RECENT DECISIONS

Decision Reported in Full

UNITED STATES SUPREME COURT

* * *

NYE, et al. v. UNITED STATES, et al.

U. S. 61 S. Ct. 810, Decided April 14, 1941.

Mr. Justice DOUGLAS delivered the opinion of the Court.

Petitioners were adjudged guilty of contempt under Sec. 268 of the Judicial Code, 36 Stat. 1163, 28 U. S. C. Sec. 385, 28 U. S. C. A. Sec. 385, for their efforts to obtain a dismissal of a suit brought by one Elmore in the Federal District Court for the Middle District of North Carolina. Elmore, administrator of the estate of his son, brought that action, in forma pauperis, against one Council and Bernard, partners, trading as B. C. Remedy Co., and alleged that his son died as a result of the use of a medicine, known as B C and manufactured and sold by them. The court appointed William B. Guthrie to represent Elmore. Defendants filed answer April 29, 1939. On April 19, 1939, Elmore notified the District Judge and his lawyer by letters that he desired to have the case dismissed. The substance of the episode involving the improper conduct of petitioners was found as follows:

Elmore is illiterate, and feeble in mind and body. Petitioners, through the use of liquor and persuasion, induced Elmore to seek a termination of the action. Nye directed his own lawyer to prepare the letters to the District Judge and Guthrie and to prepare a final administration account to be filed in the local probate court. Nye took Elmore to the probate court, had him discharged as administrator, and paid the clerk a fee of $1. He then took Elmore to the postoffice, registered the letters and paid the postage. Elmore, however, was not promised or paid anything. These events took place more than 100 miles from Durham, North Carolina, where the District Court was located.

On September 30, 1939, Guthrie filed a motion asking for an order requiring Nye to show cause "why he should not be attached and held as for contempt of this Court." The court issued a show cause order to Nye and Mayers who filed their answers. There was a hearing. Evidence was introduced and argument was heard on motions to dismiss. The court found that the writing of the letters and the filing of the final account were procured by Nye "for the express and definite purpose of preventing the prosecution of the civil action in the federal court and with intent to obstruct and to prevent the trial of the case on its merits"; and that the conduct of Nye and Mayers "did obstruct and impede the due administration of justice in this cause; that the conduct has caused a long delay, several hearings and enormous expense." It accordingly held that their conduct was "misbehavior so near to the

presence of the court as to obstruct the administration of justice" and adjudged each guilty of contempt. It ordered Nye to pay the costs of the contempt proceedings, including $500 to Guthrie, and a fine of $500; and it ordered Mayers to pay a fine of $250. The District Court filed its finding of facts and judgment on February 8, 1940. On March 15, 1940, petitioners filed a notice of appeal from the judgment. The Circuit Court of Appeals affirmed that judgment. 4 Cr., 113 F. 2d 1006. We granted the petition for certiorari because the interpretation of the power of the federal courts under Sec. 268 of the Judicial Code to punish contempts raised matters of grave importance.

We are met at the threshold with a question as to the jurisdiction of the Circuit Court of Appeals over the appeal. The government concedes that if this was a case of civil contempt, the notice of appeal was effective under Rule 73 of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c. It argues, however, that the contempt was criminal—in which case the appeal was not timely if the Criminal Appeals Rules govern, and not made in the proper form if Sec. 8 (c) of the Act of February 13, 1925, 43 Stat. 936, 940, 45 Stat. 54, U. S. C. Sec. 230, 28 U. S. C. A. Sec. 230, is applicable.

We do not think this was a case of civil contempt. We recently stated in McCrone v. United States, 307 U. S. 61, 64, 59 Ct. 685, 686, 83 L. Ed. 1108, "While particular acts do not always readily lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purpose of the complainant, and is not intended as a deterrent to offenses against the public." The facts of this case do not meet that standard. While proceedings in the District Court were entitled in Elmore's action and and the United States was not a party until the appeal, those circumstances though relevant (Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 445, 446, 31 S. Ct. 492, 499, 500, 55 L. Ed. 797, 34 L. R. A., N. S., 874) are not conclusive as to the nature of the contempt. The fact that Nye was ordered to pay the costs of the proceeding, including $500 to Guthrie, is also not decisive. As Mr. Justice Brandeis stated in Union Tool Co. v. Wilson, 259 U. S. 107, 110, 42 S. Ct. 427, 428, 66 L. Ed. 848, "Where a fine is imposed, partly as compensation to the complainant and partly as punishment, the criminal feature of the order is dominant and fixes its character for purposes of review." The order imposes unconditional fines payable to the United States. It wards no relief to a private suitor. The prayer for relief and the acts charged carry the criminal hallmark. Cf. Gompers v. Buck's Stove & Range Co., supra, 221 U. S. at page 449, 31 S. Ct. at page 501, 55 L. Ed. 797, 34 L. R. A., N. S., 874. They clearly do not reveal any purpose to punish for contempt "in aid of the adjudication sought in the principal suit". Lamb v. Cramer, 285 U. S. 217, 220, 52 S. Ct. 315, 316, 76 L. Ed. 715. When there is added the "significant" fact (Bessette v. W. B. Conkey Co., 194 U. S. 324, 329, 24 S. Ct. 665, 667, 48 L. Ed. 997) that Nye and Mayers were strangers, not parties, to Elmore's action, there can be no reasonable doubt that the punitive character of the order was dominant.

We come then to the question of the jurisdiction of the Circuit Court of Appeals. We disagree with the government in its contention that the appeal in this case was governed by the Criminal Appeals Rules. Those rules were promulgated pursuant to the provisions of the Act of March 8, 1934, 48 Stat. 399, 28 U. S. C.

