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COURTS - JUDICIAL ETHICS - BROADCAST OF MURDER TRIAL

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COURTS — JUDICIAL ETHICS — BROADCAST OF MURDER TRIAL — A microphone was installed in a court room with consent of the trial judge and counsel, for a direct broadcast of a murder trial. Prisoner's counsel, in his argument to the jury, made certain remarks concerning the plaintiff, state's witness, which the latter claimed were libelous per se. Joining as defendants the trial judge, counsel for the alleged felon, and the director of the radio station, plaintiff asserted that the installation of the equipment was an "extra-judicial and illegal" act. Defendant trial judge's motion for non-suit was granted at the close of plaintiff's case. The case was submitted to the jury, under proper instructions as to the other defendants; the jury returned a verdict for the defendants. On appeal, with one justice dissenting, it was held that the order of non-suit as to the judge was properly granted and that the judgment in favor of the defendant would not be disturbed. Counsel was not liable because of privilege,[1] hence the broadcasters were likewise privileged. *Irwin v. Ashurst*, (Ore. 1938) 74 P. (2d) 1127.*

While it is a recognized innate feature of all judicial proceedings that they are open to the public,[2] an apparent limitation upon this fundamental principle

[1] The disputed words were submitted to the jury with proper instructions on the question of pertinency. From a verdict for the defendants, the trial court inferred that the jury must have found the words either relevant or without malice.

* The defamation aspect of this case is discussed infra in this issue, 36 MICH. L. REV. 1397 (1938).

[2] The Federal Constitution, Amendment VI, and the various state constitutions and statutes assure the accused this right in criminal trials in this country. "The term 'public' in its enlarged sense, takes in the entire community, the whole body politic, and a public trial means one which is not limited or restricted to any particular class of the community, but is open to the free observation of all. This does not impose upon the authorities a duty to provide so large a place for public trials as would be plainly impracticable, but it does import a duty to make reasonable provision in that

has been adopted by the American Bar Association in canon 35 of its Canons of Professional Ethics.[3] This canon makes it unethical practice to permit any trial to be broadcast.[4] The absence of litigation on the issue of whether or not public trials should be broadcast [5] is readily understood when it is considered that the use of radio to report legal proceedings is a comparatively recent innovation, and because essentially this is a question of propriety and legal and judicial ethics rather than of substantive law. The only act of the defendant trial judge, and this was with counsel's consent, was the authorization of the broadcast. Disregarding the propriety of such action,[6] there would seem to be immunity either on the theory of a judge's discretion in trial conduct [7] or on the basis of privilege.[8] It is not clear that the Oregon court considered the ethical

regard, and this requirement is usually met by ample accommodations for that purpose." State v. Hensley, 75 Ohio St. 255 at 262, 79 N. E. 462, 9 L. R. A. (N. S.) 277 (1906). See also 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 931-950 (1927).

[3] Canon 35 was adopted at the Sixtieth Annual Meeting of the American Bar Association, at Kansas City, Missouri, Sept. 30, 1937. 62 REP. A. B. A. 350, 767 (1937).

[4] Canon 35. "*Improper Publicizing of Court Proceedings.* Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted."

[5] This is believed to be the only case presenting the issue to reach an appellate court. It is, however, common knowledge that proceedings in many city and municipal courts are broadcast each day in this country at the present time.

[6] While the instant decision did not mention the new canon 35, it is clear that the bar frowned upon such practice before this formal action was taken. OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, AMERICAN BAR ASSOCIATION, p. 144, Opinion 67 (1936): "Judicial proceedings should be conducted in a dignified manner. Radio broadcasting of a trial tends to detract from that dignity and to change what should be the most serious of human institutions either into an enterprise for the entertainment of the public, or of one for promoting publicity of the judge." See also, N. Y. TIMES 12:3 (Dec. 3, 1936); ibid., 23:8 (Sept. 13, 1937).

[7] Thompson v. American Steel & Wire Co., 317 Pa. 7, 175 A. 541 (1934); Madalinski v. Hill, 277 Mich. 219, 269 N. W. 147 (1936). It depends upon whether the act is within his discretionary or ministerial duty. Lindemann v. Kenosha, 206 Wis. 364, 240 N. W. 373 (1932); Spaulding v. Vilas, 161 U. S. 483, 16 S. Ct. 631 (1895). See also in this issue, 36 MICH. L. REV. 1398, note 3 (1938).

