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Constitutional Law--Contempt

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of work within the broad scope permissible in wartime under the 1940 Selective Service Act. If it would in no way contribute to the successful prosecution of a war, a fortiorari it is without the scope permissible in peacetime.

Granting, however, that Niles' contention in the recent case[13] is correct, that the work offered him is not related to natinal defense and therefore the Statute which authorized such assignment is in violation of the 13th Amendment, it leads to the following anomalous situation. Congress, in endeavoring to respect the convictions of the conscientious objector regarding service in the military *per se*, offers him work in a charitable institution which would seem to have a great deal of appeal to him. But this enables him to take the position that Congress must confine such offer to work that supports the military or contributes to the national defense, which in principle should be just as repugnant to his convictions as actual military service would be. However sound his argument of unconstitutionality may be, when he invokes it he defeats the object of the consideration given him by Congress.

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CONSTITUTIONAL LAW CONTEMPT.

Hoffman v. Perrucci,[1] decided in October of 1953, was one of several cases which have considered the question of whether out-of-court publications by insurance companies of advertisements, and the distribution of pamphlets directed against high jury awards, is punishable as indirect or constructive contempt of court. In the principle case the printed matter stated that excessive awards in personal injury suits by juries was the cause of insurance rates increasing. The specific issue was whether these publications by the insurance companies, not parties to the personal injury proceedings, caused such an improper influence on prospective jurors as to obstruct the proper administration of justice in the court.

The plaintiffs maintained that the conduct in this respect of the insurance companies denied them a fair trial by jury, and therefore, that the insurance companies were guilty of indirect criminal contempt of court. This has been defined as conduct directed against the dignity and authority of the court.

These advertisements were distributed in nationally circulated magazines. The pamphlets were distributed independently of the magazine advertisements. Some portrayed a jury room together with a message to the effect that more accidents and excessive jury awards, rendered by jurors who feel they can afford to be generous with the "rich" insurance company's money, are the cause of increased insurance rates. Another advertisement stated that juries were not deciding the case upon the evidence, but were controlled by their emotions in sympathy to the injured party All the advertisements concluded with the statement that the excessive awards given by jurors are tending to establish the "going" rate for day to day out of court claims, resulting in increased rates to the public. The court in the principle case, without discussing the validity of the conclusions drawn in the publications, held that these publications did not interfere with the ordinary administration of justice in the action pending before it. Using the test announced in *Bridges v. California*,[2] the court held that: "There is not present that extremely

[13] See note 3 *supra*.

[1] 117 F.Supp. 38 (E.D. Pa. 1953).

[2] 314 U.S. 252 (1941).

high degree of imminence of the substantive evil which would justify punishment of the publications."[3] The court also noted that the intent of the publication was not to influence the particular jurors of the pending action before it, but to influence the public mind generally.[4] The court felt that the plaintiffs had a safeguard in their right to a fair trial by being able to challenge jurors before the jury was empaneled. This challenge could inquire into the effect these publications had upon the convictions of the jurors relating to high or excessive awards.

Publications of this order were also under consideration in a case before a United States District Court in the State of Washington.[5] There, the plaintiffs complained that the insurance companies had conspired to interfere with the administration of justice in the plaintiff's personal injury suit. They maintained that the companies were instructing the jurors in the manner and method of adjudicating facts and evidence and assessing damages in the action. This proceeding was one for summary contempt. The power of a federal court to punish for contempt is provided for by statute.[6] The applicable section and subsection provide:

> "A court of the United States shall have the power to punish by fine or imprisonment at its discretion, such contempt of its authority, and none others as (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice."