Sec. 723a, 18 U. S. C. A. Sec. 688, which provided, inter alia, that this Court should have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases." The rules were adopted "as the Rules of Practice and Procedure in all proceedings after plea of guilty, verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, in criminal cases." 292 U. S. 661, 54 S. Ct. xxxvii. In this case there was no plea of guilty, there was no verdict of guilt by a jury, and there was no finding of guilty by the court where a jury was waived. To be sure, the rules and the Act are applicable "in criminal cases". But we do not agree with the government that the qualifying language of the rules designates merely the stage of the proceedings "in criminal cases" when the rules become applicable. It is our view that the rules describe the kinds of cases to which they are to be applied. The Act of March 8, 1934 amended the Act of February 24, 1933, 47 Stat. 904, which gave this Court rule-making power "with respect to any or all proceedings after verdict in criminal cases." The legislative history makes it abundantly clear that the amendment in 1934, so far as material here, was made because "it would not seem to be desirable that there should be different times and manner of procedure in cases of appeal where there is a verdict of a jury as distinguished from cases in which there is a finding of guilt by the court on the waiver of a jury." H. Rep. No. 858, 73d Cong., 2d Sess., p. 1; S. Rep. No. 257, 73d Cong., 2nd Sess., p. 1. In light of this history and the language of the order promulgating the rules we conclude that the categories of cases embraced in the rules cannot be expanded by interpretation to include this type of case.

That conclusion means that this appeal was governed by Sec. 8 (c) of the Act of February 13, 1925. The court is equally divided in opinion as to whether the Circuit Court of Appeals, in absence of an application for allowance of the appeal, had the power to decide the case on the merits. Hence the action of that court in taking jurisdiction over the appeal is affirmed.

We come then to the merits.

The question is whether the conduct of petitioners constituted "misbehavior * * so near" the presence of the court "as to obstruct the administration of justice" within the meaning of Sec. 268 of the Judicial Code. That section derives from the Act of March 2, 1831, 4 Stat. 73, 83, provided that courts of the United States "shall have power * * * to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." Abuses arose, culminating in impeachment proceedings against James H. Peck, a federal district judge, who had imprisoned and disbarred one Lawless for publishing a criticism of one of his opinions in a case which was on appeal. Judge Peck was acquitted. But the history of that episode makes abundantly clear that it served as the occasion for a drastic delimitation by Congress of the broad undefined power of the inferior federal courts under the Act of 1789.

The day after Judge Peck's acquittal Congress took steps to change the Act of 1789. The House directed its Committee on the Judiciary "to inquire into the expediency of defining by statute all offences which may be punished as contempts of the courts of the United States, and also to limit the punishment for the same." Nine days later James Bu-

chanan brought in a bill which became the Act of March 2, 1831. He had charge of the prosecution of Judge Peck and during the trial had told the Senate: "I will venture to predict, that whatever may be the decision of the Senate upon this impeachment, Judge Peck has been the last man in the United States to exercise this power, and Mr. Lawless has been its last victim." The Act of March 2, 1831, "declaratory of the law concerning contempts of court," contained two sections, the first of which provided:

"That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts."

Sec. 2 of that Act, from which Sec. 135 of the Criminal Code, 35 Stat. 1113, 18 U. S. C. Sec. 241, 18 U. S. C. A. Sec. 241, derives, provided:

"That if any person or persons shall, corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officers, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavor to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offense."

In 1918 this Court in Toledo Newspaper Co. v United States, 247 U. S. 402, 418, 419 38 S. Ct. 560, 563, 564, 62 L. Ed. 1186, stated that "there can be no doubt" that the first section of the Act of March 2, 1831 "conferred no power not already granted and imposed no limitations not already existing"; and that it was "intended to prevent the danger by reminiscence of what had gone before of attempts to exercise a power not possessed which * * * had been sometime done in the exercise of legislative power." The inaccuracy of that historic observation has been plainly demonstrated. Frankfurter & Landis, Power of Congress Over Procedure in Criminal Contempts in "Interior" Federal Courts —A Study in Separation of Powers, 37 Harv. L. Rev. 1010. Congress was responding to grievances arising out of the exercise of judicial power as dramatized by the Peck impeachment proceedings. Congress was intent on curtailing that power. The two sections of the Act of March 2, 1831 when read together, as they must be, clearly indicate that the category of criminal cases which could be tried without a jury was narrowly confined. That the previously undefined power of the courts was substantially curtailed by that Act was early recognized by lower federal courts. United States v. Holmes, 26 Fed. Cas. 360, at page 363, No. 15, 383; Ex parte Poulson, 19 Fed. Cas. 1205, No. 11,350; United States v. New Bedford Bridge, 27 Fed. Cas. 91, at page 104, No. 15,867; United States v. Seeley, Fed. Cas. No. 16, 248a; United States v. Emerson, Fed. Cas. No. 15,050, 4 Cranch, C. C., 188; Kent's Commentaries (3rd ed. 1836) pp. 300, 301. And when

the Act came before this Court in Exparte Robinson, 19 Wall. 505, 511, 22 L. Ed. 205, Mr. Justice Field, speaking for the Court, acknowledged that it had limited the power of those courts. And see Ex parte Bradley, 7 Wall. 364, 374, 19 L. Ed. 214. So far as the decisions of this Court are concerned, that view persisted to the time when Toledo Newspaper Co. v. United States, supra, was decided. See Ex parte Wall, 107 U. S. 265, 2 S. Ct. 569, 27 L. Ed. 552; Ex parte Savin, Petitioner, 131 U. S. 267, 276, 9 S. Ct. 699, 701, 33 L. Ed. 150; Ex parte Cuddy, Petitioner, 131 U. S. 280, 285, 9 S. Ct. 703, 704, 33 L. Ed. 154; Eilenbecker v. District Court, 134 U. S. 31, 38, 10 S. Ct. 424, 426, 33 L. Ed. 801.

