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Criminal Law-Reiterated Contempt of Court

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CRIMINAL LAW—REITERATED CONTEMPT OF COURT—The defendant was found guilty of criminal contempt of court[1] in a civil proceeding for giving "don't remember" answers,[2] after having been granted immunity

1 "A Court of record has power to punish for a criminal contempt, a person guilty of . . . contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory." N.Y. JUDICIARY LAW § 750(5). This should not be confused with N.Y. PEN. LAW § 600, which, in similiar language, defines contempt of court as a misdemeanor and provides for a criminal prosecution for the misdemeanor of criminal contempt. The New York courts have held that the two statutes are wholly independent of each other and both remedies or either may be pursued. People *ex rel.* Sherwin v. Mead, 92 N.Y. 415, 420 (1883); *In re* Amato, 204 Misc. 454, 124 N.Y.S.2d 726 (Sup. Ct. 1953).

2 Although the defendant did not in form refuse to testify, the court felt justified in concluding that his "don't remember" answers were, in fact, a refusal to testify. People *ex rel.* Cirillo v. Warden, 11 N.Y.2d 51, 181 N.E.2d 424, 226 N.Y.S.2d 398 (1962).

from prosecution,[3] to questions concerning his activities, asked during a grand jury investigation of an attempted homicide. For his refusal to testify, the defendant was given the maximum penalty provided for criminal contempt under the applicable statute.[4] After paying the fine and serving the sentence, the defendant was brought before the same grand jury thirty-five days later and was asked the same questions. The defendant repeated the "don't remember" answers and was again fined and incarcerated. On appeal, *held*, affirmed, one judge dissenting. The defendant's refusal to answer at his second appearance before the grand jury constituted a separate and new act of contempt rather than a continuation of the previous refusal. *Second Additional Grand Jury v. Cirillo*, 12 N.Y.2d 206, 188 N.E.2d 138, 237 N.Y.S.2d 709 (1963).

The power invoked by the court in the principal case to punish for contempt, although regulated by legislation, is inherent in the courts because it is necessary to the execution of the court's powers.[5] A criminal contempt conviction is said to be punitive in nature and the punishment is for the purpose of vindicating the authority of the court.[6] In this context criminal contempt is not a crime in the sense of being a misdemeanor or a felony;[7] consequently, the doctrine of double jeopardy is often said to have no application in the multiple or reiterated contempt situation.[8] More frequently, as in the principal case, the courts avoid the double jeopardy issue by holding that each reiterated contempt is a separate offense; thus the accused is not being punished twice for the same act.[9] Behind this reasoning lies the policy that each individual must testify if necessary,[10] and that society has the right to every man's evidence.[11] The reiterated contempt

3 The immunity granted by the state protects the witness against prosecution under its laws for wrongdoing the witness himself might disclose during the investigation. N.Y. PEN. LAW § 2447. However, the immunity extended by the state does not protect him against prosecution by the federal government or by other states. Mills v. Louisiana, 360 U.S. 230 (1959); Knapp v. Schweitzer, 357 U.S. 371 (1958); People v. Riela, 7 N.Y.2d 571, 166 N.E.2d 840, 200 N.Y.S.2d 43 (1960).

4 N.Y. JUDICIARY LAW § 751, provides for punishment for contempt of court, under § 750, by fine not exceeding $250, or by imprisonment not exceeding thirty days, or both.

5 See *Ex parte* Terry, 128 U.S. 289, 313 (1888).

6 Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911). If the punishment is remedial and for the benefit of the complainant the contempt is civil. *Ibid.* However, the distinction between criminal contempt and civil contempt is not at all clear. For a discussion of that distinction, see generally Goldfarb, *The Varieties of the Contempt Power*, 13 SYRACUSE L. REV. 44 (1961).

7 See note 1 *supra*.

8 "In fact, it has been repeatedly held that one who has been found guilty of contempt under the provisions of the Judiciary Law may not thereafter invoke the defense of former jeopardy because the former is not a crime." People *ex rel.* Amarante v. McDonnell, 100 N.Y.S.2d 463, 469 (Sup. Ct. 1950); *cf.* State v. Kasherman, 177 Minn. 200, 224 N.W. 838, *cert. denied*, 280 U.S. 602 (1929).

