Constitutional Law -- Effect of Press Publicity on Criminal Defendant

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for the torts of their employees that policy would appear no longer to exist.\textsuperscript{24}

It is believed that charities today should respond as do private individuals, business corporations and others, when their employees commit a tort.\textsuperscript{25} This could be accomplished by legislation or by court decisions as in the Arizona and Iowa cases.

\textbf{ROLAND C. BRASWELL.}

\textbf{Constitutional Law—Effect of Press Publicity on Criminal Defendant}

In \textit{Shepard v. Florida},\textsuperscript{1} the concurring justices\textsuperscript{2} point to aspects of the case ignored by a per curiam decision which reversed a rape conviction because of discrimination against Negroes in jury selection.\textsuperscript{3}

The concurring opinion pointed to the "lynch" atmosphere that controlled the area following the alleged offense, attributing it to racial prejudice.\textsuperscript{4} A mob attempted to take the prisoners from jail; the home of the parents of one defendant was burned as were two other Negro homes. All Negroes abandoned the area until military units restored order. Prejudicial articles, daily accounts of the mob actions, and a cartoon showing four electric chairs demanding "No Compromise—Supreme Penalty" appeared in the local newspapers. No confession was introduced in evidence yet the press printed reports that the defendants had confessed, and the sheriff was credited as being the source of the information. These published reports were never repudiated or retracted. Although motions to delay the trial and for change of venue were denied, extraordinary and observable precautions were adopted by the trial judge to prevent violence in the court-room.

Justice Jackson calls the jury discrimination a trivial matter when compared with these elements:

\textsuperscript{24} "The fact that the courts may have at an early date, in response to what appeared good as a matter of policy, created an immunity, does not appear to us a sound reason for continuing the same, when under all legal theories, it is basically unsound and especially so, when the reasons upon which it was built, no longer exist." Haynes v. Presbyterian Hosp., 241 Iowa 1269, 1274, 45 N. W. 2d 151, 154 (1950).

\textsuperscript{25} See \textit{Scott, Trusts} \S 402 (1939); \textit{Harper, Torts} \S 294 (1933); \textit{Prosser, Torts} 1079 (1941); \textit{Applaman, The Tort Liability of Charitable Institutions}, 22 A. B. A. J. 48 (1936); \textit{Feezer, The Tort of Charities}, 77 U. of Pa. L. Rev. 191 (1928); See Notes, 14 B. U. L. Rev. 477 (1924); 22 Va. L. Rev. 58 (1935); 48 Yale L. J. 81 (1938).
"... prejudicial influences outside the courtroom, becoming all too
typical of a highly publicized trial, were brought to bear on the
jury with such force that the conclusion is inescapable that these
defendants were prejudged as guilty and the trial was but a legal
gesture to register a verdict already dictated by the press and the
public opinion which is generated... This trial took place under
conditions and was accompanied by events which would deny de-
fendants a fair trial before any kind of jury... The case pre-
sents one of the best examples of one of the worst menaces to
American justice."5

In Moore v. Dempsey,6 the Court condemned mob domination of a
trial: "the whole proceeding is a mask... counsel, jury and judge
were swept to the fatal end by an irresistible wave of public passion..."7
It is possible, as in the instant case, that mob activity outside the
courtroom may so inflame community sentiment that a fair trial has been
made impossible. However, this note is restricted to the role of com-
munication media, whose widespread dissemination of crime news, may
work a denial of due process.

The conflict between freedom of the press and the right to an un-
biased trial presents a serious dilemma.8 To protect this right a free
press is indispensable yet that same free press is today the greatest threat
to a fair trial.9 The danger lies in sensational criminal cases which are
so thoroughly reported that most admissible evidence, and much that
is inadmissible, has been presented to the prospective jurors long prior
to trial.10 Newspapers, radio, and now television are the media through
which information true and false, reaches the prospective jury without
oath and without opportunity for cross-examination. Confessions, prior
criminal records of the accused and of members of his family, community
hostility toward the defendant—all become common knowledge. To

