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## Notes and Comments

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## NOTES AND COMMENTS

### CUMULATIVE VOTING FOR CORPORATE DIRECTORS

The business boom which stemmed from World War II brought in its wake an increasing number of proxy battles fought over issues concerning corporate control. Of the literally hundreds of such contests waged in the past few years, general interest quite naturally has tended to focus on those involving the so-called "giants" as, for example, the successful effort of Robert Young and his associates to obtain control of the New York Central Railroad and the partly successful attempt by the Louis Wolfson group to take over management of Montgomery Ward & Company. Whether these contests have concerned some "giant" or a corporation of lesser dimensions, almost all of them have involved the process of cumulative voting so it may come as something of a surprise to be reminded that the principle of cumulative voting, one which has received almost universal acceptance in the field of private corporation law in the United States, was originally promulgated as a means by which some representation for minority groups might be obtained in legislative bodies.

Up to the time of the adoption of the Illinois Constitution of 1870, no state had enacted a law providing for cumulative voting but in that year the revised Illinois Constitution included provisions for cumulative voting both with respect to the election of members of the House of Representatives of the General Assembly and in connection with the choice of directors by the shareholders of private business corporations.<sup>1</sup> A perusal of the record of the constitutional convention which served to frame that constitution will reveal that the burning issue, at least so far as the principle of cumulative voting was concerned, was one as to use thereof in the matter of public elections with its corporate aspects being regarded as a matter of secondary importance. Following the adoption of that constitution, editorial writers predicted that other states would soon adopt the device of cumulative voting for use in certain of their public elections but it is one of the vagaries of history that, despite these enthusiastic predictions, no other state has seen fit to adopt cumulative voting or anything similar thereto in the selection of its legislative body<sup>2</sup> but, as stated before, the principle has been widely accepted in the government of private corporations. In that area, thirteen states have made cumulative voting

<sup>1</sup> Ill. Const. 1870, Art. IV, §§ 7-8, and Art. XI, § 3.

<sup>2</sup> Campbell, "The Origin and Growth of Cumulative Voting for Directors," *The Business Lawyer*, Vol. X, p. 3 (April, 1955), particularly pp. 6-7.

mandatory both by constitution and statute<sup>3</sup> and eight others have made it mandatory by statute only.<sup>4</sup> By contrast, cumulative voting is permitted by the statutes of eighteen states<sup>5</sup> while only nine states have no express provision regarding it.<sup>6</sup>

Cumulative voting for corporate directors, of course, is a device to enable minority stockholders to achieve a degree of representation in corporate management in those situations where the minority would have no voice whatever in the event strict application to the rule of majority control were to apply. It cannot be stressed too strongly that cumulative voting does not guarantee that minority stockholders will achieve representation but it does afford a method by which a minority could obtain representation provided it possessed sufficient voting strength. Under it, a stockholder is entitled to multiply the number of his shares of stock by the number of directors to be elected and to vote the total so achieved for one or more of the candidates. If that total, either alone or when joined with similar totals by other stockholders, is sufficient to elect a director, the stockholder or the group of stockholders get representation; otherwise not.

<sup>3</sup> Ariz. Const. 1912, Art. 14, § 10, and Ariz. Code Ann. 1939, § 53-210; Ida. Const. 1890, Art. 11, § 4, and Ida. Code Ann. 1947, §§ 30-134 and 30-140; Ill. Const. 1870, Art. XI, § 3, and Ill. Rev. Stat. 1955, Vol. 1, Ch. 32, § 157.28; Ky. Const. 1891, § 207, and Ky. Rev. Stat. 1953, § 271.315; Miss. Const. 1890, Art. VII, § 194, and Miss. Code Ann. 1942, Tit. 21, Ch. 4, § 5326; Mo. Const. 1945, Art. 11, § 6, and Vernon's Mo. Stat. Ann. 1949, Tit. 23, § 351.245; Mont. Const. 1889, Art. XV, § 4, and Mont. Rev. Code 1947, § 15-405; Neb. Const. 1875, Art. 12, § 5, and Neb. Rev. Stat. 1943, § 21-135; N. D. Const. 1889, Art. VII, § 135, and N. D. Rev. Code 1943, § 10-0510; Pa. Const. 1874, Art. 16, § 4; S. C. Const. 1895, Art. 9, § 11, and S. C. Code 1952, § 12-253; S. D. Const. 1889, Art. XVII, § 5, but note the absence of any specific statute on the subject; W. Va. Const. 1872, Art. XI, § 4, and W. Va. Code Ann. 1949, § 3078.

