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CONTEMPT - SUPPRESSION ORDER - PUBLICATION OF CONTENTS OF SUPPRESSED FILE

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CONTEMPT — SUPPRESSION ORDER — PUBLICATION OF CONTENTS OF SUPPRESSED FILE — On a bill of complaint being filed in chancery court an injunction was issued against the defendant therein, and the papers in the cause were ordered suppressed by the chancellor, and to that end, sealed in an envelope. The bill alleged misrepresentation on the part of a leading banker in getting stockholders to contribute toward making up the defalcations of other officers in the bank and malfeasance of other officers. Defendant newspaper reporter obtained information relative to the allegations in the bill from sources other than the suppressed file and published the same nine months later. Upon citation for contempt, with a hearing before another judge, the publication was held to be contumacious and the reporter and publisher fined. On appeal, *held,* the order could not extend beyond the secrecy ordered and that had not been violated. Nor could the court impose silence where the matter was obtained *aliunde* the court records. To sanction that would violate the constitutional guaranties

of freedom of speech and of the press. *In re Times Pub. Co.*, 276 Mich. 349, 267 N. W. 858 (1936).

To avoid the effect of the statute [1] defining what acts are punishable as contempts and expressly excepting a true publication of judicial proceedings, amicus curiae contended that an ex parte injunction was not a judicial proceeding within the meaning of the statute, and that the statute itself was an invasion of the judicial power in limiting the power of the court to punish for disobedience to its orders.[2] The first contention seems untenable, since the reason for the rule, namely, to prevent avoidance of process by defendants who may read of the suit,[3] was absent as defendant therein had answered long before the publication. Further, the cases agree that judicial action has been taken when the chancellor reads the complaint and issues a temporary injunction.[4] However, the appellate court's statement that the trial court's power to control its records and publicity thereof until judicial action has been taken cannot extend to curtailment of free speech or a free press upon information obtained outside the court records [5] whittles down an often criticized rule.[6] The second contention is opposed by both reason and authority.[7] A few early cases laid down the proposition that the courts have an inherent power to prohibit the publication of facts concerning pending proceedings.[8] The Supreme Court of Texas exploded this theory in an exhaustive examination of these "authorities" in showing that such expressions were either dicta or concerned

[1] Mich. Comp. Laws (1929), § 13910.

[2] Brief for C. A. Bishop, Amicus Curiae, at pages 9-13, 30-37.

[3] Schmedding v. May, 85 Mich. 1 at 6, 48 N. W. 201 (1891).

[4] Metcalf v. Times Pub. Co., 20 R. I. 674, 40 A. 864 (1898); Kimball v. Post Pub. Co., 199 Mass. 248, 85 N. E. 103 (1908); Fitch v. Daily News Pub. Co., 116 Neb. 474, 217 N. W. 947 (1928); and see cases cited in 24 MICH L. REV. 489 at 490 (1926).

[5] Re Times Pub. Co., 276 Mich. 349 at 350, 267 N. W. 858 (1936).

[6] 24 MICH. L. REV. 489 at 490 (1926), cited in Campbell v. New York Evening Post, 245 N. Y. 320 at 326, 157 N. W. 153 (1927).

[7] See Nelles and King, "Contempt by Publication in the United States," 28 COL. L. REV. 401, 525 at 536-538 and 554-562 (1928), for a complete analysis of this contention as applied to every state. State v. Morrill, 16 Ark. 384 (1855), upon which most American states rely in holding the statutes as merely descriptive and not exclusive. It in turn is based on the famous dictum of Wilmot, J., in Rex v. Almon (1745, never decided) and Roach v. Garvan, 2 Atk. 469, 26 Eng. Rep. 683 (1742). Sir John Fox, in his HISTORY OF CONTEMPT OF COURT 226 and preceding (1927), demonstrates that legislatures have successfully limited the power of courts to summarily punish for contempt. The *common law* is, in fact, shown to be "not what the decisions [as the *Morrill* case] indicate, but what the American statutes have declared it to be." As is said by Nelles and King, "Contempt by Publication in the United States," 28 COL. L. REV. 401, 525 at 548 (1928), "The truth, stripped of metaphysical buncombe as to *inherence*, is simply that summary power as to various contempts is expedient, and in most non-publication cases there is no strong counter-expediency against its exercise."