9 *Ex parte* Stice, 70 Cal. 51, 11 Pac. 459 (1886); *In re* Ward, 295 Mich. 742, 295 N.W. 483 (1940); *cf.* Williams v. Davis, 27 Cal. 2d 746, 751, 167 P.2d 189, 192 (1946).

10 Blair v. United States, 250 U.S. 273, 281 (1919).

11 See 8 WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961). This is, of course, subject to the witness' constitutional privilege against self-incrimination, and the various

cases generally fall into one of three categories: refusals concerning (1) separate subjects on the same day, (2) the same subject on the same day, or (3) the same subject on different days. In the first category each refusal constitutes a separate contempt.[12] However, in the second category the initial refusal marks the contumacious act and the prosecution cannot multiply contempt convictions by repeatedly asking questions related to that subject.[13] When the courts are presented with cases in the third category, as in the principal case, they normally hold that each refusal constitutes a separate contempt.[14] Illustrative of a single case presenting both of the latter two categories is *United States v. Costello*.[15] The defendant had been brought before a congressional investigating committee on two succeeding days, and on both days had repeatedly refused to give any testimony whatever, claiming that he was suffering from acute laryngitis. He was convicted for multiple contempts. When an appeal was brought to contest the validity of those convictions, the counts relating to the defendant's repeated refusal to testify on a particular day were reduced to one count.[16] However, the court affirmed the two counts which were based on the initial refusal to testify on each day, without discussion of the issue of whether the mere fact that the refusals occurred on different days justified making the refusal on the second day a separate contempt. Neither did the court discuss the possibilities of oppression that would arise if a witness were returned for questioning day after day.

The principal case dealt directly with the problem only tacitly recognized in *Costello*. While the decision in the principal case was amply supported by authority,[17] at least two grounds exist on which the validity

immunity provisions contained in state and federal statutes. See, *e.g.*, N.Y. PEN. LAW § 2447.

12 Only one case was found in this category. A witness, without claiming the privilege of immunity, refused to testify or refused to remember, during a single day, who were the participants with him in five separate telephone conversations, and he was convicted of five separate contempts. People v. Saperstein, 2 N.Y.2d 210, 140 N.E.2d 252, 159 N.Y.S.2d 160, *cert. denied*, 353 U.S. 946 (1957).

13 A witness refused to answer seventeen questions relating to an alleged crime syndicate meeting, and he was held to have "carved out" an area of refusal. People v. Riela, 7 N.Y.2d 571, 166 N.E.2d 840, 200 N.Y.S.2d 43 (1960); *accord*, Yates v. United States, 355 U.S. 66 (1957); United States v. Orman, 207 F.2d 148, 160 (3d Cir. 1953); United States v. Costello, 198 F.2d 200, 204 (2d Cir.), *cert. denied*, 344 U.S. 874 (1952); United States v. Yukio Abe, 95 F. Supp. 991, 992 (D. Hawaii 1950). *But see* Lawson v. United States, 176 F.2d 49, 53 (D.C. Cir. 1949). In People v. Riela, *supra*, the court distinguished People v. Saperstein, *supra* note 12, on the ground that the defendant in the case did not "carve out an area of refusal." If a witness were not allowed to "carve out" a subject about which he will not testify there would be a premium on completely refusing to testify, since that is treated as only one contempt. See 20 GA. B.J. 413 (1958).

14 See *Ex parte* Stice, 70 Cal. 51, 11 Pac. 459 (1886); *In re* Ward, 295 Mich. 742, 295 N.W. 483 (1940); State v. Kasherman, 177 Minn. 200, 224 N.W. 838, *cert. denied*, 280 U.S. 602 (1929).

15 198 F.2d 200 (2d Cir.), *cert. denied*, 344 U.S. 874 (1952).

16 *Id.* at 204.