<sup>4</sup> Ark. Stat. Ann. 1947, § 64,224; Deering Cal. Code Ann., Corporation Code, § 2235; Kas. Gen. Stat. Ann. 1949, § 17-3303; Mich. Stat. Ann. 1937, § 21.32; Minn. Stat. Ann. 1945, § 300.24; Page Ohio Gen. Code, § 8623-50; Wash. Rev. Code 1951, Tit. 23, § 23.32.070; Wyo. Comp. Stat. Ann. 1945, § 44-109. The Minnesota statute specifies that there shall be cumulative voting unless the articles of incorporation provide otherwise. California, at one time, had both a constitutional provision and a statute on the point. Although the constitutional provision was eliminated in 1930, the statute was retained.

<sup>5</sup> Colo. Rev. Stat. 1953, § 31-2-4; Dela. Code Ann. 1953, Tit. 8, § 214; Fla. Stat. Ann. 1941, § 612.28; Burns Ind. Stat. Ann., § 25-207; West La. Rev. Stat., § 12.32; Flack Md. Code Ann. 1951, Art. 23, § 39; Nev. Comp. Laws 1929, § 1715; N. H. Rev. Laws 1942, Ch. 274, § 84; N. J. Stat. Ann. 1939, § 14:10-15; N. M. Stat. Ann. 1953, § 51-6-6; N. Y. Stock Corporation Law, §§ 49 and 55; N. C. Gen. Stat. 1949, § 55-110; Okla. Stat. Ann. (perm. ed.), Tit. 18, § 1.68(c); Ore. Rev. Stat. 1953, § 57.170(4); R. I. Gen. Laws 1938, Ch. 116, § 23; Williams Tenn. Code Ann. 1934, § 3741; Vt. Stat. 1947, Tit. 26, § 5784; Va. Code 1950, § 13-203.

<sup>6</sup> The statutes of Alabama, Connecticut, Georgia, Iowa, Maine, Massachusetts, Texas, Utah and Wisconsin are silent on the point. It should be noted, however, that corporation statutes often allow the incorporators or shareholders to insert in the charter "any provision not inconsistent with law, which they may choose to insert for the regulation of the internal affairs of the corporation," or authorize the charter "to define the rights of stockholders respecting voting." It is possible, therefore, that cumulative voting might exist in these states.

The formula for determining the percentage of the total number of shares required to elect a single director, in the event cumulative voting is used, may be stated as follows:

$$Y = \frac{100\%}{N + 1} + 1 \text{ share}$$

using Y as the required percentage of stock and N as the number of directors to be elected. Thus, if three directors are to be elected, 25% of the total number of shares voted plus one share would be required to elect a single director. If four directors are to be elected, 20% plus one share would be needed, and so on. The foregoing formula makes the degree of representation, if any, which a stockholder or group of stockholders could obtain on a board of directors by the use of cumulative voting depend upon the interaction of three variables, to-wit: (a) the percentage of stock owned; (b) the number of directors to be elected; and (c) whether or not the number of directors to be elected is odd or even.

Applying these three variables to the facts of any particular case may produce either no representation or a greater or lesser representation than the proportion of stock owned. For example, assume A owns 41 shares and B owns 59 shares, representing all of the outstanding corporate stock entitled to vote<sup>7</sup> and there are three directors to be elected. A can, by the use of cumulative voting, elect one of the three and thereby secure one-third of the representation.<sup>8</sup> In the event four directors were to be elected, A could, by cumulative voting, elect two of the four and thereby secure equality of representation on the board of directors, thereby forcing B, who owns more than a simple majority of the stock of the corporation, to share control with him.<sup>9</sup> In case five directors were to be elected, A could, by cumulative voting, elect two of the five and secure the equivalent of a 40% representation on the board.<sup>10</sup> Thus, with the same amount of stock ownership, the degree of representation possible could vary all

<sup>7</sup> Under Ill. Const. 1870, Art. XI, § 3, and Ill. Rev. Stat. 1953, Vol. 1, Ch. 32, § 157.28, all outstanding shares must possess the right to vote.

