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THE INTENT ELEMENT IN CONTEMPT OF INJUNCTIONS, DECREES AND COURT ORDERS

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THE INTENT ELEMENT IN CONTEMPT OF INJUNCTIONS, DECREES AND COURT ORDERS—Recent years have seen increasing effort on the part of courts to distinguish between civil and criminal contempts. This effort has been engendered by an awareness of the different procedural and substantive aspects of the two classifications.[1] A discussion of these aspects, as well as of the tests used to distinguish civil and criminal contempts, is beyond the scope of this paper.[2] Suffice it to say that those tests which have been applied leave much to be desired. The lack of clarity, so evident in prevailing tests, is in part a legacy from early decisions which permitted the two types of contempt to be intermingled without distinction and in part the result of inherent difficulties. Punishment for criminal contempt may incidentally have a remedial purpose; conversely, the use of civil contempt may have both the remedial purpose and the result of vindicating the court's authority. Even courts that desire to accomplish a separation may therefore find great difficulty in keeping the two types of contempt entirely distinct.

The nature of the intent required for contempt liability presents a special problem, necessarily involving a high degree of subjectivity. The range of possible variation can be compared only to a spectrum. At one extreme are violative acts, done with knowledge of the decree, but with no intent to impair or defy the court's authority; for such acts, the appropriate remedy is civil contempt. However, when something more

[1] See Moskovitz, "Contempt of Injunctions, Civil and Criminal," 43 COL. L. REV. 780-824 (1943); note, 57 YALE L. J. 83 at 107 (1948).

[2] See 13 L.R.A. (n.s.) 595 (1908) and 34 L.R.A. (n.s.) 874 (1911).

is added, it becomes possible to invoke either civil or criminal contempt proceedings, or possibly both.[3] The problem is to measure this added subjective element by some clear and meaningful objective test.

A. Intent in Civil Contempt

As the purpose of a civil contempt suit is either to compensate for losses caused by breach of the injunction or to compel obedience, it is usually said that no intent to defy the court or impede its process is necessary. It is enough if defendant violated the terms of an unambiguous decree of which he had notice; the only intent necessary is an intent to do the violative act.[4]

Perhaps the remedial nature of civil contempt can be best illustrated by those cases which hold an employer liable for breach of injunction by his employee even though the violative acts were done without the employer's knowledge and against his express commands.[5] Another illustration is found in the group of cases in which the violation was due to external elements over which the contemnor had no control. For example, in *Holloway v. Water Co.*,[6] defendant was forbidden to let his water tanks overflow on plaintiff's property. Defendant alleged he had done everything scientifically possible to prevent the overflow and that he had no intention of violating the decree, but the tanks did overflow, causing damages to plaintiff's property. Defendant was held liable for damages in civil contempt proceedings. In another case, defendant was ordered to operate his dam so as to keep the water in Clear Lake below a certain maximum level (allowance being made in case of unusually heavy rains). Due to a sudden storm of unprecedented intensity, the water quickly rose above the prescribed level. Defendant was held liable to adjacent owners whose property was damaged by the

[3] A refusal to comply with a court order is ordinarily a civil contempt, but if carried to the point of "contumacy" it becomes a criminal contempt. McCann v. N.Y. Stock Exchange, (C.C.A. 2d, 1935) 80 F. (2d) 211. "Yet sometimes the disobedience may be of such a character and in such a manner as to indicate a contempt of the court rather than a disregard of the rights of the adverse party." Bessette v. Conkey Co., 194 U.S. 324 at 329, 24 S.Ct. 665 (1904).

[4] Root v. Conkling, 108 Misc. 234, 177 N.Y.S. 610 (1919); Thompson v. Pennsylvania R.R. Co., 48 N.J. Eq. 105 at 108, 21 A. 182 (1891); Gage v. Denbow, 49 Hun. 42, 1 N.Y.S. 826 (1888); McComb v. Jacksonville Paper Co., 336 U.S. 187, 69 S.Ct. 497 (1949); 7 AM. AND ENG. ENC. OF LAW, 2d ed., 76 (1898); N.L.R.B. v. Whittier Mills Co., (C.C.A. 5th, 1941) 123 F. (2d) 725.

