SOME OBSERVATIONS ON THE LAW OF CRIMINAL CONTEMPT.*

I.

The judgment of Lord Hardwicke in *Roach v. Garvan*[1] is often cited as a *locus classicus* in the law of contempt of court.

> "Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the publick against persons concerned as parties in causes, before the cause is finally heard . . . There are three different sorts of contempt. One kind of contempt is scandalizing the court itself. There may be likewise a contempt of this Court, in abusing parties who are concerned in causes here. There may be also a contempt of this court, in prejudicing mankind against persons, before the cause is heard."

There is a formidable body of common law authority in England, Australia, and elsewhere in the Commonwealth, applying and expounding the doctrine of *Roach v. Garvan.* The exercise of this contempt power by English courts has been described by a recent American writer as "frightening to one who is reared in the climate of a free-wheeling press,"[2] and as a "Draconian control over press coverage of trials to keep the 'stream of justice' pure."[3] The American doctrine, in the context of contempt by publication and comment, is very different. As the American law now stands, there is, seemingly, little control by way of criminal contempt proceedings over the publication of matter which in Lord Hardwicke's antique phrase, scandalizes the courts or tends to prejudice mankind against persons before the cause is heard. In this paper, some attempt will be made to explore and compare some of the English, Australian and American rules and doctrines.

In the United States, the events which occurred in the immediate aftermath of the assassination of President Kennedy drew attention to what many American lawyers regarded as a very unsatisfactory state of affairs. In December 1963, the American Bar Association issued a statement in which it was said that what had taken place

* A paper read at the 1965 Law Summer School held at the University of Western Australia.

1 (1740) 2 Atk. 469, 26 E.R. 683.

2 GOLDFARB, THE CONTEMPT POWER (New York 1963) 88.

3 Goldfarb, *Ensuring Fair Trials. The Impropriety of Publicity, The New Republic,* 29th February 1964, at 12.

> "struck at the heart of a fundamental rule of law with its guarantees of a fair trial for everyone, however heinous the crime involved. The widespread publicising of Oswald's alleged guilt, involving statements by officials and public disclosures of the details of 'evidence' would have made it extremely difficult to empanel an unprejudiced jury and afford the accused a fair trial. It conceivably could have prevented any lawful trial of Oswald due to the difficulty of finding jurors who had not been prejudiced by these public statements."

Similar concern was expressed by others.[4] The Warren Commission Report gave a detailed account of these events[5] and recommended that "the representatives of the bar, law enforcement associations, and the news media work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings or the right of individuals to a fair trial."[6]

To an English or Australian lawyer, such a recommendation couched in voluntary and hortatory terms will surely seem very strange. But it was framed in part, at least, in light of the difficulties experienced in formulating a viable and constitutional law of contempt. It was framed, too, in the light of American doubts about the proprietary of restriction of freedom of the press. As the author of the most recent American text on contempt of court expresses it:

> "The latitude of American courts in dealing with the press is a cause both of the gauche, sensationalistic press—all too frequent in this country—and for, on the other hand, some of the social reforms, the great informational interchanges, and the general enlightenment of the population in matters of public interest. For this latter reason primarily, the use of constructive contempt against the press by American courts has been sporadic and unsuccessful."[7]

There are important and contending values, and the wise resolution of conflicts may not always be as clear as some of the English and Australian judgments would suggest. And, it should be added, there is some incoherence in English doctrine. The strict rules of contempt, once proceedings are pending, operate alongside a freedom to report com-

4 See *e.g.,* statement by American Civil Liberties Union, *New York Times,* 6th December 1963, at 18; letter by Justice Geller, *New York Times,* 12th December 1963, at 38.

5 Report of the Warren Commission on the Assassination of President Kennedy, Chapter V.

6 *Ibid.,* (Bantam Books ed. 1964) at 47.

7 GOLDFARB, THE CONTEMPT POWER, 89.

mittal proceedings in full detail. "One wonders", as GOLDFARB observes, "about the caliber of some of the existing English tabloids."[8] The account by Ludovic Kennedy of the trial of Stephen Ward leaves one with the sense that the English contempt rules do not effectively protect an accused person in a *cause celebre* from the most damning prejudice.[9]

II.

More than sixty years ago, a writer in the Law Quarterly Review described the jurisdiction to commit for criminal contempt as one "which enables a judge to commit to prison a subject of the Queen, without the verdict of a jury and without appeal; to fine him either as an additional or substitutional punishment, without limit of amount, for an offence which has never been defined by statutory enactment." This, he concluded, "is a jurisdiction which no-one will deny requires the closest scrutiny whenever it is exercised."[10] It was not until 1960 that a right of appeal was allowed in England against a summary conviction for contempt,[11] and even then, atypically, an applicant for committal or attachment may appeal in cases where the application is unsuccessful. It is the summary character of this ill-confined jurisdiction to punish for contempt which gives rise to especial concern. As a matter of authority, it is well established, and the High Court of Australia, notwithstanding an argument which was described as "interesting and informative"[12] and, I would add, valiant, held in *James v. Robinson*[13] that whatever the soundness of the historical basis of the summary jurisdiction to punish for contempt not committed in face of the Court, it was now unassailable. That historical basis rests on *R v. Almon.*[14] The actual proceedings in *Almon* went awry, and Mr. Justice Wilmot's judgment, which is the prime source of authority on this matter, was discovered in his papers and published posthumously. There have been elaborate historical demonstrations of its error of which the best known was by Sir John Fox,[15] and there are many others.[16] OSWALD, the principal (though somewhat dated)

8 *Ibid.*, at 88.

9 LUDOVIC KENNEDY, THE TRIAL OF STEPHEN WARD (London, 1964).

10 Hughes, *Contempt of Court and The Press,* (1900) 16 L. Q. REV. 292.

11 Administration of Justice Act 1960, sec. 13.

12 James v. Robinson, [1964] Argus L.R. 7, at 17, *per* Windeyer J.

13 [1964] Argus L.R. 7.

14 (1965) Wilmot's Notes 243.

15 CONTEMPT OF COURT (Oxford 1927).

16 See *e.g.*, 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (4th ed. 1938), at 393-4; Goodhart, (1935) 48 HARV. L. REV. 885, at 899; Frankfurter and Landis, (1924) 37 HARV. L. REV. 1010. See also John Fairfax & Son Ltd. v. McRae, (1955) 94 Commonwealth L.R. 351; Green v. U.S., (1958) 356 U.S. 165.

English text writer on contempt, says of Wilmot's conclusion that the power to punish summarily for contempt existed from earliest times, that "this appears in fact not to have been the case, and the judgment in question will be found on examination to depend rather on a somewhat turbid rhetoric than in ratiocination or the examination of authorities."[17] A recent American writer speaks of Wilmot's doctrine as a venerable product of *stare decisis* and years of acceptance, though somewhat limp from recent criticism,[18] a view perhaps shared by the High Court in *James v. Robinson* as to the first part, but categorically rejected by it as to the second.

In *James v. Robinson*[19] Windeyer J. observed that in the United States the scope of the jurisdiction to deal summarily with contempt has been the subject of differences of judicial opinion because of the constitutional assurances of due process and freedom of speech and of the press. It is true that the power to deal generally with contempt is bound up with these constitutional provisions, but the power to deal summarily with contempt has been considered more specifically in the context of the American constitutional provision for jury trial for crimes. It appears to be the law that when a contempt is committed in face of the court, the constitution does not deny power to punish summarily.[20] In *Sacher v. U.S.*[21] there were differences in the Supreme Court over the ambit of this power. In that case a federal judge, at the end of a long trial, summarily punished defence lawyers and a layman acting as his own attorney for contempt by conduct obstructing the trial. The majority in the Supreme Court held that this was permissible exercise of summary jurisdiction to punish for contempt in face of the court. Black J. foreshadowing later and broader arguments dissented, and said that there was no constitutional warrant for summary punishment in this case. The summary power must be narrowly confined to permit the judge to exercise it only to preserve order in his own court-room and to compel obedience to his orders. Here that need was not shown since the trial was already over when the judge purported to exercise the contempt power. Black J. characterized the general power to commit by summary process for contempt as "an illegitimate offspring of this historic coercive contempt power."[22]

17 CONTEMPT (3rd ed. 1910) at 3.

18 GOLDFARB, THE CONTEMPT POWER at 16.

19 [1964] Argus L.R. 7, at 18.

20 Ex parte Terry, (1888) 128 U.S. 289. See more recently Sacher v. U.S., (1951) 343 U.S. 1.

21 (1951) 343 U.S. 1.

22 *Ibid.*, at 22.

In *Green v. United States*[23] the Supreme Court considered the matter in a context which involved punishment for criminal contempt not committed in the face of the Court. The contempt alleged was disobedience to the order of a federal court by failure to appear for sentence, and this was summarily punished by three years imprisonment. A majority in the Supreme Court sustained the conviction, and said that "the statements of this Court in a long and unbroken line of decision involving contempts ranging from misbehaviour in court to disobedience to court orders establish beyond peradventure that criminal contempts are not subject to jury trials as a matter of constitutional right."[24] Frankfurter J. confronted with his earlier professorial demonstration of the unsoundness of the doctrine of *Almon's* case, nonetheless elected to follow it. Scholarship, he said, could not wipe out a century and a half of legislative and judicial history of federal law based on *Almon*.[25] Three members of the Court, speaking through Black J. dissented, and required trial by jury on such a charge of criminal contempt.[26]

> "The power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law. In my judgment the time has come for a fundamental and searching reconsideration of the validity of this power which has aptly been characterized by a State Supreme Court as 'perhaps nearest akin to despotic power of any power existing under our form of government.' Even though this extraordinary authority first slipped into the law as a very limited and insignificant thing, it has relentlessly swollen, at the hands of not unwilling judges, until it has become a drastic and pervasive mode of administering criminal justice, usurping our regular constitutional methods of trying those charged with offences against society . . . I would reject those precedents which have held the federal courts can punish an alleged violation outside the courtroom of their decrees by means of a summary trial, at least as long as they can punish by severe prison sentences or fines as they now can and do."

