COMMENTS

CRIMINAL vs. CIVIL CONTEMPT

In the contempt proceedings against the United Mine workers, Judge Goldsborough stated to the defense counsel "If you know the exact difference between a civil and criminal contempt, you are the only person who does."[1] Judge Goldsborough was perhaps right in denying that there is any "exact difference" insofar as the distinction between these two kinds of contempt consists of a multitude of differences, none of which are well understood by the courts. This lack of understanding arises in most instances because "any given distinction between civil and criminal contempt may be treated in one case as a basis of the classification, and in another as a consequence of the classification."[2] One of the purposes of this article is to examine the bases and the consequences of this distinction.

Two recent cases have presented new and have re-emphasized old problems in this field. In October, 1946 the Government was operating the major portion of the bituminous coal mines of the United States. On November 15, 1946 Mr. John L. Lewis notified the Government that the United Mine Workers Union was terminating the Krug-Lewis agreement under which the mines were operated. A copy of this notification was circulated among the mine workers for their "official information." On November 18, the Government obtained, in the District Court for the District of Columbia, a temporary restraining order. On that same day a gradual walkout commenced and by November 20 a strike was in progress in accord with the miners "no contract, no work" policy. Contempt proceedings were instituted against Mr. Lewis and the Union, and on December 4, the District Court found the defendants guilty of both civil and criminal contempt. Mr. Lewis was fined $10,000 and the United Mine Workers Union was fined $3,500,000. The Supreme Court granted certiorari to the United States Circuit Court for the District of Columbia. The opinion of the court in *United States v. United Mine Workers*[3] presents three matters

1. 94 N.Y. Times 2:2 (November 30, 1946).
2. Moskovitz "Contempt of Injunctions, Civil and Criminal" 43 Col. L. Rev. 780, 781 (1943). This is a leading article on the subject and contains a detailed examination of the bases and consequences of the classification. The citation of authorities is excellent.
3. 330 U.S. 258 (1947).

for consideration. First, the Supreme Court stated that even if the order of the District Court was issued without jurisdiction, the defendants would be guilty of criminal[4] but not civil[5] contempt. Second, it was held that the District Court did not err in permitting the trial of both a civil and a criminal contempt action in the same proceeding.[6] Third, the Court affirmed the fine of Mr. Lewis but reduced the fine of the United Mine Workers to $700,000 on condition that the defendant purge itself within a reasonable time.[7]

In another recent case, the Securities Exchange Commission had been conducting an investigation. A *subpoena duces tecem* was issued but the witness refused to produce the documents. An application to the District Court for an order to enforce the subpoena having been made and granted, contempt proceedings were instituted upon the continued refusal of the witness to comply. The District Court refused to grant coercive relief, but did impose an unconditional fine of $50. The Circuit Court of Appeals reversed, holding that the District Court erred in imposing the fine, and directed that the witness be ordered imprisoned until he produced the documents. In *Penfield Co. of California v. Securities Exchange Commission*,[8] the Supreme Court affirmed. The case illustrates an unusual feature: an appellate court substituted a civil contempt remedy for the criminal contempt penalty which had been imposed by the District Court. The case also illustrates an all too frequent occurrence: a final determination of the nature of the contempt proceeding was not made until the appellate stage of the proceeding. Lastly, the case is by implication a reaffirmation of the power of an agency of the Government to institute civil contempt proceedings.

