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Distinction Between Civil and Criminal Contempt - Donner et al. v. Calvert Distillers Corp

DISTINCTION BETWEEN CIVIL AND CRIMINAL CONTEMPT

Donner et al. v. Calvert Distillers Corp.[1]

On January 28, 1948 the Calvert Distillers Corp. obtained a decree from the Circuit Court for Anne Arundel County that permanently enjoined Hillard Donner and the Mills Cut Rate Liquor Mart, Inc. from selling the plaintiff's whiskey at prices below those set by the plaintiff with Maryland retailers by contract under the authority of the Maryland Fair Trade Act. Subsequently, the liquor license held by the Mills Cut Rate Liquor Mart, Inc. was reissued to Hillard Donner and to Joseph Donner. On January 3, 1949 the plaintiff filed a petition in the case, alleging a violation of the decree by the defendants, and on March 3, 1949 the defendants were judged in contempt and fined $250. On December 10, 1949 the plaintiff filed a second contempt petition, which resulted in an order holding both Hillard Don-

[41] See A. L. R., *supra*, n. 8, that:

"It is not always quite clear what is meant when the courts say that the 'intention' of the parties is controlling. There does not seem to be any basis for holding that, although a performance of the contract will necessarily and directly benefit the third person, his remedy depends upon an intention on the part of the parties to the contract that he shall have the right to sue thereon. While the intention of the parties controls in the creation of rights under the contract, and in determining the things required by the contract to be done by the parties, it would seem that, once the right is created or the duty is imposed in favor of the third person, the law furnishes the remedy, regardless of the intention of the parties in respect thereof."

The principal case is cited with apparent approval in Acme Brick Co. v. Hamilton, 238 S. W. 2d 658, 660 (Ark., 1951). There the A construction company contracted with the B brick company, A to buy and B to sell certain bricks required by A to build homes. A was building a home for C, and told C to visit B's showroom and pick out the type brick which C wanted used in the home. C did this, but B delivered the wrong color brick, which was placed in the house by A. In a suit by C against both A and B, B defended on the basis of the *Marlboro* case, that C was not in privity of contract with B, and was only an incidental beneficiary under B's contract with A. The court distinguished this case from the Maryland one, holding that reliance by C here on the contract between A and B was more than incidental, and that C could recover.

[1] 77 A. 2d 305 (Md. 1950).

ner and Joseph Donner in contempt, and imposing fines on both. The Mills Cut Rate Liquor Mart, Inc. was not held, as the court found it was no longer in business. From this order the individual defendants appealed. The Court of Appeals affirmed as to Hillard Donner and reversed as to Joseph, the reversal being on the grounds that Joseph had not violated the injunctive order. In affirming Hillard's conviction, the court carefully distinguished between criminal and civil contempt in holding that the defendant was guilty of the former.

The difference between criminal and civil contempt raises various problems that are both difficult and of considerably more than academic importance to petitioner, contemnor, and the court itself.[2]

Some of the problems rising out of this distinction have been eliminated in Maryland by statute.[3] Nevertheless, a variety of situations remains where the difference is significant indeed. For example, if a contempt order has been handed down for violation of an injunction, and on appeal the injunction was held to be improperly granted, the contempt order will fall if the contempt is civil, but will stand if the contempt is criminal.[4]

The difference basically is one of purpose. If the purpose of the contempt order is punitive, the contempt is criminal; if the purpose of the contempt order is remedial, the contempt is civil. This, then, is the test — one easier to state than to apply. The leading Maryland case distinguishing between criminal and civil contempt is *Kelly v. Montebello Park Co.*,[5] where the defendants had been enjoined from building a garage. They nevertheless proceeded with the construction, and were then held in contempt and fined. The court found that their contempt was criminal in nature and quoted with approval the following differentiation between criminal and civil contempt set forth by Judge Sanborn in *In Re Nevitt*,[6] where it was held that a contempt

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[2] For a list of these possible problems see CHAFEE, SIMPSON AND MALONEY, CASES ON EQUITY (3rd ed. 1951), 31, 32, n. 22.

[3] It seems that the issue of appealability in Maryland is no longer dependent on the criminal or civil distinction in contempt, as all contempt orders were made appealable by statute subsequent to the Kelly case, *infra*, n. 5. Md. Code Supp. (1947), Art. 5, Sec. 107. Construed in Baltimore Radio Show v. State, 67 A. 2d 497 (Md., 1949), cert. den. 338 U. S. 912 (1950). Also see Invernizzi and Kaiser, *Conflicts Between Statutes and Rules as to Time for Appeal*, 11 Md. L. Rev. 325, 333 (1950).

[4] See Worden v. Searls, 121 U. S. 14, 25 (1887); Salvage Process Corp. v. Acme Tank Cleaning Process Corp., 86 F. 2d 727 (2nd Cir., 1936).

[5] 141 Md. 194, 118 A. 600, 28 A. L. R. 33 (1922).