The Supreme Court was even more sharply divided in *United States v. Ross Barnett*.[27] The defendant Governor of Mississippi was charged with criminal contempt by wilful disobedience to the order

23 (1958) 358 U.S. 165.
24 *Ibid.*, at 183.
25 See James v. Robinson, [1964] Argus L.R. 7, at 18, *per* Windeyer J.
26 (1958) 358 U.S. 165, at 193-194.
27 (1964) 32 U.S. Law Week 4304.

of a federal court, and argued, *inter alia,* that he was entitled to a jury trial on the charge. By a majority of five to four, the Court held that he was not entitled to jury trial. As a matter of history and authority, it was said that there was no constitutional requirement of jury trial for criminal contempt proceedings, irrespective of the seriousness of the offence. The back of the majority decision seems, however, to have been broken by a footnote to the opinion which stated that some members of the Court (that is, of the majority) were of opinion that, without regard to the seriousness of the offence, the summary punishment would be constitutionally limited to the penalty provided for petty offences. As Black J. observed in dissent, application of this footnote would overrule *Green v. United States,* in part anyway, because the sentence upheld in that case was three years. This qualification, indeed this very significant modification of earlier doctrine, appears strangely placed in a footnote, though it was welcomed by Black J. as a "halting step" in the direction of "ultimate judicial obedience to the doubly proclaimed constitutional command that all people charged with a crime, including those charged with criminal contempt, must be given a trial with all the safeguards of the Bill of Rights, including indictment by grand jury and trial by jury." Black J., with the support of Douglas J., adhered to the position he had stated in *Green v. United States.* Goldberg J. in a separate concurrence, supported by two other members of the Court, held that as a matter of history, summary punishment for criminal contempt not in face of the court, was permissible only in the case of contempts punishable as petty offences by trivial penalties, but that all other trials for criminal contempts required trial by jury. It "defied reality" to describe the contempt charges in this case as trivial, for if they were sustained, they certainly did not call for trivial penalties. In accordance with the fundamental policy of the Constitution, it was therefore required that this charge of criminal contempt must be tried by jury.

From the authorities it appears that the developed doctrine in the United States federal courts has restricted the power to punish criminal contempts by summary process to cases involving (i) contempt directly in face of the Court, (ii) contempt which may be purged by compliance with the order of the Court, cases "where the defendant carries the keys to freedom in his willingness to comply with the court's directive"[28] and (iii) contempt generally, where the punishment is as for a petty offence.

[28] Green v. United States, (1958) 356 U.S. 168, at 197, *per* Black J. It should be noted that the Barnett case raised important practical issues. If Barnett was constitutionally entitled to a (Mississippi) jury trial, the chances of

English and Australian courts, as we have seen, have asserted an unchallengeable *historical* base for the exercise of this summary power to commit for criminal contempt, however unsatisfactory that history may have been. But the summary jurisdiction has also been supported as a matter of principle. In *R. v. Davies,*[29] the Divisional Court spoke of the recourse to indictment or criminal information as "too dilatory and too inconvenient to afford any satisfactory remedy." The exercise of the summary jurisdiction has been said to be "founded on the elementary necessities of justice."[30] Goodhart, in an often cited article, after demonstrating the imperfections of Wilmot's learning in *Almon* wrote that "this is an interesting example of how an error in history may prove of benefit in the development of the law, for if it were necessary to try before a jury every case of constructive[31] contempt, such as prejudicing the jury or threatening the parties, the present control of the press would lose much of its efficacy."[32] All this, with respect, is not easy to understand. It is easy to see that where a contempt is committed in face of the court, the availability of a summary power to commit may be an appropriate and useful instrument of control and of court discipline. But where the contempt is not of this character, what is the force of the argument that a jury trial is "slow", that the process of trial is "dilatory"? The important point is, surely, to establish a rule that such conduct will attract punishment, if proved. Why there should be any better use for summary proceedings here than in the case of any other crime has never been satisfactorily explained. Is it not better to say that the same general considerations of justice which lead to a jury trial upon a charge of crime also lead to the conclusion that a jury trial is appropriate on a charge of criminal contempt?[33] Of course, in a case like *Barnett,* a local jury, sympathetic to Barnett's conduct and outlook, is likely to refuse to convict. But this does not apply only to cases of criminal contempt—it applies to a charge of murder of a negro by a white accused—and if this were

securing a conviction for a manifest disregard of the federal court order were extremely remote. How can the Federal Government enforce its court decrees relating to civil rights in the South if violators of these court orders are tried by southern juries which have demonstrated their aversion to civil rights cases? See GOLDFARB, THE CONTEMPT POWER at 333-334.

29 [1906] 1 K.B. 32, at 41. See also Skipworth & Castro's Case, (1873) L.R. 9 Q.B. 230, at 233.

30 James Fairfax & Sons Pty. Ltd. v. McRae, (1955) 93 Commonwealth L.R. 351, at 370.

31 That is to say contempt *not* in face of the court.

32 *Newspapers and Contempt of Court in English Law,* (1935) 48 HARV. L. REV. 885, at 899.

33 Beale, *Contempt of Court: Civil and Criminal,* (1908) 21 HARV. L. REV. 161, at 173.

advanced as an argument in support of summary trial, it would have to be carried into other areas where the requirement of jury trial is unquestioned. A non lawyer venturing into this field described the procedure by way of summary punishment for contempt as "wholly alien from the genius of the common law"[34] and, in my view, there is much to be said for this. The summary procedure rests on concededly bad history. It is curiously lacking in principle. Is there not a case for law reform here?

III.

Almon's case was one which fell into Lord Hardwicke's category of scandalizing the court. Almon had attacked Lord Mansfield, not physically but with his pen. Mr. Justice Wilmot was at pains to explain why such acts constituted criminal contempt. It was said that attacks on judges

> "excite in the minds of the people a general dissatisfaction with all judicial determinations . . . and wherever men's allegiance to the laws is so fundamentally shaken it is the most fatal and dangerous obstruction of justice, and in my opinion calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of judges as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial and to be universally thought so are both absolutely necessary for the giving justice that free open and unimpaired current which it has for many ages found all over this kingdom."[35]

The power to punish for contempt in such cases has been reaffirmed on many occasions. An authoritative exposition of the doctrine in Australia was given in *King v. Dunbadin, ex parte Williams,*[36] where Rich J. said that the jurisdiction exists

> "because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office. The jurisdiction is not given for the purpose of protecting the Judges personally from imputations to which they may be exposed as individuals. It is not given for the purpose of restricting honest criticism based on rational grounds of the manner in which the Court performs its functions.

34 Laski, *Procedure for Constructive Contempt in England,* (1928) 41 HARV. L. REV. 1031, at 1041-1042.

35 Wilmot, *Opinions,* at 255-256, cited R. v. Davies, [1906] 1 K.B. at 41.

36 (1935) 53 Commonwealth L.R. 434, at 442-443.

> The law permits in respect of Courts, as of other institutions, the fullest discussions of their doings so long as that discussion is fairly conducted and is honetly directed at some definite public purpose. The jurisdiction exists in order that the authority of the law as administered in the Courts may be established and maintained . . . The necessity of maintaining the authority of this Court against such attacks is perhaps even greater than in the case of Courts under a unitary system of government. It is the constantly recurring task of this Court to decide upon the validity of the enactments of one or other of the seven governments of Australia. Thus the Court occupies a position which makes any tendency to weaken its authority a matter of especial concern."

There are cases where affronts to the dignity of the judicial office unquestionably constitutes a contempt. We are reminded of the cases of the seventeenth century felon who convicted before Richardson CJ., "ject un brickbat a le justice que narrowly mist" and suffered the penalty of losing the offending hand before being hanged in the immediate presence of the court, and of the individual who threw an egg at Malins V-C. as he was leaving the bench. The judge first observed that the missile must have been intended for his brother, Bacon V-C., sitting in the next court, and then committed the thrower to prison for contempt.[37] In such cases, the only serious question is whether a summary trial is appropriate, *a fortiori* by the judge who is hit or narrowly missed. But the case worthy of examination is that discussed by Rich J. in *R. v. Dunbadin;* non-physical attacks on and criticism of judges and courts. At the very end of the last century, in *McLeod v. St. Aubyn,*[38] the Privy Council, in reversing contempt convictions for criticisms of judicial performances in the West Indies, said that while such a power to punish might be appropriate in a proper case "in small colonies, consisting principally of coloured populations,"[39] it was obsolete in England where the courts were content to leave such matters to public opinion. Apart from the reference to the small and coloured colonies, the opinion has a very modern and forward-looking approach. Yet very shortly thereafter, in *Reg. v. Gray,*[40] the obsoleteness of the jurisdiction in the United Kingdom was firmly denied, and a Divisional Court punished a writer for a criticism of Darling J. published in Birmingham while Darling J. was sitting as assize judge there. A writer in the Law Quarterly Review for

37 OSWALD, CONTEMPT at 41-42.
38 [1899] A.C. 549.
39 *Ibid.,* at 561.
40 [1900] 2 Q.B. 36.

1900, in an article to which reference has already been made,[41] expressed his misgivings at the result and questioned the propriety of using the contempt power to punish what was merely scurrilous abuse, which did not reflect on judicial capacity or on the integrity of the judicial process.

Subsequent history shows that the doctrine of *Reg. v Gray* is very much alive, and during this century there have been many instances of the use of the contempt power for this purpose, although from time to time there have been notable admonitions from the Bench that "the path of criticism is a public way; the wrongheaded are permitted to err therein . . . Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."[42] In *R. v. Editor of New States-Man*[43] a journalist was punished for writing in the aftermath of a trial that people with the views of Dr. Marie Stopes could not apparently hope for a fair hearing from Mr. Justice Avory—and there are so many Avorys. This was said by Lord Hewart C.J. to lower the authority of the court and to interfere by its imputations of want of impartiality with the due performance of judicial duties. In *R. v. Colsey,*[44] a case which Goodhart characterized as going to "extreme limits,"[45] mild and wry comments on Slesser L.J. were held to constitute criminal contempt.

The jurisdiction is obviously alive in Australia. In *R. v. Arrow-smith*[46] an attack was made on the impartiality of Lowe J. sitting as a Royal Commissioner, with the power and status of a Justice of the Supreme Court, to inquire into Communism. This publication was held to constitute a criminal contempt. There are cases in which Australian courts have declined to convict but have asserted the existence of this jurisdiction,[47] and a warning has been given on occasion that the case lies very close to the border.[48] Two decisions

41 Hughes, *Contempt of Court and The Press,* (1900) 16 L.Q. Rev. 292. See *supra,* at 3-4.

42 Ambard v. Attorney-General for Trinidad and Tobago, [1936] A.C. 322, at 335, *per* Lord Atkin.

43 (1928) 44 Times L.R. 301.