I. HISTORY OF THE DISTINCTION

A noted English writer on contempt stated that "the rules for preserving discipline, essential to the administration of justice, came into existence with the law itself, and con-

4. Id. at 294.
5. Id. at 295.
6. Id. at 299.
7. Id. at 305.
8. 330 U.S. 585 (1947). In a concurring opinion, Justice Rutledge thought the holding of the majority was contra to the holding in the United Mine Workers case to the effect that both civil and criminal contempt could be tried together in the same proceeding. Id. at 595.

tempt of court . . . has been a recognized phrase in English law from the twelfth century."[9] Although the origin of contempt thus appears to be ancient, the precise instance when the distinction between civil and criminal contempt was first made is not clear. Mr. Beale stated that it was not clearly and expressly recognized until late in the nineteenth century.[10] Nevertheless, there are cases which apparently make the distinction in the seventeenth[11] and eighteenth[12] centuries. It seems clear that the distinction did not assume much importance until the origin of the Court of Chancery since "contempt as a coercive process has been the child of equity, for the injunction has been its touchstone."[13] However obscure the origin of the distinction may be, it is unquestionably firmly embedded in our law.

II. BASIS OR CONSEQUENCE OF THE DISTINCTION?

Sources of Confusion

One cannot read many of these cases without becoming exposed to utter confusion. "Few legal distinctions are emptier" says one author,[14] and one court described the distinction as "resting in shadow."[15] No doubt much of the difficulty is caused by the use of the terms "civil" and "criminal" to describe the two kinds of contempt proceedings. These terms have well fixed meanings in our law. Not un-

9. Fox, "The History of Contempt of Court" 1 (1927).
10. Beale, "Contempt of Court, Civil and Criminal" 21 Harv. L. Rev. 161, 167 (1908). Mr. Beale relied upon Wellesley's Case, 2 Russ. and My. 639, 29 Eng. Rep. 538 (1831).
11. Bartram v. Dannet, Cast. Finch 253, 23 Eng. Rep. 139 (1676); Rex v. Rodman, Cro. Car. 198, 79 Eng. Rep. 774 (1630). In both cases, the action was to recover costs awarded to a party in a contempt proceeding. A pardon was pleaded. The court held that the pardon did not extend to costs in favor of a private party. See notes 63 and 64 for the rule on pardon.
12. King v. Meyers, 1 T.R. 265, 99 Eng. Rep. 1086 (1786) (the defendant was attached for contempt for failing to pay a penalty; the court held this was a civil proceeding, and, since the defendant was apprehended on Sunday, he was released); Roach v. Garvin, 2 Atkyns 469, 471, 26 Eng. Rep. 683, 684 (1742) (The court stated there were three kinds of contempt, the second kind being described as follows: "There may be likewise a contempt of this court in abusing parties who are concerned in causes here.")
13. Note, 32 Va. L. Rev. 1010, 1021 (1946). Although the violation of an injunction is the usual situation giving rise to the distinction, the violation of a mandate may also present the distinction. Ex parte Rowland, 104 U.S. 604 (1881).
14. Nelles, "The Summary Power to Punish For Contempt" 31 Col. L. Rev. 956, 960 (1931).
15. In Re Eskay, 122 F.2d 819, 822 (C.C.A. 3d 1941).

naturally, these meanings have been carried along with the transfer of the terms. Were the courts today to adopt the terms "public contempt" and "private contempt," as suggested in an early case,[16] much confusion would be eliminated. Another factor that contributes to this confusion is that "most frequently the question of the nature and character of the proceeding, whether civil or criminal, is determined at its end in the stage of review rather than . . . at the beginning."[17] The courts have devised a number of tests upon which they base the distinction they make in a particular case. As shall be seen, these tests frequently are useless since they are applied at the appellate stage of the proceeding. In order to eliminate much of the confusion, it is imperative that the initial designation of the nature of the proceeding be made in the trial court and that this designation be reflected in the pleadings. Additional difficulty is encountered because each case usually presents fact situations permitting the application of several tests, because the results of these tests may be diametrically opposed to each other, and because any given test is seldom conclusive. No satisfactory evaluation of the weight to be given any one test has ever been made.