[5] Telling v. Bellows-Claude Neon Co., (C.C.A. 6th, 1935) 77 F. (2d) 584; Thompson v. Pennsylvania R.R. Co., 48 N.J. Eq. 105, 21 A. 182 (1891). But cf. the language in Bigelow v. R.K.O. Radio Pictures, (D.C. Ill. 1948) 78 F. Supp. 250 at 258.

[6] 100 Kan. 414, 167 P. 265 (1917).

rise of the water even though he was caught by surprise, had neither foreseen nor contributed to the violation by his own conduct or omission, and intended no harm to plaintiffs.[7]

Following the logic of the remedial theory of civil contempt punishment, it would appear that the "good faith" of defendant has no effect on his liability, and most of the cases so hold. At most, it can be considered to eliminate criminal contempt punishment, but defendant must still make plaintiff whole or render the required performance.[8] Of course, if the defendant is truly unable to comply with the decree or order, no punishment could coerce compliance and so the contempt is excused.[9] However, if lack of good faith is shown; for example, if defendant, through his own fault is unable to comply, ordinary contempt punishment will follow.[10] Defendant's good faith is most commonly proved by showing that his action was taken under advice of counsel, honestly given and taken, and that there was a reasonable basis for the advice given. In such cases, courts often say that, although the contempt is not excused, good faith serves to "mitigate" punishment.[11]

[7] Clear Lake Water Co. v. Superior Court, 33 Cal. App. (2d) 710, 92 P. (2d) 921 (1939). However, the court does indicate it thought defendant *could* have opened its gates sooner, and perhaps could thereby have prevented the overflow.

[8] In addition to cases cited in note 4, supra, see Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., (C.C.A. 6th, 1915) 230 F. 120; Mathews v. Spangenberg, (C.C. N.Y. 1883) 15 F. 813; Economist Furnace Co. v. Wrought-Iron Range Co., (C.C. Ind. 1898) 86 F. 1010; Thistlethwaite v. State, 149 Ind. 319, 49 N.E. 156 (1898). Cf. Herring v. Houston National Exchange Bank, 113 Tex. 337, 255 S.W. 1097 (1923); Sponenburg v. City of Gloversville, 46 Misc. 290, 94 N.Y.S. 264 (1905).

[9] Andrews v. Andrews, 166 Misc. 385, 2 N.Y.S. (2d) 575 (1938); Porter v. Maxwell, 208 Iowa 1224, 266 N.W. 917 (1929); Ex parte Cardella, 47 Cal. App. (2d) 329, 117 P. (2d) 908 (1941); Tudor v. Firebaugh, 364 Ill. 283, 4 N.E. (2d) 393 (1936). The ordinary case is that in which defendant is unable to pay pursuant to a decree for alimony, where special constitutional problems are encountered. See 30 A.L.R. 125 (1924). However, the courts commonly recognize financial inability to comply as a defense to contempt proceedings for failure to pay money pursuant to court order. And, although there are but few cases in point, it appears that failure to deliver up property pursuant to a judgment will not be punished either by imprisonment or compensatory fine if defendant is actually unable to produce the property through no fault of his own. Allen v. Woodward, 111 Texas 457, 239 S.W. 602, 22 A.L.R. 1256 (1922); 31 A.L.R. 649 (1924); 40 A.L.R. 546 (1926); 76 A.L.R. 390 (1932); 120 A.L.R. 703 (1939). As to inability of trustee to pay over or account for funds, see 60 A.L.R. 322 (1929).

[10] Haines v. Haines, 35 Mich. 138 (1876); Wartman v. Wartman, (C.C. Md. 1853) F. Cas. No. 17,210, Taney 362; In re Clift's Estate, 108 Utah 336, 159 P. (2d) 872 (1945). Often it appears that defendant is insolvent and is totally unable to perform, in which case the only possible punishment is incarceration. The question arises, imprisonment for how long? If for a definite term, it smacks of criminal contempt punishment; if indefinitely, the sentence may be void as tantamount to life imprisonment.

[11] In re Cooley, 95 N.J. Eq. 485, 125 A. 486 (1924); In re Braun, (D.C. Pa. 1919) 259 F. 309; Lustgarden v. Felt-Tarrant Mfg. Co., (C.C.A. 3d, 1937) 92 F. (2d) 277; Boston and Montana Mining Co v. Montana Ore Purchasing Co., 24 Mont. 117, 60 P. 807 (1900); Freeman v. Premier Machine Co., (D.C. Mass. 1938) 25 F. Supp 927.

