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# EQUITY-CRIMINAL CONTEMPT-VIOLATION OF COURT ORDER OR DECREE-ATTORNEY'S RESPONSIBILITY

Warren K. Urbom S.Ed.
*University of Michigan Law School*

EQUITY—CRIMINAL CONTEMPT—VIOLATION OF COURT ORDER OR DECREE—ATTORNEY'S RESPONSIBILITY—Employees of *R*, while on strike, picketed in the vicinity of a warehouse that was owned by *X* but a part of which had been rented by *R*. The warehouse was served by two railroad spur tracks and two streets. Attempts to deliver goods to the warehouse via the railroad tracks were physically obstructed by the pickets, whereupon a temporary injunction issued restraining employees from "picketing . . . plaintiff's railroad tracks and spur tracks or right of way or property in any manner whatsoever. . . ." Thereafter, on the strength of an attorney's advice, the employees maintained pickets fourteen feet from the railroad tracks, off the property of the railroad company, for the ostensible purpose of deterring trucks from reaching the warehouse by way of the streets. Trainmen were orally advised that the picketing was not directed

at the railroad company and that goods could be delivered over the railroad tracks unmolested. In giving his advice the attorney had relied on an earlier decision of the state supreme court holding that similar picketing was primary action rather than action directed at the railroad company.[1] On petition to make the injunction permanent the lower court held the pickets and the attorney in criminal contempt. *Held,* on appeal, affirmed, two justices dissenting. Although an attorney acts in good faith in interpreting the scope of an injunction, his advice renders him guilty of criminal contempt where the action which he recommends is violative of a lawful injunction. *Stewart v. State,* (Ark. 1953) 254 S.W. (2d) 55.

Under what is generally called an inherent power[2] courts from early times have punished for contempt persons who, having notice of a valid court order or decree, actively violate it.[3] This is true whether the contemnor is a party, a stranger, or an officer of the court.[4] However, if an attorney does not himself actively violate the order or decree but merely advises his client concerning its scope or validity, special problems arise. Because of the continual conflict between the duties of an attorney, who must, on the one hand, vigorously protect his client's rights and defenses and must, on the other hand, as an officer of the court,[5] refrain from all acts which would interfere with the administration of justice or detract from the court's dignity, courts have had no little difficulty in marking a satisfactory line between the duties.

If an attorney merely advises, there is little opportunity to hold him in civil contempt of court, which is a purely remedial device designed to compel one party to obey a previously existing order or decree.[6] But criminal contempt is often used to punish attorneys for exceeding the bounds of propriety in the defense of his client.[7] Two general tests have been laid down for holding in criminal contempt attorneys who have advised their clients concerning an order or decree: (1) An attorney may give his opinion as to the scope or validity of an order or decree, but if he advises the doing of an act that results in a disobedi-

[1] Missouri Pac. R. Co. v. United Brick & Clay Workers Union, 218 Ark. 707, 238 S.W. (2d) 945 (1951).

[2] In re Debs, 158 U.S. 564 at 594, 15 S.Ct. 900 (1895). If the court is established directly by constitutional mandate, the legislature cannot limit its contempt power. Crook v. Schumann, 292 Ky. 750, 167 S.W. (2d) 836 (1942). Congress, as creator of the federal district and circuit courts, has limited their contempt powers. Compare 62 Stat. L. 701, §402 (1948) with 1 Stat. L., c. 20, §17 (1789). For similarly restrictive state statutes see 2 Neb. Rev. Stat. (1943) §§25-1072, 25-2121; 4 Mich. Comp. Laws (1948) §605.1.

[3] Eyre v. Countess of Shaftsbury, 2 P. Wms. 103, 24 Eng. Rep. 659 (1722). For the development of contempt powers see FOX, THE HISTORY OF CONTEMPT OF COURT (1927).

[4] Fawick Airflex Co. v. United Elec. Radio & Mach. Workers, (Ohio App. 1950) 90 N.E. (2d) 610; In re Megill, 114 N.J. Eq. 604, 169 A. 501 (1933).

[5] Butterfield v. State, 144 Neb. 388, 13 N.W. (2d) 572 (1944); Ex parte Davis, (C.C. Fla. 1901) 112 F. 139.

[6] McCrone v. United States, 307 U.S. 61, 59 S.Ct. 685 (1939).

[7] For the numerous kinds of acts by attorneys that may be held contemptuous see 65 CENT. L.J. 331 (1907); 18 TULANE L. REV. 634 (1944); 11 ST. LOUIS L. REV. 313 (1926); 8 TEMP. L.Q. 543 (1934).