17 See cases cited note 14 *supra*.

of its reasoning can be questioned. The first is that the defendant was merely repeating his first refusal and thus, for the same reason that repeated refusals within a given day are treated as only one contempt, he was likewise guilty of only one contempt. Admittedly, a witness has a duty to testify, but does the passing of a day, as in *Costello*, or a month, as in the principal case, enlarge the duty? If the contempt is complete when the witness refuses to give any testimony on one particular day, why is it not then complete with respect to the whole investigation? Conceivably, the only respite for such a witness would depend upon the limited stamina of the prosecution. The situation is analogous to the case of a person who commits two assaults, each on the same provocation, yet each on different days. Clearly there are two punishable offenses; yet repeated blows during any one assault render the attacker liable for only one conviction. However, the purpose of an assault conviction is to deter the defendant from committing the act again, while the purpose of the contempt conviction is to induce the witness to testify.[18] Thus, whether the refusals constitute one or two offenses might depend upon whether the repeated questions are part of a valid attempt to obtain evidence or are for the purpose of additionally punishing the witness for his contumacy regardless of the benefit that might be obtained from his testimony. In the latter case, especially if the need for the testimony of the witness has diminished, the second conviction would seem to be more for the purpose of harassment, and the court should consider the two refusals as only one offense.

The second major objection to the result in the principal case is that, even if the distinction between refusals to answer on a single day and refusals on different days when the questions relate to the same subject is justifiable, the policy which favors valid efforts to obtain testimony should be limited by the danger of punishing a witness who is honestly unable to answer. In the principal case, the court hinted at this restriction by noting that at some point repeated convictions based on the same refusal could "be so numerous or onerous as to deny due process to the person questioned."[19] While this expressed fear runs counter to the assumption that these are "separate and distinct" offenses,[20] the argument does recognize the possibility that courts may not always be accurate in their determination of whether repeated questioning is justified as a valid attempt to obtain evidence, or is for the purpose of harassment. Although in the principal case the court was perhaps justified in treating the defendant's lapse of

18 State v. Kasherman, 177 Minn. 200, 224 N.W. 838, *cert. denied*, 280 U.S. 602 (1929).

19 Principal case at 211, 188 N.E.2d at 141, 237 N.Y.S.2d at 713; see People *ex rel.* Valenti v. McCloskey, 6 N.Y.2d 390, 404-05, 160 N.E.2d 647, 655, 189 N.Y.S.2d 898, 909 (1959), 28 FORDHAM L. REV. 540; *cf. Ex parte* Stice, 70 Cal. 51, 11 Pac. 459 (1886).

20 There is no concern about denial of due process to the two-time assaulter, and conceivably the court would have reached the same result if the convictions had been for the misdemeanor of criminal contempt. See note 1 *supra*. *Compare* People *ex rel.* Amarante v. McDonnell, 100 N.Y.S.2d 463 (Sup. Ct. 1950) (criminal contempt), *with* People v. Amarante, 100 N.Y.S.2d 677 (Sup. Ct. 1950) (misdemeanor of criminal contempt).

memory as an obvious unprivileged or recalcitrant refusal to testify, until the due process limitation is more adequately defined the danger exists that contempt proceedings may be used to exact testimony which the court deems satisfactory. As the dissenting judge pointed out, if the power repeatedly to incarcerate such a defendant "is upheld in one case, it can be abused in other cases."[21]

The legal machinery apparently exists by which a reluctant witness can be punished indefinitely. As a practical matter, however, when contempt convictions are multiplied during a single proceeding the sentences usually run concurrently.[22] Nevertheless, the courts should seriously consider the validity of the distinction between refusals occurring on the same day and refusals occurring on different days, since the metaphysical "separateness" of the offenses due to the mere passing of a day seems to cloud the real policy issues involved. In the principal case the court suggested that contempt adjudications based on the same refusal could result at some point in a denial of due process. The court did not enunciate any criteria to help decide when that point would be reached. In view of the competing policy considerations between the right to obtain testimony and the possibilities of vindictive oppression that may arise from the exercise of that right, it would seem that due process is denied when the repeated questions are principally for the purpose of harassing a witness. In the principal case no mention was made of the relevancy of the evidence the witness might have provided. Presumably the grand jury still needed the information the defendant supposedly possessed to complete its investigation. In order to balance society's rights against the rights of the individual, these factors should have been considered.

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21 Principal case at 211, 188 N.E.2d at 141, 237 N.Y.S.2d at 713.
22 See, *e.g.*, Lawson v. United States, 176 F.2d 49, 53 (D.C. Cir. 1949).