IN THE SUPREME COURT OF INDIA

CRIMINAL CONTEMPT PETITION NO. 10 OF 2009

IN

I.A. NO. 1374, 1474, 2134 OF 2007

IN WP (C) NO. 202 OF 1995

IN THE MATTER OF:

AMICUS CURIAE ....PETITIONER

VERSUS

PRASHANT BHUSHAN AND ANR. ....RESPONDENTS

COMPILATION OF JUDGEMENTS

(VOL. II)

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LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in advance the speech prepared by my noble and learned friend, Lord Scarman. I agree with it, and for the reasons which he gives I would dismiss these appeals.

LORD BRIGHTMAN. My Lords, I agree that these appeals should be dismissed for the reasons given by my noble and learned friend, Lord Scarman.

Appeals dismissed.

Solicitors: B. M. Birnberg & Co.; Treasury Solicitor.

S. H.

[HOUSE OF LORDS]

Considered in INQUIRY UNDER COMPANY SECURITIES (INSIDER DEALING) ACT 1985 [1988] 1 All ER 203

SECRETARY OF STATE FOR DEFENCE AND ANOTHER . . . . . RESPONDENTS

AND

GUARDIAN NEWSPAPERS LTD. . . . . APPELLANTS

1984 July 23, 24; Oct. 25

Lord Diplock, Lord Fraser of Tullybelton, Lord Scarman, Lord Roskill and Lord Bridge of Harwich

Contempt of Court—Sources of information—Disclosure—Secret Crown document—Copy sent to newspaper—Possibility of identification of sender from markings on copy—Newspaper seeking to protect source of information—Whether Crown entitled to immediate return of copy—Whether return of document in "interests of justice or national security"—Contempt of Court Act 1981 (c. 49), s. 10

A document classified "secret" was prepared in the Ministry of Defence. Seven copies of the document were sent from the ministry to the Prime Minister, for senior ministers, the chief whip and the secretary of the cabinet. A photocopy of the document was delivered to the defendant newspaper. The editor, who did not know how or by whom the document had been delivered, concluded after inquiries that it was authentic and published its contents. On the Secretary of State's request for the immediate return of the document, which bore certain markings which it was believed could aid the identification of the informant, the defendants claimed that by virtue of section 10 of the Contempt of Court Act 1981[1] they could not be

Dictum of LORD DIPLOCK at 349-350 applied in MAXWELL v PRESSDRAM LTD [1987] 1 All ER 656

[1] Contempt of Court Act 1981, s. 10: see post, p. 344G.

required to disclose the source of their information and said that they would only return the document with the markings excised.

By writ and notice of motion the Crown claimed that the copyright in infringing copies of the secret document was vested in the Crown and sought an order for the immediate delivery up of the document in the defendants' possession. Scott J. held that section 10 of the Contempt of Court Act 1981 was not intended to interfere with proprietary rights and that the Crown was entitled to the order sought. The majority of the Court of Appeal expressed doubts as to the application of section 10 to proprietary claims but all held that on an assumption that it did so apply the interests of "justice" and "national security" required the immediate return of the document and accordingly those exceptions to the operation of section 10 of the Act of 1981 regarding the immunity from disclosure of a source of information had been established and an order for the delivery up of the document was made.

On appeal by the defendants:—

Held, (1) that on its true construction, section 10 of the Contempt of Court Act 1981 applied to all judicial proceedings irrespective of their nature, or the claim or cause of action in respect of which they had been brought (post, pp. 349B–D, 356E–F, 362D–G, 368G—369A, 372A–C).

(2) Dismissing the appeal (Lord Fraser of Tullybelton and Lord Scarman dissenting), that although the defendants had been prima facie entitled to the protection of the section, that entitlement had been removed by the Crown adducing evidence sufficient to discharge the onus of showing that immediate delivery up of the document was necessary in the interests of national security (post, pp. 356A–B, 371C–D, 373B–E).

Per curiam. Where an interlocutory order is sought for disclosure of sources of classified information affecting national security the affidavits should be as specific as possible as to the reasons why speedy disclosure is necessary and should provide the court with the fullest possible information available (post, pp. 346E–G, 359H—360B, 364E–F, 368C–D, 372C–E).

Per Lord Diplock. The expression "justice" in section 10 of the Act of 1981 is not used in a general sense but in the technical sense of the administration of justice in the course of legal proceedings in a court of law (post, p. 350B–C).

Decision of the Court of Appeal [1984] Ch. 156; [1984] 2 W.L.R. 268; [1984] 1 All E.R. 453 affirmed.

The following cases are referred to in their Lordships' opinions:

British Steel Corporation v. Granada Television Ltd. [1981] A.C. 1096; [1980] 3 W.L.R. 774; [1981] 1 All E.R. 417, H.L.(E.)

Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd. v. Pontypridd Waterworks Co. [1903] A.C. 426, H.L.(E.)

D. v. National Society for the Prevention of Cruelty to Children [1978] A.C. 171; [1977] 2 W.L.R. 201; [1977] 1 All E.R. 589, H.L.(E.)

Norwich Pharmacal Co. v. Customs and Excise Commissioners [1974] A.C. 133; [1973] 3 W.L.R. 164; [1973] 2 All E.R. 943; H.L.(E.)

Reg. v. Lewes Justices, Ex parte Secretary of State for the Home Department [1973] A.C. 388; [1972] 3 W.L.R. 279; [1972] 2 All E.R. 1057, H.L.(E.)

Riley v. City of Chester (1979) 612 F. 2d 708

Zamora, The [1916] 2 A.C. 77, P.C.

The following additional cases were cited in argument:

Attorney-General of The Gambia v. Momodou Jobe [1984] A.C. 689; [1984] 3 W.L.R. 174, P.C.

Carey v. Hume (1974) 492 F. 2d 631

Chandler v. Director of Public Prosecutions [1964] A.C. 763; [1962] 3 W.L.R. 694; [1962] 2 All E.R. 314; [1962] 3 All E.R. 142, C.C.A. and H.L.(E.)

Home Office v. Harman [1983] 1 A.C. 280; [1982] 2 W.L.R. 338; [1982] 1 All E.R. 532, H.L.(E.)

Petroleum Products Antitrust Litigation, In re (1982) 680 F. 2d 5

APPEAL from the Court of Appeal.

This was an appeal by the appellants, Guardian Newspapers Ltd., by leave of the Court of Appeal (Sir John Donaldson M.R., Griffiths and Slade L.JJ.) from their judgment on 16 December 1983 affirming the decision of Scott J. on 15 December 1983. By that decision, Scott J. held that the appellants should forthwith deliver up to the respondents, the Secretary of State for Defence and the Attorney General, a document dated 20 October 1983 entitled "Deliveries of Cruise Missiles to R.A.F. Greenham Common—Parliamentary and Public Statements."

The facts are stated in their Lordships' opinions.

Sydney Kentridge Q.C. and *Peter Prescott* for the appellants. This case does not touch the question of the right of the newspaper to publish the document or the legality or morality of the civil servant's action in sending that document. It is accepted that it was a breach of her duty and in breach of the Official Secrets Act 1911.

The issues are as follows. As the order sought by the Crown was one designed and intended to disclose the source of the document it falls within section 10 of the Contempt of Court Act 1981. That section is not to be limited to demands for oral or written evidence as to the identity of an informant. That being so, the burden falls on the Secretary of State to satisfy the court that disclosure is necessary on one of the three grounds of exception in the section. That burden has not been discharged in the present case. There has been no specific showing of the necessity of disclosure in the interests of national security. In any event, Scott J., even if right about section 10, did not exercise judicial discretion in ordering the document's return as he said that the public interest in section 10 was not to be taken into account at all.

[LORD DIPLOCK. No one in the Court of Appeal agreed with that.]

But reliance is still placed on it in the respondents' case. In the alternative, the Crown's claim to the property was not made out, certainly in respect of the markings. It is too narrow an approach to look at the section by reference to rights of property. That does not take account of the public interest the section is designed for, and to allow a plaintiff to frame his claim on the ownership of a piece of paper is to allow him to "sail round" section 10. Far from cutting down the meaning of section 10, this is a case for giving it a broad interpretation. It entrenches a right of freedom of the press—one found in other jurisdictions in written constitutions—and the Privy Council has said that such sections must be given an interpretation giving full recognition to

entrenched rights: *Attorney-General of The Gambia v. Momodou Jobe* [1984] A.C. 689; 700. That right had been questioned in *British Steel Corporation v. Granada Television Ltd.* [1981] A.C. 1096 as to whether it was a public interest at all, but section 10 recognised it as the paramount interest which would prevail unless a limited number of other interests should outweigh it. The basis of such outweighing is stated in the section as "when necessary." It is accepted that necessity does not mean "indispensability" but the word must be given its full weight. It is not to be equated with "convenient" or "useful." Such a "full weight" interpretation is in accordance with article 10 of the European Convention on Human Rights: see *Home Office v. Harman* [1983] 1 A.C. 280. One of the purposes of section 10 of the Act of 1981 was to comply with the European Convention.

If one asks if disclosure in the present case is necessary, we have to look at the evidence on which the plaintiffs relied. The Court of Appeal, in finding it had been shown to be necessary in the interests of national security, confused two factual issues. One was whether it was necessary for those in authority to find out who had leaked the document and to deal with that person. The other, the question under section 10, whether it was necessary in the interests of national security to disclose where the document came from. That raises a number of factual issues which were not dealt with by the plaintiffs. When one is dealing with necessity in the public interest, one is not dealing with what is essential for good public administration. The Crown had to show that if the source were not found, national security would be damaged. In the present case that was by no means self-evident—the document dealt with political tactics as to public reaction. It did not follow that the civil servant would reveal a highly sensitive document; that is no more than a possibility and that is not within the meaning of section 10.

[LORD SCARMAN. We are dealing with the channels of communication between the Secretary of State for Defence and the Prime Minister. If that system isn't safe, isn't that enough to show a threat to national security?]

That is accepted, but see the judgment of Scott J.: "there is no real evidence as to the class of persons who had access to these documents; nor do I think it is a necessary inference that because some individual was prepared, in breach of his duty and reprehensibly, to leak to the press a document of the character here involved, national security requires that he be identified and got rid of." The proper approach of the court should have been to require more than a mere statement that there was a threat to national security. The Court of Appeal looked at the matter entirely from the point of view of the plaintiffs—there was little or no attention paid to the whole rationale of section 10. Cases such as *Riley v. City of Chester* (1979) 612 F. 2d 708; *In re Petroleum Products Antitrust Litigation* (1982) 680 F. 2d 5; and *Carey v. Hume* (1974) 492 F. 2d 631 point the way as to how questions under section 10 should be decided. Likewise, *Chandler v. Director of Public Prosecutions* [1964] A.C. 763 shows that the mere marking of a document "secret" does not relieve the court from making its own decision as to whether the interests of national security are involved. We are not saying that

A there is an absolute immunity or that the burden of proof on the plaintiffs should be so large as to be impossible to discharge, but this was a case brought on an interlocutory basis on hardly any evidence, and argued without sufficient reference to section 10 of the Act of 1981. Under that section a case of real urgency must be shown.

Simon D. Brown and *John Mummery* for the respondents. The first question to be asked is whether disclosure, in the circumstances of this B case, was necessary in the interests of national security within the meaning of section 10 of the Contempt of Court Act 1981. In circumstances such as those on any view of the facts here, where someone in government service conveys to the press an unauthorised copy of a document from the Ministry of Defence classified "secret" and with a very restricted high level circulation, no court could fail to be C satisfied that disclosure of the source of such leaks was necessary in the interests of national security and appropriate to be ordered on interlocutory application. If that is right, then subject to a single qualification, the Court of Appeal clearly arrived at the correct decision irrespective of what is the correct approach to (*a*) the impact, if any, of section 10 upon private property rights, (*b*) the court's discretion under section 3(3)(*b*) of the Torts (Interference with Goods) Act 1977 and (*c*) D the fact that it was an interlocutory application. The single qualification is that the Crown must establish a proper basis in law for seeking disclosure of the source. Two bases are (1) the assertion of a proprietary claim for the return of the copy document and (2) an order as made in *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] A.C. 133 and *British Steel Corporation v. Granada Television Ltd.* E [1981] A.C. 1096. That latter case would not be decided differently in the light of section 10—disclosure would be found to be necessary in the interests of justice—and it is relied on in support of our primary submission; see [1981] A.C. 1096; 1174 and 1200. Section 10 entrenches rather than overrules the pre-existing law, and the *British Steel* case casts light on the intended ambit of the word "necessary." The weighing of the public interest in that case dealing with the interests of justice is an F appropriate approach to the question of national security in the present case.

[LORD SCARMAN. Your real case is not that the contents themselves were a threat to national security if revealed, but rather that the person could do it again and was untrustworthy. Where does the affidavit evidence deal with that?]

G If one looks at paragraph 6 of the affidavit and applies one's common sense, one inescapably comes to the conclusion that whoever leaked the document could leak another. The appellants point to the passages in the Court of Appeal's judgment where they speak of what may happen in the future, and submit that section 10 does not talk of the possibility of future harm. The section does not need to speak in terms of possibility of future damage—there is a clear threat to national security H so as to make disclosure necessary if there is any appreciable risk that the source may in the future again decide to substitute for the official view his or her own view of the appropriateness of the classification of a document from a secret file of this character.

It is further contended that section 10 properly construed does not apply directly in a case for the recovery of property such as that brought in the present case. It does not admit of application to a private law property claim. Section 10 is a narrowly drawn section and it is prima facie unlikely that in a contempt of court Act Parliament would be attempting to interfere with general property law.

[LORD DIPLOCK indicated that their Lordships did not wish to hear the appellants on the "property" claim, but only on the question whether it had been established that disclosure was necessary in the interests of national security.]

Kentridge Q.C. in reply. This case indicates the dangers of things being "blindingly obvious" at the interlocutory stage: it was not a senior civil servant responsible for the leak, as the Court of Appeal thought, but a 23 year-old grade 10 clerk. The document was marked "Secret. U.K. eyes only" yet it dealt with a domestic political matter. The respondents have not grappled with the issue raised by Scott J. that there was "no real evidence as to the class of persons who had access to these documents". One cannot assume that the person who saw that political document would have access to sensitive material. They did not deal with the question whether a document dealing with confounding the opposition rather than the enemy would be in a different file. Their affidavit evidence did not even avert to the question whether people with access to the document would have had access to security documents. It was based, not on an assumption that it could happen again, but that the document itself was of significance to national security.

Their Lordships took time for consideration.

25 October. LORD DIPLOCK. My Lords, the real importance of this appeal is that it provides the occasion for this House to settle a question of construction of section 10 of the Contempt of Court Act 1981, upon which somewhat divergent views had been expressed by Scott J. at first instance and individual members of the Court of Appeal (Sir John Donaldson M.R., Griffiths and Slade L.JJ.), although each of those divergent views had led the holder to the same conclusion in its application to the instant case.

Section 10 of the Contempt of Court Act 1981 is in the following terms:

> "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

It is to be observed that the statutory protection created by the section from being compelled by order of a court which is enforceable by legal sanctions to disclose sources of information contained in a publication in what for convenience I may call the "media" does not

differentiate between disclosure in interlocutory proceedings for discovery prior to the trial and disclosure at the actual trial itself.

In this respect and also in the respect that it eliminates any discretion on the part of the judge at the trial as to whether or not the non-disclosure rule should be applied, the section alters what had been the previous practice of the courts under the so-called newspaper rule of which detailed discussion and analysis can be found in the speeches in this House in *British Steel Corporation v. Granada Television Ltd.* [1981] A.C. 1096, and in particular that of my noble and learned friend, Lord Fraser of Tullybelton (pp. 1197–1199). The section is so drafted as to make it a question of fact not of discretion as to whether in the particular case a requirement for disclosure of sources of information falls within one of the express exceptions introduced by the word "unless." If it does not, the statutory right to refuse disclosure of sources of information in the media is absolute. With all respect to Mr. Kentridge I do not think that the process of ascertaining the true construction of the section is advanced by dubbing this a "constitutional right." For my part I would repudiate this evocative phrase if it is intended to mean anything more than that in ascertaining the extent of the rights which it confers the section should be given a purposive construction and, that being done, the right, like other rights conferred on persons by statute, effect must be given to it in the courts.

The instant case comes before your Lordships, as I think unfortunately, in the form of an appeal against an interlocutory order made in an action which technically is still a pending action. The claim in the action is for delivery up to the Secretary of State for Defence and the Attorney-General of a document alleged to be Crown property that had been "handed in" anonymously to "The Guardian" newspaper on 22 October 1983 and published verbatim in that newspaper on 31 October. The only reason why the Crown wanted delivery up of the document was to assist it in identifying the civil servant by whom it had been "leaked" to the press. The interlocutory order against which appeal is brought is one made by Scott J. on 15 December 1983 and affirmed by the Court of Appeal on the following day, for the delivery up of the document to the Treasury Solicitor forthwith. It was complied with on the same day. Examination of the document aided by forensic tests enabled the civil servant responsible for the anonymous delivery of it to "The Guardian" to be identified as a clerk employed in the private office of the Secretary of State for Foreign and Commonwealth Affairs, Miss Sarah Tisdall.

My Lords, I have said that I think it is unfortunate that this question of the true construction of section 10 of the Contempt of Court Act of 1981 which is of great general importance primarily to the "media" (but having regard to the wide definition of "publication" in section 2(1) of the Act of 1981, not exclusively to them) should have come before your Lordships in the form of an interlocutory appeal. As I have pointed out section 10 applies to interlocutory proceedings and to actual trial alike. I understand that all your Lordships are agreed not only upon the true construction of the section but also that if the action had proceeded to a speedy trial and the facts as they were known to the Government at the

date of the application for the interlocutory order had been the subject of explicit oral evidence the Crown would have succeeded in establishing that disclosure of the source of the document was necessary in the interests of national security and thus that it was entitled to final judgment for delivery up of the document as a means of discovering that source. So all that divides us is whether the facts stated in the affidavit evidence of Mr. Hastie-Smith, the principal establishment officer of the Ministry of Defence, to establish that identification of the civil servant who had been responsible for the leak was necessary in the interests of national security, were sufficiently explicit to justify the inference that such necessity had been sufficiently shown. In common with all three members of the Court of Appeal, (Sir John Donaldson M.R., Griffiths and Slade L.JJ.) two of your Lordships with whom I align myself, are of opinion that those facts, when read in conjunction with those stated in the affidavit evidence of the editor of "The Guardian" and in the light of matters of public notoriety of which judicial notice might legitimately be taken were just enough, although there was material available to him at the date of his affidavit, 23 November 1983, which if Mr. Hastie-Smith had included it, as he would certainly have been wise to do, could have put beyond all doubt, without requiring any resort to the doctrine of judicial notice, that it was necessary in the interest of national security to identify the "leaker" as soon as possible. Two of your Lordships are of opinion that what was actually stated in the affidavit was not enough to compel the inference that identification of the civil servant who was responsible for the anonymous "leak" to which it was hoped examination of the document would lead, was necessary in the interests of national security. Scott J. if he had not decided the interlocutory application upon another ground, which involved a misconstruction of section 10 to which it will be necessary to advert later, indicated obiter that he would have shared the same view on this point as the minority of your Lordships.

So this point is a close-run thing upon which judicial opinion may well vary: but it is highly special to this particular case. It has no general application save to serve as a warning to those who draft affidavits for use on interlocutory applications for disclosure of sources of classified information affecting national security "leaked" to the media by someone with access to such information, that the affidavits should be as specific as possible as to the reasons why speedy disclosure is necessary in the interests of national security. I therefore propose to deal first with the question of general application: the true construction of section 10 of the Contempt of Court Act 1981.

The construction of section 10

My Lords, save that the subject matter of the Act of 1981 is limited to contempt of court, as its long title shows, there is no consistent theme that can be identified as being common to all its sections. It consists of a number of miscellaneous amendments to the previous law of contempt of court both criminal and civil; and all that can be predicated as an aid in giving a purposive construction to a particular section is that it presupposes the existence of what in section 1(1) are referred to as

"particular legal proceedings." (For present purposes the species of contempt of court which consists of "scandalising the judges" and is virtually obsolescent in England may be ignored; it is not dealt with by the Act.)

Section 10 is concerned solely with the power of a court of justice (or by virtue of the extended definition in section 19, any other tribunal or body exercising the judicial power of the State) to order a person to disclose the source of information contained in a publication for which he is responsible; a power which is exercisable only where the identity or nature of such sources is relevant to some issue that falls to be determined by the court in the particular proceedings. The section confers no powers upon a court additional to those powers, whether discretionary or not, which already existed at common law or under rules of court, to order disclosure of sources of information; its effect is restrictive only. As I have pointed out, the disclosure of sources of information with which the section deals is not, like the old "newspaper rule" at common law, limited to disclosure upon discovery where disobedience to the order for discovery would fall into the category of a civil contempt; it applies also to disclosure in response to a question put to a witness at the trial, where a refusal to answer the question if ordered to by the judge to do so would constitute a contempt committed in the face of the court and thus a criminal contempt.

Under the common law as it had developed by the time of the passing of the Act of 1981, the judge already had a discretion to decline to order disclosure of sources of information whether by means of discovery or by oral questions at the trial, despite their relevance to an issue in the particular proceedings where to require such disclosure would be contrary to some public interest. The classical example of the exercise of this discretion was where disclosure of the identity of police informers was sought; but the discretion was not confined to refusing to require disclosure of sources of information on which criminal prosecutions were based. It was extended by this House to sources of information supplied to the Gaming Board for the purpose of their exercise of their statutory functions (*Reg. v. Lewes Justices, Ex parte Secretary of State for the Home Department* [1973] A.C. 388) and to sources of information supplied to the N.S.P.C.C. for the purpose of exercising their statutory powers in relation to the care and custody of children: *D. v. National Society for the Prevention of Cruelty to Children* [1978] A.C. 171. The rationale of the existence of this discretion was that unless informants could be confident that their identity would not be disclosed there was a serious risk that sources of information would dry up. So the exercise of the discretion involved weighing the public interest in eliminating this risk against the conflicting public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue on which it is required to adjudicate should not be withheld from that tribunal. Unless the balance of competing public interest tilted *against* disclosure, the right to disclosure of sources of information in cases where this was relevant prevailed.

In the exercise of this common law discretion, the protection of some general right, albeit of imperfect obligation, which members of the

public had to be informed of reprehensible conduct by persons in responsible positions or of future action intended to be taken by government and other bodies entitled to exercise executive powers, does not appear to have been treated as a factor to be put into the balance when weighing the competing public interests in favour of and against disclosure of sources of information. There is no mention of it in the judgments and the discretion to refuse to require disclosure where this would otherwise be relevant to the determination of an issue in the particular legal proceedings was not limited to sources of information that was contained in publications to which members of the public had access.

The analysis of the former newspaper rule, applicable only to discovery, that is contained in the speech of Lord Fraser of Tullybelton in the *Granada* case [1981] A.C. 1096, 1197–1199, demonstrates that whatever may have been the reasons for the original rule, which was in practice applied only in actions for defamation, a right of members of the public to be informed about reprehensible conduct by persons in responsible positions had ceased to be one of them.

Such then is the setting of existing law in which section 10 falls to be construed. The first thing to be noted is that it is limited to information contained in a publication. This expression by virtue of section 19 (the interpretation section) bears the meaning assigned to it in section 2(1) which deals with the strict liability rule. It is there defined as including "any speech, writing, broadcast or other communication in whatever form, which is addressed to the public at large or any section of the public." Although in section 2(1) this definition is introduced by the words "includes" rather than "means", the context in which it appears in that subsection which speaks of "publications" in the plural makes it clear that it is intended as a complete and comprehensive definition of the term.

Section 10 thus recognises the existence of a prima facie right of ordinary members of the public to be informed of any matter that anyone thinks it appropriate to communicate to them as such, though this does not extend to that information's source. The right so recognised is, so far as members of the public are directly concerned, of imperfect obligation. It encourages purveyors of information to the public, but a member of the public as such has no right conferred on him by this section to compel purveyance to him of any information. The choice of what information shall be communicated to members of the public lies with the publisher alone; it is not confined to what, in an action for defamation would be regarded as matters of public interest, or even, going down the scale, information published in order to pander to idle curiosity and thus promote sales of the publication; nor is the section confined to publications by "the media" although no doubt the media will in practice be the chief beneficiaries of it. Provided that it is addressed to the public at large or to any section of it every publication of information falls within the section and is entitled to the protection granted by it unless the publication falls within one of the express exceptions introduced by the word "unless."

The nature of the protection is the removal of compulsion to disclose in judicial proceedings the identity or nature of the source of any information contained in the publication, even though the disclosure would be relevant to the determination by the court of an issue in those particular proceedings; and the only reasonable inference is that the purpose of the protection is the same as that which underlay the discretion vested in the judge at common law to *refuse* to compel disclosure of sources of information; videlicet—unless informers could be confident that their identity would not be revealed sources of information would dry up.

The words with which the section starts, before it comes to specifying any exceptions, impose a prohibition on the court itself that is perfectly general in its terms: "No court may require a person to disclose . . . the source of information contained in a publication for which he is responsible. . ." This prohibition is in no way qualified by the nature of the judicial proceedings, or of the claim or cause of action in respect of which such judicial proceedings, if they are civil, are brought. So I am unable to accept Scott J.'s construction of the section as being inapplicable to a claim for detention of goods in which an order for the delivery of the goods, without the option to the defendant to pay damages by reference to their value instead, is sought under section 3(2)(*a*) of the Torts (Interference with Goods) Act 1977. I defer for later reference the relevance of section 10 of the Contempt of Court Act 1981 to the exercise of the discretion, conferred upon the judge by section 3(3)(*b*) of the Act of 1977, whether or not to order delivery of the goods under section 3(2)(*a*).

Again, what the court is prohibited from requiring is not described by reference to the form the requirement takes, but by reference to its consequences, viz. disclosure of the source of information. If compliance with the requirement, whatever form it takes, will, or is sought in order to enable, another party to the proceedings to identify the source by adding to the pieces already in possession of that party the last piece to a jigsaw puzzle in which the identity of the source of information would remain concealed unless that last piece became available to put into position, the requirement will fall foul of the ban imposed by the general words with which the section starts. I therefore, with respect, do not share the doubts expressed by Slade L.J. as to whether section 10 of the Act of 1981 applies to anything other than an order of a court which *in terms* (his italics) directs disclosure of the identity of the source by oral evidence or affidavit; nor do I accept his alternative, though tentative, suggestion that in order to rely upon section 10 of the Act of 1981 to resist delivery up of a document the person responsible for its publication must establish by affirmative evidence that compliance will (not just may) compel him to reveal a source of information. If he can show that there is a reasonable chance that it will do so, then (subject always to the exceptions provided for later in the section) this will suffice to bring the prohibition into effect.

I find myself in full agreement with the judgment of Griffiths L.J., where he says that he sees no harm in giving a wide construction to the opening words because in the latter part of the section the court is given

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ample powers to order the source to be revealed where in the circumstances of a particular case the wider public interest makes it necessary to do so.

So I turn next to the exceptions that the latter part of section 10 provides to the general ban upon the court requiring disclosure of sources of information that is imposed by the opening words. There are only four interests, and each of these is specific, that are singled out for protection, viz.: (a) justice, (b) national security, (c) the prevention of disorder, and (d) the prevention of crime.

The exceptions include no reference to "the public interest" generally and I would add that in my view the expression "justice", the interests of which are entitled to protection, is not used in a general sense as the antonym of "injustice" but in the technical sense of the administration of justice in the course of legal proceedings in a court of law, or, by reason of the extended definition of "court" in section 19 of the Act of 1981 before a tribunal or body exercising the judicial power of the State.

The onus of proving that an order of the court has or may have the consequence of disclosing the source of information falls within any of the exceptions lies upon the party by whom the order is sought. The words "unless it be established to the satisfaction of the court" make it explicit and so serve to emphasise what otherwise might have been left to be inferred from the application of the general rule of statutory construction: the onus of establishing that he falls within an exception lies upon the party who is seeking to rely upon it. Again, the section uses the words "necessary" by itself, instead of using the common statutory phrase "necessary or expedient," to describe what must be established to the satisfaction of the court—which latter phrase gives to the judge a margin of discretion; expediency, however great, is not enough; section 10 requires actual necessity to be established; and whether it has or not is a question of fact that the judge has to find in favour of necessity as a condition precedent to his having any jurisdiction to order disclosure of sources of information.

In the instant case the Crown relied upon the interests of national security and not upon any of the other three exceptions. It was to national security alone that Mr. Hastie-Smith's affidavit was directed, and with the contents of this affidavit I shall be dealing later. In view of the course that the case took before Scott J., however, it is necessary to say something about another exception: the interests of justice. This, as I have already pointed out, refers to the administration of justice in particular legal proceedings already in existence or, in the type of "bill of discovery" case revived after long disuse and exemplified by *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] A.C. 133 (to which incidentally section 10 of the Act of 1981 would not have applied) a particular civil action which it is proposed to bring against a wrongdoer whose identity has not yet been ascertained.

I find it difficult to envisage a civil action in which section 10 of the Contempt of Court Act 1981 would be relevant other than one for defamation or for detention of goods where the goods, as in the instant case and in *British Steel Corporation v. Granada Television Ltd.* [1981] A.C. 1096, consist of or include documents that have been supplied to

the media in breach of confidence. The instant case does not provide a convenient occasion for saying anything about the effect of section 10 on actions for defamation. As respects actions for the detention of documents section 10 does not destroy the cause of action or affect its nature; what it does is to affect what interlocutory orders may be made by the court in the action, what questions witnesses may be compelled to answer and what documents (or other things) they may be required to produce at the actual trial, and what relief under the Torts (Interference with Goods) Act 1977 may be granted by the judgment given in it.

Where the only, or the predominant, purpose of the action is to obtain possession of a document in order to find out from examining it the identity of the source of information that had been contained in a publication, it is in my view plain that the provisions of section 10 would be a matter that the judge would be required to take into consideration in deciding how to exercise the discretion conferred upon him by section 3(3)(*b*) of the Torts (Interference with Goods) Act 1977. Unless he had found as a fact that the case fell within one of the four exceptions specified in section 10 of the Contempt of Court Act 1981, he should not give judgment in a form that granted relief under section 3(2)(*a*) of the Act of 1977 which compelled delivery up of the document itself. In any such case the intrinsic value of the document as a physical object is likely to be small, not to say tiny, as it was in the instant case. Having regard to the emphatic terms in which section 10 of the Contempt of Court Act 1981 is cast, I have not found it possible to envisage any case that might occur in real life, in which, since the passing of that Act, it would be necessary in the interests of justice to order delivery up of the document and thus constitute a permissible exercise of the discretion under section 3(3)(*b*) of the Act of 1977 to make such an order. Since this would be so in the case of an order in the final judgment in the action for delivery of goods a fortiori it would be so in an interlocutory order.

However, in the instant appeal what are relied upon as bringing the case within the exceptions to the general rule laid down in the first part of section 10 are not the interests of justice but those of national security. To these interests quite different considerations apply. To their application to the facts of the instant case at the interlocutory stage that it has reached, which is the only matter on which your Lordships are divided, I will now turn.

The interlocutory nature of the appeal

There is a further disadvantage, additional to its having caused a division of opinion between members of this House, which results from this case coming before this House upon what still remains an interlocutory appeal notwithstanding that the whole truth has come out at the trial of Miss Tisdall at the Central Criminal Court before Cantley J. on 23 March 1984. At the trial she pleaded guilty to an offence under section 2 of the Official Secrets Act 1911 by communicating to "The Guardian" two documents containing classified information, of which only one was the document that was published by that newspaper and was the subject of the interlocutory application for delivery up in

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which this appeal is brought. The disadvantage is that your Lordships, knowing the full facts, which since they were disclosed at a public trial held in open court and are thus within the public domain, have nevertheless to perform the difficult feat of mental gymnastics involved in dismissing from your minds the true and full facts as they are now known to be, and concentrating only upon that part of the primary facts that appeared in the evidence before the Court of Appeal, together with such further inferences of fact as may properly be drawn from them.

In carrying out this necessary exercise in mental gymnastics I have found it helpful to start by setting out the full facts as they are now known to be, using ordinary type for those facts known to the government at the time of the interlocutory proceedings and putting within square brackets such of those facts as are not expressly included in Mr. Hastie-Smith's affidavit. Facts which at the date of the interlocutory proceedings were known only to Miss Tisdall or which are later in date than those proceedings are set out in italics.

The facts

On 20 October 1983, the Minister of Defence addressed to the Prime Minister a minute which bore the marking "Secret" and which dealt with parliamentary and public statements to be made on 1 November about, and contemporaneously with, the delivery of Cruise Missiles to the Greenham Common R.A.F. base [which it was then intended should begin on that date]. Seven copies only of this minute were dispatched from [the private office of the Minister at] the Ministry of Defence; they were directed to the Home Secretary, the Foreign Secretary, the Lord President of the Council, the Lord Privy Seal, the Chief Whip and the Secretary of the Cabinet. [A separate minute by the Minister of Defence with, it may be inferred, no more extensive circulation to government offices, but dealing with contingency security arrangements for the arrival of the missiles was dispatched from the Ministry of Defence at the same time.] *On the next day Miss Tisdall, who was employed at the Foreign and Commonwealth Office as a clerk in the registry of the private office of the Secretary of State and, with three colleagues, had among her duties the operation of the photocopier, used this machine to make an extra copy of each of these minutes and took them away with her. After doing her best with a felt pen to render indecipherable the marginal markings on the documents which would enable them to be identified as the copies of the Defence Minister's two minutes that had been directed to the Foreign Secretary, she took them to the office of "The Guardian", handed an envelope containing them to an attendant at the door and went away without disclosing her identity.*

Articles appearing in "The Guardian" between 22 and 25 October 1983 which were exhibited to the affidavit of the editor, made it clear that information in some form or another of the fact that it was the intention of the Governments of the United Kingdom and the U.S.A. that the date of arrival of the missiles would be 1 November had been leaked. [In consequence steps had to be taken, in conjunction with the Americans, to postpone the date from 1 to 13 November so as to

prevent notice of the exact date of their arrival being disclosed sufficiently in advance to enable a mass demonstration to be organised to block by physical, even though not violent, means the arrival of the missiles at the Greenham Common base.] On 31 October "The Guardian" published in full the Defence Minister's minute of 20 October dealing with parliamentary and public statements about deliveries of Cruise Missiles to R.A.F. Greenham Common. *The editor did not publish either then or later the second and more sensitive minute dealing with contingent security arrangements, of which Miss Tisdall had also handed in a copy at his office. He caused it and any copies that might have been made of it in "The Guardian" office to be destroyed.*

[An inquiry was immediately undertaken of those persons in the Ministry of Defence and the recipient departments who had had access to the minute that had been published in "The Guardian."] *Among them was Miss Tisdall who filled in a questionnaire in which she flatly denied having any responsibility for the leak, thus leaving (as Cantley J. stressed in passing sentence) under the shadow of suspicion those others not only in her own but also in other government departments to which copies of the minute had been sent.* [So the inquiry proved to have been fruitless by 11 November 1983.] On that date the Treasury Solicitor wrote to the editor of "The Guardian" requesting delivery up forthwith of the document published in its issue of 31 October 1983. Solicitors for "The Guardian" by letter of 17 November offered to return the document with the marginal markings excised lest they should disclose the identity of the newspaper's anonymous informant. This offer was refused and the writ claiming delivery up of the document was served on 22 November 1983. It was accompanied by notice of motion claiming, as interlocutory relief, immediate delivery up of the unmutilated document. This motion was dealt with in the manner that I have already stated. As a result the unmutilated document was handed over on 16 December 1983 to the Treasury Solicitor.

Examination of the document, on which the attempted erasure of the marginal markings had been ineffective, enabled it to be identified as a copy prepared upon the photocopying machine in the private office of the Secretary of State for Foreign and Commonwealth Affairs. This discovery reduced considerably the circle of those upon whom suspicion fell, and further investigation reduced it to Miss Tisdall and her three colleagues whose duties included operating that photocopying machine. She persisted in her denials that she was the guilty party, pointing out as late as 6 January 1984 that it might be any of the other three; but after a weekend spent in consulting her parents she finally confessed on 9 January 1984.

The affidavit evidence

The relevant paragraphs in the affidavit of Mr. Hastie-Smith, who describes himself as responsible for the security of records and other documents at the Ministry of Defence, that deal with the risk to national security are numbered 5 and 6. They read:

> "5. Only seven copies of the said document were despatched from the Ministry of Defence. In addition to the copy sent to the Office of the Prime Minister, copies were directed to the Secretary of State

general publication in the press could do untold damage to national security. But the fact that civil servants who have access to a document that is classified as "Secret" are likely to have access to others that are so classified is an inference which, in my view, any judge is entitled to draw as a matter of common sense even though he may not be aware of the details of the internal organisation of a government department.

It might, perhaps, also with advantage, have been stated expressly that the interval between 31 October when the minute classified as "Secret" was published in "The Guardian" and 11 November 1983 when the Treasury Solicitor requested the editor to deliver it up forthwith, was occupied by the government offices concerned in instituting and pursuing their own internal inquiries of those civil servants to whom access to copies of the secret minute had been available and that such "in house" inquiries had not succeeded in identifying the culprit. But that such inquiries should have been undertaken without success, before recourse was had to tangling with the press upon what was currently so sensitive a matter as the identification of informants, with all the publicity that this was likely to entail, is another inference which any judge using his common sense alone without any special knowledge of civil service procedure would, in my view, be fully entitled to draw.

The first sentence of paragraph 6 refers to the subject matter of the leaked document. There can be no question that the subject matter, the deployment of nuclear missiles in the United Kingdom, is vitally concerned (and I use this adverb advisedly) with an aspect of national security which is likely to generate a considerable volume of documents recording "Secret" or "Top Secret" information, disclosure of which to a potential enemy power could do great harm to national security. Nor should the second sentence be brushed aside, since reliance for maintaining the national security of this country is placed upon close co-operation with our N.A.T.O. allies and if, unhappily, armed conflict should break out, upon interdependent action by us and them. Finally, the last sentence, although elliptically expressed, makes it, to my mind, clear that the risk to national security that the Government feared lay not in the publication of the particular document of which the delivery up was sought, but in the possibility—and in so potentially catastrophic a field as nuclear warfare I regard possibility as enough—that whoever leaked that document might leak in future other classified documents disclosure of which would have much more serious consequences on national security.

My Lords, the possibility elliptically referred to in the last sentence of paragraph 6, is an inference which common sense alone would justify any judge in drawing. We now know, as the Government did not at the time of the interlocutory proceedings, but the editor of "The Guardian" did, that this was no mere possibility; it was a reality.

Miss Tisdall had in fact already leaked another document, the second minute of 20 October 1983 dealing with contingency security arrangements, which must have been of considerably greater significance to national security, but which the editor of "The Guardian", with a sense of responsibility that he has shown throughout this whole affair,

not only refrained from publishing in his newspaper; he also arranged for it and all copies of it in the newspaper's possession to be destroyed.

My Lords, that is why after attempting to apply the necessary mental gymnastics, I feel compelled to range myself with those of you who, in agreement with all three members of the Court of Appeal, consider that the evidential material that was before that court at the interlocutory stage on 16 December 1983, was sufficient to establish that immediate delivery up of the document was necessary in the interests of national security.

My Lords, I am conscious that the foregoing excursus on the matter that divides us may have been disproportionately lengthy since, unlike the true construction of section 10, it does not raise any question of general importance but is peculiar to the instant case, where its importance is now limited to any effect that it might have on costs.

