

YALE LAW JOURNAL

Vol. IX.

OCTOBER, 1899.

No. 1

THE NEWSPAPER BEFORE THE LAW.

Imbedded in the Constitution of every State of the Union and in terms substantially identical, is a guaranty of the liberty of the press and of the freedom of speech, invariably, I believe, coupled with a provision for responsibility in case of abuse.*

Yet, strangely enough, the proposition of Charles Pinckney of South Carolina to insert such a clause into the Federal Constitution was rejected, and it was not until the First Congress set about to remedy the defects of the original instrument, that such a principle was adopted as a part of the first amendment to the Constitution of the United States. It is there provided that Congress shall make no law "abridging the freedom of speech or of the press."

So essential a characteristic of Civil Liberty does this freedom seem to us, that it is difficult to realize how modern is its growth and how tremendous a struggle it involved between government and press.

And yet it was as late as 1792 that Sampson Perry, editor of the *Argus*, was tried and convicted of criminal libel in England, for saying that "the House of Commons are not the real representatives of the people."

And to this day it remains the parliamentary theory in Great Britain that all reporting of its proceedings is a breach of privilege, upon the singular ground that it tends to make members of parliament answerable to their constituencies, rather than to their consciences.

*That of Connecticut is found in Art. I. of the Constitution: "§ 5. Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty. § 6. No law shall ever be passed to curtail or restrain the liberty of speech or of the press."

In this and in many other ways, the common law of England relating to the law of libel and the supervision of the press remains unchanged to this day. Yet prosecutions have all but ceased, for public opinion is really the guaranty of freedom.

Press censorship originated in the Church of Rome, as being necessary to the integrity of religion and to the protection of the people against heretical teachings.

Pope Alexander VI. in 1501 first announced the authority of the Church over printed publications, and in 1515 the Fifth Council of the Lateran formally decreed that no printed matter whatever should issue except with the written sanction of the Bishop or of the inquisitor of the diocese. This moral guardianship has been maintained by the Congregation of the Index.

At the Reformation, the Crown, in England, assumed the functions of press censorship formerly exercised by the Roman Church.

In the very infancy of the art of printing it became apparent that a free press was incompatible with absolute government, and the history of the press down to the end of the 18th century is that of a constant struggle between the government and the people, led and represented by the press, toward freedom of thought and speech.

The period of the Commonwealth was one of comparative freedom, but Cromwell conceded the liberty of printing rather from contempt of the power and influence of the press than from higher motives. One of the first measures instituted after the Restoration, was the suppression of the newspapers. A system of licensing was adopted, which was not abolished until 1694.

Attention has been called to the fact that even at the time of the Revolution of 1688 so little importance was attached to the influence of the press as a means of popular agitation and political reform, that no allusion to the liberty of the press was made either in the Bill of Rights or in the Act of Settlement. The real development of the modern newspaper began at about this period, with the refusal to re-enact the licensing law. But the publication of political news remained for a long time illegal. The House of Commons claimed for itself as a body and for its individual members, exemption from all criticism for official acts and conduct.

Different expedients were from time to time resorted to, to retain control over the press. Heavy taxes were laid upon circulation and upon advertisements, and the stamp duty was gradually increased until in the reign of George III. it had risen to 4d for each newspaper.

It was not until 1853 that the duty on advertisements was removed, and in 1855 the stamp duty, then of 1d, was abolished.

The attitude of the Colonial Governments in America toward the press was no less severe.

Massachusetts in 1662 appointed two persons licensers of the press, and prohibited any publications not supervised by them. Even the laws were not at first published for general circulation. When the magistrates of Massachusetts in 1649, yielding to popular demand, permitted them to be published, they did so under protest, deeming it "a hazardous experiment."

The royal instructions to all of the colonial governors throughout the colonial era contained this clause: "And forasmuch as great inconvenience may arise by the liberty of printing within our province, you are to provide by all necessary orders that no person keep any press for printing, nor that any pamphlet, book, or other matters whatsoever be printed without your special leave and license first obtained."

