THE SUPPRESSION OF THE PRESS IN EARLY PENNSYLVANIA: THE PENUMBRA OF BAYARD V. PASSMORE

WINTON D. WOODS JR.*

In 1941, Mr. Justice Black, writing for the Court in *Bridges v. California*,[1] noted that if contempt proceedings based upon out of court publications can

> be justified at all, it must be in terms of some serious substantive evil which they are designed to avert. . . . For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions.[2]

Again, in 1946, a unanimous Court in *Pennekamp v. Florida*[3] invoked the "clear and present danger" test to reject an attempt to utilize the contempt power to punish a newspaper editor for extended comment upon the failures of the judiciary. Invoking the authority of Mr. Justice Black, the Court noted:

> *Bridges v. California* fixed reasonably well-marked limits around the power of courts to punish newspapers and others for comments upon or criticism of pending litigation.[4]

And again, in 1946, in *Craig v. Harney*,[5] the Court vindicated a newspaper that had vehemently attacked the competency and integrity of a local judge's handling of a particular case. The Court then stated:

> The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute 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.* . . . [t]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate. (emphasis added)[6]

One would have hoped that the comparatively plain standards set down

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[1] 314 U.S. 252 (1941).
[2] *Id.* at 270.
[3] 328 U.S. 331 (1946).
[4] *Id.* at 334.
[5] 331 U.S. 367 (1947).
[6] *Id.* at 376.

by the Court would have put to rest the general problem of abuse of the contempt power by state trial judges. Yet with some regularity one finds in the reports an opinion of a court that ignores the *Bridges* line of cases and revives to some extent the common law of contempt by publication explicitly rejected by Mr. Justice Black's opinion.

I

On June 6, 1960, the Bibb County (Georgia) grand jury was instructed to investigate the "inane and inexplicable pattern of Negro bloc voting" which allegedly existed in the county.[7] The next day, J. I. Wood, the Bibb County Sheriff, released a written statement to the news media in which he charged that the investigation was based upon racial bias and that it was "shocking to find a Judge charging a Grand Jury in the style and language of a race-baiting candidate for political office."[8] In a later release, entitled *"An Open Letter to the Grand Jury,"* Sheriff Wood suggested that the real evil in Bibb County could be found by investigating the "select group in this community [that] is able to brainwash . . . the voters [so they] blindly bloc vote for certain sponsored candidates of the Democratic Executive Committee."[9]

Sheriff Wood was cited for contempt and in response he publicly defended his action on the ground that he was being "prosecuted for daring to criticise the Judges and for speaking the truth."[10] Sheriff Wood filed 19 special demurrers to each of three counts against him. Upon hearing, the court overruled the demurrers, found him guilty on each count, fined him a total of $600 and sentenced him to 20 days in jail. On appeal, the Georgia Court of Appeals affirmed as to two of the three counts. Judge Bell, writing for the court, noted that "the Constitution does not guarantee freedom to 'say what we please' about a judge or a court"[11] and upon that conclusion (which he derived from a careful analysis of Georgia cases and *Corpus Juris Secundum*) held:

> In view of the radical language complained of in this case, imputing lack of virtue and integrity to the judge of the court for an act done in his official capacity, and in view of the law as laid down by the decisions cited we hold that there was no error. . . .[12]

As to the *"Open Letter to the Grand Jury,"* however, the court held that the lack of direct attack upon the court precluded the invocation of the contempt power. In so doing, the court noted *Bridges* at the end of an eight-case string of state decisions. *Bridges* and its progeny were not discussed however. Instead, the court in a remarkable passage observed

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[7] Wood v. State, 103 Ga. App. 305, 119 S.E.2d 261 (1961).
[8] *Id.* at 309, 119 S.E.2d at 266.
[9] *Id.* at 310, 119 S.E.2d at 267.
[10] *Id.* at 312, 119 S.E.2d at 268.
[11] *Id.* at 318, 119 S.E.2d at 271.
[12] *Id.* at 318, 119 S.E.2d at 271-72.

that "one who is guilty of contempt of court cannot claim the protection"[13] of the Georgia equivalent of the first amendment.[14] In dicta, the court revived the common law doctrine that truth was not a defense in a contempt of court action.[15]

On certiorari, the United States Supreme Court reversed.[16] Mr. Chief Justice Warren, writing for the Court, first reviewed the history of constitutional limitations upon the contempt power, as articulated in *Bridges, Pennekamp* and *Craig,* and then restated the constitutional policy implicit in those decisions:

> Men are entitled to speak as they please on matters vital to them; errors in judgment or unsubstantiated opinions may be exposed, of course, but not through punishment for contempt for the expression. Under our system of government, counter-argument and education are the weapons available to expose these matters, not abridgment of the rights of free speech and assembly.[17]

Of course the Supreme Court has neither the opportunity nor the time to review every contempt proceeding that occurs and the studious avoidance of the Court's mandates as evidenced by the decision of the Georgia Court of Appeals provides a basis for assuming that some are not as fortunate as was Sheriff Wood. A recent Arkansas decision is a case in point.[18]

In 1961, J. L. Tupy distributed a pamphlet prepared by the Citizens Committee of Newton County, Arkansas, which accused the grand jury and the county prosecutor of misconduct.[19] The Supreme Court of Arkansas upheld Tupy's summary conviction for contempt noting:

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[13] *Id.* at 322, 119 S.E.2d at 273.

[14] GA. CONST. art. 1, ¶ 15 provides:
No law shall ever be passed to curtail, or restrain the liberty of speech, or of the press; any person may speak, write and publish his sentiments, on all subjects, being responsible for the abuse of that liberty.

[15] Wood v. State, 103 Ga. App. 305, 321, 326, 119 S.E.2d 261, 273 (Part C), 276 (Part II) (1961).

[16] Wood v. Georgia, 370 U.S. 375 (1962) (Justices White and Frankfurter did not participate).

[17] *Id.* at 389. The Chief Justice later added:
Consistent suppression of discussion likely to affect pending investigations would mean that some continuing public grievances could never be discussed at all, or at least not at the moment when public discussion is most needed. The conviction here produces its 'restrictive results at the precise time when public interest in the matters discussed would naturally be at its height . . . .' 370 U.S. at 392.

[18] Tupy v. State, 234 Ark. 821, 354 S.W.2d 728 (1962).

[19] The Court quotes the material portions of the pamphlet:
'The undersigned, Hugh Sparks, H. W. McGraw and J. L. Tupy, all members of the Citizens Committee of Newton County, hereby do solemnly affirm the truth of the following: That at 11:45 a.m. of March 10, 1961, they visited the Honorable Woody Murray, Judge 14th Circuit of Arkansas, in his chambers in the Boone County Court House, Harrison, Arkansas, where he told them, among other things, that the Resolutions adopted by the Newton County Grand Jury on March 9, 1961, of which a certified copy was supplied the Citizens Committee by Howard Norton, County and Circuit Clerk, was not an Order of the Court, and that they were not

> But when considered in context, the statement made in the pamphlet by petitioner destroys public confidence in the courts and Grand Juries as such because the statement is to the *effect* that he cannot obtain justice in the Court of Newton County for the reason of a rigged Grand Jury engineered by the Circuit Court which is a 'seeming complot to whitewash the accused.' It follows, therefore, that these statements create a clear and present danger to the administration of justice. (emphasis original)[20]

Any fair reading of the questioned material, reproduced above in note 19 shows that it does *not* contain the clear and present danger of imminent peril to the fair administration of the law that is contemplated by *Bridges.* Indeed the language could hardly be said to be clear, let alone dangerous.

The South does not stand alone, however, in regard to official suppression of critical comment, though the recent cases in the Northern states have reached a different result on appeal.

In 1963, the Illinois Supreme Court vindicated a group of citizens who had publicly criticised the judge of the Village Court of Maywood in an honorable and detached manner.[21] Two years and two appeals were needed, however, for that vindication. Again in 1963, the Court of Appeals of New York, in a four to three decision, rescued a newspaper that had been held in contempt for publication of an allegedly inaccurate news story about possible police misconduct.[22] Though the court based its decision upon the state statute involved, Judge Foster was careful to note the applicable constitutional standards developed in *Bridges, Pennekamp,* and *Craig.*

The last of the above mentioned cases, *Craig v. Harney,*[23] has evident significance to a recent Tennessee case in which *Craig* and all other decisions of the United States Supreme Court were ignored. In McCraw v. Adcox,[24] the Tennessee Supreme Court was faced with an *in propria persona* appeal by James Ray McCraw of Hamilton County,

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enforceable nor valid at law; and that in his selection of the Jury Commissioners for choosing the panel of Grand Jurors, from which 16 were sworn in on March 6, 1961, he made the selection on advice of County Court House officials of Newton County.'

At page 19 of the pamphlet the following appears: 'We believe that justice in this matter is being denied the citizenry of Newton County because of:

(a) A Set-up Grand Jury;
(b) The sterile legerity of the Prosecutor (who is supposed to be the Citizens' attorney);
(c) and a seeming complot to whitewash the accused.'

Id. at 821-23, 354 S.W.2d at 729.

[20] *Id.* at 825, 354 S.W.2d at 730.

[21] People v. Hathaway, 27 Ill. 2d 615, 190 N.E.2d 332 (1963).

[22] People v. Post Standard Co., 13 N.Y.2d 185, 195 N.E.2d 48, 245 N.Y.S.2d 377 (1963).

[23] 331 U.S. 367 (1947).

[24] 217 Tenn. 591, 399 S.W.2d 753 (1966).

