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decisions some authorities persisted in clinging to the old view. This attitude appeared in the decision in the state court in the instant case.³² The effect of the decision of the Supreme Court should be to make it plain that its attitude in the *Nebbia* case is now its settled policy; that hereafter price legislation need be justified by no special circumstances under the label "affected with a public interest" or otherwise. This decision is in line with recent trends toward a controlled economy, and obviously makes it possible for governmental action to supplant free competition as our principal means of determining prices. The new approach will eliminate judicial legislation as to which businesses are suitable for price control; yet by treating price fixing as an ordinary exercise of the police power, a check against capricious and arbitrary legislation will be preserved.

JAMES F. LAWRENCE, JR.

Contempt of Court—Construction of Federal Statute Concerning Punishment for Contempt

In the case of *Nye v. United States*,¹ the Supreme Court, by construction of section 268 of the judicial code,² has stringently abridged the power of the federal district courts³ to punish summarily for contempt.⁴

(1937); *Mayo v. Lakeland Highlands Canning Co., Inc.*, 309 U. S. 310, 60 Sup. Ct. 517, 84 L. ed. 481 (1940) (a preliminary injunction was denied against enforcement of a statute fixing prices of citrus juices in the citrus fruit industry). State price regulation has been upheld in the following cases: *Highland Farms Dairy, Inc. v. Agnew*, 300 U. S. 608, 57 Sup. Ct. 549, 81 L. ed. 835 (1937); *Borden's Farm Products Co. v. Ten Eyck*, 297 U. S. 251, 56 Sup. Ct. 453, 80 L. ed. 669 (1936); *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163, 55 Sup. Ct. 7, 79 L. ed. 259 (1934); *cf. Mayflower Farms, Inc. v. Ten Eyck*, 297 U. S. 266, 56 Sup. Ct. 457, 80 L. ed. 675 (1936) (the court held unreasonable and arbitrary a classification created by a N. Y. statute which limited the benefit of a price differential to milk dealers not having a well-advertised trade name to those who were already engaged in the milk business at a certain date).

³² *State v. Kinney*, 138 Neb. 574, 293 S. W. 393 (1940).

¹ *Nye v. United States*, 61 Sup. Ct. 810, 85 L. ed. Adv. Ops. 733 (1941), Note (1941) 54 HARV. L. REV. 1397. Followed in *Millinocket Theatre v. Kurston*, 39 F. Supp. 979 (D. Me., 1941). *Warring v. Colpoys*, 122 F. (2d) 642 (App. D. C. 1941) (retroactive operation of *Nye* decision).

² 36 Stat. 1163 (1911), 28 U. S. C. A. §385 (1928) ("The said courts shall have the power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts").

³ As to bankruptcy proceedings, see *Boyd v. Glucklick*, 116 Fed. 131 (D. Iowa, 1902). As to disobedience of an injunction outside the district, see *Myers v. United States*, 264 U. S. 95, 44 Sup. Ct. 272, 62 L. ed. 577 (D. C. W. D. Mo., 1924).

⁴ This note will not deal with the constitutionality of the statute. The power

E., administrator, brought a wrongful death action against *B.* and *C.* in the federal district court for the middle district of North Carolina. *N.*, a son-in-law of one of the defendants in the wrongful death action, and *M.*, his tenant, brought *E.*, an "illiterate, and feeble in mind and body", from his home to a town at a considerable distance from the middle district. *N.* and *M.* plied *E.* with liquor, and kept him in *N.*'s home overnight. The next morning, when *E.* was sober, but still under the influence of *N.* and *M.*, they induced him to seek a termination of the action. The letter to the district court was prepared by *N.*'s lawyer and mailed by *N.* *E.* was not paid anything. The district court fined *N.* and *M.*, after summary proceeding, for contempt. The circuit court of appeals upheld this decision,⁵ but the Supreme Court reversed it on the grounds that the acts were not misbehavior in the presence of the court, "or so near thereto as to obstruct the administration of justice" within the meaning of s. 268 of the judicial code.