With the growth of popular intelligence and means of communication, and with the increased fullness in the development of national and civic life, it was inevitable that both in this country and in England many of the bonds which fettered the press should be broken. Newspapers increased rapidly in numbers and in circulation, and in so far as matters of general news and information were concerned, the government relaxed its control, and the contest resolved itself into a determination upon the part of the government to prevent the publication of political news and comment, and on the part of the press to evade or defy its restrictions.

This contest is intimately associated with—indeed, inseparably connected with—the development of the law of criminal libel.

From the Restoration to 1729, newspaper reports of parliamentary proceedings were unknown.

From that time on, numbers of printers were prosecuted every session for printing fragments of parliamentary speeches. It was the custom to do so as though they were imaginary, and designating their authors by initials or nicknames. The usual fine was £100. In 1764 one paper paid that sum for merely mentioning the name of Lord Hereford. In that year 200 criminal informations were filed against printers.

Popular sympathy led to the belief that the judges were too harsh in their suppression of the discussion of public affairs, with the natural result that juries were exceedingly lenient toward the accused.

Parliament, no less than the Crown, showed extreme anxiety to withdraw press cases from the control and cognizance of juries. The House of Commons, in its determination to suppress the dis-

cussion of public affairs, excepted libels from the list of offenses covered by the parliamentary privileges of its members.

The Attorney-General, by the *ex-officio* information, was able to bring libel cases to trial without previous indictment by the grand jury.

The test of strength then came between the court and the jury; the former declaring that the question of whether the subject matter was libelous or not was entirely one for the court, and that the function of the jury was only to decide whether or not the publication had been made.

In 1770 Woodfall was tried for publishing the letters of Junius; in particular that which accused the King of cowardice.

Lord Mansfield following in this respect a long list of eminent judges, declared that the question of libel or no libel was for the court.

To his charge the jury replied by a verdict of "Guilty of printing and publishing only." This was at once set aside and a *venire de novo* ordered,* but meanwhile Miller, who had reprinted the letter in question, had been prosecuted and acquitted, to the unbounded gratification of the public.

In its discomfiture the government abandoned the further trial of Woodfall, and by its surrender was established the right of the press to criticise the conduct, not merely of ministers of Parliament, but of the King himself.

In 1792, largely through the influence of Lord Camden, Mr. Fox caused to be passed an act entitled "An act to remove doubts respecting the functions of juries in cases of libel."

This was not by way of amendment, but was expressly stated to be declaratory of the Common Law. It was declared that the law of England had always been as advocated by Lord Camden, and that in criminal proceedings the question of libel or no libel is for the jury and not for the judge.

By this act, the battle was all but won.

There remained but one important change, which in this country was worked out mainly as the result of two famous trials for libel; one in the Colony of New York, in 1735; the other also in New York, after it had attained statehood, in 1804.

It was a *dictum* of Lord Mansfield that in criminal prosecutions for libel, "the greater the truth, the greater the libel."

By this was meant that the law took cognizance of the evil effect of derogatory and offensive publications, as detrimental to

* Rex v. Woodfall, 5 Burr. 2661.

government and as tending to provoke a breach of the peace, irrespective of their truth or falsity.

In case of a *false* defamatory statement, the civil courts were open for redress, while in many cases of aggravated and unwarranted and yet *truthful* attacks upon reputation, there was no means of redress. The very impossibility of disproving the statement was deemed likely to provoke to assault as the only means of vindication.

For this reason Courts would not even permit the truth to be shown, if the publication were made with malice and without justification and were of a wanton, indecent or aggravating nature.