Purpose Test

"It is not the fact of punishment but rather its character and purpose that often serve to distingnish between the classes of cases. If it is for civil contempt, the punishment is remedial and for the benefit of the complainant. But if it is for criminal . . . the sentence is punitive, to vindicate the authority of the court."[18] This definition is almost universally accepted[19] and certainly is the best test that the courts have devised.[20] Nevertheless, its utility depends upon

16. People v. Court of Oyer and Terminer, 101 N.Y. 245, 248, 4 N.E. 259, 260 (1886).
17. See Justice Rutledge dissenting in U.S. v. United Mine Workers, 330 U.S. 258, 368 (1947).
18. Gompers v. Buck Stove and Range Co., 221 U.S. 418, 441 (1910).
19. Besette v. W. B. Conkey Co., 194 U.S. 324, 329 (1904); Denny v. State, 203 Ind. 682, 707, 82 N.E. 313, 321 (1932); State ex rel Chicago, B. and Q. Ry v. Bland, 189 Mo. 197, 214, 88 S.W. 28, 33 (1905); Drake v. National Bank, 168 Va. 230, 239, 190 S.E. 302, 306 (1937); Rapalje, "Contempt" §21 (1884); Fox, "The History of Contempt of Court" 1 (1927).
20. But even definitions sometimes must be defined. For example, an atom is defined as one of the hypothetical indivisible parts of which all matter is supposed to be formed. This definition has little meaning to a person who does not know the meaning of

an ability to ascertain the character and purpose of the particular proceeding. This can be done only if civil and criminal contempt are separately treated in the pre-trial phase of the proceedings. For example, the prayer for relief should be in its nature either remedial or vindicative; the pleadings should state the nature of the action; and the title of civil contempt proceedings should be different from those for criminal contempt. Such requirements would be easily satisfied and would determine conclusively the nature of the proceeding. Compliance with such requirements would, at the earliest stage of the action, inform the courts of the character and nature of a particular proceeding. This would enable the trial court to properly determine the consequences of the distinction; *e.g.*, does the defendant have a right against self-incrimination in the particular proceeding before the court. The failure to develop and rigidly adhere to such requirements has led to the adoption of numerous but seldom conclusive tests, discussed below, as well as resulting in confusion between tests and consequences of the distinction.

Title of Proceeding

Apart from the inconclusiveness of the tests, some of them would be effective as procedural requirements if a rigid compliance were demanded. Some courts hold that the title of the proceeding aids in determining whether the contempt is civil or criminal. In *Gompers v. Buck Stove and Range Co.*[21] the Supreme Court pointed out that a civil contempt proeceding is between the original parties and is instituted as a part of the original action; but criminal contempt proceedings are between the state and the defendant and are not a part of the original atcion. But in *Nye v. United States,*[22] the Supreme Court held that this test was not decisive. In that case, although the title of the proceeding, except on appeal, was the same as in the original

"matter." Thus, the real utility of this definition of civil and criminal contempt depends largely upon an ability to ascertain the purpose of the particular contempt proceeding. This often is not easy.

21. 221 U.S. 418, 444 (1910); see Parker v. U.S. 153 F.2d 66, 70 (C.C.A. 1st 1946); Bradstreet v. Bradstreet Collection Bureau, 249 Fed. 958, 960 (C.C.A. 2d 1918); Department of Health of New Jersey v. Borough of Ft. Lee, 108 N.J. Eq. 139, 154 Atl. 319 (1931).

22. 313 U.S. 33, 42 (1940).

action, the Court concluded that the defendant was prosecuted for a criminal contempt. In *Denny v. State*,[23] the leading Indiana decision on this subject, the court, after an extensive survey of the problems created by this distinction, stated several conclusions, among which was "that the information for a criminal contempt should be entitled State of Indiana v. the defendant . . . (and) that a proceeding for a civil contempt should be filed in the civil case out of which it arises."[24]

Prosecuting Parties

Another test is the requirement in some jurisdictions that civil contempt cases be prosecuted by the parties and that prosecution of criminal contempt cases be conducted by state officials.[25] It has been stated of this test that its value is enhanced by "the fact its application is exceptionally easy and also because it is available at the very beginning of the proceeding."[26] This, of course, is equally true of the preceeding title test.