Tennessee, who had been sued in replevin and ultimately convicted of contempt for his efforts to defend his case without the aid of counsel. On April 19, 1965, McCraw had moved in the Hamilton County trial court for a change of venue. In so doing he used language which has a familiar ring, if not familiar substance, to anyone who has had some degree of contact with agitated laymen who represent themselves in court:

> This case lay dormant in Judge Goins Court for a long time. Judge Goins is the father-in-law of plaintiff's attorney, Keith Harber.
> On the 12th day of April, 1965, Judge James F. Morgan, Circuit Judge, and Attorney Keith Harber held a star chamber court proceeding.
> Defendant moves for a change of venue, since he did not get a fair hearing on his plea in abatement on the said date of April, 1965.
>
> James Ray McCraw
> Defendant[25]

A month later he moved to disqualify the judge in the following language:

> Defendant, James Ray McCraw, moves that the Court disqualifies itself, and turn this case over to some Court which will handle it fair an (sic) impartial. Which Division II has not done. And will not do.
> * * * * * * * * * *
> Then this case was transferred to Division II to be the hatchet Court.
> Then Judge Morgan ruled in favor of plaintiff and told defendant that he, defendant, had 30 days to appeal to the Court of Appeals State of Tennessee, Knoxville, Tennessee.
> * * * * * * * * * *
> Defendant does not understand any such crookedness.
> * * * * * * * * * *
> Defendant is most absolutely not going to let Judge James F. Morgan hear this Case No. 2379.
> * * * * * * * * * *
> Defendant protests the crookedness of Judge James F. Morgan in handling this case.
> * * * * * * * * * *
> Defendant is aware of the fact that Attorney Keith Harber and Judge James F. Morgan plan a star chamber court proceeding or kangaroo trial for the alleged writ of replevin. . . .[26]

The judge found James Ray McCraw guilty of contempt, fined him $50 and sentenced him to ten days in the Hamilton County Jail. On appeal, the Tennessee Supreme Court affirmed in a per curiam opinion which made no mention of a first amendment problem. Whatever relevance

[25] *Id.* at 593, 399 S.W.2d at 754.
[26] *Id.* at 593-94, 399 S.W.2d at 754. [omissions original]

Craig had to the case was ignored, and the court instead relied upon an opinion of the Tennessee Supreme Court decided in the same year as *Gitlow v. New York.*[27]

Recently the wire services have carried reports of a Michigan case in which the editor of a monthly magazine was held in contempt for the publication of an article in the midst of the recent election campaign that alleged the corruption of the county judicial system by a local attorney. According to reports, the Michigan Press Association and Sigma Delta Chi have requested permission to intervene in the appeal.[28]

The above cases indicate that the ghost of contempt by publication, like that of *Swift v. Tyson,*[29] "still walks abroad, somewhat shrunken in size, yet capable of much mischief."[30] It is thus not irrelevant to inquire into the nature of the apparition by asking whether it is a product of a mistaken view of our constitutional history or whether it is, in fact, part of a deep-rooted tradition of suppression of unpopular opinion. Dean Levy, in his monumental study of freedom of the press,[31] takes the latter view; Mr. Justice Black predictably takes the former:

> Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press as to other liberties, the broadest scope that could be countenanced in an orderly society.[32]

The writer agrees with Dean Levy and herewith presents a tale of systematic suppression which demonstrates that at least in early Pennsylvania the press was far from free. It is plain that Mr. Justic Black was on historically questionable ground when he so eloquently stated in *Bridges* that:

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[27] 268 U.S. 652 (1925).

[28] Letter from Mrs. Mary J. Wallace of the Ann Arbor News to Winton D. Woods Jr., November 5, 1968, copy on file in the University of Arizona Law Library. Mrs. Wallace reports that the Livingston County prosecutor, who had withdrawn from the prosecutors race, re-entered the race after the contempt proceeding saying:

> [p]eople are entitled to a choice, they are fed up with the kind of witch-hunt being conducted by the editor of Today magazine . . . . Letter at 5.

The Michigan Press Association is reported to have said:

> MPA is not willing to let go unchallenged the precedent that a court can call in a person who criticizes its action, demand proof, rule on its validity and set a penalty for contempt. Judges and lawyers can deal with such charges through the same channels of libel or slander as others, but not through contempt. When one realizes how this precedent would prevent anyone from criticizing courts, no matter how valid the cause, without fear of contempt proceedings, the danger to the nation is clear.
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> Letter at 6.

[29] 41 U.S. 1 (1842).

[30] Sampson v. Channell, 110 F.2d 754, 761 (1940) (Magruder, J.).

[31] L. LEVY, LEGACY OF SUPPRESSION (1964).

[32] Bridges v. California, 314 U.S. 252, 265 (1941).

> [We must reject the argument that] the power of judges to punish by contempt out-of-court publications tending to obstruct the orderly and fair administration of justice in a pending case was deeply rooted in English common law at the time the Constituton was adopted. That this historical contention is dubious has been persuasively argued elsewhere [citations omitted]. In any event it need not detain us, for to assume that English common law in this field is ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.' [Citation omitted] There are no contrary indications in any part of the history of the period in which the First Amendment was framed and adopted. . . . The implications of subsequent American history confirm such a construction of the First Amendment. . . . In Pennsylvania and New York, for example, heated controversies arose over alleged abuses in the exercise of the contempt power, which in both places culminated in legislation practically forbidding summary punishment for publications.[33]

The story of the Pennsylvania experience follows. At the outset it should be noted that the writer makes no brief for the often articulated theory that the Supreme Court is limited by the historical context of any given constitutional standard.[34] That argument was properly laid to rest by Chief Justice Marshall, and the efforts of the present Court to pour a better brand of wine into the first amendment only carry on that tradition. Constitutionalism, however, does not destroy the history of the Republic. It is thus worthy of note that the Court in *Bridges* was fulfilling its role as a creative instrument of government and not simply restating a timeless constitutional standard.

II

In the pre-Revolution years in this country the common method for bringing a recalcitrant printer to terms was to utilize the English common law of seditious libel.[35] In 1275, Parliament enacted the statute *De Scandalis Magnatum* which was the basis of the law of seditious libel and was intended to prevent "discord in the realm."[36] The suppression of speech and printing was further extended under the authority of the Star Chamber, where the licensing system was developed and the concept of seditious libel again extended.[37] To the Eng-

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[33] *Id.* at 263-66.

[34] *See, e.g.*, Avins, *Fourteenth Amendment Limitations on Banning Racial Discrimination: The Original Understanding*, 8 ARIZ. L. REV. 236 (1967).

[35] A recent writer would attribute to Coke the innovation of the concept of seditious libel. He argues that Coke made up the legal category out of whole cloth. *See* Brant, *Seditious Libel: Myth and Reality*, 39 N.Y.U. L. REV. 1 (1964). The work of Professor Levy would seem to negate that conclusion. *See* L. LEVY, *supra* note 31, ch. 1.

[36] L. LEVY, *supra* note 31, at 7.

[37] *Id.* at 9-17.

lishmen of the day, Blackstone's opinion of freedom of the press was undoubtedly considered liberal. He stated:

> Liberty of the press consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every Freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.[38]

Yet even before Blackstone, political theorists and philosophers had begun to urge extensions of the concepts of freedom of speech and the press.[39] While some of those theorists recognized the right of the government to punish publications that were deemed mischievous, they urged a greater liberality and freedom from prior restraint.[40]

While the libertarian movement in England was progressing, the colonies began to use a distinctly American method which did not change the legal rule, but avoided it through judicious use of the power of the jury. The culmination of that movement came in 1732, when John Peter Zenger was tried on a charge of seditious libel against the Honorable William Cosby, Governor of the Royal Colony of New York. Andrew Hamilton, Zenger's counsel, after failing to convince the court that the jury had the power to consider both law and fact, skillfully circumvented that ruling by presenting the question to the jury themselves. Hamilton informed the jury that they were to decide both questions of law and fact, and that they had the power to return a general verdict.[41] For reasons that are not apparent from the reports, the

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[38] G. CHASE, THE AMERICAN STUDENTS' BLACKSTONE 915-18 (8d ed. 1892). The standard here is "no prior restraint." Blackstone thus draws the line of legitimate suppression at the time of publication. A more modern view would not make a chronological analysis but would draw the line between liberty and license. *See, e.g.*, Toledo Newspaper Co. v. United States, 247 U.S. 402, 419 (1918) (White, C. J.); Z. CHAFFEE JR., FREE SPEECH IN THE UNITED STATES 12-14 (1964). This is supported by similar thoughts, *e.g.*, Lord Kenyon, "The liberty of the press is clear to England, the licentiousness of the press is odious to England. The liberty of it can never be so well protected as by beating down licentiousness" in Z. CHAFFEE JR., *supra*, at 13. *Cf.* Freedom of the press is "not only liberty to publish, but complete immunity from legal censure and punishment for publication, so long as it is not harmful in its character, when tested by such standards as the law affords." T. COOLEY, CONSTITUTIONAL LIMITATIONS 605 (7th ed. 1902). *See also* Bentham, "In the case of the public functionary, for vituperation, how gross soever, there should be no punishment at all . . . ." 2 THE WORKS OF JEREMY BENTHAM 279 (Bowring ed. 1962).

[39] L. LEVY, *supra* note 31, at 88-125.

[40] *See, e.g.*, 2 THE WORKS OF JEREMY BENTHAM 279 (Bowring ed. 1962).

[41] The same legal standard was established later in England by the Fox Libel Act of 1792. The Fox Libel Act was preceded in America by the provisions of the Pennsylvania constitution of 1789 and followed by the New York case of People v. Croswell, 3 Johns 336 (N.Y. 1804). In 1804, Harry Croswell, editor of the federalist paper, The Wasp, published an article accusing Jefferson of paying James Callender to denounce Washington and Adams. At his trial for common law seditious libel, Chief Justice Morgan Lewis charged the jury that truth was not a defense against seditious libel and that the jury could only find the fact of publication. Croswell was convicted. On appeal, Alexander Hamilton argued that a pub-

trial judge did not object to Hamilton's argument to the jury, though he had rejected it out of hand when presented directly to the court. After the concluding statements of counsel, the jury retired and returned with a general verdict of "not guilty."[42] Thus, the first great American victory for a free press was won through the power of a free jury, rather than through a rule of law. We might note parenthetically that it is the jury which gives particular significance to the Zenger trial for without the institution of a free and powerful jury, the concept of free speech is meaningless. As we shall see, the issues that presented themselves in the Zenger trial were the same issues which were argued and reargued during the next century.