The situation arises most often where defendant was enjoined from infringing plaintiff's patent. It would be illogical to reduce punishment below the compensatory limits, but if plaintiff suffered no real damages, a nominal fine is proper.[12]

There are cases which seem to require "wilfulness" of violation for civil contempt liability—a term usually used to describe criminal contempts. In *Grant v. Johnson*,[13] defendant violated an injunction restraining him from operating his kennels and pet hospital so as to disturb plaintiff's restaurant business by noxious noises and odors. The court held defendant in contempt of the order, but reconsidered the case and discharged him, saying, "The greater weight of testimony indicates no wilful disobedience of the injunction order on the part of the defendants."[14] In *Whipple v. Nelson*,[15] defendant was enjoined from maintaining a ditch so that accumulated water overflowed on plaintiff's land. Under the advice of his lawyer and the county surveyor, defendant built two dams. Unusually heavy rains caused water to overflow the dams and run the old course to plaintiff's land. The court found that since defendant had not *wilfully* disobeyed the injunction, no contempt punishment should be imposed. Defendant had, in good faith, attempted to comply with the purpose of the order. Perhaps the result can be explained by the existence of a statute which said, "Disobedience of an injunction *may* be punished as a contempt by the court."[16]

In summary, it can be said that it is no defense to a civil contempt charge that defendant has no intention to defy the court, or impair the plaintiff's rights, or that he acted in the good faith belief that he was not violating the terms of the decree. To require proof of a specific intent by plaintiff would make effective enforcement of decrees and redress of injuries exceedingly difficult. The few exceptions to the general rule may be explained as attempts by the courts to avoid the harshness of the contempt remedy, especially where the alleged contemnor was obviously innocent of any wrongful intent, the violation occurred despite his honest efforts, or the plaintiff has suffered no appreciable injury by the breach.

[12] Strawberry Island Co. v. Cowles, 79 Misc. 279, 140 N.Y.S. 333 (1912).

[13] 272 App. Div. 968, 71 N.Y.S. (2d) 529 (1947).

[14] 272 App. Div. 1085, 74 N.Y.S. (2d) 751 (1947).

[15] 138 Neb. 514, 293 N.W. 382 (1940). Cf. the illustration given by the court in Thompson v. Pennsylvania R.R. Co., 48 N.J. Eq. 105 at 108, 21 A. 182 (1891).

[16] Neb. Comp. Stat. (1929) §20-1072. Italics supplied.

B. Intent in Criminal Court

The intent of the contemnor is the factor which serves to convert a mere civil contempt of plaintiff's rights into a criminal contempt of court.[17] The purpose of the proceeding is to punish, as for a crime, a wrong to the public represented by their courts, to discourage future contempts, and to uphold the dignity and authority of the judicial process.[18] Whether merely awarding the plaintiff his remedy in a civil contempt suit will sufficiently accomplish these ends,[19] or whether additional, punitive measures are called for,[20] must rest with the court's discretion. And the only guide to the exercise of that discretion is a vague notion as to the purpose of contempt punishment. Perhaps the various tests used to determine the existence of the requisite wrongful intent are as subjective as the state of mind they seek to measure.[21] But the court must find something more than a bare intent to violate the court order to bring into play the sanctions of criminal contempt.[22] It is submitted that gross negligence is not enough, despite occasional intimations to the contrary.[23]

The word most commonly used to characterize the state of mind which converts a civil contempt into a criminal contempt is that most

[17] Bigelow v. R.K.O. Pictures, (D.C. Ill. 1948) 78 F. Supp. 250 at 254; Denny v. State, 203 Ind. 682 at 691, 182 N.E. 313 (1932); In re Howell and Ewing, 273 Mo. 96, 200 S.W. 65 (1918); Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., (C.C.A. 6th, 1915) 230 F. 120 at 132 and 133.

[18] People ex rel. Munsell v. Court of Oyer and Terminer, 101 N.Y. 245 at 248 (1886); Thompson v. Pennsylvania R.R. Co., 48 N.J. Eq. 105 at 108, 21 A. 182 (1891); In re Rice, (C.C. Ala. 1910) 181 F. 217 at 220; People ex rel. Kelly v. Aitken, 26 Hun. (N.Y.) 327 at 329 (1879).