The application of this test in Indiana is not clear. In one case a private person was permitted to prosecute a criminal contempt proceeding.[27] Subsequently, a dictum in the *Denny* case indicated that the "who is the plaintiff" test would be followed.[28] It has been suggested that the rule in Indiana is that the state is a "proper" but not a "necessary" party to a criminal contempt proceeding.[29]

At one time the requirement that a private person prosecute civil contempt cases caused some difficulty where the United States or its agents were complaining parties in the contempt proceedings. Thus, it was held that the Federal Trade Commission had no power to commence civil contempt

23. 203 Ind. 682, 182 N.E. 313 (1932).
24. Id. at 707, 182 N.E. at 321.
25. McCann v. N.Y. Stock Exchange, 80 F.2d 211, 214 (C.C.A. 2d 1935); Wakefield v. Hansel, 288 Fed. 712, 715 (C.C.A. 8th 1923); McCauley v. First Trust and Savings Bank, 276 Fed. 117 (C.C.A. 7th 1921); Denny v. State, 203 Ind. 682, 706, 182 N.E. 313, 321 (1932); In re Whitmore, 9 Utah 441, 35 Pac. 524 (1841).
26. Moskovitz, "Contempt of Injunctions, Civil and Criminal" 43 Col. L. Rev. 780, 787 (1943).
27. Oakland Coal Co. v. Wilson, 196 Ind. 501, 149 N.E. 54 (1924).
28. Denny v. Stato, 203 Ind. 682, 706, 182 N.E. 313, 321 (1932).
29. Moskovitz, "Contempt of Injunctions, Civil and Criminal" 43 Col. L. Rev. 780, 810, n. 139 (1943).

proceedings since it represented a public, not a private, interest.[30] This holding was squarely repudiated one year later when the Supreme Court stated that "the mere presence of the United States as a party, acting through its agents, does not impress upon the controvery the elements of a criminal proceeding."[31] Subsequent cases have also affirmed the power of administrative agencies to bring civil contempt proceedings.[32] Notably, however, one distinction will probably be made between civil contempt proceedings brought by an administrativ agency and those brought by private persons. As shall be seen, a plaintiff in a civil contempt proceeding may be awarded a compensatory fine. It seems unlikely that such a fine would be awarded to an administrative agency. It is much more likely that an administrative agency will seek only to have the defendant coerced into compliance where that is possible.[33]

Payment of Fine

There is also a "to whom is the fine paid" test. In a civil contempt proceeding, a fine may be awarded to the complainant which is in its nature compensatory.[34] It will usually include actual loss,[35] plus the expenses of prosecuting the action,[36] and may include profits lost because of the contumacious conduct.[37] But in New York a statute permits

30. Federal Trade Commission v. A. McLean and Son, 94 F.2d 802 (C.C.A. 7th 1938).

31. McCrone v. U.S., 307 U.S. 61, 64 (1939).

32. Penfield Co. of California v. Securities and Exchange Commission, 330 U.S. 585 (1947); National Labor Relations Board v. Whittier Mills Co., 123 F.2d 725 (C.C.A. 5th 1941); National Labor Relations Board v. Hopwood Retinning Co., 104 F.2d 302 (C.C.A. 2d 1939).

33. But cf. U.S. v. United Mine Workers, 330 U.S. 258 (1947) where the government obtained damages for civil contempt.

34. Moore v. Sanitary Milk Co., 209 Ind. 558, 570, 200 N.E. 228, 233 (1936); Denny v. State, 203 Ind. 682, 707, 182 N.E. 313, 321 (1932); see cases in notes 35, 36, and 37.

