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Notes and Comments

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NOTES AND COMMENTS

Publications Relating to Pending Cases as Contempt of Court

The opinion of the United States Supreme Court in the cases of *Harry Bridges* v. *California* and *The Times-Mirror Co.* v. *The Superior Court for the County of Los Angeles*[1] makes it clear that the guarantee of freedom of speech and of the press contained in the First Amendment to the Constitution of the United States is extended through the Fourteenth Amendment to prevent a state court from unduly invading those freedoms by summary punishment of an out-of-court publication. Thus the policy of using the Fourteenth Amendment to guard freedom of discussion from state encroachment, apparently first enunciated from the bench by Justice Brandeis,[2] now has brought freedom to comment on court cases, while they are pending, within its scope. Justice Black, speaking for the majority, said that such punishment must come within the "clear and present danger" test of the Schenck case.[3]

The Supreme Court reversed the convictions of petitioners for contempt of court arising out of publications of newspaper editorials and a telegram. Both in the Superior Court and the California Supreme Court petitioners challenged the state's action as a violation of the constitutional guarantee of free speech, but the California Supreme Court affirmed the Superior Court's denial of this contention and upheld the convictions.[4] The California Code of Civil Procedure (Sec. 1209) said that no publication should be treated as contempt unless made in the presence of the court while in session, but the California Court reaffirmed its holding in *In re San Francisco Chronicle*[5] that that provision of the Code was unconstitutional since courts have an inherent power to punish for contempts, direct or constructive, and the legislature cannot infringe on it. The California court relied on *Toledo Newspaper Company* v. *United States*[6] and decisions in eighteen states following it,[7] to justify its throwing off of the plain legislature-imposed restriction on the court's power to punish contempts. For support of the doctrine of inherent power the

1 U.S. Law Week, Dec. 9, 1941, p. 4064, 62 S.Ct. 190, 86 L.Ed. (Adv.) 149. Certiorari granted because of importance of constitutional question involved, 309 U.S. 649, 60 S.Ct. 723, 84 L.Ed. 100, 310 U.S. 623, 60 S.Ct. 1098, 84 L.Ed. 1395.

2 Dissenting in Gilbert v. Minnesota, 254 U.S. 325, 41 S.Ct. 125, 65 L.Ed. 287 (1920). Brandeis stated that freedom of discussion was one of the privileges and immunities of a United States citizen guaranteed against state encroachment by the Fourteenh Amendment and intimated that it was also one of the liberties of which no person could be deprived without due process of law.

3 Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919).

4 Bridges v. Superior Court, 14 Cal. (2d) 464, 94 P. (2d) 983 (1939); Times-Mirror Co., v. Superior Court, 15 Cal. (2d) 99, 98 P. (2d) 1029 (1940).

5 1 Cal. (2d) 630, 36 P. (2d) 369 (1934).

6 247 U.S. 402, 38 S.Ct. 560, 62 L.Ed. 1186 (1918).

7 Ala., Ark., Ariz., Conn., Fla., Ga., Ida., Ind., Md., N.D., Okla., R.I., S.D., Tenn., Tex., Utah., Vt., and Va. Eight others have expressed views in harmony with it—Iowa, Kan., Minn., Miss., Neb., Ore., Wis., Wyo.

majority leaned heavily on the English practice and on some statements by Blackstone[8] based on a statement by Judge Wilmot in an opinion prepared for a case which was never decided.[9] The majority held that the Bridges telegram "tended materially" and that the Times-Mirror editorials "had a reasonable tendency" to obstruct the orderly administration of justice.

The telegram, for the subsequent publication of which in a Los Angeles newspaper Bridges was convicted, was sent by him to the Secretary of Labor after an injunction had been granted and while a motion for a new trial and to vacate judgment was pending. It stated that the attempted enforcement of the decree would tie up the Port of Los Angeles and affect the entire west coast. The first of the editorials for the publication of which the newspaper was punished was entitled "Sit-down Strikers Convicted." It commented on the case a day after conviction and before sentencing, with hearty approval. The second editorial was published after a verdict of guilty and before sentencing. It was entitled "Fall of an Ex-Queen" and drew a moral of the "right will triumph in the end" type from the miserable end of a one time political boss. "Probation For Gorillas?" was published after a verdict of guilty, but before sentencing, and while an application for probation was pending. It ended up by saying that the judge would make a bad mistake if he granted probation and admonished him to send the convicted men to "the jute mill."

