Case and Comment

CONTEMPT OF COURT — CRIMINAL CONTEMPTS — NEWSPAPERS — RECENT CASES IN ONTARIO.— There have been a number of recent cases in the Ontario courts, most of them unreported, which supplement and illustrate the illuminating article contributed to the March issue of the Canadian Bar Review by Chief Justice McRuer on the subject of criminal contempt of court.[1]

In *The King* v. *Sullivan* (February 13th, 1951) the Chief Justice himself had occasion to impose a fine of $3,000 on the Journal Publishing Company of Ottawa and of $300 each on two reporters of the Ottawa Journal. During the trial of the accused at Ottawa for the alleged murder of her husband, the Ottawa Journal, a well known and widely circulated daily, published under a very large headline, "Mrs. Sullivan to Tell Own Story", the statement that the accused, "whose own story of how her husband came to his death has been locked in secrecy since her arrest last November", would take the witness stand in her own defence. The Chief Justice summoned the editor and the reporters responsible for the story, who made an apology and explained that there had been no intention of prejudicing the fair conduct of the trial.

The Chief Justice pointed out the shocking nature of the report and its prejudicial tendency. He said that he was not concerned with the prestige of the court, but with the position of the accused, who was entitled to be tried on evidence given in court and, without comment, to remain out of the witness box. The question to be determined was not whether the article had interfered, but whether it tended to interfere with the course of justice. The Chief Justice concluded that it was clear that it had this tendency. The moderation of the fine, he said, in comparison to similar cases in England was due to the excellent reputation of the newspaper and the editor's apology. But for these considerations, committal to jail would have resulted.

In *Regina* v. *Meek* (March 10th, 1952), another murder case,

[1] J. C. McRuer, Criminal Contempt of Court Procedure: A Protection to the Rights of the Individual (1952), 30 Can. Bar Rev. 225.

this time at Toronto, Mr. Justice Aylen imposed a fine of $500 and costs on the publisher of a magazine known as "Inside Detective Magazine", which had apparently published a story indicating that the accused had given himself up, whereas in fact he had been arrested. The story might have led to the conclusion that the accused had by implication admitted guilt. The fact that there was no intentional contempt, that the article was "scalped" from a local paper, that there was an expression of regret and, further, that the offending publication was an American magazine published by persons who might justifiably be ignorant of Canadian standards in the administration of justice were considered in mitigation.

In *Regina* v. *Thomas* (December 1951) Mr. Justice Wells dealt at Toronto with a motion to commit the Globe Printing Company for contempt. In a newspaper editorial appearing in the Globe & Mail, published by the company, on December 7th, there had been a vigorous comment on the sentence imposed on four young men convicted of rape some four weeks earlier. The editorial referred to the four who had been convicted as "young hoodlums" and suggested that the evidence (which had been heard in camera) might have indicated that some at least of the accused had "the tendencies of sexual psychopaths". The editorial was published during the course of the separate trial (also in camera) of a fifth youth alleged to be involved in the same offence as the previous four who had been convicted. The convicted men had been made available to the defence as possible witnesses on behalf of the accused.

Mr. Justice Wells came to the conclusion that he was not concerned with the situation of the four who were previously tried, convicted and sentenced. Counsel for the Globe Printing Company maintained that it had a public duty to make the protest it did after sentence, although the time for appeal by the four had not elapsed, in order that the matter might be brought to the attention of the public and the Attorney General before the time expired. This contention seemed to be inconsistent with the decision of *Rex* v. *Davies*,[2] referred to by Chief Justice McRuer in his article.[3]

As has been said, Mr. Justice Wells expressed no opinion on this point. He considered the question whether the editorial fell within that branch of contempt of court which "prejudices mankind against persons before the cause is heard".[4] He concluded,

[2] [1945] 1 K.B. 435.
[3] (1930), 30 Can. Bar Rev. 225, at p. 233.
[4] *In re Read and Huggonson* (1742), 2 Alta. 469, *per* Lord Hardwicke.

in so far as any possible influence on the judge in imposing sentence was involved, that the offence was merely a technical contempt and he made no order in connection with it. In doing so he relied upon the decision in *Rex* v. *Solloway*.[5] In that case McTague J. fined the editor of the Financial Post $100 for contempt for publishing an article while criminal proceedings were pending against Solloway, summarizing civil proceedings in which he was involved in terms indicating clearly his guilt of the criminal offence. McTague J. came to the conclusion, relying in turn on the judgment of Wright J. in *Regina* v. *Payne*[6] that, so far as the prospective appeal in the civil proceedings was concerned, the contempt was merely technical and no order should be made.