35. Union Tool Co. v. Wilson, 259 U.S. 107, 110 (1922); Matter of Christenson Engineering Co., 194 U.S. 458, 459 (1904); Parker v. U.S., 153 F.2d 66 (C.A.A. 1st 1946); Ashby v. Ashby, 62 N.J. Eq. 618, 50 Atl. 473 (1910); City of Scranton v. People's Coal Co., 274 Pa. 63, 117 Atl. 673 (1922).

36. Norstrom v. Wall, 41 F.2d 920 (C.C.A. 7th 1930); Campbell v. Motion Picture Machine Operators, 151 Minn. 238, 186 N.W. 787 (1922); Hilton v. Hilton, 89 N.J. Eq. 422, 105 Atl. 65 (1918) (relying on statute); Clark v. Barnes, 76 N.Y. 294 (1879).

37. Freeman v. Premier Machine Co., 25 F. Supp. 927, 928 (Mass. 1928). For an analysis of the accounting methods used in computing the amount of the fine, see John B. Stetson Co. v. Stephen L. Stetson Co., 58 F. Supp. 586 (S.D.N.Y. 1944).

the imposition of a fine though no loss or injury is shown.[38] In view of the character of civil contempt fine and its payment to the complainant, it is, as observed by one court,[39] more in the nature of a tort judgment of money damages awarded for the defendant's wrongful conduct. A conditional fine in civil contempt proceedings may be imposed for the purpose of coercing the defendant into compliance with the court order.[40] Upon compliance, the duty to pay the fine is excused.[41]

In criminal contempt cases the fine is punitive and is paid to the public treasury.[42] Such fines must not be unreasonable,[43] but this does not mean that they must be small. In one case a fine of $250,000 was imposed[44] and in the *United Mine Workers* case the unconditional fine against the union was $700,000 and the conditional fine was $2,800,000.[45]

The *Nye* case also held this "to whom is the fine paid" test to be inconclusive.[46] Moreover, in three Supreme Court cases a fine was made payable in part to the complainant and in part to the Government.[47] The *coup de grace* was administered in the *United Mine Workers* case to the conclusiveness of this test in the federal courts. Though in assessing this fine the Court thought that it should consider

38. N.Y. Judiciary Law § 773.
39. Parker v. U.S., 153 F. 2d 66, 71 (C.C.A. 1st 1946).
40. U.S. v. United Mine Workers, 330 U.S. 258 (1947); Doyle v. London Guaranty Co., 204 U.S. 599 (1907); Ex parte Rowland, 104 U.S. 604 (1881).
41. See cases in n. 40.
42. Parker v. U.S., 153 F.2d 66, 70 (C.C.A. 1st 1946); Oakland Coal Co. v. Wilson, 196 Ind. 501, 149 N.E. 54 (1925); Limerick v. Riback, 204 Mo. App. 321, 224 S.W. 45 (1920); Eastern Concrete Steel Co. v. B. and M. I. Union, 193 N.Y.S. 368, 370 (App. Div. 4th Dept. 1922).
43. Freeman v. Premier Machine Co., 25 F. Supp. 927, 928 (Mass. 1938); Campbell v. Motion Picture Machine Operators, 151 Minn. 238, 186 N.W. 787 (1922); Hilton v. Hilten, 89 N.J. Eq. 422, 105 Atl. 65 (1918).
44. City of Scranton v. Peoples Coal Co., 274 Pa. 63, 117 Atl. 673 (1922).
45. U.S. v. United Mine Workers, 330 U.S. 258, 305 (1947).
46. Nye v. U.S., 313 U.S. 33, 42 (1940).
47. Union Tool Co. v. Wilson, 259 U.S. 107 (1922); In re Merchant's Stock and Grain Co., 223 U.S. 639 (1912); Matter of Christenson Engineering Co., 194 U.S. 458 (1904). The inapplicability of this test is further demonstrated by State ex rel Chicago, B. and Q. Ry. v. Bland, 189 Mo. 197, 88 S.W. 28 (1905) where the fine was made payable, neither to the complainant nor to the government, but to the public schools.

the magnitude of the harm done, the probable effectiveness of any suggested sanction, the amount of the defendant's resources, and the consequent seriousness of the burden to the particular defendant, it is impossible to say which of these considerations applied to the civil contempt fine and which applied to the criminal contempt fine. The Court did not say how much of the fine was for civil contempt and how much was for criminal contempt. Since both of the proceedings were tried together and since the Government was the complainant in both proceedings, the utility of this test was nil.

