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NOTES AND COMMENTS

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On December 12, 1955, the Colorado supreme court entered an order appointing Mr. Justice Moore "referee to consider the Canons of Professional Ethics and the Canons of Judicial Ethics."[1] The purpose was to consider whether the canons should be "continued, revoked or modified . . ."[2] Six days of public hearings, at which all were invited to attend and present their views, were held. First considered were matters pertaining to Canon 35 of the Canons of Judicial Ethics. This comment is concerned with the report and recommendation issued by the referee after the hearings on Canon 35. The Colorado court en banc approved and adopted the referee's report on February 27, 1956.[3]

The Canon was first adopted by the American Bar Association upon the recommendation of the judicial committee on September 30, 1937.[4] It was adopted by the Colorado supreme court on July 30, 1953.[5] The Colorado supreme court supplemented the canon in December, 1955 with an order which required literal compliance with the canon.[6] Matters regarding judicial canons and their amendment, have in the past been considered within the sole discretion of the courts. The referee concluded his report with a recommended amendment to Canon 35. In adopting the report, the Colorado supreme court has adopted the referee's recommendation. As thus amended the Canon provides:

Proceedings in court should be conducted with fitting dignity

1 **Re Canon of Judicial Ethics, 132 Colo. 591, 296 P.2d 465 (1956).**
2 *Ibid.*
3 *Id.* **at 605, 296 P.2d at 473.**
4 **37 J. Am. Jud. Soc. 149 (1954).**
5 **1 Colo. Rev. Stat. Ann. 156 (1953).**
6 **Orders and Judgments (of the Colorado Supreme Court), Bk. 43, P. 480.**

> and decorum. Until further order of this Court, if the trial judge in any court shall believe from the particular circumstances of a given case, or any portion thereof, that the taking of photographs in the court room, or the broadcasting by radio or television of court proceedings would detract from the dignity thereof, distract the witness in giving his testimony, degrade the court, or otherwise materially interfere with the achievement of a fair trial, it should not be permitted; provided, however, that no witness or juror in attendance under subpoena or order of the court shall be photographed or have his testimony broadcast over his expressed objection; and provided further that under no circumstances shall any court proceeding be photographed or broadcast by any person without first having obtained permission from the trial judge to do so, and then only under such regulations as shall be prescribed by him.[7]

Mr. Justice Moore's report concludes that two dangers must be avoided. The first is that under the guise of preserving the dignity and decorum of the court a civil liberty, freedom of the press, might be invaded or nullified. The second is that under the guise of protecting the same civil liberty, freedom of the press, individuals might detract from the court's dignity, distract witnesses, degrade the court, or create misconceptions in the public mind.[8]

Canon 35 in its original form assumed that court room radio and television broadcasting and photography interfere with the administration of justice. Tests conducted before the referee convinced him that this assumption is no longer justified. Under the new Colorado canon, the trial judge must decide under the facts and circumstances of the particular case whether all or any part of the proceedings should be withdrawn from complete press and air coverage in order to insure proper administration of justice in that case. Essentially, therefore, the report concludes that Canon 35 in its original form constitutes a prior restraint on the freedom of the press which is arbitrary and discriminatory and does not bear a fair relationship to the public welfare.

The report indicates that the question of whether or not the restrictions imposed by the original canon on freedom of the press are legally justified depends only on whether photography and broadcasting will detract from the dignity and decorum of the court, distract the witnesses, degrade the court or create misconceptions in the minds of the public. In this context, there seems to be no doubt that the conclusion of the report is correct. It is submitted that the conflict can be more properly stated as a conflict between two civil liberties and not as stated in the report. The real conflict is between the right of a litigant to a fair trial and the freedom of the press. The rights of parties to actions, particularly the rights of defendants in criminal proceedings, were not directly considered during the hearing, nor is there any statement in the report to indicate that the referee gave any weight to these rights. He did, however, acknowledge the possible danger to the right of fair trial.

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7 See note 1 *supra* at 603, 296 P.2d at 472.
8 *Id.* at 594, 296 P.2d at 468.

The hearing lasted six days. During that time, with the possible exception of about twenty minutes, representatives of the mass communication industry testified, performed demonstrations and argued their side of the case. The defendant in the criminal case of the future was not present nor was his case argued. The representatives of the industry clearly proved that photography, broadcasting and televising, if properly done, will not cause physical interference in a trial proceeding. However, this fact is important only if the court correctly stated the main conflict at issue.