Although the Zenger trial had attracted wide popular attention, the major point of emphasis was on the right to publish, rather than on the powers of a trial jury. With the advent of the Revolution, and the framing of state constitutions, the same emphasis was continued. Most of the states included provisions insuring the freedom of the press as an abstract principle, but ignoring the institutional aspects of the right. The first constitution of Pennsylvania was framed in 1776 by a convention headed by Benjamin Franklin, and included a declaration of rights, which, among other things, preserved to the people "freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained."[43] A new constitution was produced in 1790, and an expanded version of the free speech section was included in the declaration of rights. The new section, in addition, reserved the right to offer the truth in evidence, and significantly provided that "in all indictments for libels, the jury shall have a right to determine the law and the facts under the direction of the court as in other cases."[44]

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lisher may publish "with impunity, truth, with good motives, for justifiable ends, though reflecting on government, magistracy or individuals." The court split 2-2, Kent writing the opinion for reversal. The case led to an enactment the next year of a statute securing the power to a jury to decide the whole case and allowing truth as a defense. *See* Z. CHAFFEE JR., *supra* note 38, at 28. Chaffee concludes (from the fact of Hamilton's argument) that this case showed a repudiation of Blackstone. But he forgets that Hamilton and Jefferson had their hands in several prosecutions for what they deemed sedition. It was to be expected that Hamilton would argue for total freedom for a federalist.

[42] *See generally* J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (1963).

[43] Const. of 1776, declaration of rights XII, reprinted in 5 F. THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS 3083 (1909).

[44] Article IX § VII reads "that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature or any branch of government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man: and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence. And, in all indictments for libels, the jury shall have a right to determine the law and the facts under the direction of the court as in other cases."

Thus it is clear that by 1790 Pennsylvania constitutional theory had accepted the principle of free speech. The statement of that principle was generally held to be "the right to publish the truth from good motives and for justifiable ends." Untrue statements were, of course, censured, but problems arose in cases where a statement was published which reflected upon a public official and yet was true. At common law the truth of a libel of that kind merely made it worse, since the theoretical justification for the crime of seditious libel was the tendency to a breach of the peace. Thus it was said that a true statement reflecting upon a public official had a greater tendency to breach of the peace because it was true.[45]

Yet, the language of the Pennsylvania constitution rejected any such notion of damage inherent in exposure of public officials and accepted the view expressed at the Zenger trial. In the best of all possible worlds that fact would have precluded the persecution of Pennsylvania printers that occurred during the ensuing thirty years.

III

The first Pennsylvania case to squarely present the issues of trial by jury and the right of a printer to be free from prior restraint was the notorious 1788 case of *Respublica v. Oswald.*[46] Eleazer Oswald, printer of the *Independent Gazetter,* had published an article that placed Andrew Browne, headmaster of a Philadelphia female academy, in a plainly indecorous light. Browne brought an action for libel against Oswald, at the same time obtaining a court decree placing Oswald on his good behavior and securing such behavior by the production of bail.[47] Oswald, being of the view that such action amounted to an unconstitutional prior restraint of his right to publish, printed a piece in his paper[48] attacking Browne and the judge who had issued the bail order. Oswald alleged that the suit was instigated for political reasons by one Dr. Rush, and argued that the procedure which was followed violated the fundamental rights of trial by jury and a free press. He implied that in view of the fact that Dr. Rush's brother was a member of the Supreme Court of Pennsylvania, he was not apt to find complete

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Reprinted in 1 Z. CHAFFEE JR., DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS (1963).

[45] *See, e.g.,* Brant, *supra* note 35.

[46] I Dall. 319 (Pa. 1788).

[47] The procedures involved were two-fold. A person was placed on bond assuring his good behavior which was called a "recognizance." If he violated those terms he was subject to a common-law action in debt. The proceeding was by "attachment" which meant that the defendant was subjected to an action before the court, without a jury, to determine whether he had violated the terms of the recognizance. These are the procedural rules that gave rise to the situation to be discussed in this paper.

[48] The text of Oswald's statement is to be found in the report of the case. Respulica v. Oswald, 1 Dall. 319, 320 (Pa. 1788). Though the statement was frought with political implications, the alleged libel was relatively mild.

justice at the hand of the court, unless he was tried by a jury.[49] Oswald had two unstated reasons for his attack. First, he entertained a great dislike of the Federalist judiciary, and, second, he had managed to escape several prosecutions for libel by convincing a jury that a conviction would violate the rights of a free press.

The open attack upon the integrity of the judiciary caused William Lewis, for the Commonwealth, to petition the court for a rule to show cause why Oswald should not be punished for contempt. Lewis argued that the publication printed by Oswald was clearly libelous, and tended to obstruct the course of justice by prejudicing the minds of the people in the pending civil action. The court agreed, and issued the rule to show cause why Oswald should not be proceeded against by attachment for contempt of court.[50] Oswald appeared the next Monday, and moved for a delay in order that he might prepare his case, but Chief Justice McKean denied the motion on the grounds that "one reason for such a summary proceeding is to prevent delay."[51] Oswald's counsel responded that such a summary proceeding was prohibited by the constitution of Pennsylvania, which preserved to all criminal defendants the right to trial by jury, presentation of witnesses, and the privilege against self-incrimination. Moreover, he said, the case was clearly one of criminal libel, being prosecuted under the guise of the contempt power, and as such, was an unconstitutional deprivation of the fundamental right to freedom of the press. Chief Justice McKean rejected the arguments of the defense, and, casting aside repeated references to the Star Chamber, orally pronounced his opinion. McKean first denied that the proceedings were for criminal libel, calling them merely actions to protect the court. But later, forgetting his prior assurances, he stated:

> And here I must be allowed to observe that libeling is a great crime, whatever sentiments may be entertained by those who live by it. With respect to the heart of the libeler, it is more dark and base than that of the assassin, or than his who commits midnight arson.[52]

McKean, oblivious to the fact that he had thus granted Oswald's arguments concerning the criminal nature of the prosecution, further declared that the very nature of the "crime" of libel precludes jury trial. Only the judge, McKean thought, is capable of being unaffected by the libel, and thus able to see that justice be properly done. Apparently

[49] The fear was probably unfounded. Although Dr. Rush apparently was not beyond reproach, his brother evidently was an honest judge. William Cobbett, who would have gladly attacked the judge in his Gazzett, once stated that Dr. Rush was an outstanding man. 7. W. COBBETT, PORCUPINES WORKS 316 (1801).

[50] Respublica v. Oswald, 1 Dall. 319, 322 (Pa. 1788). It is not clear whether this action was brought in the same court that issued the original recognizance. From all indications it was not.

[51] *Id.* at 322.

[52] *Id.* at 324.

having perceived his error, McKean abruptly switched course to freedom of the press. While he agreed that the constitution preserved a free press, he justified summary prosecutions by the law of civil libel, and the rights to privacy and reputation there invaded. If his use of civil law to uphold a criminal prosecution had produced confusion, it was only compounded by the final thrust: The contempt power is a necessary adjunct to the power of the court, said the judge, and to support his case, he cited several cases of direct contempt.[53] McKean thus managed to introduce two novel approaches to the Pennsylvania law. First, and of major importance to future litigants, a contempt by publication out of court was held not to be a criminal action, and second, constructive contempt was to be considered in the same light as direct contempt, in terms of the right to jury trial.[54]

Notwithstanding the position of the Chief Justice, Justice Bryan, who had issued the original recognizance, expressed doubt as to the legality of the proceeding. But he was unwilling to dissent from the decision of his brothers, and Eleazer Oswald was found guilty of contempt of court, sentenced to one month in jail, and fined ten pounds.

Oswald was not to be subdued with such ease, however, for three weeks after his release from jail, he presented a memorial to the general assembly, requesting a determination of the constitutionality of the proceeding against him, and demanding that the judges be impeached. A committee was appointed to investigate the matter and three days later a report was made to the house, sitting as a committee of the whole. William Lewis, the original prosecutor, and a member of the house, supported his action as well as the action of the court by observing that liberty was equally endangered by tyranny on one hand, and licentiousness on the other. Liberty, he said, is not the uncontrolled right to do whatever one wishes, but is limited by the state of civil society. Society, stated Lewis, is organized to protect the liberties of man, among which liberties are included his right to own and enjoy property, and to keep his good reputation. When reputation is impinged, he argued, irreparable damage is committed which justifies a court in taking summary action against such an attack.[55] Lewis then

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[53] *E.g.*,

> If a man commits an outrage in the face of the court, what is there to be tried? — what further evidence can be necessary to convict him of the offense, than the actual view of the judges? A man has been compelled to enter into security for his good behavior, for giving the lie in the presence of the judges in Westminster Hall. *Id.* at 326.

McKean stated that the constitution incorporated the English common law.

[54] It is of great significance to future developments that McKean allowed indirect contempt to be used as a means of punishing criminally what otherwise was constitutionally protected. The *Oswald* case thus was the foundation for later persecutions of printers.

[55] Respublica v. Oswald, 1 Dall. 319, 329 (Pa. 1788). Although Lewis' argument was supportable as a statement of constitutional principle, he too failed to see the distinction between civil and criminal remedies in speech cases.

adopted the position of Blackstone, that freedom of the press amounts to no more than freedom from prior restraint, and added that when a court is involved in libel, freedom of the press must give way to a proper sanction. Indeed, said Lewis, the liberty of the press, rather than being limited, is in actuality secured by the censure of licentiousness.

