the test of the Wagner cases be applied prospectively to the activities by intrastate wholesalers under the F. L. S. A., thereby placing any situation which might "affect commerce substantially" within the scope of the present Act, such activity by the intrastate wholesalers should be properly considered the type of local activity which is allowed, by the test itself, to remain under state regulation.

CONTEMPT OF COURT—LIABILITY OF THIRD PERSONS.—Equity has always maintained that as important and as fundamental as its very existence as a judicial body and its jurisdiction to hear and decide cases, is the accompanying inherent power to exercise such activity as will assure its existence as an effective judicial body. To be effective it must command respect and obedience; it must be able to insure and compel proper and full execution of its decrees and decisions. Today, this is never questioned. Nor is it ever contended that Equity's power to punish for violation of its dignity or orders by contempt proceedings is not rightfully present. In fact, this power to punish for contempt has grown and expanded with Equity's broadening jurisdiction. Advancing civilization has become progressively more complex. Problems, legal as well as economic, social, and political, have increased in number and kind. Courts of law and equity are more and more frequently called upon and appealed to for determinations of a nature seldom if ever committed to their care in earlier legal history. The recurrent discussions of crowded dockets are ample testimony of the increasing importance of the judicial forces of any system of government.

Naturally, this very importance is reason for securing to the courts due and necessary respect and dignity, and to its decisions, obedience and proper execution. The power to cite and punish for contempt is so readily seen and accepted as a sufficient weapon for such security as to obviate any necessity for proof from reason or precedent.[1] But the very power which is sought so to insure justice

1. Dorrain v. Davis, 105 N.J.Eq. 147, 147 A. 338 (Ch. 1929).

in a system of government is reason for clearly defining its extent and carefully limiting it. "Every ground which exists for entrusting power to a body of men is a ground also for erecting safeguards against their abuse of the authority confided to them."[2] That this is equally applicable to the power to punish for contempt is undeniable. It is a necessary power; it is also one pregnant with dangerous consequences. Its use is wholesome and salutary; its abuse, dire and fatal.

For anyone at all acquainted with legal practice and procedure, there is little need to enter any lengthy treatise on contempt. Its distinction into civil and criminal, the nature and purpose of this differentiation, all these are known.[3] It is not the purpose of this note to reiterate them. We should like to inquire what are the extents and limitations of the power to punish for contempt. To answer this involves a consideration of the nature of contempt of court, its scope, and its distinction from a similar offense, known as "obstruction of justice."[4] Technical contempt of court, as distinguished from "obstruction of justice," is such conduct by a party or parties before a court as is injurious to the rights of other parties to a suit; or as is derogatory to or contemptuous of the dignity of the court or its decrees and orders. Such conduct need not be by parties. Any one who can be said to be before the court can be charged with technical contempt.[5] So, one interfering with an officer of the court, or knowingly hindering the execution of its orders may be cited for contempt. These latter of course, are guilty of criminal contempt. Violators in the former instance may be guilty of civil contempt only or of criminal contempt only. If the act charged as contemptuous has as a primary consequence interference with or injury to the rights of the moving party it is regarded as civil.[6] Since orders and decrees issue

2. Laski, in an article dealing with Constructive Contempt, 41 HARV. L. R. 1031.

3. Dorrian v. Davis, *supra*, note 1 is an excellent case dealing with contempt in general, its division into civil and criminal contempt, etc.

4. *In re* Wholesale Licensed Alcohol Beverage Salesmen's Union, 125 N.J.Eq. 539, 6 A. 2d 660 (Ch. 1939). Seaward v. Patterson, 1 Ch. Div. 545 (1897). *In re* Cooley, 95 N.J.Eq. 485, 125 A. 486 (Ch. 1924). *In re* Staire, 111 N.J.Eq. 285, 162 A. 195 (Ch. 1932). Garrigan v. United States, 163 Fed. 16. Certiorar denied. 214 U.S. 514 (1908).

5. Enterprise Foundry v. Iron Molders' Union, 149 Mich. 31, 112 N.W. 685 (1907). Garrigan v. U.S., *supra*, note 4. Franklin Union v. People, 220 Ill. 355, 74 N.E. 431 (1905).