<sup>8</sup> A can cast  $41 \times 3$  or 123 votes; B can cast  $59 \times 3$  or 177 votes. B could mark a ballot of 89 votes for one candidate and have 88 votes left over for a second. A's 123 votes would be sufficient to elect the third candidate but, no matter how divided, would be insufficient to elect two.

<sup>9</sup> A is entitled to cast  $41 \times 4$  or 164 votes; B can cast  $59 \times 4$  or 236 votes. A could cast 82 votes for each of candidates C and D; B could cast 79 votes for each of candidates E and F, and give the remaining votes to candidate G. On this basis, A would elect C and D as directors and B would elect only E and F, since the 78 votes for G would be inadequate.

<sup>10</sup> A can cast  $41 \times 5$  or 205 votes; B can cast  $59 \times 5$  or 295 votes. If A voted 103 votes for candidate C and 102 votes for candidate D, leaving it to B to cast 99 votes for his candidate E and 98 votes each for F and G, stockholder A would elect C and D as directors with B succeeding as to the other three.

the way from one-third to an equal voice with the majority, depending on how the mathematics of the other two variables work out.

In much the same way, the percentage of stock ownership required to elect even one director would vary with the number of directors to be elected. A stockholder or group of stockholders owning as much as 25% of the stock of the corporation could not, even under cumulative voting, elect a single director if only three directors were to be elected, whereas an interest consisting of 10% plus one share could, by cumulative voting, elect one director in the event nine directors were to be elected. It is apparent, therefore, that cumulative voting does not have the effect of providing exact proportional representation on the board of directors for the minority stockholder or for a minority group of stockholders.

From what has been said, the importance of the recent decision of the Illinois Supreme Court in the case of *Wolfson v. Avery*<sup>11</sup> should be apparent. The issue in that case was one as to whether or not Section 35 of the Illinois Business Corporation Act,<sup>12</sup> a provision which purported to permit the classification of a board of directors into two or three classes where there were at least nine places on the board and for the election of board members on a staggered basis for terms of two or three years, dependent upon the number of classes, was valid when tested by the constitutional guaranty given to stockholders to cumulate their votes at elections for corporate directors.<sup>13</sup> The Supreme Court, applying familiar rules of construction to the somewhat ambiguous wording of the constitutional provision, held that the statute was unconstitutional and that it was imperative, for the protection of minority groups, that all directors be elected at one and the same time. By reason of this holding, the Wolfson group was able to allocate its votes proportionately among the full nine members of the Montgomery Ward board, instead of among the three members originally scheduled to be elected, and by proper cumulation gain a degree of representation.

To highlight the importance of this decision for a minority group seeking representation on a board, a recapitulation of some of the cumulative voting principles already explained would seem to be in order. In an election to chose no more than three members of a nine-member board, approximately 250% as many votes would be required to elect a single director as would be necessary if all nine members were candidates at the same time. In case all nine members were to be elected at once, a

<sup>11</sup> 6 Ill. (2d) 78, 126 N. E. (2d) 701 (1955). Hershey, J., wrote a dissenting opinion. Compare the holding therein with the action taken by the Ohio Court of Appeals in *Humphrys v. Winons Co.*, — Ohio App. —, 125 N. E. (2d) 204 (1955).

<sup>12</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 32, § 157.35.

<sup>13</sup> Ill. Const. 1870, Art. XI, § 3.

minority holding 49% of the stock could elect four, and the majority, holding 51% of the shares and cumulating their votes in the most advantageous manner, could elect no more than five. If, however, only three members of the board were to be elected each year, the holders of 49% would be able to elect only one director at each election and could never have more than three directors on the board at any one time. Likewise, holders of 25% of the stock could elect two directors if all nine were chosen at once but would be unable to elect even one director if the terms were staggered and only three were to be chosen at each annual meeting. Clearly, then, the decision in the Wolfson case has opened the door in Illinois for a degree of minority representation on boards which, heretofore, have been almost impregnable against minority attack.

