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Constitutional Law--Freedom of the Press--Testimony Privilege of Journalist

L. B. S.

West Virginia University College of Law

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ex rel. Thompson v. Price, 79 Sup. Ct. 295 (1958), the defendant in the principal case was denied certiorari, but no reasons for the denial were given. Therefore, it is not known if the Pennsylvania practice has been sanctioned or condemned.

J. F. W., Jr.

CONSTITUTIONAL LAW—FREEDOM OF THE PRESS—TESTIMONY PRIVILEGE OF JOURNALIST.—*P* brought action against broadcasting company for allegedly false and defamatory statements made about her by a “network executive” and published by defendant newspaper columnist. The district court held defendant in criminal contempt for refusing to testify to the identity of the “network executive” who was indicated to be the source of the allegedly defamatory statement in her column. Defendant, claiming this to be a confidential communication, appealed. *Held*, that the first amendment, guaranteeing freedom of the press, does not confer an evidentiary privilege on a journalist to refuse to identify the source of an allegedly defamatory statement. *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958).

The claim of the defendant in this case of a privilege from testifying as to the source of her publication presents a twofold problem. The two legal theories on which the defendant claimed such a privilege in the principal case are those most frequently proposed in cases of this nature. They are: (1) the guarantee of freedom of the press contained in the first amendment; and (2) a privilege from testifying as a rule of evidence.

The contention with which the court was most concerned in the resolution of the principal case was the constitutional guarantee of freedom of the press. On this ground, there seems little doubt that the court accurately and soundly applied the law. The guarantees of the constitution are liberally applied, and broad scope is given to them. *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Williamson v. United States*, 184 F.2d 280 (2d Cir. 1950). Authors and publishers are entitled to a high degree of protection from accountability for their publications. *Baure v. Secretary of Commonwealth*, 320 Mass. 230, 69 N.E.2d 115 (1946). But it has long been recognized that freedom of the press is not an absolute freedom. *Schneider v. New Jersey*, 308 U.S. 147 (1939). It is primarily a freedom from prior restraint. *Near v. Minnesota*, 283 U.S. 697 (1931).

These broad principles of constitutional law are to be considered together with the principle that one of the incidents of judicial power is the obligation of witnesses to testify, and the correlative right of litigants to enlist judicial compulsion of such testimony. *Blair v. United States*, 250 U.S. 273 (1919). It is true that to some extent the enforcement of this duty is bound to impinge on the constitutional freedoms of both press and speech. But the courts have stated that such personal sacrifice on the part of a witness is a necessary contribution of the citizen to the general welfare. *Blair v. United States*, *supra*. The general policy of the courts, then, is to require the disclosure of all information necessary to see that justice prevails. *People ex rel. Mooney v. Sheriff of New York County*, 269 N.Y. 291, 199 N.E. 415 (1936). In view of this policy, it would seem that neither the constitutional guarantee of freedom of speech nor freedom of press would afford a journalist the absolute right to refrain from testifying.

In absence of a constitutional sanction for a privilege from testifying, the defendant's position in the principal case rested on the second contention of an evidentiary immunity as a rule of evidence. While this was not the primary ground on which the defendant made her appeal, this contention has certainly become the focal point of the dispute that has surrounded this case. The basic contention of the "fourth estate" in their vociferous support of the defendant's position is not only that requiring such testimony violates the unwritten journalist's code of ethics, but that statutory protection herein is necessary to insure effective news service.

Much emphasis has been placed on the court's strong recognition of the standards enunciated in the journalist's code of ethics. It has, for instance, been held to be libel to publish the false statement that a journalist violated the confidence of an informant. *Tryon v. Evening News Assoc.*, 39 Mich. 636 (1878). But when information given in such confidence is considered from the point of view of the rules of evidence, the weight attached to the libel cases is greatly weakened. The universal rule is that the mere fact that a statement is made in pursuance of an express or implied relation of confidence does not create a privilege from testifying — that ethical restraints are not synonymous with legal restraints. 8 WIGMORE, EVIDENCE § 2286 (3d ed. 1940). In the case of *People ex rel. Mooney v. Sheriff of New York County*, the court stated the rule: "The policy of the law is to require the disclosure of all information by witnesses in order that justice may prevail. The granting

of such a privilege from such disclosure constitutes an exception to that general rule The tendency is not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege." At 295, 199 N.E. at 416.

In absence of a statute granting such immunity, the courts rarely extend this privilege beyond the common law protection to private communications between husband and wife and between attorney and client. *McMann v. S.E.C.*, 87 F.2d 377 (2d Cir. 1937). Even when statutes establishing further evidentiary privileges are adopted, being in derogation of the common law, they are strictly construed. *Brogan v. Passaic Daily News*, 22 N.J. 139, 123 A.2d 473 (1956). Wigmore notes, however, that by statute, this privilege has been extended beyond its common law limitations in some states to include communications to such classes as journalists, clerks, trustees, brokers, radio and television personnel, and others. 8 WIGMORE, EVIDENCE § 2286. The most frequent statutory extension of this privilege, however, has been to journalists, with the following twelve states now granting such a privilege: Alabama, Arizona, Arkansas, California, Indiana, Kentucky, Maryland, Michigan, Montana, New Jersey, Ohio, and Pennsylvania. 8 WIGMORE, EVIDENCE § 2286.