7 But cf. State v. Newsome, 195 N. C. 552, 143 S. E. 187 (1928), criticized in Note,
8 N. C. L. Rev. 179 (1929). Defendant was assaulted amid cries of "take him,
take him" while trial was in progress and jury was in the box, but the appeal was
not based on this point.
9 261 U. S. 86, 91 (1923).
10 In cases of newspaper contempt, the premissible area of comment on pending
judicial matters is examined in light of the "clear and present danger" rule. Where
no jury was involved, the Supreme Court has reversed contempt convictions, hold-
ing that there was no "clear and present danger" that judges would be influenced
thereby to an extent endangering the judicial process. Craig v. Harney, 331 U. S.
367 (1946) (newspaper termed action of court "high-handed," "a travesty on jus-
tice," "public opinion was outraged" while motion for new trial before same court);
Pennekamp v. Florida, 328 U. S. 331 (1945) (press criticisms after verdict rend-
ered based on incomplete and misleading facts).
11 See Bromly, Free Press v. Free Trial, 202 HARPER'S MAGAZINE 90 (1951);
Time, April 23, 1951, p. 79, col. 1.
12 Shepard v. State, 46 So. 2d 880 (Fla. 1950).
take the attitude\textsuperscript{11} that jurors are able to wipe impressions so formed from their minds as they enter the courtroom seems unrealistic. The defendant may find himself with a constitutional guarantee of jury trial which he is unable to accept, and is forced to choose a trial without a jury in those jurisdictions where such is permissible.\textsuperscript{12} Freedom of the press must not be impaired but: "Newspapers, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to fair trial."\textsuperscript{13} The concurring opinion is some indication of a new awareness of a problem which the courts must eventually resolve.

JACK H. POTTS.

Joint Tort-Feasors—Validity of Covenant Not to Sue

Plaintiff, \textit{A}, brought action against tort-feasors \textit{B} and \textit{C} to recover for assault and battery. Subsequently by amendment \textit{A} struck the name of \textit{C} as a defendant. The remaining defendant filed a plea in bar, alleging that the amendment was filed in consideration of \$2500 paid to \textit{A} by \textit{C} in settlement of \textit{C}'s liability and that the agreement purporting to be a covenant not to sue was in fact a release; if for no other reason, because it was executed \textit{lis pendens}.\textsuperscript{1} Held, that since the clear intendment of the agreement shows only a covenant not to sue and not an accord and satisfaction of the claim itself, the mere fact that it was executed during the pendency of the suit does not release \textit{B}.\textsuperscript{2}

The dissenting judge agreed with the defendant, saying that an

\textsuperscript{1} State v. Smarr, 121 N. C. 669, 673, 28 S. E. 549, 550 (1897) ("The impression once entertained of the dangerous effect upon a juror's mind of having read newspaper versions of an offense and comments thereon has long since worn out.")


A liberalization of change of venue statutes would be of little aid in this age of widespread newspaper circulation and radio-television coverage.

\textsuperscript{1} "\textit{Lis pendens}" as used in this case means a pending suit. "A suit is pending after complaint is filed and process served on the defendant, or defendant has voluntarily appeared." Massey v. United States, 46 F. 2d 78, 79 (W. D. Wash. 1930).


A mere covenant not to sue is not a technical release and will not operate to release any of the joint tort-feasors other than the one in whose favor it is drawn. Papenfus v. Shell Oil Co., 254 Wis. 235, 35 N. W. 2d 920 (1949); Aljian v. Ben Schlossberg, Inc., 8 N. J. Super. 461, 73 A. 2d 290 (1950).

However, the courts are not in agreement that the covenantee is absolutely discharged from liability for the tort. Some still hold that he must, if sued, bring a separate action for breach of covenant. Chicago & A. R. R. v. Averill, 224 Ill. 516, 79 N. E. 654 (1906); Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271 (1892); Oliver v. Williams, 190 Tenn. 54, 83 S. W. 2d 271 (1935); Byrd v. Crowder, 166 Tenn. 215, 60 S. W. 2d 171 (1933). Others allow the covenant to be pleaded as a defense to an action brought against the covenantee. Davis v. Moses, 172 Minn. 171, 215 N. W. 225 (1927); Judd v. Walker, 158 Mo. App. 156, 138 S. W. 655 (1911); Ellis v. Eason, 50 Wis. 138, 6 N. W. 518 (1880).