[6] 117 F. 448, 458, 459 (8th Cir., 1902).

order jailing two judges until they should comply with a writ of mandamus was clearly one of civil contempt:

> "Proceedings for contempts are of two classes, — those prosecuted to preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts and the people are interested in their prosecution. The latter are civil, remedial and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. . . . A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the court, and private parties have little if any interest in the proceedings for its punishment. But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or advantage of a party to a suit . . . and he is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings."

In holding the two judges guilty of civil, not criminal contempt, the opinion succinctly expressed the whole idea of civil contempt: "They are imprisoned only until they comply with the orders of the court, and this they may do at any time. They carry the keys of their prison in their own pockets."[7]

Judge Sanborn's distinction in the *Nevitt* case was quoted and relied upon by the Supreme Court in *Bessette v. Conkey Co.*[8] Here the defendant was not an original party to the injunction suit, but had knowledge of the restraining order obtained, which he violated. He was found in contempt and fined $250. This was held to be criminal contempt, as the order was punitive. In its opinion the court noted that often it would be extremely difficult to tell if a

[7] *Ibid*, 461; quoted in Kelly v. Montebello Park Co., *supra*, n. 5, 200.
[8] 194 U. S. 324, 328 (1904).

proceeding was punitive or remedial, and that many contempts were in fact both.[9]

The *Kelly* decision also discussed at length the leading case of *Gompers v. Bucks Stove and Range Co.*[10] Here, Samuel Gompers and several other Union leaders had been imprisoned for violation of an injunction arising out of a labor dispute. The Supreme Court reversed on the ground that the defendants were guilty of civil contempt, while the sentences had been entered as if the proceedings were for criminal contempt. Again the punitive or remedial test was applied, but here the court elaborated on the theme, pointing out that often the plaintiff's petition will furnish a key to the problem of determining whether the court order in fact was punitive or remedial. The petitioner here had prayed for further relief in the nature of a compensatory fine payable to the petitioner, and the court held that this was "significant and determinative", as indicating that the object of the proceeding was for relief, not for punishment or vindication of the court.

It should be observed that the courts do not always seem willing to apply the distinction that is the subject of this note. In *Cassidy v. Puett Electrical Starting Gate Corp.*,[11] for example, an appeal was taken from an injunctive order and from a contempt decree. While holding that the injunction was improper, the court affirmed the contempt sentence. As to criminal and civil contempt, the court suggested that the distinction was "subtle, and, too often, tenuous".[12] However, the language of the lower court clearly showed that the contempt was in fact criminal by the use of such phrases as "in order to maintain its (the court's) authority" and "to punish those who have — disobeyed those orders". Thus, it was proper that the contempt decree remain, regardless of the holding that the injunction was wrongly issued.

The distinction was criticized in *In Re Lee*,[13] where the Court of Appeals said: "This classification (into criminal and civil contempt) has been the source of confusion and misunderstanding resulting in extensive litigation. Nevertheless, they are so recognized by this court."[14]

[9] An illustration of possible confusion in the distinction arises in alimony cases; see Dickey v. Dickey, 154 Md. 675, 681, 141 A. 387 (1928); Bushman v. Bushman, 157 Md. 166, 145 A. 488 (1929).

[10] 221 U. S. 418 (1911).

[11] 182 F. 2d 604 (4th Cir., 1950).

[12] *Ibid*, p. 607.

[13] 170 Md. 43, 47, 183 A. 560 (1936).

[14] Other Maryland cases subsequent to the Kelly case recognizing the distinction are: Emergency Hospital v. Stevens, 146 Md. 159, 126 A. 101 (1924);

The court in the instant case discusses the contempt proceedings involved in *United States v. United Mine Workers of America.*[15] Here the District Court for the District of Columbia fined John L. Lewis $10,000 and the Union $3,500,000 for contempt. The Supreme Court sustained Lewis' fine and conviction, but divided the United Mine Workers' fine into two parts, of $700,000 for criminal contempt and of $2,800,000 for civil contempt. The latter was to be coercive, and was conditional, being payable only if the miners refused to go back to work. Here again the distinction was made along the familiar grounds of punishment and remedy. This case is especially important in that it demonstrates that both types of contempt often are present in the same proceedings, and that the differentiation is a vital one; for had it been held that the injunction should not have been issued because of the Norris-LaGuardia Act, the civil contempt conviction would have been reversed, but the criminal contempt conviction would have remained, as a punishment for the United Mine Workers' flouting of the court's authority.[16]

This decision is extremely interesting insofar as it shows three separate approaches to the problem of the two types of contempt. Justices Black and Douglas, concurring in part and dissenting in part, agreed with the majority as to the imposition of the coercive fine for the civil contempt, but dissented from the judgment imposing the fine for criminal contempt.[17] They urged that the object of the court was merely to compel obedience so that the fines imposed by the lower court should have been made entirely conditional and not split; that "in contempt proceedings courts should never exercise more than 'the least possible power adequate to the end proposed'."[18] Pursuing this line of reasoning, Justices Black and Douglas felt that criminal punishment should be invoked only if the defendants should persist in disobedience of the court order.