Characteristics of Imprisonment

In addition to the treatment of fines differently, there is a distinction between imprisonment for civil contempt and imprisonment for criminal contempt. Imprisonment for civil contempt is intended to be coercive and is usually for an indefinite period of time.[48] The defendant remains in jail until he complies with the order—"he carries the keys of his prison in his own pocket."[49] This is ordinarily a very persuasive remedy, though sometimes a person may be disposed to think otherwise; for example, an Illinois woman preferred to remain in jail several years rather than comply with a court order.[50] On the other hand, imprisonment for criminal contempt is for a definite period and is intended to be punitive, not coercive.[51]

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48. Gompers v. Buck Stove and Range Co., 221 U.S. 418 (1910); Parker v. U.S., 153 F.2d 66, 70 (C.C.A. 1st 1946); Raymoor Ballroom Co. v. Buck, 110 F.2d 207, 212 (C.C.A. 1st 1940); Denny v. State, 203 Ind. 682, 707, 182 N.E. 313, 321 (1932); Markle v. Local Union, 131 N.J. Eq. 202, 208, 24 A.2d 364, 367 (1942); Sullivan, 137 S.W.2d 306, 308 (Tenn. App. 1939). Compare Dahl v. Dahl, 210 Minn. 361, 298 N.W. 361 (1941) (definite sentence of 30 days imposed in civil contempt case) with Paulson v. Johnson, 214 Minn. 202, 203, 7 N.W.2d 338, 339 (1943) (imprisonment for definite term used to show that this case involved a criminal contempt). This rule has been modified by statute in some states. See Ala. Code (1940) tit. 13, § 19; Wis. Stat. (1943) § 295.16.

49. In re Nevitt, 117 Fed. 448, 451 (C.C.A. 8th 1902).

50. Tetgmeyer v. Tetgmeyer, 292 Ill. App. 434, 11 N.E.2d 657 (1937). This case is criticised in Moskovitz, "Contempt of Injunctions, Civil and Criminal" 43 Col. L. Rev. 780, 802, n. 95 (1943).

51. Gompers v. Buck Stove and Range Co., 221 U.S. 418 (1910); Parker v. U.S., 153 F.2d 66, 70 (C.C.A. 1st 1946); The Navemar, 17 F. Supp. 495 (E.D.N.Y. 1936); Passaic-Athena Bus Co. v. Consolidated Bus Co., 100 N.J. Eq. 188, 135 Atl. 282 (1926). Contra: Blair v. U.S., 250 U.S. 273 (1919).

Negative Order Test

Some courts have adopted a negative order test; thus, where a court enjoins the performance of an act, a violation of that order can only be criminal contempt, especially where it is impossible to restore the status quo.[52] Since civil contempt is frequently considered a coercive remedy, the courts reason that they cannot coerce a defendant into undoing what he has done. This reasoning overlooks the fact that money damages customarily are substitued in those situations where a person has sustained an injury and it is impossible to retore the status quo; *e.g.*, wrongful death cases. There is no valid reason why the violation of a negative order may not be civil contempt and that the judgment be for money damages. In *Seaboard Airline R.R. v. Tampa Southern R.R.*,[53] the defendant was enjoined from using a railroad spur. Having violated the injunction, contempt proceedings were commenced. Applying this test, it was held that this could only be criminal contempt. This case clearly illustrates why this test is a poor one. Instead of imprisonment until compliance with the court order, which was impossible, the court need only have imposed a fine payable to the complainant. There is an additional reason for rejecting this test. Most court orders can be worded either affirmatively or negatively. An inadvertent choice of the negative form would preclude subsequent liability for civil contempt if this test is applied, thus denying the injured party the aid from a court which he may justly seek.