It is respectfully submitted that Mr. Justice Wells and Mr. Justice McTague might have come to a different conclusion had they had before them the case of *Rex* v. *Davies* (*supra*), and in particular the passage from the judgment of Humphreys J. in which he states that it is a fallacy to say or presume that the presiding judge is a person who cannot be affected by outside information. Mr. Justice Humphreys adds, "he is a human being". It would seem to the writer, with respect, that a vigorous comment on sentence in an editorial in a highly respected newspaper might well, consciously or unconsciously, affect the judge or judges responsible for imposing or reviewing sentence, and that both the court and the accused are entitled to have this important part of the administration of justice, the decision on sentence, decided without the court being subjected to comment of this type.

Mr. Justice Wells proceeded to hold that the article in the Globe & Mail might prejudice the fair trial of Thomas in that it would make it difficult for the accused to call as witnesses those referred to in the article. The editor of the Globe & Mail asserted that at the time of publishing the offending editorial, the editorial staff had no knowledge at all that the trial of Thomas was proceeding. The learned judge, accepting this statement, though finding a contempt, confined the penalty to the payment of the costs of the application, which were fixed at $60.00.

Another case of a very different nature to which reference may be made is *Rex* v. *Rodgers*,[7] in which McDougall, County Court Judge, sentenced a juror, who appeared in an intoxicated condition on a criminal trial, to thirty days for contempt.

Mr. Justice Treleaven imposed a fine of $1,000 on the Windsor

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[5] *Re Rex* v. *Solloway, Ex p. Chalmers*, [1936] 4 D.L.R. 321, O.R. 469.
[6] [1896] 1 Q.B. 577.
[7] [1952] O.W.N. 492.

Star recently. A columnist of that newspaper commented on the alleged frivolous conduct by defence counsel and the jurors in a trial for rape. This judge's reasons are not available for comment. It is said that his decision is to be appealed, though the right to appeal is at least questionable.

The frequency with which this matter has arisen within the last year or so in Ontario indicates perhaps that the observations made by McTague J. in *Rex* v. *Solloway* (*supra*) are no longer applicable. There he said: "It seems rather strange, and perhaps speaks well for our newspapers, that there have not been more cases in Ontario, because in England cases dealing with the conflict of two principles [the right of an accused person to a fair trial and the liberty of the press] literally run into scores in recent years". In that case, McTague J. decided it was not a matter for heavy or punitive damages because there were so few Ontario precedents on the subject. Sufficient publicity has now been given some of the recent cases in Ontario to put editors on their guard, and it is likely that in future, if there are cases of publication by the press of prejudicial statements pending the trial of a criminal case, more severe penalties will be imposed, and ignorance will be considered no excuse.

F. A. BREWIN*

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TRADE UNIONS — DISCIPLINARY ACTION AGAINST MEMBER — ABILITY OF THE UNION'S CONSTITUTION TO CURTAIL ACCESS TO THE COURTS — CONTRAST WITH KUZYCH V. WHITE ET AL.— *Lee* v. *Showmen's Guild of Great Britain*,[1] decided by the English Court of Appeal within ten months after *Kuzych* v. *White et al.*,[2] furnishes, in parts of its fundamental rationale, a marked contrast with the decision of the Privy Council. It is not that the Court of Appeal voices any overt doubt about the correctness of Viscount Simon's reasoning. Their comprehensive analysis of the authorities makes absolutely no mention of the earlier case. Nor is there any direct conflict between the results of the two cases. Though both of them deal with the power of the courts to assist a trade-unionist who has been expelled by his union, and, more directly, with the construction and effect of a union constitution as a contractual instrument governing the relations

* F. Andrew Brewin, Q.C., of Cameron, Weldon, Brewin & McCallum, Toronto.

[1] [1952] 1 All E.R. 1175.

[2] [1951] 2 W.W.R. (N.S.) 679; [1951] 2 All E.R. 435.

between member and union, the points at issue were far from identical.