[19] E.g.: Bigelow v. R.K.O. Radio Pictures, (D.C. Ill. 1948) 78 F. Supp. 250 at 258; Mathews v. Spangenberg, (C.C. N.Y. 1883) 15 F. 813.

[20] E.g., see note 3, supra, and State v. Marron, 22 N.M. 632 at 640, 167 P. 9 (1917); L.R.A., 1918B, 217.

[21] For various judicial expressions characterizing the state of mind necessary for a criminal contempt, see the following: Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., (C.C.A. 6th, 1915) 230 F. 120 at 132; In re Presentment by Grand Jury of Stetser, (D.C. Del. 1942) 45 F. Supp 556 at 557; People ex rel. Kelly v. Aitken, 26 Hun. (N.Y.) 327 at 329 (1879); Denny v. State, 203 Ind. 682 at 704, 182 N.E. 313 (1932); In re Home Discount Co., (D.C. Ala. 1906) 147 F. 538 at 555; State ex rel. Indianapolis Bar Assn. v. Fletcher Trust Co., 211 Ind. 27 at 37, 5 N.E. (2d) 538 (1937); People v. Solomon, 150 Misc. 873 at 878, 271 N.Y.S. 136 (1934); In re Ft. Lee, 108 N.J. Eq. 425 at 427, 155 A. 473 (1931); Dodge v. State, 140 Ind. 284 at 288, 39 N.E. 745 (1895).

[22] One notable exception: public policy and effective enforcement of liquor laws indicate strict criminal contempt liability for violation of a "liquor injunction." Donato v. United States, (C.C.A. 3d, 1931) 48 F. (2d) 142; Nies v. Anderson, 149 Iowa 326, 161 N.W. 316 (1917); State v. Ramsey, 151 Kan. 764, 100 P. (2d) 637 (1940).

[23] United States v. Ford, (D.C. Mont. 1925) 9 F. (2d) 990; Limerick v. Riback, 204 Mo. App. 321, 224 S.W. 45 (1920).

annoying word "wilful."[24] As if to heap equivocation upon equivocation, the word appears in most criminal contempt statutes.[25] It should be noted that the only effective control over the trial court's determination that defendant "wilfully" disregarded the mandate of the court is the slim possibility of reversal for abuse of discretion.[26]

Ascertaining the existence of sufficient wrongful intent in cases of violations of decrees and orders presents a much more difficult problem than is found in the direct contempt and contempt by publication cases. There the court has the benefit of first-hand knowledge of the words or acts of the contemnor, and can determine with reasonable accuracy the intent with which they were uttered or done.[27] As a result, the intent to contemn is usually apparent from the act done or language used, which is said to be wrongful per se, and it is only when the act is of "doubtful propriety" that an inquiry into defendant's state of mind becomes necessary.[28]

To apply the same measuring criteria in cases where an order made for plaintiff's benefit has been violated is extremely dangerous, for in the mine-run case there will be no accompanying words or acts indicative of the actor's intent. And yet to demand proof of defendant's wrongful state of mind would emasculate the contempt power. Apparently the policy of maintaining the effectiveness of contempt proceedings has prevailed, for it is generally held that intent may be inferred from the act—defendant is presumed to intend the natural and probable conse-

[24] The following quotation indicates a few of the many ways in which the word "wilful" may be used: "The word [wilful] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose ... without justifiable excuse ... stubbornly, obstinately, perversely.... The word is also employed to characterize a thing done without ground for believing it is lawful ... or conduct marked by careless disregard whether or not one has a right so to act...." United States v. Murdock, 290 U.S. 389 at 394-395, 54 S.Ct. 223 (1933).

[25] Ind. Stat. Ann. (Burns, 1933) §3-903 (1078); N.Y. Consol. Laws (McKinney, 1944) Penal Law §600; Cal. Penal Code (1949) §166; N.C. Gen. Stat. (1943) §5-1(5); Neb. Comp. Stat. (1929) §20-2121.

[26] See May Hosiery Mills, Inc. v. U.S. Dist. Court, Montana, (C.C.A. 9th, 1933) 64 F. (2d) 450; In re Moore, 93 Cal. App. 488, 269 P. 664 (1928); Caldwell v. United States, (C.C.A. 9th, 1928) 28 F. (2d) 684.