For the reasons I have given I would dismiss this appeal.

LORD FRASER OF TULLYBELTON. My Lords, the origin and history of this appeal have been explained by my noble and learned friend, Lord Diplock, and I need not repeat what he has said. I respectfully agree with him on two matters which I mention briefly before coming to the critical question in the appeal. The first relates to the construction of the first part of section 10 of the Contempt of Court Act 1981 which provides that "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible . . ." The application of that provision is, in my opinion, not limited to the case where a publisher of information is required in terms to disclose the source of information or to do something which *will* certainly disclose it, and refuses to do so. The provision extends also to a case such as the present, where the publisher is called upon, and refuses, to do something which may or may not lead to disclosure of the source. The wider construction of the section which appealed to Griffiths L.J. [1984] Ch. 156, 166–167 appears to me to be correct.

Secondly, I am of opinion that the appellants are not precluded from relying on section 10 of the Act of 1981 by the mere fact that they are doing so in answer to a proprietary claim from the respondents for the delivery of their own property. The Crown's proprietary right to the leaked document entitles the respondents to claim delivery of it under section 3(2)(*a*) of the Torts (Interference with Goods) Act 1977, but the publisher is still entitled to rely on section 10 of the Act of 1981 if he can. The property in question here is of negligible value, consisting as it does of four sheets of paper bearing a typewritten memorandum and some other marks. Neither the physical paper nor the matter typed or written on it has any substantial intrinsic value, and the sole reason why the respondents sought to have it returned to them was in order to examine the marginal marks in the hope that they would lead to identification of the source of the leak. I express no opinion on the question whether section 10 could be relied on by a publisher who might be in possession of property of substantial, or perhaps unique, value

A (such as an old master picture) the owner of which is seeking its return for its own sake. That would raise different issues.

Scott J., having held (wrongly, as I think) that section 10 of the Act of 1981 was not applicable to limit the proprietary remedy sought by the respondents as owners of the property, did not have to decide how to deal with the matter if section 10 had applied. Nevertheless he went on to say that, if the question had arisen, he would have decided that he B was not satisfied, as required by the latter part of section 10, that "disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime." It is quite clear that the only one of these grounds which is relevant here is national security. The judge explained his reasons for the view that he took. The question which is of importance in this appeal is whether his approach was C correct, and its importance lies in the guidance that may be given to courts which have to decide a similar question in future cases.

In considering the question now this House must do so on the information which was before the judge who had to decide the matter at the interlocutory stage. Since then of course much information has emerged; in particular the identity of the source of the leak has become known and she has been convicted and sentenced for her offence. All D such later information must be excluded from our consideration, and I have endeavoured to prevent its influencing my mind.

Looking at the matter on the information which was before the judge at the interlocutory stage, the first obvious point is that the contents of the leaked documents are not, and were not then, of any military value at all. It revealed no secret information of military value, although it E may have caused a little political embarrassment to the government. So much is rightly conceded on behalf of the respondents. Their case on national security, as developed in argument to the judge, rested on the fact that the leak took place at all. The occurrence of the leak, and the absence of any indication that the document had been stolen by an outsider, showed that there was some person in the government service, having access to the document, who was untrustworthy, and, although F this particular leak might not have damaged national security, the danger was that, so long as the untrustworthy servant remained in office with access to secret documents, he or she was in a position to disclose information of real importance to national security. It was also said that the occurrence of the leak was a threat to the relations of the United Kingdom with friendly countries whose governments would not entrust G Her Majesty's Government with secret information while there was a risk of its being leaked by an unknown source.

The only evidence in support of the Crown's case that was before the judge at the interlocutory stage was contained in an affidavit sworn by the principal establishment officer of the Ministry of Defence, with its appendices consisting of a copy of the leaked document and some correspondence between the parties' solicitors. The most material part H of the affidavit was paragraph 6 which has already been quoted in full by my noble and learned friend, Lord Diplock, and which I do not repeat.

That paragraph provides the only foundation for the argument on behalf of the respondents to the effect that the continuance in office of

the untrustworthy servant with access to secret documents was a threat to national security. But what is required in order to comply with the latter part of section 10 of the Act of 1981 is that the court must be "satisfied" that disclosure of the source is "necessary" in the interests of national security. The author of the affidavit does not seem to have had the terms of the section clearly in mind. He apparently did not appreciate that the final sentence of paragraph 6 which states that the identity of the person who disclosed the information must be established, is not by itself enough to satisfy the court that disclosure of that person's identity *by the publisher* of the information is necessary in the interests of national security. There may be other means of establishing it, and, unless special urgency is proved, the requirements of section 10 are not in my opinion met merely by showing that the easiest way of identifying the person is by calling upon the publisher of the information to disclose it. I have reached the opinion, in agreement with the judge, that the test of necessity was not satisfied by the information that was before him at the interlocutory stage. His own reason was expressed thus

> ". . . there is no real evidence as to the class of persons who had access to these documents; nor do I think it is a necessary inference that because some individual was prepared, in breach of his duty and reprehensibly, to leak to the press a document of the character here involved, national security requires that he be identified and got rid of."

I agree. Before he could have been satisfied in the present case, the judge would in my view have reasonably required some information as to the approximate number of persons who might have had access to the document in course of his or her duties, and as to any efforts already made to find the guilty person without success. No doubt one might assume that some efforts had been made but in order to comply with the Act of 1981 the court requires evidence and not mere assumption. In some circumstances it might be urgent to find the guilty person immediately; if so, evidence of the reason for urgency would be required, and the court, if satisfied that urgency was proved, might also be satisfied that it was necessary in the interests of national security to order immediate disclosure without waiting for other efforts to ascertain the identity of the source. The fact that a period of 12 days was allowed to elapse between publication of the document on 31 October 1983 and the writing of the letter dated 11 November 1983 from the Treasury Solicitor calling on the editor to deliver the document makes it impossible for the respondents to maintain that the present case was one of special urgency. They did not so maintain. Another matter on which evidence is noticeably lacking here is whether the classification of "Secret" would be appropriate for a document which contains really significant military information, and, if not, whether a civil servant who had access to documents marked "Secret" would necessarily have access also to documents bearing a higher security classification and containing significant military information.

My Lords, I have anxiously considered whether it is unreasonable to insist that further information on lines such as those I have indicated

ought to have been made available to the judge. I have considered it all the more anxiously because my view involves differing from that of the Court of Appeal and of the majority of your Lordships. The difference between us is narrow but it is, in my view, important. I have concluded that, without more information than he had, the judge could not properly have been satisfied that disclosure was "necessary." The test of necessity is a strict one and its strictness ought not to be whittled away by reading section 10 of the Act of 1981 as if it said "necessary or convenient" or "necessary or expedient." Parliament has used the word "necessary" by itself, and it is not for this House in its judicial capacity to relax the standard fixed by Parliament, especially in a matter of this kind where there is a flavour of constitutional right of freedom of expression. Nor can the lack of evidence be made good by leaving the court to draw inferences which may or may not be justified. With the greatest respect to the judges in the Court of Appeal I consider that they gave insufficient weight to the test of necessity. Sir John Donaldson M.R. said [1984] 156, 165:

> "The maintenance of national security requires that untrustworthy servants in a position to mishandle highly classified documents passing from the Secretary of State for Defence to other ministers shall be identified at the earliest possible moment and removed from their positions. This is blindingly obvious and would not become any less obvious at any trial."

Griffiths L.J. said, at p. 168: "The threat to national security lies in the fact that someone, *probably in a senior position* and with access to highly classified material, cannot be trusted." (Emphasis added.) We now know that the person concerned was not in a senior position but in quite a junior one. I refer to the matter not in order to be wise after the event, but only to show the danger of relying on inference which may seem reasonable at the time but which may in fact be unsound.

The second point relied on by the respondents, and referred to in the second sentence of paragraph 6 of the affidavit, is that the leak represents a threat to the United Kingdom's relations with its allies. It is easy to see that this is a possibility, at least in theory, but I do not see how a court is in a position to judge the reality or the seriousness of the risk without some evidence. Here there was no evidence but merely a bare assertion in the affidavit. Again I consider that the judge was right in his view that he would not have been satisfied on this point if it had arisen for decision by him.

Finally, I must emphasise again that I have tried to consider the question that arises in this appeal only on the evidence that was before the judge. Subsequent events have shown that the untrustworthy servant in this case represented a serious security risk, and it is probable that, even when the matter was before the judge at the interlocutory stage, evidence could have been put before him on which he might have concluded that disclosure was necessary. That is uncertain and speculation about it is a fruitless exercise which is irrelevant to the question under consideration in this appeal. The practical conclusion is not that the judge ought to have been satisfied on the affidavit evidence that was

before him of the necessity for a disclosure, but that the affidavit evidence ought to have been presented in sufficient detail to enable the judge to come to a decision upon proper evidence. I have little doubt that much of the evidence which would have been relevant, for instance as to the significance of the classification "Secret" for documents, and as to the extent of the inquiries already made to ascertain the identity of the person responsible for the leak, was available and could have been presented if the necessity for it had been appreciated by those who drafted the affidavit. I hope that the result of this appeal will be that in any future case in which section 10 of the Act of 1981 is likely to be in issue, care will be taken to present to the court adequate evidence to the extent that it is available at the time.

I would allow the appeal.

LORD SCARMAN. My Lords, I agree with the speech of my noble and learned friend, Lord Fraser of Tullybelton. I contribute a speech of my own because in an appeal of this importance it is necessary that I should state fully my own position in my own words.

At first sight the newspaper's appeal to your Lordships' House would seem to be no more than an academic exercise. The document in question has been delivered up to the Crown: the source of the newspaper's information is now known, and a civil servant has been convicted of an offence under section 2 of the Official Secrets Act 1911 for her part in putting into the newspaper's possession a photocopy of the Crown's secret memorandum. But the truth is otherwise. The guidance of the House is needed as to the true scope and effect of section 10 of the Contempt of Court Act 1981 in order that the press and public broadcasting media may know what the protection is which the law affords them.

The appeal raises two questions of importance. The first is as to the proper construction of the opening words of section 10 of the Act of 1981. These words impose upon the court the prohibition against making an order which would require a person to disclose the source of information contained in a publication for which he is responsible. Does the prohibition apply to any order of the court which, if made, would (or might?) result in disclosure? Or is it limited in some way? Scott J. held that the section had no application to an order for the delivery up of property, and another possible view is that the prohibition is limited to a direct requirement by the court ordering the person to disclose his source. On this, the point of construction, the House is fortunately unanimous. We are agreed that the section must have a wide and general application.

The second question is whether in this particular case the Crown adduced before the judge sufficient evidence to establish that disclosure by the newspaper was necessary in the interests of national security. The importance of this question is that it goes to the extent and quality of the evidence needed to prove in a judicial proceeding that disclosure is necessary. On this point I understand the House to be divided.

The point of construction

The critical words of the section 10 of the Contempt of Court Act 1981 are:

> "No court may require a person to disclose . . . the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

"Publication" includes any speech, writing, broadcast or other communication in whatever form, which is addressed to the public at large or any section of the public: sections 19 and 2(1) of the Act of 1981. The section reflects the importance which Parliament attaches to the free flow of information to the public. Prior to its enactment, such protection as the law allowed of the sources of information of the media of public communication was a matter for the exercise of a judge's discretion as and when in the course of legal proceedings a question was put or a document was sought which appeared to threaten the confidentiality of a journalist's source of information. The section substitutes for this judicial discretion a rule of law subject only to specifically stated exceptions if established to the satisfaction of the court. And "established," I would observe, must mean "proved by evidence." This is a change in the law of profound significance. Mr. Kentridge, for the appellants, described the section as introducing into the law "a constitutional right." There being no written constitution, his words will sound strange to some. But they may more accurately prophesy the direction in which English law has to move under the compulsions to which it is now subject than many are yet prepared to accept. The section, it is important to note in this connection, bears a striking structural resemblance to the way in which many of the articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969) which formulate the fundamental rights and freedoms protected by that Convention are framed: namely, a general rule subject to carefully drawn and limited exceptions which require to be established, in case of dispute, to the satisfaction of the European Court of Human Rights.

The section provides the press and media with protection at law from disclosure of the source of their information, a protection of which they can be deprived only by a judicial finding that disclosure is necessary. The court cannot require disclosure unless satisfied that one or other of the exceptional situations specified in the section has been shown to exist. If, as in the present case, the exception relied on is necessity in the interests of national security, the necessity must be proved by evidence which satisfies the court.

None of the judges who have considered section 10 of the Act of 1981 doubts the judicial nature of the protection which it affords. But opinions have differed as to the scope of the section. Scott J. held that the section was limited in its application at least to the extent that it could have no application to a case where the order being sought was to enforce a proprietary right. Had he held that the section applied, he would have refused the Crown its order, it being his view that the

evidence adduced before him was insufficient to establish the national security exception. He did not think that it had been shown that damage to national security was likely to result if he refused an order at the interlocutory stage.

The judgments of the Court of Appeal [1984] Ch. 156 are reported. Sir John Donaldson M.R. and Slade L.J. were disposed to agree with the judge's view of the limited scope of the section. Indeed, Slade L.J., at p. 170, added a further possible limitation. He thought it arguable that a publisher who seeks to invoke section 10 must satisfy the court by affirmative evidence that the order, which would otherwise be made against him (in this case the delivery up of the document) "*will* (not just may)" compel him to reveal his source of information. In the present case, of course, the appellants did not know the identity of their source: nor did they (or anybody else) know whether the photocopy handed to them would, if delivered up to the Crown, reveal the source. However, both Sir John Donaldson M.R. and Slade L.J. were so certain that disclosure was necessary in the interests of national security that they were content to deal with the appeal on the basis of the wide construction put upon the section by the third member of the court, Griffiths L.J.

My Lords, I find myself in agreement with Griffiths L.J. that Parliament must have intended the section to have a wide and general application. I cannot do better than quote his judgment on the point of principle. He said, at p. 167:

> "The press have always attached the greatest importance to their ability to protect their sources of information. If they are not able to do so, they believe that many of their sources would dry up and this would seriously interfere with their effectiveness. It is in the interests of us all that we should have a truly effective press, and it seems to me that Parliament by enacting section 10 has clearly recognised the importance that attaches to the ability of the press to protect their sources. . . . I can see no harm in giving a wide construction to the opening words of the section because by the latter part of the section the court is given ample powers to order the source to be revealed where in the circumstances of a particular case the wider public interest makes it necessary to do so."

In my view there is only one limitation; and it is to be found in the words of the section itself. The court must be satisfied that a result of the order, if made, will be, or is likely to be, that the source will be revealed. If the court is so satisfied, the section applies whatever the nature of the order sought.

I reject, therefore, the limited construction of the section favoured by Scott J. He invoked a rule of construction which I cannot regard as an appropriate guide to the true interpretation of a section which has constitutional significance in that its purpose is to support for the benefit of the public the existence of "a truly effective press." Specifically, it is my view that, since it is "in the interests of all of us that we should have a truly effective press" (*per* Griffiths L.J., at p. 167D), rights of property have to yield pride of place to the national interest which Parliament

must have had in mind when enacting the section. I would, however, add that there certainly remains a place in the law for the principle of construction which the judge applied, namely, that the courts must be slow to impute to Parliament an intention to override property rights in the absence of plain words to that effect. But the principle is not an overriding rule of law: it is an aid, amongst many others, developed by the judges in their never ending task of interpreting statutes in such a way as to give effect to their true purpose.

In the present case the intrinsic value of the property in issue was nil. Its possession was sought by the Crown for the very purpose, namely, disclosure of the newspaper's source of information, against which the section, subject to its exceptions, was intended to protect the publisher. The House is not called upon to consider in this appeal a case where the property sought to be recovered has intrinsic value. I would think, as at present advised and without the benefit of full argument, that the issue in such a case would be not whether the section applies but, upon the basis that it does, whether the party seeking an order for delivery up of the property could show that the order was necessary in the interests of doing justice in the suit which he had brought. He would then, no doubt, obtain an order at the discretion of the court pursuant to section 3(3)(*a*) of the Torts (Interference with Goods) Act 1977.

There is, however, a problem in the application of the section which clearly troubled Slade L.J. The prohibition imposed by the section is upon a court requiring a person to disclose the source of his information. The section has no application unless the court is satisfied that disclosure will result from the order which is being sought. Slade L.J. thought it arguable that the publisher who seeks the protection of the section must prove that the order, if made, will result in disclosure. The point has some relevance in the present appeal because the appellants did not know the identity of their source: nor did they know whether the photocopy would, if delivered up to the Crown, reveal the source. The point seems to me, however, to be no more than one with which courts are very familiar, namely a question of evidence. A party seeking the protection of the section must show that it applies. He does so by calling evidence. He may often be able to show that if he complies with the order which is being sought he will reveal the identity of his source. In other cases he may not be able to prove a certainty but can show that the balance of probabilities is such that, if he complies, the result will be disclosure of his source. In civil proceedings, the balance of probability is proof enough. It is, in my view, the appropriate standard of proof in determining whether the section applies in respect of the order which is being sought. When, as in the present case, the Crown's purpose in seeking the order is to identify the source of information, the court is unlikely to have much difficulty in drawing the inference that the probable result of the order will be the disclosure which the Crown seeks.

For these reasons I think that the section applies in this case.

The evidence point

The issue in the appeal is, therefore, whether the Crown must be held to have established to the satisfaction of the court that disclosure

was necessary in the interests of justice or national security or for the prevention of disorder or crime.

I agree with my noble and learned friend, Lord Diplock, that the Crown has not shown disclosure to be necessary in the interests of justice or for the prevention of crime or disorder and with his reasons for that conclusion. I proceed, therefore, to consider the crucial exception relating to national security. The judge, though it was no part of his decision, did not think that the exception was established. The Court of Appeal, while accepting that the revelation of the contents of the document was innocuous, i.e. did not damage national security, held that it was, nevertheless, urgently necessary in the interests of national security that every possible step should be taken to identify the untrustworthy person who had "leaked" the document and to remove him from a position in which he had access to classified material. The court clearly thought it probable that someone in a senior position with access to highly classified material had betrayed his trust: they did not know who the person was or that she was not a person in a high place but a junior clerk in the Foreign Office.

The existence of an exception to the general prohibition imposed by the section is a question of fact and degree, and its establishment requires evidence. The court cannot reach its judgment save on the facts put in evidence which may be supplemented, no doubt, by reasonable inference. If there are omissions in the evidence the result of which is to leave open alternative inferences as to the matters not covered by the evidence, it is not possible to treat as established the proposition that disclosure is necessary. This appears to have been the view of Scott J., and I agree with him. If two inferences may reasonably be drawn from the evidence laid before the court, e.g. one that disclosure is necessary in the interests of national security and the other that it is not, the court cannot properly say that it is satisfied that disclosure is necessary. I would accept that "satisfied" means "satisfied on a balance of probabilities." But, if the question arises on an interlocutory application as in the present case and the making of the order before trial would effectually destroy the protection offered by the section, the court must be careful not to make an order unless the evidence put before it establishes to its satisfaction that the inference of necessity is unlikely to be displaced when all the evidence is produced and tested at trial.

In my judgment the evidence adduced before the judge fell far short of what was needed to establish that disclosure of the source of information was necessary in the interests of national security. The Crown relied on the affidavit of Mr. Hastie-Smith, the principal establishment officer of the Ministry of Defence. He has "certain responsibilities" concerned with the security of records and other documents of his department. With all respect, I do not find in such undefined responsibilities any clue as to whether he was in a position to make a judgment on questions of national security. But, if he was, I find his affidavit stronger in assertion than in argument. He makes two assertions. The first is that the fact that the document "found its way into the possession of a national newspaper, is of the gravest importance to the continued maintenance of national security."

This assertion appears to rest on the following facts: (1) the classification as "Secret" of the memorandum of which the document which reached the newspaper was a photocopy; (2) the limited circulation of the memorandum (only seven copies despatched, the addressees being the Prime Minister, the Home Secretary, the Foreign Secretary, the Lord President of the Council, the Lord Privy Seal, the Chief Whip and the Secretary of the Cabinet); (3) the contents of the memorandum, being "concerned with a matter of great significance in relation to the defence of the United Kingdom and the North Atlantic Treaty Organisation;" (4) the breach of a duty of confidentiality owed to the Crown by the person who was responsible for passing the document to the newspaper. But Mr. Hastie-Smith offers no enlightenment as to the criteria used when classifying documents as secret, or by whom or upon what grounds such classification is made. Is it to be assumed that no documents other than those concerned with national security are ever classified as secret? We are not told the answer to this question. But we do know, as the Crown in argument has conceded, that the contents of this memorandum are so far as they relate to national security innocuous; that is to say, that the public revelation of the information it contained constituted no threat to national security. It was headed "Deliveries of Cruise Missiles to R.A.F. Greenham Common—Parliamentary and Public Statements." The memorandum could well have been marked "Secret" because it would have been politically embarrassing for the Government if Parliament or the public were to learn of what was in the Government's mind as to the publicity to be given to this politically sensitive matter before a parliamentary statement was made. The judge was offered no enlightenment on these matters.

Equally, it by no means follows that because a document is restricted to a limited high level circulation its "leak" to a newspaper will constitute a risk to national security. There must be many documents dealing with parliamentary, political, and other matters unconnected with national security which a government will wish to be confined to the eyes of a few in high places.

Finally, there was clearly a breach of trust by a Crown employee. Serious though a breach of trust by a Crown servant is, it does not, however, necessarily follow that national security has been endangered. The circumstances and subject matter of the breach are what matter in that context.

Mr. Hastie-Smith's second assertion was that the disclosure represented a threat to the relations of the United Kingdom with its allies in that they could not be expected to entrust H.M. Government with secret information if the security system was such that it was liable to unauthorised disclosure. For this reason he asserted that the identity of the person or persons who disclosed the document must be established in order that national security should be preserved.

This second assertion is the nearest that the evidence got to the Crown's submission which prevailed in the Court of Appeal that delivery up of the document was necessary so that the source of the newspaper's information could be discovered and steps taken to root out untrustworthy

persons from the ranks of those who have to operate the nation's security procedures.

But the evidence of danger to the security system is meagre and full of omissions. Indeed, I cannot find in the evidence any grounds which could reasonably satisfy a court that national security was endangered by the unauthorised disclosure of this document, the contents of which, if leaked, constituted no danger, to national security. We do not know, because Mr. Hastie-Smith has not told us, whether the memorandum was filed or processed in the same system as sensitive defence documents or with parliamentary or other political material. If there was a failure of procedures designed to protect national security, some explanation of the procedures and their application to this innocuous document should have been forthcoming. The Court of Appeal thought the link "blindingly obvious." I do not; nor did Scott J. It is no part of the judge's function to use his common sense in an attempt to fill a gap, which can be filled only by evidence. Common sense as a substitute for factual information is a dangerous weapon at any time. Most assuredly it is no foundation for the establishment of a matter of fact to the satisfaction of a court. And it is *the court* which has to be satisfied. Indeed Mr. Brown for the Crown did not submit otherwise. He did not suggest that the court was bound to accept without critical examination the mere assertion of Mr. Hastie-Smith that the interests of national security necessitated disclosure. Very significantly he did not even refer to the well-known (but by no means universally accepted) proposition of Lord Parker of Waddington in *The Zamora* [1916] 2 A.C. 77, 107 that "Those who are responsible for the national security must be the sole judges of what the national security requires." The present is not the case in which to consider whether Lord Parker's proposition accurately reflects the modern law even in the context of judicial review and I express no opinion on the point. But it is clear that the proposition can have no application in cases arising under section 10 of the Act of 1981. For the section plainly confers judicial protection: and, if an exception is to be made, it must be established to the satisfaction of the court.

Two further matters call for comment. The first is the view of the Court of Appeal that there was a need for urgency in countering the threat to national security. It was for this reason that the court heard the appeal on the afternoon of the morning on which Scott J. gave judgment and gave judgment the following day.

My Lords, I am torn between admiration for the court's speed and apprehension lest in the rush justice suffered. However, there was in the conduct of the Crown nothing to suggest any urgency. The existence of the document in the hands of the newspaper was known on 31 October 1983, but no action to recover it from the appellants was taken until 12 days later when the Treasury Solicitor wrote to the editor of the newspaper requesting that it be delivered up. It was suggested—but without any evidence—that the 12 days were spent on internal inquiries. If they were, the court should have been told so in evidence and whether they achieved any success.

The second matter is the submission made on behalf of the newspaper that disclosure of a source of information cannot be shown to be

necessary unless there is evidence that other inquiries which could reasonably be expected to have been made, have been made, and have proved fruitless. I think the submission goes too far. But I have no doubt that such evidence is very relevant to the issue of necessity for disclosure. If it is not available, there is plainly room for doubt as to whether necessity has been proved. In the analogous, but not directly comparable, American law it has been held that in striking the balance between a journalist's privilege and the interest of a litigant seeking information, the litigant will not be allowed access to information necessary for his case unless he can show that he has exhausted other means of obtaining the information: see, for example *Riley v. City of Chester* (1979) 612 F.2d 708, U.S. Court of Appeals, 3rd Circuit. It may well be that during the 12 days between first knowledge of the leak and the initiation of action against the newspaper, the Crown did make inquiries and that they were fruitless. But there was no evidence to that effect.

To conclude, I agree with the view of Scott J. that the Crown had not adduced the evidence needed to enable him to find as a fact that disclosure was necessary. As my noble and learned friend, Lord Fraser of Tullybelton, has emphasised, we must deal with the appeal on the basis of the evidence presented to the judge. The judge could not have lifted the prohibition unless it was established by evidence which satisfied him that disclosure was necessary. It was not so established. I would allow the newspaper's appeal.

LORD ROSKILL. My Lords, in agreement with my noble and learned friends Lord Diplock and Lord Bridge of Harwich I would dismiss this appeal. Of the two questions to which the appeal gives rise the first is by far the more important and upon that question there is happily no difference of opinion between your Lordships. It is upon the second that the difference of opinion arises but that difference is only upon a narrow matter namely whether upon the facts of this case the Crown at an interlocutory stage of the proceedings discharged the onus which unquestionably rested upon it of showing "that disclosure [was] necessary in the interests of . . . national security." I shall in due course give my own reasons for thinking that that onus was discharged. But I would at this juncture respectfully echo what my noble and learned friend Lord Diplock said in his speech that it is unfortunate that this matter falls to be decided in an interlocutory appeal and thus in the light of the evidence adduced before Scott J. and the Court of Appeal on 15 and 16 December 1983, [1984] Ch. 156 without regard to the true facts as they have subsequently emerged in the later criminal proceedings. Many years ago in this House Lord Macnaghten (albeit in a different context) protested against a tribunal charged with determining issues of fact being invited to listen to conjecture "on a matter which has become an accomplished fact. . . . With the light before him, why should he shut his eyes and grope in the dark?": see *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd. v. Pontypridd Waterworks Co.* [1903] A.C. 426, 431.

Unfortunately the necessity for looking, it might not unfairly be said, blinkered, only at the facts as proved in evidence last December and thus ignoring not only Lord Macnaghten's warning but also the truth as it has subsequently emerged, arises from the interlocutory form of these proceedings. If it were permissible to look at the truth as it has subsequently emerged I do not think it can for one moment be doubted that the Crown would have discharged the onus which rested upon it. For I respectfully agree with my noble and learned friend Lord Fraser of Tullybelton that the truth as revealed by subsequent events is that the wholly untrustworthy clerk concerned represented a serious security risk. But in reaching my conclusion on this issue I have wholly ignored those facts and indeed the further facts listed by my noble and learned friend Lord Diplock which were in truth known to the Crown last December but which for some reason which I confess I find strange the Crown's advisers did not see fit to put upon affidavit. I have endeavoured to engage in that feat of mental gymnastics to which my noble and learned friend has referred in his speech. Having done so it is with respect and regret that I find myself differing with my noble and learned friends, Lord Fraser of Tullybelton and Lord Scarman. I am however in complete agreement with them that it is of crucial importance in these cases that care be taken to provide the court with the fullest possible information available to those who seek to take advantage of the exceptions in section 10.

My Lords with that introduction I return to the question of the true construction of section 10 of the Contempt of Court Act 1981. Upon this question differing views have been expressed in the courts below. Scott J. took the view that section 10 of the Act of 1981 had no application where a plaintiff asserted proprietory rights and those proprietory rights were not challenged as they had not been before the judge. In the Court of Appeal Sir John Donaldson M.R. expressed "considerable sympathy" with the view of the judge: see [1984] Ch. 156, 164. Slade L.J. also expressed reservations: see [1984] Ch. 156, 169–170, whether section 10 had any application in this case. On the other hand Griffiths L.J. gave the language of the section a wide construction declining to cut down what the Lord Justice plainly regarded as the natural meaning of its langauge. Sir John Donaldson M.R. and Slade L.J. were prepared for the purposes of the appeal to the Court of Appeal to proceed upon the basis that the view of Griffiths L.J. was correct.

My Lords, with all respect to those who have either taken a different view from that of Griffiths L.J. or have felt doubts about the correctness of the construction which he preferred, I am of the clear opinion that his view was correct. The opening words of section 10 are plain, "No court may require a person to disclose . . . the source of information contained in a publication . . . unless . . ." There then follow four specific exceptions. I can see no reason for adding to those four specific exceptions by cutting down the natural and unqualified meaning of the section's opening words. The view which appealed to Scott J. involves doing precisely that. If it is to be said that the section has no application where the case is (say) one of unchallenged proprietory rights, that

involves writing or implying into the opening words of the section words which are not there and that I must decline to do. Accordingly I find myself on this, the all important issue in this appeal, in complete agreement with Griffiths L.J. [1984] Ch. 156, 167. The appellants must therefore be entitled to the protection of section 10 unless the case is proved to fall within one or more of the four specific exceptions.

But before I turn to that question I must note in order to reject one part of the able arguments of Mr. Kentridge for the appellants. He urged that section 10 was akin to an "entrenched" provision in a written constitution; indeed he went so far as to describe it as such. I understood Mr. Kentridge to be using the word "entrenched" in its accurate sense in constitutional law, that is to say as a provision in a written constitution which cannot be altered save by some special legislative process beyond the ordinary parliamentary process. I can only say that with all respect to the persuasiveness of the argument, I cannot accept it and for two reasons. First in a country such as our own without a written constitution, to speak of an "entrenched" provision in a statute or of a provision in a statute as "akin to an entrenched provision" is constitutionally incorrect. Secondly the fact that a section affects specific freedoms or confers specific privileges or immunities whether on individuals or on the media does not give it a special constitutional status in our law. The language of the relevant statute is subject to the ordinary rules of statutory construction, always remembering first that neither additions nor subtractions should be made to the natural meaning of the words used unless they are essential in order to give an intelligible meaning to the statutory language and second that courts should always be slow to cut down as a matter of construction plain words designed to create a privilege or immunity accorded by statute, especially in a case where to put the matter no higher, doubts had long existed as to the extent of any comparable privilege or immunity which was or may have been previously accorded at common law.

I have dealt with this further matter at some length because I wish to make it clear that in accepting as correct the view expressed by Griffiths L.J. in the Court of Appeal [1984] Ch. 156, I do not do so because of any submission that section 10 is akin to an "entrenched" provision in a written constitution but simply as a result of applying the ordinary rules of statutory construction to words which seem to me at least to be plain in their intention and effect.

I now return to the second question namely whether, the appellants being prima facie entitled to the protection of section 10 of the Act of 1981, the Crown on the evidence adduced in the courts below has discharged the onus which rested upon it. In my view only one of the four specific exceptions is relevant, "in the interests of . . . national security." I respectfully agree with what my noble and learned friend Lord Diplock has said about the meaning of the phrase "in the interests of justice."

Did the evidence before Scott J. show that it was *necessary* (my emphasis) in the interests of national security that the order sought by the Crown should be made? It is plain that the objective of the Crown in seeking delivery up of this document was to use that document when

surrendered in order to identify the offender. A judge confronted with an application of this kind must I think in exercising his discretion under the Torts (Interference with Goods) Act 1977 have regard when appropriate to the provisions of section 10 of the Act of 1981 and if the case were one in which the exceptions to section 10 had not been sufficiently established he clearly should not make an order for the delivery up of the document in question for to do so in such circumstances would defeat the protection accorded by that section.

The Crown had therefore to show that it was *necessary* in the interests of national security to obtain delivery up of the document in order if possible thereby to identify the offender. Did the material before Scott J. do so? I do not accept Mr. Kentridge's submission that before an order for delivery up can be made in these circumstances it must be shown that there is no other available means of identifying the offender or that all other possible means of identification have been exhausted. So to hold would mean that a substantial lapse of time might have to take place before any application could be made and a delayed application might then be sought to be defeated on the ground that it should have been made earlier. It cannot be right to impale a would be applicant upon the horns of such a dilemma.

None the less I think it regrettable that the affidavit of Mr. Hastie-Smith did not state what other steps had been taken or indeed deal with the several matters the omission of which has been the subject of criticism in the speeches of my noble and learned friends, which criticism I will not repeat. In particular I think it unfortunate that attention was not drawn to the present-day classification of "Secret" to which my noble and learned friend Lord Diplock has drawn attention.

But even upon the basis of that evidence it would be wrong to rest my conclusion simply upon the existence of that classification for I accept that attaching a label to a document cannot without more establish that the improper disclosure of that document involves a matter of national security for it is not unknown for documents to be wrongly classified. I rest my conclusion not only on the relevant paragraphs in the affidavit but upon the contents of the document itself. First it deals with nuclear weapons, a matter not just of political controversy but of national security. Second the distribution of the document was extremely limited and I am unable to accept that the inclusion of the Chief Whip among the names of its recipients indicates that the document was essentially political in character rather than one affecting national security. Third the document itself showed the existence of another document. That that other document existed and was also handed to the appellants is admitted in the appellants' case though your Lordships have not seen it. The appellants did not, as I think with entire propriety, publish it and your Lordships were told that that other document had been destroyed together with any copies of that other document which may have existed in the appellants' possession.

My Lords it seems to me a matter of obvious inference that on any view that other document was also one affecting national security. Anyone knowing that the one document had been leaked and that the other might have been leaked (I ignore the fact that your Lordships now

know that that other document was in fact leaked by the same offender) must ask themselves the questions "what else" and "what next" and it seems to me to be an equally obvious inference that the offender, whatever his or her position, had access to information involving national security and for that reason required to be identified as soon as possible. Some emphasis was laid in argument upon the fact that Griffiths L.J. thought that the proper inference was that the offender was "probably in a senior position" whereas in the event the offender was shown to have been a very junior civil servant. With respect, the fact that the Lord Justice's inference last December has proved in the event to be wrong, does not seem to me to matter. The essential point is that all the evidence pointed to the offender, be his or her position high or low, as someone with access to information affecting national security, and someone who could not properly be trusted with that information.

It is therefore my conclusion whatever the criticisms of the affidavit, which I share, on the totality of the evidence deduced from the affidavit and the document reproduced by the appellants in their issue of 31 October 1983, the Crown has discharged the onus of showing that it was necessary in the interests of national security that that document should be delivered up in order that the offender might be identified.

If the present application had failed on the grounds advanced by Scott J. and now accepted by my noble and learned friends, Lord Fraser of Tullybelton and Lord Scarman, it seems to me most probable, to put it no higher, that the Crown would at once have applied for and obtained an order for a speedy trial, that trial to be heard perhaps within a few days of the hearing before Scott J. If that had happened all these evidential deficiencies could have been remedied. On the material then known to the Crown but not included in the affidavit—my noble and learned friend Lord Diplock has identified that information—I find it difficult to believe that the doubts felt by Scott J. would not have disappeared.

My Lords I would only add that I have thought it right to state my conclusions on both these questions in my own words having regard to the importance of this case but I venture to add that I am in respectful agreement with the speech already delivered by my noble and learned friend Lord Diplock and also with the speech to be delivered by my noble and learned friend, Lord Bridge of Harwich.

LORD BRIDGE OF HARWICH. My Lords, the circumstances leading to this interlocutory appeal have been fully described in the speech of my noble and learned friend, Lord Diplock, and I gratefully adopt his account.

Since the order of the Court of Appeal which is now appealed against has already been complied with, the only practical issue outstanding between the parties relates to costs. This issue was not canvassed in the argument your Lordships have heard and one may anticipate that the parties will wish to be heard upon it in the light of the speeches delivered. It would not therefore be appropriate to say anything further on the subject now.

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The undoubted importance of the appeal lies in the questions it raises as to the scope of section 10 of the Contempt of Court Act 1981 on which differing views were expressed in the courts below. First, can the section apply to defeat an owner's claim to recover his own property (here a piece of paper of no intrinsic value which the Crown sought to recover intact solely for the sake of the assistance it might afford in identifying the public servant who had communicated it to the appellants)? Secondly, is it sufficient to attract the protection of the section that the order of the court in dispute *may*, although it will not necessarily, have the effect of disclosing a "source of information" to which the section applies? In agreement with Griffiths L.J. and with all your Lordships I would answer both these questions in the affirmative for the reasons given in the judgment of Griffiths L.J. [1984] Ch. 156, and in the speeches of my noble and learned friends, Lord Diplock and Lord Roskill, with which I fully agree.

A further question of some importance as a matter of practice relates to the quality of the evidence which it is appropriate for the Crown to adduce where it seeks an interlocutory order which is prima facie within the statutory prohibition imposed by section 10 of the Act of 1981 and seeks to avoid that prohibition on the ground that it can "be established to the satisfaction of the court that disclosure is necessary in the interests of . . . national security." Here again, I understand all your Lordships to be of one mind, first, that in such a case it is eminently desirable that all relevant material should be spelled out in the evidence put before the court with the utmost particularity, secondly, that the evidence relied on by the Crown in the instant case fell significantly short of that counsel of perfection. I share these views. I hope, and have no reason to doubt, that in any future similar case the Crown's advisers will take due note of your Lordships' unanimous opinion in this regard.

There remains the only question on which your Lordships are unfortunately divided, viz. whether the evidence on which the Crown relied was sufficient to discharge the onus (clearly imposed by the words "unless it be established to the satisfaction of the court") of showing that disclosure was "necessary in the interests of . . . national security." Scott J., having decided in favour of the Crown upon what your Lordships have held to be an erroneous construction of section 10 of the Act of 1981, expressed the opinion obiter that it was not. The Court of Appeal unanimously held that it was.

My Lords, this remaining question is of no general importance. There is no ambiguity in the phrase "necessary in the interests of national security." Whether such a necessity is established by the evidence, and, in the case of an interlocutory application, whether the necessity is established at the interlocutory stage, are both questions of fact which must always depend on the evidence adduced in any particular case. In this case the question is certainly not resolved merely by the fact that the evidence fell short of the standard of particularity which was desirable.

What then were the essential facts in evidence on the interlocutory application? The Minister of Defence had sent a minute to the Prime Minister classified as "Secret" and relating to the delivery of nuclear

missiles to Greenham Common. Only seven authorised copies of this minute had been made and delivered to the seven addressees identified in the speech of my noble and learned friend, Lord Diplock. An unauthorised copy of this minute had been delivered anonymously to the office of the appellant newspaper. This was published in full by the newspaper. It is common ground that the publication of the document itself was not prejudicial to national security.