The range of these statutes is extensive. Some grant an absolute and unqualified privilege for refusing to testify as to the source of the publication. See, e.g., P.A. STAT. ANN. tit. 28, § 330 (1950). Most of the statutes are, however, qualified. An example is ARK. ANN. STAT. tit. 43, § 917 (1951), which provides:

"Before an editor, reporter, or other writer for any newspaper or periodical, or publisher . . . shall be required to disclose . . . to any . . . authority, the source of information used as a basis for any article he may have written or published, it must be shown that such article was written and published in bad faith, with malice, and not in the interest of public welfare."

Such legislative extensions of the evidentiary privilege, as noted by Wigmore, are generally at the instance of organized pressure groups for their own protection and in pursuit of their own interests. 8 WIGMORE, EVIDENCE § 2286. While it cannot be denied that such self-serving reasons may well have been the basis of the legislation, and while the underlying hesitancy of the courts to extend the privilege in the absence of a statute is founded on the recognized evils that often result from the suppression of evidence, the statutes, it is believed, are not without merit.

To grant a statutory immunity, four elements are said to be necessary: (1) Communications must originate in the confidence that they will not be disclosed; (2) the element of confidentiality must be essential to the full and satisfactory maintainance of the relation of the parties; (3) the relation must be one which in the opinion of the community ought to be fostered; (4) the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation. 8 WIGMORE, EVIDENCE § 2286.

The first two elements herein seem clearly to be present in some form by witness of the public support of the privilege such as this principal case has aroused, and from the recent trend of statutory development as noted above. In the same manner, the third prerequisite is also to that degree satisfied. The alleged absence of the fourth element has been the cause of the refusal of the courts and legislatures to extend the privilege to journalists. While the requirement of testimony is necessary to the public interest in seeking out all facts necessary to do justice in each case, in many instances, such as the exposing of public corruption, wherein the information would often be unobtainable without the guarantee of protection of the confidential source, the journalist is actually aiding the administration of justice through the right of concealment of his source. It must further be admitted that the absolute rule against protection of such communication tends to a silencing of many news sources. Regarding the problem of the balance of interests in the fourth element, it must also be admitted that the public interest in the testimony of all persons would at times be outweighed by the disclosure of information of a genuine public concern that could only be obtained by a partial restriction of the absolute duty to testify.

In the example of the Arkansas statute quoted above, it is felt that the qualifications therein, that the publication be without "bad faith" or "malice", and that it "be in the interest of public welfare", would adequately allow for a free and unhampered gathering of such news as is in the genuine public interest, while furnishing the necessary essence of the judicial and litigatory benefits of the common law rule against such a privilege.

There was no statute in New York allowing a journalistic privilege and hence the court disallowed the defendant's contention. There is also no such statute in West Virginia at this time. Thus three basic alternatives would be present in these states: (1) continuance of the common law, disallowing the privilege; (2) granting

by statute of an absolute privilege; (3) or the enactment of a statute granting a qualified privilege.

The storm of controversy that the principal case has fomented has found support for each of these several alternatives. In the tone of the policy discussion that has arisen around this case, which by now greatly overshadows the legal controversy involved, the writer, while subscribing to the correctness of the decision itself, would espouse the enactment of statutes granting the qualified privilege.

L. B. S.

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—RIGHT OF PRIVACY OF THE HOME.—Petitioner refused to permit a duly authorized municipal housing inspector to enter and make an inspection of his home pursuant to a housing standard ordinance of Dayton, Ohio. The ordinance provided for the inspection of dwellings at any reasonable hour to determine their condition for the purpose of safeguarding the health and safety of the occupants of dwellings and the general public. It also fixed a penalty for refusal to allow inspection. Petitioner was convicted of violating the ordinance and applied for a writ of habeas corpus, contending that the ordinance violated both the federal and state constitutional provisions against unreasonable search and seizure. The court of appeals denied the writ. *Held*, on appeal, that the city ordinance was a valid exercise of police power, and as such was not violative of the Ohio constitution prohibiting unreasonable searches and seizures. *State ex rel. Eaton v. Price*, 151 N.E.2d 523 (Ohio 1958).

The problem presented by the principal case is the conflict between the privacy of an individual in his home as guaranteed by constitutional provisions against unreasonable search and seizure and the police power of the municipality in the regulation of public health, safety and welfare. The maxim that "every man's home is his castle" has been fashioned as a part of the constitutional law of the United States by the fourth amendment and similar provisions against unreasonable searches and seizures in state constitutions.

"The basic premise of the prohibition against searches was not protection against self incrimination; it was the common-law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization." *District of Columbia v. Little*, 178 F.2d 13, 16 (D.C. Cir. 1949).