44 The Times (London) 9th May 1931. Critically noted (1931) 47 L.Q. Rev. 315.

45 *Op. cit. supra* note 32, at 904.

46 [1950] Victorian L.R. 78. See also R. v. Collins, [1954] Victorian L.R. 46; Ex parte The Attorney-General; Re Truth and Sportsman Ltd., [1961] S.R. (N.S.W.) 454.

47 See *e.g.,* Bell v. Stewart, (1920) 28 Commonwealth L.R. 419; R. v. Brett, [1950] Victorian L.R. 226.

48 In R. v. Brett, [1950] Victorian L.R. 226, O'Bryan J. gave such a warning. He did not record a conviction but he made no order for costs. This in itself was a punishment.

of the High Court, now some thirty years old, examined the jurisdiction. In *King v. Fletcher; Ex parte Kisch,*[49] an application was made to the High Court to punish an editor and newspaper proprietor for contempt of the High Court in publishing articles and letters purporting to criticize a decision of the Court. That decision was *R. v. Wilson; Ex parte Kisch,*[50] in which the Court held that Scottish Gaelic could not be regarded as a European language within the scope and intention of section 3 (a) of the Immigration Restriction Act 1901. Some here today may remember those stirring and memorable events. The decision, not very perfectly understood, aroused the ire of Scottish nationalists, and language was used which was characterized by the court as unwarranted, inaccurate, intemperate and offensive. Evatt J. held that the matter published exceeded the limits of fair criticism. He did not however fix a penalty beyond refusing to make an order as to the costs of the respondents. In *King v. Dunbabin; Ex parte Williams,*[51] the proprietor and editor of a newspaper were punished by substantial fines. There the article attacked the High Court for decisions in this immigration case and in respect of sales tax. The article was certainly tasteless, and Rich J. described its thrust as being to "represent that the Court exercises its ingenuity in order to defeat legislation to which great public importance attaches and that the Federal Government encounters in the Court an obstacle it might well seek to remove." This is combined with a suggestion that one of its decisions pleased no one but the "Little Brothers of the Soviet."[52] All three members of the Court held that this constituted a contempt; as Rich J. put it "Such imputations, if permitted, could not but shake the confidence of litigants and the public in the decisions of the Court and weaken the spirit of obedience to the law."[53] The majority agreed in imposing substantial penalties, while Starke J. was of the opinion that the common good and authority of the Court would be sufficiently vindicated "in this summary and arbitrary process,"[54] if the publication was declared a contempt and the respondents were ordered to pay the costs of the motion.

In this case, in a passage already cited,[55] Rich J. affirmed this jurisdiction in unequivocal terms, and said that the necessity for maintaining the authority of the High Court, having regard to its

49 (1935) 52 Commonwealth L.R. 248.
50 (1934) 52 Commonwealth L.R. 234.
51 (1935) 53 Commonwealth L.R. 434.
52 *Ibid.,* at 444.
53 *Ibid.,* at 445
54 *Ibid.,* at 446.
55 See *supra,* at 9.

federal constitutional functions, was perhaps even greater than in the case of courts under a unitary system of government. A reading of this statement and of these decisions of the High Court, would certainly surprise their brethren on the Supreme Court of the United States. There can be little doubt, having regard to the course of decision, that the exercise of contempt power in cases like *Fletcher* and *Dunbabin* would be unconstitutional[56] in the United States. So far as the federal courts are concerned, the power to punish for contempt is conferred by statute, which was narrowly drawn and has been restrictively interpreted,[57] and the power of the state courts is controlled by the constitutional doctrine enunciated by the Supreme Court of the United States.[58] A reading of American press comment and discussions of Supreme Court decisions points up the difference in startling fashion. It would be said that it is precisely *because* the Court is assigned high constitutional functions and responsibilities that it is subject to public criticism which may be expressed vehemently and intemperately. There are of course very real differences of *ethos* in the two countries. While Americans are impressed with the performance and the style of British courts, they would not accept the doctrine which finds expression in cases like *Fletcher* and *Dunbabin, Reg. v. Gray,* and the other cases discussed. They would say, as I see it, that there is no warrant for this rule of law, that in this context the values of free expression outweight those of preserving the dignity and standing of the judicial process. They would also say, I think, that the court on which the burden of vehement criticism rests most heavily, the Supreme Court of the United States, is not overborne by such criticism, tasteless and even shocking though it may be. They would say that the limits of protection for the security of the judicial process mush be much more narrowly drawn, and should be confined to contempt in face of the court.[59]

There is, I believe, some ground for doubting the case for the maintenance of this head of contempt, save in the most extreme case. The judgment of the Privy Council in *McLeod v. St. Aubyn* that this jurisdiction was "obsolete" in the United Kingdom has been shown

56 See Bridges v. California; Times-Mirror v. Superior Court of California in Los Angeles, (1941) 314 U.S. 252; Pennekamp v. Florida, (1946) 325 U.S. 331; Craig v. Harney, (1947) 331 U.S. 367; Woods v. Georgia, (1962) 370 U.S. 375. These cases deal with diverse aspects of the contempt power, but the constitutional doctrine they state is plainly applicable to this case.

57 See GOLDFARB, *op. cit. supra* at 20-22, 90-93. See also Nye v. United States, (1940) 313 U.S. 33.

58 See note 56 *supra.*

59 See *e.g.,* Ex parte Terry, (1888) 128 U.S. 289.

to be wrong as a matter of law; the English and Australian cases assert that the jurisdiction is "undoubted,"[60] and during the course of this century it has been exercised. It may, with respect, be asked whether there was any warrant for its exercise in such a case as *Dunbabin,* or indeed in any of the other cases discussed. Do the judges and does the judicial process really need this protection? Would it not have been the path of wisdom to have accepted the judgment on *Dunbabin,* or indeed in any of the other cases discussed. Do the judges the jurisdiction given by the Privy Council in *McLeod v. St. Aubyn*? And, even if we concede the desirability of the jurisdiction, is this not the case where there is the strongest argument against its exercise by "summary and arbitrary"[61] process. In *King v. Fletcher*[62] Evatt J. said that in such cases, as in all cases of contempt, the court has power to act not only summarily but *ex mero motu.* And this is the area in which the judge or court is most directly affronted by the alleged contempt. There are safeguards, often but not invariably adopted, in having the contempt issue tried by another judge or other judges. But, again, if the justification for the jurisdiction is the tendency of the act or statement to impair the confidence of the people in the court's judgments because the matter published aims at lowering the authority of the court and excites misgivings as to the integrity, proprietary and impartiality brought to the exercise of the judicial office, is not the reality of that tendency better judged by "the people," through the jury? Despite repeated statements in the judgments that this jurisdiction is to be exercised cautiously and sparingly, it has not too infrequently been exercised, and punishment inflicted, where the pollution of the stream of justice is not very obvious.

IV.

Since the early 1940's, American courts, and particularly the Supreme Court of the United States, have enunciated constitutional doctrines limiting the power to punish for contempt. The cases have involved constructive contempts, that is to say contempts not committed in face of the court, and have for the most part been concerned with Lord Hardwicke's head (somewhat extended) of "prejudicing mankind against persons before the cause is heard." In *Bridges v. California* and *Times-Mirror v. Superior Court of California in Los Angeles,*[63] contempt convictions by California State

60 King v. Dunbabin, (1935) 53 Commonwealth L.R. 434, at 446, *per* Starke J.
61 *Ibid.,* at 446, *per* Starke J.
62 (1935) 52 Commonwealth L.R. 248, at 258.
63 (1941) 314 U.S. 252.

courts were reversed by bare majority decisions of the Supreme Court of the United States as unconstitutional abridgements of freedom of speech and of the press. Harry Bridges had sent a telegram to the Secretary of Labour which he published in Los Angeles and San Francisco, in which he attacked a decision of a state judge as outrageous and said that an attempt to enforce it would precipitate a strike. At this time, a motion for a new trial was pending. In the *Times-Mirror* case, two labour unionists were awaiting sentence, and a Los Angeles newspaper in an editorial declared that the judge would make a serious mistake if he granted probation to the defendants who were described as "gorillas" who should be sent to prison as an example to the community. In these cases, the publications were held by the trial courts to prejudice the fair conduct of legal proceedings before judges sitting without juries. In reversing, the majority in the Supreme Court of the United States required a showing of "clear and present danger" to support contempt convictions. This was a formula drawn from other constitutional contexts, and it was said that the substantive evil must be extremely serious and the degree of imminence of danger extremely high before utterances or publications could be punished as contempt. The majority judges observed that the California legislature had not addressed itself to the law of contempt, by enacting legislation, and that the state courts had purported to exercise a common law power. It was also said that English authorities were not decisive, having regard to American constitutional history and law, and the majority held further that the pressures brought to bear on the judges were of little significance. Frankfurter J., speaking for the dissenting judges, stressed the importance of safeguarding fair and balanced trials. He did not find any special significance in a "clear and present danger" test, which "is an expression of tendency and not of accomplishment, and the literary difference between it and 'reasonable tendency' is not of constitutional dimension."[64]

In *Pennekamp v. Florida*,[65] the Supreme Court unanimously reversed a state court conviction for contempt in respect of articles attacking judicial integrity and performance. On the facts it was not a strong case, and the court held that there was no impact on the conduct of pending proceedings and that any possible effect on future proceedings was too remote. Frankfurter J. in a separate concurrence reminded the court of the importance of striking a proper balance between the interests of a free press and the conduct of a fair trial.

64 *Ibid.*, at 296.
65 (1946) 328 U.S. 331.

In *Craig v. Harney*[66] the Supreme Court, once again divided, reversed a state court conviction for contempt. Successive newspaper articles criticized a layman judge for his conduct of judicial proceedings, which was described as arbitrary and as a travesty of justice. The articles were published at a time when a motion for a new trial was pending. The majority in the Supreme Court characterized the articles as strong and intemperate, but said that to sustain a contempt conviction it was necessary to show "an imminent, not merely a likely threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."[67] Frankfurter J. with Vinson C.J. dissenting, pointed out that these newspapers dominated the community, that they constituted a formidable pressure on this individual judge, and concluded that there was no warrant for interfering with the judgment of the Texas court that the publications constituted a clear and present danger to the due administration of justice. Jackson J. in a separate dissent, pointed to the fact that the judge who was attacked was a layman with no anchor in professional opinion, and that his short elective term made him peculiarly sensitive to such newspaper pressures.