John Peter Zenger published in the columns of his New York *Weekly Journal*, satires and criticisms upon the administration of Governor William Crosby, which led to his arrest and prosecution for criminal libel. His paper was ordered burned by the common hangman, and for nine months he lay in prison before he could obtain a trial. When it came Chief Justice De Lancey disbarred Zenger's counsel for questioning the validity of the judge's commission, and Andrew Hamilton, a noted lawyer of the day, came on from Philadelphia to conduct the defense.

Zenger entered a plea of not guilty, admitted the publication and sought to justify it by proving its truth. The chief justice refused to permit this and charged the jury that the publication was libelous and that it was their duty to return a verdict of guilty. They soon brought in a verdict of not guilty.

Mr. Hamilton's address in defense of his client and in vindication of the liberties of the press, is deemed a classic.

In commenting upon this case, in a recent address, Hon. H. C. Caldwell, presiding judge of the U. S. Circuit Court of Appeals for the Eighth Circuit, said: "The verdict electrified the country. Gouverneur Morris, one of the ablest and most sagacious statesmen of the revolutionary period, dated American liberty, not from the Stamp Act of 1765, nor yet from the 'Boston Tea Party,' but from the verdict of the jury in Zenger's case. The rendition of this verdict constituted the immortalizing moment of those men's lives, and is the richest heritage of their descendants. If the names of these twelve patriots were at hand they would appear here. Their names should go down in history with those of the foremost patriots of the Revolution. This historic incident would not be complete, without adding that the people bore Zenger's lawyer, Hamilton, out of the court-room on their shoulders, and that the Common Council of New York gave him the freedom of the city in a gold box for his

gratuitous services in 'defense of the rights of mankind and the liberty of the press.' " *

The other case, nearly seventy-five years later, was that of Harry Crosswell, who was indicted in 1804 for a libel upon President Jefferson.† This led to a change in the law of New York, by statutory enactment, permitting the truth to be given in evidence in all criminal prosecutions for libel.

Alexander Hamilton, in this case, made one of the most brilliant oratorical efforts of his life, and his definition of criminal libel in connection with political offenses, is now the accepted doctrine in all of the States.

"Nothing is a libel which is written and published from good motives and for justifiable ends; and to show this, the truth of the facts charged as libelous may be given in evidence, and this whether against public measures, public officers or private citizens."

In nearly every one, if not all of the States, the victory won was guaranteed by constitutional provisions, of which that of New York of 1821 is typical, and perhaps the most clearly stated.

"Every citizen may freely write, speak and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain the liberty of speech or of the press. In all prosecutions or indictments for libels, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted, and the jury shall have the right to determine the law and the fact.

Incomplete as this outline historical sketch may be, it perhaps may give us a fair understanding of the present law of criminal libel and of the responsibility of the newspaper to the sovereignty.

The freedom of the press means at least this, that it is to be exempt from censorship, and may publish what it deems proper, being responsible only for the abuse of that privilege.

Censorship as a war measure, and based upon matters of State and public expediency, will be accepted by most persons as a justifiable exception.

We have seen to what extent the newspaper is accountable to the sovereign power of the State for the abuse of the privilege of

* "Trial by Judge and Jury," an address before the Missouri State Bar Association, 60 Albany Law Journal, p. 39. The names of the jurors were furnished through the courtesy of Mr. Newman Erb, and appear in a note on page 40, with a reference to the pamphlet containing a report of the trial.

† *People v. Crosswell*—3 Johnson's Cases, 336.

free publication. But in addition to this, there is a further accountability to the person defamed, to be enforced in a civil action for damage to his reputation. A totally different theory prevails here from that which pervades the criminal law.

The liability is based upon the presumption that every man is entitled to such reputation and standing in the community as he may deserve, and that no man is legally entitled to defend an ill-gotten reputation, and that the publication of the truth can never result in a legal injury to him. While, on the one hand, the criminal law at one time would not even permit the truth of defamatory matter to be shown in evidence, on the other hand, in the civil courts proof of the truth of the matter published is invariably a complete defense to the action. There are, indeed, traces of an earlier doctrine more closely akin to that of the criminal law permitting the truth to be proved, but only in mitigation of damages, but I believe that there is now no exception to the rule which I have just stated, and which permits a newspaper to publish anything whatsoever of a person, with whatsoever motive, without responsibility, in a private action for damages, provided it is prepared when called upon to prove the truth of the charge.