Justice Edmonds of the California Court wrote a strong dissent in each case in which he said that the inherent power doctrine is based on a fiction and an incorrect statement by Blackstone and that therefor the statute ought to be upheld. He thought that White's decision in the Toledo Newspaper case based on the so-called right of self-preservation was palpably incorrect. In his dissenting opinion Justice Edmonds said that the guarantees of free speech in the Federal and the California Constitutions are binding upon the courts and that no claim of judicial necessity ought to outweigh them.

In order to understand the implications of the United States Supreme Court's decision it is necessary to know briefly the history of the summary power to punish contempt by publication in the United States. The Judiciary Act of 1789 empowered the federal courts to punish all contempts. Then in 1826 Judge Peck attached a man named Lawless for contempt for out-of-court publications. The fear of the power of the federal courts and of its abuse led to such an outcry against Peck's "tyranny" that he was tried for impeachment and acquitted by a narrow margin. But public opinion was thoroughly aroused against the summary power and resulted in the Act of 1831[10] which limited, and still limits, the power of federal courts to punish summarily for contempt to offenses in court "or so near thereto" as to obstruct justice. By 1860, twenty-three of

[8] 4 Comm. 284 et seq.

[9] King v. Almon, Wilm. 243, 97 Eng. Rep. 94 (1765).

[10] 28 U.S.C.A. § 385, as amended in 1911.

the then thirty-three states had adopted similar laws.[11] Although the state courts began avoiding the legislative limitations on their assumed powers as early as 1855[12] the federal courts respected the Act of 1831 and construed it as a limitation on their powers until 1918 when Justice White in the Toledo Newspaper case came to the startling conclusion that that act imposed no limitation not already existing and by necessary implication sanctioned the right of summary punishment of constructive contempts. Justices Holmes and Brandeis dissented from what they called "an amazing historical solecism." This decision was followed in seven federal cases[13] but in *Nye* v. *United States*[14] the United States Supreme Court overruled what Frankfurter called the complete subversion of Section 268,[15] and restored to plain language its obvious meaning by holding that "so near thereto" means geographical, physical presence.

In the light of this background of the history of the clash between freedom of the press and the assumed interest in protecting the independence of the judiciary, the United States Supreme Court came to pass on the validity of a state court decision which had, at least to some people,[16] disturbing implications in that under its rule there was no limit to the court's power to punish summarily for constructive contempt, so that even law reviews could be conceived as in danger of its exercise. Justice Black, in the majority opinion, held that even if there had been a long English custom of putting utterances commenting on the work of courts in pending cases in a class by themselves, which was doubtful,[17] it was a mistake to suppose that we adopted it in our Constitution, and that the criteria applicable under the Constitution to other types of utterances are applicable in contempt proceedings in state courts to punish out-of-court publications pertaining to a pending case. Although recognizing that the clear and present danger test as enunciated by Justice Holmes in the Schenck case does not comprehend the whole problem, Justice Black said it was handy in solving concrete situations and was, in effect, that the evil must be extremely serious and the degree of immi-

11 Dissenting opinion of Justice Edmonds in Bridges case, supra; Walter Nelles and Carol Weiss King, "Contempt by Publication in the United States," 28 Col. L. Rev. 525 (1928).

12 State v. Morrill, 16 Ark. 384 (1855).

13 U.S. v. Craig, 266 F. 230 (1920); Craig v. Hecht, 263 U.S. 255, 44 S.Ct. 103, 68 L.Ed. 293 (1923); In re Independent Publishing Co., 240 F. 849 (1917); U.S. v. Providence Tribune Co., 241 F. 524 (1917); U.S. v. Markewich, 261 F. 537 (1919); U.S. v. Sanders, 290 F. 428 (1923); Francis v. People of Virgin Islands, 11 F. (2d) 860 (1926); U.S. v. Sullens, 36 F. (2d) 230 (1939).

14 313 U.S. 33, 61 S.Ct. 810, 85 L.Ed. 1172 (1941).