Lewis supported the alleged grant of power to the court by a string of ready references to common-law statutes and decisions. The power to proceed by attachment was said to be necessary to the existence of the court, for the absence of such power

> would inevitably involve us in a labyrinth of error, and eventually endanger that liberty, [of the press] . . . .
>
> . . . [I]t would be preferable to return to the state of nature, than to live in a state of society upon the terms which that memorial presented; — terms, which left the weak and the innocent a prey to the powerful and the wicked; and which gave to falsehood and licentiousness all that was due to freedom and to truth.[56]

After Lewis finished his speech, William Findley rose to address the house. Findley acknowledged Lewis' learned exposition of the common law, but, he submitted, the constitution of Pennsylvania was not to be construed according to ancient doctrines, but rather in the light of the spirit of liberty that had given birth to the Pennsylvania declaration of rights. While agreeing that the power to try certain types of cases by summary proceedings was necessary to preserve the power of the court, Findley argued that such proceedings should be limited to outrages committed in the face of the court, for misconduct of the officers of the court, and for disobedience of legal proceesses. The power did not extend, he claimed, to "constructive contempts; to criminal offences committed out of court; nor to such acts as in their nature did not call for sudden punishment, and which, in their operation, involved a variety of facts that a jury was only competent to investigate and determine."[57] In order to "avert the pernicious consequences of allowing the case of Mr. Oswald to grow into precedent," Findley submitted a resolution condemning the action of Chief Justice McKean and his brethren.[58] The Findley resolution was rejected by

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[56] *Id.* at 329(d) n.(b).

[57] *Id.* at 329(e) n.(b) to 329(g) n.(b). Findley thus enunciated the distinction that Lewis and McKean had failed to see. He accurately predicted that the *Oswald* decision would prove to be one of the less illustrious decisions rendered by the Pennsylvania court.

[58] 'Resolved, That the proceedings of the supreme court against Mr. *Eleazer Oswald*, in punishing him by fine and imprisonment, at their discretion, for a constructive or implied contempt, not committed in the presence of the court, nor against any officer, or order thereof, but for writing and publishing improperly, or indecently, respecting a cause depending before the Supreme Court, and respecting some of the judges of said court, was an unconstitutional exercise of judicial power, and sets an alarming precedent,

the house, and instead, a resolution vindicating the court was accepted by a considerable majority.[59]

The Oswald decision, supported by legislative approval, set a precedent for effective suppression of public comment. It secured to the courts the power to punish libel by summary proceeding (under the guise of the contempt power), and established the Blackstonian concept of freedom of speech and press as the fundamental law of the Commonwealth. The libertarian sentiments of William Findley were, however, to find legislative support some twenty years later, when Mr. Findley would again present a nearly identical memorial to the legislature and receive legislative redress for the Oswald precedent.[60]

While the Oswald case did not set off a wave of prosecutions for seditious libel, there can be little doubt that the power entrusted to the judiciary serve to limit the "indiscretions" of the more timid members of the press. But, a new member of The Fourth Estate, who was soon to arrive in Philadelphia, was far from timid, and was endowed with unending hatred of the establishment.

William Cobbett, farm boy turned scholar, landed in Wilmington in November of 1792. He was a loyal Englishman who, with the typical fearlessness of youthful reformers, had attempted to reform the British government during a short stay in London. Having despaired on ridding Pitt's England of nepotism and bribery, he turned to the new world to find a government dedicated to liberty and high purpose. To support himself, William became a French tutor, and in that capacity had occasion to make the acquaintance of several young Frenchmen who had come to the United States to escape the anarchy of the French Revolution. Through them, he learned of the atrocities committed in the name of "liberty, equality, and fraternity," which laid the foundation for his bitter feud with Jacobin democracy.[61]

The Washington administration was at that time beginning to face the rising tide of French sentiment which was incompatible with many Federalist policies. Cobbett felt an affinity with the Federalists, who,

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of the most dangerous consequence, to the citizens of this commonwealth.

Resolved, That it be specially recommended to the ensuing General Assembly, to define the nature and extent of contempts, and direct their punishment.' *Id.* at 329(g) n.(b).

[59] The political overtones of the *Oswald* case cannot be overlooked. Oswald was an active and vociferous anti-federalist, and though McKean was later elected governor on the Republican ticket, he had strong Federalist tendencies. The party presses of the day spared no mercy to the opposition, and thus the intimidation of anti-federalist printers was a much to be desired goal.

[60] *See* part IV *infra.*

[61] Young William, interestingly enough, had approached Thomas Jefferson immediately following his arrival in Wilmington in an attempt to find employment. Jefferson at the time had no need of a writer and Cobbett was forced to turn to tutoring. It is interesting to speculate about what might have occurred had Jefferson found a place for the young writer. There is no indication that Cobbett was in any way embittered by this stroke of luck. *See* M. BOWEN, PETER PORCUPINE: A STUDY OF WILLIAM COBBETT ch. 2 (1935).

he believed, supported the principles of responsibility in government; furthermore, he was irrevocably opposed to all "Jacobin" influences in American life. It was this opposition that was to lead him to his career as a political writer.[62]

Cobbett was moved to political writing by the arrival of Dr. Joseph Priestly, an internationally known scientist and member of the Royal Academy. Priestly was a prodigious writer who, in taking up the standard of the French Revolution, had disgraced himself in the eyes of many Englishmen, including Cobbett. Priestly arrived in America to the tumultuous accolade of the many "democratic societies" which had developed. It was the grand public welcome of the distinguished partisan that inspired Cobbett to write his first political pamphlet in America. Directed at the "Jacobin priest," as Cobbett called the doctor, the pamphlet was innocuously titled *Observations on the Emigration of Joseph Priestly.* It was not, however, true to its timid title, for it roundly attacked Priestly and all that he stood for.[63] The pamphlet was extremely popular, and was widely circulated and discussed in this country as well as in England, where it was greeted with hoots of great approval. In Philadelphia, however, it was the source of much conflict and controversy between the "Democrats" and the Federalists, and when the secret of its authorship leaked out, Cobbett found himself embroiled in the first of the many controversies that were to characterize his stay in America.

Cobbett, rejoicing in the havoc he created, followed one pamphlet with another. Soon he had his own printshop, where he printed his works under the name of "Peter Porcupine," and where he was later to publish his small newspaper, *Porcupine's Gazette.* No person was immune to attack, and although Cobbett directed an occasional diatribe toward a Federalist or two, he consistently maintained his intense loyalty to the British crown. It was this loyalty which involved him in the first of his many forays into the courts of justice.

The Chevalier Don Carlos Martinez de Yrujo, minister from Spain, arrived in Philadelphia in the spring of 1796, ostensibly to represent Spanish interests in pending trade agreements between the United States and the European powers.[64] It soon became clear, however, that Martinez de Yrujo was under the influence of the French, who were opposed to a treaty soon to be signed between Great Britain and the United States. The Spanish Minister, in an attempt to block the treaty,

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[62] *See* M. BOWEN, *supra* note 61, at 3-65, for an interesting and informative summary of the trials and tribulation of young Cobbett's early life.

[63] Reprinted in 1 W. COBBETT, *supra* note 49, at 145. Cobbett encountered some difficulty in arranging to have the pamplet published. He finally managed to have it published anonymously by Thomas Bradford, son of the journalist opponent of John Peter Zenger. In short order, however, he had his own printshop where his pamphlets were produced. *See* M. BOWEN, *supra* note 61, at 66-72.

[64] An excellent summary of the arrival of Martinez de Yrujo appears in 2 J. B. MCMASTER, A HISTORY OF THE PEOPLE OF THE UNITED STATES 350-51 (1904).

submitted a steady stream of complaints to Secretary of State Pickering. Pickering, annoyed by such persistence, returned several of the complaints unread. Enraged by the audacity of the upstart American, Martinez de Yrujo decided to take his case to the people, and for reasons that unfortunately were not disclosed for posterity, chose Cobbett's *Porcupine's Gazette.* He delivered an open public letter to Cobbett with the request that he print it forthwith. Cobbett delayed for a day, gleefully assuring the unwitting official that his letter, along with some "editorial comment," soon would be printed.[65]

True to his word, Cobbett published the letter the next day on the front page of the *Gazette,* along with comment that lambasted the Spanish minister and ended with the sage observation that "the Spanish nation is the only nation on earth which can vie with the French in perfidy and cruelty."[66] Martinez de Yrujo was justly unhappy with the editorial comment which had been so thoughtfully added, and he immediately sought redress by demanding that Secretary Pickering instigate a federal prosecution for libel against Cobbett. Pickering complied, but shortly after the prosecution was initiated, certain advisors to Martinez de Yrujo suggested that a prosecution in the state courts might meet with greater success, in view of the fact that the Minister was engaged to the daughter of Chief Justice McKean. Martinez de Yrujo, displaying the insight that had been lacking when he chose Cobbett to be his editor, acknowledged the essential logic of their arguments by attempting to have the case transferred to the state court. When the federal government refused, the decision was made to create a second libel upon which a case in the state court could be based. Thus, a second action, this time for seditious libel, was brought in the state court against Cobbett.[67]

Cobbett was brought forthwith before Chief Justice McKean, and was obligated to enter into the familiar recognizance in the amount of $2000, to insure his good behavior and appearance. Cobbett, who was financially unable to post such an amount, turned to his friends, Benjamin Davies and Richard North, who together secured the recognizance. His freedom was, however, conditioned upon his good behavior "toward the aforesaid commonwealth, and all the liege people until the next Court of Oyer and Terminer and General Gaol Delivery to be holden before the justices of the Supreme Court of Philadelphia."[68]

On November 27, 1797, the charge was brought before the grand jury for the city and county of Philadelphia. After hearing witnesses

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[65] M. CLARK, PETER PORCUPINE IN AMERICA: THE CAREER OF WILLIAM COBBETT, 1792-1800, at 113-14 (1935).

[66] *Id.* at 114.

[67] *Id.* at 114-15.

[68] See Respublica v. Cobbet [sic], 3 Yeates 93, 94 (Pa. 1800) where the recognizance is reprinted in full.