So far as they are material for the present purpose, the salient facts of the *Showmen's* case were as follows. The defendant guild was a society of showmen and a registered trade union formed to protect the rights and interests of showmen visiting fairs and show-grounds. The plaintiff, a travelling showman, was a member of the guild. In 1949 a dispute arose between the plaintiff and one Shaw, another member of the guild, over the right to occupy a particular pitch or site (No. 2 site) at the Bradford summer fair. The plaintiff succeeded in persuading the Bradford Corporation to allot the site to him.

The rules of the guild contained the following provision:

> 15(c). No member of the guild shall indulge in unfair competition with regard to the renting, letting or taking of ground or position.

Rule 14(a) empowered the section committee to impose fines on any member breaking any of the rules and enacted that if such fine was not paid within a month, the member was deemed to have ceased to be a member of the guild.

Shaw filed a complaint with the Yorkshire section committee, charging, in substance, that the plaintiff had indulged in unfair competition with regard to the renting of No. 2 site. The committee decided that the complaint against the plaintiff had been proven, fined him £100 and instructed him to release the site to Shaw. The plaintiff having failed to pay the fine, the committee subsequently resolved that he was deemed to have ceased to be a member of the guild.

The Court of Appeal, affirming the judgment of Ormerod J., held that the plaintiff's conduct did not amount to unfair competition and that the fine and expulsion were *ultra vires* and void. The possibility of a conflict with the *Kuzych* case comes to the front in those portions of the judgment directed to the guild's contention that the committee's decision finding the plaintiff guilty of unfair competition within rule 15(c) was final and one with which the courts had no jurisdiction to interfere.

The decision of the committee was unfavourable to the plaintiff, but the courts are not bound to accept the committee's decision as final and binding in a case where it is based on an erroneous interpretation of the rules and expels a member who, on the correct interpretation of the constitution, the committee has no right to expel. In concluding that he was guilty, the committee must have misconstrued rule 15(c), for a detailed examination of the facts shows that he had done nothing to justify a

finding that he had been guilty of "unfair competition" within the correct meaning of those words. Because it is based on an incorrect construction of the constitution, and consequently involves an erroneous decision on a question of law, the committee's decision is not final and binding and does not oust the jurisdiction of the courts.

The *Kuzych* case depended on the construction and effect of a collateral provision purporting to forbid the ordinary courts from examining the validity of an expulsion unless and until the member had appealed to a domestic forum within the general framework of the union. The Judicial Committee applied unalleviated doctrines of freedom to contract and of literal construction in spite of the fact that the result was to diminish the right of access to the courts. The union emerged victorious because, although the expulsion proceedings were probably irregular and invalid, the privative clause was effective to prevent the court from passing any judgment on their validity and effect.

In the *Showmen's* case, where there was no special provision purporting to enjoin it from doing so, the court was able to proceed to a consideration of the validity of the expulsion, and to embark on the inquiry into the merits effectively forbidden to it in *Kuzych* v. *White*. It found itself in a position to deal with the construction and effect of the primary provisions conferring the power of expulsion, prescribing the procedure to be followed and defining the effect of a decision to expel. In doing so it suggested restrictions on the binding effect of the contract contained in the constitution and, with some assistance from that device, it procured the reinstatement of the member.

As a matter of stare decisis, there may be no direct conflict between the two cases, but it cannot be denied that both of them hinge on the contractual effect of a union constitution and that they represent contrasting attitudes on the extent of its ability to prevent judicial interference with the decisions of the tribunals existing within the union. The deviation is noticeable especially in the judgment of Denning L. J. and, to a lesser extent, in the judgment of Romer L. J. The following paragraphs are based mainly on the reasoning of Denning L. J.

In the first sentence of his judgment the Lord Justice accepts the contract theory as forming the general basis for the jurisdiction of the domestic tribunals of a trade union. He does, however, with some concurrence from Romer L. J., loose a well-aimed shaft at the very root of the doctrine, remarking that while, in theory, the member is supposed to have contracted to give wide

powers to the union's tribunals, yet, in practice, he has no choice in the matter; of freedom of contract there is almost nothing; the union imposes the rules and, if the member wishes to engage in the trade, he has no opportunity to reject them. But, though there is some questioning of the applicability of contract principles, there is no reference to the relation theory suggested as an alternative in some of the American law reviews.[3]

Though Denning L. J. agrees that the jurisdiction of the union's tribunals is founded on contract, he indicates, almost at once, the possibility of two limitations on the complete operation of that theory. Here it is that the departure from the fundamental approach of the *Kuzych* case begins to become apparent.