From these facts alone certain inferences can plainly be drawn. The unauthorised disclosure had almost certainly been made by a public servant who had had authorised access to the original or one of the seven authorised copies of the secret minute; this, I think, is not disputed. The group of public servants with access to such a document in the course of communicating it to the named addressees and handling it on their behalf must have been very limited in number. Some, if not all, of this group, whatever their status in the bureaucratic hierarchy, must have been in positions giving them access to classified documents of the highest sensitivity from the point of view of national security. An unidentified member of the group was prepared, for motives which could not be known before identification, to make unauthorised disclosure to the public of a document which those responsible had thought fit to classify as "Secret." That the presence of such a disloyal servant in such a position represents a potential threat to national security seems to me self-evident.

I have taken due note of the omissions from the evidence to which attention is drawn in the speeches of my noble and learned friends, Lord Fraser of Tullybelton and Lord Scarman. That it would have been better if these matters had been dealt with in terms I accept. That the omission to deal with them falsifies in any way the conclusion expressed in the foregoing paragraph I do not accept.

There are two matters to which I wish to refer specifically. First, it is plainly relevant, in deciding whether "disclosure is necessary in the interests of national security" to consider whether the "source of information" to be disclosed can be identified by other means. This is far from saying, and I certainly do not say, that the necessity of disclosure can only be established if it is shown that there is no other means of identifying the source. Be that as it may, in the instant case it is obvious that the identity of the disloyal public servant could only be established by a confession. All that Mr. Hastie-Smith could, and no doubt should, have said in his affidavit on this matter was: "All those in the public service who had authorised access to the document have been asked whether they made the unauthorised disclosure and all have denied it." But it is surely unthinkable that the Government should have embarked on the present litigation without taking the elementary step of such an internal inquiry. To hold the omission to refer to this in the evidence fatal to the Crown's claim would be, in my respectful opinion, to carry legalistic nicety to an unreasonable extreme.

The other question to which I would refer is that of urgency. This again was not dealt with in the Crown's evidence. It is true that 12 days elapsed between publication of the document in the appellants' newspaper and the first letter from the Treasury Solicitor demanding its return.

Assuming, as I do, such an internal inquiry as is referred to in the foregoing paragraph and taking judicial notice, as I think I am entitled to, of the fact that important decisions in Government are rarely taken without time-consuming consultation and deliberation, I can see nothing in the lapse of 12 days to show that the identification of the disloyal servant who had made the unauthorised disclosure was not a matter of urgency.

The role of the Court of Appeal was not that of a school-mistress to scold the Crown for the poor quality of its evidence as if it were a piece of homework required to be done over again. A potential threat to national security was clearly revealed and, assuming that the gravity of the threat could be weighed at all, it was certainly not to be weighed by the scruple. Any threat to national security ought to be eliminated by the most effective and speediest means possible.

I would dismiss the appeal.

Appeal dismissed.
No order as to costs.

Solicitors: Lovell White & King; Treasury Solicitor.

C. T. B.

[HOUSE OF LORDS]

COUNCIL OF CIVIL SERVICE UNIONS AND OTHERS . . . . . APPELLANTS

AND

MINISTER FOR THE CIVIL SERVICE . . . . RESPONDENT

1984 Oct. 8, 9, 10, 11, 15, 16; Nov. 22

Lord Fraser of Tullybelton, Lord Scarman, Lord Diplock, Lord Roskill and Lord Brightman

Crown—Minister, determination by—Whether subject to review by courts—Minister for Civil Service giving instruction that staff no longer to be permitted to belong to national trade unions—Instruction given without prior consultation with those affected—Whether reviewable—Whether decision-making process unfair—Whether justified on ground of national security

Judicial Review—Crown—Prerogative power—Minister for Civil Service issuing instruction under Order in Council—Whether open to review by courts

The main functions of Government Communications Headquarters ("GCHQ") were to ensure the security of military and official communications and to provide the Government with signals intelligence; they involved the handling of secret

Considered in R v SECRETARY OF STATE, EX P RUDDOCK [1987] 2 All ER 518

Dictum of LORD DIPLOCK at 410-411 applied in R v PANEL ON TAKE-OVERS AND MERGERS, EX P DATAFIN PLC [1987] 1 All ER 564

Dicta of LORD FRASER, LORD DIPLOCK and LORD ROSKILL at 401, 408-409, 415 considered in R v SECRETARY OF STATE FOR TRANSPORT [1985] 3 All ER 300

Considered in R v PANEL ON TAKE-OVERS AND MERGERS, EX P DATAFIN PLC [1987] 1 All ER 564

ASHWORTH, J.: I agree.

BLAIN, J.: I also agree. *Case remitted.*

Solicitors: *Grangewood, Allen & Co.* (for the landlords); *Douglas-Mann & Co.* (for the tenants); *Solicitor, Ministry of Housing and Local Government.*

[*Reported by* NAEEM BUTT, ESQ., *Barrister-at-Law.*]

R. v. METROPOLITAN POLICE COMMISSIONER, *Ex parte* BLACKBURN (No. 2).

[COURT OF APPEAL, CIVIL DIVISION (Lord Denning, M.R., Salmon and Edmund Davies, L.JJ.), February 26, 1968.]

Contempt of Court—Publications concerning legal proceedings—Criticism of administration of justice—Court of Appeal—Judgment regarding non-enforcement of gaming laws criticised—Error of fact in matter published—Right of fair comment on matters of public importance.

Criticism, however vigorous, of a judgment or a decision of a court will not constitute contempt of court, if it is made in good faith and is reasonable, even though it contains error; but it is desirable that criticism should be accurate and fair, bearing in mind that the judiciary cannot enter into public controversy and thus cannot reply to criticism (see p. 320, letter G, and p. 321, letters A and F, post).

Dictum of LORD RUSSELL OF KILLOWEN, C.J., in *R. v. Gray* ([1900-03] All E.R. Rep. 59 at p. 62) applied.

[**Editorial Note.** While the decision in the present case shows that the courts are open to criticism by reasonable comment on, or protest at, a judicial act as being contrary to law or to the public good, yet the liberty of the press in this matter is no greater and no less than the liberty of every subject of the Queen. Personal scurrilous abuse of a judge as a judge, for example, is and has always been contempt of court (compare per LORD RUSSELL OF KILLOWEN, C.J., in *R. v. Gray* ([1900-03] All E.R. Rep. at p. 62, letters E, F); so also are publications of matter that are calculated to interfere with the administration of justice.

As to contempt of court by criticism of the administration of justice or by attack on judges, see 8 HALSBURY'S LAWS (3rd Edn.) 7, paras. 8, 9; and for cases, see 16 DIGEST (Repl.) 22-24, *159-179.*]

Case referred to:

R. v. Gray, [1900-03] All E.R. Rep. 59; [1900] 2 Q.B. 36; 69 L.J.Q.B. 502; 82 L.T. 534; 64 J.P. 484; 16 Digest (Repl.) 23, 176.

Motion.

This was a motion by the applicant, Albert Raymond Blackburn, by notice dated Feb. 21, 1968, to the Court of Appeal for an order that the Right Honourable Quintin Hogg, P.C., Q.C., M.P., was guilty of contempt of court in that he published in the issue of "Punch" dated Feb. 14, 1968, an article which brought or sought to bring the Court of Appeal into ridicule or contempt or to lower its authority. The facts are set out in the judgment of LORD DENNING, M.R.

The case noted below* was cited during the argument in addition to the one referred to in the judgment of EDMUND DAVIES, L.J.

The applicant appeared in person.

Sir Peter Rawlinson, Q.C., and *J. P. Harris* for the respondent.

LORD DENNING, M.R.: Some few days ago (1) we had before us an application by Mr. Albert Raymond Blackburn, seeking an order of mandamus against the Commissioner of Police of the Metropolis. After that case was

* *Ambard v. A.-G. of Trinidad and Tobago*, [1936] 1 All E.R. 704; [1936] A.C. 322.

(1) [1968] 1 All E.R. 763.

reported, the respondent, Mr. Quintin Hogg, wrote an article in "Punch" dated Feb. 14, 1968, under the heading "Political Parley". Mr. Blackburn today moves the court saying that Mr. Quintin Hogg, by this article, has been guilty of contempt.

Let me read the salient passages in the article. It starts:

> "The recent judgment of the Court of Appeal is a strange example of the blindness which sometimes descends on the best of judges. The legislation of 1960 and thereafter has been rendered virtually unworkable by the unrealistic, contradictory and, in the leading case, erroneous, decisions of the courts, including the Court of Appeal. So what do they do? Apologise for the expense and trouble they have put the police to? Not a bit of it. Lambaste the police for not enforcing the law which they themselves had rendered unworkable and which is now the subject of a Bill, the manifest purpose of which is to alter it. Pronounce an impending dies irae on a series of parties not before them, whose crime it has been to take advantage of the weaknesses in the decisions of their own court. Criticise the lawyers, who have advised their clients. Blame Parliament for passing Acts which they have interpreted so strangely. Everyone, it seems, is out of step, except the courts . . . The House of Lords overruled the Court of Appeal . . . it is to be hoped that the courts will remember the golden rule for judges in the matter of obiter dicta. Silence is always an option."

That article is certainly critical of this court. In so far as it referred to the Court of Appeal, it is admittedly erroneous. This court did not in the gaming cases give any decision which was erroneous, nor one which was overruled by the House of Lords. Is the article, however, a contempt of court?

This is the first case, so far as I know, where this court has been called on to consider an allegation of contempt against itself. It is a jurisdiction which undoubtedly belongs to us, but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter. Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication. Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.

So it comes to this. Mr. Quintin Hogg has criticised the court, but in so doing he is exercising his undoubted right. The article contains an error, no doubt, but errors do not make it a contempt of court. We must uphold his right to the uttermost.

I hold this not to be a contempt of court, and would dismiss the application.

SALMON, L.J.: The authority and reputation of our courts are not so frail that their judgments need to be shielded from criticism, even from the criticism of Mr. Quintin Hogg. Their judgments, which can, I think, safely be left to take care of themselves, are often of considerable public importance. It is the inalienable right of everyone to comment fairly on any matter of public

importance. This right is one of the pillars of individual liberty—freedom of speech, which our courts have always unfailingly upheld. It follows that no criticism of a judgment, however vigorous, can amount to contempt of court, providing it keeps within the limits of reasonable courtesy and good faith. The criticism here complained of, however rumbustious, however wide of the mark, whether expressed in good taste or in bad taste, seems to me to be well within those limits.

LORD DENNING, M.R., pointed out on Mr. Blackburn's application for an order of mandamus that there had been decisions of the courts, one recently overruled in the House of Lords, which had introduced doubts into one corner of the field of the gaming law (2). Incidentally, those decisions were not decisions of the Court of Appeal, as Mr. Hogg stated, but that is of little consequence. They, however, hardly excuse the inertia which allowed large gambling empires to be built up before they were delivered.

The purpose of the legislation of 1960 was plain: to do away with the legal taboos on gaming and at the same time to prevent its commercial exploitation. The provisions of the Act of 1960 were clear and effective to achieve the purpose of Parliament—which is more than can be said for some modern legislation. They failed to do so and gambling empires flourished, not because of any fault in the provisions of the Act but for lack of sufficiently energetic action to enforce them.

No one could doubt Mr. Hogg's good faith. I, of course, entirely accept that he had no intention of holding this court up to contempt; nor did he do so. Mr. Blackburn complains that Mr. Hogg has not apologised. There was no reason why he should apologise, for he owes no apology, save, perhaps, to the readers of "Punch" for some of the inaccuracies and inconsistencies which his article contains. I agree that this application should be dismissed.

EDMUND DAVIES, L.J.: The right to fair criticism is part of the birthright of all subjects of Her Majesty. Though it has its boundaries, that right covers a wide expanse and its curtailment must be jealously guarded against. It applies to the judgments of the courts as to all other topics of public importance. Doubtless it is desirable that critics should, first, be accurate and, secondly, be fair, and that they should particularly remember and be alive to that desirability if those whom they would attack have, in the ordinary course, no means of defending themselves.

In *R.* v. *Gray* (3), LORD RUSSELL OF KILLOWEN, C.J., said:

> "Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court."

Whether, despite his great learning and his distinction as a Queen's Counsel, Mr. Hogg paid proper respect to the standards of accuracy, fairness and good taste when he was composing his "Punch" article may, unhappily, be open to doubt. But whether his article amounted to contempt involves different and graver considerations. For my part also, inaccurate though the article is now acknowledged to be in a material respect, I have no doubt that contempt has not been established, and I would accordingly refuse this application.

My conclusions regarding the fairness and good taste of the article in question are immaterial, and I, therefore, refrain from revealing them. To that extent, and that extent only, I propose to observe what Mr. Hogg, in his article, described as "the golden rule" for judges in relation to obiter dicta, namely that "Silence is always an option".

Application dismissed.

Solicitors: *Bull & Bull* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(2) See [1968] 1 All E.R. 767.
(3) [1900] 2 Q.B. 36 at p. 40; [1900-03] All E.R. Rep. 59 at p. 62.

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J. C.* ARTHUR REGINALD PERERA . . . APPELLANT;

1951 AND

Feb. 28; *Apr.* 16. THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Contempt of court—Ceylon—Prison visitors' book—Entry by member of Legislature—Inaccurate comment in good faith on hearing of appeals in absence of prisoners—Whether contempt—Costs.

The appellant, a member of the House of Representatives in Ceylon, when visiting the Remand Prison at Colombo as part of his public duties, received a complaint from some of the prisoners to the effect that they had not been present in court when their appeals against conviction were being heard, and a prison jailor told him "we do not take all the prisoners, but only those who are "undefended". That was not an accurate statement, and the only foundation for it was the then-prevailing practice (since abandoned) of the High Court in dealing with unstamped petitions of appeal, which practice in fact involved no differentiation between defended and undefended prisoners, and did not amount to the hearing of anything which could be called an appeal in the absence of the prisoner. Being then unaware of that, however, and relying on the information which he had received from the prisoners and the jailor, the appellant made the following entry in the prison visitors' book, which by Ordinance was required to be kept to enable specified classes of persons, including members of the legislature, to record their observations and recommendations: "The present "practice of appeals of remand prisoners being heard in their "absence is not healthy. When represented by counsel or otherwise "the prisoner should be present at proceedings". A rule having been served on the appellant requiring him to show cause why he should not be punished for contempt of court in making the entry in the visitors' book:—

Held, applying the general rules which the Board apply in determining appeals from criminal convictions, that the appellant had not been guilty of contempt of court: he had acted in good faith and in discharge of what he believed to be his duty as a member of the legislature; he made no public use of the inaccurate information; the words made no direct reference to the court or to any of its judges, or to the course of justice or to the process of the courts; his criticism was honest criticism on a matter of public importance; there was nothing in his conduct which came within the definition of contempt of court—that there must be involved some "act done or writing published calculated to bring a court or "a judge of the court into contempt or to lower his authority",

* *Present:* LORD SIMONDS, LORD MORTON OF HENRYTON and LORD RADCLIFFE.

or something "calculated to obstruct or interfere with the due "course of justice or the lawful process of the courts": *Reg.* v. *Gray* [1900] 2 Q. B. 36, 40.

Costs were awarded against the Crown.

Order of the Supreme Court of Ceylon reversed.

APPEAL (No. 53 of 1950), by special leave, from an order of the Supreme Court of Ceylon (July 25, 1950), whereby the appellant was adjudged guilty of contempt of court.

On June 20, 1950, the appellant, Arthur Reginald Perera, visited Colombo Remand Prison as a member of the House of Representatives. A number of prisoners complained to him that they had not been present in court when their appeals against convictions were being considered, and the escorting prison jailor told him "we do not take all the prisoners, but only those who "are undefended". The appellant wrote in the prison visitors' book: "The present practice of appeals of remand prisoners being "heard in their absence is not healthy. When represented by "counsel or otherwise the prisoner should be present at proceed-"ings". The information which the appellant had received at the prison was not accurate, and in any case he thought that the prison authorities were responsible for the alleged practice.

The appellant was directed to show cause why he should not be punished for contempt of court in making the above entry in the visitors' book. The matter came before Basnayake, J., and he was found guilty of contempt and ordered to pay a fine of Rs.500, and in default to undergo six weeks' rigorous imprisonment.

1951. Feb. 28. *Dingle Foot*, *R. Millner* and *S. A. Tellis* for the appellant. It has been held that there can be no appeal within the Island of Ceylon itself against an order committing a person for contempt: *In re Wijesinghe* (1); in the face of that decision the appellant came straight to this Board. According to all the authorities, to constitute contempt of court there must be something which is calculated to obstruct or interfere with the course of justice or the due administration of the law: *In re a Special Reference from the Bahama Islands* (2); *McLeod* v. *St. Aubyn* (3); *Reg.* v. *Gray* (4); *Ambard* v. *Attorney-General for Trinidad and Tobago* (5), and *Debi Prasad Sharma* v. *The King-Emperor* (6). The statement here complained of has not

(1) (1913) 16 C. N. L. R. 312.
(2) [1893] A. C. 138, 148.
(3) [1899] A. C. 549, 560.
(4) [1900] 2 Q. B. 36, 40.
(5) [1936] A. C. 322, 334.
(6) (1943) L. R. 70 I. A. 216, 223.

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in any way obstructed or interfered with the course of justice or the due administration of the law. Secondly, even if the words had been intended as a criticism on the Supreme Court, they would have constituted an entirely reasonable criticism, and one which any member of the public was entitled to make: *Ambard's* case (5). Thirdly, a fortiori, there cannot be a contempt where there is no intention to refer to the court at all. There must be an element of malice in order to constitute a contempt of court, and there can be no malice where the person concerned did not even know that the practice alleged resulted from an order of the court. Lastly, even if it were possible to construe the words as a contempt, there was a perfectly ample apology which ought to have been accepted.

This matter is one which quite clearly comes within the Board's powers in dealing with criminal appeals. Costs have been given in a number of cases of this kind. *Parashuram Detaram Shamdasani* v. *King-Emperor* (7) deals most fully with the matter. There appears to be no case since the beginning of the century in which the individual judge was made respondent, and in those circumstances it seemed that the appellant was bound to make the Crown respondent in this case, and if that be so it is submitted that it is a proper case for an order for costs: *Ambard's* case (5) and *Shamdasani's* case (7). The whole committal order was entirely misconceived. The appellant was carrying out a public duty and doing something that he was fully entitled to do. Even his application to the court for an adjournment so that he might obtain further legal assistance was refused, and he had to make his own submissions. It would be harsh to him if he were not to have his costs simply because the Crown does not appear before the Board. [Reference was made to *Johnson* v. *The King* (8) and *Waugh* v. *The King* (9).] The present is quite an exceptional case, and one in which the Board would be justified in making an order for costs.

Feb. 28. LORD SIMONDS announced that their Lordships would humbly advise His Majesty that the appeal should be allowed, subject to the qualification that, before making any order on the respondent for payment of costs, they proposed to intimate to those representing the respondent in this country that, if they wished an opportunity of showing why an order for costs should

(5) [1936] A. C. 322, 334.
(7) (1945) L. R. 72 I. A. 189, 195.
(8) [1904] A. C. 817, 824.
(9) [1950] A. C. 203.

not be made against the respondent, an opportunity would be given to do so.

March 8. *Gahan* for the Crown. In exercising its discretion the Board's practice is not to make an order for costs in a matter of this kind unless there are some special circumstances of improper conduct on the part of the party who is ordered to pay costs: *McLeod* v. *St. Aubyn* (10); *Shamdasani's* case (11). In the present case the Executive has done nothing to seek to justify or uphold this committal order; they have not appeared on the appeal or opposed the petition for special leave. It is only in the case of some ill-advised conduct on the part of the Crown that any order for costs is made against the Crown. If an order for costs is sought against the judge there is no reason why he should not be made a party to the appeal. In *Shamdasani's* case (11) the Crown must necessarily have been a party to that appeal; the order was made in that case because the Executive had sought to justify what was done. In these contempt cases the general rule is that there is no order for costs; it is only in very exceptional cases of misconduct where an order for costs has been made.

Dingle Foot was not called on.

LORD SIMONDS announced that the Board would order that the Crown should pay the appellant's costs.

April 16. LORD RADCLIFFE delivered the reasons of their Lordships for allowing the appeal, as follows:—This is an appeal, by special leave, from an order of the Supreme Court of Ceylon, dated July 25, 1950, whereby the appellant was ordered to pay a fine of Rs.500 and, in default of payment, to undergo six weeks' rigorous imprisonment. This sentence was imposed by the court (Basnayake, J.) as a punishment for a contempt of court of which he held the appellant to have been guilty.

Owing to the nature of the proceedings there could be no appeal in Ceylon from this order. The appellant was, however, granted special leave to appeal by His Majesty in Council; and their Lordships have applied to his case the same general rules as it is their practice to apply on the occasions when appeals from criminal convictions are before the Board. The respondent was not represented at the hearing of the appeal or of the petition for special leave.

(10) [1899] A. C. 549.

(11) L. R. 72 I. A. 189, 192, 195.

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The appellant, Mr. Perera, is a member of the House of Representatives in Ceylon. On June 20, 1950, he paid a visit to the Remand Prison at Colombo and was escorted round the prison by one of the jailors. It appears that for many years past it was the practice that members of the State Council should make occasional visits to public institutions for the purpose of information or inspection, and after 1948, when the House of Representatives came into being, the practice was continued by members of that House. The Prison Amendment Ordinance (No. 53 of 1939), s. 35, makes provision for the jailor of a prison to keep, inter alia, a visitors' book in which judges of the Supreme Court, Senators or members of the House of Representatives (as it now reads) and members of the Board of Prison Visitors may record observations or recommendations after a visit paid to the prison; and by the same Ordinance a direction is given that a copy of each new entry in the visitors' book is to be forwarded to the Inspector-General of Prisons.

In the course of this visit Mr. Perera received a complaint from some prisoners to the effect that they had not been present in court when their appeals against conviction were being heard. He asked the jailor accompanying him whether it was the case that some prisoners were not taken to court on such occasions, and was told: "We do not take all the prisoners, but only those "who are undefended".

It has become clear in these proceedings that that was not an accurate answer. The only foundation for it was the then prevailing practice of the High Court in dealing with unstamped petitions of appeal. These petitions were referred to a judge in chambers, Basnayake, J., who either rejected the petition for want of compliance with the due procedure or acted in revision in any that he regarded as deserving cases. This practice, which has since been abandoned, appears to have originated in an order of the former Chief Justice. It involved no differentiation between prisoners who were, and prisoners who were not, defended; nor did it amount to the hearing of anything that could be called an appeal in the absence of the appellant. But these particulars their Lordships have extracted from a letter which the Registrar of the Supreme Court furnished to Mr. Perera, at his request, after the court had found him guilty of contempt and imposed its fine. They were not known to him at the date of his visit to the Remand Prison.

Relying on what he had heard from the prisoners and the jailor, Mr. Perera made the following entry in the prison visitors'

book: "Visited Remand Prison in the company of jailor Wije-
"wardena. Premises clean. Adequate library facilities required.
"The present practice of appeals of remand prisoners being heard
"in their absence is not healthy. When represented by counsel
"or otherwise the prisoner should be present at proceedings. In
"my opinion not more than one prisoner should be in a cell
"(7 x 9) approximately".

It can be said at once that there was no reason at all to suppose that Mr. Perera, in making these observations, was acting with any other purpose than that of calling attention to an undesirable practice which had been brought to his attention. His visit to the prison had been undertaken as part of his public duties, and the visitors' book no doubt presented itself to him as the obvious place in which to record his comments and recommendations. On the day following his visit he wrote a letter to the Minister of Home Affairs and Rural Development bringing to his notice the substance of what he had recorded in the visitors' book and asking him to have these matters inquired into and redress provided.

The rest of the story can be shortly told. On June 29, 1950, the acting Commissioner of Prison and Probation Services forwarded Mr. Perera's remarks to the Registrar of the Supreme Court, asking for his observations. The Registrar submitted the paper to Basnayake, J., as the judge in charge of unstamped petitions from prisoners in jail, and the judge then wrote on it the following minute: "Registrar, The statement is incorrect and "is a contempt of the court. Issue a rule on A. Reginald Perera "returnable on Tuesday the 25th. I shall sit specially on that "day. (Sgd.) Hema Basnayake, 11/7/50".

Thereupon a rule returnable on July 25 was issued and served on Mr. Perera, ordering him to appear before Basnāyake, J., on that day and show cause why he should not be punished for contempt of court in making in the visitors' book of Colombo Remand Prison the entry that has been set out above. On the day named Mr. Perera attended the court. He first requested that he might have further time, since he needed to obtain some documents not in his possession and further legal advice. This request was refused. He then made a statement to the judge. It is not necessary to go through it. Its purport was to explain without ambiguity the circumstances that had led to his making the entry complained of and to inform the court that in so doing he had acted in pursuance of his duties as a member of the legislature, and that he had no intention of bringing the court into

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disrepute or contempt. In response to the judge's questioning he made it clear that he had acted on the strength of the information given to him by the jail authority and that he had not been able to investigate the matter for himself. Finally, he submitted that his entry in the visitors' book did not amount to contempt of court. The judge pronounced him to be guilty of contempt and sentenced him to pay a fine of Rs.500, in default to undergo six weeks' rigorous imprisonment.

Their Lordships are satisfied that this order ought not to have been made. They have given the matter the anxious scrutiny that is due to any suggestion that something has been done which might impede the due administration of justice in Ceylon. And it is proper that the courts there should be vigilant to correct any misapprehension in the public that would lead to the belief that accused persons or prisoners are denied a right that ought to be theirs. But Mr. Perera, too, has rights that must be respected, and their Lordships are unable to find anything in his conduct that comes within the definition of contempt of court. That phrase has not lacked authoritative interpretation. There must be involved some "act done or writing published calculated to "bring a court or a judge of the court into contempt or to lower "his authority" or something "calculated to obstruct or inter-"fere with the due course of justice or the lawful process of the "courts": see *Reg.* v. *Gray* (12).

What has been done here is not at all that kind of thing. Mr. Perera was acting in good faith and in discharge of what he believed to be his duty as a member of the legislature. His information was inaccurate, but he made no public use of it, contenting himself with entering his comment in the appropriate instrument, the visitors' book, and writing to the responsible Minister. The words that he used made no direct reference to the court, or to any judge of the court, or, indeed, to the course of justice, or to the process of the courts. What he thought that he was protesting against was a prison regulation, and it was not until some time later that he learnt that, in so far as a petitioner had his petition dealt with in his absence, it was the procedure of the court, not the rules of the prison authorities, that brought this about. Finally, his criticism was honest criticism on a matter of public importance. When these and no other are the circumstances that attend the action complained of there cannot be contempt of court.

(12) [1900] 2 Q. B. 36.

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At the time of the hearing of the appeal the respondent had not entered an appearance. It was, however, brought to their Lordships' attention that there seemed to be some misunderstanding on the respondent's part as to the parties to the appeal. In the special circumstances they therefore gave a direction that, before tendering their advice to His Majesty, they would hear any representations that the respondent might wish to place before them, such representations to be confined to the question of costs. At an adjourned hearing the respondent appeared by counsel. Having taken into consideration what was urged before them, their Lordships have humbly advised His Majesty that the appeal should be allowed and the order of the Supreme Court of Ceylon dated July 25, 1950, set aside, any moneys paid by the appellant by way of fine to be repaid to him and the respondent to pay his costs (if any) of the proceedings in Ceylon. The respondent must pay the appellant's costs of the appeal, excluding any costs of the adjourned hearing.

Solicitors: *T. L. Wilson & Co.; Burchells.*

FUNG KAI SUN . . . . . APPELLANT;

AND

CHAN FUI HING AND OTHERS . . . . RESPONDENTS.

J. C.*
1951
June 4.

ON APPEAL FROM THE COURT OF APPEAL FOR HONG KONG.

Estoppel—Mortgage—Forgery—Delay in informing mortgagee—Duty of disclosure—Detriment.

The manager of certain real property belonging to the respondents fraudulently mortgaged it by means of forged mortgages to the appellant, whose first intimation that the mortgages were alleged to be forged was the service of the writ by the respondents in their action against him for a declaration that the mortgages were null and void and should be set aside. There had been no contractual or other relationship between the respondents and the appellant, and the former, after they became aware of the forgery, had, for their own purposes, delayed for about three weeks—until the issue of the writ—before informing the appellant of the forgery. By his defence the appellant alleged, inter alia, that the respondents' silence had deprived him of any opportunity of obtaining

* *Present*: LORD PORTER, LORD REID and SIR LIONEL LEACH.

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ANDRE PAUL TERENCE AMBARD *v.* THE ATTORNEY-GENERAL OF TRINIDAD AND TOBAGO.

[PRIVY COUNCIL (Lord Atkin, Lord Maugham and Sir Sidney Rowlatt), **March 2, 1936.**]

Privy Council—Practice—Appeal—Contempt of court—Court of record. Contempt of court—Publication of criticism of the administration of justice—Imputation—Improper motives—Liberty of the press.

A newspaper published an article commenting on the inequality of sentences, citing as examples two sentences at the local sessions in charges of intent to murder but expressly disclaimed the suggestion that one of the judges was habitually severe, the other habitually lenient:

HELD: (i) it is the ordinary right of members of the public or the press to criticise in good faith in private or public the public administration of justice.

(ii) to justify a committal for contempt of court, there must be evidence in the article itself taken as a whole, that the publisher has acted with untruth or malice, or that he imputed improper motives to those taking part in the administration of justice.

On a preliminary objection raised by the respondent as to the competency of the appeal:—

HELD: it is competent to His Majesty in Council to give leave to appeal and to entertain appeals against orders of courts of record overseas imposing penalties for contempt of court.

[EDITORIAL NOTE. It has long been the policy in England to allow a wide latitude to criticism of the administration of justice. What is done in public should be freely debated in public provided the criticism is not actuated by malice or intended to impair the administration of justice. In places where the population consists largely of uncivilised or only partly civilised races it may be necessary to take a stricter view of what criticism may be allowed, but any restriction, it is here said, should be the exception, and the administration of justice must suffer the respectful though outspoken comments of ordinary men. This case also decides the question whether an appeal will lie to His Majesty in Council against an order of a court of record overseas imposing a penalty for contempt of court.

FOR A STATEMENT OF THE LAW AND PRACTICE, see HALSBURY, Hailsham Edn., Vol. 7, p. 7, para. 9; and FOR THE CASES, see DIGEST, Vol. 10, pp. 20-22, Nos. 152-168; and as to APPEALS FROM OVERSEAS, see HALSBURY, Hailsham Edn., Vol. 11, p. 216, para. 419; and FOR THE CASES, see DIGEST, Vol. 17, pp. 478, 479, Nos. 412-430.]

Cases referred to:

(1) *Rainy* v. *Sierra Leone JJ.* (1853), 8 Moo. P.C.C. 47; 17 Digest 479, *426.*
(2) *McDermott* v. *British Guiana Judges* (1868), L.R. 2 P.C. 341; 17 Digest 479, *423.*
(3) *Surendranath Banerjea* v. *Bengal High Court Chief Justice and Judges* (1883), L. R. 10 Ind. App. 171; 17 Digest 479, *424.*
(4) *McLeod* v. *St. Aubyn*, [1899] A.C. 549; 16 Digest 20, *152.*
(5) *R.* v. *Gray*, [1900] 2 Q.B. 36; 16 Digest 21, *166.*
(6) *Re Ready and Huggonson* (1742), 2 Atk. 469; 16 Digest 6, *1.*

APPEAL by special leave from the judgment of the Supreme Court of Trinidad and Tobago, dated Sept. 5, 1934, whereby the appellant was

convicted of contempt of court and ordered to pay a fine of £25 or in default to be imprisoned for one month and to pay the respondent's costs to be taxed as between solicitor and client.

F. P. M. Schiller, K.C., and *Kenelm Preedy*, for the appellant.

Edward W. Cave, K.C., and *Richard A. Willes*, for the respondent.

The facts are fully set out in the judgment of their Lordships delivered by LORD ATKIN.

LORD ATKIN: This is an appeal by special leave from an order of the Supreme Court of Trinidad and Tobago ordering the appellant to pay a fine of £25 or in default to be imprisoned for one month for contempt of court, and further ordering him to pay the costs of the proceedings as between solicitor and client.

The first question that arises is whether as contended by the respondent the Privy Council is incompetent to entertain an appeal from an order of a court of record inflicting a penalty for contempt of court. The decisions on the point are conflicting. In *Rainy* v. *Justices of Sierra Leone* (1), a Board consisting of LORD CRANWORTH, KNIGHT BRUCE, L.J., DR. LUSHINGTON and SIR EDWARD RYAN undoubtedly decided that no such appeal lay. LORD CRANWORTH, in giving the judgment of the Board, after pointing out that in this country every court of record is the sole and exclusive judge of what amounts to a contempt of court proceeded:

> We are of opinion, that it is a court of record, and that the law must be considered the same there as in this country; and, therefore, that the orders made by the court in the exercise of its discretion, imposing these fines for contempts, are conclusive, and cannot be questioned by another court; and we do not consider that there is any remedy by petition to the Judicial Committee to review the propriety of such orders.

The argument, with respect, is not convincing, for it would seem to apply equally to all decisions in criminal cases which at that time in both this country and the colony were conclusive and could not be questioned by any court. In *McDermott* v. *Chief Justice of British Guiana* (2), leave to appeal from a committal for contempt had been given "without prejudice to the competency of Her Majesty to entertain an appeal." At the hearing the Board, consisting of LORD CHELMSFORD, WOOD, L.J., SIR JAMES COLVILE and SIR E. VAUGHAN WILLIAMS, treated the hearing as a motion to revoke the leave. An incidental question was whether the court that imposed the penalty was a court of record and in giving the judgment of the Board LORD CHELMSFORD said that the applicant had to show either that the court was not a court of record or that if it was, yet there was something in the order which rendered it improper and therefore the subject of appeal. He proceeded to say at page 363:

> Not a single case is to be found where there has been a committal by one of the

colonial courts for contempt, where it appeared clearly upon the face of the order that the party had committed a contempt, that he had been duly summoned, and that the punishment awarded for the contempt was an appropriate one, in which this Committee has ever entertained an appeal against an order of this description.

It would appear to their Lordships that the grounds of decision assume that jurisdiction exists at any rate in cases where it does not appear on the face of the order that the party had committed a contempt, etc. Whether this means that if the order merely recited that a contempt had been committed without more the Board would examine the alleged contempt is not clear. But in *Surendranath Banerjea* v. *Chief Justice of Bengal* (3), on an appeal from a committal for contempt by the High Court in Calcutta, the Board examined the written article which was complained of and said that it was clearly a contempt of court. They set out the passage which has just been quoted, and proceed at page 179 :

Their Lordships having decided that the libel was a contempt of court, and that the High Court had jurisdiction to commit the petitioner for a period of two months, the case is not a proper one for an appeal to Her Majesty.

This decision is difficult to reconcile with the doctrine that found favour in *Rainy's* case (1), that the colonial court is sole judge of what constitutes a contempt, and that there is no remedy by way of appeal to His Majesty in Council to review the propriety of such orders.

However, in 1899, in the case of *McLeod* v. *St. Aubyn* (4), the Judicial Committee entertained an appeal from an order committing for contempt and allowed the appeal with costs against the respondent. The point that there was no jurisdiction to entertain such an appeal was not taken, but it seems unlikely that if it were a good point it should not have occurred to counsel or to any of the members of the Board before whom the case came at different stages. The Board in this case quite plainly assumed jurisdiction and their Lordships respectfully agree with their view. There seems no reason for limiting in this respect the general prerogative of the Crown to review all judicial decisions of courts of record in the dominions overseas whether civil or criminal : though the discretion as to the exercise of the prerogative may have to be very carefully guarded. It should be noticed that the Order in Council of 1909 dealing with the jurisdiction of the Supreme Court of Trinidad and Tobago, S. R. & O. 1909, page 854, imposes no limit other than pecuniary as to the orders, decisions, etc., of the Supreme Court from which there may be an appeal : and it would appear from it that the Supreme Court itself could have granted leave to appeal to the Privy Council from this order in the present case. But apart from any question of this kind their Lordships come clearly to the conclusion that it is competent to His Majesty in Council to give leave to appeal and to entertain appeals against orders of the courts overseas imposing penalties for contempt of court. In such cases the discretionary power of the

Board will no doubt be exercised with great care. Everyone will recognise the importance of maintaining the authority of the courts in restraining and punishing interferences with the administration of justice, whether they be interferences in particular civil or criminal cases or take the form of attempts to depreciate the authority of the courts themselves. It is sufficient to say that such interferences when they amount to contempt of court are *quasi*-criminal acts, and orders punishing them should, generally speaking, be treated as orders in criminal cases, and leave to appeal against them should only be granted on the well-known principles on which leave to appeal in criminal cases is given.

On these principles their Lordships proceed to examine the complaint made in this case. In June, 1934, one, Joseph St. Clair, was charged at the sessions, Port of Spain before GILCHRIST, J., and a jury, on an indictment containing two counts, one charging the accused with attempt to murder a superior officer, the second with shooting with intent to do grievous bodily harm. It appears that the accused fired his rifle at the officer but failed to hit him. He was found guilty on the second count with a recommendation to mercy and was sentenced on June 12 to eight years hard labour. He did not appeal.

At the same sessions, one, John Sheriff, was charged before ROBINSON, J., and a jury, on an indictment containing three counts: (1) wounding with intent to murder a particular woman; (2) wounding with intent to murder generally; (3) wounding with intent to do grievous bodily harm. It appears that he attacked with a razor and seriously mutilated a woman who was not the person he had intended to attack. He was convicted on the third count and was sentenced on June 14 to seven years' hard labour. After sentence he said, "I give notice of appeal," and on June 20 filed formal notice of appeal against his conviction. His appeal eventually succeeded apparently on the ground of mis-direction and the conviction was quashed. Meanwhile on June 29 the present appellant, who is the editor-manager and part proprietor of a daily newspaper called *The Port of Spain Gazette*, published the article which has been found to constitute a contempt of court. He did not write it but revised it editorially before publication and undoubtedly is fully responsible for its publication. It is necessary for the purposes of this case to consider the whole article. [The article was then read.]

On July 3, the Attorney-General gave notice of motion to the registrar of the Supreme Court that he would move for an order *nisi* calling upon the appellant to show cause why a writ of attachment should not issue against him for his contempt in publishing the article in question and on the same date an order *nisi* was made by the court in the terms of the notice of motion. The notice and the order *nisi* at first were limited to contempt in publishing an article calculated to interfere with the

due course of justice the complaint being that it was improper having regard to Sheriff's pending appeal. Later it was amended so as to include a complaint that the article contained " statements and comments which tend to bring the authority and administration of the law into disrepute and disregard." In this amended form the matter came before the full court, consisting of the Chief Justice and Gilchrist and Robinson, JJ. It was heard on various days in July, and on Sept. 5, the Chief Justice gave the judgment of the court. He acquitted the appellant of contempt in respect of the pending appeal of Sheriff : and no more need be said on that point. But he found that the article was written with the direct object of bringing the administration of the criminal law by the judges into disfavour with the public, and desiring to impose a penalty which if relatively light would yet emphasise that, while the judges would place no obstruction in the way of fair criticism of their performance of their functions, untruths and malice would not be tolerated, he fined the respondent £25, in default one month's imprisonment, and ordered him to pay the costs of the proceedings to be taxed between solicitor and client. The formal judgment, slightly departing from the wording of the oral judgment recited that the appellant had committed a contempt of court, the article having been written " with the direct object of bringing the administration of the criminal law in this colony by the judges into disrepute and disregard " so following the amended order *nisi*.