(including the Chief Justice himself!), McKean charged the jury on the subject of seditious libel. He first defined libels in general terms as words or acts which are published for the purpose of provoking their subject to wrath or exposing him to contempt, hatred or ridicule. But, he continued, libels against persons employed in a public capacity are of much greater import because they tend to

> breed in the people a dislike of their governors and incline them to faction and sedition. . . . [He then described various punishments.] By this law and these punishments, the liberty of the press (a phrase much used, but little understood) is by no means infringed or violated. The liberty of the press is, indeed, essential to the nature of a free state, but this consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter, when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his temerity. To punish dangerous or offensive writing, which published, shall on fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the peace and good order of government and religion, the only solid foundation of civil liberty. Thus the will of individuals is left free; the abuse only of that free will is the object of legal punishment.[69]

McKean then continued his charge by launching a personal attack on Cobbett during which he apparently lost all semblence of judicial composure.[70] He pictured Cobbett as the basest of villians, a man completely without scruples, who would attack his mother if he thought it would sell newspapers. The virulence of invective (which must have put Justice Chase of impeachment fame to shame), fortunately, did not impress the jury and after due deliberation, the bill was returned ignoramus.[71]

Chief Justice McKean was not to be so easily denied his pound of flesh, however, and at the end of the December term of court he caused

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[69] F. WHARTON, STATE TRIALS 323-24 (1849). *Compare* McKean's statement of the law of Pennsylvania in 1797 *with* Blackstone's statement of the law of England in 1769. The reader will note that the material quoted above is a direct quote from Blackstone. *See* G. CHASE, *supra* note 38, at 917-18. Dr. Levy in his recent work, LEGACY OF SUPPRESSION, observes: "McKean's 1797 exposition of the free-press clause might have been issued under the name of Hutchinson, Blackstone, or Mansfield." It was, in fact, unacknowledged. L. LEVY, LEGACY OF SUPPRESSION 207 (1964).

[70] F. WHARTON, *supra* note 69, at 325:

> Impressed with the duties of my station, I have used some endeavors for checking these evils, by binding over the editor and printer of one of them, licentious and virulent beyond all former example, to his good behaviors; but he still perseveres in his nefarious publications; he has ransacked our language for terms of insult and reproach, and for the basest accusations against every ruler and distinguished character in France and Spain with whom we chance to have intercourse, ...

[71] *Id.* See also Cobbett's account of the trial which he published under the sarcastic title of "Republican Judge," reprinted in 7 W. COBBETT, *supra* note 49, at 318.

an action in debt, based upon an alleged violation of terms of the recognizance, to be instituted against Cobbett. Cobbett responded by a petition for removal to the United States circuit court on the grounds that under the Judicary Act of 1789 (§ 12) aliens could remove any action brought against them to the federal courts.[72] The court held that removal was available only to aliens who were defendants in civil cases, and that since the present action was in effect a criminal action, (though in the form of an action in debt), the defendant was not entitled to removal.[73]

Cobbett, realizing that McKean was bound to eventually find a way to vindicate his daughter and her Spanish fiancee, speedily retired to his native land, leaving the suit in the hands of friends.[74]

The action in debt finally came to trial in December of 1800.[75] Although Chief Justice McKean was by then Governor McKean, his son, Joseph, was the newly appointed Attorney General, and it was fully expected that he would carry on the family tradition. In addition, McKean's successor, Chief Justice Shippen, was no more disposed toward licentous knaves than had been his predecessor — in short, the honor of the Governor's daughter was bound to be upheld, notwithstanding the absence of the defendant in the original action.

William Lewis, the prosecutor in the *Oswald* case, was retained by the defense. He based his argument against the proceeding on three points: (1) that McKean had no power to take a recognizance of good behavior in a libel case prior to conviction; (2) that the form of the recognizance was improper, and (3) that the defendant had not forfeited the recognizance, and that in any event, it was void due to failure to pursue it.[76]

On the first contention, the court held that the justices of the supreme court were vested with all of the powers of the Court of King's Bench in England who were clearly empowered under the Statute of 34 Edward III, Chapter 1 to issue such a recognizance.[77]

Having lost his first point, Mr. Lewis condemned the prosecution as nothing more than a camouflage for a prosecution by information, which marked a return to practices of the Star Chamber. "We have been taught to believe," he cried, "that grand juries are bulwarks and

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[72] Respublica v. Cobbet [sic], 2 Yeates 352 (Pa. 1798). The case raises interesting questions of federal jurisdiction beyond the scope of this paper.

[73] *Compare* this approach *with* the *Oswald* case discussed *supra* notes 47-60 and accompanying text, where the court, through McKean, indicated that a contempt proceeding was *not* criminal.

[74] M. CLARK, *supra* note 65, at 115-16. Davies and North, Cobbett's two friends who had secured his bond, were left to defend the suit. When Cobbett returned to England he became involved in several more libel suits which are reported in 29 How. St. Tr. 2. Cobbett was eventually elected to the House of Commons.

[75] Respublica v. Cobbet [sic], 3 Yeates 93 (Pa. 1800).

[76] *Id.*

[77] *Id.* at 93-95.

ramparts between the public and the individual; an attempt to deprive the defendant of the benefit of their review is indeed a libel on the laws."[78] Every man has a right to express his sentiments on matters of public interest, claimed Lewis, but

> whether a publication is an abuse of the public liberty, may only be inquired into on the presentment of a grand jury, and tried in the usual method by a petit jury; but not by such mode of procedure as the present, in nature of an information, not within the exceptions of the 10th section of the ninth article of the Constitution of Pennsylvania.[79]

McKean the younger, apparently forgetting his father's prior decision in the removal case,[80] argued that the action was not a criminal one, but merely civil in nature, and that thus the arguments of Lewis were not pertinent. Besides, he said, had not Mr. Lewis supported the validity of such summary proceedings when he prosecuted the *Oswald* case? Lewis was evidently embarrassed by McKean's final parry, for he had indeed argued the exact opposite of his present position only a decade before.[81]

Chief Justice Shippen found the argument of the young attorney general far more persuasive than that of his more experienced adversary, and he decreed that the action in debt was good.[82] Shippen soon found, however, that he was faced with a problem he had not contemplated; how was the $2000 to be collected? When the oppressed editor of *Porcupine's Gazette* had made his exit, he had taken with him all of his property, leaving nothing to which the attachment could attach. But young Mr. McKean, who like his father was never at a loss for clever ideas, quickly brought an action against Davies and North, the sureties in the original proceeding. Judgment was passed and affirmed on appeal in 1804.[83] Davies and North, in desperation born of total defeat, appealed to Governor McKean, who gave them the courtesy of a curt reply.[84]

The friends, following the footsteps of Eleazer Oswald, then turned to the legislature, though now purely on principle since William Cobbett had made good their losses. A statement was signed by the members

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[78] *Id.* at 96-97.
[79] *Id.* at 97-98.
[80] The elder McKean had held that the action was criminal for removal purposes — in contradiction to the opinion of court in the *Oswald* case. *See* note 73 *supra.*
[81] Lewis had argued that a jury was not required in contempt cases when he urged the conviction of Eleazer Oswald in 1789. *See* notes 50, 51 *supra* and accompanying text.
[82] 3 Yeates 93, 100 (Pa. 1800).
[83] Commonwealth v. Davies, 1 Binney 97 (Pa. 1804).
[84] M. CLARK, *supra* note 65, at 117. It is supposed that the friends appealed on a matter of principle rather than with any real hope of success.

of the jury in North's case and presented as part of the appeal.[85] Upon presentment of the statement, the case was referred to a committee, but the petition was returned with the recommendation that it be denied. Acting upon that recommendation, the house rejected the petition as it had the Oswald petition, ending, it hoped, the temerity of the public press.[86]

Thus, the state of the law in 1805 was much the same as it had been for 15 years. In that year, however, Justice Yeates sitting at nisi prius in Philadelphia charged the jury in the case against Joseph Dennie in terms which marked a substantial weakening of the anti-press law.

Joseph Dennie was a Harvard graduate who practiced law for a short time. Becoming disenchanted with the legal profession, he turned to literature as an avocation and journalism as a profession. He found employment with the *Farmer's Weekly Museum* of Walpole, New Hampshire, but was soon attracted to Philadelphia by an offer from William Cobbett, who hoped to print a collection of Dennie's essays. When he arrived in Philadelphia, however, Dennie discovered that Cobbett had returned to England, and in order to support himself he started a journal of literature and politics which he named the *Port Folio.*[87]

Dennie was a staunch Federalist, having served as a personal secretary to Timothy Pickering and as an editorial writer for Fenno's *Gazette of the United States,* the Federalist party organ. As Dennie observed the growing power of Duane's group of radical democrats, he felt compelled to publish an article attacking the radical concept of democracy. The article was published in the *Port Folio,* and its author was soon the subject of an action for seditious libel.[88]

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[85] That had we not been taught to believe by the charges from the judges of the said court that the whole proceedings was strictly warranted and required by law, we could not in conscience have found a verdict for the commonwealth; as we did then and now do entertain the opinion that in every free country the Liberty of Press ought to be unshackled by any previous restraint, and that the degree of punishment for any abuse of that Liberty ought to be proportioned to the magnitude of the offense, and not left to the arbitrary will of a Magistrate, however respectable he may be.

Petition and Remonstrance of Richard North and Benjamin Davies, in M. CLARK, *supra* note 65, at 117-18.

[86] *Id.* at 119-20. It is interesting to note that Dr. Clark reports that Cobbett returned to this country in 1817 in a futile attempt to vindicate his position. Although he again lost his plea, his position was ultimately accepted by the court by virtue of a legislative directive.

[87] 5 DICTIONARY OF AMERICAN BIOGRAPHY 235-36 (Author's ed. 1930).