A further strongly worded dissent by Justice Rutledge, with Justice Murphy concurring, urged that neither the

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Ex Parte Sturm, 152 Md. 114, 136 A. 312 (1927); Ex Parte Bowles, 164 Md. 318, 165 A. 169 (1933); see also Wingert v. Kieffer, 29 F. 2d 59 (4th Cir., 1928). For an excellent critical analysis of the distinction see 5 Minn. L. Rev. 459 (1921).

[15] 330 U. S. 258 (1947). See 15 U. of Chi. L. Rev. 202-209 (1947); 45 Mich. L. Rev. 469 (1947).

[16] *Ibid,* 330 U. S. 258 (1947); see also the concurring opinion of Justice Frankfurter, 307.

[17] *Ibid,* 330 U. S. 258, 328 (1947).

[18] *Ibid,* 332, citing Anderson v. Dunn, 6 Wheat. (U.S.) 204, 231 (1821) and In Re Michael, 326 U. S. 224, 227 (1945).

fines for criminal contempt nor the fines for civil contempt should have been imposed, and that to combine the prosecution of both civil and criminal contempts in one proceeding was repugnant to the Constitution.

Thus, we see in one case a wide disparity of views, not so much as to the basic distinction between criminal and civil contempt, but rather as to the method and timing of the application of the two procedures, as well as to the constitutionality of such an intermingling of civil and criminal procedure in one action, with the result that seven justices regarded the civil contempt fine as proper, five justices regarded both the civil and criminal contempt penalties as proper, and two justices felt that neither should have been imposed.[19]

The overall legal theory behind contempt is based on the desire to uphold the dignity and authority of the court and the necessity of doing so. Thus, theoretically all contempts, regardless of their exact nature, could be made punishable, as they are a flouting of the court's express orders or desires. The historical evolution of the law of contempt shows that all of the roots are grounded in the punitive process, pure and simple. There was punishment for either contempt of the king, or of the king's seal in the hands of his representatives. The remedial process did not appear until the time when the chancery courts attained more prominence, and when, with the increase of chancery business, came the practical need for coerciveness, in cases where mere punishment was unsatisfactory.[20]

The distinction having developed, the separate devices of civil and criminal contempt orders continue as means looking to different ends. So, if in the eyes of the court the situation presents the necessity of punishment, the proceedings will be criminal. If, on the other hand, the need is for coerciveness, the courts will subordinate the idea of punishment for disobedience, in order to get the desired results. Thus, the pivotal point of the distinction has been placed on the nature of the proceedings, *i.e.*, are they remedial or punitive, and not on the nature of the act of contempt itself. Though there are many indicia pointing to either criminal or civil contempt, they are indicia only, pointing to the probable result.[21] The test remains — what is the purpose of the decree?

[19] See 45 Mich. L. Rev. 469 (1947).

[20] For an excellent short history of contempt, criminal and civil, see Beale, *Contempt of Court, Criminal and Civil*, 21 Harv. L. Rev. 161 (1908).

[21] See Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 Col. L. Rev. 780 (1943).

Despite the criticisms sometimes made of the distinction between civil and criminal contempt, this distinction gives to the courts a practical tool, enabling them to apply pressure in the desired direction. At the same time, both coercion and punishment can be achieved by convicting the contemnor of both civil and criminal contempt. Then, should the injunction prove on appeal to have been improperly granted, the civil contempt would fall, but the criminal would remain as a punishment for the denial of the court's authority. This, as stated above, was the approach used in the proceedings against the United Mine Workers.[22]

Moreover, coercion rather than punishment may frequently be the primary objective of the petitioner. The framing of prayers asking for relief often may be an important factor in the court's decision as to whether the purpose of the decree should be remedial or punitive, a point well illustrated in the *Gompers* case.[23]

The distinction has the disadvantage that the contemnor often is to a large extent unaware of which short of contempt he is guilty, until the decree has been handed down. Also, it is very often extremely difficult to decide if an order is in fact, punitive, remedial or both. Thus there is a certain fluidity that thrusts a vexing interpretive problem into the picture.[24]

A more serious aspect, which the distinction does little to clarify or ameliorate, is the danger of placing too much power in the court. Thus, though a court may proceed criminally, the contemnor in the absence of statute may be denied some of the usual safeguards of criminal procedure.[25] The very constitutionality of such procedure was questioned in the minority opinion of Justice Rutledge in the *United Mine Workers* case.[26]

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[22] *Supra*, n. 15.

[23] *Supra*, n. 10.

[24] This difficulty was noted in the leading case of Bessette v. W. B. Conkey Co., 194 U. S. 324 (1904).

[25] See Nelles, *The Summary Power to Punish for Contempt*, 31 Col. L. Rev. 956 (1931); see also note, 121 A. L. R. 215, following Cobb v. State, 187 Ga. 448, 200 S. E. 796, 121 A. L. R. 210 (1939).

[26] United States v. United Mine Workers of America, 330 U. S. 258, 342, 363 *et seq.* (1947). *Cf.* Michaelson v. United States, 266 U. S. 42 (1924).