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Constitutional Law - Right to Fair and Impartial Hearing - Newspaper Publicity as an Obstacle to a Fair Trial

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pretation of *Shelley v. Kraemer* correctly appraises the true result of that case.

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CONSTITUTIONAL LAW — RIGHT TO FAIR AND IMPARTIAL HEARING— NEWSPAPER PUBLICITY AS AN OBSTACLE TO A FAIR TRIAL. — The defendant, a Collector of Internal Revenue, was indicted by a federal grand jury for accepting bribes and issuing false certificates. Thereafter, despite objections by the Department of Justice, a Congressional subcommittee conducted an open public investigation of the conduct of the defendant's office. As a result of the nation-wide publicity given these hearings, the defendant moved for a continuance of his trial until the prejudicial effect of the press coverage could wear off. The motion was denied. *Held,* conviction reversed. Forcing the defendant to trial under such circumstances denied him his right to an impartial hearing. Nor was the defendant obliged to move for a change of venue instead of a continuance, since he had a constitutional right to be tried in the district where the alleged offense was committed. *Delaney v. United States,* 199 F.2d 107 (1st Cir.. 1952).

The Court of Appeals did not make it clear whether it regarded its decision as an exercise of its supervisory authority over the district courts within its jurisdiction or as an adjudication that the defendant's rights under either the Fifth [1] or Sixth [2] Amendments to the United States Constitution had been violated. Under any view, the result seems highly desirable. It is to be hoped that the case will have some tendency in the future to prevent the "sensationalizing" of criminal prosecutions for political or other purposes.

The larger issue inherent in the case is a complex one. What practical measures can be taken, in view of the constitutional right of newspapers to freedom of expression, to safeguard the rights of an individual who is subjected to "trial by newspaper"? It seems clear that direct action against the publications involved, by means of constructive contempt procedures, would have been ineffective. Congress can pass no law abridging freedom of speech or of the press [3] and the same disability applies to the states by virtue of the due process clause of the Fourteenth Amendment [4] to the Federal Constitution. While the right of freedom of speech and press is not unlimited [5] and does not prevent the punishment of those who abuse this freedom [6] courts are extremely reluctant to proceed against newspapers for contempt of court in instances

1. "No person . . . shall be deprived of life, liberty, or property without due process of law. . . ." U.S Const., Amend. V.

2. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." U.S. Const., Amend. VI.

3. U.S. Const., Amend. I.

4. Terminiello v. City of Chicago, 337 U.S. 1 (1949); *see* Carpenters Union v. Ritter's Cafe, 315 U.S. 722, 726 (1942).

5. Gitlow v. New York, 268 U.S. 652, 666 (1925).

6. Dennis v. United States, 341 U.S. 494 (1951) (upheld Smith Act sanctions as not violating First Amendment); *see* Stromberg v. California, 282 U.S. 359. 368 (1931).

where prejudicial publicity is given to an accused person.[7] The reluctance stems from several factors.

The famed "clear and present danger" test laid down by Mr. Justice Holmes in *Schenck v. United States*[8] must be applied in determining whether newspaper publicity surrounding a trial constitutes contempt of court. There is no precise definition of the concept "clear and present danger"[9] and punishment for contempt[10] violates the constitutional guarantee of freedom of the press in the absence of a showing that the utterances involved created a "clear and present danger" to the fair administration of justice.[11] Mr. Justice Frankfurter has commented that the clear and present danger test tends to require proof that interference be so imminent and so demonstrable that the power of the courts to proceed is almost paralyzed.[12] Under such a test, it seems that free speech is favored to the extent of destroying essentially conflicting social interests, one of which is the right to a fair trial.

In the past, Mr. Justice Frankfurter has favored the adoption of the English view that anything having a "reasonable tendency to interfere with justice in impending actions" should be punishable as a constructive contempt.[13] He has pointed out that the press is equally as free in England as in the United States and that the administration of criminal justice is more effective there than here.[14] Under English law it has been held contempt of court for a newspaper to publish statements about an accused person which could not be used against him at his trial.[15] It has even been held to be contempt to publish a picture of the accused person where identity is uncertain.[16] Such decisions manifest a scrupulous regard for the rights of accused persons which contrasts in an extremely favorable manner with the treatment often accorded them in this country.[17]

7. The famous criminal lawyer, Clarence Darrow, has been quoted as saying, "The truth is that the courts and the lawyers don't like to proceed against newspapers. They are too powerful. As the law stands today there is no important criminal case where the newspapers are not guilty of contempt of court day after day. All lawyers know it, all judges know it, and all newspapers know it. But nothing is done about it." Perry, *The Courts, The Press and the Public*, 30 Mich. L. Rev. 228, 234 (1931).