But this truth must always be specially set up as a defense by the defendant in his pleadings, and must be proved by a preponderance of evidence upon the trial. If this is not done, the truth may still in some cases be proved to rebut actual malice and mitigate the damages, but cannot bar the action. In this respect the law extends to the press the fullest possible liberty of publication, holding it responsible merely for the abuse of that privilege.

But in a great many cases—and I do not say this in contempt of the morality of the journalist—the statement complained of is not true. What, then, are the respective positions of the newspaper and its victim?

The full and free discussion of all public affairs and of all trials and proceedings of legislative, executive and judicial bodies, is privileged; provided, however, that in case of judicial proceedings they are not *ex parte*, and do not hinder and obstruct the Court in its performance of its judicial duties, and thereby amount to a contempt of Court.

The publication of *ex parte* proceedings is not privileged, says Judge Cooley (Cooley on Torts, p. 258), because it “tends to poison the source of justice and to prejudge those whom the law still presumes to be innocent.”

But in the discussion of ordinary matters of news, there is no privilege accorded to the press by the common law. For the false

and malicious publication of matter derogatory to reputation, either damaging *per se* or because of peculiar circumstances, there exists a civil liability for such damages as the jury may see fit to award, not, of course, exceeding the amount demanded in the complaint. These may be intended as actual damages, the assessment of which must, of course, rest in the discretion of the jury, from the nature of the case, or, in extreme cases of wanton and malicious publications, exemplary damages or smart money may be included. As to a very large portion of a newspaper's contents, therefore, in relation particularly to matters of local gossip and private affairs, no privilege exists, unless especially conferred by statute.

Of late years, however, statutes have been enacted in a very large number, perhaps all, of the States, whose purpose it is to extend to the newspaper an additional privilege with respect to such news, if published in good faith, and without malice. In all such cases it is incumbent upon the plaintiff to prove malice as a matter of fact, and it is no longer to be inferred, as in general it is, or may be, from the falsity and derogatory nature of the language used. The Connecticut statute, Sec. 1116, reads as follows:

"In every action for a libel, the defendant may give proof of intention; and unless the plaintiff shall prove either malice in fact, or that the defendant, after having been requested by him in writing to retract the libelous charge, in as public a manner as that in which it was made, failed to do so within a reasonable time, he shall recover nothing but such actual damage as he may have specially alleged and proved."

In common speech this means that the plaintiff can recover no more than his actual damage unless he can prove unjustifiable publication or a failure to retract, upon demand.

In the case of *Arnott v. The Standard Association*, 57 Conn., p. 86, the Court said that this statute was enacted in the interest of publishers of newspapers, and intended to furnish them a measure of protection in the publication of current news, criticisms upon public men and measures, and comments upon matters of public interest. It gave the defendant a right to prove in justification that the publication was intended merely as an item of news or of fair and just criticism upon men and measures, and if he could make such proof, the plaintiff could recover nothing but such actual damage as he might have alleged and proved, unless either there was a refusal to retract upon written request, or the plaintiff was able to prove actual malice or malice in fact. In that particular case the libelous matter complained of was this: "Mr. Eaton might endorse a person, and he would be more likely to do so than not, but

he would not willingly endorse a thief, a jail-bird or a sneak like Arnott." The defendant set up by way of "proof of intention" that by a mistake in punctuation, and a failure to insert a comma after the word jail-bird, it was made to appear that all such epithets were intended to apply to Arnott, but such was not the intent of the publishers. This explanation was doubtless satisfactory to the jury, for a verdict was given to the defendant, and the Supreme Court held that it was not erroneous.