In granting the motion to dismiss, the court applied the interpretation placed on a comparable former statute, enacted in 1831, by the United States Supreme Court.[7] The Supreme Court there held that the phrase "so near thereto" meant actual geographical, physical nearness to the court and not relevancy Therefore, acts which reasonably tend to obstruct the administration of justice, if committed at a substantial distance from the court, do not come within the scope of the statute. This construction overruled a former interpretation by the Supreme Court,[8] which had held that the phrase "so near thereto" meant "reasonable tendency " This new construction, the court felt, conformed more to the intent of Congress. That intent, the court felt, was to limit the power of the federal courts to punish for contempt more strictly than like powers given by the states to state courts. The Washington District Court, after adopting the construction of the statute, placed an additional limitation upon the interpretation of the statute:

> "Prospective jurors who have not as yet been summoned to appear for service at the place where the court is held are not component parts of the court; and distribution to them of the magazine article, described in the relator's petition, could not be regarded as misbehavior in the presence of the court, or so near thereto as to interfere, in a physical sense, with the court's functions."[9]

The court did not make a direct finding as to the effect of the articles on the after-empaneled jurors, but the court, referring to *Hoffman v. Perrucci*,[10] found that in these advertisements there was not present that extremely high degree of immi-

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[3] Hoffman v. Perrucci, 117 F.Supp. 38, 40 (E.D. Pa. 1953).

[4] See Pennekamp v. Florida, 328 U.S. 331 (1946).

[5] United States *ex rel.* May v. American Machinery Co., Inc., 116 F. Supp. 160 (E.D. Wash. 1953).

[6] 63 STAT. 90, 28 U.S.C. 385 (1940) as amended, 18 U.S.C. 401 (1949).

[7] Nye v. United States, 313 U.S. 33 (1941).

[8] Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).

[9] United States *ex rel.* May v. American Machinery Co., Inc., 116 F. Supp. 160, 163 (E.D. Wash. 1953).

[10] See note 1 *supra.*

nence of the substantive evil which would justify punishment of those responsible for them.

Underlying and supporting the two district court decisions relating to such publications by insurance companies is the broad, national, constitutional policy developed by the United States Supreme Court. The policy safeguarding freedom of speech and press was thoroughly reviewed in *Bridges v. California*.[11] The court in that case adopted as a practical guide and controlling principle, the "clear and present danger" test formulated in *Schenk v. United States*.[12] Certain editorials by Los Angeles newspapers were highly critical of a possible adverse decision, from the viewpoint of the editor by a California court in a labor case. Also published in a newspaper was a telegram sent by Harry Bridges to the Secretary of Labor intimating that a strike might be called tying up the Los Angeles port if the decision was enforced. These outbursts of free expression were held not to be so intimidating as to threaten a mind of reasonable fortitude, such as a judge's mind should be. The court, after reviewing the Common Law on free speech and press, concluded that it was the intent of the framers of the Constitution to secure to the people of the United States a greater freedom of expression than that enjoyed by the people of Great Britain. Reaffirming the "clear and preesnt danger" test, the court adapted it to the pending controversy: "What finally emerges from the clear and present danger cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[13] And again, the court stated:

> "The assumption that respect for the judiciary can be won by shielding judges from published criticisms wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind although not always in perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."[14]

Justice Frankfurter's dissenting opinion condemned the conduct of the newspapers as a trial by newspaper and maintained that this question should be approached with the view that these liberties of free expression themselves depend upon an untrammelled judiciary to whom is given the power to preserve those liberties.

The position of the majority was reiterated in *Pennekamp v. Florida*.[15] The court there emphasized that the "clear and present danger" test should be applied by the state courts by their own law and standards, and these decisions would only be disturbed if the application of these standards was shown to be arbitrary and unreasonable. The authority of the Supreme Court to determine the meaning and the application of the provisions of the First Amendment to the states as adopted by the Due Process clause is well established.[16]

The insurance cases discussed above arose in a state court and a federal court, respectively The federal court, by applying the new construction placed upon the federal statute, has replaced the "reasonable tendency" rule with the physical proximity test. Therefore, these advertisements of the insurance companies in

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[11] See note 2 *supra*.
[12] 249 U.S. 47 (1919).
[13] Bridges v. California, 314 U.S. 252, 263 (1941).
[14] *Id.* at pp. 270–271.
[15] See note 4 *supra*.
[16] Gitlow v. New York, 268 U.S. 652 (1925).