In *Maryland v. Baltimore Radio Show Inc.*[68] the Supreme Court refused to review a decision of the Maryland Court of Appeals reversing a contempt conviction by a trial court. The alleged contempts were radio broadcasts relating to a negro accused charged with the murder of a young girl. The crime was atrocious and had attracted wide attention. One of the broadcasts began with the words "Stand by for a sensation." It announced the arrest of the accused, and recounted his confession and prior criminal record in detail. The same matter was broadcast by other stations. The defendant in these circumstances waived jury trial under the Maryland rules, and was tried and convicted for murder by a three judge court. A Maryland court held the radio broadcaster guilty of contempt and based its power to do so both on a specific rule of the Supreme Bench of Baltimore and on its general power to issue citations for contempt to protect the rights of prisoners to a fair trial. This conviction was reversed by a majority decision of the Court of Appeals of Maryland which purported to apply the clear and present danger test as formulated by the Supreme Court of the United States. It was held that the broadcasts did not constitute a clear and present danger within the meaning

66 (1947) 331 U.S. 367.
67 *Ibid.*, at 376.
68 (1950) 338 U.S. 912.

of that test. This was a case which, apart from the accused's election to waive, would have involved jury trial, and it was argued therefore that the Supreme Court test must be interpreted to accommodate the special circumstances of a jury trial. As to this, the Maryland court said "The distinction [between jury and non-jury trials] . . . is hardly tenable. Judges are not so 'angelic' as to render them immune to human influences calculated to affect the rest of mankind. Conversely while juries represent a cross-section of the community, it cannot be denied that in every community there are citizens who by training and character are capable of the same firmness and impartiality as the judiciary."[69] The Supreme Court of the United States, without assigning reasons, declined to review, and Frankfurter J. took the comparatively unusual course of filing a separate opinion in which he pointed out at some length that the denial of *certiorari* did not disclose any view of the Court beyond a refusal to take the particular case. In an appendix to his opinion, he collected the English decisions on contempt for publication prejudicial to the fair administration of justice.

Again, in *Woods v. Georgia,*[70] the Supreme Court by a majority reversed a contempt conviction by a Georgia court. The state court had convicted a sheriff who had made statements at a press conference called by him which were held by the court to constitute a clear and present danger to the deliberations of a grand jury sitting at the time and considering the matters on which the sheriff had spoken. There were complex political issues in the case and in the grand jury proceedings. Warren C.J. for the majority in the Supreme Court found that the clear and present danger test was not satisfied. This was not a trial of an individual but a general grand jury investigation into a matter of concern to the general community, and the Court should not at this time consider the "variant factors that would be present in a case involving a petit jury."[71] Harlan J. dissented sharply; in his view the state conviction met federal constitutional standards. The sheriff was a law enforcement officer, and this gave an official and authoritative character to his statements, while the grand jury was engaged on a specific investigation which had been the object of the sheriff's statement and attack. "What may not seriously endanger the independent deliberations of a judge may well jeopardise those of a grand or petit jury."[72]

69 Baltimore Radio Show Inc. v. State, 67 A.2d. 497, at 508-509.
70 (1962) 370 U.S. 375.
71 *Ibid.,* at 389.
72 *Ibid.,* at 401-402.

No case has yet arisen in which the Supreme Court has directly considered the issue of contempt by prejudicial publication in the context of petty jury proceedings. Warren C.J. left this case open in *Woods v. Georgia,* although the court in *Craig v. Harney*[73] said, somewhat surprisingly, that jurors are "men of fortitude, able to thrive in a hardy climate." One recalls the admonition of Lord Ellenborough more than a hundred-and-fifty years ago in *R. v. Fisher*[74] that "if anything is more important than another in the administration of justice, it is that jurymen should come to trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced. Is it possible that they should do so after having read for weeks and months before ex parte statements of the evidence against the accused which the latter had no opportunity to disprove or to controvert?" It may be that there is not too significant a distinction for this purpose between the situation of a juryman and a lay judge with a short elective term, and in the latter case the Supreme Court of the United States in *Craig v. Harney* reversed a contempt conviction.

The course of decision in the Supreme Court over the course of the last twenty years has occasioned extensive discussion.[75] It has been said that the cases show the contempt power to be a "negligible device for protecting a defendant's right to a fair trial."[76] It is not the case, however, that the cases starting with *Bridges v. California* opened the floodgates. Before that time criminal trials were not infrequently conducted in a blaze of prejudicial publicity. The *Hauptmann* case in the mid-1930's—Lindbergh baby kidnapping case—was a startling example. It was said of that case that it "exhibited perhaps the most spectacular and depressing example of improper publicity and professional misconduct ever presented to the people of the United States in a criminal trial."[77] The events preceding, during and after the trial were chronicled by radio and news media without mercy; interviews were given daily throughout the proceedings by attorneys for

73 (1947) 331 U.S. at 376.

74 (1811) 11 Rev. R. 779.

75 See GOLDFARB, *op. cit. supra, passim* and esp. Chapter 2; Donnelly and Goldfarb, *Contempt by Publication in the United States,* (1961) 24 MOD. L. REV. 239; Goldfarb, *Public Information, Criminal Trials and The Cause Celebre,* (1961) 36 N.Y.U.L. REV. 810; Will, *Free Press Versus Fair Trial,* (1963) 12 De Paul L. REV. 197; *The Case against Trial by Newspaper: Analysis and Proposal,* (1962) 57 Nw. U.L. REV. 217; Mullaney, *A Re-examination of Bridges v. California,* (1959) 23 Albany L. REV. 61.

76 Donnelly and Goldfarb, *Contempt by Publication in the United States,* (1961) 24 MOD. L. REV. at 245.

77 66 American Bar Association Reports 851, at 861.

both sides. The decisions of the Supreme Court since *Bridges* have however made it unlikely that a viable contempt weapon can or will be fashioned to control the publication of matter calculated to prejudice a fair trial. The Warren Commission recommended co-operation and voluntary agreement to establish standards for the collection and presentation of information to the public so that there would be no interference with pending criminal investigations, court proceedings, or the right to a fair trial. What hope there is of effective and comprehensive voluntary agreement is very uncertain: the late H. L. Mencken in characteristic style put it that "journalistic codes of ethics are all moonshine." In the meantime, the problem remains a formidable one, as evidenced by the concern of the Warren Commission, the American Bar Association and by a recent spate of writing in the aftermath of the Kennedy and Oswald assassinations. Only a few years ago, not in the context of a prosecution for contempt, but in the case of a successful application to the Supreme Court for reversal of a conviction for murder on the ground that undue prejudicial publicity surrounding the events and trial had foreclosed the possibility of a fair trial and thereby denied the accused a trial satisfying the requirements of due process of law, Mr. Justice Frankfurter wrote:

> "Not a term passes without this Court being importuned to review convictions had in States throughout the country in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—too often, as in this case, with the prosecutor's collaboration—exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court. Indeed such extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced to forego trial by jury . . . For one reason or another this Court does not undertake to review all such envenomed state prosecutions. But again and again, such disregard of fundamental fairness is so flagrant that the Court is compelled, as it was only a week ago, to reverse a conviction in which prejudicial newspaper intrusion has poisoned the outcome . . . This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were

poisoned, the poisoner is constitutionally protected in plying his trade."[78]

Frankfurter J., as we have seen, has consistently argued, often in dissent, that the Court is not required as a matter of constitutional doctrine to invalidate contempt convictions unless there is a showing of clear and present danger as spelled out in the cases discussed.

There is now, however, a substantial body of authority in the Supreme Court reversing on due process grounds, convictions of accused persons which have been obtained in a trial and pre-trial process perverted by prejudicial publicity. *Irvin v. Dowd*[79] was such a case; there for months before the trial a barrage of newspaper publicity was directed against the accused; radio and television rehearsed his personal history, his record of juvenile crimes and other convictions; he was described as a "confessed slayer," a parole violator and fraudulent cheque artist. A similar case was *Shepherd v. Florida.*[80] Recently, in *Rideau v. Louisiana,*[81] the Supreme Court by a majority decision reversed a murder conviction where a local television station had thrice shown a film of an interrogation of Rideau by the sheriff in which the accused had confessed his guilt. It was said that due process of law in this case required a trial by jury drawn from a community of people who had not seen or heard Rideau's televised interview.

This sampling of due process cases reveals an interesting aspect of American law. Some judges, Black J., for example, have regularly joined with majorities in reversing *contempt* convictions for prejudicial publicity, while vigorously asserting that convictions of accused persons should be reversed where the trial was perverted by prejudicial publicity. In *Beck v. Washington*[82] a majority in the Supreme Court refused to reverse the conviction of Beck, who complained of prejudice. Black J. dissented, asserting that "a fair trial under fair procedure is a basic element in our government. Zealous partisans filled with bias and prejudice have no place among those whom government selects to play important parts in trials designed to lead to fair determination of guilt or innocence." *Beck* was a case in which, as noted, the majority refused to reverse the conviction for want of due process, and there will always be a judgment as to which side of a line a case falls. But

78 Irvin v. Dowd, (1961) 366 U.S. 717, at 729-730.

79 *Ibid.*

80 (1951) 341 U.S. 50.

81 (1963) 31 Law Week 4548.

82 (1962) 369 U.S. 541, at 569-570.

the cases in which convictions have been reversed on due process grounds, because of prejudicial publicity, expose a curious situation. Reversals of convictions do not operate as a sanction on, or a control of, the activities of the *media* of publicity. Reversals of convictions are "all in the nature of after thoughts or after-effects,"[83] and may well produce the consequence that a guilty man will go free because the courts deny to themselves power to control publicity which tends to prejudice the conduct of proceedings, the outcome of which they will subsequently nullify, because, and only because of that prejudicial publicity. As Judge Will puts it, "it can be either the public or the accused who suffers as the result of the publicity, to say nothing of the ill effects on the fair and efficient administration of justice."[84]

V.