Ever since Congress, in 1831, as the result of the acquittal of a federal judge who punished summarily a critical newspaper editor,⁶ passed the ancestor of the present statute, limiting the power to punish for contempt, the construction of the language used has been a judicial problem of no mean proportions. On the one hand the courts are faced with a loss of control over indirect contempts if they construe the statute geographically; on the other hand, a cause and effect interpretation runs afoul of the policy of strict construction of a criminal statute and of the literal congressional language.

The Supreme Court has at various times used both tests. In cases involving the influencing of a witness to disobey a subpoena⁷ and an altercation with a judge after court had adjourned,⁸ for examples, the Supreme Court has construed the language in question in a spatial sense. But in cases involving the shadowing of a juror outside the courthouse,⁹ adverse criticism of the court in a pending matter,¹⁰ an

of Congress to regulate contempts in the lower federal courts has long been recognized. *Michaelson v. United States*, 266 U. S. 42, 45 Sup. Ct. 18, 69 L. ed. 162 (1924); *Atwell v. United States*, 162 Fed. 79 (C. C. A. 4th, 1908); *Ex parte Robinson*, 19 Wall. 505, 510, 22 L. ed. 205, 207 (1874). See article by Frankfurter and Landis, cited *infra* note 6.

⁵ *Nye v. United States*, 113 F. (2d) (C. C. A. 4th, 1940), Note (1941) 19 N. C. L. Rev. 219.

⁶ See STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1833); *Ex parte Shenck*, 65 N. C. 354 (1871); Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in the Separation of Powers* (1924) 37 HARV. L. REV. 1010.

⁷ *Ex parte Robinson*, 19 Wall. 505, 22 L. ed. 205 (1874).

⁸ *Ex parte Bradley*, 7 Wall. 364, 19 L. ed. 214 (1869).

⁹ *United States v. Sinclair*, 279 U. S. 749, 49 Sup. Ct. 471, 73 L. ed. 938 (1929).

¹⁰ *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 38 Sup. Ct. 560, 62 L. ed. 1186 (1918).

attempt to influence a witness outside of the courtroom,¹¹ an attempt to influence a prospective juror before he was drawn,¹² and lynching a prisoner after an appeal had been allowed,¹³ the language was construed in a causal sense.

The lower federal courts have been equally confused. The bribing of a witness,¹⁴ service of a witness with a civil process after court had adjourned,¹⁵ corrupting a juror,¹⁶ publication of a newspaper article concerning a pending matter,¹⁷ and a letter written to a special assistant attorney general charging the judge in a pending matter with bias,¹⁸ have all been held to be contempt within the meaning of the statute, even though the offense in each case originated at a point geographically removed from the court. On the other hand, in cases involving a newspaper article about a pending matter,¹⁹ service of a writ of garnishment on a witness during a recess of court,²⁰ a letter to a litigant criticizing the procedure in a pending matter,²¹ sale of assets by a bankrupt,²² and wrongfully inducing a trustee in bankruptcy to pay out money,²³ the language of the statute was construed to deprive the court of jurisdiction over such distant misconduct.

Oddly enough each of these decisions, including the principal case—no matter which of the views it upholds—seems to reach its conclusion by reasoning along one or both of two lines. They seek to interpret the history of the statute and to determine the legislative intent therefrom; or they attempt to construe the words "so near thereto".

The court in the instant case, speaking through Mr. Justice Douglas, said: "Congress was responding to grievances arising out of the exercise of judicial power as dramatized by the Peck proceedings. . . . The two sections of the Act of March 2, 1831 . . . clearly indicate that the category of criminal cases which could be tried without a jury was narrowly confined".²⁴

¹¹ Savin, Petitioner, 131 U. S. 267, 9 Sup. Ct. 703, 33 L. ed. 150 (1889).

¹² Cuddy, Petitioner, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. ed. 150 (1889).

¹³ United States v. Shipp, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. ed. 319 (1906).