ence of the order, he is liable as a criminal contemnor.[8] (2) An attorney may advise the doing of any act which he believes in good faith to be permissible under the order or decree, but he may not conspire with the client to violate the command.[9] Courts using test (1) rule that intent or good faith is immaterial. This test appears to be consistent with the function of civil contempt, but incongruous with the purpose of criminal contempt. Inasmuch as civil contempt proceedings are designed to protect the party for whose benefit the order or decree was given by coercing compliance with the order or decree,[10] it is unimportant to the injured party that the contemnor did not intentionally violate the order or willfully hold the court in disrespect. Since the penalty for civil contempt is conditioned upon compliance with the order or decree,[11] the contemnor may relieve himself of the penalty at any time.[12] In this way penalizing despite good faith works no material hardship on the contemnor; he is required to do only that which he is already under a duty to do. On the other hand, criminal contempt is invoked for the purpose of vindicating the court's dignity or authority from some contumacious act.[13] It is often said that if the contemnor did not willfully impugn the dignity of the court, the law is not offended, and no punishment is necessary.[14] Many courts recognize that at least an affirmative showing of good faith on the part of the contemnor will relieve him of any serious penalty,[15] if not purge him completely of the contempt.[16] As the client will in these jurisdictions be held to this "good faith" standard, no sound reason is perceived for holding the attorney to a stricter test. However, prompted by a feeling that an officer of the court ought to be especially respectful of a court's authority, a few courts following test (2) have indicated that attorneys will be held to more stringent liability than their clients.[17]

The principal case clearly applies test (1) to both the attorney and his clients. Although it is probably wise to judge attorney and client by identical standards

[8] In re Cooley, 95 N.J. Eq. 485, 125 A. 486 (1924); 2 HIGH, INJUNCTIONS, 3d ed., §1426 (1890).

[9] In re Watts and Sachs, 190 U.S. 1, 23 S.Ct. 718 (1903); Wells v. Commonwealth, 62 Va. 500 (1871).

[10] Thompson v. Pennsylvania R. Co., 48 N.J. Eq. 105, 21 A. 182 (1891); NLRB v. Whittier Mills Co., (5th Cir. 1941) 123 F. (2d) 725.

[11] Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 31 S.Ct. 492 (1911); Penfield Co. v. SEC, 330 U.S. 585, 67 S.Ct. 918 (1947).

[12] Civil contemnors "carry the keys of their prison in their own pockets." In re Nevitt, (8th Cir. 1902) 117 F. 448 at 461.

[13] In re Merchants' Stock & Grain Co., 223 U.S. 639, 32 S.Ct. 339 (1912); Bessette v. Conkey Co., 194 U.S. 324, 24 S.Ct. 665 (1904).

[14] Kelly v. Aitken, 19 Hun (N.Y.) 327 at 329 (1879).

[15] The court in In re Sylvester, (D.C. N.Y. 1930) 41 F. (2d) 231, merely held the attorney in technical contempt without punishment except a reprimand.

[16] NLRB v. Bell Oil and Gas Co., (5th Cir. 1938) 98 F. (2d) 405; People v. Jersin, 101 Colo. 406, 74 P. (2d) 668 (1937).

[17] See In re Portland Electric Power Co., (D.C. Ore. 1947) 97 F. Supp. 903. The language of this case may mean only that an attorney will be more heavily punished than his client, although held to the same standard as to the existence of a contempt. The principal case follows this procedure as to test (1).

as to the existence of a contempt so that the attorney will be astute to uphold the full authority of the court, test (1) seems to be too strict for either client or attorney. It is particularly difficult to understand how the dignity of a court can be offended by an innocent misconstruction of an order or decree that is reasonably capable of more than one construction, as in the principal case.[18] Furthermore, the use of test (1) is subject to the criticism that it may cause an attorney to be unduly hesitant in protecting his client's privileges that are just outside the scope of the order or decree.[19] The wiser course would seem to be to apply test (2) to both attorney and client, thereby refusing to hold either for criminal contempt upon a showing of good faith.[20]

*Warren K. Urbom, S.Ed.*

[18] This is not to say that the party for whose benefit the order was given may not be injured by the misconstruction. In such circumstances civil contempt could be used against the violating party to protect the injured party, and criminal contempt could be used against the attorney if the requisite intent were present on his part.

[19] A number of decisions have used this as a basis for exculpating the attorney. Caldwell v. United States, (9th Cir. 1928) 28 F. (2d) 684; In re Watts and Sachs, 190 U.S. 1, 23 S.Ct. 718 (1903). Semble: Schmidt v. United States, (6th Cir. 1940) 115 F. (2d) 394, stressing the long-lived effects of a criminal contempt conviction on an attorney's professional career.

[20] There is some slight indication that a court may apply a different standard to attorneys depending upon whether his advice is given on the basis of an interpretation of the scope of the order or decree or of its validity. While declaring that test (2) above applied, the court in Leber v. United States, (9th Cir. 1909) 170 F. 881, punished for contempt an attorney who advised his client that an order was void although good faith appeared to be established. Emphasis was placed on the fact that the attorney could have challenged the order's validity by other methods, such as moving to quash. However, the same would be true as to determining scope as well. An attorney could apply for a modification or a construction of the order by the court, In re Braun, (D.C. Pa. 1919) 259 F. 309, which should then relieve him of contempt proceedings arising from that construction or from advising an act after a refusal by the court to construe the order. Riverside Bank v. Maxa, (Fla. 1950) 45 S. (2d) 678. Probably this type of procedure is what the courts using test (1) desire to promote.