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It is not often that a court announces a decision the effect of which is to limit its own powers. This unusual phenomenon occurred only a few days ago (April 14, 1941), when the Supreme Court of the United States announced its decision in Nye v. U. S.[1] (U. S. Law Week, Vol. 9, Sec. 4, p. 4280, 85 L. Ed. Adv. Op. 733.) However, of far more significance than the curtailing of the judicial power is the other effect of the decision; namely, extension of the principle of freedom of press.

The court construes Section 268 of the Judicial Code[2] and sharply limits its scope. The history of this statute as outlined by the majority opinion indicates that it was enacted in 1831 following the acquittal of Judge James E. Peck in an impeachment trial, the basis of which was Judge Peck's imprisonment of one Lawless for publishing a criticism of a judicial decision. The Act of 1831 was apparently intended to limit the power of Federal courts in this respect and until 1918 it had that effect. It was in 1918 that the Supreme Court decided the case of Toledo Newspaper Co. v. U. S.[3] This decision wiped out the limitations imposed by the Act of 1831, construing it so that it extended to a newspaper criticism of a judicial decision. The instant case (Nye v. U. S.) flatly overrules the Toledo case and it is the implications arising from this action which make the decision particularly noteworthy.

The principle which stands in the background in all of these decisions is that of freedom of expression and more particularly freedom of

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[1]In this case R. H. Nye and L. C. Mayers used improper means to induce a plaintiff in a civil action in Federal District Court to dismiss it. The court held that such conduct is not punishable by Federal court as a contempt; that the proper remedy for the government in such a case is the filing of a criminal information.

[2]This section provides: (4 Stat. At Large 487, Chap. 99, 28 U. S. C. A., Sec. 385)

> "The said courts shall have 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: Provided, That 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, rule, decree, or command of the said courts."

[3]62 Law. Ed. 1186, 247 U. S. 402. This case is strikingly similar to Patterson v. People considered infra. It arose over a street railway rate controversy. An ordinance had been enacted providing for three-cent fares. The creditors of the street railway sued to enjoin compliance with the ordinance. An injunction issued. While the decision was pending and after it was rendered, the *Toledo News Bee* published articles and cartoons strongly condemning the company and urging that the ordinance be upheld. The publisher was held in contempt. In a dissenting opinion, Mr. Justice Holmes took the position that the proper remedy was a criminal information and not a summary contempt proceeding.

the press, and one of the issues raised is whether courts are immune from truthful, fair criticism.

The controversy recalls a famous early Colorado decision—that of People v. News Times Publishing Co. and Thomas H. Patterson.[4] In this case the Colorado Supreme Court held that judges are immune from criticism; that truth is no defense to a contempt charge arising out of such a publication. The issues in the Patterson case bear such a strong resemblance to those which arose in the Nye case and the Toledo case that it is worth while to comment briefly on the Patterson case in the light of the recent development.

Thomas Patterson was a very famous personality in Colorado public and private life. Besides being a leading lawyer, he had been a United States Senator and he also published two newspapers, *The Rocky Mountain News* and *The Denver Times*. Perhaps his most important quality was a genuine belief in certain economic and political principles, together with a zealous and crusading spirit. It was this quality which brought him into conflict with the Supreme Court and which furnished the subject matter of People v. Patterson. On June 24th, 26th, 27th and 28th of the year 1905, certain editorials and cartoons were published in the *News* and *Times*.[5] These editorials left little room for innuendo. They charged in plain language that certain of the justices of the Supreme Court were owned and operated by some of the utility companies. A cartoon represented the court as "The Great Judicial Slaughter House and Mausoleum," and the Chief Justice as "The Lord High Executioner."[6] A further charge was that the decisions rendered in certain election cases were part of a deep-seated plot on the part of the Tramway and Water companies to circumvent the Home Rule Amendment and thus to continue in power. The Supreme Court did not accept the accusation good naturedly. An information was filed charging Patterson and the Publishing Company with contempt.