[27] Dodge v. State, 140 Ind. 284 at 288, 39 N.E. 745 (1895); Dale v. State, 198 Ind. 110 at 123, 150 N.E. 781 (1926); In re Creely, 8 Cal. App. 713, 97 P. 766 at 768 (1908); Lancaster, Ticer and Trevathan v. State, 208 Ark. 412 at 415, 186 S.W. (2d) 673 (1945); State v. Kayser, 25 N.M. 245 at 255, 181 P. 278 (1919); Conley v. United States, (C.C.A. 8th, 1932) 59 F. (2d) 929 at 935; In re Terry, (C.C. Cal. 1888) 36 F. 419.

[28] See May Hosiery Mills, Inc. v. U.S. Dist. Court, Montana, (C.C.A. 9th, 1933) 64 F. (2d) 450.

quences of his act.[29] As in the direct contempt cases, some acts are considered contemptuous per se, and little opportunity is given defendant to show lack of intent to defy the court's authority.[30]

Other courts, with an eye to the inherent danger and possibility of injustice in too readily inferring "criminal" intent, may require a showing of wrongful intent beyond a reasonable doubt,[31] or perhaps will be quick to excuse defendant if his acts are capable of a construction consistent with innocence.[32] The philosophy underlying such holdings is ably set forth in *Weeks v. Smith*:[33] "The disobedience complained of must be 'wilful'. If the order be ambiguous or doubtful, or fairly capable of a construction which will consist with the person's innocence of any intentional disrespect to the court, I think the court should not interfere to punish for a contempt. Otherwise, this most salutary remedy which was intended, and should be used, only to maintain the dignity and efficiency of the court, might degenerate into a trap to catch the unwary and vex and annoy the innocent."

Practically all courts recognize an affirmative showing of good faith as relieving defendant of all criminal contempt liability.[34] The problem

[29] "If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent." Holmes, J. in Ellis v. United States, 206 U.S. 246 at 257, 27 S.Ct. 600 (1906). See Wartman v. Wartman, (C.C. Md. 1853) F. Cas. No. 17,210, Taney 362 at 370; In re Rice, (C.C. Ala. 1910) 181 F. 217 at 223; In re Home Discount Co., (D. C. Ala. 1906) 147 F. 538 at 555; Swepson v. United States, (C.C.A. 6th, 1918) 251 F. 205 at 208, 163 Cust. App. 361; United States v. P. and W. Coat Co., (D.C. N.Y. 1943) 52 F. Supp. 792; Selowsky v. Superior Court, 180 Cal. 404, 181 P. 652 (1919); Levinstein v. E. I. Du Pont De Nemours & Co., (D.C. Del. 1919) 258 F. 662; United States v. Kroger Grocery and Baking Co., (C.C.A. 7th, 1947) 163 F. (2d) 168; In re Creely, 8 Cal. App. 713, 97 P. 766 at 768 (1908).

[30] In re Rice, (C.C. Ala. 1910) 181 F. 217 at 223; Matter of North v. Foley, 149 Misc. 572 at 574, 267 N.Y.S. 572 (1933); Kayser v. Fitzgerald, 109 Misc. 27, 178 N.Y.S. 130 (1919); In re Parker, 177 N.C. 463, 99 S.E. 342 (1919).

[31] See In re Rice, (C.C. Ala. 1910) 181 F. 217 at 227-228; Sawyer v. Hutchinson, 149 Iowa 93 at 94, 127 N.W. 1089 (1910); Norwood v. Ray Mfg. Co., 11 Civ. Prac. R. 273 at 278 (1886).

[32] See In re Rice, (C.C. Ala. 1910) 181 F. 217 at 228; Matter of North v. Foley, 149 Misc. 572 at 574, 267 N.Y.S. 572 (1933); United States v. Kroger Grocery and Baking Co., (C.C.A. 7th, 1947) 163 F. (2d) 168; In re Singer, 109 N.J. Eq. 103, 156 A. 427 (1931).

[33] 3 Abb. Prac. (N.Y.) 211 at 212-213 (1856).