The English rule which is also the Australian rule on criminal contempt by prejudicial publicity, has been stated on many occasions. The basis upon which the rule rests was stated sixty years ago by Wills J. in *R. v. Parke.*[85]

> "The reason why the publication of articles like those with which we have to deal is treated as a contempt of court is because their tendency and sometimes their object is to deprive the court of the power of doing that which is the end for which it exists—namely to administer justice duly, impartially and with reference solely to the facts judicially brought before it. Their tendency is to reduce the court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned."

In each case, the court has applied the test whether the matter complained of is calculated to interfere with the course of justice,[86] and the critical question is the *tendency* of the publication to interefere with the course of justice, and *not* the *intention* of the publisher.[87] The judges have said that this summary power to punish should be used only in a clear case,[88] and have acknowledged the importance of reconciling "the right of free speech and the public advantage that a knave shall be exposed and the right of a suitor to have his case fairly

83 Will, *Free Press Versus Fair Trial,* (1963) 12 De Paul L. Rev. 197. at 209.

84 *Ibid.,* at 205.

85 [1903] 2 K.B. 432.

86 Reg. v. Odham's Press Ltd., [1957] 1 Q.B. 73, at 80.

87 Davis v. Baillie, [1946] Victorian L.R. 486.

88 See *e.g.,* Reg. v. Payne, [1896] 1 Q.B. 577; R. v. Davies, [1945] 1 K.B. 435; Reg. v. Duffy, [1960] 2 Q.B. 188.

tried,"[89] and of striking the right balance.[90] One factor which may be material is whether a jury or a judge is determining the issue. In *Reg. v. Duffy*[91] after conviction and before appeal, a newspaper published statements about a man which, it was alleged, made him appear a man addicted to violence. It was said by Lord Parker C.J. that such matter would not prejudicially affect the mind of the judges who heard the case on appeal, and that it was not appropriate to issue a writ of attachment. There are, however, modern cases where a publication after conviction was held to be punishable as contempt because of prejudice to a possible appeal.[92]

Where the court finds the case clear, it will not hesitate to act summarily and severely. One of the most celebrated cases of recent years, which bears striking comparison with the facts of some of the American cases already discussed, was *R. v. Bolam*[93] in which a newspaper company was heavily fined and its editor imprisoned for contempt. The paper published statements relating to one Haigh who had been arrested for murder. It was said that he was a human vampire, and supporting descriptions were furnished. It was also said that he had committed other murders, and the names of the victims were supplied. Lord Goddard C.J. said:

> "In the long history of the present class of case there had never, in the opinion of the court, been one of such gravity as this, or one of such a scandalous and wicked character. It was of the utmost importance that the court should vindicate the common principles of justice, and, in the public interest, see that condign punishment was meted out to persons guilty of such conduct."

The rule which emphasises tendency rather than intention has produced some draconian decisions. In *Reg v. Odhams Press*[94] a newspaper company was punished for contempt in publishing an article which stated that a named person was engaged in the business of prostitution and brothel keeping in London, and urged his prosecution and arrest. Unknown to the defendant, this person was in fact under arrest and was awaiting trial at the time of publication. It was held not to be a defence that the defendant did not know of the

89 R. v. Blumenfeld, (1912) 28 Times L.R. 308, at 311; R. v. Arrowsmith, [1950] Victorian L.R. 78.

90 Davis v. Baillie, [1946] Victorian L.R. 486, at 494-495.

91 [1960] 2 Q.B. 188. See also Lord Parker C.J., note 10, *infra.*

92 Ex parte The Attorney-General; Re Truth and Sportsman Ltd., [1961] S.R. (N.S.W.) 454; and see R. v. Davies; Ex parte Delbert-Evans, [1945] 1 K.B. 435.

93 (1949) 93 Sol. Jo. 220.

94 [1957] 1 Q.B. 73.

proceedings; since the publication was calculated to interfere with the case of a person under arrest and awaiting trial, it was punishable as contempt. Section 11(1) of the English Administration of Justice Act now provides that a person shall not be guilty of contempt on the ground that he has published any matter calculated to interfere with the course of justice in connexion with any proceeding pending or imminent at the time of publication if at that time (having taken all reasonable care) he did not know and had no reason to suspect that the proceedings were pending or that such proceedings were imminent. Provided that the publisher has exercised due care, he will now have a defence in such a case as *Reg v. Odhams Press.*

In *Reg v. Griffiths,*[95] the English distributors of the American weekly, Newsweek, were held in contempt in respect of an issue of the paper circulated in England which commented on the *John Bodkin Adams* case while it was still proceeding. The distributors argued that they had no knowledge of the contents of the magazine, and that they were in the position of innocent disseminators. This was held to afford no defence. Section 11(2) of the Administration of Justice Act now provides that a person shall not be guilty of contempt on the ground that he has distributed a publication containing such matter as is mentioned in subsection (1) if at the time of distribution (having taken all reasonable care) he did not know that it contained any such matter and had no reason to suspect that it was likely to do so. The burden of proof of any fact tending to establish a defence under the section—that is under section 11(1) and (2)—lies on the person raising the defence.[96] This is not an Australian statute, and it is a question whether the severe doctrines of *Reg v. Odhams Press* and *Reg v. Griffiths* remain law in Australia. If they do, there is a case for statutory change.

Western Australia has recently made a contribution to the jurisprudence of contempt by directing attention to the question of the point of time at which the power to punish for contempt arises. It has long been clear law that publication at a time when proceedings are neither pending nor imminent will not constitute contempt. In *Porter v. The King; Ex parte Yee*[97] the High Court reversed a contempt conviction by the Supreme Court of the Northern Territory. The contempt was alleged to lie in the publication of matter in a newspaper, and the editor before publishing had ascertained from a court official that no legal proceedings relating to the matter had been

95 [1957] 2 Q.B. 192.
96 Sec. 11 (3).
97 (1926) 37 Commonwealth L.R. 432, at 444. See also *per* Higgins J. at 447-448.

commenced. Isaacs J. said that if proceedings had been commenced, there would have been a very serious interference with the due course of justice which, on settled principles, would have been punishable as a contempt.

> "But where as here, there is no attack on a Court or Judge and no proceedings have even been begun, how does the Court—any Court—enter into the circumstances as a factor. I conceive the principle of individual liberty of speech and writing, limited only by the ordinary law, is in force in such a case, and that it would be unprecedented and unwarranted stretch of curial authority, and an undue limitation of the right of free speech to fine or imprison for a mere conjectural impediment to a non-existent proceeding. The power would be too arbitrary."

With such a principle, stated so very well, there can surely be no disagreement.

To stifle the press or discussion because of a possibility, because of a merely conjectural interference with the due administration of justice would often do great public mischief. But the question is one of limits, and there remains a question as to the precise point at which the power to punish for contempt arises. It is now settled that the power can and will attach at the point of time at which a person has been arrested, even though charges have not yet been laid, and a trial has not yet begun.[98] Recently in Scotland, a newspaper company was heavily fined for contempt in publishing an article at a time when a man was merely detained by police in England in connexion with inquiries into two murders which had been committed in Scotland. He was not charged until a date subsequent to the publication. The court said that the prisoner was under police arrest, and declined to accept the time of committal as the first point at which the power to punish for contempt arose. "The test must necessarily in both cases be the same—will the steps that have been taken by the newspaper be such as to prejudice the impartiality of the ultimate trial if a trial takes place?"[99] As Wills J. said, long ago, in *R. v. Parke*[1] "it is very possible to poison the fountain of justice before it begins to flow."

What then of the case where an arrest is imminent but not yet effected, though the police are in hot pursuit? May prejudicial publicity at that point be treated as contempt? This was the issue in *James*

98 See R. v. Parke, [1903] 2 K.B. 432; R. v. Clarke; Ex parte Crippen, (1910) 103 L.T. 636; Packer v. Peacock, (1912) 13 Commonwealth L.R. 577; James v. Robinson, [1964] Argus L.R. 7.

99 Stirling v. Associated Newspapers, [1960] Sc.L.T. 5, at 7.

1 [1903] 2 K.B. 432, at 438.

v. Robinson.[2] Before that case, the point had been raised and left open by Lord Hewart C.J. in *R. v. Daily Mirror; Ex parte Smith,*[3] and by the High Court of Australia in two more recent cases.[4] In *Reg. v. Beaverbrook Newspapers Ltd.*[5] a Northern Ireland Court held that the power to punish for contempt might attach before arrest, and where arrest was imminent. There the defendant newspaper company was held in contempt for publishing photographs and other matter relating to a man who was arrested and charged with murder very shortly thereafter. At the time of publication the man was under constant police surveillance, and statements to the effect that he was regarded as a principal suspect were included in the newspaper reports. It was argued on behalf of the defendants that there could be no contempt, because no arrest had been made, and no warrant issued at the date of publication. The court rejected the argument and, in convicting, relied specifically on the terms of section 11 of the Administration of Justice Act 1960. The terms of that section have already been stated;[6] it provides that a person shall in certain circumstances not be guilty of contempt on the ground that he has published any matter calculated to interfere with the course of justice in connection with any proceedings, *pending or imminent,* at the date of publication.

On its face, the section was remedial; it was framed as a limitation of liability and as a defence in the cases to which it applied. Counsel argued that this was the limit of its operation, that if the effect of the introduction of the word "imminent" in section 11 was that a publication could be an offence in circumstances where proceedings had not yet begun, that it was a result which could not have been intended. The "authorities show that the common law is not to be altered by a mistaken view in an amending act . . . The common law cannot be amended by inference."[7] The court, however, rejected this argument and relied on the section to assert a substantive liability to contempt proceedings in cases where proceedings, alleged to be affected by prejudicial publicity, were imminent. The possibility of this result was foreseen by Windeyer J. in *James v. Robinson*[8] though

2 [1964] Argus L.R. 7.

3 [1927] 1 K.B. 845, at 851. And see 8 HALSBURY, LAWS OF ENGLAND (3rd ed.) at 9.

4 Consolidated Press Ltd. v. McRae, (1955) 93 Commonwealth L.R. 325, at 344-345; John Fairfax & Sons Pty. Ltd. v. McRae, (1955) 93 Commonwealth L.R. 351, at 358-359.