Mindful of that history, we come to the construction of Sec. 268 of the Judicial Code in light of the specific facts of this case. The question is whether the words "so near thereto" have a geographical or a 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. In Ex parte Robinson, supra, 19 Wall. at page 511, 22 L. Ed. 205, it was said that as a result of those provisions the power to punish for contempts "can only be exercised to insure order and decorum" in court. "Misbehavior of any person in their presence" plainly falls in that category. In re Terry, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405. And in Ex parte Savin, Petitioner, supra, it was also held to include attempted bribes of a witness, one in the jury room and within a few feet of the court room and one in the hallway immediately ajoining the court room. See Cooke v. United States, 267 U. S. 517, 45 S. Ct. 390, 69 L. Ed. 767. The phrase "so near thereto as to obstruct the administration of justice" likewise connotes that the misbehavior must be in the vicinity of the court. Nelles & King, Contempt by Publication in the United States, 28 Col. L. Rev. 525, 530. It is not sufficient that the misbehavior charged has some direct relation to the word of the court. "Near" in this context, juxtaposed to "presence," suggests physical proximity not relevancy. In fact, if the words "so near thereto" are not read in the geographical sense, they come close, as the government admits, to being surplusage. There may, of course, be many types of "misbehavior" which will "obstruct the administration of justice" but which may not be "in" or "near" to the "presence" of the court. Broad categories of such acts, however, were expressly recognized in Sec. 2 of the Act of March 2, 1831 and subsequently in Sec. 135 of the Criminal Code. It has been held that an act of misbehavior though covered by the latter provisions may also be a contempt if committed in the "presence" of the Court. Ex parte Savin, Petitioner, supra. And see Sinclair v. United States, 279 U. S. 749, 49 S. Ct. 471, 73 L. Ed. 938, 63 A. L. R. 1258. Yet in view of the history of those provisions, meticulous regard for those separate categories of offenses must be had, so that the instances where there is no right to jury trial will be narrowly restricted. If "so near thereto" be given a causal meaning, then Sec. 268 by the process of judicial construction will have regained much of the generality which Congress in 1831 emphatically intended to remove. See Thomas, Problems of Contempt of Court (1934) c. VII. If that phrase be not restricted to acts in the vicinity of the court but be allowed to embrace acts which have a "reasonable tendency" to "obstruct the administration of justice" (Toledo Newspaper Co. v. United States, supra, 247 U. S. at page 421,

38 S. Ct. at page 564, 62 L. Ed. 1186) then the conditions which Congress sought to alleviate in 1831 have largely been restored. See Fox, The History of Contempt of Court (1927) c. IX. The result will be that the offenses which Congress designated as true crimes under Sec. 2 of the Act of March 2, 1831 will be absorbed as contempts wherever they may take place. We cannot by the process of interpretation obliterate the distinctions which Congress drew.

We are dealing here only with a problem of statutory construction, not with a question as to the constitutionally permissible scope of the contempt power. But that is no reason why we should adhere to the construction adopted by Toledo Newspaper Co. v. United States, supra, and leave to Congress the task of delimiting the statute as thus interpreted. Though the statute in question has been on the books for over a century, it has not received during its long life the broad interpretation which that decision gave it. Rather, that broad construction is relatively recent. So far as decisions of this Court are concerned, the statute did not receive any such expanded interpretation until Toledo Newspaper Co. v. United States, supra, was decided in 1918. The decisions of this Court prior to 1918 plainly recognized, as we have noted, that Congress through the Act of March 2, 1831 had imposed a limitation on the power to punish for contempts—a view consistent with the holdings of the lower federal courts during the years immediately following the enactment of the state. The early view was best expressed in Ex parte Poulson, supra, decided in 1835. In that case it was held that the Act of March 2, 1831 gave the court no power to punish a newspaper publisher for contempt for publishing an "offensive" article relative to a pending case. It was held that the first section of the Act "alludes to that kind of misbehavior which is calculated to disturb the order of the court, such as noise, tumultuous or disorderly behavior, either in or so near to it as to prevent its proceeding in the orderly dispatch of its business." 19 Fed. Cas. at page 1208. That was a plain recognition that the words "so near thereto" connoted physical proximity. And prior to 1918 the decisions of this Court did not depart from that theory, however they may have expanded the earlier notions of "misbehavior." To be sure, the lower federal courts in the intervening years had expressed a contrariety of views on the meaning of the statute and some were giving it an expanded scope which was later approved in Toledo Newspaper Co. v. United States, supra. But it is significant that not until after the turn of this century did the first line of fracture appear suggesting that the statute authorized summary punishment for publication. Thus the legislative history of this statute and its career demonstrate that this case presents the question of correcting a plain misreading of language and history so as to give full respects to the meaning which Congress unmistakably intended the statute to have. Its legislative history, its interpretation prior to 1918, the character and nature of the contempt proceedings admonish us not to give renewed vitality to the doctrine of Toledo Newspaper Co. v. United States, supra, but to recognize the substantial legislative limitations on the contempt power which were occasioned by the Judge Peck episode. And they necessitate an adherence to the original construction of the statute so that, unless its requirements are clearly satisfied, an offense will be dealt with as the law deals with the run of illegal acts. Cf. Mr. Justice

Holmes dissenting in Toledo Newspaper Co. v. United States, supra, 247 U. S. at pages 422 et seq., 38 S. Ct. at page 565, 62 L. Ed. 1186.