Just what action, if any, will be taken by those Illinois corporations affected by the decision cannot be foreseen at this time. One possibility would be to provide for reincorporation in a jurisdiction which permitted the use of classified boards of directors with the election of directors on a staggered-term basis. Although some thirty-five jurisdictions now expressly permit classification of directors with staggered terms, only a relatively small handful of corporations have seen fit to classify their boards. Out of a total of 1655 domestic corporations whose stocks are listed on the New York Stock Exchange, the American Stock Exchange and the Midwest Stock Exchange, only 196 have classified directors.<sup>14</sup> This figure may be indicative of the doubt as to the constitutionality of such arrangements when faced with the cumulative voting principle, so reincorporation may not be a solution for those seeking to retain themselves in positions of power.

Another obvious step to prevent a minority from gaining representation would be to reduce the total number of directors on the board. As the Illinois Business Corporation Act requires that a local corporation have a minimum of three directors on the board,<sup>15</sup> the size of the board could not be reduced below that figure but the statute does permit of an increase or decrease in the composition of the board by an amendment to the by-laws. Since the right to make, alter, amend, or repeal the by-laws is vested in the board of directors, unless reserved to the stockholders in the articles on incorporation,<sup>16</sup> it would be possible for a majority bloc of

<sup>14</sup> Of this number, 15 are Illinois corporations which can no longer be considered in the total and must act to elect a complete board at the next election. While the number appears to be small, the importance of these corporations must not be overlooked for, at the end of 1954, the market value of the listed securities of the corporations possessing classified boards of directors totalled \$24,755,463,500. See also Scott, "Developments in Corporate Law," *The Business Lawyer*, Vol. x, pp. 25-37 (July, 1955), particularly pp. 25-7.

<sup>15</sup> Ill. Rev. Stat. 1953, Vol. 1, Ch. 32, § 157.34.

<sup>16</sup> *Ibid.*, Ch. 32, § 157.25.

directors, the charter and by-laws permitting, to reduce the number of directors and thereby force an increase in the percentage of shares required to be held by the minority if that group is to gain a degree of representation.<sup>17</sup>

As long as the present Illinois constitutional provision in favor of cumulative voting remains, however, there is little that corporate management can do to preserve its hold other than to perform its duties fairly, wisely, and with profit, thereby assuring ample stockholder support against unjustified attacks by ambitious minority groups.

J. T. RITCHIE.

### PRESS PARTICIPATION IN CRIMINAL TRIALS

There was some occasion to believe that, with the adoption of the several canons of ethics relating to the proper conduct of trials,<sup>1</sup> the day of the circus atmosphere in the courtroom, a condition which reached its most disgusting spectacular level in the "terrible 'thirties,"<sup>2</sup> had come to an end, with sound judicial decorum prevailing over the clamor of the newspaper press for the utmost of freedom in the conduct of its activities. The press has not been silent at the curbs placed around it but it was not until recently that journalistic efforts to override judicial orders entered in connection with the conduct of criminal cases have provided the courts of two American jurisdictions with further opportunities to determine the length to which the working members of the press may go in asserting a right to be present in the courtroom, and to portray the courtroom scene, in the interest of full newspaper coverage of such trials.

The New York case of *United Press Association v. Valenti*,<sup>3</sup> one

<sup>17</sup> In effect, assuming a provision for cumulative voting and a statutory requirement for a minimum of at least three directors on the board, the only minority which would have an absolute guarantee of representation would be one which could vote one share more than one-fourth of all the shares voted.

<sup>1</sup> See, in particular, Canon 35 of the Canons of Judicial Ethics of the American Bar Association. Note also Canons 1, 15, 18, 20 and 22 of the Canons of Professional Ethics promulgated by the same body.

<sup>2</sup> The opinion of the court in the case of *State v. Hauptmann*, 115 N. J. L. 412, 180 A. 809 (1935), gives only a pallid account of the courtroom scene in the Lindbergh kidnapping case. Busch, *They Escaped the Hangman* (The Bobbs-Merrill Co., Indianapolis, 1953), discussing the Hall-Mills case, notes at p. 182 that "nearly half" of the public gallery space was "pre-empted by representatives of the press." Other instances could be called to mind, but the record is too shameful to bear repetition. A dispassionate discussion appears in Holtzoff, "The Relation Between the Right to a Fair Trial and the Right of Freedom of the Press," 1 *Syracuse L. Rev.* 369 (1950), and a note in 3 *Syracuse L. Rev.* 150-7.