[34] In addition to the cases cited in note 16, supra, see N.L.R.B. v. Bell Oil and Gas Co., (C.C.A. 5th, 1938) 98 F. (2d) 405; People ex rel. Attorney General v. Jersin, 101 Colo. 406, 74 P. (2d) 668 (1937). But see the following cases declaring that "good faith" may be considered only in mitigation of punishment: In re Ft. Lee, 108 N.J. Eq. 425, 155 A. 473 (1931); State v. Marron, 22 N.M. 632 at 640, 167 P. 9 (1917); State v. Kayser, 25 N.M. 245, 181 P. 278 (1919); Levinstein v. E. I Du Pont De Nemours & Co., (D.C. Del. 1919) 258 F. 662; Eustace v. Lynch, (C.C.A. 9th, 1935) 80 F. (2d) 652; Nies v. Anderson, 179 Iowa 326, 161 N.W. 316 (1917); United States v. Johnson, (D.C. N.Y. 1943) 52 F. Supp. 382.

is how to establish "good faith" or lack of disrespectful intent to the court's satisfaction. It was once held that a sworn denial of intent to contemn would purge a criminal contempt.[35] But the only remedy against a false affiant was a perjury proceeding, which was not sufficiently effective to discourage untruthfulness and maintain the efficiency of the contempt power. Consequently, the doctrine is generally rejected today,[36] although sometimes recognized in a modified form by a few courts which hold that where the acts are ambiguous, so that intent becomes crucial, the contempt may be purged by a sworn disclaimer of improper intent.[37] Even this vestigal remainder is rejected by many courts[38] and given but slight cognizance by others.[39]

The most common method of establishing "good faith" is to show that the action was taken under advice of reputable counsel, honestly given and accepted; that, although counsel was mistaken, there was some basis for his opinion; and that defendant actually believed his acts constituted no violation of the order.[40] The rationale of this excuse is explained by the court in *People ex rel. Kelly v. Aitken*:[41] "If, for example, one, after careful examination, wrongly interpret, and through his mistake, disobey an order, the majesty of the law is not offended, nor the dignity of the court impaired; and, as he is innocent of wilful offense, the infliction of punishment could have no justification."

Other commonly accepted ways of establishing "good faith" are (1) proof of insanity,[42] (2) showing that the violative act occurred through mere inadvertence and through no fault of defendant,[43] (3)

[35] 8 AM. AND ENG. ENC. OF LAW, 2d ed., 74 (1898).

[36] Dale v. State, 198 Ind. 110, 150 N.E. 781 (1926); In re Terry, (C.C. Cal. 1888) 36 F. 419; United States v. Shipp, 203 U.S. 563 at 574, 27 S.Ct. 165 (1906).

[37] See 9 L.R.A. (n.s.) 1119 (1907) and L.R.A. 1917E, 650; United States v. Shipp, 203 U.S. 563, 27 S.Ct. 165 (1906); Lancaster, Ticer and Trevathan v. State, 208 Ark. 412, 186 S.W. (2d) 673 (1945); State ex rel. Indianapolis Bar Assn. v. Fletcher Trust Co., 211 Ind. 27 at 34, 5 N.E. (2d) 538 (1937).

[38] See Clark v. United States, 289 U.S. 1 at 19, 53 S.Ct. 465 (1932) overruling United States v. Shipp, 203 U.S. 563, 27 S.Ct. 165 (1906) on this point.

[39] See In re Rice, (C.C. Ala. 1910) 181 F. 217 at 228; State v. Marron, 22 N.M. 632 at 640, 167 P. 9 (1917). On the subject of purgation by oath and its present day implications, generally, see Curtis, "The Story of A Notion In The Law Of Criminal Contempt," 41 HARV. L. REV. 51 (1927).

[40] Matter of North v. Foley, 149 Misc. 572, 267 N.Y.S. 572 (1933); Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., (C.C.A. 6th, 1915) 230 F. 120 at 133; Wartman v. Wartman, (C.C. Md. 1853) F. Cas. No. 17,210, Taney 362; Mathews v. Spangenberg, (C.C. N.Y. 1883) 15 F. 813; Furrer v. Nebraska Bldg. and Investment Co., 109 Neb. 1, 189 N.W. 295 (1922); In re Home Discount Co., (D.C. Ala. 1906) 147 F. 538.

[41] 26 Hun. (N.Y.) 327 at 329 (1879).

[42] People v. Burt, 257 Ill. App. 60 (1930).