15 Robert E. Herman, "Recent Limitations on Free Speech and Free Press," 48 Yale L.J. 54 (1938).

16 Ibid.

17 See dissenting opinion of Edmonds in Bridges case, supra n. 4, and dissenting opinion of Gibson in Times-Mirror case, supra n. 4. See also articles cited in notes 11 and 15 supra; Felix Frankfurter and James M. Landis, "Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers," 37 Harv. L. Rev. 1010 (1924).

nence extremely high before utterances can or ought to be punished.[18] He concluded that the utterances punished below did not even tend to bring about the feared evil—unfair administration of justice. It should be noted that the majority stated that they were not considering a statute which showed that the legislature had appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance.[19]

The dissenting Justices, Frankfurter, who wrote the minority opinion, Stone, Roberts, and Byrnes, thought that "reasonable tendency" and "clear and present danger" were substantially the same tests, that the right of free speech was not absolute and ought not to be allowed to interfere with the impartial administration of justice, and that a state which had adopted the English means of attaining impartial justice ought not to be told that it is improper and denies due process. They concluded that the first two of the editorials mentioned above were mere comment so not objectionable, but that "Probation For Gorillas?" threatened the judge with denunciation and was a real attempt to exert outside influence and so to hamper the impartial administration of justice and that the Bridges telegram was a threat to call a strike and an attempt to coerce the mind of the judge in arriving at his decision and so to obstruct justice.

The most obvious result of the decision is that it extends to another field of discussion the protection of the Fourteenth Amendment, thus carrying further the policy begun in *Gitlow* v. *New York*[20] and extending down through *Cantwell* v. *Connecticut*,[21] *Hague* v. *Committee for Industrial Organization*,[22] *Lovell* v. *City of Griffin*,[23] *Near* v. *Minnesota ex rel. Olson*,[24] *Thornhill* v. *Alabama*[25] and others. It seems highly desirable that the power of a state court should be subject to some limitations on behalf of the personal and social interests in free and open discussion, because, as Lord Camden said,[26] "The discretion of a judge is the law of tyrants, . . . it is every vice, folly, and passion, to which human nature is liable." And that unlimited summary power is necessary to maintain the independence of courts and to preserve their existence has been amply exposed as a fallacy by the life and dignity of the courts of New York and Pennsylvania which have gotten along without it for one hundred and fifty years and by the experience of the federal

18 On this point also see Zechariah Chafee, Free Speech in the U.S. (1941).

19 See also Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 589, 84 L.Ed. 1213 (1940).

20 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925).

21 Supra n. 19.

22 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).

23 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938).

24 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931).

25 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

26 See Lord Campbell, Lives of the Lord Chancellors (2d ed.), I, 13, n. 1, cited, 28 Col. L. Rev. 403 (1938).

courts which did not have the power for seventy-nine years and yet maintained their independent existence.

The test laid down by the court by which the power of the state courts is to be kept within the constitutional limitation is open to question on the ground of its indefiniteness and lack of stability of meaning through times of changing tempers. After all, as the minority opinion points out, "clear and present danger" and "reasonable tendency" are different only in degree. Neither one provides a guarantee that freedom of discussion, so vital to a democracy, will be preserved, especially on behalf of a publisher of an unpopular minority opinion. Neither one gives a writer or speaker a clear standard by which to determine in advance whether or not his proposed utterance will be punishable by summary action on the part of a disgruntled judge. Zechariah Chafee, in his valuable book on free speech,[27] has pointed out the pitfalls in the reasonable tendency test when applied to the field of opinions and utterances. Thomas Jefferson, in the Preamble to the Virginia Toleration Act of December 26, 1785,[28] showed how ill-suited to American standards of free expression is the evil tendency test in the following words, "To suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill-tendency is a dangerous fallacy . . . because he, being . . . judge of that tendency will make his opinions the rule of judgment." Rather than lay down such an uncertain standard, it would seem preferable to have denied to state courts entirely the power to punish summarily out-of-court publications, at least in the absence of statute.[29]

The majority opinion intimates that a carefully drawn statute clearly pointing out particular kinds of utterances in definitely specified types of situations and subjecting them to limited and reasonable punishment might be upheld as a necessary limitation of the right of free speech. In the light of the history of what state courts have done to previous legislative attempts to curb their summary power, it is at least doubtful whether a state statute such as this would be upheld by the state courts, but the result would seem to be desirable. The social interest in free and open discussion as a means of arriving at the truth and in deciding on the wisdom of policies is fundamental to the success of a democratic system but the interest in securing to men on trial for their lives or liberty a trial free from too much outside influence is also extremely important and ought to be safeguarded by reasonable means. To that end, what has been called "Trial by Newspaper" ought to be

[27] Op. cit., supra, n. 18.

[28] 12 Hening's Statutes, Va., Ch. 34, p. 84.