5 [1962] N.I. 15.

6 See *supra,* at 25.

7 [1962] N.I. 15, at 18.

8 [1964] Argus L.R. 7, at 21.

without knowledge of *Reg v. Beaverbrook Newspapers Ltd.* Windeyer J. referred to section 11 of the Administration of Justice Act in the context of the word "imminent", and said "The Act may allow courts in England to take a step that I think we cannot take here. It may, by an indirect approach, have thus altered the law there."

So far as the decision of the court in *Reg v. Beaverbrook Newspapers Ltd.* rests upon section 11 of the Administration of Justice Act, its force is doubtful. As Goodhart observes, it is difficult to believe that any draftsman would introduce a positive amendment by the use of negative terms, and the most that can be said of the significance of the 1960 Act in respect of imminent proceedings is that it furnishes strong evidence that Parliament in using the word "imminent" must have assumed that it was describing the then existing law, because otherwise there could be no rational explanation for its inclusion in the Act.[9]

It is not altogether clear from the judgment of the North Ireland court whether the decision was reached *exclusively* by reference to the terms of section 11. And in an address to American judges, Lord Parker C.J. referred with approval to *Reg v. Beaverbrook Newspapers Ltd.*[10] But as a statement of the common law it was rejected by a unanimous High Court in *James v. Robinson.*[11] There, as will be well recalled here, a Perth newspaper published two articles in which it was stated that two people had been murdered by a gunman, and that Robinson, whose photograph was published, was being hunted by the police. Two days later he was arrested. The decision of the Supreme Court of Western Australia holding the newspaper company and its editor guilty of contempt was reversed by the High Court. *Reg v. Beaverbrook Newspapers Ltd.* was not brought to the attention of the Court, which after a detailed examination of other authority, concluded that while matter published antecedently to arrest or other initiation of legal proceedings might constitute a libel, it could not be contempt.

> "If a publication is to constitute contempt at all it must be a contempt at a time it is made, and the person aggrieved must be aggrieved in his capacity as a party to proceedings; therefore he must be a party at that time. It would be an astonishing state of affairs if a person responsible for a publication were to be held

9 *Contempt of Court when Proceedings Imminent,* (1964) 80 L.Q. REV. 166, at 168.

10 Printed in Thirty-Ninth Report of Judicial Council of Massachusetts, 1963. Public Doc. No. 144. Also referred to by Goodhart, *op .cit. supra* at 166.

11 [1964] Argus L.R. 7.

> guilty or not guilty of contempt according as proceedings should or should not be commenced thereafter . . . if the imminence of proceedings were to be regarded as sufficient foundation for application for attachment for contempt in matters of this character—which would, of course, introduce many difficulties and much uncertainty—then there was no reason why the courts should have taken the trouble, as they have done in the many cases mentioned, to examine the significance of the laying of an information or the making of a charge and subsequent arrest."[12]

Windeyer J. in a separate concurring judgment stressed the character of contempt as being historically, and by its name and nature, "concerned with the position of courts, with proceedings in court and with the protection of parties to proceedings in court."[13] If this produced results which were not satisfactory, this was a matter for the legislature, and not for the courts.

So far as Australia is concerned, this states the law, and in view of the close examination of the authorities by the Court it is not likely to change its mind because of the decision in the *Beaverbrook* case, which, whatever its soundness in principle, is not a very satisfactorily reasoned decision. But it is noteworthy that the *Beaverbrook* decision has, in the result anyway, commanded the extra judicial approval of the Lord Chief Justice of England. And Goodhart has added a comment on *James v. Robinson* which, I think, is persuasive.[14] He argues that there may be sound arguments in principle for extending contempt proceedings to such cases as *Robinson,* where the hue and cry had been raised and proceedings in a very obvious sense were imminent against a particular person, and where the effect on the conduct of a trial of the publication of prejudicial material in such a case is as great as if proceedings had actually been commenced by an arrest. Of course, the High Court argued the matter on the authorities, and not as a matter of *lex ferenda,* though it was pointed out, as a matter of principle, that "difficulties and much uncertainty" would arise if publication was punishable as contempt, in the case of "imminent" proceedings. It may be argued, with respect, that there is a question as to the thrust of the authorities. In giving practical application to the doctrine that it is possible very effectually to poison the fountain of justice before it begins to flow, the courts have reached further and further back, to the point of arrest or detention. They have declined to go back to a point, as in *Porter v. The King,* where proceedings

12 *Ibid.,* at 13-14.
13 *Ibid.,* at 20.
14 (1964) 80 L.Q. Rev. 166.

were not in any sense imminent. The present formulation of doctrine does not, it is submitted, categorically foreclose the application of contempt doctrines to cases where proceedings are plainly imminent against a particular person. If the words of particular judgments are cited against the validity of this proposition, it is submitted with respect that they can appropriately be read in the context of the facts of the particular case with which the Court was concerned. The courts were reaching further and further back to bring the facts of the particular case within the ambit of the contempt power. This does not necessarily foreclose one further extension, consistent with the principles of which the cases are particular applications, to cover situations where the hue and cry is already on. The argument then is that it does not do violence to authority, and certainly no violence to principle to extend contempt doctrines to "imminent" proceedings. As for the argument of "difficulties and much uncertainty" in so extending contempt, it may be said generally that they are undoubted. But the common law is used to the application of general categories and formulae to particular cases; and in the context of such a case as *Robinson* there would be little difficulty. In a doubtful case, and having regard particularly to the present summary character of the jurisdiction, the proper course would be to lean against invoking the contempt power. Moreover, as Goodhart points out,[15] in certain cases where the police are in hot pursuit, the press and other media may by publication of material (including photographs) help in the apprehension of a dangerous man. It would obviously be improper to hold such conduct to be contempt, but it would be quite another thing to give the same protection to publication of details of his past criminal record and other prejudicial material of this character.

In dealing with the authorities in *James v. Robinson,* Windeyer J. referred to *Attorney-General v. Butterworth.*[16] There members of a union were held guilty of contempt of court in taking punitive action against an officer of the union who had given evidence in court proceedings which had displeased the members. As Pearson L.J. said:

> "It was contended that the court's inherent jurisdiction to deal with contempt of court is limited to two classes of cases, namely, those in which there is a scandalizing of the court, and those in which there is prejudice to pending proceedings, and that the jurisdiction does not extend to a case in which after the conclusion of the proceedings some person is victimized for what he

15 *Ibid.,* at 170.

16 [1963] 1 Q.B. 696, at 728. *Cf.,* Chapman v. Honig, [1963] 3 Weekly L.R. 19; Note (1963) 79 L.Q. Rev. 468.

did as witness or juror in those proceedings. In my judgment, however, such victimization, because it tends to deter persons from giving evidence as witnesses in future proceedings, and giving that evidence frankly and fully and without fear of consequences, is an interference with the due administration of justice as a continuing process, and does constitute contempt of court, and can be dealt with summarily under the inherent jurisdiction."

In *James v. Robinson, Attorney-General v. Butterworth* was considered by the Court and was put aside, as not relevant to the issue before the High Court. As Windeyer J. said, *Butterworth* dealt with a contempt different in character from that before the Court; it was a contempt because the conduct affected the administration of justice *generally,* and not because proceedings in a *particular* case were affected.[17] As to this, Goodhart observes that "the administration of justice generally is made up of proceedings in an unlimited number of particular cases,"[18] and if we go behind the words of a formula to its *raison d'etre,* the reason why pressure on witnesses in past cases is punishable as contempt is that it deters witnesses from giving evidence in subsequent and particular cases, and therefore effectually poisons the fountain of justice before it begins to flow in each particular case. In other words the basic policies of punishing as contempt acts which affect the course of justice generally and those which affect an identified particular proceedings are the same. Narrow and, as I believe, unprincipled compartmentation is to be avoided. If this analysis be correct it is submitted that the principle stated in *Butterworth* was relevant to the issue before the court in *James v. Robinson.*

VI.

Notwithstanding the determination and severity with which English and Commonwealth courts visit by summary punishment for contempt the publication of matter which prejudices mankind against persons before the cause is heard, the cases continue to arise. There is a substantial and increasing *corpus* of authority in the books and digests. This suggests a question. If in *R. v. Bolom* a newspaper published highly prejudicial matter which is severely punished before the trial as criminal contempt, what is the standing on appeal of a conviction in the subsequent criminal proceedings tainted by the publication which, though punished as contempt, will have had the widest

17 [1964] Argus L.R. 7, at 19; see also at 10.

18 *Op. cit. supra* at 170.

circulation? The prejudicial matter may consist of details of an accused person's prior convictions or charges of other crimes which would plainly be inadmissible on his trial on a plea of not guilty. If such matter was wrongly admitted in *evidence,* a conviction in such a trial would almost certainly be reversed on appeal. Does it follow, if it can be shown that the publication had a wide and pervasive effect, that a conviction would be reversed on the ground that there was a miscarriage of justice?[19] There is certainly no case in the books which supports the propostion that prejudicial publication severely punished as contempt would provide ground for the reversal of the subsequent conviction of the person whose trial it was calculated to prejudice. Cases like *Reg. v. Box,*[20] where it was held that a juryman's personal knowledge of the prior conviction of a prisoner did not of itself afford grounds for the reversal of a conviction (though the wrongful admission in evidence of the prior criminal record would undoubtedly have supported reversal), suggest that the publication of prejudicial matter punishable or punished as contempt would not be sufficient ground for quashing or reversing a conviction. This appears to be the reading of the English law by the most recent American text writer on contempt. After reviewing English decisions on contempt by publication, GOLDFARB writes:[21]

> "The greatest failure of English contempt law is its disrelation with its most valuable object—protection of fair trials. It is of little service to an accused person who is written into jail by a prejudiced press that the publisher or editor is fined or imprisoned. His victory is a hollow one unless the conviction is reversed. The contempt vehicle is only indirectly curative of unfair trials, if at all, though this is its most valuable purpose."

If this is so, we have a further interesting contrast between English and American law. The course of American decision shows the difficulty of sustaining contempt convictions for the publication of matter prejudicial to the conduct of a fair trial, but it also points to the very real possibility of a reversal or quashing of a conviction tainted by such prejudicial publicity. The English cases show that there is a ready disposition on the part of the courts to punish such publication as contempt, but there is no suggestion that such publication would provide ground for the reversal or quashing of convictions.