The conduct of petitioners (if the facts found are taken to be true) was highly reprehensible. It is of a kind which corrupts the judicial process and impedes the administration of justice. But the fact that it is not reachable through the summary procedure of contempt does not mean that such conduct can proceed with impunity. Sec. 135 of the Criminal Code, a descendant of Sec. 2, of the Act of March 2, 1831, embraces a broad category of offenses. And certainly it cannot be denied that the conduct here in question comes far closer to the family of offenses there described than it does to the more limited classes of contempts described in Sec. 268 of the Judicial Code. The acts complained of took place miles from the District Court. The evil influence which affected Elmore was in no possible sense in the "presence" of the court or "near thereto." So far as the crime of contempt is concerned, the fact that the judge received Elmore's letter is inconsequential.

We may concede that there was an obstruction in the administration of justice, as evidenced by the long delay and large expense which the reprehensible conduct of petitioners entailed. And it would follow that under the "reasonable tendency" rule of Toledo Newspaper Co. v. United States, supra, the court below did not err in affirming the judgment of conviction. But for the reasons stated that decision must be overruled. The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the court in any normal meaning of the term. It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business. Cf. Ex parte Savin, Petitioner, supra, 131 U. S. at page 278, 9 S. Ct. at page 702, 33 L. Ed. 150. Hence, it was not embraced within Sec. 268 of the Judicial Code. 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. Accordingly, the judgment below is reversed.

Mr. Justice STONE.

The court below did not pass on the question, mooted here, whether it acquired jurisdiction under the appeal provisions of the applicable section, 8 (c) of the Jurisdictional Act of February 13, 1925, 28 U. S. C. A. Sec. 230. Only four members of this Court are of opinion that it did. Assuming for present purposes that it had jurisdiction to decide the merits, I think its decision was right and that the judgment below should be affirmed.

We are concerned here only with the meaning and application of an act of Congress which has stood unamended on the statute books for one hundred and ten years. It gives statutory recognition to the power of the federal courts to punish summarily for contempt and provides that that power "shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts or so near thereto as to obstruct the administration of justice."

The issue is not whether this statute has curtailed an authority which federal courts exercised before its enactment. Concededly it has. The only question before us is whether it has so limited that authority as to preclude summary punishment of the contemptuous action of petitioner

which it is not denied, is "misbehavior" although not in the presence of the court, and which it is admitted seriously obstructed the administration of justice in a cause pending in the court. The question is important, for if conduct such as this record discloses may not be dealt with summarily the only recourse of a federal court for the protection of the integrity of proceedings pending before it, from acts of corruption and intimidation outside the court room, is to await the indictment of the offenders, with or without adjournment of the pending proceedings as the exigencies of the case may require.

It is not denied that the distance of the present contemptuous action from the court in miles did not lessen its injurious effect, and in that sense it was "near" enough to obstruct the administration of justice. The opinion of the Court supports its conclusion on the ground that "near" means only geographical nearness and so implicitly holds that no contempt is summarily punishable unless it is either in the presence of the court or is some kind of physical interference with or disturbance of as good order, so that the nearness to the court of the contemptuous act has an effect in obstructing justice which it would not have if it took place at a more distant point. From all this it seems to follow that the surreptitious tampering with witnesses, jurors or parties in the presence of the court, although unknown to it, would be summarily punishable because in its presence, but that if it took place outside the court room or while the witness, juror or party was on his way to attend court it would not be punishable because geographical nearness is not an element in making the contemptuous action an obstruction to justice.

These contentions assume that "so near thereto" can only refer to geographical position and they ignore the entire history of the judicial interpretation of the statute. "Near" may connote proximity in causal relationship as well as proximity in space, and under this statute as the opinion seems to recognize even the proximity to the court, in space, of the contemptuous action, is of significance only in its causal relationship to the obstructions to justice which result from disorder or public disturbances. This Court has hitherto, without a dissenting voice, regarded the phrase "so near thereto" as connoting and including those contempts which are the proximate cause of actual obstruction to the administration of justice, whether because of their physical nearness to the court or because of a chain of causation whose operation in producing the obstruction depends on other than geographical relationships to the court. See Ex parte Savin, Petitioner, 131 U. S. 267, 9 S. Ct. 699, 33 L. Ed. 150; Ex parte Cuddy, Petitioner, 131 U. S. 280, 9 S. Ct. 703, 33 L. Ed. 154; Toledo Newspaper Company v. United States, 247 U. S. 402, 38 S. Ct. 560, 581, 62 L. Ed. 1186; Sinclair v. United States, 279 U. S. 749, 764, 765, 49 S. Ct. 471, 476, 73 L. Ed. 938, 63 A. L. R. 1258; Craig v. Hecht, 263 U. S. 255, 44 S. Ct. 103, 68 L. Ed. 293. Cf. McCann v. New York Stock Exchange, 2 Cir., 80 F. 2nd 211, 213. Contempts which obstruct justice because of their effect on the good order and tranquility of the court must be in the presence of the court or geographically near enough to have that effect. Contempts which are surreptitious obstructions to justice, through tampering with witnesses, jurors and the like, must be proximately related to the condemned effect. We are pointed to no legislative history which militates against such a construction of the statute.

In the Savin, the Craig, and the

Sinclair cases, as well as in the Toledo case, the contempts were of this latter kind. The contempt held summarily punishable by this Court in the Savin case, decided sixty years ago, was the attempted bribery of a witness at a place in the court house but outside the courtroom, without any disorder or disturbance of the court. The contemptuous acts in the other cases took place at points distant from the court in the city where it sat. In all, the injurious effect on the administration of justice was unrelated to the distance from the court. In holding that they were contempts within the summary jurisdiction of the court this Court definitely decided that "so near thereto" is not confined to a spatial application where the evil effect of the alleged contempt does not depend upon its physical nearness to the court.