Their Lordships can find no evidence in the article or any facts placed before the court to justify the finding either that the article was written with the direct object mentioned or that it could have that effect : and they will advise His Majesty that this appeal be allowed. It will be sufficient to apply the law as laid down in *R.* v. *Gray* (5), by Lord Russell of Killowen, L.C.J., at page 40 :

> Any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority, is a contempt of court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts is a contempt of court. The former class belongs to the category which Lord Hardwicke, L.C., characterised as " scandalising a court or a judge." (*Re Read and Huggonson* (6).) That description of that class of contempt is to be taken subject to one and an important qualification. Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court.

And that in applying the law the Board will not lose sight of local conditions is made clear in the judgment in *McLeod* v. *St. Aubyn* (4) where Lord Morris, after saying that committals for contempt of court by scandalising the court itself had become obsolete in this country, an

observation sadly disproved the next year in the case last cited, proceeds:

> Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of court for attacks on the court may be absolutely necessary to preserve in such a community the dignity of and respect for the court.

(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 criticising 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.)

In the present case the writer had taken for his theme the perennial topic of inequality of sentences under the text "The Human Element," using as the occasion for his article the two sentences referred to. He expressly disclaimed the suggestion that one of the particular judges was habitually severe, the other habitually lenient. It is unnecessary to discuss whether his criticism of the sentences was well founded. It is very seldom that the observer has the means of ascertaining all the circumstances which weigh with an experienced judge in awarding sentence. Sentences are unequal because the conditions in which offences are committed are unequal. The writer is, however, perfectly justified in pointing out what is obvious that sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is quite inevitable. Some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; others equally conscientious have thought it their duty to view the same crimes with leniency. If to say that the human element enters into the awarding of punishment be contempt of court, it is to be feared that few in or out of the profession would escape. If the writer had as journalist said that St. Clair's sentence was, in his opinion, too severe; and on another occasion that Sheriff's sentence was too lenient, no complaint could possibly be made; and the offence does not become apparent when the two are contrasted. The writer in seeking his remedy, as has been remarked by the Supreme Court, has ignored the Court of Criminal Appeal: but he might reply that till such a court has power on the initiative of the prosecution to increase too lenient sentences

its effect in standardising sentences is not completely adequate. It appears to their Lordships that the writer receives less than justice from the Supreme Court in having untruths imputed to him as a ground for finding the article to be in contempt of court. He has correctly stated both offenders to have been charged with intent to murder: and though he has subsequently inaccurately stated that the conviction of both affirmed that intent, yet seeing that both were convicted of the same intent, viz., to do grievous bodily harm, the reasoning as to unevenness of sentence appears to have been unaffected. And it seems of little moment that the writer thought that this sentence might be for life instead of in fact being for fifteen years. If criticism of decisions could only safely be made by persons who accurately knew the relevant law, who would be protected? There is no suggestion that the law was intentionally mis-stated.

Their Lordships have discussed this case at some length because in one aspect it concerns the liberty of the press which is no more than the liberty of any member of the public to criticise temperately and fairly but freely any episode in the administration of justice. They have come to the conclusion that there is no evidence upon which the court could find that the appellant has exceeded this right, or that he acted with untruth or malice, or with the direct object of bringing the administration of justice into disrepute. They are satisfied that the Supreme Court took the course they did with a desire to uphold the dignity and authority of the law as administered in Trinidad; there nevertheless seems to their Lordships to have been a misconception of the doctrine of contempt of court as applied to public criticism. A jurisdiction of a very necessary and useful kind was applied in a case to which it was not properly applicable, and this in the view of their Lordships has resulted in a substantial miscarriage of justice. Acting, therefore, on the principles enumerated in the first part of this judgment as applicable to appeals from convictions for contempt of court, their Lordships will humbly advise His Majesty that this appeal be allowed and that the order of the Supreme Court dated Sept. 5, 1934, be set aside. The respondent must pay the costs here and in the court below.

Solicitors: *Maples, Teesdale & Co.* (for the appellant); *Burchells* (for the respondent).

[*Reported by* S. P. KHAMBATTA, ESQ., *Barrister-at-Law.*]

the form of contract sued on, and they also seize upon an expression of PARKE, B., as reported in *Foster* v. *Bates* (12 M. & W. at p. 287), which is inconsistent with what I have cited of that learned judge, both as PARKE, J., and LORD WENSLEYDALE; and it appears from the contemporaneous reports of the case (Dow. & L., p. 404; 13 L.J.Ex., p. 90; and 7 Jur., p. 1093) that the expression is not accurately reported in MEESON AND WELSBY, for a serious omission has therein been made, and which expression, when the accurate report is read, is not in the appellants' favour. In my judgment, upon this doctrine of ratification the law has been settled for years. If I were to accede to the appellants' contention, I should have to differ and disagree (i) with LORD WENSLEYDALE in the House of Lords; (ii) with the Exchequer Chamber—which I could not do even if I had desired to do so, which I do not; (iii) with the Court of Appeal, consisting of LORD CAIRNS, COCKBURN, C.J., and BRETT, L.J. (presided over by LORD CAIRNS) to which the same remark applies; (iv) with the full Court of Common Pleas, presided over by TINDAL, C.J.; (v) with the full Court of Exchequer, presided over by ROLFE, B., and then with PARKE, B., before he went to the House of Lords, HOLROYD, J., ERLE, C.J., WILLES and BLACKBURN, JJ., WILDE, MARTIN, and AMPHLETT, BB., and last, but not least, BOWEN, L.J.

With all submission to my learned brothers who disagree with me, I think, even if I had the courage to try to differ with all these very learned judges, which I have not, it not only would be useless, but it would be most mischievous at this date to try to overturn what for years has been laid down as law by these most eminent judges without a single discordant voice, with the exception of COCKBURN, C.J.'s, and in my judgment, for the reasons above, this appeal must be dismissed. As my brothers, however, disagree with me, the action must go down for a new trial.

R. *v.* GRAY

[QUEEN'S BENCH DIVISION (Lord Russell of Killowen, C.J., Grantham and Phillimore, JJ.), May 27, 28, 1900]

[Reported [1900] 2 Q.B. 36; 69 L.J.Q.B. 502; 82 L.T. 534; 64 J.P. 484; 48 W.R. 474; 16 T.L.R. 305; 44 Sol. Jo. 362]

Contempt of Court—Scandalous attack on judge—Liability of judges to criticism—Extent of liberty of the Press—No greater than that of every subject.

Any act done or writing published which is calculated to bring the court or a judge of the court into contempt or to lessen his authority is a contempt of court, characterised by LORD HARDWICKE as "scandalising the court itself." At the same time judges and courts are open to criticism if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good. No court could treat that as contempt, and the courts should not be astute adversely to criticise what is stated in such cases and with such an object, but it is to be remembered that in this matter the liberty of the Press is no greater and no less than the liberty of every subject of the Queen.

Contempt of Court—Summary process—Exercise with scrupulous care—Clear case.

The jurisdiction of the court to deal summarily with a contempt by attachment or committal is as old as the common law, but it should be exercised with

scrupulous care and only where the case is clear beyond reasonable doubt. If there is any reasonable doubt, the court should leave the Attorney-General to proceed by criminal information.

Notes. Applied: *R.* v. *New Statesman, Ex parte D.P.P.* (1928), 44 T.L.R. 301. Referred to: *R.* v. *Tibbitts*, [1902] 1 K.B. 77; *Louth North Division Case* (1911), 6 O'M. & H. 103; *Scott* v. *Scott*, [1911-13] All E.R. Rep. 1; *Ambard* v. *A.-G. for Trinidad and Tobago*, [1936] 1 All E.R. 704.

As to punishment for contempt of court and attacks on judges, see 8 HALSBURY'S LAWS (3rd Edn.) 3-7, or for cases see 16 DIGEST (Repl.) 18, 22, 57.

Cases referred to:

(1) *Re Read and Huggonson* (1742), 2 Atk. 469; 26 E.R. 683; sub nom. *Roach* v. *Garvan*, Dick. 794, L.C.; 16 Digest (Repl.) 6, *1*.

(2) *R.* v. *Almon* (1765), Wilm. 243; 97 E.R. 94; 16 Digest (Repl.) 6, *2*.

Also referred to in argument:

Skipworth's Case (1873), L.R. 9 Q.B. 230; 28 L.T. 227; sub nom. *R.* v. *Skipworth*, *R.* v. *Castro*, 12 Cox, C.C. 371; 37 J.P. Jo. 85, D.C.; 16 Digest (Repl.) 23, *171*.

Rule Nisi for a writ of attachment directed to Howard Alexander Gray calling on him to show cause why he should not be committed for contempt of court.

At the Birmingham Spring Assizes on Mar. 15, 1900, a man named Wells was to be tried for publishing an obscene libel. DARLING, J., was the presiding judge in the Crown Court, and before the case was opened he made the following statement:

"Before this case of Wells is gone into, I wish to say a word for the benefit of the Press. This is a case which, whatever may be the rights of it, is bound to involve the giving in evidence or the discussion of matters which it would be wholly inexpedient to have published in anything like detail. The basis of this prosecution is that things were said which (whether they ought to be said in certain places, or at all, is another matter) are not things that ought to be published to all and sundry, such as newspaper readers. I wish to say this because I feel that any well-conducted newspaper represented in this court today will not give anything like a full or detailed account of what may pass in the hearing of the case. I say that because I hope and believe my saying so will be sufficient. However, I will say this one word in case any newspaper should be inclined not to act upon the advice I now give them, and it is this: Although a newspaper has the right to publish accounts of proceedings in a law court, and although for many purposes they are protected in doing so, there is absolutely no protection to a newspaper for the publishing of objectionable, indecent, and obscene matter, and any newspaper which does so may be as easily prosecuted as anybody else, and if I find my advice disregarded I shall make it my business to see that the law is in that respect enforced."

On the same day Wells was convicted and sentenced. While the Birmingham Assizes were still going on and DARLING, J., was still sitting as one of Her Majesty's judges of assize, Gray wrote and published in the "Birmingham Daily Argus" dated Mar. 16 an article, headed "A Defender of Decency," as follows:

"Mr. Justice DARLING, having so few prisoners to try in Birmingham, and feeling the inspiration strong upon him to be a terror to evildoers, filled in a pleasant five minutes yesterday by 'giving fits' to the reporters. If anyone can imagine Little Tich upholding his dignity upon a point of honour in a public house, he has a very fair conception of what Mr. Justice DARLING looked like in warning the Press against the printing of indecent evidence. His diminutive Lordship positively glowed with judicial self-consciousness. He was determined

there should be no reporting of improper details in the case before him. He felt himself bearing on his shoulders the whole fabric of public decency. Under the evident impression that newspapers were always on the prowl for unseemliness, he warned their representatives against giving a full report of what was about to transpire in their hearing. He hoped his words would be sufficient, but, if not, he warned them of the penalties which he should make it his business to enforce in the event of disobedience. The terrors of Mr. Justice DARLING will not trouble the Birmingham reporters very much. No newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr. Justice DARLING, is exempt. There is not a journalist in Birmingham who has anything to learn from the impudent little man in horse-hair, a microcosm of deceit and empty-headedness, who admonished the Press yesterday. It is not the credit of journalism, but of the English Bench, that is imperilled in a speech like Mr. Justice DARLING'S. One is almost sorry that the Lord Chancellor had not another relative to provide for on the day that he selected a new judge from among the larrikins of the law. One of Mr. Justice DARLING'S biographers states that 'an eccentric relative left him much money.' That misguided testator spoiled a successful bus conductor. Mr. Justice DARLING would do well to master the duties of his own profession before undertaking the regulation of another. There is a batch of quarter sessions prisoners awaiting trial, who should have been dealt with at this assize. A judge who applies himself to the work lying to his hand has no time to search the newspapers for indecencies."

The Attorney-General (*Sir Richard Webster, Q.C.*) (*H. Sutton* with him) for the Director of Public Prosecutions.

Hugo Young, Q.C. (*Gilbertstone Tangye* with him) for the defendant.

The judgment of the court was delivered by

LORD RUSSELL OF KILLOWEN, C.J.—One Wells was indicted at the Birmingham Assizes for certain indecent publications. The case came to be tried before DARLING, J., sitting under the Queen's Commission of Oyer and Terminer at Birmingham, and before the trial the learned judge thought it right to call public attention to the nature of the trial and to the character of the evidence which would be necessarily brought forward, evidence of various indecent matters very undesirable from every point of view for publication. The learned judge thought it right to warn all concerned, including the Press at Birmingham, against the publication of any of those indecent details, taking care at the same time that his observations should not in any sense prejudge the matter to be tried, because he was careful to point out that, although necessarily indecent matter was to be put in evidence, it did not follow that the publication of it under the circumstances in the actual case necessarily constituted a criminal offence. The learned judge proceeded, after giving this warning, to point out the means existing in point of law for the punishment of persons who did publish any of the indecent matter which probably might be given in evidence. I do not think for one single instant that the learned judge meant at all thereby to insult the Press of Birmingham. His warning may have been unnecessary; he may not have been aware of the fact, which evidenced the good sense and the propriety of conduct of that Press, that there was no publication of indecent details in the reports during the preliminary proceedings before the magistrates, and before the defendant was committed for trial. I think the probability is that he had in his mind the popular, but erroneous, impression that there was impunity for the publication of any matter that transpired in a court of justice. That having taken place upon Mar. 15, on the evening of the next day, and after the trial of the man Wells had taken place resulting in his conviction, the article in question was published. It was read in extenso yesterday by the Attorney-General, and I do not propose to read it again. Of its character there can be no question,

and no one has described it in stronger language of condemnation than Howard Alexander Gray himself in the affidavit to which I shall presently call attention. It is not too much to say that it is an article of scurrilous abuse of the judge in his character of judge; scurrilous abuse in reference to his conduct when acting under the Queen's Commission, and scurrilous abuse published in the town in which he was still sitting in discharge of the Queen's Commission. It cannot be doubted, and indeed it has not been doubted or argued to the contrary by the learned counsel who represented the defendant, that it does constitute a contempt of court, but as these applications are happily of an unusual character, we have thought it right to explain a little more fully than is perhaps necessary what does constitute a contempt of court, and what are the means which the law has placed at the disposal of the judicature for checking and punishing contempt of court.

Any act done or writing published, calculated to bring the court or a judge of the court into contempt or to lessen his authority, is a contempt of court. That is one class of contempt. Another class is any act done, or writing published, calculated to obstruct or interfere with the due course of justice, or the lawful process of the court. That is another class of contempt. The former class belongs to that category which LORD HARDWICKE characterised as "scandalising the court itself": *Re Read and Huggonson* (1), 2 Atk. at p. 471; but that description of that class is to be taken subject to one qualification—and an important qualification. Judges and courts are alike open to criticism if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good. No court could or would treat that as contempt, and the courts would not be, and ought not to be, astute to criticise adversely what in such cases, and with such an object, is stated; but it is to be remembered that in this matter the liberty of the Press is no greater and no less than the liberty of every subject of the Queen. No one would, I think, suggest, and, as I have already mentioned, it has not been suggested, that this is not a contempt of court, and that it does not fall—and nobody has suggested that it does fall—within the right of public criticism in the sense that I have described. I repeat that it is personal scurrilous abuse of the judge as a judge.

We have, therefore, to deal with it as a case of contempt, and we have to deal with it brevi manu. This is not a new-fangled jurisdiction; it is a jurisdiction as old as the common law itself, of which it forms part—a jurisdiction, the history, the purpose, and the extent of which are admirably treated in the opinion of WILMOT, C.J., when a justice of the Queen's Bench, in *R.* v. *Almon* (2), given in his OPINIONS AND JUDGMENTS, at p. 243. It is a jurisdiction, however, to be exercised with scrupulous care; to be exercised only where the case is clear beyond reasonable doubt. If a case is not clear beyond reasonable doubt the court ought to and will leave the Attorney-General to proceed by criminal information. How, then, are we to deal with this matter? That it is a serious case no one can doubt, and I do not hesitate to say, speaking for myself and for my brethren, that if it had not been for the conduct of the defendant since the publication, and especially if it had not been for the affidavit which he has put before the court for its consideration, we all think that it would have been our duty to have sent Howard Alexander Gray to prison for a not inconsiderable period of time. But he has come forward and frankly acknowledged his own individual and sole responsibility in the matter. He has done more; he has in his affidavit, we hope and we believe sincerely, expressed his regret for what he has done. In that affidavit he makes reference to the fact that other publications and other newspapers in Birmingham had made comments upon the conduct of the learned judge in question. I have to make but this observation in that regard. So far as they have been all adverted to, they were obviously comments of a very different character. They are not before us, and we must assume that they are not before us because the Attorney-General in his discretion did not think that they were sufficiently serious to be called to the attention of the court in order that the punitive jurisdiction of the court should be exercised in regard to those responsible for their publication. After referring to this matter,

A the defendant, in his affidavit, says that he wrote the article under a strong feeling that the learned judge had not in effect shown sufficient confidence in the judgment and good taste and discretion of the Press in Birmingham, and he then proceeds:

"That was the only motive present to my mind in writing the article, and I wrote it on the impulse of the moment. In doing so, I used language referring to Mr. Justice DARLING in terms which were intemperate, improper, ungentlemanly, and void of the respect due to his Lordship's person and office. The expressions applied to Mr. Justice DARLING were not deliberately intended to bring discredit upon his Lordship, but were the outcome of my strong feelings. I know they cannot be justified, and I do not seek to justify them. I am entirely responsible for the article and for everything which it contains. I deeply regret the publication of the article and the inexcusable and insulting language in which it referred to one of Her Majesty's judges, and I humbly apologise to his Lordship and to the court for my conduct, which I now upon consideration see reflected not only upon the individual judge, but upon the Bench of judges and the administration of justice, and I submit myself to the merciful consideration of the court."

Howard Alexander Gray, the judgment of the court is that you be fined £100 and ordered to pay a further sum of £25 for costs, and that you be detained and, if necessary, lodged in Holloway Gaol until these sums be paid.

Order accordingly.

Solicitors: *Solicitor to the Treasury; Pepper, Tangye & Co.*, for *Pepper, Tangye & Winterton*, Birmingham.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

IN THE GOODS OF HISCOCK

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Francis Jeune, P.), December 3, 1900]

[Reported [1901] P. 78; 70 L.J.P. 22; 84 L.T. 61; 17 T.L.R. 110]

Will—Soldier's will—"Actual military service"— Acts in obedience to orders—Wills Act, 1837 (7 *Will.* 4 & 1 *Vict. c.* 26), s. 11.

By s. 11, of the Wills Act, 1837, it is provided: "Provided always, and be it further enacted that any soldier being in actual military service . . . may dispose of his personal estate as he might have done before the making of this Act."

As soon as a soldier has done something under his orders, actual military service has commenced within the meaning of the section.

Per SIR FRANCIS JEUNE, P.: "It would be going too far to say that he was in in actual military service as soon as he had received his orders."

Notes. Applied: *Gattward* v. *Knee*, [1902] p. 99. Considered: *Re Wernher, Wernher* v. *Beit*, [1918] 1 Ch. 339; *In the Estate of Grey*, [1922] All E.R. Rep. 124; *Re Booth, Booth* v. *Booth*, [1926] All E.R. Rep. 594. Referred to: *In the Estate of Stanley*, [1916-17] All E.R. Rep. 352; *In the Estate of Gossage, Wood* v. *Gossage*, [1921] All E.R. Rep. 107; *In the Goods of Newland*, [1952] 1 All E.R. 841.

The respondents must pay to the appellant company their costs of this appeal. J. C. 1899 CANADIAN PACIFIC RAILWAY v. PARKE.

Solicitor for appellants: *S. V. Blake.*
Solicitors for respondents: *Hubbard & Wheeler.*

[PRIVY COUNCIL.]

McLEOD . . . . . APPELLANT.

AND

ST. AUBYN . . . . . RESPONDENT.

J. C.* 1899 May 17, 18; July 22.

ON APPEAL FROM THE SUPREME COURT OF ST. VINCENT.

Contempt of Court—Innocent Loan of Paper containing Scandalous Matter respecting a Court—Committing Judge ordered to pay Costs.

Contempt of Court may be committed by publication of scandalous matter respecting the Court after adjudication as well as pending a case before it. In England committals for such contempts have become obsolete: in small colonies consisting principally of coloured populations they may still be necessary in proper cases:—

But *held*, that where the appellant was neither printer nor publisher nor writer of such scandalous matter, but had innocently lent the paper containing it to a friend without knowledge of its contents, he was neither constructively nor necessarily guilty of contempt of Court, and that the judge who committed him must pay the costs of appeal to Her Majesty in Council.

APPEAL from an order of the respondent as Acting Chief Justice of the Supreme Court (May 3, 1897) committing the appellant to Kingstown prison for fourteen days for an alleged contempt of Court by negligently publishing, on April 2, 1897, a copy of a newspaper called the *Federalist*, dated March 31, 1897, wherein were a letter headed a "Judicial Scandal" and signed "Fairplay," and an article headed "The Administration of Justice."

The facts and proceedings in the case, the article, and the letter are set out in the judgment of their Lordships.

The respondent filed in answer to the appeal certain observations addressed to their Lordships in which he gave his

* *Present:* LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, and LORD DAVEY.

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own version of the proceedings, and concluded, "that if in a small Colony like this such a scandal had been allowed to pass unheeded, the damage done to the administration of justice would have been incalculable."

Blake Odgers, Q.C., and *Shipman*, for the appellant, contended that the respondent's judgment and order were founded upon insufficient reasons, and that the appellant never committed any contempt of Court. His delivery of a copy of the *Federalist* to the librarian in question could not possibly constitute the offence charged, or any other offence known to the criminal law. When the letter and article relied upon are read and fairly considered, it is found that they do not contain anything which either involves criticism on a pending case, or which could interfere with or obstruct the administration of justice. They did not, therefore, constitute any contempt of the Court. Besides, they were not and did not even purport to be written or published by the appellant, and they were neither written nor published with his knowledge. The different kinds of contempt are specified by Lord Hardwicke in *In re Read and Huggonson*. (1) Where the contempt alleged is in the nature of a criminal offence, scienter must be shewn: see *Emmens* v. *Pottle* (2); *Metropolitan Music Hall Co.* v. *Lake* (3); see also *Ex parte Turner* (4); *Dallas* v. *Ledger* (5), where the contempt was of a very trifling nature; *Helmore* v. *Smith* (6); *Moseley's Case*. (7)

Alderson Foote, Q.C., and *Groser*, for the respondent, contended that the statements and matters contained in the letter and article were scandalous and defamatory, were an attack upon the integrity of the Court, and were calculated to obstruct and interfere with the administration of justice in the island of St. Vincent, and to bring the same into contempt. The publication thereof by the appellant was established by the delivery of the paper to the librarian, for delivery entailed responsibility, whether or not there was either negligence or

(1) (1742) 2 Atk. 291, 469.
(2) (1885) 16 Q. B. D. 354.
(3) (1889) 58 L. J. (Ch.) 513.
(4) (1844) 3 M. D. & D. 523.
(5) (1888) 52 J. P. 328; S. C. 4 Times L. R. 432.
(6) (1886) 35 Ch. D. 449.
(7) [1893] A. C. 138.

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mistake. The essence of contempt lies in the effect produced, not in the intention with which a particular act is done. The effect here was to circulate a scandal on the Court. If done innocently or inadvertently it was nevertheless a contempt, which the appellant has refused to purge by a sufficient apology. See *Rex* v. *Lord George Gordon* (1), cited in Odgers on Libel, p. 453; *Crawford's Case.* (2) See also *In re R. Thompson* (3); *Rex* v. *Almon* (4); *American Exchange Co.* v. *Gilling* (5); *Rex* v. *Clement* (6); *Rex* v. *Jeff* (7), cited in Odgers; *Ex parte Jones* (8); *O'Shea* v. *O'Shea and Parnell* (9); *Ex parte Green* (10); *Jones* v. *Flower* (11); *McDermott's Case* (12); *Rainy* v. *Justices of Sierra Leone* (13); *Pollard's Case* (14); *Wallace's Case.* (15)

Odgers, Q.C., replied.

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July 22.

The judgment of their Lordships was delivered by

Lord Morris. This case arises on appeal from the judgment and order dated May 3, 1897, made by the Acting Chief Justice of the Supreme Court of Judicature of the island of St. Vincent, the appellant being Charles John McLeod, and the respondent Geoffrey Peter St. Aubyn, the Acting Chief Justice of St. Vincent.

At the time of the happening of the events which led up to the order appealed from, the appellant was a barrister-at-law practising in the Supreme Court of St. Vincent, of which the respondent was the Acting Chief Justice. At the time there was a weekly newspaper called the *Federalist*, printed and published in the island of Grenada; the appellant was the agent and correspondent of the said newspaper for St. Vincent, and sent letters and articles to the said newspaper from St. Vincent

(1) (1787) 22 How. St. Tr. 176.
(2) (1849) 13 Q. B. 613.
(3) (1680) 8 How. St. Tr. 50, appendix to judgment.
(4) (1765) Wilmott's Opinions, 243, 254.
(5) (1889) 58 L. J. (Ch.) 706.
(6) (1821) 4 B. & A. 218.
(7) (1630) 15 Vin. Abr. 85.
(8) (1806) 13 Ves. 237.
(9) (1890) 15 P. D. 59.
(10) (1891) 7 Times L. R. 411.
(11) (1894) 11 Times L. R. 122.
(12) (1866) L. R. 1 P. C. 260; S. C. (1868) L. R. 2 P. C. 341.
(13) (1852) 8 Moo. P. C. 47.
(14) (1868) L. R. 2 P. C. 106.
(15) (1866) L. R. 1 P. C. 283.

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which were always printed in a special column headed "St. Vincent." The *Federalist* newspapers were sent by post to subscribers at St. Vincent. The Public Library of St. Vincent was a subscriber, and ordinarily received its copy of said newspaper by post. The librarian was Benjamin Stephen Wilson. The *Federalist* of March 31, 1897, contained a leading article entitled "The Administration of Justice" as follows:—

"The Administration of Justice.

"At the present time, more than any other, it seems to be absolutely necessary, that the administration of justice in the several West Indian Colonies should inspire the confidence of every class of the population (1) with the stagnation in trade, the absence of ready money, the want and misery which prevails, the suffering inhabitants of these islands may grow reckless and desperate if on the bench they failed to find that impartial protection which a British judiciary implies. Happily for us in Grenada, the honesty, independence and impartiality of the bench is beyond the faintest shadow of suspicion. If the people in Grenada did not possess confidence in the superior courts there had been a serious state of affairs especially after the sweeping sales of the properties of the peasants for overdue taxes. This confidence and faith in the Supreme Court of the island is well founded, for no judge here has ever, within living memory, forgotten for a moment the sacred nature of the office which he fills nor the importance of the decisions which he may pronounce.

"All the other islands do not appear to be as fortunate as Grenada. St. Vincent especially has suffered more, perhaps, than any other from maladministration of justice. In Mr. Trafford the public had no confidence, and his locum tenens, Mr. St. Aubyn, is reducing the judicial character to the level of a clown. Law and order will only be observed when the tribunals of justice is (sic) pure and impartial.

"It does not seem from the letter of 'Fairplay,' which appears in another column, that the Acting Chief Justice of St. Vincent is capable of maintaining the noble traditions of the

(1) Punctuation *sic* in the record and presumably in the original.

British bench. He has apparently been too wrapped up and intermingled with personal disputes and squabbles of a questionable character to allow him to deal honestly and impartially with questions which come before him to be judicially settled. To nod and wink to counsel engaged in cases is not at all dignified in a judge; it becomes doubly criminal when he who performs these grievances and gymnastics is solemnly adjudicating questions of the utmost importance, involving the liberty, almost the life, of British subjects.

"Mr. Chamberlain having severely rebuked and censured Mr. St. Aubyn for gross partiality as a magistrate we fail to see how he could have been appointed as Acting Chief Justice of St. Vincent. If as police magistrate, with limited jurisdiction, Mr. St. Aubyn displayed in the administration of justice his violent partizanship, would he not as a chief justice, with absolute jurisdiction, give reins to his passions, and prostitute one of the most sacred secular positions merely to gratify his venom and his spleen? He has, it appears, done so, and thereby created a feeling of disquiet and unrest. If the people can have no faith in the findings of the Chief Justice, they may, doubtless, be tempted to redress their own wrongs, either of a private or public nature, with this result, that he who may be the chief cause of illegality will escape scathless whilst those he has provoked to an outbreak will become the victims of martial chastisement.

"St. Vincent has suffered much from the maladministration of justice.

"Discontent which might have culminated in riot has only been prevented by the influence and exertion of the St. Vincent editor of this journal, we hope he may be able to assist in allaying the dissatisfaction which prevails, consequent on the misconduct of the Acting Chief Justice. This ought not to be a difficult matter, especially as a strong desire is expressed that his Honour W. S. Commissiong, Q.C., Acting Chief Justice of Grenada should be appointed successor to Mr. Trafford. A week or two ago, all classes of the community, without regard to public and political differences, presented an address to the Acting Chief Justice of Grenada, indicative of the respect and

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esteem in which he is held, especially from his impartial, honest, and upright demeanour as a judge with such a man presiding over the Supreme Court of St. Vincent we are perfectly satisfied that complaints respecting the administration of justice would be no longer heard. Mr. Commissiong's experience as a practising barrister extends over a term of twenty-five years. Sir Walter Sendall, acknowledging Mr. Commissiong's ability at one time offered him the appointment of Chief Justice of St. Vincent, then vacant, ill-health prevented him accepting it at the time; but we have no doubt, that his Honour will not refuse to go to St. Vincent if the position of Chief Justice of that island were offered him. It would be well if a petition to this end were formulated for signatures in St. Vincent and then forwarded to the Colonial Office. There is no doubt but that the administration of justice in St. Vincent is rotten and corrupt, and that except some one be appointed to the bench who will inspire confidence and respect, the already oppressed peasantry may be goaded into madness. Mr. Commissiong, having as a judge won the confidence, the respect, and the esteem, of even his most violent political opponents, and having served the Government for a long number of years is entitled as well by his service as his ability to be successor to Mr. Justice Trafford, and we hope our fellow citizens in St. Vincent in their own interest, in the cause of the pure and impartial administration of justice in this island, will successfully press his claim upon the Colonial Offices."

It also contained a letter dated from St. Vincent of the date of March 15, 1897, as follows:—

"No. 4.

"A Judicial Scandal.

"To the Editor of *The Federalist*.

"Sir,—Kindly grant me space in your unfettered and fearless journal to expose the scandalous state of things that has existed here since Mr. Geoffrey Peter St. Aubyn's appointment as Acting Chief Justice in November last.

"The public career of this gentleman is interesting. A briefless barrister, unendowed with much brain who religiously

attended with his empty bag at the several Courts of London in the forlorn hope of picking up a case he, after long weary years of waiting exchanged the law for the stage (being a good amateur actor) and tried to earn an honest penny by turning his undoubted histrionic talent into account. In the meantime he had become an assiduous hanger-on at the Colonial Office and applied for every vacancy real or imaginary that he heard of, and it was whilst he was 'starring' in the provinces that, in an evil moment for St. Vincent, he was appointed police magistrate of the Kingstown District in May, 1891, at a salary of 450*l.* a year. His demeanour in the Magistrate's Court has been anything but dignified, and he has indulged in offensive expressions to the litigants before him which were discreditable to one in his position.

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"A man of the Torquimada (1) type, narrow, bigoted, vain, vindictive, and unscrupulous, he takes advantage of his position to vent his spleen upon those whom he hates, though, unlike Torquimada, fortunately, he is unable to send them to the stake.

"He distinguished himself by openly advocating that all games of chance be played at the club, when, as police magistrate, it was his duty to punish those playing games of chance. But in the case of Mr. Sheffield late headmaster of the grammar school, the biter got bit rather severely and his spite and vindictiveness nearly landed him into serious trouble. Mr. Sheffield when his school was prosperous and he was in easy circumstances was drawn into the Kingstown Club, that haunt of dissipation and gambling; the poor man was ruined, and had to leave the club as a defaulter, whereupon a dead set was made by a clique headed by Mr. St. Aubyn upon the unfortunate man and every effort was made to smash him.

"Two women had a case before Mr. St. Aubyn as police magistrate upon one of them, who had tried to blackmail Mr. Sheffield, mentioned his name, Mr. St. Aubyn pressed the woman to make scandalous accusations against Mr. Sheffield. Mr. Branch, another of the clique wrote an anonymous letter in the *Sentry* on the matter, and after some time the administrator,

(1) *Sic*, and see note at p. 552 above.

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egged on by the clique, ordered the Grammar School Board to institute an inquiry. At the meeting the principal witness against Mr. Sheffield was Mr. St. Aubyn who in the most venomous manner repeated the accusations which he had extracted from the woman in his Court. Upon these facts being laid before the Secretary of State, Mr. Chamberlain took a very unfavourable view of Mr. St. Aubyn's conduct, severely censured him, told him that his conduct had been most unEnglish, and plainly hinted that his promotion would be stopped.

"Mr. St. Aubyn returned in November last lying under the cloud, but Mr. Thompson, who himself had taken a strong stand against Mr. Sheffield, appointed him to act as Chief Justice during the continued absence of Mr. Trafford. Mr. St. Aubyn soon shewed that he was utterly unfitted for such a post. He hob-nobs with two or three of the barristers, winks significantly at them in court, and in the trial of cases he has cast to the winds the ordinary principles of justice and fair play which require a judge to keep even the scales of justice between parties.

"At the sessions in November in the case against James Jack for larceny, the prisoner was undefended, and he called as a witness a woman named Emily Sirus. The Acting Attorney-General in a few questions completely disposed of the witness by shewing that she was a bad character and had been to prison many times. But Mr. St. Aubyn, to the disgust of everyone present, for a full quarter of an hour closely cross-examined the witness, sneered at her, asked her such questions: 'Why do you remember such a day; is it because you had gone to jail that day?' &c., and brought all the weight of his position against the undefended prisoner in the dock.

"At the recent sessions Mr. St. Aubyn's action on the bench was most extraordinary, more befitting a prosecuting counsel bent upon securing a conviction than a judge. In the case against James Dacon for carnal knowledge of a girl under 13 years, the prisoner, having given evidence on his own behalf, was subjected to a long and able cross-examination by the Acting Attorney-General, but Mr. St. Aubyn, satisfied, tried his persuasive powers, and closely questioned the unfortunate man, putting

him surprise questions clearly with a view to forcing a confession out of him, but Dacon having remained firm in his innocence, Mr. St. Aubyn threw his head back looking quite annoyed, and in his summing-up he said that Dacon was either very cunning or an idiot, as nothing could be made out of him in cross-examination. He charged the jury strongly against the prisoner, though after the evidence of Dr. Pereira for the prosecution and the evidence for the defence, it was clear that the prisoner must get off. The jury, in the teeth of the summing-up, acquitted the prisoner. Mr. St. Aubyn could not conceal his vexation at this result.

"The next day, when the case against Jack James for feloniously wounding was on, Mr. St. Aubyn exhibited feelings quite unprecedented in a British court of justice. His manner was most theatrical. He energetically fanned himself, fumed and fretted—hardly took a note of the evidence for the defence, told the Attorney-General it was a waste of time to cross-examine the prisoner's witnesses, interrupted Mr. McLeod, prisoner's counsel, without rhyme or reason, and in his summing-up told the jury that the defence was an insult to their intelligence, that they must bring in a verdict of guilty and recommend the prisoner to mercy. He added: 'Gentlemen, make up your minds in the box.' But the jury, the sole and exclusive judges of the evidence, resented this dictation, and retired, and, after mature deliberation, returned a verdict of 'Not guilty.' Mr. St. Aubyn's face was a picture. No judge has ever received such a humiliating snub. Jurymen who were present said that they had never seen such conduct on the part of a judge.

"Simply because Mr. McLeod was solicitor for Mr. Sheffield, Mr. St. Aubyn has shewn the greatest antipathy to that gentleman. He goes out of his way to be most offensive and discourteous to Mr. McLeod, and regrettable passages at arms have taken place between the two.

"It is the general opinion that Mr. St. Aubyn has proved himself incapable of filling the important position of judge, requiring calmness and dignity and evenness of conduct towards all, and the hope is expressed that if, as is anticipated,

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Mr. Trafford does not return, Mr. Commissiong will be appointed judge of this Colony.

"Yours faithfully,
"Fairplay."

"St. Vincent, 15th March, 1897."

On Friday evening, April 2, 1897, the appellant received by mail from Grenada some copies of the *Federalist* of March 31, and on the same evening the appellant went, as was his habit, to the Library. On arriving there he met a friend, Mr. T. R. Nairn, who in conversation mentioned that the *Federalist* newspaper had not arrived. The librarian, Mr. Wilson, stated that he had not received it as the post was late, but that he could have it in the morning. The appellant then stated that he had received his copies, and offered one to the librarian, Mr. Wilson, and handed it to him to be returned the following morning. On April 17 the appellant appeared as counsel in a case called on before the respondent, who thereupon directed the registrar to postpone cases in which the appellant was engaged as counsel until April 24. On that day the respondent made an order calling upon the appellant to attend in court on May 3, 1897, to shew cause why he should not be committed for contempt of Court in publishing the said copy of the *Federalist* by the handing of it to the librarian on the evening of April 2, 1897. On May 1 the appellant made and filed an affidavit as cause against the said order nisi, and on May 3 the appellant appeared in court. In his said affidavit the appellant swore that on the said April 2 the steamer arrived much later than usual from Grenada, and that he received a few copies of the *Federalist* near to 8 o'clock P.M., that he proceeded to the Library to get some papers before it closed—the hour of closing being 8 o'clock P.M. The appellant stated in his said affidavit the circumstances under which he lent the copy of the *Federalist* to Mr. Wilson, and was corroborated in that respect by Mr. Nairn. He further swore that he did not go to the Library to deliver the said copy, that he had not read the newspaper, and had not the slightest idea that it contained the article headed "The Administration of Justice," or the letter signed "Fairplay." On May 3, 1897, the appellant appeared by counsel before

the respondent. His counsel stated that neither the letter nor the article in the *Federalist* of March 31 was written by the appellant. The respondent, after hearing the arguments of appellant's counsel, made the order appealed from, which is as follows:—

"Whereas, by an order dated the 24th day of April, 1897, stating that on the letter headed 'A Judicial Scandal,' dated the 15th day of March, 1897, and signed 'Fairplay,' and the article headed 'The Administration of Justice,' dated the 31st day of March, 1897 (both appearing in a certain copy of an issue of a certain newspaper called *The Federalist*, dated the 31st day of March, 1897, annexed and exhibited respectively to the affidavits of Benjamin Stephens Wilson and Herbert Horatio Holder respectively) being read, and the said affidavits proving the said copy of the said issue of the said newspaper to have been published and otherwise dealt with as therein mentioned by Charles John McLeod, Esquire, barrister-at-law and solicitor of the said Court, being respectively read, and upon the Court taking the matter thereof into consideration, and deeming the conduct of the said Charles John McLeod therein mentioned and the said publishing of the said copy of the said issue of the said newspaper by the said Charles John McLeod a contempt of this Court. It was ordered that Charles John McLeod of Lot 103 in Kingstown, Esquire, barrister-at-law, and solicitor of the said Court, having personal notice thereof, should attend this Court on Monday, the 3rd day of May, 1897, at the hour of eleven o'clock in the forenoon, and should then shew cause why he should not be committed for contempt of this honourable Court in publishing the said copy of the said issue of the said newspaper called *The Federalist* (wherein were the said letter and article) on the 2nd day of April, 1897, and for his said conduct, and the said Charles John McLeod attending this Court this day pursuant to the said order and the affidavits and exhibit filed in this matter this day being read, and upon hearing Mr. Arthur Wellesley Lewis and Mr. James Eldon McCombie Salmon of counsel for the said Charles John McLeod, and the Honourable the Acting Attorney-General and Mr. Conrad Johnson Simmons of counsel, and this Court being of opinion that the said Charles John McLeod has (being

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agent in Saint Vincent for the said newspaper) by negligently publishing the said copy of the said issue of the said newspaper called *The Federalist* (wherein were the said letter and article containing matter scandalising the said Court) on the 2nd day of April, 1897, been guilty of a contempt of this Court, doth order that the said Charles John McLeod do stand committed to the Kingstown prison for fourteen days for his said contempt.

