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Case Digests

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CONSTITUTIONAL LAW: Fair Trial

Sheppard v. Maxwell, 384 U.S. 333 (1966).

Sheppard was convicted in 1954 in the Court of Common Pleas of Cuyahoga County, Ohio for the second-degree murder of his wife. His trial was preceded and pervaded by publicity. A proceeding for a writ of habeas corpus was instituted in the federal court for relief from confinement contending that because of inflammatory publicity the petitioner was deprived of a fair trial. The district court found five separate violations of petitioner's constitutional rights, *viz.*, failure to grant a change of venue or a continuance in view of the newspaper publicity before trial; inability to maintain impartial jurors because of publicity during trial; failure of the trial judge to disqualify himself although there was uncertainty as to his impartiality; improper introduction of lie detector test testimony; and unauthorized communications to jury during their deliberations. 231 F. Supp. 37 (S.D. Ohio 1964). A divided court of appeals reversed, holding that the petitioner had failed to sustain the burden of demonstrating the unconstitutionality of his trial. 346 F.2d 707 (1965). The United States Supreme Court granted certiorari.

Held: Judgment reversed and case remanded to the district court with instructions to issue the writ and order that Sheppard be released from custody unless recharged within a reasonable time. The state trial judge's failure to insulate the proceedings from the inherently prejudicial publicity which saturated the community, and his failure to control disruptive influences in the courtroom deprived Sheppard of the chance to receive a fair hearing consistent with the due process clause of the fourteenth amendment. Sheppard was denied due process by the trial judge's refusal to take precautions in three fundamental areas.

First, the judge should have adopted stricter rules governing the use of the courtroom by newsmen. The Court pointed out that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. A press table was erected for reporters inside the bar and the number of reporters allowed in the courtroom was not limited. The reporters clustered within the bar made confidential talk among Sheppard and his counsel almost impossible during the proceedings. During recesses trial exhibits were handled and photographed by newsmen. Their movement in and out of the courtroom made it difficult for the

witnesses and counsel to be heard. In *Estes v. Texas*, 381 U.S. 532 (1965), it was held that the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged.

Second, the trial judge should have insulated the witnesses and jury. Prospective witnesses were interviewed by newspapers and radio stations at will, and in many instances their testimony was disclosed before they testified in court. During deliberations the jurors were permitted to hold unmonitored telephone conversations with persons outside the jury room.

Third, the judge should have made some effort to control the release of leads and gossip to the news media by the police, witnesses, and the counsel for both sides. The prosecution repeatedly made evidence available to the press which was never offered in the trial. For example, publicity about Sheppard's refusal to take a lie detector test came directly from police officers. Much of the "evidence" disseminated in this manner was clearly inadmissible, and the Supreme Court observed that the exclusion of such evidence in court is rendered meaningless when a news media makes it available to the public. Much of the material printed or broadcast during the trial was never heard from the witness stand, such as the charges that Sheppard had purposely impeded the murder investigation; that he was a perjurer; that he had sexual relations with numerous women; that his slain wife had characterized him as a "Jekyll-Hyde"; that he was "a bare-faced liar" because of his testimony as to police treatment; and that a woman convict claimed Sheppard to be the father of her illegitimate child. Effective control of these sources, which the Supreme Court found to be within the trial judge's power, might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity. The judge should have at least warned the newspapers to check the accuracy of their accounts, and, further, should have sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses, and especially the police.

> Had the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom—not pieced together from extra-judicial statements. . . . If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966).

Since the state trial judge did not fulfill his duty to protect Sheppard sufficiently from the massive, pervasive, and prejudicial publicity that attended his prosecution and thus deprived him of a fair trial, the Court found it unnecessary to decide two other questions raised by the petitioner. Because the precautions outlined would have been sufficient to guarantee Sheppard a fair trial, the Court refused to consider what sanctions might be available against a recalcitrant press. For a discussion of the proposed solutions to the problem of trial by newspaper see 44 NEB. L. REV. 614 (1965). Likewise, the charges of bias made against the trial judge who reportedly told a national newswoman "It's an open and shut case . . . he is guilty as hell" were avoided.

CONTRACTS: Business Coercion

McCubbin v. Buss, 180 Neb. 624, 144 N.W.2d 175 (1966).

The plaintiff was the general manager of Goodrich Dairy and the defendant was the president. The two parties (the primary stockholders of the closed corporation) had entered into an agreement dated January 20, 1959, which required a stockholder to give first option for the sale of stock to the dairy and second option to the other stockholders. They also agreed that the dairy would purchase the stock of a deceased stockholder. A change in the proportionate interests of the stockholders occurred and the defendant became the majority stockholder. On several occasions the defendant discussed the stock option agreement with the plaintiff and it was his suggestion that they discharge the contract by a new agreement. When they were unable to agree, the defendant threatened to fire the plaintiff if he did not permit the discharge of the contract. The plaintiff then complied with the demand and the contract was discharged. He was later fired by the defendant. The plaintiff sued for recission of the new agreement alleging business coercion. The district court held for the defendant and the Nebraska Supreme Court reversed and remanded.