The Savin and Sinclair cases were decided by a unanimous court. The dissenting judges in the Toledo and Craig cases, in which the acts held cases, in which the acts held to be contemptuous were the publication, at a distance from the court, of comments derogatory to the judge, made no contention that the phrase imposed a geographical limitation on the power of the court. Their position was that the particular contemptuous acts charged did not in fact have the effect of obstructing justice, a contention which cannot be urged here. In the Toledo case Justice Holmes said, 247 U. S. at page 423, 38 S. Ct. at page 565, 62 L. Ed. 1186; "I think that 'so near as to obstruct' means so near as actually to obstruct—and not merely near enough to threaten a possible obtruction." And in the Craig case, after commenting on the fact that no cause was pending before the court, he said, 263 U. S. at page 281, 44 S. Ct. at page 108, 68 L. Ed. 293; "Suppose the petitioner falsely and unjustly charged the judge with having excluded him from knowledge of the facts, how can it be pretended that the charge obstructed the administration of justice . . .?" Complete agreement with the dissents in these cases neither requires the Court's decision here nor lends it any support.

I do not understand my brethren to maintain that the secret bribery or intimidation of a witness in the court room may not be summarily punished. Cf. Ex parte Savin, supra; Sinclair v. United States, supra. If so it is only because of the effect of the contemptuous act in obstructing justice which is precisely the same if the bribery or intimidation took place outside the court house. If it may be so punished I can hardly believe that Congress, by use of the phrase "so near thereto," intended to lay down a different rule if the contemptuous acts took place across the corridor, the street, in another block, or a mile away.

If the point were more doubtful than it seems to me, I should still think that we should leave undisturbed a construction of the statute so long applied and not hitherto doubted in this Court. We recently declined to consider the contention that Sherman Act can never apply to a labor union, because of long standing decisions of this Court to the contrary, a construction which Congress had not seen fit to change. See Apex Hosiery Co. v. Leader, 310 U. S. 469, 487, 488, 60 S. Ct. 982, 988, 989, 84 L. Ed. 1311, 128 A. L. R. 1044.

In view of our earlier decisions and of the serious consequences to the administration of justice if courts are powerless to stop summarily, obstruc-

tions like the present, I think the responsibility of departing from the long accepted construction of this statute should be left to the legislative branch of the Government to which it rightfully belongs.

The CHIEF JUSTICE and Mr. Justice Roberts concur in this opinion.

Speaking Of Lawyers

THE PRACTICE OF LAW has always appealed to the spectacular in life. It has been the gateway to politics and public life, while science furnishes some sort of a key to the mysteries of the universe. A sight of the courtroom in full action does not compare with a view of the heavens on a clear night, or the revelations of the microscope when turned in a certain direction, and focused just right. The future is with science and not with the law. Very rapidly the business of the lawyer is being absorbed by other lines which save both time and money and get easier and surer and better results.

In my opinion, lawyers have always had too much to do with public affairs. Legislative bodies are filled with them. Their debates are long and prosaic; they never take a direct line when another can be found. Business men and physicians and scientists are much more practical; no business could be conducted on the lines of a court hearing. Lawyers work as though eternity is at their disposal and time would stand still to listen to their palaver.—CLARENCE DARROW, *The Story of My Life.*

Digest of Current Cases

CIVIL PROCEDURE — *Mercado and Sandico, petitioners, vs. Ocampo, Judge of the CFI of Pampanga, Baluyot and Rivera, Respondents, G. R. No. 47738, June 13, 1941.*—In the testate proceedings of the deceased Atilano Mercado, Special Proceeding No. 6659 of the C.F.I. of Pampanga, the petitioners presented a motion in conformity with Article 709 of the code of Civil Procedure asking that Baluyot and Rivera be ordered to appear before the court to make declarations regarding certain property allegedly fraudulently obtained by them from the deceased. The motion was granted; but the respondents impugned the jurisdiction of the court on the grounds that the facts alleged do not justify the remedy provided for by Art. 709, Code of Civil Procedure and that the special administrator had already filed a civil action for the recovery of the same property. These objections were overruled by Judge Bautista whereupon the respondents filed a motion for reconsideration which was granted by Judge Ocampo who in his order of July 2, 1940 annulled the order of Judge Bautista and declared that the respondents were not bound to make the declarations as required by Art. 709, C.C.P. This is now a petition for certiorari presented by the petitioners, who cite the case of Orais vs. Escaño (14 Phil. 211) wherein it was held that judges with concurrent jurisdiction can not annul orders or decisions of judges, with the same concurrent jurisdiction unless new facts or conditions arise; and that as a general rule, a judge has no power to review the decisions of a judge with concurrent jurisdiction because in that case the only remedy is appeal. *Held*: The case of Orais vs. Escaño (14 Phil., 211) has been modified by the rulings in the cases of Nuñez vs. Low (19 Phil. 256) and Eleazar vs. Zandueta (48 Phil. 204) wherein it was held that a judge of the CFI has the power to modify or annul the decision of a judge with the same jurisdiction, without violating the principle of concurrent jurisdiction; and that the norm to be followed is that if the judge who penned the first decision had power to modify or annul, then the other judge who did modify or annul both had also the same power. The reason for this doctrine is that both judges acted in the same court and it is the same court that modified or annulled the order. The court does not now decide which order was correct; the only point decided in this case is that the respondent judge had the power to annul or modify the decision of Judge Bautista and that in so doing he did not abuse the discretion conferred upon him by law, because the allegations in the petition were not sufficient. Petition denied. (Per curiam. Avanceña, C. J., Diaz, Laurel, Moran, Horrilleno, J. J., concurring.)—*Briefed by* ALINA MORALES.