"Dated the 3rd day of May, 1897.

"By the Court,

"Geoffrey P. St. Aubyn,

"Acting Chief Justice."

"(Seal.)

The respondent, for the purpose of giving the appellant time for apologising, stayed the issuing of the committal order until the following day, May 4, on which day the appellant attended and made the following statement:—

"May it please the Court,

"Since the adjournment of the Court last night I have seriously considered my position. I am aware of the grave responsibility which rests upon me. I am aware that the loss of my freedom may entail want upon those dependent on me. But I have come to the conclusion that I cannot conscientiously do what I am asked to do, viz.:—make an affidavit pleading guilty to and expressing contrition for a crime of which I know I am innocent.

"I am prepared to express regret that I should have inadvertently and innocently, without the knowledge that it contained matter which this Court has held to be libellous and a contempt of Court, lent the man Wilson a paper for his personal use for one night. But beyond that my conscience does not allow me to go.

"Should your Honour unfortunately think that such an expression of regret is insufficient, I have no alternative but to submit, under protest, and under reserve of all rights as to appeal or otherwise, to the judgment that your Honour has been pleased to pass upon me.

"C. J. McLeod.

"St. Vincent,

"In Court, this 4th day of May, 1897."

The respondent would not accept the apology, which he considered insufficient, as not containing an expression of regret by the appellant of the nature of the publication itself. The appellant was arrested, and committed to prison for a period of fourteen days.

Now, what are the considerations applicable to the case? Committals for contempt of Court are ordinarily in cases where some contempt ex facie of the Court has been committed, or for comments on cases pending in the Courts. However, there can be no doubt that there is a third head of contempt of Court by the publication of scandalous matter of the Court itself. Lord Hardwicke so lays down without doubt in the case of *In re Read and Huggonson*. (1) He says, "One kind of contempt is scandalising the Court itself." The power summarily to commit for contempt of Court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the judge as a person. He must resort to action for libel or criminal information. Committal for contempt of Court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice. Hence, when a trial has taken place and the case is over, the judge or the jury are given over to criticism.

It is a summary process, and should be used only from a sense of duty and under the pressure of public necessity, for there can be no landmarks pointing out the boundaries in all cases. Committals for contempt of Court by scandalising the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court. On that view, was this a case in which the respondent was under the circumstances justified in making the committal order of May 3, 1897? The appellant was not alleged to be the writer or author of the article or letter in the *Federalist* of

(1) 2 Atk. 471.

J. C. 1899 McLEOD v. ST. AUBYN.

March 31. He was not the printer or publisher of the newspaper. He was a mere agent and correspondent of it at St. Vincent. On the evidence it must be assumed that he innocently, and without any knowledge of the contents, handed under the circumstances he stated the copy of the newspaper to Mr. Wilson. It would be extraordinary if every person who innocently handed over a newspaper or lent one to a friend, with no knowledge of its containing anything objectionable, could be thereby constructively but necessarily guilty of a contempt of a Court because the said newspaper happened to contain scandalous matter reflecting on the Court. The respondent arrived at the conclusion that the appellant was guilty of negligence in not making himself acquainted with the contents of the newspaper before the handing of it to Mr. Wilson. This assumes there was some duty on the appellant to have so made himself acquainted. That is a proposition which cannot be upheld. A printer and publisher intends to publish, and so intending cannot plead as a justification that he did not know the contents. The appellant in this case never intended to publish. Their Lordships are of opinion the appellant was not under the circumstances of this case guilty of a contempt of Court. Their Lordships are also of opinion the apology offered by the appellant before his committal contains sufficient to have called on the respondent to stay his hand. It is an unconditional expression of regret for the act for which he was arraigned. Their Lordships will therefore humbly advise Her Majesty that the order of May 3, 1897, be rescinded and this appeal allowed. The respondent will pay to the appellant his costs of this appeal, but from the date on which the appellant was permitted to proceed with his appeal in formâ pauperis his costs will only be allowed on that footing.

Solicitors for appellant: *Pattinson & Brewer.*
Solicitor for respondent: *John Fawcett.*

THE

ENGLISH REPORTS

VOLUME XCVII

KING'S BENCH DIVISION

XXVI

CONTAINING

WILMOT

BURROW, VOLS. 1, 2 AND 3

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surrender, and before the admittance, the estate remains in the surrenderor, and is not vested at all in the lord, not even in "transitu," between the surrender and admittance; and though every admittance may be pleaded as a grant, yet it really operates as a grant only in respect of the lord, and against his right as lord; for to every other person and purpose whatsoever, it is valid or void according to the right of the parties. The surrender controuls the admittance in all cases whatever; if the surrender is for life, and the admittance in fee, the estate of the copyholder is according to the surrender, and not according to the admittance: so if the lord admits A. and B., where the surrender is only to A., the whole estate is in A.; or if the surrender is absolute, and the lord admits upon condition, the condition is void; the reason given is, because the lord has only a customary power to admit, according to the surrender, and so far as he exceeds that power, the Act is void. 4 Co. 28 b. In the case of a descent, the admittance is of still less validity, for it is not so much as necessary to complete the title; **[241]** and if the lord admits twenty different persons as heirs at law, the unadmitted real heir at law will have a good title against them all; and the grant in the present case is stated expressly to have been made to the plaintiff and her sister Ellen, in "coparcenary," which shews the nature of this grant; and therefore if they had no title as heirs at law, the grant and admittance were totally void, and the defendant could traverse nothing else but the grant; for the allegation, "by virtue whereof they were seised," is not a matter traversable; but the traverse is taken properly to the grant, which puts the right of the copyholder properly in issue; and the grant is good or void, and the plea proved or disproved, as that right is determined.

As to the case of *Humberton and Howgill*, in Hob. 72, where it is said, "If issue be taken directly, enfeoffed or not enfeoffed, it must be avoided by covin specially pleaded, for it is a feoffment tiel quel." 1st. This was not the point of the case: but, 2dly. The feoffment was good to every intent and purpose, except as against creditors; whereas, in the present case, it is void against every body; for even the lord himself may admit the real owner, and the first admittance will not defeat or frustrate the second. And in that case, if feoffment by a person incapable from the nature of the estate, or other incapacity, which renders the Act totally void,—it would prove the plea. It is then said, that a possessory action is not sufficient to destroy the plaintiff's title. 4 Rep. 71. 6 Co. 15. He must shew the title in himself, and he relies only on the grant of the lord.

But if Sarah Boreham took only a life estate, Leppingwell had a title under the heir at law, and then the grant of the lord to him is substantiated; and though possession is sufficient against a **[242]** wrong-doer, yet it is not against the real owner, who has a right of entry, which would be the present case, if Thomas, the nephew, was the customary heir: if he was not, then the defendant is an entire stranger and wrong-doer, and the plaintiff's possession would enable her to maintain the action, and the merits would be against the defendant upon both the questions; but as the law is clearly with the plaintiff on the 1st question, she is entitled to the

Postea.

[243] IN THE KING'S BENCH.

THE KING *against* ALMON. Hil. 5 Geo. III. 1765.

[See *Miller* v. *Knox*, 1838, 4 Bing. N. C. 587; *Ex parte Martin*, 1879, 4 Q. B. D. 215. Applied, *In re Johnson*, 1887, 20 Q. B. D. 72. Approved, *Attorney-General* v. *Kissane*, 1893, 32 L. R. Ir. 271; see *R.* v. *Gray* [1900], 2 Q. B. 41; *R.* v. *Davies* [1906], 1 K. B. 41.]

Mr. Justice Wilmot (*a*).—This is an application made to the Court by the Attorney General, for an attachment against Mr. Almon, for publishing a pamphlet, containing

(*a*) This opinion was not delivered in Court, the prosecution having been dropped, in consequence, it is supposed, of the resignation of the then Attorney General, Sir Fletcher Norton; but it was thought to contain so much legal knowledge on an important subject, as to be worthy of being preserved. The occasion of it was a motion in the Court of King's Bench, by the Attorney General, for an attachment

many libellous passages upon this Court, and upon the Chief Justice for his conduct both in Court and out of it: and it charges the Court, and particularly the Chief Justice, with having introduced a method of proceeding to deprive the subject of the benefit of the Habeas Corpus Act; and though the Chief Justice is [244] named and marked out in that passage, yet the whole Court is most manifestly, and in express words, involved in it.

The passage reflecting upon the Chief Justice for amending an information out of Court, is in page 126, and is laid before the Court in this manner. Mr. Barlow, by affidavit, informs the Court, that upon the 18th of February, he received directions from Mr. Wallace, to get an information against Mr. Wilkes amended, by striking out the word "purport," and inserting the word "tenor:" that he applied to Lord Mansfield for a summons, to shew cause why it should not be amended, and sent two copies of the summons, one to Mr. Hughes, the clerk in Court for the defendant, and another to Mr. Phillips, the solicitor for the defendant, which he believes were left at their houses. That on Monday, the 2d of February, he attended Lord Mansfield, and there met Mr. Hughes and Mr. Phillips; and Lord Mansfield then asked them what objections they had to such amendment: that they said they could not consent to it; and that Lord Mansfield said, he did not ask their consent, but what their objections were? and asked, if it was not usual, or the common practice, to amend informations? and read from a book several cases of amendments, and then made an order for the amendment; and Mr. Hughes confirms the account given by Mr. Barlow, of what passed at Lord Mansfield's when this amendment was made.

[245] The passage in this pamphlet represents this amendment to have been made by Lord Mansfield, "officiously, arbitrarily, and illegally."

The evidence laid before the Court, of Mr. Almon's having published this pamphlet, is an affidavit made by David Bell, in which he swears that the pamphlet was sold and delivered to him at Mr. Almon's shop, by a woman belonging to Mr. Almon, and that he paid her 1s. 6d. for it.

Three objections have been made to the granting this attachment.

1st. That in the mode of prosecution, the fact, sworn by Bell, doth not sufficiently evidence a publication of the pamphlet by Mr. Almon, and that his privity to the publication ought to be proved.

2dly. That to warrant this "summary" mode of proceeding, the contempt ought to be clear and certain; that the scandal ought to be self-evident and apparent, not to be made out by private anecdotes and inferences, or any nice ingenious subtle interpretation; that it is the proper province of a jury to judge of the application and relation of a libel; and that whether these passages do or do not relate and apply to the Court, or the Chief Justice, would be much more proper for a jury to exercise their judgment upon than the Court.

3dly. But if both these points should be against them, then it is insisted upon, that under all the circumstances of this case, the Court ought not to proceed by way of attachment, but leave the offence to be prosecuted and punished by indictment or information.

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against Mr. Almon, for publishing a pamphlet, intituled, "A Letter concerning Libels, Warrants, Seizure of Papers, &c. Printed for J. Almon, Piccadilly, 1765."

In consequence of this motion, grounded on affidavits of the above pamphlet having been bought at the shop of Mr. Almon, in Piccadilly, a rule was made for Mr. Almon, to "shew cause" why a writ of attachment should not issue against him for his contempt. In answer to these affidavits Mr. Almon made an affidavit, in which he expressed his "concern and surprize at this charge, being no ways conscious of having in any act of his life been guilty of the least intentional disrespect towards that Court, nor does he now, nor did he ever apprehend or understand that the passage or extract of the pamphlet, intituled, "A Letter," &c. "was so meant or intended, or could be so construed."

As these proceedings were afterwards dropped, they are not mentioned in the reports of this period; but it appears that this opinion was prepared after the argument on the rule to "shew cause," as it takes notice of the arguments of counsel, and of the objection made to the granting of the attachment.

But as the matter never came to a final decision, it must be considered only as the opinion of the Judge who gives it.

As to the 1st objection. I cannot find out that any distinction has ever been taken between attachments and informations, as to the [246] evidence expected by the Court for granting them. Demonstration is not required in either case, but such a degree of probability, as warrants the mind to form a conclusion of the truth of the fact proposed, and to act upon it.

The fact, proposed here, is the publication of this pamphlet by Mr. Almon.

The evidence is, that it was sold in his shop by a woman belonging to him. What is the inference that the mind draws from such a sale? That it was sold under his direction, for his use, and with his privity. Like all other probabilities, it may be answered and explained; but unless it is answered and explained, it rises so near to a certainty, that it produces in the mind that kind of assent which is called assurance; and upon that foundation Courts of Justice, as well as private men, must rest satisfied and contented as the best and only succedaneum to demonstration; and this kind of evidence has always been held sufficient to induce the Court to grant informations for libels.

In *The King and Roberts*, Mich. 8 Geo. II. it was laid down by Lord Hardwicke and the Court, to be the constant evidence of the publication of a libel, that the person bought it in the defendant's shop: and as to the objection which was made to its being bought from one who appeared to be a servant, and not the master himself; and that there might be some combination between the buyer and seller, in order to injure the master; it was said, the proof of that lies upon the master, if he would remove the general presumption of its being sold by his privity and direction; and that this species of evidence has always been held sufficient to induce the Court to grant an information. It is also now established and settled by a [247] multitude of cases which might be adduced, and an uniform practice in pursuance of them, that this evidence is sufficient to prove a publication by the defendant, even upon a trial.

If it be sufficient to convict a man of publication upon a trial, "a fortiori," it must be sufficient to found a proceeding upon, which is so far from convicting, that it only calls upon the party to answer the charge, and defers the whole trial of that charge to his own oath.

And as Mr. Almon has made an affidavit himself in this case, and does not deny his privity to the sale of this pamphlet, it fortifies the presumption which the law makes, and for these purposes very sufficiently evidences the publication of this pamphlet by him.

As to the 2d objection, which respects the application of the passages, it is admitted, and indeed it is upon very rational grounds now most clearly settled, that it is totally immaterial in what particular form or mode of expression calumny and defamation are conveyed.

The use of speaking and writing, is to excite in the mind of the hearer, or the reader, the idea entertained in the mind of the speaker or writer; and therefore, let the speaker or writer paint that idea how he will, and in what colours he pleases, still, if it produces an idea of calumny and defamation in the minds of the persons who hear or see it, it is a picture which the law forbids to be drawn under any form or under any disguise whatsoever; and Courts of Justice have for many years said, that they would not renounce their senses upon such occasions, but would see with the same eyes that all other people do.

[248] It is totally immaterial what terms are made use of, whether affirmative, negative, past, present, future, ironical, hypothetical, or interrogatory; if they convey scandal, Judges are bound to understand it in the plain, popular, and obvious sense which the words import, and not suffer the slanderer to shelter himself by any delusive colouring whatsoever.

But really there is no colouring at all in this case, except making use of the future tense instead of the preterperfect.

The passages, 122 to 126 (*a*), contain a direct, plain, explicit charge upon this Court,

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(*a*) "I hope we shall never see any Chief Justice, especially in that great Court of criminal process, the King's Bench, who shall deny, or delay, the issuing one of these writs (of habeas corpus) to any man who applies for it, but award the same instantly, upon the prayer of any one, as a writ of right, to which the subject is entitled for asking, by motion of course, without any affidavit whatsoever. In many cases, as, for example, in that of "close" confinement, it may be impossible for the

of an intention to defeat the Habeas Corpus [249] Act, by introducing a rule to be attained by an affidavit, instead of granting the writ "of course," and averring that a man was two years obtaining his liberty under one of these rules. The passages expressly mention the Chief Justice in that great Court of criminal process, the King's Bench, in "apertâ Curiâ."

[250] And as the Chief Justice can neither deny nor delay the issuing of an habeas corpus, without the concurrence of the other Judges, it is imputing that denial or delaying to them. But it does not rest there, for it says, "if speaking to a friend, sending a letter, or making an affidavit, be required by the Court, it will be a virtual denial of the writ;" which is saying that, by requiring an affidavit, they have virtually

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party either to speak to a friend, send a letter, or make an affidavit; and, consequently, if either be required by the Court, it will be a virtual denial of the writ; it is a means of defeating the Habeas Corpus Act. The requisition of an affidavit, puts it likewise in the power of a Judge, to object to its form or contents, and to say the same is not full enough; and yet, before another can be had, the party guilty of the violence, upon being apprized of what has passed, may, by means of this delay, remove the prisoner to some other place, or shuffle him into some other hands, nay, hurry him into a ship and carry him to the East or West Indies, and then all attempt for redress will come too late, and be in vain. An application to the King's Bench for an habeas corpus in term-time, used to be esteemed, I remember, a mere 'motion of course.' 'Our inheritance is right of process of the law, as well as in judgment of the law.' The condition of the subject would be still worse, if any Chief Justice, instead of granting the writ prayed for, should force the party into the taking of a rule upon the imprisoner, to shew cause why he detained the person imprisoned; and this last miserable remedy would still be rendered less adequate, if the person applying was obliged to give notice of such rule to the Solicitor of the Treasury, as well as to the person imprisoning; and even this again would be still made more grievous, tedious, and precarious, if the Judge should be critical upon the affidavit of the service of notice, and be extremely rigid in its being most punctually set forth in every the minutest circumstance. What a noble field for delay, evasion, and final disappointment, would this open to every committer of violence; and how easy would it be, in the mean time, to dodge the man imprisoned from place to place, and from hand to hand, so as to render it utterly impracticable for any friend to procure his enlargement. A bold and daring minister might thus easily transport a troublesome, prating fellow, to either India, long before any 'cause could be shewn' upon such a rule. I am informed, that a freeholder, pressed for a soldier under a temporary Act of Parliament, was two years obtaining his liberty under one of these rules; although he did his utmost by money and counsel, during all the time, to push on the hearing of his case upon the merits: indeed he had the great good fortune not to have his regiment removed farther than from Falmouth to Carlisle, in the whole time; for, had it been ordered abroad, I do not see how he could have had any relief at all, until the end of the war; before which he might have died of diseases, or been knocked on the head by the enemy. But it would be even still much worse, if any Judge should take it into his head for six months together, that noblemen were so great as to be privileged from paying obedience to a habeas corpus at all."

"Or, if any Chief Justice, contrary to the usage of Judges, who are to have no ears for any thing that is to come in judgment before them, until the same is brought on judicially, should, weeks before any Crown-trial, officiously send for the proceedings to see whether they were legal, and upon discovering an error on the prosecutor's side, should summon the attorney of the other side, and tell him he must consent to the setting right of this error, to the end that the 'tenor' of the pleading might be such as judgment could be pronounced thereupon; and notwithstanding the attorney should protest he could not consent thereto upon the account of his client, and that the same was a criminal prosecution, and that such alteration of the record was not warranted by any adjudged precedent, should nevertheless arbitrarily direct it to be done, without either having the point debated before himself by counsel, or brought on before the whole Court for their opinion; and that the defendant, being found guilty by the jury, should be deprived, by such amendment, of taking advantage of the error aforesaid, in arrest of judgment, which he might otherwise have done, and the same would have been fatal to the prosecutor, &c. &c."

denied the writ; "that it is a means of defeating the Habeas Corpus Act; that an application for an habeas corpus used to be a 'motion of course;' that the condition of the subject would be still worse, if any Chief Justice, instead of granting the writ, should force the party into a rule, and that notice of such rule should be given to the Solicitor of the Treasury; if any Judge should be of opinion that noblemen were privileged from paying obedience to the habeas corpus; and that a peer could not be attached by the King's Bench, for treating the Court with opprobrious language."

What inuendo, inference, deduction, nice and subtle or ingenious interpretation is to be made, for applying this to the Court and the Chief Justice? What anecdote is to be known, unless the proceedings in this Court are anecdotes, and the records of it are secrets and mysteries, impervious to human eyes, and unknown even to the Judges themselves.

As to the other passages relating to the Chief Justice amending the information, the application is equally obvious, direct, and necessary; for what Chief Justice can make amendments in criminal prosecutions before trials in which the Crown is concerned, but the Chief Justice of the King's Bench?

[251] If the words "Lord Mansfield," had been printed in capital letters, it would not have pointed him out more visibly to the public, than the words "Chief Justice," applied to the amendment of an information; and where, from the manifest context of all the passages relating to a Chief Justice, it is evident that the Chief Justice, mentioned in the first part of the passage, page 123, is the same person who is carried through all the passages, and that is, the Chief Justice in that great Court of criminal process, the Court of King's Bench.

Affidavits are only necessary where the person does not appear with clearness and certainty upon the face of the libel; but the affidavit of the Chief Justice himself, or of the whole Legislature put together, could not have connected the person and the passage together more strongly than the words themselves do: and the affidavit made by Mr. Barlow and Mr. Hughes does not fix the relation, or add the least additional evidence, in respect of the allusion, but only to shew, "ex abundanti," that there was not the least foundation for any part of the assertion.

The affidavit only shews that it was a malignant fiction, formed upon a transaction which did pass before the Chief Justice, and a libellous misrepresentation of it; and, if no such affidavit had been made, it would have appeared, upon the face of the paper, to have been an infamous aspersion and libel, unrelated to any transaction whatsoever; and there is nothing for a jury to determine, but whether the Court of King's Bench is the Court of King's Bench, and whether Lord Mansfield is the Chief Justice in it.

But suppose there were facts upon which a jury might exercise their judgment; is it not half the business of this Court to examine [252] and try those facts upon applications for attachments? And though I wish as well, and have as high an opinion of trials by jury, as any man has or ever had; and where facts are doubtful, this Court often directs issues to ascertain them; yet attachments are only process to bring parties into Court; and where facts are clear, plain, and as manifest as words can make them, to what end, intent, and purpose, are we to desire any further information or satisfaction about them?

I think no affidavit is necessary to connect the passages either with the Court or the Chief Justice, but that the relation is self-evident, and appears to a demonstration upon the face of the pamphlet.

The third and last objection is, that, supposing this pamphlet to contain passages libelling the Court or the Chief Justice, yet that it is not proper for this Court to proceed against the delinquent by way of attachment, but that it should leave him to be prosecuted by indictment or information.

There are two points to be considered under this objection.

The first respects the passages affecting the Court, and the Chief Justice acting in Court: the other respects the passage reflecting upon the Chief Justice for the amendment made out of Court.

I will first consider what has been said with respect to attachments in general, and the distinction made between the propriety of applying them to one species of contempt and not to another; because that part of the argument goes to all the passages in the pamphlet, whether they reflect upon the Judges for what they do in the Court, or in their judicial capacity out of it.

I will then consider the other point about the amendment made by the Chief Justice out of Court.

[253] It has been argued, that the mode of proceeding by attachment is an invasion upon the ancient simplicity of the law; that it took its rise from the Statute of Westminster, ch. 2; and Gilberts History of the Practice of the Court of Common Pleas, p. 20, in the first edition, is cited to prove that position. And it is said, that Act only applies to persons resisting process; and though this mode of proceeding is very proper to remove obstructions to the execution of process, or to any contumelious treatment of it, or to any contempt to the authority of the Court; yet that papers reflecting merely upon the qualities of Judges themselves, are not the proper objects of an attachment; that Judges have proper remedies to recover a satisfaction for such reflections by actions of "scandalum magnatum;" and, that in the case of a peer, the House of Lords may be applied to for a breach of privilege; that such libellers may be brought to punishment by indictment or information; that there are but few instances of this sort upon libels on Courts or Judges; that the Common Pleas lately refused to do it; that libels of this kind have been prosecuted by actions and indictments; and that attachments ought not to be extended to libels of this nature; because Judges would be determining in their own cause; and that it is more proper for a jury to determine "quo animo" such libels were published.

As to the origin of attachments, I think they did not take their rise from the Statute of Westminster, ch. 2; the passage out of Gilbert does not prove it; but he only says, "the original of commitments for contempt 'seems' to be derived from this statute;" but read the paragraph through, and the end contradicts the "seeming" mentioned in the beginning of it, and shews that it was a part of the **[254]** law of the land to commit for contempt, confirmed by this statute; and indeed, when that Act of Parliament is read, it is impossible to draw the commencement of such a proceeding out of it: it impowers the sheriff to imprison persons resisting process; but has no more to do with giving Courts of Justice a power to vindicate their own dignity, than any other chapter in that Act of Parliament.

The power, which the Courts in Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every Court of Justice, whether of record or not, to fine and imprison for a contempt to the Court, acted in the face of it, 1 Vent. 1. And the issuing of attachments by the Supreme Courts of Justice in Westminster Hall, for contempts out of Court, stands upon the same immemorial usage as supports the whole fabrick of the common law; it is as much the "lex terræ," and within the exception of Magna Charta, as the issuing any other legal process whatsoever.

I have examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none. It is as ancient as any other part of the common law; there is no priority or posteriority to be discovered about it, and therefore cannot be said to invade the common law, but to act in an alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. And though I do not mean to compare and contrast attachments with trials by jury, yet truth compels me to say, that the mode of proceeding by attachment stands upon the very same foundation and basis as trials by jury do,—immemorial usage and practice; it is a constitutional **[255]** remedy in particular cases, and the Judges, in those cases, are as much bound to give an activity to this part of the law as to any other part of it. Indeed it is admitted that attachments are very properly granted for resistance of process, or a contumelious treatment of it, or any violence or abuse of the ministers, or others, employed to execute it. But it is said that the course of justice in those cases is obstructed, and the obstruction must be instantly removed; that there is no such necessity in the case of libels upon Courts or Judges, which may wait for the ordinary method of prosecution without any inconvenience whatsoever. But when the nature of the offence of libelling Judges for what they do in their judicial capacities, either in Court or out of Court, comes to be considered, it does, in my opinion, become more proper for an attachment than any other case whatsoever.

By our constitution, the King is the fountain of every species of justice, which is administered in this kingdom. 12 Co. 25. The King is "de jure" to distribute justice to all his subjects; and, because he cannot do it himself to all persons, he delegates his power to his Judges, who have the custody and guard of the King's oath, and sit in the seat of the King "concerning his justice."

The arraignment of the justice of the Judges, is arraigning the King's justice; it is an impeachment of his wisdom and goodness in the choice of his Judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction **[256]** whatsoever; not for the sake of the Judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current, which it has, for many ages, found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth.

In the moral estimation of the offence, and in every public consequence arising from it, what an infinite disproportion is there between speaking contumelious words of the rules of the Court, for which attachments are granted constantly, and coolly and deliberately printing the most virulent and malignant scandal which fancy could suggest upon the Judges themselves. It seems to be material to fix the ideas of the words, "authority" and "contempt of the Court," to speak with precision upon the question.

By the word "Court," I mean the Judges who constitute it, and who are intrusted by the constitution with a portion of jurisdiction defined and marked out by the common law, or Acts of Parliament. "Contempt of the Court" involves two ideas: contempt of their power, and contempt of their authority. The word "authority" is frequently used to express both the right of declaring the law, which is properly called jurisdiction, and of enforcing obedience to it, in which sense it is equivalent to the word power: but by the word "authority," I do not mean that coercive power of the Judges, but the deference and respect which is paid to them and their acts, from an opinion of their justice and integrity.

Livy uses it according to my idea of the word, in his character of Evander:— "Authoritate magis quam imperio pollebat:" it is not **[257]** "imperium;" it is not the coercive power of the Court; but it is homage and obedience rendered to the Court, from the opinion of the qualities of the Judges who compose it: it is a confidence in their wisdom and integrity, that the power they have is applied to the purpose for which it was deposited in their hands; that authority acts as the great auxiliary of their power, and for that reason the constitution gives them this compendious mode of proceeding against all who shall endeavour to impair and abate it; and therefore every instance of an attachment for contumelious words, spoken of a rule of the Court (of which there are great many) is a case in point to warrant an attachment in the present case, where a rule of Court is the object of the defamation; and it would be a very strange thing that Judges, acting in the King's Supreme Court of Justice in Westminster Hall, should not be under the same protection as a bailiff's follower, executing the process which those Judges issue: it is not their own cause, but the cause of the public, which they are vindicating, at the instance of the public; for I do not think that Courts of Justice are to take their complaints up of themselves: it must be left to His Majesty, who sustains the person of the public, to determine whether the offence merits a public notice and animadversion; and in this state of the proceedings, they are only putting the complaint into a mode of trial, where the party's own oath will acquit him; and in that respect it is certainly a more favourable trial than any other: for he cannot be convicted if he is innocent, which, by false evidence, he may be by a jury; and if he cannot acquit himself, he is but just in the same situation as he would be in, if he was convicted upon an indictment or an information; for the Court must set the punishment in one case as well as the other: **[258]** they do not try him in either case; he tries himself in one case, and the jury try him in the other.

An action of "scandalum magnatum" is only to redress the private injury: compensation, and not punishment, is the object of it; and though some Judges may have sought pecuniary satisfaction, yet others have thought more liberally, and disregarded all private emolument or gratification for the personal injury, and resented the indignity as the cause of the public; and the conduct of the Court of Common Pleas, in respect of the libel published by the court martial, is an authority in point upon this part of the case.

As to proceeding in the House of Lords for a breach of privilege, the scandal upon the noble Lord does not affect him in the character of a peer, but as the Chief Justice of this Court; and if it did, I cannot think it a more favourable mode of prosecution than an attachment, where his own oath will acquit him. As to leaving such libels to be prosecuted by indictment or information, that juries may judge, "quo animo," they were written or published; I am as great a friend to trials of facts by a jury, and would step as far to support them as any Judge who ever did, or now does, sit in Westminster Hall; but if to deter men from offering any indignities to Courts of Justice, and to preserve their lustre and dignity, it is a part of the legal system of justice in this kingdom, that the Court should call upon the delinquents to answer for such indignities, in a summary manner, by attachment, we are as much bound to execute this part of the system as any other; for we must take the whole system together, and consider all the several parts as supporting one another, and as acting in combination together, to attain the only end and object of all laws, the safety and security of the people.

[259] The trial by jury is one part of that system; the punishing contempts of the Court by attachment is another; we must not confound the modes of proceeding, and try contempts by juries, and murders by attachment. We must give that energy to each, which the constitution prescribes. In many cases we may not see the correspondence and dependance which one part of the system has and bears to another; but we must pay that deference to the wisdom of many ages as to presume it; and I am sure it wants no great intuition to see, that trials by juries will be buried in the same grave with the authority of the Courts who are to preside over them.

The constitution has provided very apt and proper remedies for correcting and rectifying the involuntary mistakes of Judges, and for punishing and removing them for any voluntary perversions of justice. But if their authority is to be trampled upon by pamphleteers and news-writers, and the people are to be told that the power, given to the Judges for their protection, is prostituted to their destruction, the Court may retain its power some little time, but I am sure it will instantly lose all its authority; and the power of the Court will not long survive the authority of it: is it possible to stab that authority more fatally than by charging the Court, and more particularly the Chief Justice, with having introduced a rule to subvert the constitutional liberty of the people? a greater scandal could not be published.

A rule was first made in Hilary term, 1757, in the case of *The King and Charles Thacker*, and was calculated entirely to meet the case of persons pressed under the 29 Geo. II. c. 4.

It had been doubted, (not by the Court,) upon former Press Acts, whether the judgment of the commissioners, as to the fitness of the **[260]** men impressed, was not intended by the Legislature to be final; but as it was an authority only in the commissioners, complaints were made of their exceeding and abusing it, and writs of habeas corpus granted; but the facts, stated in the return of these writs, being only controvertible in an action for a false return, according to the opinion of the House of Lords in the year 1759, great delay must have arisen in cases which required immediate dispatch; and in case no return was made by the officer, but that he had the party in his custody, and had him ready in Court, according to the command of the writ (and as he was a stranger to the propriety of the press, he could scarcely make any other,) all the pressed men in the army must have been discharged, to the manifest hazard of the nation, who had been under a necessity of having recourse to that expedient for recruiting the army; but still, in that case, or if the man had not been in actual custody, but at large, and had left the army without a military dismission, it must have been, in both cases, at the peril of his being afterwards tried and punished as a deserter, in case he was a proper object of the press; and therefore, to give a full, complete, and adequate relief to the party pressed, and to give the Act of Parliament that operation which the Legislature intended, and which that supreme law, the safety of the people, required, and which must have been endangered by discharging all the pressed men, (because the persons, who made the returns, were, and from the nature of the case, must have been, strangers to the facts which did or did not make them objects of the press,) the Court, in Hilary term, 1757, first made a rule upon the commissioners under the Act of Parliament, as having exceeded their authority, to shew cause why the party should not be discharged out of the custody of Mr. Hayward, **[261]** the keeper of the Savoy, where Thacker was confined; and that

Hayward should not suffer him to be taken or sent away, until the Court should further determine therein, and that notice of that rule should be given to the Solicitor of His Majesty Treasury in the mean time. By this rule, the question of the fitness of the man, viz. whether he was an object of the Act or not, was brought before the Court much more expeditiously than it could have been done by an habeas corpus, where the facts of the return could not be controverted by affidavits. He was secured, by the provision in the rule, from being taken or sent away in the mean time; and by making the Crown and the commissioners parties to the rule, the question received such a complete determination, as delivered the party absolutely from the condition of a soldier, in case it was determined for him; and if it was determined against him, he might still have recourse to an habeas corpus, and take the sense of a jury upon the facts which should be contained in the return to that writ; and no habeas corpus was ever denied to any body who prayed it upon a proper foundation. This rule was offered to the people as a more beneficial remedy, but was not imposed upon them in the place of the habeas corpus. The manifest and apparent utility of it, made it the option of the Bar in many subsequent cases, in preference to the writ of habeas corpus.

I was not in Court that term the rule was made (*a*), but I was informed of it, and most cordially approved of it. I mention the circumstance of my not being here at that time for two reasons; 1st. To express my sorrow that I had not a share in the formation of it. 2dly. To avoid any imputation of applauding myself in what I am going to say about it.

[262] In more temperate times, this rule would have been treated as a heaven-directed thought for the better supporting the liberty of the people, in the execution of an Act of Parliament, which breaks in upon that equality which the law most anxiously affects to establish for all who live under this Government, and which nothing but the necessities of the State can ever reconcile to the genius of a free constitution. It was the best expedient which the most consummate prudence, and the warmest wish for the happiness of the people, could have invented, to give the State all the benefit which the Legislature really meant they should receive from that law; and at the same time to guard individuals against any abuse of it; and in times to come, it will be one great memorial of the zeal and affection of the Judges who made it, for the liberties of the people.

It was said, that this pamphlet was an answer to a libellous pamphlet on another Court: I never read any pamphlets, and therefore do not know what that pamphlet was; but as to litigated questions between the two Courts, on the Habeas Corpus Act, I know of none; and a libel upon one Court of Justice, is a very odd way of answering a libel upon another: I should rather think that both the pamphlets came out of the same quiver; I am sure the same malignant spirit, the same evil genius of this nation, guides the hand of the persons who calumniate any Court of Justice: and as to the Court of Common Pleas not taking up a complaint of this kind, what was the nature of that complaint? If properly proved, or how it came before them, is not stated: but I am fully persuaded, from my knowledge of their wisdom and justice, that if such a complaint as this had been laid before them, they would have acted as we do upon it.

[263] If an attachment is a constitutional mode of proceeding for libels upon Courts of Justice, they must be competent to the question of "quo animo" they are published; and especially in this stage of the proceeding, which is only to bring the party into Court to tell his own story. It is the intention which, in all cases, constitutes the offence. "Actus non facit reum, nisi mens sit rea." It would be a contradiction in terms to admit Courts to have a cognizance of the offence, and yet not admit them to be Judges of the only ingredient which makes it so.

As to the passages relating to the amendment made by the Chief Justice out of Court, there is no necessity of giving any opinion upon that part of the case, as the attachment ought to go for the other passages reflecting upon the Court and the Chief Justice, for acts charged upon him as done in Court; but as that point has been argued very elaborately, I will give my opinion upon it. The legality of this amendment was never controverted: it could not be controverted: it was founded upon

(*a*) Sir Eardley was at this time in the Court of Chancery, being one of the Commissioners of the Great Seal.

precedents, and upon that immutable principle of all practice, the bringing the real merits of the case in question before the Court: the whole doctrine of amendments turns upon that principle.

The objection to granting the attachment upon this passage is, that it respects the Chief Justice only, and neither reflects upon the Court, nor the process of the Court; that orders made by Judges at their chambers cannot be enforced by attachment, till they are made orders of the Court; and that the disobedience must be subsequent to their being made orders of the Court; and a doubt has been rather hinted at than made, as to the legality of orders made [264] by Judges at their houses or chambers. And the passage, in 2 Inst. 103, was mentioned as condemning this practice.

When the practice first began I cannot find out; my search and inquiries have been as fruitless and ineffectual in that respect as Mr. Dunning's. Popham, 180.—One hundred and forty years ago, an order was made by two Judges in vacation, to stay a judgment:—a very extraordinary interposition, but no complaint of it as illegal. But whenever it began, it stands upon too firm a basis to be now shaken;—constant immemorial usage, sanctified and recognised by the Courts of Westminster Hall, and in many instances by the Legislature; and it is now become as much a part of the law of the land, as any other course of practice which custom has introduced and established: but though difficult to find out when it was introduced, yet it is very easy to see why it was introduced—for the ease and convenience of the suitors of the Court;—to accommodate them at a much easier expence, and with less trouble, in a great variety of cases, and especially in vacation-time, when they could not have access to the Court; and when there was a great multiplicity of business, the saving of the time of the Court in adjusting trifling matters, which might be so much better employed in momentous ones, was no inconsiderable motive towards establishing it. And still, it is the business of the Court, which is done at chambers; that is, it is business which must be done in Court, if it could not be done at chambers.

And the passage in Lord Coke, 2 Inst. 103, when duly considered, relates only to rules, orders, awards, and judgments, made at chambers, "ex parte;" where a man may lose his cause, or receive great prejudice or delay, in his absence, for want of defence; and [265] the passage, cited by him out of Seneca, very fully explains Lord Coke's meaning to relate to orders or rules, "parte alterâ inauditâ:" whereas, Judges never make orders in chambers, without hearing both parties, or giving them an opportunity of being heard. And there is nothing in the constitution of the Court, which forbids the business of it being done by one Judge; for one Judge, sitting in Court, has the authority of the whole Court; and a libel upon him, would be a libel upon the Court in the strictest sense of the word; and certainly a libel upon a single Judge, for an opinion given in Court, controuled by the other three Judges, although it could never be called a libel upon the Court, yet would be a contempt of the Court, and be proper for an attachment; and therefore the question resolves itself at last into this single point, whether a Judge, making an order at his house or chambers, is not acting in his judicial capacity as a Judge of this Court, and both his person and character under the same protection, as if he was sitting by himself in Court? It is conceded that an act of violence upon his person, when he was making such an order, would be a contempt punishable by attachment; upon what principle? for striking a Judge in walking along the streets, would not be a contempt of the Court. The reason therefore must be, that he is in the exercise of his office, and discharging the function of a Judge of this Court; and if his person is under this protection, why should not his character be under the same protection? It is not for the sake of the individual, but for the sake of the public, that his person is under such protection; and in respect of the public, the imputing corruption and the perversion of justice to him, in an order made by him at his chambers, is attended with much more mis-[266]-chievous consequences than a blow; and therefore the reason of proceeding in this summary manner, applies with equal, if not superior, force, to one case as well as the other; there is no greater obstruction to the execution of justice from the striking a Judge, than from the abusing him, because his order lies open to be enforced or discharged, whether the Judge is struck or abused for making it.