The main contention of the defendant was that a threat to do what one has a legal right to do cannot constitute duress. In support of this proposition the defendant cited *Carpenter Paper Co. v. Kearney Hub Pub. Co.*, 163 Neb. 145, 78 N.W.2d 80 (1956); *Malec v. ASCAP*, 146 Neb. 358, 19 N.W.2d 540 (1945); and *Kunkel Auto Supply Co. v. Leech*, 139 Neb. 516, 298 N.W. 150 (1941). The court in reply stated that if these cases implied that the threat would not be wrongful unless there would be an independent liability for the threatened act, such an implication was an overstatement of the

law. "An unjust and inequitable threat is wrongful, although the threatened act would not be a violation of duty in the sense of an independent actionable wrong in the law of crimes, torts, or contracts." 180 Neb. at 628, 144 N.W.2d 175, 178. The court may have created some confusion in that it is not clear whether the principle in the cases cited by the defendant has been modified, or is merely distinguishable from the instant case and situation. The result that the court reached in *McCubbin* can be explained without creating a conflict with the three cases cited by the defendant. The principle that seems consistent in all these cases is that it is not wrongful to threaten an act in pursuance of an existing right; for example, it would not constitute illegal duress to threaten suit if someone continued to trespass on your land after being warned. It would be wrongful, however, to threaten suit for trespass to create or to vitiate certain rights collateral to the trespass, such as coercing someone to sign a new contract or permit nullification of an existing contract.

In the instant case the defendant threatened to fire the plaintiff. From the evidence presented it appears that he may have had a valid right to do so, but he should not have the right to threaten plaintiff's job for the purpose of vitiating his rights (under the stock option agreement) which were wholly collateral to defendant's right to fire employees. An important distinction, not set out by the court, is that it is not wrongful to threaten action to enforce existing rights, but it is wrongful to threaten action for the purpose of creating new or vitiating old rights. Therefore, there is no necessary conflict between the earlier Nebraska decisions and the *McCubbin* case.

CONTRACTS: Installment Sales

Engelmeyer v. Murphy, 180 Neb. 295, 142 N.W.2d 342 (1966).

The plaintiff purchased a rotary hoe from the defendant on October 6, 1965. The plaintiff executed a contract which provided for a down payment and the payment of the balance of the purchase price in installments. The time price differential included in the balance of the purchase price was in excess of nine per cent simple interest but within the maximum rate prescribed by NEB. REV. STAT. § 45-338 (Supp. 1965). The plaintiff contended that this act violated NEB. CONST. art. 1, § 16, which prohibits the passage of a bill of attainder, ex post facto law or law impairing the obligation of contracts. The plaintiff also alleged that the act constituted a special law regulating interest where a general law could be made applicable, and that the act presented an unreasonable classification.

The 1964 amendment to NEB. CONST. art. 3, § 18, which led to the passage of section 45-338, allows the legislature to ". . . separately define and classify loans and installment sales, to establish maximum rates within classifications of loans or installment sales which it establishes, and to regulate with respect thereto." The lower court held that the act was constitutional.

On appeal, *held*: judgment affirmed. The court reasoned that in interpreting a constitutional amendment all the circumstances leading to its adoption should be considered. Since the legislature clearly expressed its intent by including the language "notwithstanding any other provisions of this Constitution," in the amendment, the court rejected the plaintiff's argument based upon art. 1, § 16. The court stated: "The amendment should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it was aimed." *Engelmeyer v. Murphy*, 180 Neb. 295, 299-300, 142 N.W.2d 342, 345 (1966).

Plaintiff's argument that the act created an unreasonable classification because it did not require the seller to retain the title to or a lien upon the goods was rejected. The court said that this classification was more general and thus more reasonable than if the seller was required to retain the title to or a lien upon the goods.

This case removes all uncertainty from installment sales contracts in Nebraska entered into subsequent to May 24, 1965, provided the contracts conform to the act. However, the case is not so clear with respect to actions based upon previous installment sales acts. These actions are now governed by NEB. REV. STAT. § 25-205 (Reissue 1964), which requires that any contract sought to be nullified because of the unconstitutionality of the statute relied upon must be brought within one year of the decision declaring the law unconstitutional or within one year of November 23, 1963, whichever date is later. The 1959 Installment Sales Act was declared unconstitutional in *Elder v. Doerr*, 175 Neb. 483, 122 N.W. 2d 528 (1963), which was decided on June 28, 1963. Thus, actions based upon the unconstitutionality of the 1959 act may no longer be brought. The same result is true with respect to the 1963 Installment Sales Act. The 1963 act was declared unconstitutional in *Stanton v. Mattson*, 175 Neb. 767, 123 N.W. 2d 844 (1963), which was decided on October 18, 1963. Since both laws were declared unconstitutional prior to November 23, 1963, the latest date an action based upon the unconstitutionality of these two previous acts could have been brought was November 23, 1964.

It now appears that the Nebraska time sales dilemma has finally been solved. All contracts based upon the 1965 act are valid and all actions based upon the invalidity of the two previous acts can no longer be brought because of section 25-205.