CRIMINAL LAW (Arbitrary Detention)—*People of the Philippines, Plaintiff and Appellee vs. Agapito Corpus, Defendant and Appellant. CA-G.R. No. 6005, January 9, 1941.*—The offended party was convicted of disobedience to authority and sentenced accordingly. Due to the inability of the accused chief of police to bring the offended party to court to hear his sentence, the justice of

the peace delivered the decision duly signed to said accused with verbal instructions to have it read to the offended party and to detain him. The justice of the peace left without signing the commitment order. The accused obeyed the verbal order and locked the offended party in jail. Thereafter, the accused sent one of his policemen to the residence of the justice of the peace with a prepared copy of the commitment order for his signature, but the latter would not be found. For placing the offended party in jail without the corresponding commitment order, the chief of police was charged with arbitrary detention. *Held*: The accused did nothing more than comply with his duty and obey the verbal order given to him by the justice of the peace. The procedure followed by him is perfectly legal. Anyone familiar with the procedure and practice followed both in the Court of First Instance and in the justice of the peace courts that the order of commitment is usually signed and sent by the judge or justice of the peace hours or even days, after the person of the accused is actually received in jail. The accused has committed no offense either criminal or administrative. (Per Montemayor, J.; Briones, Melencio, Torres, J. J., concurring.)—*Briefed by* GREGORIO D. BEJASA.

CRIMINAL LAW (Prescription) —*The People of the Philippines, Plaintiff and Appellant vs. Dionisio Maneja, Defendant and Appellee, G. R. No. 47684, June 10, 1941.*—The sole question raised in this appeal is whether the period of prescription for the offense of false testimony which, in the instant case, is five years (Art. 180, No. 4, in relation to Art. 90, R.P.C.), should commence from the time the appellee adduced the supposed false testimony in criminal case No. 1872 on December 16, 1933, as the lower court held, or, from the time the decision of the Court of Appeals in the aforesaid basic case became final in December, 1938, as the prosecution contends. *Held*: The theory of the prosecution is correct. The period of prescription shall commence to run from the day on which the crime is discovered by the offended party, the authorities or their agents, (Art. 91, R.P.C.) with regard to the crime of false testimony, considering that the penalties provided therefor in Article 180 of the Revised Penal Code are, in every case made to depend upon the conviction of the defendant in the principal case, the act of testifying falsely does not therefore constitute an actionable offense is finally decided. (Cf. U. S. vs. Opinion, 6 Phil. 662, 663; People vs. Marcos et al., G. R. No. 47388, Oct. 22, 1940.) And before an act becomes a punishable offense, it cannot possibly be discovered as such by the offended party, the authorities or their agents. If the period of prescription is to be computed from the date the supposed false testimony is given, it would be impossible to determine the length of such period in any particular case, depending, as it does depend, on the final outcome of the basic case. For instance, a witness testifies falsely against an accused who is charged with murder. If the accused is found guilty, the perjurer shall be sentenced to reclusion temporal (Art. 180, R.P.C.), which prescribes in 20 years. But if the accused is acquitted, the perjurer shall suffer a penalty of arresto mayor (Art. 180, idem), which prescribes in 5 years. If the perjurer, therefore, is to be prosecuted before final judgment in the basic case, it would be impossible to determine the period of prescription. Order of dismissal is reversed and case demanded for further proceedings.

(Per Moran, J.; Avanceña, C. J., Diaz, Laurel, Horrilleno, J. J., concurring)—*Briefed by* MAGDALENA S. LAPUS.

CRIMINAL LAW (Theft of Large Cattle).—*People of Philippines, Plaintiff and Appellee vs. Aurelio Bangay, Defendant and Appellant.*—Defendant is a herdsman of Hodges. One day, the overseer of the cattle ranch of Hodges, named Franca, inspected the ranch and discovered that one of the cows under the care of the defendant was missing. It was found later that the defendant had slaughtered the cow for a blow-out. This fact was testified to by one Bascaguin who took part in the blow-out and who was consequently charged together with Bangay. The accused sets up two defenses: (1) That the testimony of the defendant Bascoguin be not considered because it comes from a polluted source. (2) That there can be no theft because possession of the thing alleged to be lost was in the offender. *Held*: As to the first point, suffice it to say that the record fails to show that the co-defendant Boscaguin had been excluded from the information in order to serve as the prosecution's witness. Nor does it show that the fiscal gave him any promise of leniency or consideration if he testifies for the government. His testimony therefore should be considered like that of any other witness. As to the second point, we hold that a herdsman may be guilty of the crime of theft of large cattle notwithstanding the fact that he has physical possession of the animal, for the reason that the legal possession of the animal was in the owner and the possession held by the herdsman is merely physical. (Per Paras, Pres. J., Imperial and Hontiveros, J. J.) Judgment affirmed.—*Briefed by* CESAR B. LONDRES.

CRIMINAL LAW (Theft)—*People of the Philippines, Plaintiff-Appellee vs. Venancio Adorno y Ambel, Defendant-Appellant, CA-G.R. 7364, April 25, 1941.*—This is an appeal from a judgment of the Court of First Instance of Manila, convicting the defendant of the crime of robbery and sentencing him to the principal penalty of three years, six months and twenty-one days of prision correccional, to indemnify the offended party and to pay half the cost. On the night of June 12, 1940 the defendant herein broke the glass show-window of the Bombay Palace Bazar located at 609 Avenida Rizal, Manila and removed from the same forty watches of various makes valued at ₱627.50. The lower court in convicting the defendant took into consideration the aggravating circumstance of nightime and recidivism. *Held*: The offense committed by the accused is merely that of theft and not robbery, for the reason that although the show-window was broken the accused did not enter the same but merely introduced his hand through the broken glass in order to remove the watches from the show-window, and for the further reason that the show-window in question was outside the store. There is robbery with force upon things only when doors or windows are broken in order to enter a building to steal or when doors or wardrobes are broken inside a building. Here there is no entrance. (Per Montemayor, J.; Paras, Imperial, and Hontiveros, J.J., concurring.)—*Briefed by* MACARIO M. CRUZ.