¹⁴ *In re Brule*, 71 Fed. 943 (D. Nev., 1895).

¹⁵ United States v. Zavelo, 177 Fed. 536 (C. C. N. D. Ala., 1910).

¹⁶ Kirk v. United States, 192 Fed. 273 (C. C. A. 9th, 1911).

¹⁷ *In re Independent Publishing Co.*, 240 Fed. 849, (C. C. A. 9th, 1917).

¹⁸ Froelich v. United States, 33 F. (2d) 660 (C. C. A. 8th, 1929).

¹⁹ *Ex parte Poulson*, 19 Fed. Cas. 1205, No. 11,350 (C. C. E. D. Pa., 1835) (the first case decided construing the Act of 1831); *Morse v. Montana Ore Purchasing Co.*, 105 Fed. 337 (C. C. D. Mont., 1900).

²⁰ *Ex parte Schulenberg*, 25 Fed. 211 (C. C. E. D. Mich., 1885).

²¹ Hillman v. Insurance Co., 79 Fed. 749 (C. C. D. Kan., 1897).

²² *In re Probst*, 205 Fed. 512 (C. C. A. 2nd, 1913).

²³ Morgan v. United States, 95 F. (2d) 830 (C. C. A. 8th, 1938).

²⁴ Nye v. United States, 61 Sup. Ct. 810, 815, 85 L. ed. Adv. Ops. 733 (1941); see, 1 KENT'S COMMENTARIES (11th ed. 1867) 301, n.; Frankfurter and Landis, *Power of Congress Over Procedure in "Inferior" Federal Courts—A Study in the Separation of Powers* (1924) 37 HARV. L. REV. 1010, 1031; Nelles and King, *Contempt By Publication* (1928) 28 CALIF. L. REV. 525.

The opposite view is typified by the statement of District Judge Jones:²⁵ "It is doubtful, to say the least of it, whether any of the eminent lawyers in the Congress which adopted this provision . . . had in mind anything more than to prevent the punishment, as for contempt, of the exercise of the right of free speech and liberty of the press in criticizing and denouncing judicial acts".²⁶

When judicial interpretations of the clause "misbehavior . . . in their presence, or so near thereto as to obstruct the administration of justice" are looked at, an equally wide divergence of attitudes is seen. Mr. Justice Douglas, in the instant case, said: "The question is, whether the words 'so near thereto' have a geographical or causal connotation. Read in their context, and in the light of their ordinary meaning, we conclude that they are to be construed as geographical terms".²⁷ But Mr. Chief Justice White, in the *Toledo Newspaper* case,²⁸ said, "The test, therefore, is the character of the act done, and its direct tendency to prevent and obstruct the discharge of judicial duty".²⁹

It is submitted, however, that in the instant decision the court need not have responded to either of these arguments. The coerced letter seeking dismissal of the action was received by the court in the middle district. It was the fulfillment of a chain of acts, all intended to obstruct the administration of justice. No part of the operation would have been effective unless the letter had been received by the court. The Supreme Court might have applied the doctrine of constructive presence as enunciated in the criminal law; *i.e.*, that an act is committed at the place where it takes effect.³⁰ The proceedings in question were for criminal and not civil contempt.

In the light of this unsettled state of the law, the court seems to have based its decision on grounds of policy. It was apparently moved by the thought that it would be more compatible with democratic insti-

²⁵ *Ex parte* McLeod, 120 Fed. 130, 137 (D. Ala. 1903).

²⁶ *United States v. Huff*, 206 Fed. 700 (S. D. Ga., 1913); *Kirk v. United States*, 193 Fed. 273 (C. C. A. 9th, 1911); *United States v. Anonymous*, 21 Fed. 61 (C. C. W. D. Tenn., 1884).

²⁷ *Nye v. United States*, 61 Sup. Ct. 810, 815, 85 L. ed. Adv. Ops. 733 (1941). See, *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 422, 38 Sup. Ct. 560, 565, 62 L. ed. 1186 (1918) (Mr. Justice Holmes dissenting); *Cuyler v. Atlantic & N. C. Ry.*, 131 Fed. 95 (C. C. E. D. N. C., 1904). See *supra* notes 7, 8, 9, 19, 20, 21, 22, 23.

