Buffalo Law Review

Volume 1 | Number 1 Article 22

4-1-1951

Constitutional Law—Civil Rights—"Threat" to Public Order Held Superior to Freedom of Speech

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are given on non-fair-traded items redeemable with those that are fair-traded. It does not seem tenable that the last-mentioned situation could be considered within the purview of the statute. If discounts are given on merchandise which is not fair-traded, and that is the only point at which a price reduction is effected, the discount will have been completed and the transaction consummated before fair-traded merchandise enters the picture, regardless of what is thereafter done with receipts evidencing the transaction.

Mary K. Davey

CONSTITUTIONAL LAW—CIVIL RIGHTS — "THREAT" TO PUBLIC ORDER HELD SUPERIOR TO FREEDOM OF SPEECH

Feiner, a Syracuse University student, speaking through a loud speaker system from a box located near a street intersection in Syracuse, New York, addressed a mixed crowd of whites and Negroes urging attendance at a speech by O. John Rogge that night in the Syracuse Hotel. In the course of his speech, he made derogatory remarks about the President, other public officials and the American Legion, and also indicated that Negroes did not have equal rights. It was found by the trial judge that he then called upon them to rise up in arms. This statement, although emphasized by the majority of the Supreme Court, was disputed by other witnesses who swore that petitioner's statement was that his listeners "could rise up and fight for their rights by going arm in arm to the Hotel Syracuse, black and white alike . . ." In any event, one man threatened that if the police "don't get that son of a bitch off, I will go over and get him myself." Feiner was first asked, then told, finally commanded to step down. All the time, he continued to urge attendance at the Rogge meeting. He was arrested and charged with violation of § 722 of the New York Penal Law—disorderly conduct. His conviction was upheld in the United States Supreme Court by five of the Justices in an opinion by Mr. Chief Justice Vinson on the ground that a clear danger of disorder was threatened and hence the preservation of peace and order on the streets was superior to defendant's right of free speech. Mr. Justice Frankfurter concurred in a separate opinion. Mr. Justice Black in his dissent took direct issue with this view, contending that the police officer should have protected "petitioner's right to talk, even to the extent of arresting the man who threatened to interfere." It was Black's contention that the defendant had been sentenced for the expression of unpopular views. Justices Douglas and Minton concurred in a dissent on the ground that the record showed merely an unsympathetic audience and the threat of one man to interfere with the speaker. *Feiner* v. *New York,* —— U. S. ——, 71 S. Ct. 303 (1951).

There have been only a few cases wherein the social interests of public order and freedom of speech have clashed. Outstanding have been *Cantwell*

v. *Connecticut,* 310 U. S. 296 (1940) and *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1941). On their facts these cases did not require exposition of the possible inconsistencies of the two interests. *Terminiello* v. *Chicago,* 337 U. S. 1 (1949) brought the problem into sharper focus but, as Professor Chafee points out in *Free Speech in the United States* at p. 525, "Indoor agitation is usually less restricted, because it does not interfere with the general use of public areas." The Feiner incident occurred at a public intersection. It was not illegal for Feiner to speak there. In fact, it was a customary spot from which soap box orators were prone to deliver addresses. Nor was it illegal for Feiner to use a loud speaker system. Thus the Supreme Court was presented with an excellent example of the conflict between the two interests. In any event, it should not be considered as relevant that the sentiments expressed (by Feiner) were popular or unpopular.

The much belabored standard used in free speech cases is the clear and present danger test, formulated in *Schenck* v. *United States,* 249 U. S. 47 (1919). *Gitlow* v. *New York,* 268 U. S. 652 (1924) may have determined that the *Schenck* doctrine is not applicable in situations where the legislative body has, by statute, determined that utterances of a certain kind involve such danger of substantive evil that they may be punished. The question presents itself whether the statute in the *Feiner* case is of the *Gitlow* character. The *Gitlow* statute did not specifically mention precise words which were to be condemned, but did give the courts a guide for deducing which words were to be proscribed. Feiner was charged with violating § 722(2) of the New York Penal Law: Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct . . . 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct or be offensive to others." This subdivision's vagueness is readily apparent, and the courts recognize the defect by advising that its application should be limited. *People* v. *Schroedel,* 147 Misc. 296, 263 N. Y. Supp. 658 (Sup. Ct. 1933). Here the conviction of Feiner rests solely on his verbal utterances and their tendency to precipitate a public disturbance. In other words, the statute is determined to be of the *Gitlow* variety, impliedly condemning language which would "annoy, disurb, interfere with, obstruct or be offensive to others." The fiinal determination as to which language is to be condemned, however, does not rest on legal principles. At this point, judges and juries must draw upon their own convictions and prejudices in order to determine the social worth of the language in question. Thus we are confronted with the anomaly of both majority and dissent drawing upon different passages from the same case, *Cantwell* v. *Connecticut, supra,* to rationalize on the one hand that the speaker should be convicted, on the other hand that he should be protected.

The *Feiner* case was termed an opportunity for the Court "to completely

review the formula for restricting freedom of speech, by fixing a standard to determine when a danger is clear, when it is present and what degree of evil shall be deemed sufficient to justify abridgement of free speech." See 2 SYRACUSE L. REV. 171, 173 (1950). This was at best an ingenuous suggestion. The area of free speech defies formulae. As "damned racketeer" and "damned Fascist" are considered "fighting words" in *Chaplinski* v. *New Hampshire,* 315 U. S. 568 (1941), so now are the words, "rise up in arms," uttered by a Young Progressive to an audience of mixed sympathies. The courts will always attempt to solve free speech cases within the time honored framework of case and controversy, and will wisely avoid going any further. But it now can be seen that the Court has opened a Pandora's box. On the one hand, Terminiello can rant and rave although cordons of police are needed to keep off a riotous mob of 2,300 people, but Feiner, addressing 70 somewhat restless people, is silenced because one man threatens to assault him. The New York statute, aside from the question of its vagueness, which must cast a shadow upon its constitutionality, obviously embodies a threat to freedom of speech. It is hardly an argument that three New York courts cannot be wrong, or that judges sitting in Albany can better understand conditions in Syracuse than judges sitting in Washington. The Feiner case is simply an unfortunate holding. It mirrors the post-war reaction to thoughts or ideas which in any manner can be connected with unpopular politics. The application of the *Gitlow* doctrine to such vaguely drawn statutes may now be an effective weapon in the hands of local police officials to silence the expression of opinions hostile to the majority view in the particular community.

Edward S. Spector

NEGLIGENCE — DOCTRINE OF MACPHERSON v. BUICK — LIABILITY OF REMOTE SUPPLIER

Defendant, who owned and made a business of supplying cranes, rented one of them to another supplier, also a defendant, who kept it for two days and then re-rented the crane to the plaintiff's employer for use in its shipyard. Thirteen months later, a chain on the crane gave way, injuring the plaintiff how was working nearby. Expert testimony indicated that a fracture had existed in a link of the chain for at least two years and had at all times been discoverable by "visual inspection." The owner of the more than ten-year-old crane had agreed to repair it during the rental period. *Held* (5-2): the owner of the crane as well as the intermediate supplier can be held liable under the principle of *MacPherson* v. *Buick Motor Co.,* 217 N. Y. 382, 111 N. E. 1050 (1916). The owner is not relieved of liability merely because the plaintiff's employer had an equal opportunity to discover the defect and would also be within "the compass of the MacPherson doctrine." *LaRocca* v. *Farrington,* 301 N. Y. 247, 93 N. E. 2d 829 (1950).