CRIMINAL PROCEDURE (Jurisdiction of Justice of the Peace Courts)—*The People of the Philippines, Plaintiff-Appellant, vs. Patricio Caldito and Tomasa de Guzman, Defendants-Appellees. G. R. No. 47694, June 10, 1941.*—Prosecu-

ted in the Court of First Instance for a violation of the Usury Law, defendants moved to quash the information alleging that the case comes within the original jurisdiction of the Justice of the Peace Court. The motion was granted and the government appealed. The Solicitor-General contends that as Sec. 10 of the Usury Law, as amended by Act No. 2992, prescribes not only a fine of not less than ₱50 nor more than ₱200, or imprisonment for not less than ten days nor more than six months, or both, but also the return of the entire sum received as interest from the party aggrieved, and in case of non-payment to suffer subsidiary imprisonment at the rate of one day for every two pesos, the penalty thus provided by law is in excess of that which may be imposed by Justice of the Peace Courts, and, therefore, violations thereof come within the original jurisdiction of Courts of First Instance. *Held*: This contention is predicated upon the theory that the return of the sum received as usurious interest is not merely a civil indemnity but an additional penalty. But the ultimate result of such a theory is to render a person found guilty of collecting usurious interest liable to return twice the usurious interest collected, first in a criminal action, and again, in a civil case. The words "without prejudice to the proper civil action" appearing at the beginning of Sec. 10 of the Usury Law, can have no other meaning than that civil action lies only in proper cases, as where the offended party has reserved his right to institute it separately. (Rule 107, Sec. 1 [a], Rules of Court). But where there is no such reservation, and this is the situation contemplated in Sec. 10 of the Usury Law, then the civil action is deemed instituted with the criminal action, and the judgment, aside from imposing the penalty provided by law, may compel the guilty person to return the usurious interest to the offended party by way of civil indemnity. The return of the usurious interest is, therefore, a civil liability and is not a part of the penalty. True that subsidiary imprisonment is provided by law in case of nonpayment of the fine or the usurious interest. But such subsidiary imprisonment cannot be added to the maximum penalty fixed by law for jurisdictional purposes. Notwithstanding previous pronouncements to the contrary, the court now holds, that subsidiary imprisonment, like accessory penalties, is not essential in the determination of the criminal jurisdiction of a court. Order affirmed. (Per Moran, J.; Avanceña, C. J., Diaz, Laurel, Horrilleno, J. J., concurring).—*Briefed by* FERMIN R. MESINA.

EXECUTION (Property exempt from execution).—*Miguel Mabanza v. Domingo Espiritu and Rufina Sosa, C.A.-G.R. No. 678, May 10, 1941.* —Plaintiff bought a camarin and lot at an execution sale on July 25, 1934. Defendants failed to repurchase the property within one year so plaintiff obtained final deed of conveyance, August 17, 1935. Defendants refused to vacate the premises claiming it was exempt from execution under section 452, Code of Civil Procedure, as amended by Act 3862, the property being a homestead of less than ₱300 value. Plaintiff brings action to have himself declared owner of the property and to oust the defendants therefrom. *Held*: It was not shown that at the time of the levy nor during the execution sale, the defendants ever made such claim of exemption. Moreover, evidence shows that at the time of the levy and execution sale, the property could not be regarded as homestead of the de-

fendant for they did not live on it until later, in 1937, as admitted by them. Section 452, Code of Civil Procedure, as amended, refers to a homestead of the judgment debtor at the time of the levy and execution sale, and not afterwards. Furthermore, it appears that the defendants had some other property. Judgment affirmed with costs against defendant appellants. (Per Montemayor, J.; Paras, Pres. J., Imperial, and Hontiveros, JJ., concurring).—*Briefed by* SOCORRO TIRONA.

PLEADINGS AND PRACTICE (Execution)—*Sabino Aguilos, Petitioner vs. Conrado Barrios and Eleno Agujetas, Respondents, G. R. No. 47816, June 10, 1941.*—This is a petition for a writ of certiorari, challenging the validity of the order of execution of a judgment rendered against the petitioner herein Civil Case No. 10919. The said order of execution was issued pending the perfection of the petitioner's appeal and upon verbal motion of the prevailing party without notice to the petitioner herein. This petition was instituted under Rule 39 sec. 2 of the Rule of Courts which provides that "before the expiration of the time for appeal, execution may issue, in the discretion of the court, on motion of the prevailing party with notice to the adverse party, upon good reasons to be stated in the special order." Respondent judge contends that as the verbal motion of the prevailing party has been made of record, petitioner should have taken notice, as in fact he did take notice thereof; and, therefore, the requirement of the Rule has been complied with. *Held*: The requirement about notice to the adverse party which was not complied with in the instant case, is mandatory and is precisely an innovation introduced in the new rules to remove the doubt suggested in Gamy vs. Gutierrez David (48 Phil 768) and to restate the doctrine laid down in Monteverde vs. Jaranillo (60 Phil 297, 307). Furthermore according to Rule 26, sec. 2 "all motions shall be in writing except motions for continuance made in the presence of the adverse party or those made in the course of the hearing or trial." The verbal motion presented in this case is, therefore, insufficient and the fact that the party was present in court when the proceeding was had does not justify the omission of the written notice. Besides no special reasons are stated in the order of execution here challenged. The court therefore exceeded its jurisdiction in issuing the order of execution complained of. Writ granted. (Per Moran, J.; Avanceña, C. J., Diaz, Laurel and Horrilleno, J. J., concurring.)—*Briefed by* MACARIO CRUZ.