[88] The alleged libel read as follows:

A democracy is scarcely tolerable at any period of national history. It's omens are always sinister, and it's powers are unpropitious. With all the lights of experience blazing before our eyes, it is impossible not to discover the futility of this form of government. It was weak and wicked at Athens, it was bad in Sparta, and worse in Rome. It has been tried in France, and terminated in despotism. It was tried in England, and rejected with the utmost loathing and abhorrence. It is on trial here, and it's issue will be civil war, desolation and anarchy. No wise man but discerns it's imperfections, no good man but shudders at its miseries, no

Dennie was indicted in 1803, and brought before the justices of the supreme court sitting at nisi prius in Philadelphia on November 13, 1805. The bill charged Dennie with libel "in manifest contempt of the Constitution and laws of the said United States and this commonwealth, in derogation of national independence, reputation and honor, to the evil example of all others in the like case offending, and against the peace and dignity of the commonwealth of Pennsylvania."[89] The prosecution was handled again by Joseph McKean, who attacked Dennie's article as having a direct tendency to disturb the peace and to lead the populace to sedition and riot. In short, McKean argued the old common-law of seditious libel, with no recognition given to the claimed right of a publisher to publish his sentiments with impunity.

Jared Ingersoll, later to become McKean's attorney general, argued the case for the defense. Freedom of the press, he claimed, was a fundamental right, protected by the Pennsylvania constitution. A man could not be punished, he said, for publication of unpopular sentiments if they were not intended to subvert the government, since it is the right of every freeman to communicate his thoughts on political subjects to the public without fear of retribution for unpopular beliefs.[90]

Dennie's counsel won the day, for when Justice Yeates delivered his charge to the jury, it had a decidedly libertarian cast. Yeates charged the jury that criminal libel must include criminal intent as an element of the crime, for punishment can only be applied to intentional acts "deliberately designed to unloosen the social bond of union, totally to unhinge the minds of the citizens, and produce popular discontent with the exercise of power, by the known constituted authorities."[91] Yeates further upheld the right of a publisher "in publishing the truth from good motives and for justifiable ends though it reflects on government or on magistrates."[92] The latter statement, though not new by any means, was new in its application, for in the context of Yeates' charge it granted to publishers a freedom of publication theretofore unrecognized in the Pennsylvania courts. In short, the court was repudiating the Blackstonian concept that freedom of speech and press meant only freedom from prior restraint which had been deftly incorporated into the Pennsylvania law by Chief Justice McKean. It now meant considerably more because the burden was placed on the government to

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honest man but proclaims its fraud, and no brave man but draws his sword against its force. The institution of a scheme of polity so radically contemptable and vicious, is a memorable example of what the villainy of some men can devise, the folly of others receive, and both establish in despite of reason reflection and sensation. Respublica v. Dennie, 4 Yeates 267, 268-69 (Pa. 1805).

[89] *Id.* at 269.

[90] *Id.*

[91] *Id.* at 270.

[92] *Id.*

show bad motives and a direct tendency to "produce popular discontent with the exercise of power, by the known constituted authorities."[93]

Yeates further liberalized the concept of free speech by the recognition of the *Zenger* precedent and the Pennsylvania constitution, which committed to the jury the determination of the law as well as the facts.[94] When the jury returned with a verdict of not guilty there can be little doubt of the feelings of relief among the printers of Philadelphia.

The following year, additional strength was to be added to the citadel of the free press by a case which was part of one of the great political battles in early Pennsylvania history. The story of the main actor in that case begins at the end of the eighteenth century.

William Duane was born in New York, but returned at an early age to his family's native Ireland, where he was instructed in the printer's trade. At the age of 27, Duane emigated to India where he edited his first newspaper — a paper dedicated to the exposure of the unscrupulous methods of the East India Company and the support of the many grievances of the Army officers stationed in Calcutta. His exposés, highly unpopular with the East India Company, soon led to his arrest without charge, and a summary deportation and confiscation of his library and other property. Enraged by the summary and illegal treatment he had received, Duane sought redress by petioning the British government for the return of his property. His plea, however, went unanswered, and disdainful of British justice, he, as had William Cobbett before him, turned to America in his search for freedom.[95]

When Duane arrived in Philadelphia he quickly found employment with Benjamin Franklin Bache, editor of the *Aurora,* one of the leading Philadelphia gazettes. Bache greatly admired the young writer, and Duane soon found himself to be a powerful voice in the politics of the day. When Bache died in the yellow fever epidemic of 1798, Duane became editor of the *Aurora,* and shortly, by virtue of his marriage to Bache's widow, its owner. In his newfound freedom, Duane launched a series of attacks upon the Federalist administration that rivaled those of Cobbett. The attacks became so frequent and so vociferous that President Adams was induced to write a letter to Secretary Pickering, discussing the feasibility of instituting deportation proceedings under the Alien Act. However, Pickering evidently concluded that Duane was not a likely candidate for deportation, for nothing came of the correspondence.[96]

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[93] *Id.*

[94] The Pennsylvania constitution recognized the right to jury trial and the commission to the jury of the law and the facts, but the contempt power had been used in prior cases to circumvent the constitution. Thus Dennie was the first to gain a jury trial for seditious libel.

Prof. Chaffee notes: "Only one state case since 1800 has ever suggested that seditious libel remained a common law crime." Z. CHAFFEE JR., *supra* note 38, at 506.

[95] 5 DICTIONARY OF AMERICAN BIOGRAPHY 467-68 (Author's ed. 1930).

[96] *Id.*

As time went by, Duane found himself increasingly the center of anti-Federalist activity, and a leader in the fight to elect Jefferson to the Presidency. In an attempt to elicit public disapproval of the Alien and Sedition Acts, Duane and others went to a Philadelphia church in February of 1799, where, during a service, they posted a notice requesting the congregation to remain after the service so that they might sign a petition for the repeal of the hated Acts. A substantial number of the persons attending that day were Federalists, however, and when they saw the poster it was ripped from the tree upon which it had been nailed and destroyed. A riot ensued, and Duane and his companions were arrested for seditious riot and bound over by the mayor on a recognizance for good behavior. After several days they were tried and acquitted, primarily through an eloquent appeal to the jury by Alexander Dallas, perhaps the ablest attorney in the city.[97]

Duane's second major encounter with the opposition came early in 1800. The Federalists, having correctly guessed that the tide of public opinion was going against them, determined to devise a means whereby they might retain power. The election was not far off, and from all indications the Jeffersonians were increasing rapidly in strength. Senator James Ross, a Pennsylvania Federalist, introduced a motion in the United States Senate to establish a committee to consider the feasibility of developing a body of rules to cover contested elections. A committee of Federalists was appointed and reported out a bill that provided their party with the power to control the election. The scheme was simple. A High Committee was to be established from the Senate, House, and Judicary which was to have the power to determine the credentials of the members of the electoral college. If the committee determined that the elector in question had been bribed, corrupted, or subjected to any illegal force, he was to be disqualified.[98]

The sponsors of the bill had intended to keep it under wraps, but Duane discovered it shortly after the second reading and published it in full along with judicious editorial comment. It was, said Duane, nothing short of an attempt to control the election by disqualification of any elector who indicated Jeffersonian leanings. Senator Ross and his friends were enraged by Duane's unauthorized publication and decided to gain revenge by bringing an action for libel of the Senate against Duane. Duane was ordered to appear before the Senate to answer the charges made against him. He complied, but on arrival he denied the power of the Senate to punish him for libel and demanded that he be allowed counsel. The Senate agreed to allow him counsel, but with the provision that counsel could only be heard in excuse or mitigation of the crime.[99]

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[97] F. WHARTON, *supra* note 69, at 345.
[98] 2 J. B. MCMASTER, *supra* note 64, at 461-63.
[99] *Id.* at 464.

In an attempt to find an attorney, Duane wrote to Alexander Dallas, his counsel in the seditious riot case and a high ranking Jeffersonian, and to Thomas Cooper, a Philadelphia lawyer, requesting their appearance on his behalf. Dallas refused on the grounds that an appearance under the restrictions placed upon him by the Senate would be useless and degrading to himself and to the legal profession. Cooper also declined on much the same grounds, saying that to appear with the Senate gag in his mouth would be useless. The two lawyers advised Duane that counsel would be of no value before the Senate, and that he should therefore refuse to appear unless the restrictions were removed.[100]

Duane did refuse, and the Senate responded by holding him in contempt and issuing an order for his arrest. Duane, however, managed to avoid the warrant by staying out of reach of the sergeant-at-arms until Jefferson's election in the fall. There can be little doubt that the exposé of the Ross Election Bill and the other attacks upon the Federalists published in the *Aurora* were a prime factor in the Jeffersonian victory.[101]

The Jeffersonian victory was, however, a mixed blessing for Duane and his journal; the national capital was moved from Philadelphia to Washington, and Duane was left without the contacts that were the basis of his success. After a brief and unsuccessful stay in Washington, Duane returned to Philadelphia, where he became a leader in Pennsylvania politics and made his small contribution to legal history.[102]

At the close of the eighteenth century, Pennsylvania was quickly becoming a stronghold for the Democrat-Republicans. Thomas McKean, who began his career as a Federalist, had switched parties, and with his election to the governorship, the success of the "Democratic" party seemed assured. However, a fight between the radicals and the conservatives was beginning to make itself felt within the ranks of the party. McKean aligned himself with the conservative element and supported an independent judiciary, a strong executive, and the prevailing constitution. Duane, though a McKean supporter in the past, became the leader of the radicals and supported constitutional reform, a weaker executive and judiciary, and general democratization of the government. The split in the party did not become apparent, however, until the election of 1802, when Duane openly rejected McKean's candidacy. McKean was re-elected by a slim margin, and Duane decided

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[100] *Id.*

[101] *Id.* Revenge was to be exacted toward Duane's "insolent" counsel, however, and Dallas was charged with malfeasence in office. He was subsequently acquitted. Respublica v. Dallas, 3 Yeates 300 (Pa. 1801). Cooper was tried on a trumped-up charge of seditious libel under the Alien and Sedition Acts. *See Cooper's Trial for Sedition*, in F. WHARTON, *supra* note 69, at 659.