Apparently Patterson welcomed the opportunity to bring the matter to a head. He stated:

> "* * * I consider the proceedings against me as a direct assault upon the freedom of the press, and I shall defend that ancient and important prerogative of a free people with all my power. * * *"[7]

In his answer Patterson told an amazing story.[8] He showed with more particularity the basis of his charges. It was a tale of a conspiracy to unseat certain Democratic office holders, including the governor of the state. It told of corruption and bribery and finally charged that two

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[4]35 Colo. 253-461, 84 Pac. 912; writ of error dismissed, 205 U. S. 454, 51 Law Ed. 870.
[5]35 Colo. 256-275.
[6]35 Colo. 258.
[7]35 Colo. 275.
[8]35 Colo. 275-355.

of the justices obtained their seats as part of the conspiracy. His position was that he had published the articles but that they were true and that truth was a complete defense; that judges and courts are not immune from truthful criticism. The court, however, rejected this offer of proof and ordered a judgment on the pleadings.

If the newspaper articles and the respondent's answer constituted contempts, the extemporaneous statement of Patterson made in open court was even more strongly contemptuous.

It follows in part:

"I can only say, if your honors please, that it is the most stupendous indictment that can be framed against this whole doctrine of constructive contempt; or, has it come to this in the United States, that the publisher of a newspaper, because men are judges, may not speak the truth of them as to their official actions, except at the peril of confinement in the common jail, the payment of heavy monetary penalties, or both?

"* * * if this is to be maintained, it simply means that we have in each of the states of this Union a chosen body of men who may commit any crime, who may falsify justice; who may defy constitutions and spit upon laws, and yet no man dare make known the fact.

"So far as I am concerned, if the court please, I am unwilling to be bound by such a system, and therefore, if no other result is to come from these proceedings beyond my own punishment, than the arousing of the public to the danger of such a power in the hands of any body of men, a great good will have been accomplished; more, perhaps, than is necessary to compensate for what I may suffer; and I only desire to say, further, before I sit down, that no matter what penalty the court may inflict, from this time forward I will devote myself—by the constitutional amendment, if necessary, and by the decisions of the court it has become necessary—to deprive every man and every body of men of such tyrannical power, of such unjust and dangerous prerogative, of the ability to say to publishers of newspapers: 'While about everything else you may speak the truth, no matter what our offenses may be, you speak the truth with the open door of the jail staring you in the face, or the depletion of what you may possess in this world's goods, and probably of both.'

"If the court please, I am now ready to receive judgment of the court."[9]

Mr. Justice Steele was the lone dissenter. In his opinion, which

[9]35 Colo. 395-399.

covered sixty-six pages of the reporter and which contained an exhaustive survey of the authorities, he vigorously assailed the majority:

> "The court has punished the respondent for a mere libel, under a proceeding for contempt; and has held that the truth is not a justification, and that, when the truth is pleaded as a justification, the pleading of it is a direct contempt and as such is punishable summarily. To do this it was necessary for the court to set aside acts of the legislature and to hold that section of the bill of rights which declares that, 'every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact,' is inapplicable. As I am of opinion that it is not a crime in this state to speak, write, or publish the truth of or concerning the official conduct of public officers, I must dissent from the judgment."[10]

A writ of error was dismissed on a subsequent appeal to the Supreme Court of the U. S., 205 U. S. 454 (decided April 15, 1907). The basis for the ruling was jurisdictional in that the violation, if any, was of local law and did not present a Federal question. (Mr. Justice Harlan and Mr. Justice Brewer dissenting.)

Certainly Thomas Patterson would be pleased with the trend represented by the Nye case. Perhaps it indicates that courts are assuming an attitude which he urged that they should have. (See p. 269 of 35 C. —an excerpt from a Patterson editorial.)

> "The power, the almost unlimited power held by courts should cause them to approach its exercise with chastened hearts and nobility of mind."

The Supreme Court in overruling the Toledo case wiped out the power of Federal courts to punish newspaper publishers and editors in contempt proceedings.

It is finally submitted that the Nye case is very definitely a step in the right direction. It indicates that the Supreme Court has sufficient stature to realize that Article 1 of the Bill of Rights should prevail in a situation where it comes into conflict with the judicial power to punish contempts. Thus a strong blow has been struck for Freedom of Expression and Thomas Patterson's beliefs have received recognition from the highest court in the land.[11]

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[10] 35 Colo. 395.

[11] It is not contended that the Nye case changes the status of the Patterson case. Nevertheless it would be persuasive if the problem should again arise. But regardless of the Nye decision, it would seem to be safe to predict that the Colorado Supreme Court would now overrule the Patterson case.