SALES (Warranty)—*Emilio M. Javier, Plaintiff and Appellant, vs. Marcelo Enriquez, Defendant and Appellee, CA-G.R. No. 6272, May 31, 1941.*—Marcelo Enriquez and wife sold two parcels of land to Emilio Javier for ₱800. The deed of sale contained the usual covenant of warranty in case of eviction. Plaintiff later sold the property to L. Montejar, but later both Javier and Montejar were sued by Maria Bernard, who claimed a prior right as purchaser in an execution sale for the satisfaction of a judgment rendered against Marcelo Enriquez. The property was adjudicated in favor of Maria Bernard. Hence, an action was instituted by Javier against Enriquez under the warranty clause. The lower court absolved the defendant on the ground that the latter was not made a party to the eviction case as required under Article 1481 of the Civil Code, in connection with the Code of Civil Procedure. It is

admitted that the present defendant was not made a party defendant in the eviction case. But it is obvious from the evidence that the defendant was not made a party defendant in the previous case because he and the plaintiff realized that they had no defense and that the fact that the defendant had been previously convicted of swindling might only prejudice their case. On the other hand, the preponderance of evidence shows that the defendant had full knowledge of the existence of the case and even cooperated with the present plaintiff in the preparation of the evidence. The issue is therefore whether the defendant may not be made to answer for the warranty just because he was not formally joined or summoned. *Held*: It is plain that all the time the defendant knew of the existence of the action. He merely desisted from being a party thereto for their own benefit. Considering that the purpose of the law is to give the warrantor an opportunity to show that the action is unjust and considering further that the defendant actively participated in the defense of the case, it may be safely said that he has waived his right to be a party to the eviction case. (Per Reyes; J., Bengzon, Tuazon, and Torres, J., concurring.)—*Briefed by* ALBERTO MEER.

SUCCESSION.—*Administration of the Estate of Agripino Neri y Chavez, Eleuterio Neri et al., Petitioners, vs. Ignacia Akutin, and Her Children, Respondents, G. R. No. 47799, June 13, 1941.*—Agripino Neri died leaving children by a first marriage as well as by a second marriage. In his testament he willed his entire estate to the children of the second marriage because according to him the children of the first marriage had already received their corresponding shares during his lifetime. The lower court however found out that such a statement was based upon a mistaken belief, and rendered judgment declaring the children of both marriages intestate heirs, without prejudice to one-half of the improvements introduced during the existence of the last conjugal partnership. The Court of Appeals modified the decision, declaring that the will was valid with respect to the two-thirds part which the testator could freely dispose of. This is now a petition for certiorari to review the decision of the Court of Appeals. The question is whether the omission of the children of the first marriage annuls the institution of the children of the second marriage as sole heirs of the testator, or whether the will may be held valid, at least with respect to one-third of the estate which the testator may dispose of as legacy and to the other one third which he may bequeathed as betterment, to said children of the second marriage. *Held*: The omission of the forced heirs or of anyone of them, whether voluntary or involuntary, is a preterition if the purpose to disinherit is not expressly made or is not at least manifest. Preterition avoids the institution of heirs and gives rise to intestate succession except as to legacies and betterments which shall be valid in so far as they are not officious. In the will here in question, no express betterment is made in favor of the children by the second marriage; neither is there any legacy made in their behalf consisting of the third available for free disposal. The whole inheritance is accorded the heirs by the second marriage upon mistaken belief that the children by the first marriage had already received their shares. Were it not for this mistake the testator's intention, as may be clearly inferred from his will, would have been to divide his property equally

among all his children. Judgment of the Court of Appeals is reversed. (Per Moran, J.; Avanceña, C. J., Diaz, Laurel, Horrilleno, J. J., concurring.)—*Brief by* ALINA MORALES.

WORKMEN'S COMPENSATION ACT—(Casual Employment; prescription of action)—*Sergio Cajes vs. Philippine Manufacturing Company, CA-G.R. No. 7286, May 16, 1941.*—Mariano Uy Chuye, defendant's agent in Tacloban, to whom defendant's goods are remitted for distribution among its several customers in Leyte, hired the plaintiffs on January 8, 1935 to join the delivery truck of defendant and help in loading and unloading the merchandise. On its return trip, the distribution truck collided with a truck loaded with coconuts. Plaintiffs suffered injuries, necessitating hospital confinement for several days. This action was brought to recover compensation under the Workmen's Compensation Act. Were the plaintiffs in fact employed by the defendant? If so, was the employment regular, or casual? The agent, Chuye, had authority to employ helpers, according to the defendant's manager. *Held*: Plaintiffs were not casual laborers, as held by the trial court. Casual employment is not determined by the duration of the employment; rather, by the nature of the service rendered. If the service rendered is connected with the business or occupation of the employer as in this case, the employment is regular, not casual. Action has not prescribed. Prescriptive period for actions under the Workmen's Compensation Act is not that defined in par. 3 of Sec. 43, Code of Civil Procedure, which refers to actions for ordinary damages, but par. 2 which relates to actions for damages arising out of an obligation created by law. (Per Enage, J.; Albert, Padilla, Briones, Melencio, JJ., concurring.)—*Briefed by* ALBERTO O. VILLARAZA.