[29] An interesting commentary on the minority opinion, which would leave the state courts' summary power practically without limit is that it was written by Justice Frankfurter, who with Landis, wrote an article (37 Harv. L.R. 1010) which, though dealing with federal courts, condemned summary punishment for indirect contempts and blamed its origin on the notorious Star Chamber. In that article he approved trial by jury as a remedy, yet now he would let a court punish without a jury.

regulated by statute. Many writers have pointed out that the practice becomes a considerable evil in certain kinds of capital cases.[30] The decision in the Sacco-Vanzetti case[31] was probably influenced by the flood of newspaper stories and comments on the defendants and the acts involved.[32] Many labor and liberal leaders and writers have doubted the accuracy of the results reached in the Mooney-Billings Case[33] because of the influence of newspaper comments on the outcome.[34] Some of this doubt might be removed from future cases, similar in nature, by some clear legislative grant of power to the courts to punish flagrant out-of-court comment on pending capital cases, especially where what is really on trial is some unpopular political belief. However, the safeguard of trial by jury, for what it is worth, ought to be provided. The statutes ought clearly to remove from punishment entirely those utterances which do not influence decision but only scandalize the court or offend its dignity. English courts have long since given up punishing the latter type of utterance, which ought to be let alone, as the dignity and respect for courts depends on something more basic than lack of adverse criticism of their work.

G. ADLER

CIVIL PRACTICE ACT CASES

APPEAL AND ERROR—ASSIGNMENTS OF ERROR—EFFECT OF FAILURE TO COMPLY WITH COURT RULES.—In the case of *Swain* v. *Hoberg*,[1] the appellant filed his brief which was correct in all details save that it did not contain a "brief statement of the errors relied upon for reversal" as provided by Supreme Court Rule 39.[2] In lieu of this, the appellant had set out each error relied upon by itself and then proceeded to present his argument thereon immediately following, before giving the next point of error. The appellee failed to take exception to the defect until after the case had been taken under advisement when his motion to dismiss the appeal and the appellant's countermotion for leave to amend were held to be too late. The court, however, Justice Dove filing a vigorous dissent, proceeded to dismiss the appeal of its own motion for failure to comply with such rule.

Prior to the Civil Practice Act it was required that assignments of

30 Sullivan, The Law of Trial by Newspaper (3rd ed., 1941), quoting Chief Justice Taft on page 137; Henry W. Taft, Law Reform; Frankfurter, The Case of Sacco and Vanzetti.

31 Commonwealth v. Sacco, 255 Mass. 369, 151 N.E. 839 (1926); 259 Mass. 128, 156 N.E. 57 (1927); 261 Mass. 12, 158 N.E. 167 (1927); 275 U.S. 574, 48 S.Ct. 17, 72 L.Ed. 434 (1927).

32 Sullivan, op. cit.

33 People v. Mooney, 175 Cal. 666, 166 P. 999 (1917); 176 Cal. 105, 167 P. 696 (1917); 177 Cal. 642, 171 P. 690 (1918); 178 Cal. 525, 174 P. 325 (1918); 248 U.S. 579, 39 S.Ct. 21, 63 L.Ed. 430 (1918).

34 Sullivan, op. cit.

1 312 Ill. App. 610, 38 N.E. (2d) 966 (1942).

2 "The concluding subdivision of the statement of the case shall be a brief statement of the errors or cross errors relied upon for a reversal. . . ." Ill. Rev. Stat. 1941, Ch. 110, § 259.39.

error be attached to or written on the record and compliance therewith was considered essential.[3] By the new Rule 36 it was provided: "No assignment of errors or of cross errors shall be necessary except . . . as required in Rule 39." Rule 39, as adopted in 1933, did not include the provision under interpretation, but it was added as an amendment in 1935.[4] The problem is one of interpreting the language of the Supreme Court, that is, of determining the court's intent in making this modification of the rule.

It has been stated, "If the issues of the case are adequately raised and presented in the brief and argument, the place where they appear is not jurisdictional."[5] This would appear to be in line both with Section 76 of the Illinois Civil Practice Act,[6] which provides that no step other than the perfection of the appeal shall be deemed jurisdictional, and Rule 36 which purportedly does away with the necessity of assignments of error. However, the view has prevailed, as exemplified by the case of *Bender v. Alton Railroad Company*,[7] where it was said, "There being no statement of errors . . . in the concluding subdivision of the statement of the case in the brief of appellant, we are without authority to review the case . . . ."[8] A statement of errors is still of importance. Hence, a total omission would warrant dismissing the appeal.