Limerick v. Riback[54] demonstrates another evil of this test. A negative order was issued. The court recognized that the violation of that order could not be civil contempt, relying on the negative order test; consequently, the court held that the defendant was guilty of criminal contempt. The court conceded that there was no evidence of intentional conduct, but concluded that "gross negligence" would support the conviction. Generally, there must be wilfulness to support a conviction for criminal contempt.[55] The court's

52. Gompers v. Buck Stove and Range Co., 221 U.S. 418, 443 (1910); Bessette v. W. B. Conkey Co., 194 U.S. 324 (1904); Phillips v. Welch, 11 Nev. 187 (1876); State v. Knight, 3 S.D. 509, 54 N.W. 412 (1893).

53. 101 Fla. 468, 134 So. 529 (1931).

54. 204 Mo. App. 321, 224 S.W. 45 (1920).

55. Denny v. State, 203 Ind. 682, 707, 182 N.E. 313, 321 (1932); Pawlowski v. City of Schnectady, 217 N.Y. 117, 111 N.E. 478 (1916); State v. Highsmith, 105 S.C. 505, 90 S.E. 154 (1916).

conclusion that gross negligence was adequate is clearly undesirable and it is submitted that the negative order test was responsible for the conclusion.

The Indiana Supreme Court properly rejected the negative order test in the *Denny* case when the court concluded "That the intent of the alleged contemnor distinguishes a criminal contempt from a mere violation of an order of injunction; and, consequently, criminal and civil contempts cannot be distinguished by the test of whether the conduct of the defendant consists in refusing to do an act required by an order of the court or in doing an act prohibited by the order of the court, since one may as flagrantly defy the authority of a court by refusing to do an act enjoined, as by doing an act forbidden by an order of the court."[56]

Despite this criticism, there is one speical situation in which the application of the test would work no great harm. That situation arises when an administrative agency issues a negative order. As already noted, in civil contempt, imprisonment is designed to coerce the defendant into obedience, the release from jail depending upon compliance. When a negative order is issued, coercion to secure compliance is impossible—the defendant cannot undo what he has already done. Therefore, in such a situation the only civil contempt relief available to an administrative agency would be damages; however, such agencies do not ordinarily seek damages. Thus, by applying the negative order test here, no substantial harm results since the agency is not deprived of any relief that it would otherwise obtain.[57] Of course, the criminal contempt penalties are still available.

Argument of Counsel and Prayer for Relief

Occasionally, a court may look to the argument of counsel to determine the nature of the contempt proceeding. In *The Navemar*[58] the court relied in part on the argument of counsel to decide that the case involved a criminal contempt

56. Denny v. State, 203 Ind. 682, 707, 182 N.E. 313, 321 (1932).
57. See Moskovitz, "Contempt of Injunctions, Civil and Criminal" 43 Col. L. Rev. 780, 813 (1943).
58. 17 F. Supp. 495 (E.D.N.Y. 1935). See U.S. v. United Mine Workers, 330 U.S. 258, 297 (1947) ("And in argument on the motion the defendants stated and were expressly informed that a criminal contempt was to be tried").

proceeding. But in another case,[59] the court refused to do this, stating "We will not take cognizance of equivocal remarks made by court or by counsel in the course of the case." Similarly, the courts have sometimes looked to the prayer for relief, keeping in mind the remedial aspect of civil and the vindicating aspect of criminal contempt.[60]

Defeneses

As previously observed, sometimes the courts treat these tests as the bases of the distinction and sometimes as the consequences of the distinction. But there are some consequences which ordinarily are not considered or applied as tests. The nature of the contempt proceeding will affect the defenses available. Good faith may mitigate the penalty in criminal[61] but not in civil[62] contempt. Although usually a defendant may be pardoned by the executive for criminal contempt[63] but not for civil contempt,[64] in Indiana the executive has no power to pardon for criminal contempt.[65]