[43] Matter of North v. Foley, 149 Misc. 572 at 574, 267 N.Y.S. 572 (1933); United States v. Kroger Grocery and Baking Co., (C.C.A. 7th, 1947) 163 F. (2d) 168; Strawberry

proof of actual inability to comply with the order,[44] and (4) showing that defendant is one whose veracity is not to be doubted, and that there was some reasonable explanation for his act.[45]

There are other cases in which the courts were convinced that there was no disrespectful intent, and therefore no need for criminal contempt punishment. Although these cases do not fall into well-defined categories, they are illustrative of possible ways in which the burden of demonstrating good faith may be satisfied. In *People v. Bouchard*,[46] defendant succeeded in convincing the court that he violated an injunction solely for the purpose of testing the constitutionality of the statute pursuant to which it had been issued. And in *Hutton v. Superior Court*,[47] defendant was enjoined from intimidating plaintiff's patrons. Defendant was excused because he had no knowledge that a person arrested by him was one of plaintiff's customers.

Conclusion

The basic difficulty with the contempt decisions lies in the broad nature of the power, whose exercise depends almost entirely on judicial discretion. The desideratum is a clear and uniform expression of the purpose of and means of distinguishing civil and criminal contempt proceedings. For example, if courts would remember that a civil contempt suit is simply another remedy available to a damaged injunction plaintiff, and that a criminal contempt suit is but a means of deterring future violations by punishing past offenses, thereby upholding the dignity and effectiveness of the court and its process, they could more readily label a proceeding at the outset. Then the particular intent to be required, if any, could be determined.

Island Co. v. Cowles, 79 Misc. 279 at 290, 140 N.Y.S. 333 (1912); Bigelow v. R.K.O. Radio Pictures, (D.C. Ill. 1948) 78 F. Supp. 250 at 258.

[44] Hansborough v. State, 193 Miss. 461 at 466, 10 S. (2d) 170 (1942); Maggio v. Zeitz, 333 U.S. 56, 68 S.Ct. 401 (1948), noted in 46 MICH. L. REV. 933 (1948). But if the present inability to comply was caused by the wrongful act of defendant, criminal contempt punishment may be imposed. Cartwright's Case, 114 Mass. 230 at 240 (1873).

[45] This category seems to be limited to such persons as judges and other public officials who deny disrespect to the court. For example, see In re Perkins, (D.C. N.C. 1900) 100 F. 950 (defendant a deputy marshal who refused to execute a warrant, though with good reason, in a rather insolent letter to a U.S. commissioner); In re Smith, 2 Cal. App. 158, 83 P. 167 (1905) and Ryan v. Busick, 50 Cal. App. 26, 194 P. 514 (1920) (both involving judges who violated writs of mandamus which had been discharged by the appellate court, though remittiturs had not yet been filed); Havemeyer v. Superior Court, 87 Cal. 267, 25 P. 433 (1890) (defendant a judge who, on the advice of counsel, believed he could not lawfully obey the writ of prohibition).

[46] 6 Misc. 459, 27 N.Y.S. 201 (1894).

[47] 147 Cal. 156, 81 P. 409 (1905).

Although no particular intent is necessary for a civil contempt, beyond the intent to do the violative act, some damage to the plaintiff should be shown and the remedy shaped accordingly. It is submitted that the power to punish as for a civil contempt should be sparingly exercised when other, less stringent remedies are available.

The problem of intent in criminal contempt is more difficult to assess, since past tests to determine the existence of the requisite intent have been as subjective as the state of mind they seek to measure. However, some uniformity might be attained if each court carefully considers the harshness of the punishment and the purpose of the penalty. Thus far, lip service has been given to the statement that some intent to bring the court into disrespect is a prerequisite to criminal contempt liability. However, close examination of the cases reveals that punishment has often been imposed where the presence of such intent might be doubted. In such cases the explanation given is that wrongful intent may be inferred from the act. It is submitted that the courts should recognize the existence of a power to punish as for a criminal contempt in cases of violations where it appears necessary to deter future violations of a similar nature. There would then be two bases for criminal contempt liability: (1) violation of a decree or order plus a proved intent to impair judicial authority, and (2) violation of a decree or order under circumstances which indicate a need for punishment as a warning to prospective violators similarly situated. This proposed solution, while no panacea, would have the merit of clarifying the rationale of punishment in a particular case, and yet would preserve the necessary amount of discretion in the trial court.

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