The greatest objection upon this part of the case has been, that this Court will not enforce obedience to a Judge's order, by an attachment, before it is made a rule of Court; and that the refusal to perform it must be subsequent to its being made

a rule of Court; and from thence it has been inferred, that it can be no contempt of the Court to libel a Judge for making an order, because it would be no contempt of the Court to disobey it. But, upon consideration, I think the inference is not a just one.

The right of the Court to controul these orders is to preserve a uniformity of practice, and to prevent any clashing which might arise from four distinct and separate exertions of the same jurisdiction. The refusing to issue an attachment for the breach of such an order, before it is made an order of the Court, was founded upon the same principle: we will not enforce obedience to it till we have adopted it; but that provision only respects the effect of the order when made, and does not the least apply to the capacity or character in which the Judge makes it. He is still opening and exercising the jurisdiction of the Court, and is doing the business which must otherwise be done in Court, exactly in the same manner as we do at the side Bar; and surely a libel upon the Judges for what they do at the side Bar, within a few yards of the Court, would be as much the object of an attachment as for any thing done in [267] Court. Custom legitimates the practice at chambers, as much as at the side Bar; and custom may qualify and modify the acts they do in both places.

But still they are emanations of judicial power, and whether they have more or less weight, they are acts done by the Judge in the same capacity and character in which he sits here; and whether he is swearing an affidavit out of Court, or pronouncing a solemn opinion in Court, the reason of resenting the indignity is the same, and "ubi eadem est ratio, ibi idem est jus."

It may perhaps merit a less punishment to libel a single Judge in Court or out of Court, than to libel the whole Court; but the quantum of the offence does not vary the mode of prosecuting it; it is an offence "ejusdem generis" although "inferioris gradus:" and I cannot explore a single reason which can be urged to cover the Judges in Court against calumny and detraction for what they do there, which does not hold equally true, though in a less degree, when applied to what they do in their judicial capacities out of Court: the quantum of the offence is different, but the quality of the offence is the same.

Suppose the pamphlet had charged all the Judges with corruption in making four orders in different causes, it would have been a greater offence than charging one: but if it is not a proper mode of proceeding in the case of a single Judge, it would not be proper in the case of the four; for though the libel would, in that case, take in the whole Court, yet if the reason which is urged, of the inefficacy of their orders till made rules of Court, is sufficient to take them out of the protection of the Court in the case of one Judge, it must hold in the case I mention; for each order may afterwards be con-[268]-trouled by the other Judges, when they come to sit collectively together as a Court.—See the consequence: if a bailiff's follower, at the time of executing a process to arrest a man, should be called a rogue and abused, the Court is to grant an attachment; but if the four persons whom the King appointed to execute one of the noblest branches of his regal function, which the usage says may be done out of Court as well as in it, are represented to the people as acting in their judicial capacities out of Court corruptly, illegally, or oppressively, they are not to be under the same protection as a bailiff's follower; but the Chief Justices and Judges of this Court must wait at the door of the grand jury chamber, with their indictments in their hands, and afterwards attend the trial, which must still be before one of themselves, in order to get at that justice which the meanest person in the kingdom, acting under their authority, has a right to, in the first instance, by an attachment.

If the practice of making orders at chambers is a legal one, the protection must and ought to follow it. If the people are told that the Judges act unjustly and impiously at chambers, can they think that they act otherwise when they sit here? Does not the scandal follow them into this Court, and mark them out as objects for the finger of scorn to point at? Would it not, must it not, necessarily bring this Court into contempt, to say, the Judges at their Chambers make orders or rules corruptly? The difference between the force, the weight, and the energy of an order and of a rule, respects only the mode of executing them; but the imputing corruption to the Judges who made either, equally murders their fame, which is the vital part of their authority when they sit here; and really in every shape which this question presents itself to my understanding, I can make [269] no difference between a Judge

acting in Court, or judicially out of it, but that he has not the same plenitude of power in the one case which he has in the other. But still he acts by virtue of the patent constituting him a Judge of this Court, and of the power which the law gives him in that character and capacity. When he issues his warrant as a conservator of the peace, the Court punishes the officer, who disobeys it, by attachment: Why?—Because it is the act of a Judge in his judicial capacity; indeed it is an obstruction to process in that particular complaint. But suppose he was calumniated for issuing such a warrant, would not the Court grant an attachment for it?

The Court of Chancery has always punished the abuse of their Masters, or of commissioners of bankrupt, whilst acting in the execution of their offices, in this summary manner, by attachment; and I should think a libel upon them, or upon the Master of the Crown Office, or on the civil side, for acts done by them in their official capacities, would be within the reach and reason of this mode of proceeding. It is the business of the Court, transacted by their officers; and though under the controul of the Court, that only respects the effects of what they do, and not the capacity in which they do it.

Perhaps it may be said, though attachments are granted for the abuse of officers in the actual service of process, yet never for a libel upon them for what they have done in that capacity; and therefore no argument can be drawn from the practice of issuing attachments in favour of bailiffs abused in actual service, any further than whilst a Judge is in the actual execution of his office: but the principles upon which the Court proceeds, in granting attach-[270]-ments for abusing bailiffs in the execution of process, and abusing Courts for their judgments, must be attended to, in order to find out the difference between the case of libelling a bailiff, and libelling a Judge of the Court.

The principle upon which attachments are granted, in respect of bailiffs, is to facilitate the execution of the law, by giving a summary and immediate redress and protection to the persons who undertake it. The law considers it as a contempt of the authority of the Court, to abuse and vilify the person who is acting under it.

But the principle upon which attachments issue for libels upon Courts, is of a more enlarged and important nature,—it is to keep a blaze of glory around them, and to deter people from attempting to render them contemptible in the eyes of the public.

Bailiffs are neither appointed by the King nor the Court; a libel upon them terminates only in the defamation of a private individual: it is only telling the people, that a person employed to execute process has abused his authority. But a libel upon a Court is a reflection upon the King, and telling the people that the administration of justice is in weak or corrupt hands; that the fountain of justice itself is tainted, and, consequently, that judgments, which stream out of that fountain, must be impure and contaminated.

The authority of the Court is contemned by abusing a bailiff in the actual service of process: but the justice of the Court is not arraigned, nor is the Court rendered contemptible in the eyes of the people by imputing misbehaviour to him; and therefore an attachment for a libel upon a Judge for what he does at chambers, does not proceed upon any principle analogous to the case of a libel upon a bailiff, but falls directly within the principle of libelling the [271] Court, which is imputing to the King a breach of that oath, which he takes at the coronation, to "administer justice to his people;" and a Judge, at his chambers, is as much in the administration of that justice, as when he is in Court, though his acts have not the same efficacy as the acts of the whole Court; and orders for amendments do in some respects differ materially from mandatory orders, enjoining a third person to pay money or perform any particular act; for obedience cannot be enforced to such mandatory orders, till the Court has expressly recognized them; but orders for amendments require no act of the Court to authenticate them. When the alteration is made in pursuance of such an order, and there is no application to discharge such an order, but it is acquiesced in by all parties, it becomes the act of the whole Court; and the part amended is as much a part of the record of the Court as any other part of it; and when this pamphlet was printed, the record had been amended in pursuance of the order made by the Chief Justice; and therefore to every intent and purpose the amendment had been adopted, recognized, and was become the act of the Court, by the acquiescence

of the parties, as emphatically and effectually, as if it had been originally ordered by the Court (*b*).

[272] IN THE COMMON PLEAS.

ROE, ON THE DEMISE OF GEORGE DODSON, ESQ. *against* GREW AND OTHERS. —In Ejectment. Hil. 7 Geo. III. 1767. 2 Wilson; 322.

[S. C. 2 Wils. 322; 95 E. R. 834 (with note).]

This was a case on an ejectment for the recovery of certain lands in the county of Middlesex, which was tried before Lord Camden at the sittings after last Easter term, whereby it appeared—

That Daniel Dodson was seised in fee of the premises in question, and devised them in these words; viz.

"Item. I give, devise, and bequeath unto my nephew, George Grew, all that my mansion-house or dwelling, with the out-houses, stables, buildings, orchards, gardens, and lands thereto belonging, situate and being at Waltham Cross, in the said county of Hertford, now in my own possession, and used therewith: and also all those my meadow lands in Fowley, in the parish of Cheshunt, in the said county of Hertford, also in my own possession: and also all that my one close of pasture land, in Waltham Cross aforesaid, now in the possession of William Hunt: and also all those my three acres of common field land, lying and being in Brickwall Field, Swan Field, and White-horse Field, in Waltham Cross aforesaid, now in the possession of myself and the said William Hunt: and also all those my three acres of land, **[273]** lying and being in Bellsmore Lane, in the parish of Enfield, and county of Middlesex; and all other my lands, tenements, and hereditaments in Enfield aforesaid: and also all those my chambers in Lincoln's Inn, No. 5, now in my own possession, in the said county of Middlesex:—to hold all and every the aforesaid messuage, lands, tenements, hereditaments, chambers, and premises, with their and every of their appurtenances, unto him the said George Grew for and during the term of his natural life; and from and after his decease, to the use of the issue male of his body lawfully to be begotten, and the heirs male of the body of such issue male; and for want of such issue male, then I give all and every the aforesaid premises unto my nephew George Dodson, his heirs and assigns for ever."

That in the devise to George Grew, the words "heirs male of his body" were originally written, but that the word "heirs" was scratched out, and the word "issue" inserted in its stead, in the same hand with the body of the will, but in different ink.

That George Dodson, the devisee in remainder in the said will, was George Dodson, the lessor of the plaintiff.

That the testator devised other estates to the said lessor of the plaintiff in fee.

That George Grew, and the lessor of the plaintiff, were the testator's nephews; and that he devised the residue of his estates, both real and personal, equally between his said two nephews.

That George Grew had no child at the time of making the will: that he entered on the premises, suffered a recovery thereof, and died without issue male.

[274] On this case a verdict was given for the plaintiff, subject to the opinion of the Court upon this question, viz.

Whether George Grew took an estate tail, or for life only, under the said will?

Lord Chief Justice Wilmot.—I think this is an estate tail. The general rule is a clear and a just one, that the intention of the testator is to be collected from the whole will, and such a construction made as will effectuate that intention, provided that intention does not contradict, or clash with, any legal principles or positive rules of law: for though the Statute of Wills gives a power to parties to devise at their will and pleasure, yet that will and pleasure are bounded and circumscribed, and must not pass the line which the law has laid down for the modification of real property

(*b*) Vide note (*a*), p. 243, also the case of *Rex* v. *John Wilkes, Esquire*, Hil. term. 10 Geo. III. 4 Bur. p. 2527, where the subject of amendments, made out of Court, is fully discussed.

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Report of the Committee on Contempt of Court

Presented to Parliament by the Lord High Chancellor and the Lord Advocate by Command of Her Majesty December 1974

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CHAPTER 7

SCANDALISING THE COURT

159. The archaic title of this chapter refers to that part of the law of contempt which prohibits certain forms of verbal attack upon courts or judges. In Scotland the phrase used was "murmuring" judges and in addition to being a contempt it was until 1973 a statutory offence there as well[84]. The object of the law of contempt here, as elsewhere, is to protect the administration of justice, and the preservation of public confidence is an important part of this process. But the conduct of judges as judges and the decisions of the courts are matters of legitimate public concern, and there must clearly be freedom to comment or criticise within reasonable limits. In virtually every case of contempt of this kind the courts have stressed that *bona fide* criticism is permissible[85]. As Lord Atkin said in a celebrated opinion[86]:—

> "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 criticising, 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."

Broadly speaking what is prohibited is (*a*) scurrilous abuse of a judge as a judge or of a court and (*b*) attacks upon the integrity or impartiality of a judge or court.

160. Proceedings for contempts of this kind are in fact rare. The last successful application in this country appears to have been as long ago as 1930[87]. The view was indeed expressed by one Lord of Appeal at the end of the last century that this form of contempt was obsolete[88] but in the event a case arose in the following year[89]. There is not much evidence that the press is unduly inhibited by this aspect of the law. Criticism has become more forthright in recent years, especially since the creation of the National Industrial Relations Court. Things have been said and published

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[84] Judges Act 1540, now repealed by the Statute Law (Repeals) Act 1973; see generally *Hume on Crimes*, Vol. 1, p. 406.

[85] For example, *R.* v. *White* (1808) 1 Camp. 359n; R. v. *Metropolitan Police Commissioner, ex parte Blackburn (No. 2)* [1968] 2 Q.B. 150.

[86] *Ambard* v. *A.-G. for Trinidad and Tobago* [1936] A.C. 322, at p. 335.

[87] *R.* v. *Wilkinson* (1930), *The Times*, 16th July.

[88] Lord Morris in *McLeod* v. *St. Aubyn* [1899] A.C. 549, at p. 561.

[89] *R.* v. *Gray* [1900] 2 Q.B. 36.

bout that Court and its President which could undoubtedly have been made he subject of proceedings for contempt. For example, in one publication it was stated as a fact that the judge had conferred in private with one party o proceedings with a view to advising them about the next step to take. Although this was untrue and a gross contempt no proceedings was instituted.

161. Most attacks of this kind are best ignored. They usually come from disappointed litigants or their friends. To take proceedings in respect of them would merely give them greater publicity, and a platform from which the person concerned could air his views further. Moreover, the climate of opinion nowadays is more free. Authority, including the courts, is questioned and scrutinised more than it used to be. The Lord Chief Justice said in his evidence to us: "Judges' backs have got to be a good deal broader than they were thought to be years ago". It is no doubt because of this, and in pursuance of the spirit of Lord Atkin's dictum that practice has reverted to what it was before the turn of the century when it was said that[90]:—

> "Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them."

We feel that the time has come to bring the law into line with this practice.

162. At one stage we considered whether such conduct should be subject to penal sanctions at all. It was argued that any judge who was attacked would have the protection of the law of defamation, and that no further protection is necessary. We have concluded, however, that some restraints are still required, for two reasons. First, this branch of the law of contempt is concerned with the protection of the administration of justice, and especially the preservation of public confidence in its honesty and impartiality; it is only incidentally, if it all, concerned with the personal reputations of judges. Moreover, some damaging attacks, for example upon an unspecified group of judges, may not be capable of being made the subject of libel proceedings at all. Secondly, judges commonly feel constrained by their position not to take action in reply to criticism, and they have no proper forum in which to do so such as other public figures may have. These considerations lead us to the conclusion that there is need for an effective remedy, both in England and Wales, and in Scotland, against imputations of improper or corrupt judicial conduct.

163. We are, however, satisfied that the remedy should not be part of the law of contempt. It does not normally require to be dealt with urgently and so be subject to the summary procedure, nor are there good reasons of convenience why it should be. Moreover, it can be argued with some force that by dealing with these cases under the summary contempt procedure, the judges are sitting as judges in their own cause, although of course the judge who was himself the subject of attack would not in practice sit to hear the case[91]. If, on the other hand, the conduct occurs or the imputations are made in the face of the court, or relate to particular proceedings which are in progress, and give rise to a risk of serious prejudice, such conduct can and should be capable of being dealt with summarily as a contempt on that basis. Where the attack is made in court upon the presiding judge it should

90 *per* Lord Morris in *McLeod* v. *St. Aubyn* [1899] A.C. 549, at p. 561.

91 *Skipworth's* case [1873] L.R. 9 Q.B. 230, at pp. 238-9.

of course continue to be a contempt, and we have already concluded that reasons of convenience require that he should, as at present, be able to deal with it himself[92].

A new offence recommended

164. **We therefore recommend that this branch of the law of contempt should be replaced by a new and strictly defined criminal offence**[93]. The offence should be constituted by the publication, in whatever form, of matter imputing improper or corrupt judicial conduct with the intention of impairing confidence in the administration of justice. It would be triable only on indictment. Criticism, even if scurrilous, should only be punishable if it fulfilled these two requirements. As the offence would be one which struck generally at the administration of justice itself, prosecution should only be at the instance of the Attorney-General in England and Wales and of the Lord Advocate in Scotland.

Should truth be a defence?

165. We considered whether there should be any defences to the new offence we have recommended, and in particular whether, in the event of a specific allegation being made (for example of partiality or corruption) it should be a sufficient defence merely to prove that the allegation was true. In view of the special constitutional position of courts and judges, we do not think that a criminal trial is the right way of testing this issue. A defence of truth may or may not be advanced in good faith; an allegation of bias, for example, may follow a long and responsible investigation or it may be generalised or malicious invective on the part of somebody who has lost his case. The latter is usually, no doubt, best ignored but if, in an extreme case, a prosecution were brought and such a defence put forward its effect would simply be to give the defendant a further and public platform for the wider publication of his assertions or allegations, which might be wholly without foundation. An allegation of bias in relation to a particular case might, if the defendant were permitted to plead justification, be used in effect as a means of getting a case reheard. Finally, a simple defence of truth would permit the malicious and irresponsible publication of some damaging episode from a judge's past, however distant, calculated to cast doubt upon his fitness to try a particular case or class of cases. We therefore do not consider that truth alone should be a defence.

Public benefit

166. We think, however, that if, in addition to proving the truth of his allegation, a defendant can also show that its publication was for the public benefit he should be entitled to an acquittal. We are very much alive to the juridical difficulties of such a defence, but the present context, in our view, justifies its creation and there is a precedent for it in the closely analogous law of criminal libel in England and Wales. We would, however, add an

92 See paragraphs 30-31 above.

93 The view has been expressed in Scotland (*Gordon on Criminal Law*, p. 1017) that Scots law has always recognised slander of judges as a common law offence, but if such conduct ceases to be justiciable as a contempt, and punishable by the court at its own instance, it may be doubted whether the authority cited by Gordon would support that conclusion.

87 A

important proviso. In our view, the proper course for anyone to take who believes that he has evidence of judicial corruption or lack of impartiality is to submit it to the proper authority, namely, the Lord Chancellor or the Secretary of State for Scotland, as the case may be. It is they who have the power of removal of judicial officers below High Court level if they misbehave[94], and they are the appropriate recipients for complaints as to the conduct of High Court Judges. It is hard to conceive how it could be held to be for the public benefit to publish allegations imputing improper motives to those taking part in the administration of justice if the defendant had taken no steps to report the matter to the proper authority, or to enable that authority to deal with it.

Conclusion

167. **Our recommendation is therefore that it should be a defence to show that the allegations were true and that the publication was for the public benefit.** This defence would thus be the same as exists at present to a charge of criminal libel. We understand that the Committee on Defamation[95] is likely to recommend that the law of criminal libel should be preserved to cover certain specific situations. The offence we recommend could conveniently be made, in England and Wales, a part of that law. There is, however, no law of criminal libel in Scotland and we understand that the Committee on Defamation will not recommend its extension to that country. **The offence we recommend, and the defence to it, should therefore be made a separate statutory offence in Scotland.**

cf par 145 p. 52

94 Courts Act 1971, section 17(4); Sheriff Court (Scotland) Act 1907, section 13.

95 Set up by your predecessors on 11th June 1971.

from. R. Dhavan: Contempt of Court and the Press (1982) 88

CHAPTER III

POLICY PERSPECTIVE AND LEGISLATIVE COMPROMISES

I

IN THIS century, at least three committees and five enactments[1] have concerned themselves with the law of contempt. This does not mean that any of these committees and enactments have dealt with the subject systematically or exhaustively. Each of these efforts have operated within their contemporary situation and reached to the problems of the day. Legislation affects society in various ways and is enacted for the achievement of all kinds of purposes. Sometimes winning the argument by enacting legislation is all that is intended. The fact that such legislation is enacted has its own symbolic impact. Legislation may be enacted simply to give the appearance that the government is dealing with the problem even when it is not and has no intention of doing so. It is often enacted for one purpose in the knowledge that it will be used for another. The purposes for which legislation is used may themselves transform over time.[2] Legislation often proceeds on the basis of premises and facts which

1. *Select Committee Report on the Contempt of Courts Bill, 1925* (1925); *Sanyal Committee Report* (1963) ; *Report of the Joint Committee on the Contempt of Court Bill, 1968* (1971—hereafter '*Bhargava*' *Committee Report*) ; Contempt of Courts Act, 1926 ; Contempt of Courts (Amendment) Act, 1937 ; Contempt of Courts Act, 1952 ; Contempt of Courts Act, 1971 ; Contempt of Courts Act, 1976.
2. For some of the literature on this see, J. Gusfield, "Moral Passage : The symbolic process in public designations of deviance", (1967) 15 *Social Problems* 175 ; W.G. Carson, "Symbolic and Instrumental Dimensions of Early Factory Legislation", in R. Hood (ed.), *Crime, Criminology and Public Policy* (1974) ; V. Greenwood and J. Young, *Abortion in Demand* (1975) ; C. Davies, *Permissive Britain : Social Change in the Sixties and Seventies* (1975) ; H. Hall, *Theft, Law and Society* (1952) ; B. Strachan, *The Drinking Driver and the Law* (1976) ;

are wrong, ill considered or inadequate. Often, all kinds of compromises have to be made during the process of enactment. It would be interesting to review the policy perspectives which inspired the various attempts to deal with the law of contempt and consider the problems that were encountered in trying to give effect to these policy perspectives.

II

We have already shown that by the turn of the century, the contempt jurisdiction of the Calcutta, Bombay and Madras High Courts came to be securely established in India and was used to deal with constructive contempts committed by the press.[3] In addition to the contempt jurisdiction, various provisions of the Indian Penal Code, 1860 made it possible for the courts to deal with any interference in the due administration of justice.[4] Meanwhile, the newspapers had become quite vociferous in their demands about the reform of judicial administration. The *Kelkar* case (1909)[5] in which the editor of the *Kesari* was punished for contempt for his outspoken allegations of bias in relation to the *Tilak* trial, left the British in little doubt that administration of justice needed to be protected. The real question was whether the existing legal weapons for protection were enough to protect from attacks on the entire British system of courts.

An Expert Committee of 1907, reacting to the *Khulna* incident where a Calcutta newspaper had made comments on a trial outside Calcutta, reported to the government that the High Courts did not possess the power to deal with complaints outside their jurisdiction.[6] Lord Minto's government wanted to ensure that *all* High Courts have the power to punish contempts against themselves or their subordinate courts. While consultations were undertaken with the Provincial Governments, the Press Act,

H. Teff, *Drugs, Society and the Law* (1975); M. Cunningham, *Pollution, Social Interest and the Law* (1975); V. Aubert, "Some Social Functions of Legislation" in V. Aubert, *Sociology of Law* (1975) 116; S. Macaulay, *Law and the Balance of Power : The Automobile Manufacturers and their Dealers* (1969). For Indian examples see R. Dhavan, *The Amendment : Conspiracy or Revolution* (1982); *ibid*, *Amending the Amendment* (1978); *ibid*, "Engrafting the Ombudsman Idea on a Parliamentary Democracy—A Comment on the Lok Pal Bill, 1977" (1977) 19 *J.I.L.I.* 257-32. For an analysis of some of the instrumental techniques which can be used see, R.S. Summers, The Technique Element of Law, (1971) 59 *Calif. K.R.* 733. The above list is not intended to be exhaustive. It illustrates the interesting range of legislation which has been used for differential use. Indeed, it would be argued that all legislation proceeds on a multiple basis, is subject to multiple compromises and transformed into multiple uses.

3. *Supra* chapter II.
4. Sections 191-229, Indian Penal Code, 1860.
5. *In Re Narasimhachari Chintamani Kelkar*, (1909) 33 *Bom.* 240.

1910 introduced a system of direct control on the press. The contempt proposals surfaced in 1914. The strategy was to make amendments to the Indian Penal Code. The amendments were quite far-reaching. Except for true comments made in good faith, the contempt of any court or even officials connected with ordering or administering oaths was made an offence. It was also an offence to punish inaccurate and misleading reports of judicial proceedings which would prejudice the courts in the minds of the public. The government were aware that these were far-reaching proposals and tried to make them acceptable by suggesting that these offences would be tried by the ordinary criminal procedure and not by the summary process. Sir Reginald Craddock observed :

> Moreover even Judges are human, and it is well to guard against the possibility, I will say the remote possibility, that the outraged feeling of the Judge might lead to a somewhat hasty or severe treatment of contempt of judicial authority. The Bill, therefore, contemplates that offences of this kind should be ordinary offences instituted and tried as such by the appropriate Courts.[7]

Eleven years later, Sir Hari Singh Gaur used this statement to attack the government's proposals to consolidate and extend the law of contempt through the process of summary procedure.[8]

It was because of the First World War and Sir Tej Bahadur Sapru's attack on these proposals in 1921 and his insistence that contempt of subordinate courts should be tried by the High Courts—, that fresh proposals to deal with the law of contempt emerged in 1925. In 1921, in a spirited debate on the Press and Registration of Books Act, 1867 and the Press Act, 1910,[9] British representatives in the Legislative Assembly expressed their fears about how newspapers used the process of litigation to attack the government. Sir William Vincent described this process as follows:

> As soon as an editor was prosecuted ... the proceedings were protracted for an indefinite time, the paper sold like hot cakes while the case was pending—on some occasions many thousand copies being sold at a rupee a copy—the editor became a martyr and, finally, when he was convicted, he usually got some short

7. (1914) *Proceedings of the Imperial Legislative Council* 858 (18 March, 1914) cited by H.S. Gour, *infra* note 8.
8. (1925) *Legislative Assembly Debates* (hereafter *L.A.D.*) 1113 (16 February, 1925).
9. Debates on the Resolution, *Press and Registration of Books Act and the Indian Press Act* (1921) I *L.A.D.* 338-54 (22 February, 1921) ; presentation of Report (1921) II *L.A.D.* 2687 (1 March, 1921) ; discussion on the Report (1922) II *L.A.D.* 339-41 (15 September, 1921), 1011 (26 September, 1921), 3685-90 (25 March, 1922) ; consent of Council of States (1922) III Council of States Debates (hereafter *C.S.D.*) 39 (6 September, 1922).

courts in India is unlimiied as it is in England. These are the main points in the Bill and I do not think at this stage I need detain the House much longer. The Bill affirms and confirms the jurisdiction of the High Courts to protect themselves and subordinate courts; it confers the jurisdiction of chartered High Courts on certain other High Courts. It further limits and controls the powers of the High Courts as provided in the Bill in respect of punishment.[15]

After a small protest by C. Duraiswami Aiyangar that copies of the Bill were not circulated,[16] Sir Alexander Muddiman was given leave to introduce the Bill. He had succeeded in obscuring the main purpose of the Bill which was to ensure that the whole higher judiciary should be vested with a total and uncontrolled power to deal with comments about any section of the judiciary.[17] The putative *quid pro quo* was the limited punishment clause. Six months in jail (including rigorous imprisonment) and two thousand rupees fine were not exactly lenient limits.

Dominated by prominent lawyers, the Assembly Debates got drawn into legalistic arguments about the existing case law[18] and inconsequential discussions as to whether the contempt jurisdiction had become obsolete in England.[19] Proceeding on the assumption that some kind of protection was necessary for courts—a view endorsed by Indian and European members[20]—the proposals were presented as technical, necessary and humane proposals. It is to the credit of Kelkar, who had himself had a taste of the law of contempt, to have exposed the intentions of the government :

[M]y first point is that the Preamble and the Statement of Objects and Reasons are entirely misleading.... If Government really wanted to do all that they want to do, they should have expressly said so in the Statement of Objects and Reasons, which, however, they have not done.... What is in the forefront of the Preamble is a desire or anxiety to reconcile certain conflicting judgments in the matter of contempt of court. But if you go into the details of the Bill you will find that much more has been imported into the body

15. (1925) V *L.A.D.* at 991 (11 February, 1925). Note the discussion at 990 on the conflict of opinion amongst the courts.
16. *Ibid.*
17. This poit was raised by N.G. Kelkar—as we shall see below.
18. (1925) V *L.A.D.* 1111 (Sir H.S. Gour) ; (1925) VI *L.A.D.* 367-8 (Sir Chimanlal Setalvad) ; 369-70 (Motilal Nehru).
19. (1925) VI *L.A.D.* 352 (Rangaswami Iyengar) 354 (E.H. Ashworth doubting the assertion made by Rangaswami Iyengar) 356 (R.K.S. Chetty stating that contempt was obselete only in respect of scandalizing the judges), 357 (N.G. Kelkar), 362 (Sir Henry Stanyon).
20. *Id.* at 351 (Rangaswami Iyengar) 353 (E.H. Ashworth); 363 (Sir Henry Stanyon), 367 (Sir Chimanlal Setalvad). E.H. Ashworth also relied upon his own experience as a judicial officer.

> of the Bill than is vouched for by the Preamble. The more objectionable features of the Bill appear to have been introduced, incidentally or, as it were, without any set or definite purpose .... If there was really any doubt as to the powers of certain superior courts to take cognizance of and punish contempts of court in subordinate court, the Bill should have been confined only to that purpose....[21]

He went on to argue that an old jurisdiction had been generously re-defined, "elevated (from)... what was an exception into a regular rule" and extended to give "an artificial and unjust protection to inferior tribunal".[22] He felt that after matters were decided "they must be left and handed over to general public opinion for criticism"[23] and argued :

> The Judges form part of one estate of the realm, the press forms part of another ; and I suppose the rights and obligations of one part of the realm may fairly be balanced against the rights and privileges of another constituent of the realm. And therefore my contention is that Government ought not to be so severe against the public press in the matter of criticising judgments in cases where the proceedings are not pending but have been finished.[24]

Even Kelkar did not stress the need to recognise the public interest in pending litigation. He did, however, argue that judges were themselves unscrupulous and misbehaved :

> Judges often behave in a way as if they were not amenable to any law, as if they are the incarnations of the King who is supposed to do no wrong. Judges abuse their authority and privileged position in three ways at least. They slander and abuse the parties, the court officers... sometimes even pleaders and counsel, all of whom have practically no protection against the Judges. This is an abuse of their powers. Secondly, they themselves in their personal remarks provoke contempt or ridicule, and are then angry if their critics indulge in a little bit of ridicule in return. Thirdly, judges are often guilty of non-judicial conduct on the Bench..."[25]

After approving of the apology provisions and the reduction in the limits of punishment, Kelkar went on to compare the Bill with the law of sedition and asserted :

> Government are giving individually to each judicial officer the whole of the artificial protection which they claim for themselves as a corporate body.[26]

21. *Id.* at 356-7.
22. *Id.* at 357.
23. *Id.* at 358.
24. *Id.* at 359.
25. *Id.* at 359-60.
26. *Id.* at 361.

Taken in by the manner the government introduced the Bill, several members reacted to Kelkar's speech with the response that they would now like the question to be put.[27]

British members like Colonel Sir Henry Stanyon tried to cash in on the sentiment that the High Courts and the British judicial system deserved protection.[28] Sir Alexander Muddiman made a spirited defence of the work of the magistrates.[29] Sir P.S. Sivaswamy Aiyer suggested that the Indian High Court judges were like bureaucrats who could not be trusted with these powers and who would be unprepared to give them up once they got them.[30] M.V. Abhyankar agreed with this and went on to assert that Indian judges and magistrates made some 'scandalous' decisions.[31] Unfortunately, this line of attack was not sustained. Sir Chimanlal Setalvad intervened in the debate to express "regret that during the course of this debate observations have been made calculated to lower the dignity and authority of our courts."[32] The debate reverted to legal issues such as whether the definition clause was adequate and whether the drafting was proper.[33] The matter was then referred to a Select Committee. The British had taken the precaution of using a long procedure along which they advanced stage by stage. Indian members could not really complain at this stage. Like Sir P.S. Sivaswamy Aiyer they could see no possible objection to sending the proposal to the Select Committee which had the right to make alterations and amendments.[34] They seemed to forget that as proposals advance through the fermenting process of procedure, they become more and more viable as they mature.

The Bill received rough treatment at the hands of the Select Committee. Much to the amusement of the Legislative Assembly, there were many dissenting reports.[35] The major achievement of the Select Committee was the deletion of the definition clause which made it an offence where :

> Whosoever, by words either spoken or written or by signs or by visible representation or otherwise, interfers with or obstructs or attempts to interfere with or obstruct the administration of justice in, or brings or attempts to bring into contempt or lowers or attempts to lower the authority of, a Court specified in the Sehedule or a Court Subordinate thereto.

27. *Ibid.*
28. *Id.* at 363.
29. *Id.* at 371.
30. *Id.* at 365.
31. *Id.* at 366-7.
32. *Id.* at 367.
33. (1925) V *L.A.D.* 1113 (Sir H.S. Gour); (1925) VI *L.A.D.* 351 (Rangaswami Iyengar); 356 (R.K.S. Chetty); 368 (Sir Chimanlal Setalvad); 370 (Motilal Nehru).
34. (1925) VI *L.A.D.* 365.
35. (1925) VI *L.A.D.* 1387 (16 September 1925).

It is a moot question as to whether this section is wider or narrower than the definition of contempt under the common law. While the attempt to entrench this definition was blocked, the opportunity for defining contempt narrowly was also lost.

It is with the clause by clause discussion of the Bill that the issues between some of the Indians and the British became clearer. The major issue was whether contempt power should be extended to the Chief Courts of the Judicial Commissioners—an issue on which A. Rangaswami Iyengar lost by 36 votes to 44 after Sir Alexander Muddiman made a misleading speech that the House had already accepted this basic principle before the matter had been referred to in the Select Committee and were now—in a sense—being asked to go back on their word.[36] Sir Alexander Muddiman's next move to give the Chief Courts power to commit for contempts of subordinate courts was narrowly defeated (42 : 43)[37] after the intervention of Sir Hari Singh Gour on the dangerous propensities of this move and despite an argument between Sir Hari Singh and Motilal Nehru as to whether the general contempt powers of the High Court were open to challenge or not.[38] Sir Alexander Muddiman then tried to give the High Courts an unlimited power to fine (and, thus) cripple Indian newspapers on the grounds that a limitation of Rs. 2000 was "an insult to the High Court".[39] This gained some support from Indians but was defeated by 49 votes to 40.[40] Khan Bahadur W.M. Hussanally, who was inducted into the Select Committee by Sir Alexander and who, on this matter, hardly voted against the government, tried to raise the limit of the fine from Rs. 2000 to Rs. 5000 on the grounds that big newspapers could easily afford the big fine and that Rs. 5000 would only be a 'fleabite' to Kelkar.[41] His move was defeated by 40 votes against 50.[42] Sir Alexander also accepted an amendment to the effect that an apology could be offered at any time during the trial and not just when at the stage of punishment.[43] This would obviously enhance the symbolic power of the court in enabling it to receive extended and unqualified apologies. With all these defeats, Sir Alexander was put in the advantageous position that he could complain that the House had gone back on its word in supporting his initial proposal to refer the matter to the Select Committee.[44] He made the pretence that he was forced to accept half a loaf of bread instead of the whole loaf.[45] The Indian

36. (1926) VII *L.A.D.* 746-9 (3 February, 1925).
37. *Id.* at 749-56.
38. *Id.* at 752-4.
39. *Id.* at 756 attributing the idea to Sir Henry Stanyon.
40. *Id.* at 758.
41. *Id.* at 759.
42. *Id.* at 760.
43. *Id.* at 760-1.
44. *Id.* at 758—see also 883-4 (8 February, 1926).
45. *Id.* at 884.

legislators with a few notable exceptions like U. Tok Kyi of Burma, C. Duraiswami Aiyangar, Sir Hari Singh Gour and Bipin Chandra Pal were not able to put their finger on their real cause of complaint.[46] When M.A. Jinnah asked Motilal Nehru what was wrong with the Bill, the latter replied that it was the extension of the contempt power to the Chief Courts. (Motilal Nehru had committed himself to the view that the High Courts' contempt power could itself be challenged). Jinnah was put in the position where he could ask with feigned incredulity : "Well, Sir, are we going to throw this Bill on that point alone ?" Nehru's response : "Yes that is my point"[47] was much too feeble to have clinched the issue. The Bill was carried by 63 votes to 27.[48]

By the time the Bill reached the Council of States, its future as an Act had become a *fait accompli.* Sir Alexander had assured Jinnah that fresh amendments would not be made in the Council. K.C. Roy suggested a decrease in the punishment to Rs. 500 and made the complaint that the Bill was not submitted to a Joint Committee of both Houses.[49] On the latter point J. Crerar (Home Secretary) was able to reiterate that the Bill 'a measure simple in itself, a concise measure',[50] had really been discussed at length. When V. Pantulu objected to extension of the power to Chief Courts,[51] he was attacked by P.S. Desika Chari for having missed the point that the Bill was really trying to clear a historical anachronism which gave these powers only to the Presidency High Courts.[52] Crerar used Chari's intervention to clinch the point that "it is surely in the interests not only of the legal profession but also of the courts and of the public that that law should be made precise and clear."[53]

By the time the Legislative Assembly returned to discuss contempt of court in 1937,[54] the 1926 statute had become fully accepted. The amendment was necessitated because the Lahore High Court claimed an unlimited power of punishment in respect of contempts of itself.[55] Sir Nripendra Sircar made it clear that he did not wish to go into the larger question of whether the law of contempt was archaic and needed to be revised or amended.[56] A.C. Dutta supported the Law Member because

46. *Id.* at 761 (U. Tok Kyi), 762-3 (C. Duraiswami Aiyangar), 763-4 (Sir H.S. Gour), 881-3 (Bipin Chandra Pal). The legal squabbles continued—note the exchange at 763-4 between Sir H.S. Gour and Motilal Nehru.
47. *Id.* at 765.
48. *Id.* at 885-6.
49. (1926) VII *C.S.D.* 332-3 (2 March, 1926).
50. *Id.* at 335.
51. *Id.* at 335-8.
52. *Id.* at 338-40
53. *Id.* at 341—note also the low-profile introduction at 330-2.
54. (1937) *L.A.D.* 340 (1 February, 1937), 638-41 (9 February, 1937).
55. *Hari Kishan Lal* v. *The Crown*, A.I.R. 1937 Lah. 497.
56. (1937) *L.A.D.* 638-9.

he "had some unkind words (with him)... yesterday criticised the Lahore High Court for making an obvious mistake and made only a passing reference to the fact that the Act of 1926 curtailed the freedom of the press.[57] The Law Member made it clear that "we cannot discuss High Court judges here" and did not concede that there was a need to deal with any ill effects of the 1926 legislation because of the High Court decision.[58] The discussion got lost in exchanges about whether Lalvani was a member of the House in 1926[59] and whether unkind words had been uttered by the law Member to Datta.[60] The Bill was passed.

In 1939, Datta returned to this subject by proposing a Bill which would define contempt, give further leeway to the press and public to comment on judicial matter and try to provide all the safeguards of an ordinary trial in contempt matters.[61] Lalchand Navalrai preempted the acceptance of the Bill by proposing that it be circulated for eliciting public opinion.[62] J.A. Thorne, the Home Member, readily accepted this proposal but pointed out that the proposals seriously curtailed the contempt power to cases of actual interference with the administration of justice in pending cases. He quoted Sir Chimanlal Setalvad and Motilal Nehru as being against a definition of contempt and argued that Datta's:

> Bill, is in the main a mere ressurrection of proposals which received a decent burial many years ago; and where as the definition of contempt, he departs from the proposals that were then made, it is an innovation which, it appears to the government should not be supported.[63]

These proposals were circulated for public opinion and, with the intervention of the Second World War, never revived.