The first limitation is that the parties are not free to make any contract they like. Public policy imposes important restrictions. As an illustration, a stipulation absolving the tribunal from observing the principles of natural justice, from giving the accused notice of the charge and a reasonable opportunity of meeting it, or enabling them to condemn him unheard, would be invalid.

The other limitation — it is probably a specialized form of the first—is that the parties cannot by contract oust the ordinary courts of their jurisdiction. They cannot agree to make the domestic tribunal the final arbiter on questions of law, prevent its decisions being examined by the courts, or take the law out of the hands of the courts and into the hands of the private tribunal without any recourse at all to the courts in case of error of law. To that extent their agreement would be contrary to public policy and void.

That such limitations are difficult to reconcile with the implications of the *Kuzych* decision is almost beyond doubt. The Judicial Committee based their judgment on an unqualified form of the contract theory, holding, almost explicitly, that the rights of the parties depend solely on the terms of a contract, that the terms of that contract can be derived only from the true construction of the actual provisions of the union's constitution, and that the court, when engaged in the task of interpretation, should not import doctrines which may accomplish justice but, at the same time, depart from the natural meaning of the words. They declined, for instance, to read the constitution as if it were, by implication, subject to the qualifications that a lawyer would men-

[3] Zechariah Chafee, Jr., The Internal Affairs of Associations Not For Profit (1930), 43 Harv. L. Rev. 993; Clyde W. Summers, Legal Limitations on Union Discipline (1951), 64 Harv. L. Rev. 1049, and Union Powers and Workers' Rights (1951), 49 Mich. L. Rev. 805. Compare, Dennis Lloyd, The Disciplinary Powers of Professional Bodies (1950), 13 Mod. L. Rev. 281.

tion in stating whether the decision of an inferior tribunal is free from attack. And, by necessary implication, they declined to reach the same result by applying an overriding principle of public policy which, while not affecting the interpretation of the constitution, would enable the plaintiff to escape from its restrictions.

The two decisions deal with different portions of differing constitutions, but the line of distinction may be so fine that it is almost imperceptible. If the protective clause takes the form of declaring that the decision of the domestic tribunal on the interpretation of the union constitution or on other questions of law shall be final and conclusive the courts may be able to escape from its embrace by holding it to be contrary to public policy on the ground that it attempts to oust the jurisdiction of the ordinary courts. But if, on the other hand, the clause takes the form of forbidding resort to the courts unless and until the member has first appealed to other domestic tribunals, then the courts must yield full force and effect to the clause and refuse to entertain the action even though the expulsion proceedings were tainted and vitiated by bias, prejudice, intimidation and absence of natural justice. Will the courts surrender their jurisdiction in compliance with the second type of provision, if the member alleges that the original tribunal had misconstrued the constitution and had been guilty of other errors of law? Will they inform the member that those questions must first be submitted for the consideration of the higher domestic tribunal? Can the constitution require the member to exhaust his rights of internal appeal before he submits to the courts the very contentions on which he succeeded in the *Showmen's* case? Should the courts enforce stringently the provision requiring an internal appeal and subsequently, after the internal appeals have been exhausted, give only a qualified effect to provisions declaring that the decisions of the domestic tribunals on the interpretation of the constitution and on other questions of law shall be final and unassailable?

It becomes almost impossible to imagine Denning L. J. applying a rigid principle of freedom to contract and literal construction, and saying, in a paraphrase of Viscount Simon:[4]

> At any rate, this is the appeal which the plaintiff was bound by his contract to pursue before he could issue his writ. He has not done so and on this ground, his action must be dismissed.

The possibility of a divergence between the Privy Council and the Court of Appeal is accented by the fact that, in imposing

[4] *Kuzych* v. *White et al.*, [1951] 2 W.W.R. (N.S.) 679, at p. 689.

limitations on the parties' freedom of contract, Denning L. J. expressly discounted a dictum of Maugham J. in *Maclean* v. *The Workers' Union*.[5] This is an important feature because, although the views expressed by Maugham J. passed almost unnoticed in the judgment of the Privy Council, it is conceived that they furnish one of the keys to the decision in *Kuzych* v. *White*. The remaining member of the court in the *Showmen's* case, Somervell L. J., had already expressed a view on the power of the court to interfere which, as he recognized, was not completely in accord with another dictum from the *Maclean* case.