The report states that if relaxation of the original canon causes detraction of court room dignity and decorum, the canon should be retained in its present form. Dignity, however, is not a substantive right possessed by the judicial system. It is but a means of creating the proper atmosphere to make possible a proceeding which will insure the defendant a fair and impartial trial. Dignity, in and of itself, is not the end sought and therefore, is not the paramount issue involved. Furthermore, the report states, the previously prohibited activities will not be allowed in a case where they distract witnesses while giving testimony. At the hearing, the questions propounded by the refree and the testimony of representatives of the mass communication industries dealt with the possible distraction of witnesses in only two ways. The first was whether or not the broadcasting or photography would cause any physical interference with the giving of testimony. The second was whether or not the witness' knowledge that his testimony was being broadcast would render him so nervous or self-conscious as to decrease his ability to testify understandably.

The next danger considered, the possibility that broad courtroom publicity might create misconceptions in the minds of the people, was dealt with by considering whether or not such publicity would serve to educate the public in the workings of the judicial system. The above dangers might affect a defendant's rights, but at most, indirectly. The rights that a defendant is most concerned about were not presented or argued. These must be considered and weighed against the opposing considerations before one can be confident that the step taken is in the right direction.

Considering the rights of a defendant in a criminal proceeding, the Colorado Constitution provides that "no person shall be deprived of life, liberty or property without due process of law."[9] This section guarantees a defendant a fair and impartial trial as does the Fourteenth Amendment to the Constitution of the United States.[10] A fair and impartial trial demands that the defendant have an opportunity to be heard.[11] Inseparable from the right to be heard is the right to present witnesses. To the extent that the testimony of his witnesses is made less effective by outside influences, the defendant's right to be heard is undermined. The report concluded that since there is no physical distraction the right to present the uninhibited testimony of witnesses remains unabridged.

9 Colo. Const., art. II, § 25 (1876).
10 Wharton v. People, 104 Colo. 260, 90 P.2d 615 (1939); In re Murchison, 349 U.S. 133 (1954); In re Oliver, 333 U.S. 257 (1947).
11 In re Oliver, *supra* note 10.

It was further concluded that the knowledge of a witness that his testimony is being broadcast or televised will not adversely affect his ability to testify. The conclusion was based upon testimony of highly respected commentators and news men. But it was testimony only of their opinions as laymen which are of limited value in the field of judicial administration. Moreover, it must be noted that they were interested witnesses. Assuming, however, that the conclusion is correct, there are other questions that need answering. Prior to any criminal trial the prosecutor's case will have been fully presented to the public because of the publicity given the preliminary hearing. Public sentiment, usually against an accused person, will have been crystallized. Will not a witness' recollection of the facts in favor of the defendant be colored by the publicity and public sentiment? Again, even if a witness' recollection is unaffected, will not the fact that his testimony is broadcast make him reluctant to fully state the facts in favor of the defendant, in the face of adverse public sentiment? The amended canon reserves to a subpoenaed witness the right to prevent broadcast of his testimony by objecting, but he must take the initiative by objecting. The question remains whether, as a practical matter any witness will feel entirely free to object in the atmosphere created by advance publicity.

Due process requires that a defendant's right to a presumption of innocence not be abridged.[12] The Colorado Constitution guarantees a right to an impartial jury.[13] What affect will the broadcast of preliminary hearings in a criminal case have on the prospective juror's ability to make an impartial decision?[14] What effect will it have on the defendant's right to be presumed innocent? Another problem is whether the resultant public sentiment will have adverse affect on these rights during the trial.

Many responsible jurists, lawyers, and journalists believe that court proceedings can be, and frequently are, materially influenced under the prevailing system of allowing daily comment on the court proceedings.[15] Their arguments would apply more forcibly against fragmentary, editorialized presentation of the actual proceedings by means of radio and television broadcasting. The underlying principle behind this viewpoint is well stated as follows: "Proceedings for the determination of guilt or innocence in open court before a jury are not in competition with any other means for establishing the charge."[16]

After the newsworthy facts of a criminal case have been presented to the public through radio and television, there is no doubt

12 Eddy v. People, 115 Colo. 488. 174 P.2d 717 (1946).

13 Colo. Const., art. II, § 16 (1876).

14 Colo. Rev. Stat. Ann. § 78-5-3 (1953) sets out the test for jury bias. There is serious question whether the test is adequate for the present circumstances. It was applied at least as early as 1874. Jones v. People, 2 Colo. 351 (1874).