TORTS: Guest Statute

Davis v. Landis Outboard Motor Co., 179 Neb. 391, 138 N.W.2d 474 (1965).

Plaintiff was aboard a motorboat which stalled on the Missouri River. The pilot called a repairman, who fixed the boat and piloted it back to the landing because it was then dark and the trip was very dangerous at night. Plaintiff was told that she was to ride back in an automobile with the repairman's wife to avoid the hazardous river journey. The repairman's wife lost control of the vehicle on a sharp curve, and plaintiff was injured in the ensuing accident. The trial court found as a matter of law that plaintiff was a guest in the automobile in which she was riding and that defendant driver was not guilty of gross negligence. Recovery was thereby precluded under Nebraska's "guest statute," NEB. REV. STAT. § 39-740 (Reissue 1960). On appeal, *held*: judgment affirmed.

The decision may easily be defended as a literal application of the guest statute. That statute states that a "guest" is " . . . a person who accepts a ride in any motor vehicle without giving compensation therefor. . . ." In this case it did not appear that the plaintiff paid for her ride nor that the repairman's bill to the boat pilot included a separate item attributable to the plaintiff's transportation. The court cited the rule that

> "A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity. However, if his carriage contributes such tangible and substantial benefits as to promote the mutual benefits of both the passenger and owner or operator, or is primarily for the attainment of some tangible and substantial objective or business purpose of the owner or operator, he is not a guest." *Davis v. Landis Outboard Motor Co.*, 179 Neb. 391, 395-96, 138 N.W.2d 474, 478 (1965), citing *Born v. Estate of Matzner*, 159 Neb. 169, 65 N.W.2d 593 (1954).

The court concluded that defendants would receive no benefit by having the plaintiff return by car rather than by boat and that "the transportation was furnished plaintiff through a desire to render assistance to a lady who would otherwise be forced to undertake the trip home under circumstances involving considerable danger." *Id.* at 397, 138 N.W.2d at 479.

The rule quoted above is broad enough that the court might have reached a different conclusion, however, by approaching the guest statute with a different philosophy. Since that statute operates harshly to deny recovery to injured plaintiffs, it would seem reasonable to limit its effect to those situations which either present the danger of collusion among family members, or which arise outside the context of a business transaction in which tangible compensation flows to the defendant.

A stronger case for holding the guest statute inapplicable would have been presented had the repairman been unable to fix the boat, and the boatman had been injured while riding back in the repairman's automobile, as an alternative to being stranded overnight on the river. But to allow recovery even in this hypothetical situation would have required the court to take the position that business or commercial transactions cannot be divorced from attendant social dealings. That is, a customer expects certain courtesies from those he patronizes, which any enterprising businessman provides not so much out of altruism as out of business necessity. Although such a ride may be considered a social gesture, it would arise in the context of business dealings and could not as a practical matter be separated from them. The benefit is not direct remuneration for the transportation, but the patronage of the customer. Although the abstract good will of unascertained, prospective customers may not be a benefit sufficiently tangible to avoid the guest statute, it could be said that cementing relations with an actual, present customer by providing those services, such as transportation, which are normally expected to be a part of the commercial transaction, does result in a tangible benefit to the defendant as proved by the money he receives.

The proposed result in the hypothetical case would conform to the doctrine of *Van Auker v. Steckley's Hybrid Seed Corn Co.*, 143 Neb. 24, 8 N.W.2d 451 (1943). In that case the plaintiff had been provided free transportation in order that he might assist in defendants' sales promotion booth, and it was held that he was not barred by the guest statute. The result would be reconcilable with *Born v. Estate of Matzner*, 159 Neb. 169, 65 N.W.2d 593 (1954), in which a member of a church guild, injured while traveling to a guild conference with the pastor of the church, was denied recovery under the guest statute. In that case there was no direct commercial transaction between the pastor and the plaintiff or the guild.

The present case is also distinguishable from the hypothetical, for here the plaintiff did have a ready alternative to traveling

with the defendant: she could have returned on the boat. It could be said that the repairman's "social-business" obligation to provide alternative transportation on his return trip ended when he fixed the boat. This may have been an important consideration in the case, for the court stated that "Nothing appears to indicate a benefit would occur to the defendants to have the plaintiff return by car rather than by boat." *Davis v. Landis Outboard Motor Co.*, 179 Neb. 391, 397, 138 N.W.2d 474, 479 (1965). However, the court did not indicate that the result would have been different had the boat been inoperable. It said the defendant was motivated by hospitality, which conclusion might also apply had the plaintiff been stranded.

The unique factual situation presented in the case limits its stare decisis effect; indeed, the court has stated that whether a person riding in a motor vehicle is a guest should be decided on the particular facts of each case. *Van Auker v. Steckley's Hybrid Seed Corn Co., supra.* The importance of the case lies in its reflection of the court's attitude toward construction of the guest statute. The holding may represent an unfavorable reaction to the argument that a plaintiff whose transportation was furnished in the context of a business transaction, as a service normally expected in that situation, should escape the burden of proving gross negligence.