[8] Generally judges are given an absolute privilege for defamatory words spoken and acts performed while engaged in judicial proceedings. Douglas v. Collins, 152 Misc. 839, 273 N. Y. S. 663 (1934); Royal Aquarium v. Parkinson, 1 Q. B. 431, 61 L. J. (N. S.) (Q. B.) 409 (1892); HARPER, TORTS, § 248 (1933). It is to the public interest that judges be protected. Bradley v. Fisher, 13 Wall. (80 U. S.) 335, 20 L. Ed. 646 (1871). But this immunity is limited to "judicial" acts and does not apply to conduct outside the scope of his capacity. Grove v. Van Duyn, 44 N. J. L. 654, 43 Am. Rep. 412 (1882); Calhoun v. Little, 106 Ga. 336, 32 S. E. 86, 71 Am. St. Rep. 254 at 261 (1898). See also in this issue, 36 MICH. L. REV. 1398, note 4 (1938).

issue involved, as the majority of the court, without discussing the question of the ethics of broadcasting such a trial, affirmed the action of the lower court in granting the order of non-suit of the defendant trial judge. It is interesting to note that the dissenting judge considered this issue of sufficient importance to warrant a reversal of the decision.[9] It would seem that no right to public trial could be said to be impaired if radio companies were denied the right to broadcast legal proceedings, for these proceedings have been considered public from antiquity without radio.[10] In justification, the effect of such practice on deterring crime may be urged.[11] It is believed, however, that the popular appeal of such programs is in their entertainment value, at the direct expense of the essential dignity of the judiciary, and in the presentation to the public of the sordid and sensational details in crime.[12] No great stretch of the imagination is required to visualize a national hook-up of a highly popularized murder trial direct from the courtroom. Indeed, a radio program, simulating a court proceeding, has been discontinued due to the combined efforts of the judiciary and the bar associations.[13] Because of privilege on the part of counsel [14] and because

[9] There was no reported dissent. However, communication with the dissenting justice disclosed that he was of the opinion that this decision would go a long way in defeating the recognized ethical practice. See infra, 36 MICH. L. REV. 1401, note 20 (1938).

[10] See note 2, supra, for citations.

[11] The sponsors of the so-called "good will" court radio program conducted over the National Broadcasting Company's network believed that "the court (this program simulated court procedure), as a social service, is a free tribunal, which aims to help prevent crime by publicizing the laws." N. Y. TIMES, § 9, p. 10:3 (July 26, 1936). Contra, see notes 4 and 6, supra.

[12] "Using such a trial for the entertainment of the public or for satisfying its curiosity shocks our sensibilities. The promotion of publicity for a judicial officer by such means is prostitution of a high office for personal advantage and is contrary to Canon 34 of the Canons of Judicial Ethics which provides that a judge should not 'administer his office for the purpose of advancing his personal ambitions or increasing his popularity.'" OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, AMERICAN BAR ASSOCIATION, p. 144, Opinion 67 (1936).

[13] The "good-will" court, a commercially sponsored program on the National Broadcasting System, achieved wide popularity during its series of programs. N. Y. TIMES, § 9, p. 10:3 (July 26, 1936). In December, 1936, the Committee on Professional Ethics of the American Bar Association issued opinion 166 to the effect that "Participation by a judge or the use of his name in a commercially sponsored program purporting to be for the benefit of the public through the giving of legal advice to the indigent person is contrary to the standards of behavior prescribed by the canons of judicial ethics." See N. Y. TIMES 12:3 (Dec. 3, 1936): "we deprecate the simulation of an actual judicial proceeding by a group of lawyers or judges, and especially one having for its primary purpose the advertising of an article of commerce. It is an affront to the dignity of judicial tribunals and should not be tolerated." Judges who so participated were believed to have violated canons 4, 25, and 34. 22 A. B. A. J. 837 at 838 (1936). In the respondent's brief filed against the bill praying a temporary injunction, the Good Will Court, Inc., asserted that it "serves to accomplish effectively and on an incomparable scale one of the objects which bar associations have recently been urging—to wit: the popularizing of the law." N. Y. TIMES 22:6 (Dec. 4, 1936). Injunction was denied. N. Y. TIMES 25:3 (Dec. 9, 1936). The Appellate

of a kind of implied privilege on the part of the broadcasters,[15] the decision rendered in favor of all the defendants in the present case seems impregnable on basic tort principles.[16] While granting that the concession to the radio station may not be a basis for a waiver of his absolute privilege, with resulting liability for defamation, as to the trial judge, it seems likely that he would be subject to censure under the canons of judicial ethics. It is submitted that the refusal of permission to broadcast legal proceedings will preserve the judicial dignity and will improve public relations between the legal profession and the public at large.

Division of the Supreme Court of New York forbade lawyers and judges to participate in commercially sponsored programs. The good will court was abandoned by the sponsor. N. Y. TIMES 8:5 (Dec. 19, 1936). See also 2 UNAUTHORIZED PRACTICE NEWS 143 (1936).

[14] See the discussion of the defamation aspect of this case in this same issue. 36 MICH. L. REV. 1398, note 2 (1938).

[15] Ibid., 36 MICH. L. REV. 1401, notes 18, 19 (1938).

[16] This involves some interesting questions as to whether broadcasting is governed by the law of negligence or defamation and, if the latter, whether it is slander or libel. See discussion infra, 36 MICH. L. REV. 1397 (1938).