<sup>3</sup> 308 N. Y. 71, 123 N. E. (2d) 777 (1954), affirming 281 App. Div. 395, 120 N. Y. S. (2d) 174 (1953), which in turn affirmed 203 Misc. 220, 120 N. Y. S. (2d) 642 (1953). Desmond, J., wrote a concurring opinion. Froesel, J., wrote a dissenting opinion concurred in by Dye, J.

which arose as an offshoot to a spectacular but sordid prosecution for compulsory prostitution,<sup>4</sup> took the form of a proceeding by newspaper interests to restrain a trial judge from carrying out an order intended to exclude all persons except such as had legitimate business in the courtroom.<sup>5</sup> The attempted restraint was rejected, and the New York Court of Appeals affirmed, when it held that a state statute which declared that court sittings "shall be public . . . and every citizen may freely attend the same"<sup>6</sup> did not confer any special privilege on the press. As a consequence, it was held that it would be proper to exclude the working members of the press from a criminal trial provided the general public was also properly excluded.

By contrast, in the Ohio case of *E. W. Scripps Company v. Fulton*,<sup>7</sup> the relator, a newspaper publisher, was held entitled to have a writ of prohibition against the order of a trial judge which was designed to exclude all members of the public, including the press, from the trial of a defendant accused of pandering, even though the defendant had given a written waiver of the right to a public trial and had expressed the belief that more effective cross-examination of certain witnesses would be possible at a private hearing. Despite this, the somewhat related Ohio Supreme Court case of *State v. Clifford*<sup>8</sup> upheld a conviction of an editor, a reporter and a newspaper photographer for contempt in disturbing certain arraignment proceedings by the taking of a flashlight photograph while the court was in session, an act done in deliberate violation of a court rule on the point.<sup>9</sup> The conviction was sustained when the court found that, while the case did not involve any attempt to exclude the

<sup>4</sup> See the companion case of *People v. Jelke*, 308 N. Y. 56, 123 N. E. (2d) 769 (1954), affirming 284 App. Div. 211, 130 N. Y. S. (2d) 662 (1954). Desmond, J., wrote a dissenting opinion which was concurred in by Conway, J. The court there held that, except as specifically limited by statute, it was for the defendant, and not the trial judge, to determine whether the criminal trial should be closed to the public.

<sup>5</sup> The judge, over objection, had excluded the general public, including the press, but did allow the defendant to have present "any friends or relatives" he deemed necessary for the protection of his interests.

<sup>6</sup> N. Y. Cons. Laws, Judiciary Law, § 4. See also Code of Crim. Pro., § 8, and Civil Rights Law, § 12. It should be noted that the New York Constitution is silent on the point, but the statutes referred to have been held to be no more than a declaration of the common law on the point.

<sup>7</sup> — Ohio App. —, 125 N. E. (2d) 896 (1955). Hurd, J., wrote a concurring opinion. Contra: *Commonwealth v. Blondin*, 324 Mass. 564, 87 N. E. (2d) 455 (1949).

<sup>8</sup> 162 Ohio St. 370, 123 N. E. (2d) 8 (1954), affirming 97 Ohio App. 1, 118 N. E. (2d) 853 (1954).

<sup>9</sup> While no formal court rule on the point had been enacted, the trial judge, by reason of the nature of the pending criminal proceeding, had reason to suspect that the press would be on hand so he gave specific instruction on the point in advance of the court session. This was held, at least as to those who had full knowledge, to be the equivalent of a formal rule or other properly journalized order.



press, it was proper to limit the conduct and actions of newspapermen in the interest of the maintenance of proper courtroom decorum as well as to insure a fair trial.