19 Criminal Appeal Act 1907, sec. 4.

20 [1963] 3 Weekly L.R. 696. See note (1964) 80 L.Q. REV. 13 where the approach of the English law is described as perhaps "schizophrenic."

21 THE CONTEMPT POWER at 88.

VII.

Alongside the rule that publication of matter which is calculated to prejudice the conduct of a fair trial is punishable as contempt, has to be set the rule, current in England and in Australian jurisdictions, that publication of the detailed course of committal or like preliminary proceedings in criminal cases is not subject to legal restriction. In England before the Law of Libel Amendment Act 1888, it was regarded as doubtful whether the publication of proceedings conducted publicly before magistrates as a preliminary to committal for trial at the assizes or quarter sessions was legally protected. That Act has been construed as giving implied permission for the publication of such proceedings.[22] The consequences of this have been noted by a distinguished Scots lawyer,[23]

> "As regards publication of the prosecution's evidence before trial, English law is as lax as its rules regarding comment are strict. After arrest an accused may be remanded in custody by a magistrate and later committed for trial by a panel of justices if they find that the prosecution has made out a prima facie case. Widespread publicity is often given to the evidence led against the accused at the pre-trial hearing, including evidence of alleged confessions and other evidence, which may actually be excluded at the trial itself. As a rule, only the evidence for the prosecution is heard at the proceedings for committal, and, although the magistrates have a discretion to exclude publicity, they have rarely done so."

Goodhart comments rather mildly that "whether these newspaper reports are in the public interest is doubtful."[24] We have, too, the recent and more vehement testimony of writers on *causes celebres.* Thus, Ludovic Kennedy in his account of the trial of Stephen Ward—one of the chapters in the Profumo-Keeler story—writes:[25]

> ". . . there were other reasons, too, many overlapping and all accumulative which led the jury to their verdict. The first was something that happened long before they had been either called or chosen. This was the very wide publicity given to the proceedings at the lower court at the end of June and the beginning of July. It is impossible to over-estimate the harm that this publicity must have done to Ward's defence. The prosecution's case was

22 Goodhart, *Newspapers and Contempt of Court in English Law,* (1938) 48 HARV. L. REV. 885, at 888-889.

23 T. B. SMITH, STUDIES CRITICAL AND COMPARATIVE (Edinburgh 1962) at 288.

24 *Op. cit. supra* note 22, at 889.

25 THE TRIAL OF STEPHEN WARD (London 1964) at 233-234.

prima facie more damaging to him than it was at the Old Bailey; for it contained not only Ronna Ricardo's lying evidence, which must have seemed to those who read it (and who didn't), as general confirmation of what Mandy and Christine had alleged, but also two charges concerning the arranging of abortions and of keeping a brothel. The last charge was subsequently dropped for lack of evidence, and the two abortion charges were placed on a separate indictment. The evidence for all three charges was flimsy in the extreme, and it is impossible to resist the conclusion that the only reason they were brought was the belief that the more mud that was thrown, the more chance that some of it would stick. The dice was loaded in the prosecution's favour even further by the fact, unknown to the general public, that the defence at the lower court deliberately says little for fear of disclosing its hand. All this combined to make the ordinary reader (including the subsequent Old Bailey jury) believe that Ward was guilty of a multitude of sexual misdemeanours long before he was tried. It was all very well Mr. Justice Marshall telling the jury to put out of their minds everything they had heard so far; but this was virtually an impossibility."

The case of Dr. John Bodkin Adams may be recalled as a most striking illustration of the prejudice caused by the publication of the report of the committal proceedings before the magistrates. In the course of those proceedings, evidence was given that other patients of the doctor had died in mysterious circumstances under his care, and this evidence was not and could not have been given at his trial. In the event Adams was acquitted, but the blaze of prejudicial publicity made the burden of the defence and of the trial judge a very formidable one.[26] Lord Devlin (then Mr. Justice Devlin) tried the case, and in the course of the trial urged magistrates to exercise their power of adjourning to hear such cases in camera.[27] It is interesting to recall that it was comment on the Adams trial which gave rise to a very stringent application of the rules of criminal contempt in *Reg v. Griffiths*.[28] What the hapless English distributors of Newsweek could add to what the English press had already done without let or hindrance, is not very clear.

As a result of the Adams case, a Departmental Committee on Proceedings before Examining Justice was set up under the chairmanship of Lord Tucker. The Committee unanimously recommended[29]

26 See SMITH, *op. cit. supra,* at 288-289.
27 See BLOM-COOPER, THE A6 MURDER (Penguin Books 1963) at 88.
28 [1957] 2 Q.B. 192. See *supra* at 25.
29 Cmd. 479 of 1958.

that committal proceedings should be held in public, but that they should not be reported beyond a statement of the name of the prisoner and short details of the charge, unless the prisoner was discharged. If the prisoner was committed for trial, details of the committal proceedings could be published after the actual trial was concluded. In making these recommendations the Committee pointed to the very different Scottish practice described by Professor T. B. Smith:[30]

> "In Scots law . . . after an accused has been charged with a crime, the press may only publish the bare fact of arrest and charge until the time of trial, at which stage they may fully report the trial, but without comment on the merits until after the verdict . . . There is no public pre-trial hearing in Scotland as in England, and no problem has thus arisen with regard to the publication of prosecution evidence before the actual trial. Any infringement of this public interest in a fair trial would be restrained and punished."

There is a very real question whether there is any good reason to retain committal proceedings at all.[31] But if they are retained, the case for adopting the Tucker Committee's recommendations—in Australian jurisdictions as well as in England—is very strong. In England their adoption was strongly opposed as a muzzle on the press by the greater part of the press, and no action so far has been taken to implement them. If the present law of criminal contempt is to make sense, it can only be made coherent by prohibiting the detailed reporting of committal and preliminary proceedings until such time as the trial is concluded.

VIII.

At the end of his judgment in *James v. Robinson*[32] Windeyer J., having held that there could not be a conviction for contempt where proceedings were not pending, though imminent, said:

"This does not mean, however, that prejudicial matter that is not

30 *Op. cit. supra* at 289.

31 BLOM-COOPER, *op. cit. supra* at 90-91 writes "Committal proceedings could safely be dispensed with. In their place the Crown would be obliged to serve on the defence copies of all the statements of witnesses whom the Crown proposes to call. If the defence, on seeing this evidence, wishes to say that the evidence does not add up to a right of the prosecution to try the accused, an application could then be made to the magistrates to dismiss the case. This is likely to be a development which will be acceptable to the authorities; already the Home Office has an internal working party studying the problem."

32 [1964] Argus L.R. 7, at 21.

summarily punishable as a contempt can be published with impunity. The common law misdemeanour constituted by conduct tending to pervert the course of justice does not, it has been held, depend upon their being proceedings presently pending: *R. v. Sharpe and Stringer*[33] . . . In Western Australia the common law on this topic has, it seems been supplanted by ss. 135 and 143 of the Criminal Code. But we do not have to determine their scope: the only question for us is whether the summary conviction for contempt can stand. I agree that it cannot."

This appears to suggest, though without any expression of a concluded view, that though criminal contempt cannot as a matter of authority, be stretched to cover the case of proceedings not yet pending, though imminent, the common law misdemeanour might be broad enough in scope to cover such a case. There is authority to support the proposition that a common law misdemeanour may cover ground also directly covered by the law of criminal contempt. In *R. v. Tibbits and Windust,*[34] an editor and reporter who had published articles bearing on the conduct and character of accused persons during the course of a criminal trial, were held guilty of the commonlaw misdemeanour of unlawfully attempting to pervert the course of justice by publishing these articles and also of unlawfully conspiring to do so. Lord Alverstone C.J., who delivered the judgment of the court for the Consideration of Crown Cases Reserved, rejected the argument of counsel that such charges could only be punished, either summarily or on indictment, as contempt. The authority of the case does not now appear to be questioned.[35] In *Tibbits,* the decision gave the persons charged the entitlement of a jury, but the case does not furnish an answer to the question whether the misdemeanour would be apt to cover a case like *James v. Robinson,* that is, on the footing that that case was correct in its holding as to the scope of criminal contempt.

R. v. Sharpe and Stringer[36] was a case involving the interpretation of a statutory misdemeanour of conspiring to obstruct the course of public justice,[37] and the question was whether that offence could be committed by acts done before proceedings were commenced or pending. The argument that it could not be committed in these circum-

33 [1938] 1 All E.R. 48; 26 Cr. App. R. 122.

34 [1902] 1 K.B. 77.

35 See GLANVILLE WILLIAMS, CRIMINAL LAW (London 2nd ed. 1961) at 416; see also OSWALD, *op. cit supra* at 93-94; though see O'Shea v. O'Shea and Parnell, (1890) 15 P.D. 59, at 64-65.

36 [1938] 1 All E.R. 48.

37 Criminal Procedure Act 1851, sec. 29.

stances was characterized by Du Parcq J., speaking for the court, as a "hopeless proposition and so absurd that it does not form part of the law of this country."[38] The court said that a man who obstructs public justice as soon as a crime is committed is just as much guilty of the offence as if he waits until proceedings are actually pending. This, with respect, makes very good sense and its reasoning might have been invoked in *James v. Robinson* to support an argument that the ambit of criminal contempt was sufficiently broad to cover the facts of that case. But Windeyer J. referred to *Sharpe* to suggest the possibility, thought without deciding the point, that where, as in *James v. Robinson* contempt proceedings would not lie, proceedings for the common law misdemeanour constituted by conduct tending to pervert the course of justice might be appropriate. As to this, two points might be made. First, we would have the seemingly anomalous situation that if proceedings were maintainable in respect of prejudicial publication at a point of time when arrest was imminent, such proceedings would have to be tried by jury;[39] but that if proceedings were instituted in respect of a like publication made after arrest they could be tried summarily. Perhaps this tells nothing more than that bad history can produce unsatisfactory consequences. The second point is more substantial. It is that contempt is an offence of a wide and sometimes of oppressive range. It is one thing to say, as in *R. v. Tibbits* that an act which is contempt may also constitute an act tending to obstruct or pervert the course of public justice; it is another to say that where the outer limits of contempt have been reached, the arm of the law may be extended still further by resort to a very broadly framed misdemeanour, to punish conduct which is *not* a contempt in law, but which it is sought to punish for precisely the reason that is conduct which, if committed a little later, would be contempt. This is not to argue that *James v. Robinson* is correctly decided; it is to argue that if the conduct in that case was not punishable as contempt, it should not, in the best interests of the rule of law, be punishable as a case falling within the ambit of a common law misdemeanour constituted by conduct tending to pervert the course of justice.