Although the British could legitimately say that they had conceded a large number of points, they had succeeded in the main efforts to consolidate the power of the High Courts to punish for contempts of court against them or those subordinate to them and extended this power to Chief Courts in respect of contempts against the latter. They had limited the punishment. But the term of imprisonment was really quite extensive and the fine (of Rs. 2000) would still be quite a considerable imposition on many of the local native papers. Kelkar was right when he asserted that the tough law of sedition had been extended in relation to any kind

57. *Id.* at 640.
58. *Ibid.*—note Lalwani's point about dealing the past ill effects of the legislation at 639.
59. *Id.* at 640-1.
60. *Id.* at 641.
61. (1939) II *L.A.D.* 1122-3 and (1939) V *L.A.D.* 596-600.
62. *Id.* at 597.
63. *Id.* at 598-9.

of comments about courts. To some extent, Indian legislators were misled into accepting the limited technical nature of the Bill and finally convinced by the rhetoric that the courts deserved protection. Meanwhile, while lawyers traded fine points, a fairly significant Bill passed through to become a significant part of the law of British India.

III

The subject of contempt of court did not receive critical attention from the Constituent Assembly. It was eventually written into the Constitution as a 'reasonable restriction' on freedom of speech; there is no mention of freedom of the press in the Interim Report on Fundamental Rights, the discussion on the Interim Report, the Draft Constitution or the discussion on the latter.[64] Although J.P. Narayan wanted a forum for complaints against all officials including judges, the issue of 'contempt of court' was not raised.[65] 'Contempt of Court' was suggested as a restraint by T.T. Krishnamachari on 17 October 1949 just a few months before the Constitution was adopted.[66] After a discussion on whether the restrictions had to be qualified by the idea of "reasonableness",[67] R.K. Sidhva[68] and B. Das[69] attacked the contempt provisions on the grounds that the judge was converted into a kind of 'super god' and that 'contempt of court' was really an instrument to keep people down.[70] This caused Naziruddin Ahmad to emphasize the need to conduct "a trial in an atmosphere of calm."[71] The argument went no further. The President, sensing that a general attack was being made against the whole judiciary, administered the stern rebuke : "(The) individual judge ... may have erred, but we should not cast aspersions on the judiciary as a whole."[72]

Years later, the Sanyal Committee in 1963[73] and H.R. Gokhale in the debate in the *Rajya Sabha* in 1971,[74] put forward the view that because the Constitution makers had made the Supreme Court and the High Courts 'Courts of Record', the contempt jurisdiction of these courts could not be altered or reduced without an amendment to the Constitution.[75] The

64. (1947) III *Constituent Assembly Debates* (hereafter *C.A.D.*) 441 (29 April, 1947); VII *C.A.D.* 711-87 (1 December, 1949) while discussing the Draft Constitution circulated on 21 February, 1948.
65. B. Shiva Rao (ed.), *The Framing of the Constitution* (hereafter cited as *Shiva Rao* preceded by volume number) IV, 40.
66. X *C.A.D.* 394.
67. *Id.* at 395-7.
68. *Id.* at 398.
69. *Id.* at 400.
70. *Id.* at 399.
71. *Ibid.*
72. *Id.* at 401.
73. *Infra* note 103.
74. *Infra* note 165.
75. The point is not free from dispute, but there are persuasive reasons that the legislature does have the power to make changes in the law of contempt.

Report of the Ad Hoc Committee on the Supreme Court (1947) makes no mention of the contempt power or the words 'Court of Record'.[76] The Drafting Committee's Draft Constitution (1948)[77] contains no reference to the court's 'contempt power'. But, both the Supreme Court and the High Courts are mentioned as courts of record.[78] The Provincial Constitution contains no discussion on this subject.[79] It is difficult to say where these provisions were introduced. The questionnaire of the Constitutional Adviser[80] and the various responses do not discuss it.[81] The phrase 'Court of Record' is used without any explanation or discussion in the Constitutional Adviser's Memorandum and Notes to the Union Constitution Committee.[82] Further discussions on the judiciary do not go into this question.[83] The 'Court of Record' designation of the Supreme Court was not discussed in the Comments on the Draft Constitution[84] even though Atul Chandra Gupta did suggest that the phrase be deleted from the High Court provisions because it was taken from "Engiish legal history (which) has little meaning in Indian Constitutional Law."[85] Be that as it may, the phrase 'Court of Record' was retained in the Constitution without any serious comment either in the preliminary discussion or on the floor of the Constituent Assembly. H.V. Kamath did suggest the deletion of the phrase in the debate on the Supreme Court[86] because the phrase "is a borrowed phrase and we need not use it here."[87] At this stage, without any real discussion on this matter the Draft Article (Article 108) was amended to read:

> The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.[88]

Similar changes were made in the provisions on the High Court—once again with no discussion on this matter.[89]

There is no doubt that the Constitution-makers wanted to make the Supreme Court and High Courts 'Courts of Record' with the power to

76. II *Shiva Rao* 587-91.
77. III *Shiva Rao* 554-62.
78. Draft Constitution of India, 1948 ; articles 108 and 192.
79. II *Shiva Rao* 629.
80. *Id.* at 447-8.
81. *Id.* at 465 (per K.T. Shah) 486 (Documents of the Constitutional Advisor).
82. *Id.* at 521.
83. *Id.* at 532, 535, 547, 583, 600 and on the provincial judiciary at 629-30, 640, 662, 673-4.
84. III *Shiva Rao* 153.
85. *Ibid.*
86. VIII *C.A.D.* 378-83 (27 May, 1949).
87. *Id.* at 378-9.
88. *Id.* at 383.
89. *Ibid :* 657-8.

punish for contempt. But, there was no pointed discussion on the contempt power. Equally, the legislatures were given powers to legislate on contempt of court. There is no reason to suppose that the amendments and alterations in the contempt jurisdiction were totally out of the purview of the legislature. Otherwise it is difficult to see the intended purpose of the legislative power. There may still, however, be room for dispute as to whether the legislature could abolish this power of contempt altogether.

The Constitution-makers did not discuss the implications of the contempt power. Since a new Constitution was being promulgated in which the judiciary was given a prominent and responsible role, very little critical attention was diverted to the kinds of coercive powers the judiciary ought to have. This appears a little strange in view of the fact that the contempt jurisdiction had excited quite a significant body of case law and litigation. A very trusting and respectful attitude was taken of the judiciary.

It will be recalled that one of the major points of controversy about the 1926 statute arose over the question of whether Judicial Commissioners' courts should have the right to punish for contempt of subordinate courts. In 1950, a legislation was passed which gave this power to these courts.[90] Although some members of the legislature—notably M.P. Bhargava, Shiv Charan Lal, Pooncha—talked of the poor quality of justice offered by these courts,[91] the contempt of courts issue was not raised. Sardar Patel had convinced the House that the main purpose of the Bill was beneficial in that it provided, *inter alia*, for appeals to the Supreme Court.[92]

The substantive debate on the Contempt of Courts Act, 1952 were also very brief.[93] Once again, the Minister for Home Affairs, Katju, proceeded on the assumption that "High Courts are courts of record and occupy very deservedly the highest place in our estimation." He presented the debate as dealing with the technical question of whether High Courts should have the power to deal with contempts against them outside their jurisdiction. He felt that the point raised in the Bill was "a short one and to lawyers it has been of great interest for many many years."[94] The debate lasted for only a few minutes. Much of the time was spent in Thakur Das Bhargava asking Tek Chand—an expert on the law of contempt—whether the question of an extra territorial jurisdiction for High Courts to punish for contempts outside their state was justified.[95] Even

90. (1950) *Parliamentary Debates* part II, vol. II, 930, cols. 1297-1304 (9 March, 1950).
91. *Id.* at 1298-1303 ; *cf.* Hyder Hussain's explanation that the purpose behind the Bill was to close the gap left by the abolition of appeals to the Privy Council.
92. *Id.* at 1301.
93. (1952) *Parliamentary Debates*, part II, vol. I, cols. 1504-10.
94. *Id.* col. 1504.
95. *Id.* cols. 1505-8.

though the Act virtually re-drafted the whole of the law of contempt, the main proposals of the Bill were treated as non-contentious and passed without comment. Less time was devoted to the discussion of the law of contempt than to whether this—and other Bills—ought to extend to Jammu and Kashmir.[96]

From all this, it is clear that a small Bill which was introduced by the British to deal with some technical matters, had really provided the basis on which a consolidated law of contempt was introduced into India. Once this was done, it was here to stay. Apart from the brief attempt by A.K. Datta in 1939, and of the Press Commission in 1954[97] (which essentially revived the cases), to induce a reappraisal of the law, the quiet and surreptitious expansion of the law of the contempt went by unnoticed.

IV

The next attempt to re-examine the law of contempt was made on April Fools' day in 1960 when B.B. Das Gupta introduced a Bill to amend and consolidate the law of contempt of court in the *Lok Sabha*. The government appointed the Sanyal Committee to examine the law of contempt. The committee headed by H.N. Sanyal the Additional Solicitor General of India included W.S. Barlingay, Member of Parliament, G.R. Rajagopaul, Special Secretary and Member, Law Commission, Legislative Department, Ministry of Law, L.M. Nedkarni, Joint Secretary, Ministry of Home Affairs, and Mr. H.C. Daga, Joint Secretary and Legal Adviser, Department of Legal Affairs, Ministry of Law. The Committee began a process of consultation—taking care to "address the public in general, and in particular, the State Governments, High Courts, Bar Councils, High Court Bar Associations, Universities and the Indian Law Institute."[98] More attention was paid to legal opinion than the opinion of those—like the press—who were affected by the law of contempt. The general attitude of the committee was conservative. It apologised for being "over cautious",[99] declared that it was trying to "devise a set of

96. *Id.* cols. 1509-10 (raised by J.R. Kapoor).
97. *Report of the Press Commission* (1954) I, 408-488. Note the observation at pr. 1089 that "The Indian Press as a whole has been anxious to uphold the dignity of courts and the offences have been committed out of the ignorance of law relating to contempt than to any deliberate intention of obstructing justice or giving affront to the dignity of courts. As stated before instances when it could be suggested that the jurisdiction has been arbitrarily or capriciously exercised have been extremely rare and we do not think that any change is called for either in the procedure or in the practice of the contempt of court jurisdiction exercised by the High Courts". This analysis has a different emphasis from our own review of the case law in Chapter II.
98. *Sanyal Committee Report* (1963) 2, the Bill was introduced in the *Lok Sabha* on April 1, 1960. 41 *L.S.D.* (Second Series) col. 9187.
99. *Ibid.*

rules which would stay clear of the Scylla of the contempt of judicial authority and the Charybdis of undue restraints on the individual's freedom"[100] and ending up by supporting the judiciary:

> [F]or we would certainly not wish to recommend anything which may tend to undermine the confidence of the public in the administration of justice—a confidence which is so essential for the preservation of our liberty.[101]

To begin with, the committee, after stating that the administration of justice was as old as Kautilya[102]—an invocation to the ancient texts being obligatory for any Indian committee—very seriously circumscribed the constitutional limitations within which Parliament could change the law. The committee virtually concluded that Parliament could scarcely alter the law. Its conclusions on this matter were summed up as follows:

> Under the Constitution Parliament is competent to legislate on contempt of courts subject only to the limitations that it cannot (*i*) abrogate, nullify or transfer to some authority, the power of superior courts to punish for contempt, (*ii*) exercise its power so as to stultify the status and dignity of the superior courts, and (*iii*) impose any unreasonable restrictions on the fundamental right of the citizen to freedom of speech and expression.[103]

This was almost like saying that Parliament could do anything as long as it did not change the *status quo*. These limitations on the power of Parliament were important and were used many years later by Law Minister Gokhale to restrain Parliament from making too many radical changes.[104]

The committee also refused to de-limit the definition of contempt on the basis of the strange argument that enumerating the broad heads of the contempt power would be too inexhaustive and a new definition would make some existing powers obsolete.[105] In other words, a new

100. *Ibid*
101. *Ibid.*
102. *Id.* at 3.
103. *Id.* Chapter XII: Conclusion: (4) at 58. This matter is discussed in Chapter III at 13-8.
104. *Infra*; see discussion on the Contempt of Courts Bill, 1968.
105. *Sanyal Committee Report*, *supra* note 98 at 22-7. The following definition was nevertheless suggested : "Whoever by words, either spoken or written, or by signs or by visible representation or otherwise:—
   (*a*) interferes or attempts to interfere with, or obstructs or attempts to obstruct, the administration of justice; or
   (*b*) scandalises or attempts to scandalise, or lowers or attempts to lower the authority of, a court of justice; or
   (*c*) publishes or makes false or misleading reports of, or comments on, pending proceedings or any stage thereof;
   is said to commit contempt of court".

definition could not be attempted because such a definition might fulfil the very kind of a function that a definition is supposed to fulfil—namely, provide a clear idea as to what an offence is really about.

Having decided not to upset the *status quo* or re-define the vague offence of contempt, the committee began by accepting the proposals which were proposed by an unofficial committee on the subject and reforms which had been enacted in the law of contempt in England.[106] Thus, innocent distributors and those who did not know of the pendency of proceedings were given a defence and proper provisions were made to provide appeals.[107] In addition to such 'English' suggestions, there were also some proposals outlining a fair procedure,[108] allowing for the fair and accurate reporting of judicial proceedings[109] and permitting fair comments on a case after it was disposed of.[110] It was expressly admitted that courts had the power to restrict the reporting of certain matters which were heard *in camera*—having left the question of the extent of these powers quite open by a reference to a somewhat vague and indecisive comment by Lord Haldane in a House of Lords case of 1913.[111]

Apart from making a few useful suggestions about procedure, appeals and the protection of an inadvertent contemnor, the committee did not really fully discuss the broad sweep of the law of contempt, its effect on the press and the need to look for alternative methods of balancing the competing interests which such a law intruded and pronounced upon. It was a lawyers' report, dealing with legal questions and which took its lead from changes which had recently occurred in England.

Even the limited proposals of the Sanyal Committee lay fallow for five years after which a Bill was referred to a Joint Select Committee of the two Houses of Parliament.[112] For the first time in the debate in the *Rajya Sabha*,[113] on whether the Bill should be referred to the Joint Committee, some attention was paid to the problems of the press. The *Rajya Sabha* had many members who were also newspaper men and who had, at some stage or the other, been cited for contempt. Prominent

106. *Id.*, at 11, 19-20, 21, 36, note 2 where the British Report is mentioned.
107. *Id.*, Chapter VII "Contempt in relation to Innocent Dissemination", 37-8. Note the reference to English reform.
108. *Id.*, Chapter X, 47-52 and Chapter XI, 53-7.
109. *Id.*, Conclusion 14 (*i*), 59.
110. *Id.*, Conclusion 14 (*ii*)—the defence of the 'public good' was also recommended in such cases.
111. *Id.*, Chapter VIII, 39—42. The case in question was *Scott* v. *Scott*, (1913) A.C. 417.
112. Contempt of Courts Bill, 1968: *Gazette of India Extraordinary*, pt. II, section 2, p. 95 (29 February, 1966).
113. (1968) 66 *Rajya Sabha Debates* (hereafter *R.S.D.*) cols. 1454-76 (26 November, 1968); 1601-42 (27 November, 1968).

amongst these were Antani,[114] A.D. Mani,[115] Bhadran,[116] Jagat Narain[117] and Bhupesh Gupta.[118] R.K. Karanjia's case[119] was mentioned by several speakers. The debate tended to be a bit unruly and was interrupted by several points of order—many of which were raised by Bhupesh Gupta.[120] Some speakers complained that not enough time was allotted to the debate.[121]

The debate was introduced by K.S. Ramaswamy, Minister of Home Affairs, who after admitting that "there was a great need to modify the law of contempt" outlined what were in effect the proposals of the Sanyal Committee.[122] Before Antani could speak there was a wrangle about the membership of the committee and when it should report.[123] The point was obviously one of substance because the Joint Select Committee came back to the House for at least three extensions after it was set up.[124] Antani recounted how his paper had been "dragged in court" because they had missed out the word "alleged".[125] While criticising the punitive aspects of the law of contempt, he congratulated the government and was satisfied that the government was protecting free speech and the dignity of the courts.[126] It was A.D. Mani who really split the debate wide open by arguing that the public interest in litigation and the administration of justice ought to be given due recognition and contempt of court clearly recognised so that people at least knew what the offence

114. 66 *R.S.D.* cols. 1459-60 (26 November, 1968).
115. *Id.*, cols. 1460-7.
116. *Id.*, cols. 1607-11.
117. *Id.*, cols. 1629-33.
118. Bhupesh Gupta's entire contribution appears to have taken place in the form of interruptions.
119. *Id.*, col. 1460 (in an interjection) 1463 (A.D. Mani), 1610 (M.V. Bhadran) 1601-3 (A. Arora), 1607 (B.K.P. Sinha); 1640 (K.S. Rajamony), 1490 (M.N. Verma). *P.C. Sen's* and *Namboodiripad's* cases were mentioned by M.V. Bhadran (cols. 1608-9) and A.D. Mani (cols. 1460-7) mentioned the cases he was involved in.
120. *Id.*, col 1455 (on adding A.D. Mani's name); 1457-8 (on the date the Joint Select Committee should report back). It should be noted that there were approximately 70 interruptions by some member or the other during the speeches of other members when the latter had the floor of the House.
121. *Id.*, cols. 1625, 1635-6.
122. *Id.*, col. 1456.
123. *Id.*, cols. 1457-9.
124. The Joint Select Committee came for extensions in their time to report on several occasions. Para 10 of its *Report* states: "The Report of the Committee was to be presented to the House by the last day of the Sixty-seventh session of the Rajya Sabha. The Committee were, however, granted extension of time three times. First up to the last day of the sixty-ninth session; then upto the first day of the Seventieth session and then again upto the first day of the Seventy-first session of the Rajya Sabha."
125. 66 *R.S.D.* col. 1459.
126. *Id.*, col. 1460.

was.[127] He criticised the idea of giving courts powers to proceed with cases *in camera* and argued strongly that the contempt provisions should not extend to protecting Commissions of Inquiry—a matter which had caused considerable controversy in England in the late sixties and India in the aftermath of the Emergency.[128] This general line was followed except that Niranjan Verma did suggest that many newspapers could not be trusted to behave responsibly.[129]

Amidst a host of irrelevant controversies—like whether the Bill should extend to Jammu and Kashmir[130]—the discussion concentrated on the definition clause with some attention given to the question of contempts of Commissions of Inquiry.[131] The discussion often reached a very comical level as when Thillai Villalan described the kind of definition he would like:

> If we put a question "What is a cow ?", the answer is : "It is not an ass", "It is not a horse", "It is not a fox". In that way, an attempt, has been made. My humble submission is that we must straightaway give the definition for a cow. What does a cow mean ? Cow is a cow. We must give definition to that. As a lawyer I can say what is contempt. Contempt is an act which is calculated to interfere with, or has a tendency to interfere with, the due process of law, with the administration of justice. We can put it like that.... But the Bill says all sorts of things, just like the answer to "What is a cow ?"— "It is not an ass."[132]

But he did not indicate the kind of definition he wanted. And this represents one of the real difficulties in the debate. While certain problems were indentified, the speakers were not able to give very clear guidelines about the kind of law they actually wanted. Parallels between a contempt of court and a contempt of Parliament were incompletely worked out. No clear guidance was provided as to the limits of permissible

127. *Id.*, cols. 1460-7.
128. The matter of contempts of Commissions of Inquiry became quite an important matter in England in the sixties: See Royal Commission on Inquiries Act, 1921 (1966) *Cmnd.* 3121—see further, Chapter II, note 49, *supra*,
129. 66 *R.S.D.* col. 1468.
130. *Id.*, cols. 1639-40 where the constitutional difficulty is inadequately explained.
131. *Id.*, 1474 (K.P. Mallikarjunudu), 1474-5 (A. Arora), 1607 (M.V. Bahdran), 1619 (B.B. Das), 1627-9 (Kesavan), 1628-9 (T. Villalan), 1630 (J. Narain). The commission of inquiry question was raised by A.D. Mani (1467), J. Narain (1631), B.B. Das (1624—and note the interjection of A.D. Mani at 1625). In response K.S. Ramaswami, Deputy Minister in the Ministry of Home Affairs felt that it was very difficult to give a definition to contempt and that neither commissions of inquiry nor labour tribunals case falls within the purview of the intended Bill.
132. *Id.*, col. 1628.

criticism of the courts. Only A.D. Mani[133] and B.K.P. Sinha[134] were cogent and consistent in their views. The latter presented a powerful case that the American practice should be followed and the law in India "should be brought in line with the law as it obtains in free countries of the world".[135] Much of the debate was repetitive, depended on anecdotal information and consisted of the expression of the simple sentiment that something was wrong with the arbitrary law of contempt.[136]

The *Lok Sabha* referred the matter to the Joint Committee without any discussion.[137]

The Joint Select Committee followed a slightly broader pattern of discussion than the Sanyal meetings.[138] Of its 26 meetings, 3 each were held in Madras, Calcutta and Bombay and witnesses were also allowed to present their views. Apart from the Press Council of India and the universities, most of the bodies specifically requested to react to the Committee's brief were people and institutions with legal backgrounds[139] 48 memoranda and 38 witnesses lobbied the committee. Despite all this, the committee's report is a legalistic one which does not really canvass the competing arguments. It merely looks at the clauses and does not take the argument much further than the recommendations of the Sanyal Committee apart from defining the law of contempt. Despite its claim and hope that its definition would "remove uncertainties arising out of an undefined law and help the development of the law of contempt on healthier lines",[140] the committee did not make any alterations in the law of contempt. The law of contempt was still as wide and extensive as it had always been. Its catchment area was not reduced. The committee did, however, tidy up the law relating to imminent proceedings (by specifying the exact time when proceedings became pending) and laid down

133. *Id.*, cols. 1460-7.
134. *Id.*, cols. 1612-8. Bhupesh Gupta seemed to have a point of view which was difficult to decipher because his contribution to the debate (at this stage) largely consisted of interruptions and interjections.
135. *Id.*, col. 1618.
136. On the arbitrary aspects of contempt see, 66 *R.S.D.* cols. 1460 (Antani), 1462 (A.D. Mani), 1467 (N. Verma), 1604 (A. Arora), 1609-10 (M.V. Bhadran), 1620-1 (B.B. Das), 1625-6 (Kesavan), 1633 (Chitta Basu—demanding a codification of the law of contempt), 1637-8 (B.N. Mandal). Note K.P. Mallikarjunudu's speech (at cols. 1472-1475) examining the constitutional provisions and paying some attention to the clauses of the proposed Bill.
137. 23 *L.S.D.* (IVth Series) No. 6 cols. 16-18 (14 December, 1968).
138. Report of the Joint Committee on the Contempt of Courts Bill, 1968; Government of India, *Gazette Extraordinary* pt. II sect. 2 (23 February, 1970).
139. *Id.*, pr. 6. The referees were the Supreme Court and High Courts, the Bar Councils and Bar Associations, Attorney-Generals, Solicitor-General and Advocate-Generals, Press Council, Association of Working Journalists and the Indian Law Institute.
140. *Id.*, pr. 15

that comments would be permitted on cases which were not pending.[141] It also facilitated the making of complaints against the lower judiciary[142] and, while allowing for the fair and accurate reporting of judicial proceedings, left the circumstances under which report of such proceedings could be limited somewhat vague.[143] The courts' power to exact unconditional apologies was undermined.[144] The rule that contempts must interfere substantially with the administration of justice was incorporated.[145] A new clause was added to make it possible to punish judicial officers who committed contempt of their own courts.[146] Time limits were imposed within which contempt actions would have to be commenced[147] and *Nyaya Panchayats* were exempted from the contempt jurisdiction.[148]

The Minority Report after giving an emotional account of the power of contempt used by the British courts in India,[149] thought that it was "to the credit of the Joint Select Committee that it applied its mind somewhat independently on the subject without permitting itself to be enmeshed in the cobwebs of the Sanyal Committee's outdated wisdom."[150] This was despite the fact that the Committee used the Sanyal Committee's proposals as a base.[151] But Bhupesh Gupta (along with three colleagues) rightly argued that there were many essential points missed by the Joint Select Committee.[152] He felt that an extended ideological and theoretical criticism of the judges should be allowed "instead of brandishing the *danda* (stick) of the law of contempt."[153] He then went on to discuss the right of the public to take interest in pending litigation:

> It is in public interest that the justice is administered without unjust and obstructive interference. But what amounts to such interference is the crucial issue to be settled. The Joint Select Committee made some effort but, we regret to say, the solution has eluded it. One can understand interference if physical threats are used or bribes offered or so on .... But why (should) comments on cases or reporting of the same (...) be restricted.[154]

141. *Id.*, pr. 16—comment on clause 3.
142. *Id.*, pr. 16—comment on clause 3 (2).
143. *Id.*, pr. 16—comment on clause 6.
144. *Id.*, pr. 16—comment on clanse 12.
145. *Id.*, pr. 16 comment on clause 13.
146. *Id.*, pr. 16 comment on clause 16.
147. *Id.*, pr. 16—comment on clause 20.
148. *Id.*, pr. 16—comment on clause 21.
149. Minority Report of Bhupesh Gupta, V. Vishwanatha Menon, S.M. Banerjee, D. Sen Gupta, pr. 2-4
150. *Id.*, pr. 4.
151. The basic strategy was the same as that of the Sanyal Committee even though the Bhargava Committee went beyond the Sanyal Committee on certain matters.
152. Minority Report, *supra* note 149, pr. 7.
153. *Id.*, pr. 9-10 (*sic.*)
154. *Id.*, pr. 10.

Having raised a fairly fundamental question, Bhupesh Gupta diluted its importance by reserving to the press the right to make incorrect and misleading reports and, further, complicated the issues by suggesting that the real people who interfered with the due administration of justice were the police and big business.[155] . He approved of the change in the law as to when a case is pending and severely criticised the 'new definition.'[156] He wanted there to be no punishment clause and argued that people should be guilty of only wilful and malicious attempts to obstruct the administration of justice.[157] Having thanked the various witnesses and the members of the committee, the Minority Report made an eloquent attack on the "wall of stiff bureaucratic resistance to any radical change in the original Bill... (because the bureaucrats) could not get themselves to understand what was happening in public life outside or even in the minds of many members of the Joint Committee."[158]

The Minority Report of S.C. Goyal wanted comments on cases pending appeal to be permitted, restrictions to be placed on matrimonial reporting and some mechanism to prevent journalists from being harassed by frivolous proceedings.[159] K.K. Nayar wanted the Bill to permit 'fair and correct' rather than 'fair and accurate' proceedings.[160]

There is no doubt that the Joint Select Committee had while relying on the Sanyal Committee's recommendations strayed beyond that framework. Some of its innovations—like the 'definition' clause—did not really change the law. Other provisions—such as, those on pending proceedings and fair reporting of cases—were new. Sometimes, the baby was thrown out with the bathwater—as, for example, when a power was conceded to the courts to restrict reporting in respect of certain broad categories of cases. The Minority Report of Bhupesh Gupta was right in asserting that the committee had overlooked and not gone into many important issues.[161] When the Bill recommended by the Joint Select Committee reached the *Rajya Sabha*,[162] H.R. Gokhale presented fresh amendments to the Bill which virtually did away with some of the important changes recommended by the Joint Select Committee.[163] This move was challenged by Bhupesh Gupta who requested the government to withdraw these amendments—diluting his case somewhat by making allegations that Gokhale's secretary was behaving irresponsible outside

155. *Id.*, pr. 11-12.
156. *Id.*, pr. 17.
157. *Id.*, pr. 18 (on the 'wilful' concept); pr. 23 (on the punishment clause).
158. *Id.*, pr. 27.
159. Separate Minority Report of Shri Chand Goyal.
160. Separate Minority Report of K.K. Nayar.
161. Minority Report, *supra* note 149, prs. 8-9.
162. (1971) 78 *R.S.D.* No. 4 (18 November, 1971) cols. 203-56; No. 6 (22 November, 1971) cols. 104-63
163. 78 *R.S.D.* (No. 4) cols. 207-12 (18 November, 1971).

Parliament in respect of another matter, which had nothing to do with the law of contempt.[164] Using the Sanyal Committee as his starting point, Gokhale argued that any substantive change in the law of contempt was not possible because it would take away from the High Courts and Supreme Court power which had been given to them by the Constitution.[165] Without going into the merits of the controversy, Gokhale put a gloss on the entire debate by making it clear that no real reform was possible. In particular, three new changes according to Gokhale—could not be made. These were abolition of the contempt jurisdiction in respect of imminent proceedings, the new clause making it possible for judicial officers to be cited for contempt and the modification of the proposal that a contempt case could be transferred from one judge to another. No one challenged Gokhale's interpretation of the Constitution. There was some talk of the amendment of the Constitution but Gokhale was able to demonstrate that any such proposals had very wide implications.[166] Quite apart from the constitutional restrictions, it was clear that Gokhale did not really like some of the proposals of the Joint Select Committee. Thus, he attacked the proposal to make judges liable in contempt on merits:

> Every day the courts will be flooded with umpteen applications against the Judges themselves and what I said was that in the limited knowledge which I have relating to this law I have not come across in any other country a provision that Judges speak something in the due performance of their duties and they themselves are hauled up for contempt.[167]

Bhupesh Gupta's earlier retort

"How do you know ? Have you gone to all the courts in the world?"[168] does not really clinch the issue. Gokhale had an arguable case. The real difficulty was that he had decided that there was to be no discussion on these matters because it was readily assumed that any change in this regard would perpetuate an unconstitutionality.

Bhupesh Gupta's narrower argument that Gokhale was going back on his word to the Joint Select Committee was only partly answered on the basis of constitutional mandate. In the main, it was ignored. Gupta

164. *Id.*, cols. 203-6.
165. *Id.*, cols. 210-11.
166. 78 *R.S.D.* (No.) col. 111 (19 November, 1971) (on the question of the amendment of the Constitution). This question was also touched upon in 78 *R.S.D.* No. 4 at 215-6 (D.P. Singh), 223 (K. Chandrasekharan) and 228-9 (K.P. Mallikarjunudu). Bhupesh Gupta hinted (at No. 5 col. 126-7) that officials were responsible for the Law Minister taking this view.
167. 78 *R.S.D.* (No. 4) col. 210 (18 November, 1971).
168. *Id.*, col. 209.

argued that Chavan, the Home Minister, had conceded the government's acquiescence in respect of the Joint Select Committee's proposals. The exchange went as follows:

> Sri H.R. Gokhale: ... (He) made it clear that he reserved the right to move an amendment later on...
>
> Shri Bhupesh Gupta: No ...
>
> Shri H.R. Gokhale: Anyhow, we are doing a very serious matter relating to contempt of court ...
>
> Shri Bhupesh Gupta: Where is his note of dissent ...
>
> Mr. Deputy Chairman: Don't interrupt, Mr. Bhupesh Gupta.
>
> Shri Bhupesh Gupta : He appended a note of dissent to the Select Committee's report. Therefore, what is the use of trying to influence some members? We are deeply impressed by Mr. Chavan. He took his defeat sportingly. He appended a note of dissent to the majority report. The Government was actually party to the report...
>
> Mr. Deputy Chairman: Please sit down.
>
> Shri Bhupesh Gupta: If Mr. Gokhale is trying to influence some members, it would be bad.[169]

After that the argument went by default.

Since Gokhale had convinced the *Rajya Sabha* that they could only hope for a limited response, the preliminary discussion became a general debate on the judiciary. It was generally argued that judges should not get touchy.[170] Comments were made on the judges themselves. It was said that one judge used to touch the feet of Govind Ballabh Pant,[171] Chief Justice Sinha had joined business,[172] Justice Bhagwati told a lawyer 'to shut his trap',[173] and that a Nagpur judge had called one of the parties before him 'a cad'.[174] Since the issue of judges committing contempt of court was a part of the Bill, all this was not exactly irrelevant, but this anecdotal treatment of the issue converted the debate into a general 'judge

169. *Id.*, col. 206.
170. *Id.*, cols. 213 (M. Ruthnaswamy), 220-2 (J.P. Mathur), 234 (B. Gupta), 251 (A.D. Mani) and at No. 5 col. 106 (H.R. Gokhale).
171. *Id.*, col. 215 (B. Gupta).
172. *Id.*, col. 215-6 (B. Gupta).
173. *Id.*, col. 248 (B. Gupta).
174. *Id.*, col. 249 (A.D. Mani).

bashing' session. This culminated very logically in Bhupesh Gupta's assertion that judges were part of the bourgeoisie system and "the greatest criminals in many respects."[175]

There was some discussion on the merits of the Bill. Some people liked the definition.[176] While one member thought that it merely put the law of contempt "on a more solid base."[177] Some of the well known contempt cases—*Namboodripad's* case,[178] the *Blitz* case,[179] the *P.C. Sen* case[180]—were mentioned. The controversy about 'imminent' cases received some attention and K. Chandrasekharan went on to argue lack of knowledge of pending proceeding should be a general defence.[181] Bhupesh Gupta wanted a clean break with the British past and presented, in substance the suggestions which he had made in his dissenting report.[182] In a sense the real debate was postponed until the clause by clause consideration of the Bill. A.D. Mani hoped that Gokhale would withdraw his "sheaf of amendments" and hoped that he would "honour the report of the Committee in spirit and not bring amendments to the various clauses which water down the amendments."[183]

Gokhale made it clear that he simply had to stay within the contours of the Constitution and, in any event, the contempt proposals were not only for the defence of the judges but also to protect the accused.[184] He replied to each of the major arguments—even obligating Mani with the citation of a case—and left matters standing exactly where they were.[185]

It is in the clause by clause consideration that something quite remarkable happened. At first, Gokhale successfully blocked Bhupesh Gupta's amendment, that only 'wilful' obstruction of the administration of justice should be punished as contempt,[186] with his stock reply that the constitutional provisions did not really permit a change in the law.[187] But while discussing Gokhale's own amendment of the "imminent" rule, there was a storm of protest.[188] In particular, Bhupesh Gupta said that on the

175. *Id.*, col. 234.
176. *Id.*, 212 (M. Ruthnaswamy), 223 (K. Chandrasekharan) and 230 (K.P. Mallikarjunudu).
177. *Id*, col. 246 (A.P. Chatterjee).
178. *Id.*, cols. 22-3 (K. Chandrasekharan), 246-7 (A.P. Chatterjee).
179. *Id.*, cols. 226-7 (K. Chandrasekharan), 236 (B. Gupta).
180. *Id.*, col. 217 (D.P. Singh).
181. *Id.*, col. 226.
182. *Id.*, cols. 230-41.
183. *Id.*, col. 252.
184. 78 *R.S.D.* No. 6 cols. 105-6, 108 (22) November, 1971).
185. *Id*, col. 113.
186. *Id.*, cols. 114-123.
187. *Id.*, col. 122. But there is some discussion on the merits of the argument at col. 123.
188. *Id.*, cols. 123-9.

preceding Thursday the Minister had agreed to look at the objections of the House to any amendments to the Joint Select Committee's report:

> This is the result of your thought? You got Friday, Saturday and Sunday and you never consulted any of us. Well, we thought that you would give consideration to it, why didn't you hear our views? Are only the officials everything that matter with you and are not we anything? Sir, this is contempt of Parliament.[189]

Gokhale withdrew his amendment after pointing out that his constitutional objections were part of the record on the preservation of the 'imminent' rule.[190] While several of Gokhale's amendments including a major one imposing some limitations on the transfer of a contempt case from one judge to another were accepted[191] his attempt to delete the clause dealing with contempts by judges was frustrated after a volatile discussion.[192] Gokhale had lost the debate on two important points. At the final reading critics continued to pass comments on the Bill.[193] Although there had been little discussion of freedom of speech, even Bhupesh Gupta was satisfied:

> I think the Contempt of Court Bill will at least remedy one thing. We will be in a position to criticise, to comment better than before. The Damocle's sword shall not always hang over our heads.[194]

Before he could end his congratulations, the Deputy Chairman rang what Bhupesh Gupta called 'music'[195] (the bell) and the debate ended soon after.

After this the Bill passed on to the *Lok Sabha*.[196] Gokhale recounted his concessions in the *Rajya Sabha* and presented the Bill as one "that takes care of all possible situations which arise in the law relating to contempt".[197] Once again the discussion went off on a tangent. M. Halder's[198] attacks on the judges had to be cut short by the Speaker with the words, "This Bill is not about the conduct or appointment of Judges. It deals with contempt of courts."[199] C.M. Stephen made a thoughtful

189. *Id.*, col. 127.
190. *Id.*, col. 129.
191. *Id.*, cols. 140-1. Other amendments made by Gokhale were clarificatory amendments to cl. 6 (at cols. 130-1), on the right to appeal from Judicial Commissioners in cl. 19 (at cols. 147-8) and a formal amendment about the date of the enactment and the enabling formulae (at cols. 149-51).
192. *Id.*, cols. 141-8.
193. *Id.*, cols. 151-3 (P. Das), 153-5 (Thillai Villalan), 155-9 (B. Gupta), 161-2 (S. Sanyal).
194. *Id.*, col. 158.
195. *Id.*, cols. 158-9.
196. (1971) X *L.S.D.* (Vth Series) cols. 9-40 (20 December, 1971).
197. *Id.*, col. 10.
198. *Id.*, cols. 11-4.
199. *Id.*, col. 12.

speech on introducing the general law of *mens rea* into the law of contempt,[200] criticised the fact that evidence could not be adduced against a judge,[201] pointed out some procedural irregularities[202] and questioned the restriction that the Attorney or Advocate General's consent was needed to initiate a contempt action.[203] This last point was supported by Indrajit Gupta.[204] S.M. Banerjee raised the general question about comments on pending cases[205]—a point which received some support in a meandering speech by Krishna Menon[206] and by S. Seshiyan.[207] S.M. Banerjee and K. Manoharan questioned the right of judges to determine what fair comment was.[208] It was in answer to these queries that Gokhale made it clear that Parliament simply had to trust the judges and try and protect them from unfair criticism.[209] Even though Gokhale may have been right on the specific point, his response begs the whole question if not the entire controversy. The law of contempt had to be reformed because it reposed too much power and discretion in the hands of the judiciary.

It is interesting to note that although there were various critics of various provisions in the *Lok Sabha*, not a single amendment was moved by any of the members.[210] So, when Krishna Menon made a long speech on the *Namoodiripad* case,[211] which he, as counsel, had lost in the Supreme Court, it seemed as if he was merely using this parliamentary opportunity to recoup his defeat. R.V. Bade's long criticisms, at the third reading, seem strange after he had obviously made no attempt to move any amendments.[212] Even Halder who was so critical of the judiciary and, in particular, the 'definition' clause,[213] made no effort to hazard an attempt to change the law. Undoubtedly, the existence of a government majority had something to do with this reticence.

In both the Houses, many important issues were not fully discussed. The freedom of the presss was not really brought up as a constitutional issue. Much of the debate consisted of attacks on the judiciary—often straying into levity and irrelevance with undisguised ease. A lot of energy

200. *Id.*, col. 15.
201. *Id.*, col. 16.
202. *Id.*, cols. 16-7 asking that if all contempts in certain cases would be tried by a Division Bench no question arose of appeals in such cases by a Single Judge; see further analysis on other texual problems at cols. 18-9.
203. *Id.*, cols. 17-8.
204. *Id.*, col. 30 (in an interjection).
205. *Id.*, col. 23.
206. *Id.*, cols. 33-7.
207. *Id.*, col. 39.
208. *Id.*, cols. 21-3 (S.M. Banerjee), 26 (K. Manoharan).
209. *Id.*, col. 27.
210. *Id.*, col. 31 (clauses 2-24 were added on to the Bill and passed without any discussion).
211. *Id.*, cols. 33-7.
212. *Id.*, cols. 33-8.
213. *Id.*, col. 14.

was diverted into persuading Mr. Gokhale that he should not create constitutional limitations in the way of implementing the Joint Select Committee's proposals.