[102] Bushey, *William Duane*, 5 PA. HISTO. 141 (1938).

to push his program through the legislature which he controlled. McKean, however, vetoed every one of Duane's "giddy innovations," as he called them, and with each veto the gulf between the two men widened. By the end of 1803, Duane had developed an abiding dislike for McKean, and he continually attacked the Governor's nepotism — in particular the appointment as Attorney General of his son Joseph, who Duane named the "heir apparent."[103]

McKean, however, had undergone the attacks of William Cobbett and having emerged with a semblence of victory, he was determined to repeat his performance with William Duane. His opportunity came when Duane had the temerity to publish an attack on the Marquis de Yrujo. The Spaniard had countenenced the attacks by Cobbett, and now that he was the Governor's son-in-law, he was plainly unwilling to accept the attacks by Duane, even if he did claim to be a "Jacobin" of sorts. Martinez de Yrujo immediately brought suit against Duane and induced his brother-in-law, Joseph McKean, to bring an action to place Duane on a recognizance for good behavior. When Duane appeared before the mayor's court, he refused to enter into a recognizance for he knew all too well that to do so would only insure the ultimate victory of the McKeans. The judge placed Duane in jail for his refusal, but Duane obtained a writ of habeas corpus and appeared before Chief Justice Tilghman, a recent McKean appointee to the supreme court. Tilghman was faced with a dilemma. On one hand, Duane was the leader of the radical democrats who commanded a majority of the legislature, which at that moment appeared to have an inordinate love for impeachment proceedings.[104] There was no reason to doubt that a wrong decision might adversely affect his judicial tenure. On the other hand, the original plaintiff in the case was the son-in-law of his benefactor, who undoubtedly wished to keep Duane indisposed for a while. In addition, he was faced with the square precedent in the *Oswald* and *Cobbett* cases, decided by McKean, that such a recognizance was legal in Pennsylvania.[105]

Duane's counsel argued that a recognizance for good behavior was absolutely prohibited by the Pennsylvania constitution. He urged that such a recognizance amounted to a prior restraint, which the common law had held to be illegal since the time of Blackstone. Secondly, he asserted that it deprived the defendant of his fundamental right to indictment and trial by jury. McKean answered the defense simply by reference to his father's opinion in the *Cobbett* case.[106]

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[103] The complicated story is told in W. DUNAWAY, A HISTORY OF PENNSYLVANIA (1904). See particularly the tracing of the developments between McKean and Duane at 351-55.

[104] *See* Henderson, *The Attack on the Judiciary in Pennsylvania*, 61 PA. MAG. HISTO. & BIO. 113, 136 (1937).

[105] The opinion, printed in footnote (a) at p. 98 of Commonwealth v. Davies, 1 Binney 97 (Pa. 1804), is entitled Commonwealth v. Duane.

[106] Commonwealth v. Duane, 1 Binney 98, 100 (Pa. 1806). *See* pp. 330-32, *supra*.

With a deftness befitting John Marshall, Chief Justice Tilghman managed to agree with both sides and still reach a proper result. By an historical analysis of the common-law basis of the recognizance for good behavior in libel cases, he concluded that it was at best unclear whether such a recognizance was void at common law. The Chief Justice declared that specific provisions in the majority of state constitutions, which proclaimed the inviolability of the right to freedom of speech and press, were intended to be a rejection of the common law. If the recognizance for good behavior were to be adopted as a standard procedure in libel cases, it could easily lead to evil results for "[n]o man can exactly calculate how far a practice of this kind, exercised by wicked and daring hands, into which it may sometimes fall, may stifle or even extinguish the spirit of honest investigation and necessary inquiry."[107] Such a procedure should only be used, the Chief Justice said, in the most extraordinary of cases. Refusing to overrule McKean's opinion in Cobbett's case, he attempted to distinguish the precedent into oblivion. The final holding, however, was clear. "But I am of the opinion that it will be most agreeable to the spirit of our constitution, and most conducive to the suppression of libels, to adopt it as a general rule, *not to demand surety for good behaviour before conviction*."[108] Thus, with a loud accolade to the ex-Chief Justice, Tilghman managed to save himself from attack, and the law from a bad precedent. Duane was free for the moment, but his final victory was yet to come.

IV

We have now seen the law of criminal libel and contempt undergo the evolution which resulted in the sort of legal standards which many scholars contend were the basis of the First Amendment. Yet the law remained unclear insofar as the right of a publisher to print his opinion on matters of public interest was concerned. The fog was ultimately to be cleared away by the Pennsylvania Legislature in two statutes which clearly secured to the press those rights that we now deem fundamental. The cases discussed above are very much a part of the legal background of that legislative action; however, the catalyst was to be found in a case which involved an obscure Philadelphia businessman named Thomas Passmore.

Passmore's story began about the time that William Cobbett returned to England, and thus is contemporary to the *Duane* and *Dennie*

[107] Commonwealth v. Duane, 1 Binney 98, 101 (Pa. 1806). Duane was as colorful a character as Cobbett and was also subjected to numerous trials for sedition brought on by his vituperative attacks on political figures and the government establishment. Nearly the entire volume of Wallace's United States Circuit Reports (1801) is filled with cases against Duane for libel.

[108] Commonwealth v. Duane, 1 Binney 98, 102 (Pa. 1806). (emphasis added).

cases. If for no other reason, the *Passmore* case is significant because it so clearly points up the continuing conflict between legislative bodies and judicial control of official and private action.

Thomas Passmore was a self-made Philadelphia merchant who had risen from a humble station to a position of wealth and influence. Passmore, who was at the moment engaging in commercial adventures upon the high seas, attempted to secure his enterprise against loss by employing a number of underwriters, among whom were Andrew Bayard and Andrew Petit. When one of his vessels was damaged beyond repair off the coast of Nova Scotia, Passmore called upon Bayard and Petit to indemnify him. Bayard, however, contending that the ship had been uninsurable on the date the policy was issued, refused to pay and induced the other underwriters to do the same. An action was commenced on August 6, 1802, by Passmore against Bayard and Petit, and on the following day the case was referred to a board of referees. All parties agreed to abide by the decision of the referees, and when their report was returned in favor of Passmore, he concluded that he had won his suit. Bayard, however, stayed execution on the judgment by filing a bill of exceptions before John Inskeep, one of the city aldermen. Bayard swore that the judgment of the referees was improper for several reasons, all of which implied that Bayard and Petit had been treated unfairly. Passmore was enraged by what appeared to be another sly method for depriving him of his money, and he thereupon posted an angry notice in a public tavern.[109] James Kitchen, the proprietor of the tavern, tore down the notice and brought it to Bayard and Petit, who took it into court and obtained a rule to show cause why an attachment should not issue against Thomas Passmore for contempt by publication concerning a cause then pending before the court.[110]

Moses Levey, presenting the case for the defense, argued that a publication must relate on its face to a cause pending in court which the publication in question did not do. Further, he argued, any prejudice which may arise from the publication can affect only the jury, and is thus irrelevant when the case is on appeal. Alexander Dallas and

[109] The subscriber publicly declares, that Petit and Bayard of this city, merchants and quibbling underwriters, has basely kept from me the said subscriber for nine months about 500 dollars, and that Andrew Bayard, the partner of Andrew Petit did on the 3d or 4th instant go before John Inskeep, esq., Alderman, and swore to that which is not true, by which the said Bayard and Petit is enabled to keep the subscriber out of his money for about three months longer, and the said Bayard has meanly attempted to prevent others from paying the subscriber about 2500 dollars, but in this mean and dirty action he was disappointed in; I therefore do publicly declare, that Andrew Bayard is a liar, a rascal, and a coward, and do offer two and a half per cent to any good person or persons to insure the solvency of the said Bayard and Petit for about four months from this date. Philadelphia, September 8, 1802. (Signed) Thomas Passmore. Bayard v. Passmore, 3 Yeates 438, 439 (Pa. 1802).

[110] J. B. MCMASTER, *supra* note 64, at 157-58.

Joseph McKean argued the case for the commonwealth, and insisted that "if the intention must appear on the face of the writing itself, any artful man may escape with impunity. . . . *No atonement has been offered for this base outrage.* The sole apology for the conduct of Passmore which is offered, is the assertion that Bayard has perjured himself. . . ."[111] It was clear that the court and prosecutor were solely concerned with a proper apology, and they released Passmore on a recognizance for three hundred dollars and advised him to consider what apology he might wish to make upon his next appearance. Upon his next appearance, Passmore steadfastly refused to apologize to Bayard, though he admitted that he had acted improperly before the court. He also denied that he had any intention of prejudicing the minds of the public or the court in the cause then pending.[112]

Although the defendant did not question the power of the court to punish for contempt by summary proceedings, the court sua sponte recognized the problem. Chief Justice Shippen concluded, however, that the court was empowered to punish contempt by a summary proceeding. He justified the power in the standard terms of the necessity for the court to protect its reputation and to insure the justice that it administered. But the Chief Justice made clear the real reason behind his judgment when he said: "The defendant has set at nought the advice we gave him when we ordered the attachment. He has made no atonement whatever to the person whom he has so deeply injured, and he can only blame himself for the consequences."[113] Passmore was adjudged guilty of contempt and fined fifty dollars and imprisoned for thirty days.

Passmore was not content, however, to philosophically dismiss such harsh treatment, and as Eleazer Oswald had done in 1788, he presented a memorial to the legislature requesting that the judges be impeached, and that his conviction be overturned. The memorial[114] was in turn presented to a committee which reported it in his favor. The conviction of a man on a criminal charge without benefit of trial by jury was antithetical to the constitution and laws of the Commonwealth of Pennsylvania, the committee stated, and unless such conduct was stopped, trial by jury, the greatest bulwark of liberty, would be destroyed. However, the committee refused to recommend impeachment and instead recommended a bill to define the contempt power.