6. Garrigan v. U.S., *supra*, note 4.

for the protection of rights of parties litigant it is obvious that most violations thereof partake of the nature of civil contempt. More important, however, than these observations is the inquiry as to the very nature of contempt. The essence of the matter will indicate its limits. We may conclude that, broadly speaking, contempt is disobedience. Disobedience is disregard of or failure to comply with an order of some one. For its existence we require, necessarily, an order, by some one with authority, directed to someone, with knowledge in the latter of the order. No one can be charged with disobeying an order unless he can be shown to have known, or is chargeable with knowledge, that a command was directed to him. Clearly, a party to a suit out of which issues an order has or is fairly chargeable with such knowledge.[7]

That such actual knowledge is essential is further evidenced by cases involving agents and servants of parties to a proceeding. These latter may, for violation of the court's order, be cited for contempt.[8] The nature of their violation will also be civil. But an essential part of the case must be an averment and proof of actual knowledge in the alleged violator of the court's order. Constructive knowledge is an insufficient and defective averment. It is not enough to say that defendant knew or "by the exercise of ordinary intelligence might have known."[9] This is no more than just. The charge is disobedience. Disobedience is disregard. Disregard requires as a pre-requisite knowledge of something to disregard. Failure to comply by reason of ignorance cannot be called disobedience. The latter is positive and affirmative. And this must be so even if the act done is itself illegal.[10] No court may assume to punish by contempt the act of a stranger merely upon the ground that it is illegal. There is a real danger here. For many courts are prone to consider illegality as giving jurisdiction whereas the basis is disobedience of a duly authorized and issued order, by one individual included in the order. Beyond these parties to a suit and their agents and servants, technical contempt can also be

7. Bessette v. Conkey Co., 194 U.S. 324, 24 Sp. Ct. 665. In the matter of the Christensen Engineering Co. 194 U.S. 458, 24 Sp. Ct. 729.

8. People v. Marr, 181 N.Y. 463, 74 N.E. 431 (1905). Berger v. Superior Court of Sacramento Co., 175 Cal. 719, 167 Pac. 143 (1917). Rigas v. Livingston, 178 N.Y. 20, 70 N.E. 107 (1904).

9. Garrigan v. U.S., *supra*, note 4.

10. Rigas v. Livingston, *supra*, note 8.

committed by anyone who can be brought within the class encompassed in the order.[11] Thus if a club or union is ordered to act or refrain from action, all those in the class, whether before the court or not, are amenable to a charge of technical contempt, if with actual knowledge of the order they violate it. Technical contempt then, may be committed by parties to a proceeding out of which arises an order or decree, the servants and agents of such parties, and all those who are included in the class, if any, toward which the order is directed or who are intended by the court to be subject to its order. In a word, parties and privies to a case or procedure are amenable to such a charge.

Such in sketchy outline, is the theory and nature of technical contempt. While application may often be difficult, the principles are settled. The difficulty is only the ever-present judicial one of fitting facts to principles or principles to facts. Much more is involved when we consider the charge of "obstructing justice." Judicial declarations are contradictory on the subject. In discussing this topic it is most important and necessary to recall once again that "every ground which exists for entrusting power to a body of men is a ground also for erecting safeguards against their abuse of the authority confided to them."[12] There is a conflict between policies and rights. A court must have respect and dignity. It must have means to command obedience and respect when these are not freely given. The power to command and punish is one fraught with possibilities of great consequence. Such power is the basis of tyranny and dictatorship. If and when given it must be specified, explicit, and limited. In a system of individual liberty no grant of power which threatens liberty can have any justification in reason or necessity.

It is obvious, of course, that courts must have some control beyond that exercised over parties and privies. Decrees can be made ineffectual, the dignity and authority of the court may be contemned as effectively by indirection as well as by direct action. Those persons blanketed by the order of the court may abide by it. But its vitality may, nevertheless, be sapped by acts of strangers to the order who act in behalf of or on the advice of said parties, to make ineffectual the court's decree. Surely it is as much contempt of court