With the enormous expansion of the number and the circulation of newspapers, and with the occasional recklessness of the reporter on the scent of a sensation, it is not in the least surprising that the columns of the press are plentifully sprinkled with the seed of litigation, and yet the number of libel suits is astonishingly small. Why is this? The answer would seem to be this: The public has become so accustomed to the unreliability of press statements, whether through error, political warfare or spite, as to give them little heed, and to well understand that no public man can possibly remain free from vilification. It is also well understood that in large numbers of cases such false statements have little tendency to injure, and are readily discounted in advance. No public man can devote his whole life to the prosecution of libel suits, and yet, if he once began, he could do nothing else. It has come to be regarded undignified to seek redress at law, and the man would subject himself to the ridicule of the community should he take seriously the abuse which is heaped upon him.

The overwhelming volume of the newspaper circulation of the country contains in itself a better remedy for this abuse. The most outrageous libels upon a member of one party are matched by equally untrue praises in the organs of the other, and the bewildered people know not what to believe, and believe nothing. Now and then there may be a libel so gross or touching one so exclusively in his private or family life, that he feels bound to resort to the courts, and occasionally an enormous verdict is given the plaintiff, but usually he is very glad to get his six cents. Such a verdict as this, while perhaps not generally so regarded, is really a contemptuous reflection upon the influence of the defendant newspaper, for good or for evil.

It may be said in general that an injunction will not issue to restrain the printing and publication of a threatened libel, though there are some exceptions where the threatened publication would be injurious to property; and there are some instances in which courts have issued orders in the nature of injunctions to prohibit the publication of testimony prior to the decision of the cause. (Am.

& Eng. Enc., Injunction, p. 896.) It is intimated that the courts have power in this way to prevent the publication of pending judicial proceedings. (Note to *State v. Galloway*, 98 Am. Dec., p. 419, and cases.)

Such a remedy is, however, very rarely adopted, as there are other means of enforcing compliance equally efficacious. The Court may feel bound, from the nature of the testimony or of the case, in the interest of public morals, or to avoid local prejudice or demonstration, to prohibit the publication of testimony. In some jurisdictions this may be done either by an order excluding the public from the court room, or by an order prohibiting or regulating the publication, declaring a violation of the order to be contempt. In such a case its violation may sometimes be so punished. But the most satisfactory method of control is by non-interference, and a punishment for contempt if the privilege of fair discussion is abused.

A considerable branch of the law as to contempt of court is of recent growth, and is rapidly developing, having to do with newspaper publications in relation to the dignified and orderly conduct of the judicial business of the country. Contempts are divided into two general classes; civil and criminal. While agreeing upon the classification, courts are not agreed as to the location of the division line. Speaking generally, the former have to do merely with the violation of orders of court injurious to the adverse party, as in the case of disobedience of injunctions, orders in relation to alimony, *mandamus* proceedings, etc. Attachment for contempt is also the way by which a court of equity enforces its decree. While a court of law grants an execution, a court of chancery issues an order requiring some act or omission of the party. As there is no way in which this conduct may be compelled, the court must needs content itself with the personal punishment by fine or imprisonment for the violation of the order.

Criminal contempts, however, have to do with any and all acts which, in or out of the presence of the court, hinder, obstruct or impede its functions.* Actual contempts of the authority of the court by rude, insulting or disorderly conduct while the court is in session, do not as a rule present any interesting or difficult questions of law. Another classification is into direct and constructive contempts.

* "Generally, it may be said that a criminal contempt embraces all acts committed against the majesty of the law, and the primary purpose of their punishment is the vindication of public authority." 7 Am. and Eng. Encycl. of Law, 2d Ed. 28.