8. 249 U.S. 47 (1919).

9. *See* Pennekamp v. Florida, 328 U.S. 331, 348 (1946).

10. *I.e.*, punishment for constructive contempt of court by a publication which interferes with the court's fair administration of justice.

11. Craig v. Harney, 331 U.S. 367 (1947) (intemperate criticism of judge held not contempt); Bridges v. California, 314 U.S. 252, 263 (1941) " 'Clear and present danger' . . . is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Cf.* Near v. Minnesota, 282 U.S. 697, 715 (1931).

12. See Dennis v. United States, 341 U.S. 494, 532 (1951) (dissenting opinion).

13. See Bridges v. California, 314 U.S. 252, 295 (1941) (dissenting opinion).

14. See Pennekamp v. Florida, 328 U.S. 331, 359 (1946) (concurring opinion).

15. Rex v. Tibbitts, 1 K.B. 77 (1901).

16. Rex v. Daily Mirror, 1 K.B. 845 (1927).

17. The law of constructive contempt has been accorded general approval in England. It has completely prevented newspaper convictions or acquittals. Since the public trial as distinguished from the preliminary proceedings can always be fully reported, it would be impossible for the doctrine of contempt of court to interfere with the fundamental principle of the open administration of justice. See Goodhart, *Newspapers and Contempt of Court in English Law*, 48 Harv. L. Rev. 885 (1935). The real source of the evil is the invasion of politics into the administration of law. Some writers contend that political influences impinge upon the entire process of law enforcement and everyone connected therewith, and that the accused

No attempt at contempt proceedings took place in the instant case. Had they been attempted, the logical answer on the part of the newspapers would have been that it was the congressional committee which caused and stimulated the pre-trial publicity and which therefore might be considered the proximate cause of the evil. Moreover, if the newspapers had been silenced by contempt proceedings, an important objective of the Congressional committee would not have been attained,[18] since the committee had stated that considerations of public interest demanded a public investigation at that particular time.[19] Of what value would a public investigation be if there were no vehicle of expression to carry the results to the public? In its larger aspects, the problem in cases such as this is at least partially concerned with the doctrine of separation of powers.[20] Since contempt proceedings in cases of this type obviously present no remedy of a practical character, the only other course of action open is to delay the trial until public attention becomes centered upon other matters.

The only North Dakota case dealing with such a problem was decided in 1914.[21] An editor who had charged that a pending hearing in the North Dakota Supreme Court was the result of a plot to hold a fake hearing before an approaching election was convicted of contempt of court. In its opinion the court said, "Surely there must come a time when the rights of the free speaker are overshadowed by the rights of other men to unhampered justice." [22]

ALBERT M. CHRISTOPHER

EQUITY — INTERLOCUTORY MANDATORY INJUNCTIONS — NEGATIVE DECREE ORDERING DEFENDANTS TO CEASE FROM REFRAINING TO PURCHASE ADVERTISING SPACE. — The plaintiff was engaged in the publication of news in interstate commerce. The defendants, owners and operators of hotels and restaurants in the area, jointly decided to discontinue advertising in the plaintiff's newspaper, thereby threatening its continued publication. Plaintiff brought action under the Sherman Anti-Trust Act on the theory that the discontinuance of his paper would create a monopoly in the only other paper in the vicinity. On Plaintiff's motion for a preliminary injunction the court *held* that an interlocutory injunction having the mandatory effect of ordering Defendant to continue advertising in Plaintiff's newspaper would be issued. *Greenspun v. McCarran*, 105 F.Supp. 66 (D.Nev. 1952).

In this case the use of the extraordinary power of the court when acting as a court of equity appears to have been carried to an unprecedented extreme. Relief by affirmative mandatory injunction was at one time

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is prosecuted by a politician before a political judge. Actually trial by newspaper could be stopped if judges, even those who are not elected, would use the contempt powers that are in their hands. See Perry, *The Courts, the Press, and the Public*, 30 Mich. L. Rev. 228 (1951).

18. *Cf.* Stroble v. California, 343 U.S. 181 (1952).
19. See Delaney v. United States, 199 F.2d 107, 110, 114 (1st Cir. 1952).
20. *Cf.* Myers v. United States, 272 U.S. 52, 293 (1926) (dissenting opinion).
21. State v. Nelson, 29 N.D. 155, 150 N.W. 267 (1914).
22. *Id.* at 162, 150 N.W. at 269.