At this point the *Passmore* case and the legal evolution that had culminated in the *Dennie* decision collided. The "liberals," led by William Duane, and the "conservatives," led by Thomas McKean, were

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[111] Bayard v. Passmore, 3 Yeates 438, 440 (Pa. 1802). (emphasis added)
[112] *Id.* at 440.
[113] Respublica v. Passmore, 3 Yeates 441, 442 (Pa. 1802).
[114] The memorial is presented in a footnote to the case in Bayard v. Passmore, 3 Yeates 438, 440 (Pa. 1802).

at last brought into a public conflict. The general opinion of the day was in favor of Thomas Passmore, and Duane milked every ounce of sustenance for his cause from that public support. Notwithstanding the recommendation of the committee, Duane forced the impeachment proceedings against the three justices who had sat at Passmore's trial.[115] The impeachment succeeded in the house, and was sent to the senate. While the senate considered the impeachment case, William Findley, who had led the fight for Eleazer Oswald, carried a judicial reform bill through the house and turned it over to the senate, where it also carried. Governor McKean, however, vetoed the bill, and when the senate by a vote of thirteen to eleven, dismissed the charges against the judges, Duane's forces exploded. The cry for reform was heard throughout the commonwealth giving the movement for a new constitution a new urgency.[116]

Open warfare between the moderate faction of the McKean party, led by Alexander Dallas, and the radical Duane faction broke out. In 1805, Duane attempted to keep McKean from the gubernatorial nomination, and when the attempt failed, he openly opposed McKean's re-election. McKean, however, managed to form a coalition between the moderate wing of the Democratic party, and a third party called the "Constitutionalists." By this means, he managed to get re-elected by a narrow majority, with the Constitutionalists carrying both houses of the legislature, also by a narrow majority. McKean responded to this new victory by wholesale removal of Duane's friends in the government, which only increased the opposition against him. In 1806, the radicals regained control of the state legislature, and proceedings to impeach McKean were initiated. However, the impeachment proceedings were postponed until McKean's term expired in 1808, and he retired from public office.[117]

The election of 1806, had destroyed the power of William Duane, but the radical cause was in good hands. Simon Snyder, who had been the Duane nominee in 1806, was elected governor in 1808 along with a strong majority in both house and senate. Though Duane was no longer the leader, the success of his program was assured.

The new leader of the radical democrats was John Binns, publisher of the *Democratic Press*, and under his leadership much of the reform

[115] The story of the *Passmore* case and the subsequent attempts to impeach the judges is told in Nelles & King, *Contempt by Publication*, 28 COLUM. L. REV. 401, 413 (1928). *See also* 3 A. J. BEVERIDGE, THE LIFE OF JOHN MARSHALL ch. 2 (1919); W. HAMILTON, REPORT ON THE TRIAL AND AQUITTAL OF SHIPPEN C. J. AND YEATES AND SMITH J. S. (Lancaster ed. 1805). The three justices were all Federalist appointees and the plaintiffs (Bayard and Petit) were closely connected to the McKean family, Petit being married to one of the McKean girls. In addition Bayard and Petit were represented by Joseph McKean and Alexander Dallas. *See* Nelles & King, *supra*, at 413.

[116] *See* 3 J. B. MCMASTER, *supra* note 64, at 158-59.

[117] *See* W. DUNAWAY, *supra* note 103, at 352, 354-55.

legislation that Duane had espoused was enacted. Of particular interest to Duane, Binns and other publishers was the progeny of the *Passmore* case. With the McKean veto no longer a threat, the legislature passed An Act Concerning Libels[118] on the 16th of March, 1809 which provided that the publication of true articles concerning public officials, acting in their official capacities, could not be the subject of prosecution. On April 3, 1809, An Act Concerning Contempts of Court was passed, which barred the use of summary contempt proceedings in libel cases.[119]

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[118] Law of March 16, 1809, ch. MMMLI § 1-2, Pa. Stat. at Large XVIII, provided:

AN ACT CONCERNING LIBELS.

Section. I. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same. That from and after the passing of this act no person shall be subject to prosecution by indictment in any of the courts of this commonwealth, for the publication of papers examining the proceedings of the legislature or any branch of government, or for investigating the official conduct of officers or men in public capacity

Section II. And be it further enacted by the authority aforesaid, That in all actions or criminal prosecutions of a libel, the defendant may plead the truth thereof in justification or give the same in evidence, and if any prosecution by indictment, or any action be instituted against any person or persons contrary to the true intent and meaning of this act, the defendant or defendants in such action or indictment may plead this act in bar, or give the same in evidence on the plea of not guilty: Provided, That this act shall be and continue in force for the term of three years, and from thence to the end of the next session of the legislature.

APPROVED — The sixteenth day of March, one thausand eight hundred and nine.

Section II is now incorporated into the Pennsylvania constitution art. I. § 7.

[119] Law of April 3, 1809, ch. MMMLXCIII § 1-5, Pa. Stat. at Large XVIII, provided:

AN ACT CONCERNING CONTEMPTS OF COURT

Section I. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, That from and after the passing of this act, the power of the judges of several courts of this commonwealth to issue attachments and inflict summary punishments for contempts of court shall be restricted to the following cases, that is to say, To the official misconduct of the officers of such courts respectively, to the negligence or disobedience of officers, parties, jurors, or witnesses against the lawful process of the court, to the misbehavior of any person in the presence of the court, obstructing the administration of justice.

Sect. II. And be it further enacted by the authority aforesaid, That from and after the passing of this act, all publications out of court respecting the conduct of the judges, officers of the court, jurors, witnesses, parties or any of them, of, in and concerning any cause pending before any court of this commonwealth, shall not be construed into a contempt of the said court, so as to render the author, printer, publisher, or either of them, liable to attachment and summary punishment for the same; but if such publication shall improperly tend to bias the minds of the public, the court, the officers, jurors, witnesses or any of them, on a question pending before the court, any person feeling himself aggrieved by such publication, shall be at liberty either to proceed by indictment, or to bring an action at law against the author, printer, publisher or either of them, and recover thereupon such damages as a jury may think fit to award.

Sect. III. And be it further enacted by the authority aforesaid, That the punishment of imprisonment in the first instance shall extend only to such contempts as are committed in open court; and all other contempts shall be punished by fine only: Provided always, That the sheriff or other proper officer, may take into custody, confine or commit to jail, any person

On April 4, 1809, the day following the enactment of the contempt bill, a case came before the Supreme Court of Pennsylvania, which to the uninformed observer was of little significance. But to those familiar with the trials and tribulations of Pennsylvania printers, it indicated the end of an era and the beginning of freedom of the press in Pennsylvania. That case was entitled *Commonwealth against Duane.*[120]

In a final attempt to even the score, Thomas McKean in one of his last acts as Governor, had instigated a criminal libel prosecution against William Duane, for a libel of the Governor in his official capacity. In December of 1808, Duane was convicted upon one count, but he moved in arrest of judgment, because, although the indictment charged the libel to be malicious, scandalous, and seditious, it did not charge it to be false, which Duane alleged to be necessary for conviction. Argument on the motion was delayed, and when the case was called up for argument in the spring term of 1809, the statute of 16 March, 1809, (An Act Concerning Libels) was in effect. Therefore, the parties were directed to prepare arguments on the effect of that act on a case initiated prior to its enactment before continuing with the merits of the case.

Duane's counsel offered a simple argument; the statute, he said, amounted to nothing more than a *nolle prosequi* initiated by the legislature, and since the case at hand was still in process, albeit on a motion in arrest of judgment, it should be discontinued. The statute, he said, "does not merely prevent new prosecutions; it cuts up existing prosecutions by the roots; no one can be punished under the old law, because . . . the offense is gone; and no one can be punished for what is not a crime at the time of punishment."[121]

Jared Ingersoll, the Attorney General, argued the case for the com-

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fined for a contempt, until such fine is discharged or paid; but if he shall be unable to pay such fine, such person may be committed to prison by the court for any time not exceeding three months.

Sect. IV. And be it further enacted by the authority aforesaid, That notwithstanding any thing in this act contained, the said courts shall have power respectively to make rules upon any sheriff or coroner for the return of any writ or writs for the payment of money received on any execution or process, and for the production of the body after a return of cepit corpus to an execution, or in default thereof for the payment of the debt and costs, and also to compel obedience to the said rules or any of them by attachment. And the said courts shall have the same powers against former sheriffs and coroners: Provided, That complaint and application is made for that purpose within one year after the termination of their said offices respectively.

Sect. V. And be further enacted by the authority aforesaid, That this act shall be and continue in force for and during the term of two years from the passing thereof, and from thence unto the end of the next session of the legislature.

APPROVED — the third day of April, one thousand eight hundred and nine.

The present provision is PL 748 § 26 which is substantially the same.

[120] 1 Binney 601 (Pa. 1809). The case is virtually unknown, yet it adds a final footnote to a political struggle that consumed the better part of a decade.

[121] *Id.* at 603.

monwealth. He demanded a restricted construction of the statute, which he termed unconstitutional, since,

> To expose a servant of the public to the foulest calumnies, and to leave him no redress but a civil suit against a person who may have been selected for his poverty to be the libeller of virtue, and against whom a verdict for damages would be a solemn mockery, is so complete an overthrow of the means of protecting character, that if the right remains, it may be said to be without remedy. Such a law surely deserves not to be extended by construction.[122]

Chief Justice Tilghman, however, had little trouble with the case. The statute, he said, did not take away a personal right, but only a right of the state. To do so, he stated, is within the province of the legislature, and the case must be dismissed. Justice Brackenridge concurred in the judgment of the Chief Justice, but Justice Jasper Yeates, one of the last of McKean's cronies still in power, dissented.

William Duane had won the final battle against Thomas McKean, and with it he had won the war. The trials and tribulations of Eleazer Oswald, William Cobbett and Joseph Dennie had found vindication, strangely enough, because of the efforts of a "Jacobin" Radical-Democrat, who represented the antithesis of the omnipotent government which they had espoused.

[122] *Id.* at 604.