15 E.g., Shepard v. Florida, 341 U.S. 50 (1950) (although reversed on other grounds the court declared that the press interference constituted sufficient grounds for reversal); Pennekamp v. Florida, 328 U.S. 331, 350 (1945) (concurring opinion by Justice Frankfurter discussing dangers of trial by newspaper. See also, Phillips & McCoy, *Conduct of Judges and Lawyers* 187 (1952); Perry, The Courts, the Press and the Public, 30 Mich. L. Rev. 228 (1931).

16 Maryland v. Baltimore Radio Show, 338 U.S. 912, 920 (1950).

that the defendant's right to a presumption of innocence has been wiped away in the public eye and he has been done irreparable harm even though the jury may find him not guilty. This argument can be met by the argument that operation of the presumption of innocence is limited to the court room, and it has no force in the arena of public opinion. Undoubtedly, innocent persons have been and will be subjected to the rigors of criminal proceedings. At best it can be said that these unfortunate occurences are necessary evils, but it is not necessary to compound the damage by televising and broadcasting their trials.

The report's contention that all that transpires at a trial is public property, and therefore the public has a right to know everything concerning the trial, is supported by a quotation to that effect from the United States Supreme Court in the *Craig* case.[17] It is unfortunate but several such broad and general statements can be found. The constitutional provision is that "the *accused* shall have the right to a speedy public trial . . ."[18] There is no mention of a right guaranteed to the public. This provision was intended to afford a right only to the accused, a right which would guarantee him a fair and impartial trial.[19]

The legitimate public interest in a trial is twofold.[20] First, in

17 Craig v. Harney, 331 U.S. 367, 374 (1946) "A trial is a public event. What transpires in the court is public property."

18 Colo. Const., art. II, § 16 (1876).

19 In re Oliver, 333 U.S. 257 (1947); Pennekamp v. Florida, 328 U.S. 331, 350 (1945) (concurring opinion); Kirstowski v. Superior Court, ... Cal. App. ..., 300 P. 2d 163, Calif. 3d Dist. Ct. of App. (1956); 1 Cooley, Constitutional Limitations 647 (8th ed. 1927).

20 Pennekamp v. Florida, *supra* note 19; Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950); Boldt, Should Canon 35 of the Code of Judicial Ethics Be Revised? 16 Fed. R.D. 83 (1954).

a free society it is imperative that the public be educated in the methods of judicial administration. Second, the public must be constantly aware of whether or not the courts are fully protecting the liberties guaranteed to the people. The details of any particular case are only incidental to this dual public interest in a trial. Nowhere can one find any mandate as to what method must be used to satisfy the public interest in trial proceedings. *Craig* and similar cases should be placed in proper perspective.[21] They were cases involving contempt proceedings for allegedly improper comments on trial proceedings. None of them prescribed a mandatory method of bringing information of trial proceedings to the public. Each was only a factual determination that the particular defendant's action did not present a clear and present danger to the administration of justice. They reaffirmed the idea that a court has the inherent power to suppress any serious and imminent threat to the administration of justice. The factual determination in the above cases was strongly criticized by Justice Jackson as follows: "This court has gone a long way to disable a trial judge from dealing with press interference with the trial process."[22] Even more important is the fact that the cases were all tried to judges sitting without juries. This fact has been suggested as a reason for the broad statement of the public's right.[23]

The referee's report states "here then is a case involving a conflict between liberty and authority, a conflict that is sometimes labeled 'civil right v. the police power' or 'liberty of the individual v. the general welfare.' "[24] It is more accurately stated as a conflict between freedom of the press and the right to a fair and impartial trial. Both freedoms are of equal dignity. "Newspapers in the enjoyment of their constitutional rights, may not deprive accused persons of their right to a fair trial."[25] The same rule should apply to radio and television. In a case where no particular medium of communication is required to satisfy the legitimate public interest in a trial and a reasonable means to fulfill that requirement is already provided, weighing the balance in favor of freedom of the press is not justified. The conclusion of the report rests heavily on the fact that modern technological advances have made possible live broadcasting and televising without physical disturbances. Whether or not there is a physical distraction should not be the sole test. To assure that the step taken does not abridge the right of fair trial, this right should be given full consideration. If it is determnied that there is no abridgment of this right, or any abridgment is out-weighed by the value of a completely free press, then that assurance will be possible.

21 Pennekamp v. Florida, 328 U.S. 331 (1945); Bridges v. California, 314 U.S. 352 (1941).
22 Shepard v. Florida, 341 U.S. 50, 52 (1950).
23 *Ibid.*
24 Quoting Hamilton v. City of Montrose, 109 Colo. 228, 231, 124 P.2d 757, 759 (1942).
25 Shepard v. Florida, 341 U S. 50, 53 (1950).