[8] State v. Galloway, 5 Cold. (45 Tenn.) 326, 98 Am. Dec. 404 (1868); United States v. Holmes, 1 Wall, Jr. 1, Fed. Cas. No. 15,383 (1842); Rex v. Clement, 4 Barn. & Ald. 218, 106 Eng. Rep. 918 (1821). Contra: State v. Dunham, 6 Iowa 245 (1858).

with actual interferences with the administration of justice.[9] The court laid down the doctrine that the publication of a true report of proceedings and testimony adduced in court may not be prohibited unless such publication would, in some way, interfere with the administration of justice. It went still a step further than most of the later cases which have followed it, in that the court held that arguments of convenience and necessity in protecting the dignity and authority of the court from disobedience to its orders are outweighed by the express words of the bill of rights and the constitutional guaranties of freedom of speech and of the press. In a similar case,[10] a statute permitted the hearing of divorce proceedings in private. The trial court's order not to publish those proceedings was held invalid as beyond the power of the court. If the public could not be prohibited from discussing this matter, it is difficult to see how the court can validly prohibit the publication of that matter.[11] As the Michigan Supreme Court has said before, "it is the right of everyone, not the privilege of any particular one, to comment fairly and honestly on any matter of public interest. . . ." [12] The subject of *previous* restraints on publication received its deserved attack in a recent federal case.[13] If the legislature, by enactment, determines the public policy of a state, not much argument can be made for supporting this restraint just because the chancellor felt it was "for the best interests of the people." It would seem that that question had been decided by the statute and the state and federal constitutions. The subject matter of the publications was of vital interest to thousands of investors and depositors,[14] although the court does not expressly mention that fact as lending weight to the decision. It could not impede justice by prejudicing any jury since the case

[9] Ex parte Foster, 44 Tex. Cr. 423, 71 S. W. 593 (1903); Re Shortridge, 99 Cal. 526, 34 P. 277 (1893). The latter case points out that no decision in this country upholds the right of a court to make such prohibition, except where publication tended to interfere with the proceedings before the court. For a striking illustration, see State v. Dunham, 6 Iowa 245 (1858).

[10] Re Shortridge, 99 Cal. 526, 34 P. 277 (1893).

[11] "What one may lawfully speak he may lawfully write and publish." Re Shortridge, 99 Cal. 526 at 533, 34 P. 377 (1893). English precedent to the contrary, as the California court points out at pp. 534-535, is valueless since it was in part to wipe out such claims and to prevent such occurrences that the framers of our constitutions, federal and state, incorporated the guaranties of freedom of speech and of the press.

[12] Van Lonkhuyzen v. Daily News Co., 203 Mich. 570 at 588-589, 170 N. W. 9 (1918).

[13] Near v. Minnesota ex rel. Olson, 283 U. S. 697, 713, 51 S. Ct. 625 (1930); Grosejean v. Amer. Press Co., 297 U. S. 233, 56 S. Ct. 444 at 449 (1936), points out that it is the chief purpose of the guaranty to prevent previous restraints on publication. It is to be noted that power to attach for contempt by publication was apparently taken from all federal courts in 1831, but see Nelles and King, "Contempt by Publication in the United States," 28 COL. L. REV. 401, 525 (1928).

[14] The publication took place in March, 1933, after all Michigan banks had been closed by proclamation of the governor on Feb. 14, 1933, which was followed by a similar order by President Roosevelt on March 6, 1933. Two banks involved as defendants in the original suit were thus closed and remained so on March 28 and 31, 1933, the dates of the publication here involved, and were never permitted to reopen.

was in equity. Nor could it affect the court's decision, since it merely repeated facts the chancellor already knew. And even if, theoretically, there were personal sentiments expressed by the paper, ought the chancellor to admit that he might be influenced by them? A restraint of a true publication would probably violate other state and federal constitutional provisions.[15] Any result other than that reached in the principal case would lead to the indirect censorship of the press achieved in modern England.[16]

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[15] Grosjean v. Amer. Press Co., 297 U. S. 233, 56 S. Ct. 444 (1936), held that restraints on publication (state tax) deprived newspapers of equal protection of the laws (U. S. Const., art. XIV, § 1) and violated the due process clause of the same article.

[16] See Hughes, "Contempt of Court and the Press," 16 L. Q. REV. 292 (1900).