There are, however, in all cases of contempts, certain peculiarities of procedure which render them a terror to the offender. Of necessity the court whose dignity is insulted must have the power of summary disposition of the cause, and must itself pass upon it. The offender is, indeed, entitled to be heard in his defense, and an apology is frequently accepted, but the court possesses the power summarily to punish by fine and imprisonment, and the judge to whom the insult has been personally offered is hardly in the position of a disinterested tribunal; although it must be said that the very delicacy of the position of the court gives rise to the utmost caution in exercising this terrific power, and instances of its abuse are very rare.

A still more peculiar characteristic is that at common law (and the same is in general true to-day in the absence of statute), no right of appeal existed in contempt cases, nor could the question of the action of the court be reviewed in any way. There are some exceptions to this rule, where the question of whether the act done constitutes a contempt, is submitted to the court as a question of law.* Nor can the question be raised by a writ of *habeas corpus*, unless the judge has exceeded his jurisdiction. If he is within his jurisdiction, the judgment is valid, and if valid, no relief can be had upon *habeas corpus*. The law will not permit the question to be reviewed in that or in any other way, if within the jurisdiction of the court.

The party is entitled to be heard, though only in proper person and not by counsel. The severity of this rule, however, is now generally relaxed. There is no right of trial by jury. The accused is given the right to purge himself of the contempt, by his answers, and in many States his answer under oath is conclusive as to the meaning and purpose of the acts done or language used.

This brings me to a very important branch of our subject; the responsibility of a newspaper to the court, under process for contempt. It is, of course, clear that a newspaper publication cannot be a contempt of court in the sense in which the term has heretofore been used, and the contempt, if it exists, is what is known as the constructive contempt, or, as it is sometimes said, contempt of court out of court. Interference with property *in custodia legis*; suing a receiver without leave of court, etc., are other instances of constructive or indirect contempts.

I shall briefly discuss the principles which the most recent cases have adopted in dealing with this subject, in order to indicate the limitations upon the power of the press to criticise the courts and

*Tyler v. Hamersley, 44 Conn. 393-6.

their doings, and to show how the Government, through its judicial branch, has regained a very substantial part of the power which formerly rested to a greater extent with the executive or legislative department.

Simple as these principles are as legal propositions, their application is sometimes exceedingly difficult, where an attempt must be made to fix the boundaries beyond which the public press may not go in publications respecting judges and judicial proceedings; and, on the other hand, beyond which the judges and the courts may not go in restraining the freedom of the press and in punishing it as for improper interference with these proceedings, or for bringing them into unmerited contempt.

In addition to the power to punish any disorderly, tumultuous or disrespectful conduct in its presence, the court is also clothed with the inherent power to punish any act or publication which is calculated to disturb the business of the court, to impair its usefulness, to interfere with its orders or process, or which tends to bring it into disrespect or contempt. These powers, it is conceded, so far as constitutional courts are concerned, not only do not owe their existence to legislative action, but they are not subject to destruction by the legislative power, although their exercise may be regulated. This, at least, is the doctrine with respect to contempts in the presence of the court, and to interference with its process.

Implied in the very existence of the court is the power to compel orderly and respectful proceedings and demeanor on the part of all persons coming into its presence; obedience to its judgments and mandates, and the refraining from all acts and words which may tend to pollute the administration of justice, or which may discredit the courts and judges by imputing to them dishonorable motives in the discharge of their duties. Courts must have the power to protect and vindicate themselves and the honor of their judges and officials.

With respect, however, to courts owing their existence to legislative action, the right to punish for contempt may be abridged.*

It is usual to divide alleged contempts of courts by newspapers and their publications into two classes: those in which it is claimed that the object of the publication was to affect, or its tendency was naturally to affect, the decision of a pending cause; and the other class including those whose apparent purpose is to bring the courts or their judges or other essential officers into discredit.