While the guarantee of the right to a public trial as expressed in the United States Constitution<sup>10</sup> does not apply to criminal proceedings conducted in state courts,<sup>11</sup> the respective states have, either by constitutional provision or by legislative enactment, granted to their citizens the protection afforded by a public trial.<sup>12</sup> As is true of other constitutional guarantees, however, both in federal and state courts, the accused generally has the privilege of waiving this right to a public trial if he should so desire,<sup>13</sup> hence it is not required that all criminal proceedings must be public, but rather that a public trial is necessary only in those cases wherein the accused so desires.<sup>14</sup>

In the event a public trial is so desired, an issue might then be reached as to just what constitutes a "public" trial and how far the courts may go in excluding some of those who constitute the public, which problem has long troubled the judiciary. Even today, there is a split of authority on this matter with the New York court which, up until a short time ago, allowed the presiding judge, in his discretion, to exclude certain classes of the public from criminal trials,<sup>15</sup> now holding that attendance by a limited class of persons would not satisfy the legislative mandate despite the fact the case was one of an obscene, indecent, or revolting nature.<sup>16</sup> Other states follow this rule in substance but deviate from it to the extent that minors may be excluded from trials where lurid and obscene acts will be in question.<sup>17</sup> It is certain, however, that the power of the trial judge is such that he may regulate the proceedings of the trial in order to assure security and orderly progress.<sup>18</sup>

Considering the problem for a moment solely as a matter of concern to a defendant in a criminal case, there is evident reason why such a person would generally want a public trial for the open examination of the witnesses "viva voce" in the presence of all mankind is much more

<sup>10</sup> U. S. Const., Amend. VI.

<sup>11</sup> *Falkowski v. May*, 173 F. (2d) 742 (1949). See also *Baker v. Utecht*, 161 F. (2d) 304 (1947).

<sup>12</sup> A list of these provisions appears in a note in 49 Col. L. Rev. 110, note 2.

<sup>13</sup> *United States v. Sorrentino*, 175 F. (2d) 721 (1949).

<sup>14</sup> The extent to which these constitutional rights are personal to the defendant may be noted in the recent Illinois case of *People v. Spegal*, 5 Ill. (2d) 211, 125 N. E. (2d) 468 (1955), which deals with a defendant's right to waive trial by jury.

<sup>15</sup> *People v. Hall*, 51 App. Div. 57, 64 N. Y. S. 433 (1900).

<sup>16</sup> *People v. Jelke*, 308 N. Y. 56, 123 N. E. (2d) 769 (1954).

<sup>17</sup> *State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462, 9 L. R. A. (N. S.) 277, 116 Am. St. Rep. 734 (1906).

<sup>18</sup> *People v. Byrnes*, 84 Cal. App. (2d) 64, 190 P. (2d) 290 (1948).

conducive to the clearing up of truth than any "private and secret examination taken down before an officer or his clerk in the ecclesiastical courts and all others that have borrowed their practice from the civil law, where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal."<sup>19</sup> When the defendant elects a public trial, therefore, under the English rule as laid down in the case of *Daubney v. Cooper*,<sup>20</sup> he must realize that the proceedings of the court are to be public to the extent that all parties who desire to witness the proceedings have a right to do so, provided there is room, provided they do not disturb the trial, and provided there is no specific reason why they should not be there.

The press representatives, as members of the public, would also have a right to be present but they must be guarded as to what they report in print for it has been said that if an English newspaper were to "publish an unfair and misleading account of committal proceedings, or give damaging information about an accused person, there is always the chance that the court will regard it as contempt."<sup>21</sup> Although efforts to induce the English Home Secretary to introduce legislation designed to restrict newspaper reports of cases were turned down on the theory the power to punish for contempt of court was sufficient,<sup>22</sup> other English-speaking jurisdictions have enacted legislation to deal with the matter.<sup>23</sup>

So far as courts in the United States are concerned, it cannot be said that there is any uniform rule followed throughout the states. Some jurisdictions hold to the view that all reasonable rules for the orderly, speedy and effective conduct of the court's duties should be upheld,<sup>24</sup> with the consequent addition that the constitutional right of a party to have a case tried fairly before an impartial tribunal carries with it the thought that the trial should not be influenced by newspaper dictation or popular clamor.<sup>25</sup> The strongest expression of this view is to be found in the

<sup>19</sup> Bl. Comm., III, 373.

<sup>20</sup> 10 B. & C. 237, 109 Eng. Rep. 438 (1829).

<sup>21</sup> Jackson, *The Machinery of Justice in England* (Cambridge University Press, 1953), 2d Ed., p. 131. The author notes that, "in March 1949, the editor of the *Daily Mirror* was committed to prison for three months and the newspaper company ordered to pay a fine of £10,000 and costs for contempt of court in publishing material about a man who had been charged with murder."