Windeyer J. made reference to sections of the Western Australian Criminal Code. Section 135 deals with conspiracies to obstruct, prevent, pervert or defeat the course of justice, while section 143 provides that any person who attempts in any way not specially defined in the Code to obstruct, prevent, pervert or defeat the course of justice is

38 [1938] 1 All E.R. 48, at 51.

39 See Li Keung Pong v. Attorney-General (Hong Kong), [1964] 1 Weekly L.R. 892, at 897.

guilty of a misdemeanour. Contempt of court, *eo nomine,* is dealt with in two specific sections of the Code: in section 178 in respect of disobedience to lawful orders of courts and other authorized persons, and in section 639 in respect of acts done in allowing a jury to separate in disobedience to the terms of that section. Section 7 of the Criminal Code Act says that nothing in the Act nor in the Code itself shall affect the authority of Courts of Record to punish a person summarily for contempt, but so that a person cannot be so punished and also punished under the provision of the Code for the same act or omission. In light of what has been argued in connection with the common law misdemeanour, it is submitted that section 143 should be restrictively interpreted, and in particular that it should not be employed to extend the boundaries of criminal contempt.

IX.

The law of criminal contempt raises many teasing problems. Its wide reach and its summary procedures make it, potentially, a very oppressive instrument. We have seen that in this area American and English-Commonwealth law have taken divergent paths. Douglas J. of the Supreme Court of the United States has said of the American doctrines, in comparing them with the English rules, that "we have made our choice, refusing to sacrifice freedom of the press to the whims of judges. We know that judges as well as editors can be tyrants."[40] No doubt English and Commonwealth judges and lawyers will be startled and will bridle at the word "tyrant", but it has been the argument of this paper that the use of the summary contempt power to punish for criticisms of courts and judges has been excessive. Except for a direct threat to the effective conduct of actual proceedings, it is not clear that there is any warrant for the exercise of contempt power and jurisdiction in such cases, either summarily or, for that matter, on indictment. The security and the integrity of the judicial process is not imperilled by unmannerly, tasteless, intemperate or even unbalanced verbal or written attacks. If the judges do not deign to avail themselves of the law of defamation—and it is readily understandable why they do not—there is doubtful wisdom in making available to them as against such attackers the processes of the criminal law, *a fortiori* when those processes are summary and arbitrary, to use words employed by judges themselves in characterizing the jurisdiction. A study of the learning on contempt in a cognate field, contempt of parliament, also gives rise to great concern. The decision of the High

40 *The Public Trial and The Free Press,* 46 A.B.A.J. 840, at 841.

Court in *Reg v. Richards; Ex parte Fitzpatrick and Browne*[41] is deeply disturbing for it teaches that the citizen is defenceless and without any court protection against a decision of the parliament committing him for contempt. There is no definition of what constitutes contempt and of what constitutes its limits, and the court has said the resolution of the House of Parliament and its warrants are conclusive of the issue of contempt. In saying that this is an appalling doctrine, one may perhaps bring upon himself the pains and penalties of contempt, but it should be said. Contempt for scandalizing the court is in not dissimilar case though not likely to be so dramatic or so drastic. In this context does not the American law, which asserts the freedom of the press and of speech as a preferred value, speak wisely?

The law of contempt reaches into many places. It may be invoked to suppress inquiry into matters of public concern on the ground that such inquiry may prejudice the conduct of existing legal proceedings. This matter was discussed by Sholl J. in the Supreme Court of Victoria in *Johns & Waygood Ltd. v. Utah Australia Ltd.*[42] There an injunction was sought to restrain a Royal Commission appointed under the prerogative from conducting an inquiry into the causes of the collapse of a Melbourne city bridge, and it was argued that the pursuit of this inquiry was contempt, insofar as it prejudiced the conduct of existing litigation. Sholl J. held that in the absence of specific statutory authority to carry out the inquiry, its proceedings might be restrained as contempt if they in fact were calculated to prejudice the conduct of existing legal proceedings. On the facts of the case he held that there was no sufficient showing of prejudice. But the jurisdiction undoubtedly exists. A question has been raised whether the mere issue of a writ (in *Johns & Waygood Ltd. v. Utah Australia Ltd.*, the matter had gone beyond that stage) will prevent the further conduct of an inquiry traversing matters which may be in issue in the legal proceedings—if they materialize. In 1952, a Royal Commission consisting of three Supreme Court judges had been appointed in Victoria, in the exercise of the prerogative, to investigate allegations of corruption. A person whose conduct might have been in question issued a writ, claiming damages for defamation, and the Commission declined to proceed further with its inquiry. With reference to this case, Fullagar J. said in *Lockwood v. The Commonwealth*[43] "I have not seen a copy of any reasons given for this decision, and I can therefore express no opinion

41 (1955) 92 Commonwealth L.R. 157. Leave to appeal refused by the Privy Council (1955) 92 Commonwealth L.R. 171.

42 [1963] Victorian R. 70.

43 (1954) 90 Commonwealth L.R. 177, at 186. See also *Johns & Waygood Ltd. v. Utah Australia Ltd.*, [1963] Victorian R. 70, at 85.

upon it, but I cannot help feeling that the soundness of the decision may be open to question. It would indeed savour of absurdity if an inquiry duly authorized by law could always be stultified by the simple expedient of issuing a writ out of a superior court." In the 1952 case, neither the libel action nor the inquiry ever went on. With the view expressed by Fullagar J. I would respectfully and wholeheartedly agree; it is intolerable that an inquiry into a matter of public importance should be muzzled by the mere issue of a writ. Yet the law remains uncertain; once a writ is issued, proceedings are pending, and it remains very uncertain whether discussion in the press or on public platforms on matters which may be traversed in the action, if it ever comes on, may be carried on without risk of incurring penalties for contempt. It is not possible to advise with any confidence. This is a very unsatisfactory state of affairs, which should not be allowed to remain so uncertain and obscure.

It is in the field of prejudice to the conduct of criminal proceedings that the English and Commonwealth law of contempt may perform its most useful office. Here it may be that the preferred American freedom of the press is bought at too high a price. The English doctrine rests on assumptions about the impact of prejudicial matter on the minds of jurors. As an American comment puts it "At the centre of the analysis lie difficult sociological questions—to what extent do community attitudes affect the mind of the juror? The courts will have to rely on speculation from common experience to reach conclusions until more reliable and specific studies are made than exist at the present time."[44]

In these circumstances, and until we know better—if we ever know better—it seems prudent and reasonable to preserve the existing contempt rules in jury cases (though not the summary procedure) with respect to prejudicial publication. But when a case is taken on appeal to a bench of judges, the case for the exercise of contempt jurisdiction becomes very doubtful. The propriety of the exercise of this jurisdiction was recently asserted by the Full Supreme Court of New South Wales in *Ex parte The Attorney-General; Re Truth and Sportsman Ltd.*[45] where the court said that publicity might make it difficult for a court to deal with the issues in a "detached and impartial fashion"[46] and might, where the publicity was unfavourable to the accused, tend to deter him from proceeding with his appeal. The

44 *Free Speech v. Fair Trial in the English and American Law of Contempt by Publication,* 17 U. CHI. L. REV. 540, at 552.

45 [1961] S.R. (N.S.W.) 484.

46 *Ibid.,* at 495.

court drew support from the decision of an English Divisional Court in *R. v. Davies, Ex parte Delbert Evans.*[47] That case was later considered by a bench of five judges in *Reg v. Duffy, Ex parte Nash*[48] where Lord Parker C.J. speaking for the Court said:

> "It is by no means clear what the judges in that case (*Davies*) intended to convey by the word 'embarrassed'. If, in its context, the word means no more than this, namely, that the article had put upon the judge, quite unnecessarily, the task of dismissing the offending matter from his mind, then we think the dicta quoted go too far. Embarrassment which has no effect on impartiality is not necessarily contempt of court. The question always is whether a judge would be so influenced by the article that his impartiality might well be consciously, or even unconsciously, affected. In other words, was there a real risk, as opposed to a remote possibility, that the article was calculated to prejudice a fair hearing?"

Applying this test which, in my submission, states the law very satisfactorily, it will be a rare case that constitutes contempt of an appellate court. The press and the media may on occasion state their criticism tastelessly and sensationally, but unless such statements create a real risk of overbearing appeal judges, they should not expose their publishers to the penalties of contempt. The freedom of the press, including the tasteless and sensational press, is an important value. Moreover, a public protest, by no means expressed in a sensational or tasteless manner, may well be an honest expression of indignation at what is regarded as an unjust sentence or state of the law. To deny public expression to such a protest on the ground that it may constitute contempt of pending appellate proceedings is doubtful wisdom or policy; except in the rarest case, there is little likelihood of it disturbing the course of justice.

There is, however, ground for arguing that the ambit of contempt rules should be extended to cover situations of "imminence" as in *James v. Robinson,* where the English and Australian law may now diverge. But in this case, there is an important problem of balance, for the press may serve a very valuable function in assisting in the apprehension of criminals, as for example by the publication of photographs and descriptions of the wanted man. Here the law must of necessity be more flexible than at a time after arrest.

The most unsatisfactory aspect of the English law (and of the

47 [1945] 1 K.B. 435.

48 [1960] 2 Q.B. 188, at 200.

law of those Commonwealth jurisdictions which follow this English doctrine) is the coexistence of strict contempt rules with the rule which allows publication of preliminary proceedings. The argument voiced in the English press in response to the Tucker Committee's report, that the press is a watchdog, and that full publication of preliminary proceedings is, like full publication of the proceedings at the actual trial, a safeguard of the liberty of the subject, carries no conviction. The present situation is scandalous: in respect of the same matter the press is strictly muzzled and not muzzled at all, and principle disappears.

The law of criminal contempt has grown unevenly and unsatisfactorily. It is an area of the law which in various ways raises important issues touching the liberty of the subject, and it should be subject to severe scrutiny, so that it may be put in better order.

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