As to the first class of cases, any publication pending a trial,

* 7 Am. and Eng. Ency. of Law, p. 32.

whose object is to influence or terrorize either judges, prosecuting officers, jurors, grand jurors, witnesses, or parties, constitutes most clearly a contempt of court. Where, however, the case is once decided, the capacity for this particular evil ceases, and it is a matter of much more difficulty to make out a case of contempt. Such publications are apt to take the form of a comment upon the conduct of the judges or jurors, and it becomes a matter of the utmost delicacy to decide whether the proper punishment is by way of a suit or prosecution for libel at the instance of the judge, or whether the attack is upon the dignity of the Court as such, so as to hinder, impede or obstruct it in the proper performance of its public duties.

It may be said in general that it is the tendency of modern decisions, where the comment bears no relation to the cause then pending, to regard the reflections as rather upon the character of the individual judge than upon the function and dignity of the Court. Where, however, the matter does or may affect a pending case, the arm of the law is long, and will reach the publisher of any matter the tendency of which is pernicious.

And yet we are not without decisions authorizing commitment for contempt, even for comment upon past proceedings, either based upon the common law or upon special statute.*

So far as I know, the question of the extent to which a newspaper may lawfully comment upon the proceedings of a court has never come up before the highest court of Connecticut, and only one case has come to my notice in which the right has been questioned. In that instance the accused were allowed to purge themselves of contempt and were dismissed with a caution.

A few words in relation to two or three of the most recent cases may perhaps serve to illustrate the most important features of this doctrine in practice. A few years ago the divorce suit of Price v. Price was on trial in California, and the court was advised that the evidence would probably be of such a nature that all persons should be excluded from the court room during the progress of the suit. Such an order was passed by the court, and it was further ordered "that no public report or publication of any character of the testimony in the case be made." The next day Mr. Shortridge, editor of the San Jose *Mercury*, published an article referring to the order of the court, and containing what purported to be the testimony of the witnesses. He was summoned to appear and show cause why he should not be adjudged guilty of contempt. In his answer he disclaimed any intention of reflecting upon the court, or of show-

* State v. Morrill, 16 Ark. 384.

ing any disrespect for it, and claimed that in publishing a fair and true report of the testimony and proceedings he was simply exercising a constitutional right with which the court could not interfere, by order or otherwise. He was, nevertheless, judged guilty of contempt of court, and ordered to pay a fine of \$100. The Supreme Court of the State (*in re Shortridge*, 99 Cal. 526), in a carefully considered opinion, ruled that the statute which permitted the court to direct a trial in divorce cases to be private, and to exclude the public from the court room, did not go so far as to permit an order that no public report of the testimony should be made. There was, therefore, no liability for contempt in making such a publication. As this report contained no reflection upon the judge and nothing to intimidate any witnesses, or other persons connected with the trial, it could not constitute a contempt of court, even though the court had forbidden its publication, and if the publication could not have interfered with the full and fair investigation of the merits of the case, no contempt could have been committed. The proceedings of the lower court were therefore annulled.

Another recent case,* decided in the fall of 1897, involved the question of how far a judge who was a candidate for re-election could go in the direction of punishing as for contempt the publication of newspaper articles reflecting upon his impartiality and honesty in the trial of cases already disposed of. Judge Bailey was a candidate for re-election, his term expiring in January, 1898, and the election was to take place on the 6th of April, 1897. During the month of March Judge Bailey was engaged in holding court, and on the 11th of that month an article was published charging the judge with being extravagant in the management of the court, with being partial and unfair in respect to his official conduct in the trial of causes, and with being influenced by corrupt motives. The authors and publishers of the articles were summoned before Judge Bailey, and after a few continuances of a few hours each, an alternative writ of prohibition from the Supreme Court was served upon Judge Bailey, prohibiting him from taking further cognizance of the contempt proceedings. He therefore stayed those proceedings, but adjudged the parties guilty of a new contempt in the presence of the court, by reason of their filing an affidavit alleging the truth of the original articles published by them. It being adjudged by the Supreme Court that both of these proceedings for contempt were in excess of the jurisdiction of the court, the writ of prohibition was made absolute. The argument was pressed that such publications