11. Garrigan v. U.S., *supra*, note 4. *In re* Staire, *supra*, note 4.
12. Laski *op. cit.*, *supra*, note 2.

for such third persons to disregard and disobey the order of a duly authorized judicial authority![13] But, whereas, in technical contempt proceedings, parties and issues and limits are clearly discernible, such is not the case here. It is all well and good to say an act in willful disobedience of a court of justice or its process is an offense against the state. But can such an act be punished as a contempt of the court whose decree is disregarded? Certainly, a stranger to an order is bound as a member of the public not to interfere with or obstruct the course of justice. But is such a violator to be punished by contempt proceedings? One should not aid or abet a party to an order or one of the class included in it to violate the order. But what constitutes aiding or abetting? No one should set the known command of the court at defiance by interference with or obstruction of the known order. But, conceding the violation, is the punishment to be by contempt? It would seem to be clear that one who is an absolute stranger to an order is not bound by it.[14] Since the power to punish by contempt is incidental to the exercise of judicial power it would seem that it should be limited in its application to activity arising therefrom and connected therewith. And yet there exists the need to assure for the court the respect of the general public. On the one hand is the danger of abuse by too extensive a use of the power; on the other, the necessity of its exercise.

How far, then, may a court punish a stranger who is charged with "obstruction of justice" in causing the court's order to be set at naught? Again, we are to be guided by the nature of the thing. Contrary to an act which is technically contempt, any conduct amounting to obstruction of justice is purely a criminal contempt of court.[15] The violator is willfully defying the court. The court in citing for contempt is now not concerned with protecting the rights of a litigant. It is upholding its own dignity and authority to determine issues and to enforce its decrees. If, then, the proceedings are purely criminal in nature, we must exercise care and caution. All the protections given to a defendant in any criminal action must be allowed here, in addition to the limitations always placed on criminal trials by judge without jury. But, first the scope of such authority must be clearly defined. There can be no objection to allowing such procedure against

13. People v. Marr, *supra*, note 8. *In re* Staire, *supra*, note 4. Seaward v. Patterson, *supra*, note 4. *In re* Cooley, *supra*, note 4.
14. Rigas v. Livingston, *supra*, note 8.
15. Berger v. Superior Court, *supra*, note 8.

one who with actual knowledge of the order aids or cooperates with a party to the order in its violation. As a criminal accusation, the petition must aver actual and full knowledge of the order by the defendant. The facts showing this and the aiding and abetting must be clearly established. Courts generally are in agreement that a court's power to punish for such conduct is reasonably and necessarily existent.

Were this the extent of jurisdiction to punish for contempt, we might well say there is no problem. But language in many cases indicates that judges do not believe in so limiting this power. Unless we qualify such a definition of criminal contempt as "acts which hinder, delay, or obstruct the administration of justice,"[16] we too will reach a similar conclusion. Surely we may be pardoned for quoting at length from an opinion which clearly sets forth the extents to which some would go.[17] "A party absolutely a stranger to a suit may be guilty of contemptuously obstructing the administration of justice by doing what other persons had been enjoined from doing, with knowledge of the injunction against them. It is entirely consonant with reason and necessary to maintain the dignity and usefulness and respect of the court that any person whether a party to a suit or not, having knowledge that a court of competent jurisdiction has ordered certain persons to do or to abstain from doing certain acts, cannot intentionally interfere to thwart the purpose of the court in making such order. Such an act, independent of its effect upon the rights of the suitors in the case, is a flagrant disrespect to the court which issues it and an unwarranted interference with and obstruction to the orderly and effective administration of justice and as such is and ought to be treated as contempt of the court which issues the order." Such words can mean only one thing: Anyone who knowingly does an act which a court has ordered not to be done by another person is guilty of contempt of court, whether he acts independently or in aid of the person restrained. A conclusion such as that certainly is not the result of a proper balancing of all the considerations. It must be clear that not every act which somehow or other works against some judicial purpose or end is contempt of court, whatever else it may be, however illegal it may be. So to hold is to give courts tremendous

16. Garrigan v. U.S., *supra*, note 4.
17. *In re* Reese, 107 Fed. 942.

power. Who is to set any limits on its exercise? Where will it stop? We must remember that the judicial power to punish for contempt exists only as an incident, albeit an inherent one, to the exercise of the judicial function. It is an unusual procedure; it is pregnant with possibilities for abuse. It must be carefully checked and kept in rein. Especially is this to be observed when we realize the subject matter upon which it operates. Individual liberty, the right to trial by jury whenever personal liberty is attacked or sought to be curbed or destroyed are affected thereby. It is contended that practical considerations necessitate and justify such extension. Courts must have such power to carry out their purpose. But, as was stated, no grant of power which threatens liberty and freedom can have any justification in necessity, convenience or practicality. "Every ground which exists for entrusting power to a body of men is a ground also for erecting safeguards against their abuse of the authority confided to them."