²⁸ *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 38 Sup. Ct. 560, 62 L. ed. 1186 (1918).

²⁹ *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 419, 38 Sup. Ct. 560, 564, 62 L. ed. 1186 (1918); *United States v. Craig*, 206 Fed. 230 (S. D. N. Y., 1920); *McCaulley v. United States*, 25 App. D. C. 404 (1905). See *supra* notes 9, 10, 11, 12, 13, 14, 15, 16, 17, 18.

³⁰ *In re* Independent Publishing Co., 240 Fed. 849 (C. C. A. 9th, 1917); *Keeney v. United States*, 17 F. (2d) 976 (C. C. A. 7th, 1927); *accord*, *Snow v. Hawkes*, 183 N. C. 365, 111 S. E. 621 (1922). This point was raised in the Brief for the United States, p. 40, *Nye v. United States*, 61 Sup. Ct. 810, 85 L. ed. Adv. Ops. 733 (1941).

tutions to insure to the accused in such cases jury trial and the other protections afforded by criminal prosecution. Thus, the court says: "If petitioners can be punished for their misconduct, it must be under the criminal code, where they will be afforded the normal safeguards surrounding criminal prosecutions".³¹

There are, however, countervailing considerations, as pointed out by Mr. Justice Stone (now Mr. Chief Justice Stone) in the dissent.³² The criminal process is slow and cumbersome and likely to be defeated by sundry interferences. The danger of judicial tyranny in summary contempt proceedings is less than the danger that a weakened judiciary will be unable to protect its litigants against outside obstructions of justice. It is therefore urged that Congress amend the statute. Unless this action is taken such offenses as trial by newspaper of pending causes and non-corrupt influencing of witnesses and jurors will, under the present ruling, escape punishment altogether, either as contempts or as crimes.

FRED R. EDNEY, JR.

Elections—Federal Laws Applied to Primaries

Defendants, election officials, were charged with having altered, falsely counted and certified the returns of ballots cast in a Democratic primary election in Louisiana. The primary was held for nomination of a candidate for Representative in Congress. By Louisiana law no candidate unsuccessful in the primary could receive any votes in the general election, "write-in" votes for such persons being disqualified as having been cast for an ineligible candidate.¹ Because of these laws and the one party character of Louisiana politics, the outcome of the Democratic primary has always been tantamount to election. Indictments were secured under statutes providing penalties for injury or oppression of any citizen in the free exercise of rights secured to him by the Constitution or laws of the United States. *Held*: (1) Congress has the power to control fraud in such a primary election, and (2) it had exercised that power through Sections 19² and 20³ of the Criminal Code, under which the indictments were secured.⁴

³¹ *Nye v. United States*, 61 Sup. Ct. 810, 817, 85 L. ed. Adv. Ops. 733.

³² *See, Nye v. United States*, 61 Sup. Ct. 810, 818, 85 L. ed. Adv. Ops. 733 (1941) (Mr. Justice Stone dissenting: "The question is important, for if conduct such as the record discloses may not be dealt with summarily the only recourse of a federal court for the protection of integrity of proceedings pending before it, from acts of intimidation and corruption outside the court room, is to await the indictment of the offender, with or without adjournment of the pending proceedings as the exigencies of the case might require").

¹ *Serpas v. Trebucq*, (La. app.) 1 So. (2d) 346 (1941); rehearing denied with opinion, 1 So. (2d) 705 (1941).

² R. S. §5508; c. 321, §19, 35 Stat. 1092; 18 U. S. C. A. §51 (1927).

³ R. S. §5510; c. 321, §20, 35 Stat. 1092; 18 U. S. C. A. §52 (1927).

⁴ *United States v. Classic*, 61 Sup. Ct. 1031, 85 L. ed. Adv. Ops. 867 (1941).