The debate did not really stray too wide of the framework of the Joint Select Committee Report. Bhupesh Gupta did try to secure acceptance for some of the recommendations of the Minority Report. He did not succeed. In the *Lok Sabha*, the government were able to seal the debate with a note of satisfaction that it had done all that was needed to be done and that the law of contempt had really taken care of all possible situations.[214]

The Contempt of Courts (Amendment) Bill, 1976 did not provide the occasion for a renewed debate on contempt of court.[215] The purpose behind the Bill was to provide a mechanism for initiating contempt cases (other than on the motion of judges) in Delhi. V.A. Seyid Muhammed introducing the Bill in the *Rajya Sabha*[216] treated it as a matter of resolving "practical difficulties".[217] High Courts, other than Delhi, had an Advocate General to initiate proceedings. It was proposed that in Delhi this power should be given to such officers as notified by the Delhi High Court. Bir Chandra Deb tried to expand the debate by suggesting that the Bill was not as simple as was suggested and the law on contempt had been made more complex by the Contempt of Courts Act, 1971.[218] He argued that the consent of the Advocate-General should not be necessary to initiate proceedings[219] and alleged that judges behaved badly.[220] The Bill was treated as a routine matter and passed on to the *Rajya Sabha*.[221]

In the *Lok Sabha*, V.A. Seyid Muhammad made virtually the same speech that he had made in the *Rajya Sabha*.[222] D. Joarder admitted the necessity of the Bill,[223] but questioned the need for preserving the provision requiring the permission of the Attorney-General to initiate proceedings.[224] Alleging that judges behaved badly and that the Bar and Bench should realise that they too must contribute to maintaining the prestige and dignity of the Court,[225] he observed :

214. *Id.*, cols. 9-10 (Gokhale's opening speech).
215. *Gazette of India*: pt. II, p. 401 (19 January, 1971) see further 94 *R.S.D.* cols. 109-10.
216. (1976) 96 *R.S.D.* 95-100 (8 March, 1976).
217. *Id.*, col. 96.
218. *Id.*, col. 97.
219. *Id.*, cols. 97-8.
220. *Id.*, cols. 98-9 (A comment which may have been made during the Emergency for political reasons).
221. *Id.*, cols. 99-100.
222. (1976) 59 *L.S.D.* cols. 220-1 (26 March, 1976) and continued at cols. 141-7 (29 March, 1976). The comment was made on 26 March, 1976.
223. *Id.*, col. 141 (29 March, 1976).
224. *Id.*, col. 142.
225. *Id.*, col. 144.

A Joint Committee consisting of Members from both the Houses had also considered this Bill before it was passed. We remember that though the original Bill was processed and recommended by the Joint Committee, there were a lot of amendments made in each and every clause of the Bill. At that time most of the amendments brought forward by the individual Members of both the Houses were not taken into consideration, by the Ministry and some of the amendments were very important which should have been considered and should have been incorporated in the Bill. The Bill should have been amended at that time. But even now I would request the Hon'ble Minister to take into consideration all those amendments. I would request that all the lacunae in the original Act should be removed. I do not want to dilate much on this. I would simply request the Hon'ble Minister to take into consideration all those amendments again.[226]

This plea was ignored and the debate continued. B. Barua[227] defended the Advocate-General provisions on the grounds that these saved the time of the court. And then the debate finished and the Bill was passed.

Parliament seemed to have come to the conclusion that the Contempt of Courts Act, 1971 provided the right kind of framework to house the contempt jurisdiction. Even the critics of the Act, merely wanted some amendments to be passed. They did not want to look further ahead.

V

Apart from the efforts made by judges, the unequivocal and total introduction of the law of contempt was made possible only by legislative intervention in 1926. The chief protagonist of this move was Sir Alexander Muddiman who introduced the Contempt of Courts Act, 1926 virtually on the basis that the legislature was merely intervening in order to deal with some judicial decisions which were making the law illogical and inconvenient. With the exception of a few legislators, most of the legislators accepted the footing on which Sir Alexander proceeded. Minute discussions on the state of the law often obscured the main purpose of the law which was to give the judiciary the same kind of protection which the new law of sedition gave to the rest of the administration. It was a matter of triumph for Sir Alexander that he was able to introduce this law, manoeuvre himself into a moral position where he could complain that the legislature let him down and, at the same time, be seen to have made important concessions to the opposition.

This set the stage for much of the debate on contempt. Apart from some amendments in 1939—which never materialised anyway—no

226. *Id.*, col. 143.
277. *Id.*, col. 145. The Bill was received back by the *Rajya Sabha* on 30 March, 1976—see 95 *R.S.D.* 99-100.

critical attention was devoted to the law of contempt. Even in the Constituent Assembly when the provisions relating to freedom of speech and expression were being discussed the need for a contempt jurisdiction as a restriction on freedom of speech was accepted by most members. In 1952, K.N. Katju proceeded on the assumption that the law of contempt was much needed and all that he was trying to do was to clear some technicalities.

It is only from 1963—after the Report of the Sanyal Committee—that the law of contempt really came to be considered with a reforming perspective. Unfortunately, the Sanyal Committee had committed itself to the view that major changes in the law of contempt were unconstitutional and that the needs of the judiciary had a priority over everything else. There are many things wrong with the law of contempt in respect of its arbitrary procedure and the fact that it punishes even those who commit inadvertent mistakes without really knowing that the courts were seized of the matter. The Sanyal Committee, by and large, looked at these problems of the law of contempt. In this, it got some assistance from some changes in the law of England and from an unofficial report published in London in 1959. The Joint Select Committee took the matter further in certain respects. Even though it made some important changes, it did not, however, travel too far away from the broad framework set by the Sanyal Committee.

No sooner had the Joint Select Committee report been submitted to Parliament and the accompanying legislation considered, than Gokhale threw a spanner in the works by suggesting that major reforms could not be made in the law of contempt. Although the *Rajya Sabha* fought this advice and ignored it on two matters, it cast a gloss on the whole debate in the *Rajya Sabha*, In the *Lok Sabha* the discussions of the *Rajya Sabha* were virtually treated as a *fait accompli*. Even critics of the Bill did not move any amendments.

All in all, legislatures have considered this question on three occasions. The first spell was from 1914, when changes were suggested in the Penal Law, and which culminated in the statute of 1926. The next spell was in 1952 when the matter was scarcely looked into. The last spell was from the Sanyal Committee. There is a view that this last spell has really concluded the debate. In effect, it has not. Under pressure from the government view that radical changes cannot really be made, serious questions about the relationship between public opinion and the courts have not really been considered. All this discussion has proceeded on the basis that there are no alternatives to the law of contempt. Although many of the changes made in 1971 clear certain anchronistic, oppressive and inconvenient cobwebs from the law of contempt, a large part of the debate is not over. It remains pending and should begin.

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Attorney-General v Times Newspapers Ltd

QUEEN'S BENCH DIVISION
LORD WIDGERY CJ, MELFORD STEVENSON AND BRABIN JJ
7th, 8th, 9th, 17th NOVEMBER 1972

Contempt of court – Publications concerning legal proceedings – Pending proceedings – Test to be applied – Serious risk that course of justice likely to be interfered with – Pressure affecting party's freedom of action in settling proceedings – Comment designed to bring pressure on party to settle action on more generous terms – Children allegedly injured by drug – Claims against drug manufacturer – Newspaper wishing to publish article concerning manufacturer – Intention to bring pressure on manufacturer to settle claims at more generous figure – Risk of interference with manufacturer's freedom of action in litigation.

From about 1958 until 1961 D Ltd manufactured and marketed in England a drug known as thalidomide. In 1961 a number of children were born with terrible deformities. Investigations into the cause of that occurrence pointed to the conclusion that it was due to the mothers of the children taking thalidomide during pregnancy. Writs alleging negligence were issued in 1961 against D Ltd on behalf of 62 of the children affected. Those actions were settled on D Ltd agreeing to pay 40 per cent of the damages which it was estimated would have been payable by them in the event of full liability being established, in return for the allegations of negligence being unreservedly withdrawn. In 1968 some 266 further writs were issued with leave against D Ltd on behalf of the children affected by their mothers having taken thalidomide. In 1972 negotiations were taking place with a view to the possible settlement of those claims when the defendants started to publish a series of newspaper articles on the plight of the thalidomide children. The defendants' purpose in publishing the articles was to persuade D Ltd to recognise their moral obligations to the children. The general theme of the articles was that the children were not being fairly treated. In the articles published in September and October 1972 criticism was made of the time that was passing without any settlement of the pending actions, and of the way in which judges generally assessed the sums payable in such cases. It was contended that the amount payable to the children was likely to be insufficient. Subsequently the defendants wished to publish a further article, which was then in draft and traced in detail the history of the development, marketing and testing of thalidomide. The draft article did not purport to express any views as to the legal responsibility of D Ltd for the sufferings of the children concerned but it was critical of D Ltd and charged them with neglect in regard to their own failure to test the drug or to react sufficiently sharply to warning signs obtained from tests by others, suggesting in all a substantial degree of negligence by D Ltd. The editor of the newspaper considered that it was in the public interest that the article should be published before a final settlement of the claims against D Ltd was reached, for only if that was done could it be of benefit to the children. The Attorney-General sought an injunction restraining publication of the article on the ground that the publication would be a contempt of court.

Held – (i) It was contempt of court for a party in a pending action to be subjected to pressure by reason of unilateral comment on his case if that pressure was of a kind which raised a serious prospect that he would be denied justice because his freedom of action in the case would be affected. The test of such contempt was whether the words complained of created a serious risk that the course of justice might be interfered with; in each case that test had to be applied in the light of all the surrounding circumstances (see p 1142 h and p 1145 a, post).

(ii) On the evidence the defendants were deliberately seeking to influence the settlement of pending proceedings by bringing pressure to bear on D Ltd and the publication of the article complained of would create a serious risk of interference with D Ltd's freedom of action in the litigation; accordingly the injunction would be granted (see p 1146 c, post).

Dicta of Lord Hardwicke LC in *The St James's Evening Post Case* (1742) 2 Atk at 469, 471, of Maugham J in *Re William Thomas Shipping Co Ltd* [1930] 2 Ch at 376, and of Blackburn J in *Skipworth's Case* (1873) LR 9 QB at 232, 233 applied.

Per Curiam. It is not the function of the court in proceedings for contempt to balance competing interests, i e the protection of the administration of justice and the right of the public to be informed on grave and weighty issues of the day. Where comment raises a serious risk of interference with legal proceedings the law requires that it should be withheld until those proceedings have been determined (see p 1145 f to h, post).

Notes

For contempt of court in relation to pending proceedings, see 8 Halsbury's Laws (3rd Edn) 7-10, paras 11, 12, and for cases on the subject, see 16 Digest (Repl) 6, 7, 1-9, 25-38, 180-336.

Cases referred to in judgment

Attorney-General v London Weekend Television Ltd p 1146, post.
Church of Scientology of California v Burrell (30th July 1970) unreported.
Daw v Eley (1868) LR 7 Eq 49, 38 LJCh 113, 33 JP 179, 16 Digest (Repl) 33, 278.
Dawson, ex parte, Re Australian Consolidated Press Ltd [1961] SRNSW 573.
Hunt v Clarke (1889) 58 LJQB 490; sub nom *Re O'Malley, Hunt v Clarke* 61 LT 343, CA, 16 Digest (Repl) 29, 224.
Ludlow Charities, Re, Lechmere Charlton's Case (1837) 2 My & Cr 316, 6 LJCh 185, 40 ER 661, LC, 16 Digest (Repl) 8, 14.
Robson v Dodds (1869) 20 LT 941, 16 Digest (Repl) 31, 247.
S v Distillers Co (Biochemicals) Ltd, J v Distillers Co (Biochemicals) Ltd [1969] 3 All ER 1412, [1970] 1 WLR 114, Digest (Cont Vol C) 287, 165*h*.
St James's Evening Post Case, The, Roach v Garvan (or Hall) (1742) 2 Atk 469, 26 ER 683, Dick 794, 16 Digest (Repl) 6, 1.
Schenck v United States, Baer v Same (1919) 249 US 47.
Skipworth's Case (1873) LR 9 QB 230, 28 LT 227; sub nom *R v Skipworth, R v De Castro* 2 Cox CC 371, DC, 16 Digest (Repl) 23, 171.
Taylor's Application, Re [1972] 2 All ER 873, [1972] 2 QB 369, [1972] 2 WLR 1337, CA.
Tichborne v Tichborne (1870) 39 LJCh 398, 22 LT 55, 16 Digest (Repl) 29, 216.
Vine Products Ltd v Mackenzie & Co Ltd (or Green or Daily Telegraph) [1965] 3 All ER 58, [1966] 1 Ch 484, [1965] 3 WLR 791, Digest (Cont Vol B) 206, 275*a*.
William Thomas Shipping Co Ltd, Re, H W Dillon & Sons Ltd v The Co, Re Sir Robert Thomas [1930] 2 Ch 368, 99 LJCh 560, 144 LT 104, 16 Digest (Repl) 31, 251.

Cases also cited

Alliance Perpetual Building Society v Belrum Investments Ltd [1957] 1 All ER 635, [1957] 1 WLR 720.
Attorney-General v Butterworth [1962] 3 All ER 326, [1963] 1 QB 696, CA.
Carl-Zeiss-Stiftung v Rayner & Keeler Ltd [1960] 3 All ER 289, [1960] 1 WLR 1145.
Cheltenham & Swansea Railway Carriage & Wagon Co, Re (1869) LR 8 Eq 580.
Coats (J & P) v Chadwick [1894] 1 Ch 347.
Crown Bank, Re, Re O'Malley (1890) 44 Ch D 649.
Gaskell & Chambers Ltd v Hudson, Dodsworth & Co, R v Hudson, ex parte Gaskell & Chambers Ltd [1936] 2 KB 595, DC.
Kitcat v Sharp (1882) 52 LJCh 134.
New Gold Coast Exploration Co, Re [1901] 1 Ch 860.
R v Duffy, ex parte Nash [1960] 2 All ER 891, [1960] 2 QB 188, DC.

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R v Metropolitan Police Commissioner, ex parte Blackburn (No 2) [1968] 2 All ER 319, [1968] 2 QB 150, CA.

Thomson v Times Newspapers Ltd [1969] 3 All ER 648, [1969] 1 WLR 1236, 3 CA.

Webster v Bakewell Rural District Council [1916] 1 Ch 300.

Action

On 12th October 1972 the Attorney-General as plaintiff issued a writ against the defendants, Times Newspapers Ltd, the publishers of the Sunday Times newspaper, claiming an injunction to restrain the defendants by themselves, their servants or agents or otherwise from publishing or causing or authorising to be published or printed an article dealing, inter alia, with the development, distribution and use of the drug thalidomide, a copy of which had been supplied to the Attorney-General by the defendants. By a summons also dated 12th October 1972 the Attorney-General applied to the judge in chambers for an interim injunction restraining the defendants from publishing or causing or authorising the publication or printing of the article until the trial of the action or further order. By consent of the parties on 20th October 1972 the matter was ordered to be transferred to the Divisional Court of the Queen's Bench Division. By consent the hearing of the application was treated as the trial of the action. The facts are set out in the judgment of the court.

The Attorney-General (Sir Peter Rawlinson QC), Gordon Slynn and *N D Bratza* in support of the claim.

Brian Neill QC and *Charles Gray* for the defendants.

Cur adv vult

17th November. **LORD WIDGERY CJ.** The judgment which I am about to read is the judgment of the court in this case. Judgment in the *London Weekend Television* case[1] is not ready, but will be delivered, I hope, early next week.

In these proceedings the Attorney-General moves for an injunction to restrain the Sunday Times newspaper from publishing an article on the subject which is conveniently described as 'the plight of the thalidomide children'. The basis of the application is that the publication would be a contempt of court.

The facts relevant to this matter, so far as they need to be referred to in this judgment, are in exceedingly small compass. During the 1950s a German chemical manufacturing company produced a new drug which has been sold under a variety of titles but which for present purposes may simply be described as thalidomide. It was in the nature of a tranquilliser or sedative, and certain exceptional advantages were claimed for it as compared with other drugs designed for a similar purpose, notably that it had no toxic effects and consequently eliminated the risk apparent in some other drugs of death being caused by an overdose, or by children obtaining access to the drug. The Distillers company (to whom we will refer as 'Distillers'), who were traditionally more interested in the production of whisky and other spirits, became interested in the marketing of drugs during the second world war. Distillers became aware of the existence of thalidomide and entered into negotiations with the German company with a view to that drug being manufactured and marketed in England by Distillers. Production in England by Distillers began in about the year 1958 and continued until 1961 when the drug was finally withdrawn from the market. A substantial advertising campaign was mounted in this country, and the sales in this period were considerable. Amongst others who received the drug on prescription were a number of expectant mothers.

In 1961 a number of children were born with perfectly horrible deformities. Investigation into the cause of this disaster pointed to the conclusion that it was due to their mothers having taken thalidomide during their period of pregnancy. Accordingly in 1961 legal action on behalf of these children against Distillers as the producers of the drug was contemplated. The parents of the children concerned

1 See *Attorney-General v London Weekend Television Ltd*, p 1146, post

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very sensibly got together and received the best legal advice on their position. This court is able to confirm that such legal advice was available from its knowledge of the personalities who were concerned to advise on the children's behalf. There seems to be little doubt that the children's parents were advised on the scientific aspects of the case by equally eminent experts in that field. In the result, in 1961 some 62 writs were issued against Distillers on behalf of 62 of the children affected.

The Attorney-General has properly described this as a unique case. It certainly raised legal issues of considerable difficulty. In the first instance there was the problem not solved in English law at the present time, of whether an unborn child can suffer injuries which permit of its bringing an action for damages after its birth. Put another way, the case raised the question of whether damage to a foetus could ever result in an action for damages by the child. Further, any claim against Distillers was bound, according to English law, to fail unless it could be established that Distillers had been guilty of negligence in the legal sense, and the prospect of proving negligence in a subject-matter ranging so widely over a large undertaking and a substantial period of years was obviously a formidable one. There could be no doubt that if the 62 actions proceeded in the normal way there was a serious possibility that all would fail on one or other of the grounds to which we have referred. Accordingly, and as it seems to us, sensibly, the representatives of the children entered into discussion with the representatives of Distillers to see whether a basis of compromise could be achieved, and in the end it was agreed that the cases might be settled on the footing that Distillers accepted responsibility for 40 per cent of the damages which would have been payable by them in the event of full liability being established. Whether this was a sensible and suitable settlement on behalf of the children is not for us to say, but we see no reason on the information before us to think that it was other than a sensible conclusion in the face of all the difficulties which lay in the children's path.

It having been decided that the basis of settlement should be 40 per cent, it was then agreed that two representative actions should be heard with a view to ascertaining the amount of damages which would be payable on an assumption of full liability, and 40 per cent of which would be payable under the terms of the compromise. These two actions were heard by Hinchcliffe J[2], and, in the end, some 60 of the then pending actions were finally compromised on the basis of the children receiving 40 per cent of the figure which, on Hinchcliffe J's estimation, would have been payable to them on a footing of full liability. Those cases are now finally disposed of, and any possibility of appeal is past.

There have, in the intervening years, however, been a number of further actions brought. We are told that in 1968 or thereabouts some 266 further writs were issued. In some instances the plaintiffs were in difficulties because of the operation of the Limitation Acts, but however that may be, a substantial number of actions on the lines of those dealt with by Hinchcliffe J are now pending. It is on this account that the Attorney-General contends that publication of the article now under consideration will be a contempt of court.

Over the years since the circumstances of this tragedy were discovered, the press and television have, from time to time, published articles or other commentary on the fate of these unfortunate children. These articles have, in the most part, been carefully prepared in the light of the so-called sub judice rule, and until 1971 no complaint was raised that they in any way tended to interfere with the operation of the court in disposing of the cases still pending. In the main, they merely drew the attention of the public to the circumstances of the children, and kept the public memory of the tragedy alive. However, in 1971 a number of newspapers began to take a somewhat firmer line, and to concern themselves with the fairness or otherwise of the solution which was being worked out in the courts.

2 In *S v Distillers Co (Biochemicals) Ltd, J v Distillers Co (Biochemicals) Ltd* [1969] 3 All ER 1412, [1970] 1 WLR 114

This court is not in possession of details of the negotiations which have been going on in regard to the further 266 cases, but we do know that a new style of compromise was under discussion which would have involved Distillers putting up a charitable trust fund from which provision might be made for the benefit of the children, and in December 1971 the Daily Mail published an article which prompted complaints from the parents' side that it might jeopardise these delicate negotiations and thus be a contempt of court. No proceedings were taken in consequence of the Daily Mail article, and no further reference to it is necessary.

However, in the summer and autumn of 1972 the Sunday Times began a series of articles giving wide coverage to this whole subject. One must attempt, in summarising the effect of these articles, to be fair to both sides, and we think it is fair to say that the general theme of the Sunday Times articles was that the children were not being fairly treated. Criticism was made as to the manner in which Hinchcliffe J had assessed the sum payable, the criticism being directed not at the learned judge himself so much as at the method by which judges generally arrive at such an assessment. Criticism was also directed to the time which was passing without settlement of these disputes, and we detect a general criticism of the prevailing situation in that by one means or another it was contended that the amount payable to the children was likely to be insufficient. Articles on these lines appeared in the Sunday Times on 24th September, and on 1st, 8th, 15th, 22nd and 29th October 1972. In some cases complaint was made to the Attorney-General that these articles amounted to a contempt of court, but he decided to take no action on them, and it is only in regard to a further and, as yet, unpublished article, that this court is required to adjudicate.

The court has read a draft of the article complained of, and in proceedings of this nature it is desirable that as little publicity as possible be given to the contents of the document the publication of which will itself be alleged to amount to a contempt of court. It suffices, we think, to say that the article is clearly the product of many years of work, and that it traces the history of the development, marketing and testing of thalidomide from the very earliest times and in very considerable detail. The article does not purport to express any views as to the legal responsibility of Distillers for the sufferings of the children concerned, but it is quite clear that it is in many respects critical of Distillers and charges them with neglect in regard to their own failure to test the product, or their failure to react sufficiently sharply to warning signs obtained from the tests by others. No one reading the article could, we think, fail to gain the impression that the case against Distillers on a footing of negligence was a substantial one.

The circumstances in which this draft was prepared, and the intention of the editor of the Sunday Times, are set out with great frankness and clarity in an affidavit made by the editor himself, Mr Harold Matthew Evans. Amongst other points which he makes in his affidavit he says that this article has been carefully checked and re-checked for factual accuracy, and that if it is published and attracts a claim for libel from Distillers, it is the intention of the Sunday Times to defend that claim by justification as well as by any other appropriate means. The Attorney-General has not suggested that the observations contained in this article are false in fact, and, accordingly, it seems to us that for the purposes of this application we ought to approach the article on the footing that its allegations are true.

Mr Evans's motives in deciding to publish this article are stated with equal clarity and candour. In para 24 of his affidavit he explains how his purpose in the earlier articles was to argue the moral case for a substantially better financial provision for the children. He goes on to say that these arguments have been of no avail, in that they have not affected Distillers' attitude, and in sub-para (b) of para 24 he says this:

> 'It is apparent that arguing the moral case ad infinitum is therefore not only likely to be without benefit to the children, but that an article such as the draft which is the subject of these proceedings needs to be published for only then can the true strength of the moral case be judged.'

It is, I think, important to say that a great deal of the factual material in the article comes from documents in the possession of Distillers which documents were disclosed on discovery in one of the earlier decided cases. It is therefore clear that the parties are themselves advised of these matters, and that there is no obstacle to their being raised in court in any subsequent litigation if the parties wish so to raise them. In any event, it was unnecessary to publish the material in a newspaper if all that was sought to be done was to ensure that the parties were adequately informed of the position.

In sub-para (d) of para 24, Mr Evans says:

> 'It is self-evident that if publication of this or similar articles is prevented until after the conclusion of all litigation, it will be of no benefit whatsoever to those now seeking adequate financial provision to help them cope with their injuries. Ten years have passed since the tragedy. The children are now entering their most difficult and expensive years. The need for help is now.'

It seems to us quite clear that Mr Evans is making the point that unless these matters can be published to the world now, and thus allowed to affect public opinion on this issue, they cannot have any ultimate effect on the outcome of any future litigation. This seems to us to make it perfectly clear that the intention behind publication is that public opinion shall be aroused on this issue, and that as a result of such public opinion the children may obtain better terms than would otherwise be available to them. If the matter were in doubt, it is, we think, concluded by the last sentence in sub-para (e) of para 24, which reads:

> 'Unless Distillers can be persuaded to increase their offer, such parents and children will be forced to accept a settlement which bears no relation to their real needs.'

Since the only effect of publication will be to mobilise public opinion on the children's behalf, it seems to us again that the purpose of publication is to affect the outcome of the pending litigation. Finally, if any doubt on this matter were still left, it would, we think, be resolved by what Mr Evans says in para 26 of his affidavit. It is this:

> 'I therefore came to the conclusion that it was in the public interest that I should publish the draft article and that if I delayed doing so until after the final settlement of all claims against Distillers the article would not be of any benefit to the children. I admit that my purpose in seeking to publish the draft article is to try to persuade Distillers to take a fresh look at their moral responsibilities but I submit that this persuasion is in no way improper. In my judgment the fate of these children is of great concern, not only to their parents, but to the country as a whole.'

In the course of his argument before us counsel for the defendants has laid great stress on the fact that at no time has the editor attempted to argue that Distillers' legal rights are unsound. Much point is made of the fact that the only purpose of the Sunday Times has been to persuade Distillers to recognise their moral obligations. We see no distinction in this case between persuasion directed to a legal obligation, and persuasion directed to a moral obligation. The avowed purpose of the article is to persuade Distillers to pay more, or to settle for a higher figure than they would otherwise be minded to settle for, and the means by which this result is intended to be achieved is not by supplying the children's advisers with additional and valuable information, but by supplying that information to the public so that public opinion may be brought to bear on Distillers' attitude to this case.

We must now turn to consider the law on this subject. The phrase 'contempt of court' in this context is a somewhat unhappy one because it suggests to the layman

that the court is concerned with preserving its own dignity. In fact the court's concern is not with the preservation of the dignity of itself or its judges, but with ensuring that justice shall be administered impartially in the court. The essence of a hearing in court is that both parties should present their evidence at a single hearing, before a single tribunal, and that each should be able to place before that tribunal whatever matter it considers to be relevant within the rules of evidence. The objection to unilateral comment, prior to the conclusion of the court hearing, is that such comment may prevent the due and impartial administration of justice in one of three principal ways. First, it may affect and prejudice the mind of the tribunal itself. It is perfectly true that as juries are employed in fewer cases in civil actions than heretofore, the risks of contempt under this head have been somewhat diminished. It is widely recognised that a professional judge is likely to be unaffected by temperate comment on the case before him, even though that comment is one-sided, but we should not, in out judgment, too readily accept the proposition that a judge sitting alone is not open to prejudice of this kind. Unfortunately the comments made on pending proceedings are not always temperate, and, indeed, they may in some instances be so strong as to amount to a threat to the judge that if he does not follow the arguments there put forward, he may be severely criticised, if not pilloried subsequently. If the comment is such as to amount to an implied threat of this kind, it may very well be contempt of court, even though the tribunal is to be a judge alone, but, happily, this is an aspect of contempt with which the present case is not concerned.

The second class of prejudice which may result from unilateral comment before the hearing of a case is that the comment may affect witnesses who are to be called. In an extreme case the comment might amount to a threat to the witness sufficient to deter him from giving evidence at all, and even where the comment is temperate and in no sense threatening, it is well known that witnesses often have difficulty in reconstructing the events of an occurrence some time previously, and it is clearly possible that comment sufficiently strong and sufficiently often repeated might persuade a witness, quite unwittingly, to adopt a version of the events to which he speaks which is not the true version at all. Here again, happily, there is no element of this kind in the present case, because most of the comment in the article complained of is of a highly scientific character which would be quite unlikely to prejudice the opinion of scientific witnesses subsequently called to speak to it.

The third form of prejudice, and the one relevant to the present case, is a prejudice to the free choice and conduct of a party himself. As will appear in a moment, when we turn to the authorities, it is quite clearly established that comment on a pending action, directed to the conduct and integrity of a party, may have the result of causing that party to abandon his claim or to settle his claim for a lower figure than he would otherwise have been prepared to accept. If a party is subjected to pressure by reason of unilateral comment on his case, and that pressure is of a kind which raises a serious prospect that he will be denied justice because his freedom of action in the case will be affected, then a contempt of court has been established and may be the subject of prosecution or injunction.

The first authority is that of Lord Hardwicke LC in *The St James's Evening Post Case*[3] where he said:

> 'Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there any thing of more pernicious consequence, than to prejudice the minds of the publick against persons concerned as parties in causes, before the cause is finally heard.'

Later he said[4]:

3 (1742) 2 Atk 469
4 (1742) 2 Atk at 471

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'There are three different sorts of contempt. One kind of contempt is scandalizing the court itself. There may be likewise a contempt of this court, in abusing parties who are concerned in causes here. There may be also a contempt of this court, in prejudicing mankind against persons before the cause is heard. There cannot be any thing of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters.'

Lord Hardwicke LC's judgment has been constantly referred to, and followed in the judgments of the succeeding 200 years: for example, by Malins V-C in *Robson v Dodds*[5], by Stuart V-C in *Tichborne v Tichborne*[6], and, in the present century by Maugham J in *Re William Thomas Shipping Co Ltd*[7]. In the last mentioned case the form of contempt alleged in the hearing before us is put by Maugham J in these terms[8]:

'I think that to publish injurious misrepresentations directed against a party to the action, especially when they are holding up that party to hatred or contempt, 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 which he otherwise would not come to, for a like reason.'

The judgment of Blackburn J in *Skipworth's Case*[9], also contains a valuable summary of the principles which we have to apply[10]:

'But there is another, and a much more important purpose, for which proceedings for contempt of Court become necessary. When a case is pending, whether it be civil or criminal, in a Court it ought to be tried in the ordinary course of justice, fairly and impartially . . . Now, it may happen, and in many cases does happen, that persons interfere for the purpose of preventing that ordinary course of justice . . . More commonly the mode adopted has been that of an attempt to influence the trial by attacking, deterring and frightening witnesses, or by commenting on the case, or, as it is called, appealing to the public, and endeavouring, by statements made ex parte, without the other side being heard, and without the means of testing the matter which the law requires, to prejudge the case and prejudice the trial . . . When an action is pending in the Court and anything is done which has a tendency to obstruct the ordinary course of justice or to prejudice the trial, there is a power given to the Courts . . . to deal with and prevent any such matter . . .'

Later Blackburn J[11] cites Lord Cottenham LC in *Re Ludlow Charities*[12] in these words:

'All these authorities tend to the same point; they shew that it is immaterial what measures are adopted, if the object is to taint the source of justice, and to obtain a result of legal proceedings different from that which would follow in the ordinary course.'

In many of the decided cases, the words complained of were alleged to have been published with the deliberate intention of interfering with the course of justice, but

5 (1869) 20 LT 941
6 (1870) 39 LJCh 398 at 404
7 [1930] 2 Ch 368 at 373
8 [1930] 2 Ch at 376
9 (1873) LR 9 QB 230
10 (1873) LR 9 QB at 232, 233
11 (1873) LR 9 QB at 235
12 (1837) 2 My & Cr 316 at 342

Blackburn J did not restrict his observations to those cases, and in *Daw v Eley*[13] Lord Romilly MR accepted that unintentional interference could amount to contempt. He said[14]:

> '... they ought not to prejudice the minds of the public beforehand by mentioning circumstances relating to the case. Now, if that is done with the intention of perverting the ends of justice there is no question that the Court would stop it, and very often the Court will judge for itself what are the fair inferences to be derived from the publications which appear; but it must also go beyond this; it must stop the publication where the evident result would be to affect the administration of justice, though that might not have been the intention of the person who did it.'

A man who is unaware of the existence of pending proceedings will of course have a defence to a charge of contempt, but if he is aware of them he must not comment in such a way as to interfere with their outcome.

These observations which we have quoted are of a general character, but it is well established that not every comment on pending proceedings will amount to contempt. A constantly recurring phrase in the authorities is that the comment must be 'intended' or 'calculated' to interfere with the course of the proceedings: see Cotton LJ in *Hunt v Clarke*[15]. There must therefore be a relationship between the publication of the comment and its potential effect on the trial. If it be shown that the publisher actually intended to interfere with the course of justice he can rarely be heard to say that his comment would not have that effect. But in other cases the potential prejudice must be proved or capable of being inferred. The essential element to be proved is that the comment was 'calculated' to interfere with the proceedings, but (perhaps in an attempt to make the test more intelligible to a layman) many judicial synonyms have been attempted. Thus in *Vine Products Ltd v Mackenzie & Co Ltd*[16] Buckley J said[17]:

> 'The test must always be, in my judgment, whether or not in the circumstances of the particular case what has happened is something which is likely to prejudice the fair trial of the action, and the risk that it will prejudice the fair trial of the action must be a real risk.'

In *Church of Scientology of California v Burrell*[18] James J put it this way:

> 'I take the view that the law at present is that it does amount to a contempt if there is a publication which entails and involves a grave and substantial risk that the administration of justice will be interfered with.'

Another possible interpretation of the law contended for is that it must be shown as a matter of probability that interference with the course of justice will follow, and we have also been reminded of the phrase adopted in the United States of America[19], namely, that there must be a 'clear and present danger' of interference.

We think that all these judicial definitions are attempting to describe the same thing, and we do not intend to increase the confusion by adding yet another definition of our own. It may be that to a lawyer the word 'calculated' is precise enough, but the decision to publish or not must often be taken by a layman, and we would prefer to adopt the words which are most helpful to him. Accordingly, we adopt the for-

13 (1868) LR 7 Eq 49
14 (1868) LR 7 Eq at 59
15 (1889) 58 LJQB 490 at 492
16 [1965] 3 All ER 58, [1966] 1 Ch 484
17 [1965] 3 All ER at 63, [1966] 1 Ch at 498
18 (30th July 1970) unreported
19 See *Schenck v United States* (1919) 249 US 47 at 52

mula that the test of contempt is whether the words complained of create a serious risk that the course of justice may be interfered with. In each case this test must be applied in the light of all the surrounding circumstances. It is no answer to a charge of contempt that the facts alleged are true (see Blackburn J in *Skipworth's Case*[20]) because a comment which deals with only one side of a case may be highly prejudicial even if it contains no factual inaccuracy within itself.

Counsel for the defendants' main argument is that even if the authorities support the conclusion that it is a contempt of court to make any comment which involves a serious risk of interference with the course of legal proceedings, these rules are outdated, and, being merely procedural, should be relaxed. He submits that the court's concern with a possible prejudice to the public mind, has lost much of its force with the decline in jury trials, and that the increase in public interest in newspaper articles and broadcasts on current affairs has produced a new climate in which the news media have both the right and duty to keep the public informed on matters of great public interest, even if some interference with the course of legal proceedings may result. He contends that in cases like the present there are really two competing public interests; one, the protection of the administration of justice, and another, the right of the public to be informed on the grave and weighty issues of the day, and he says that even if a case of contempt has been made out within the authorities to which we have referred, the publication should not be punished or restrained if, on balance, the latter interest is the more important, in the circumstances of the particular case.

This is a new doctrine so far as the English cases are concerned, although it appears in the New South Wales case of *Ex parte Dawson*[1] where Owen J said:

> 'The discussion of public affairs . . . cannot be required to be suspended merely because the discussion . . . may, as an incidental and not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant.'

That is not this case.

The English authorities to which we have been referred do not require the court to balance competing interests, but require that a comment which raises a serious risk of interference with legal proceedings should be withheld until those proceedings are determined. We think that this is a matter of substantive law and not merely of practice, and we think that these authorities bind us. The balancing of competing public interests is an administrative rather than a judicial function, and if left to the courts would give rise to uncertainty and inconsistency of decision, and even if we had felt free to take a different view, we should not have regarded the increased power and importance of the news media as a ground for relaxing the law of contempt, but, if anything, an argument to the contrary. Further, the issue in the present case is not whether the full story of thalidomide should be told or withheld for all time, but whether it should be told *now* rather than after the determination of the pending cases. We cannot see a public interest in immediate disclosure which could possibly outweigh the public interest in preventing the application of pressure to the parties to pending litigation.

We have not overlooked Mr Evans's concern that ten years have already elapsed since the tragedy, and that the majority of the claims remain unsettled. We know nothing of the intermediate negotiations except so far as they relate to the abortive attempt to set up a charitable trust (see *Re Taylor's Application*[2]). This delay is, no doubt, a matter of public concern, and a criticism of a legal system which permits

20 (1873) LR 9 QB at 232, 235
1 [1961] SRNSW 573 at 575
2 [1972] 2 All ER 873, [1972] 2 QB 369

of such delay could be so framed as to run no risk of contempt. What is not permitted is an attempt to break the deadlock by applying pressure to one party with a view to inducing him to settle.

We return to the facts of this case. Having failed in his previous attempts to make Distillers honour what he considers to be their moral obligation, Mr Evans wants to publish material which tends to show that the company was at fault. He wishes to do this now before negotiations are concluded, and his undoubted motive is to enlist public opinion to exert pressure on Distillers and cause Distillers to make a more generous settlement than might otherwise be the case. He has been careful not to suggest that Distillers are under a legal liability, but that seems to us to be irrelevant since his object in any event is to increase the figure at which the pending legal claim is settled.

In the end this appears to us as a very simple case in which a newspaper is deliberately seeking to influence the settlement of pending proceedings by bringing pressure to bear on one party. Not only is the interference intended, but, having regard to the power of public opinion, we have no hesitation in saying that publication of the article complained of would create a serious risk of interference with Distillers' freedom of action in the litigation. It would therefore be a clear contempt and the Attorney-General is entitled to the injunction which he seeks.

Injunction ordered in the terms claimed until further order.

Solicitors: *Treasury Solicitor; J Evans* (for the defendants).

N P Metcalfe Esq Barrister.

Attorney-General v London Weekend Television Ltd

QUEEN'S BENCH DIVISION
LORD WIDGERY CJ, MELFORD STEVENSON AND BRABIN JJ
9th, 10th, 24th NOVEMBER 1972

Contempt of court – Publications concerning legal proceedings – Pending proceedings – Risk of interference with course of justice – No serious risk of interference – No intention to influence pending proceedings – Single showing of television programme – Children allegedly injured by drug – Claims against drug manufacturers – Television programme on plight of children.

D Ltd manufactured and marketed in England a drug known as thalidomide. Children were born with gross deformities, allegedly due to their mothers having taken thalidomide during the period of pregnancy. Actions were brought against D Ltd on behalf of the children. Some of the claims were compromised but many of the actions were pending when in October 1972 the respondent company, who were television programme contractors, decided to televise a programme, in their current affairs series, on the plight of those children. D Ltd declined an invitation from the respondents to send a representative to take part in the programme and their solicitors made it clear in a letter to the respondents that negotiations were being conducted between the parties in the pending actions about a possible settlement of the claims. D Ltd's solicitors pointed out the inherent risk of a contempt of court inadvertently occurring in such a programme at that time. The respondents' chairman considered that if the programme was directed at the moral