* State ex rel. Atty. Gen. v. Circuit Court of Eau Claire Co., 97 Wis. 1.

as were the subject of investigation tended to diminish the respect due to the court in the trial of future causes, and thus impair its usefulness; but it was said, this doctrine is certainly extreme. Carried to its ultimate conclusion it would call for the punishment of any adverse criticism on the official conduct of the sitting judge, and absolutely prevent all public or private discussion of court proceedings. It is true, Judge Bailey was a candidate for re-election, but if he had been a candidate for any other office than that of judge, it would not for a moment be claimed that the publications in question would afford ground for any other legal action than an action for libel in the regular course of the law. But the claim was made, that because he was a judge and was holding court at the time, such unfavorable criticism of his past actions may be summarily punished by the judge himself as for contempt. "Truly," says the court, "it must be a grievous and weighty necessity which will justify so arbitrary a proceeding, whereby a candidate for office becomes the accuser, judge and jury, and may within a few hours summarily punish his critic by imprisonment."

The penalties of the law have generally fallen upon the individuals who have personally taken part in the writing or printing of the objectionable matter. But in January, 1899, the Supreme Judicial Court of Massachusetts held that a corporation, as the proprietor of a newspaper, might be adjudged guilty of contempt and punished by a fine, though of course not, in the nature of things, by imprisonment. And this, too, under circumstances quite startling at first sight. A case was upon trial before the Superior Court, for the assessment of damages to one Loring for land taken for public purposes by the town of Holden. The *Telegram*, in commenting upon the case, said: "The town offered Loring \$80 at the time of the taking, but he demanded \$250, and, not getting it, went to law."

Words to the same effect were also published by the *Gazette*. These came to the notice of the presiding justice, who, of his own motion issued a summons in the name of the court to the managers of the papers, to show cause why the corporations should not be punished for contempt of court. Upon their appearance and after hearing, a fine of \$100 was imposed upon each corporation. The cases were taken up by writs of error and the judgments affirmed. A number of questions of practice were disposed of, and it was held that the publications tended to obstruct justice and prevent a fair trial, and so constituted contempts of court. That evidence of such an attempt to compromise would be inadmissible, is obvious. It is equally clear that if these facts came to the knowledge of the jurors,

they would have a tendency to prejudice them against the plaintiff, while the very fact that the publications came to the attention of the judge, was evidence of the probability of their reaching the jurors, and of their capacity for mischief.

It was held, too, that an execution was a proper way by which to reach the corporations' property, in case the fines were not willingly paid.

In the same State, and at about the same time, Torrey G. Wardner, the editor of the *Boston Traveler*, was convicted of contempt and imprisoned for publishing serious reflections upon the conduct of the trial of D. W. Getchell, an engineer of the N. Y., N. H. & H. R. R. Co., who was convicted of manslaughter for causing the accident at Sharon Station, whereby several passengers lost their lives.

Threats of an appeal were made, but acting under the advice of friends and counsel, Wardner apologized, purged himself of the contempt, and was released.

I have thus called attention, though with no attempt at an exhaustive statement of all the problems solved or to be solved, to the safeguards which surround the constitutional right of the press to freedom, as well as the limitations upon the abuse of that freedom and its degeneration into license. These, in turn, constitute the safeguards of the freedom of individual character and reputation, and of the free and unimpeded exercise of their proper functions by the judicial, executive and legislative departments of government.

This brief history of the newspaper before the law shows many extraordinary changes in their relations toward each other.

Macauley goes so far as to say: "No sooner had the press been emancipated from government censorship than the government itself fell under the censorship of the press."

Without quite conceding this, we have at last worked out a fairly satisfactory definition of that vague term. "The Liberty of the Press"—so often and so unreasonably appealed to as a shield against responsibility for abuse and vituperation, and the language of Alexander Hamilton is both comprehensive and accurate when he says: "The liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy or individuals."

GEORGE D. WATROUS.