No. 453, O.T. 1946
3/24/47

Penfield Co. v. SEC: F.F.'s dissent

Although I agree that the CCA should be reversed, I do not agree with F.F.'s ground. It has been said that "In a civil contempt punishment is not discretionary because the object is remedial, and the party invoking the court's aid on the contempt has the right to its remedy." In re Sylvester, 41 F.2d 231, 236; E. Ingrhama Co. v. Germanow, 4 F.2d 1002, though of course the nature and extent of the relief is for the trial court. E. Ingraham Co. v. Germanow, supra.

When an administrative agency has issued a lawful subpoena, it must be judicially enforced. See Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186. And once judicially enforced, if not obeyed, it is my view that the court must give appropriate relief in civil contempt. Otherwise, we allow the court to inquire into the questions which it may not inquire into at the earlier enforcement stage.

If a person faced with an administrative subpoena which he believes was incorrectly enforced or which, because of some change in circumstances, he believes should not be obeyed, he should move to quash it or make some similar appropriate motion.

In my view the District Court should have given civil relief. The CCA was correct in reversing the District Court. But it should not have ordered the contemnor imprisoned. The kind of civil relief to be given was a matter for the District Court to decide. (For the moment, I assume In re Bradley, 318 U.S. 50, is not applicable to this type of situation, but see my earlier "draft" dissent.)

3. *Bring down _____ from note 2.*

4. See the Court's discussion in Gompers v. Buck's Stove & R. Co., 221 U.S. 418, particularly at pp. *444*-449, *451* ff.; see also discussion in United States v. United Mine Workers, 330 U.S. ___, dissenting opinion, p. ___, Part III.

5. The Gompers opinion, as I understand it, *does not hold* that the character of the relief sought is exclusively the criterion of the character of the proceeding. _____ _____, in view of the Court's stress upon other factors, including the private or public character of the complainant, whether or not the contempt proceeding arises in and as corollary to civil litigation, and the necessity for observing distinct procedural requirements in the course of trial, *the case seems* clearly *to* rule that the character of the proceeding determines the nature of the relief which can be given *rather than the reverse*.

6. *See the references cited in Note 4 supra; and see Note 5.*

7. "A Criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest….." Rule 42 (b), Federal Rules of Criminal Procedure. See United States v. United Mine Workers, 330 U. S. ____, dissenting opinion, p. ___, and n. 45.

8. See text infra. The record does not show that the function of the subpoena had been exhausted at the time of the judgment in contempt, *although this was Young's contentions accepted, apparently, by the District Court*. The contrary, in fact, affirmatively appears. The subpoena did not purport to be issued exclusively in connection with and for the purposes of the criminal trial which transpired in the District Court between its issuance and the time of the judgment in contempt. Counsel for the Commission expressly stated that the subpoena was not limited to that matter and the Court said, after referring to the period of the criminal suit: "Whether that period of time is covered by what the Securities and Exchange Commission seeks or not, I do not know." *Bring up matter from n. 9.*

I find it difficult to reconcile the action taken in this case with what was done in the Mine Workers decision. A majority *there held as I thought contrary to the Gompers ruling*, that civil and criminal contempt could be prosecuted in a single contempt proceeding conducted according to the rules of procedure applicable in equity causes, [17] and that both types of relief, civil and criminal, could be imposed in such a mixed proceeding. *It was* also held that on review the appellate court is free to substitute its own judgment concerning the nature and extent of both types of relief for that of the trial court, and therefore that in remanding the cause for further proceedings there was no necessity to leave room for the further exercise of _____ _____ discretion in relation to either type of relief.

If *in this case* a single mixed proceeding could suffice without regard to the requirements of Rule 42 (b) and the Gompers line of decisions concerning procedures to be followed in instituting and conducting contempt proceedings, for the imposition of both civil and criminal penalties, I see no valid reason why the same thing could not be done in this cause or why both the criminal fine imposed by the District Court and the civil relief given by the Circuit Court of Appeals should not be allowed to stand.

No. 453, O.T. 1946

File

Penfield and Young v. SEC

Mr. Justice Rutledge,

The action of the Circuit Court of Appeals in remanding the case "for an order requiring Young's imprisonment to compel his obedience" was erroneous in two respects.

1. Petitioner had paid the fine imposed by the District Court. In such circumstances, In re Bradley, 318 U.S. 50, holds that the fine, even if erroneously imposed, is "a full satisfaction of one of the alternative penalties of the law"[1] and the power of the courts is "at an end". See also Ex parte Lange, 18 Wall. 163. The Bradley case was not limited to case where one criminal contempt sanction was imposed *after* another. Nor could *it* have been, for the same statute governs both criminal and civil contempts.[2] In re Sixth and Wisconsin Tower, Inc., 108 F.2d 538. For although the statute had its origin in the abuse of the criminal contempt power, see Frankfurter and Landis, Power of Congress over Procedure in "Inferior" Federal Courts (1924) 37 Harv. L. Rev. 1010, it is general in terms and not limited to criminal contempt. And the suggestion that Congress would permit both fine and imprisonment to be used coercively but

---

[1] Section 268 of the Judicial Code provides, "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers in said courts in their official transactions, and the disobedience or resistance by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

[2] See note 1.

would forbid their joint use as a means of punishment seems to me untenable[3], particularly so in view of the historical confusion between the two types of contempt.

In my view there cannot be fine and imprisonment either in civil or criminal contempt. And though the statute, of course, does not forbid fine or imprisonment for civil contempt and fine or imprisonment for criminal contempt where the proceedings are separate, compare United States v. United Mine Workers, 330 U.S.—, and the same act constitutes both, this qualification has no application here. When the proceeding is one, the choice of fine or imprisonment must be made. That is plainly the Congressional command.

Accordingly, I conclude that the case is governed by In re Bradley, supra.

2. But even if it were not, the Circuit Court of Appeals should have allowed the District Court to decide what type of coercive relief—fine or imprisonment—was appropriate under the circumstances. As Judge Learned Hand said in reversing an order denying punishment for civil contempt and remanding the case, "…naturally the form and extent of the punishment must be decided by the District Court to whose hands we remit it without any suggestion." E. Ingraham Co. v. Germano 4 F.2d 1002, 1003.

---

[3] The suggestion is made by the Government. The Court, however, assumes argunedo that the statute applies to civil as well as to criminal contempt.