. Magee Pub. Co., 29 N.M. 455, 224 Pac. 1028 (1924).

39 340 P.2d 423, 429 (1959). Another instance: "The law-abiding, intelligent and patriotic people of this state will effectually settle the matter, if they are ever given an opportunity to deal with it." State v. Shepherd, 117 Mo. 205, 76 S.W. 79 (1903).

40 Frankfurter, J., concurring in Dennis v. United States, 341 U.S. 494, 532 (1951).