<sup>22</sup> *Ibid.*, p. 131.

<sup>23</sup> Manitoba, Rev. Stat. 1913, c. 46, § 50, indicates that the public or any particular class of the public may be excluded from the trial in the interest of public morals. New Brunswick Rev. Stat. 1927, c. 129, § 18c, directs that filiation proceedings are not to be held in open court. Under Newfoundland Stat. 1930, c. 14, § 38, the committing magistrate may direct that "no person shall have access" if he deem it best.

<sup>24</sup> *People v. Kerrigan*, 73 Cal. 222, 14 P. 849 (1887). See also *People v. Swafford*, 65 Cal. 223, 3 P. 809 (1884), to the effect that the word "public" does not mean that every person who sees fit shall, in all cases, be permitted to attend criminal trials.

<sup>25</sup> *In re Hughes*, 8 N. M. 225, 43 P. 692 (1895).

Maryland case entitled *Ex parte Sturm*<sup>26</sup> where the court said that the right of the accused to a public trial was for his benefit and that this right did not entitle the press or the public to take advantage of his predicament or to photograph him during his confinement. The court there also noted that where the right of freedom of the press was invoked in support of acts which constituted an invasion of that domain wherein the court's authority was exclusive then, after giving due regard to both the press and the court, any encroachment under the guise of freedom of the press could not be sanctioned.

Other jurisdictions take a "middle of the road" attitude, holding fast to the principle of the freedom of the press while at the same time stating that the motive for coverage and publication of material should be looked into, so that matter published for the public good<sup>27</sup> should be distinguished from the publication of unwholesome matter.<sup>28</sup> But an extreme view in favor of the press may be noted in the North Carolina case of *Cowan v. Fairbrother*<sup>29</sup> where it was said that freedom of the press included not only exemption from censorship but also security against legislation as well as measures resorted to by other branches of the government for the purpose of stifling just criticism or the muzzling of public opinion. This view, to some extent, has been followed by the Supreme Court of Ohio for it has said that the people have a right to know what is being done in their courts, provided the free observation and discussion concerning the proceedings of public tribunals was consistent with the truth and written with an eye toward decency.<sup>30</sup> In that connection, the most recent Ohio case on the point has stated that "public morals are not protected by trying to hide its sins behind closed doors. Better that we know our faults than we may ever increase our efforts to live in social rectitude."<sup>31</sup> To that thesis, a concurring judge added that it was his opinion that "crime and corruption grow and thrive in darkness and secrecy. Justice thrives in the open sunlight of day."<sup>32</sup>

<sup>26</sup> 152 Md. 114, 136 A. 312, 51 A. L. R. 356 (1927).

<sup>27</sup> *State v. Shepherd*, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624 (1903).

<sup>28</sup> *State v. Pioneer Press Co.*, 100 Minn. 193, 110 N. W. 867, 117 Am. St. Rep. 684, 9 L. R. A. (N. S.) 480 (1907).

<sup>29</sup> 118 N. C. 406, 24 S. E. 212, 32 L. R. A. 829 (1896).

<sup>30</sup> *State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462, 9 L. R. A. (N. S.) 277 (1906). The case of *State v. Keeler*, 52 Mont. 205, 156 P. 1080 (1916), also notes that the doors of the court room must be open during all the sittings of the court and the power does not exist anywhere to exclude anyone *sui juris* who comes into the presence of the court when there is accommodation for him so long as he conducts himself in a becoming manner.

<sup>31</sup> — Ohio App. —, 125 N. E. (2d) 896 at 904.

<sup>32</sup> — Ohio App. —, 125 N. E. (2d) 896 at 909.

Somewhere, in this maze of conflict, lies an ordinance of reason which, if promulgated properly, could redound to the common good. To discover this ordinance will be no easy task but, if the rights of all the parties are to be fairly considered, a just rule must be laid down. The issues, constitutional and otherwise, are too important to any free race of people to permit of their settlement by default or as the result of any organized pressure built up by one group or another to advance their own ends. The highest forms of American ingenuity are needed and must be called into play if the wisest solution is to be produced. Anything less would be both insufficient and dangerous.

J. J. MULDOON.