In the instant case the appellant did set out the errors relied upon but

[3] An appeal is treated as a new suit in another court, rather than a continuation of the case in the lower court and the assignment of errors was required as being in the same position as the complaint in the lower court. Claffy v. Farrell, 196 Ill. App. 65 (1915); Brown v. Otrich, 119 Ill. App. 136 (1905).

[4] As adopted in 1933 (Ill. Rev. Stat. 1933, Ch. 110, § 241) the rule contained the words "The brief of the appellant shall contain a short and clear statement of the case showing . . . fifth, the errors relied upon for reversal." In 1935, the words "the errors relied upon for reversal" were removed and in their place was inserted, "The concluding subdivision of the statement of the case shall be a brief statement of the errors or cross errors relied upon for a reversal. . . ." (Ill. Rev. Stat. 1935, Ch. 110, § 259.39.)

[5] Trust Co. of Chicago v. Iroquois Auto Ins. Underwriters, Inc., 285 Ill. App. 317, 330, 2 N.E. (2d) 338, 342 (1936). See also City of Chicago v. Peterson, 360 Ill. 177, 178, 195 N.E. 636 (1935), where it was stated: "While this statement of errors relied on is insufficient to confer jurisdiction upon this court, as we shall hereafter show, it nevertheless is an attempt to comply with rule 39 of this court, and, as such, is sufficient to prevent a dismissal of the appeal." Stroops v. Jones, 285 Ill. App. 602, 3 N.E. (2d) 158 (1936), where the court heard the appeal notwithstanding the fact that the appellant had disregarded the rules in the absence of a motion to strike; Ledbetter v. Evans, 290 Ill. App. 533, 8 N.E. (2d) 970 (1937), same ruling as preceeding case; Gyure v. Sloan Valve Co., 367 Ill. 489, 11 N.E. (2d) 963 (1937), which was cited in both the opinion and dissent, is distinguishable on the ground that there was no setting out of the errors relied on.

[6] Ill. Rev. Stat. 1941, Ch. 110, § 200(2), contains the words ". . . no step other than that by which the appeal is perfected shall be deemed jurisdictional."

[7] 284 Ill. App. 419, 1 N.E. (2d) 108 (1936).

[8] 284 Ill. App. at p. 422, 1 N.E. (2d) at p. 110. See also Farmers State Bank v. Meyers, 282 Ill. App. 549 (1935); Weindorf v. Keck, 285 Ill. App. 600, 3 N.E. (2d) 120 (1936), where the court held that it did not have authority to hear an appeal without brief statement of errors; Keckich v. New England Mut. Life Ins.

not in the place in which they are customarily located, to wit; "in the concluding subdivision of the statement of the case."[9] There was then, probably an attempt to comply with the rule, although it is admittedly not a literal compliance therewith. The fact that the rule was amended some two years after its original adoption to include this requirement may well indicate that the Supreme Court felt that the rule was not complete in its original form without providing for a definite place in which the errors relied upon were to be stated in the brief. Having now so indicated, doubtless from their experience that a concise summary facilitates the disposition of the court's business, it would seem no hardship to require appellant to comply with such practice. It is undoubtedly within the power of the court to dismiss an appeal if it feels that there has been no attempt to comply with its rules,[10] and although it might appear that the decision in the instant case is quite strict, and to some extent arbitrary, applying the rule as it now stands, the decision cannot be deemed incorrect.

J. SAFEBLADE

Co., 285 Ill. App. 600, 3 N.E. (2d) 150 (1936); Lipovsek v. Supreme Lodge of Slovene National Benefit Society, 284 Ill. App. 656, 3 N.E. (2d) 158 (1936), where it was decided that where the appellant's brief contained no statement of errors relied on in the proper place the court had no jurisdiction to hear the appeal.

[9] Ill. Rev. Stat. 1941, Ch. 110, § 259.39. See n.2, supra.

[10] Taylor v. City of Berwyn, 372 Ill. 124 at p. 132, 22 N.E. (2d) 930 at p. 935 (1939), where the court said: "Since the statute ordains that no step other than notice of appeal is jurisdictional the determination of whether the method of stating and arguing the issues sufficiently presents them for decision rests in the discretion of the reviewing court." See also Trust Co. of Chicago v. Iroquois Auto Ins. Underwriters Inc., 285 Ill. App. 317, 2 N.E. (2d) 338 (1936).