One general caution uttered by each of the judges in *Lee* v. *Showmen's Guild* is, in substance, that a trade union is not to be treated as being on the same footing as a social club. It follows that when the court is asked to review the activities of a union tribunal it should not be governed by the reluctance to interfere exhibited in similar cases on clubs. This attitude can be traced to the recognition of a right to work and of the social and economic importance of that right. It may go hand in hand with the doubt over the existence of a true contract. These judges would probably agree with those who believe that expulsion from a powerful union is little less than a sentence of industrial death.[6] But it is doubtful whether they would extend the right to work to the point of agreeing with O'Halloran J. A. who, in *Kuzych* v. *White*,[7] asserted that if membership in a union is a condition precedent to a man working at his trade then he has an indefeasible right to belong to that union.

Comparing the *Showmen's* case with *Kuzych* v. *White* and *Maclean* v. *The Worker's Union* gives rise to the feeling that the two earlier decisions may have marked the zenith of the reluctance of the courts to interfere with the internal affairs of trade unions. Though they do not directly criticize the *Kuzych* case, members of the Court of Appeal are displaying some desire to retreat from the more extreme positions occupied in its forerunner, the *Maclean* case, together with an anxiety to curtail the effect of provisions that restrict the right of access to the courts.[8] *McRae* v. *Local No. 1720*,[9] decided in New Brunswick within two months after *Lee* v. *Showmen's Guild*, may be another illustration

[5] [1929] 1 Ch. 602.

[6] *Braithwaite et al.* v. *Amalgamated Society of Carpenters*, [1921] 2 Ch. 399, at p. 426, *per* Younger L. J.

[7] [1950] 2 W.W.R. 193, at p. 198.

[8] Some slight hint of their attitude can be observed in *Russell* v. *Duke of Norfolk et al.*, [1940] 1 All E.R. 109. Only Denning L. J. participated in both judgments.

[9] Commented on in (1952), 30 Can. Bar Rev. 525.

of the same trend — an independent illustration because it makes no mention of the Court of Appeal decision. Whether *Kuzych* v. *White* is right or wrong, it is hardly the type of decision that is accepted with equanimity.

E. F. WHITMORE*

From East to Western Sea

The claim made for provincial control is, in my opinion, excessive. The first and fundamental accomplishment of the constitutional Act was the creation of a single political organization of subjects of His Majesty within the geographical area of the Dominion, the basic postulate of which was the institution of a Canadian citizenship. Citizenship is membership in a state; and in the citizen inhere those rights and duties, the correlatives of allegiance and protection, which are basic to the status.

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It follows, *a fortiori*, that a province cannot prevent a Canadian from entering it except, conceivably, in temporary circumstances, for some local reason as, for example, health. With such a prohibitory power, the country could be converted into a number of enclaves and the 'union' which the original provinces sought and obtained disrupted. In a like position is a subject of a friendly foreign country; for practical purposes he enjoys all the rights of the citizen.

Such, then is, the national status enbodying certain inherent or constitutive characteristics, of members of the Canadian public, and it can be modified, defeated or destroyed, as for instance by outlawry, only by Parliament.

Highways are a condition of the existence of an organized state: without them its life could not be carried on. To deny their use is to destroy the fundamental liberty of action of the individual, to proscribe his participation in that life: under such a ban, the exercise of citizenship would be at an end. A narrower constitutional consideration arises. Civil life in this country consists of inextricably intermingled activities and relations within the legislative jurisdiction of both Parliament and Legislature, and deprivation of the use of highways would confound matters appertaining to both. To prevent a person from engaging in business at a post office or a customs house or a bank by forbidding him the use of highways is, so far, to frustrate a privilege embedded in Dominion law. These considerations are, I think, sufficient to demonstrate that the privilege of using highways is likewise an essential attribute of Canadian citizenship status. (Rand J. in *Winner* v. *S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887, at pp. 918ff)

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* E. F. Whitmore, LL.B. (Sask.). Member of the Saskatchewan Bar. Professor of Law, University of Saskatchewan. Associated as a consultant with the firm of Disbery, Bence and Walker, Saskatoon, Saskatchewan.