Indiana follows the rule that a defendant in a criminal contempt proceeding is entitled to a discharge upon his verified answer if the answer is sufficient to show lack of intent to defy the authority of the court.[66] This defense, obviating the necessity of introducing evidence, is generally not approved in the United States and has been severely criticised.[67] As with the application of the negative order test, this defense has led the courts to reach undesireable results. In *Locrasto v. State*,[68] in order to hold that the verified an-

59. National Popsicle Corp. v. Kroll, 104 F.2d 259, 260 (C.C.A. 2d 1939).
60. McCann v. N.Y. Stock Exchange, 80 F.2d 211 (C.C.A. 2d 1935); Kelley v. Montbello Park, 141 Md 194, 118 Atl. 600 (1922); Hanna v. State ex rel Rice, 169 Miss. 314, 153 So. 371 (1934).
61. Eustace v. Lynch, 80 F.2d 652, 656 (C.C.A. 9th 1935).
62. Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 230 Fed. 120, 132 (C.C.A. 6th 1916).
63. Ex parte Grossman, 267 U.S. 87 (1925); In re Nevitt, 117 Fed. 448 (C.C.A. 8th 1902).
64. Rivers v. Miller, 31 F. Supp. 540, 546 (M.D. Ga. 1940); see In re Opinion of the Justices, 301 Mass. 615, 621, 17 N.E.2d 906, 911 (1938); Rex v. Rodman, Cro, Car. 198, 79 Eng. Rep. 139 (1676).
65. State v. Schumaker, 200 Ind. 716, 164 N.E. 408 (1928).
66. Denny v. State, 203 Ind. 682, 707, 182 N.E. 313, 321 (1932). But cf. Dale v. State of Indiana, 198 Ind. 110, 150 N.E. 781 (1926).
67. Curtis and Curtis, "The Story of a Notion in The Law of Criminal Contempt" 41 Harv. L. Rev. 51 (1927).
68. 202 Ind. 277, 173 N.E. 456 (1930).

swer was not an adequate defense, the court held that the case involved a civil contempt proceeding; yet, by an application of many of the tests previously considered, this would have been a criminal contempt proceeding: a determinate sentence was imposed, a fine was made payable to the state, the case was entitled in the name of the state, and the case was prosecuted by state officials.

Evidence

In some respects different rules of eivdence are applied. In a criminal contempt proceeding, the defendant cannot be compelled to be a witness against himself[69] but may in civil contempt proceedings.[70] In criminal contempt the defendant is presumed to be innocent[71] and the quantum of proof required is beyond a reasonable doubt.[72] A determination that a defendant is guilty of civil contempt need not be supported by proof beyond a reasonable doubt;[73] however, the courts are not uniform in the quantum of proof required; *e.g.*, some require that the proof in civil contempt cases be clear and convincing[74] and other courts only require a preponderance of the evidence to sustain the holding.[75]

Settlement

Where there has been a change of circumstances sub-

69. Gompers v. Buck Stove and Range Co., 221 U.S. 418 (1910); Parker v. U.S., 153 F.2d 66 (C.C.A. 1st 1946); State ex rel Dailey v. Dailey, 164 Wash. 140, 2 P.2d 79 (1931).

70. American Pastry Products Corp. v. United Products Corp., 39 F.2d 181 (Mass. 1930); Root v. McDonald, 260 Mass. 344, 157 N.E. 684 (1927); State ex rel Baker Lodge No. 47 v. Sieber, 49 Ore. 1, 88 Pac. 313 (1907).

71. Parker v. U.S., 153 F.2d 66 (C.C.A. 1st 1946); Eastern Fruit Growers v. Gottfried, 136 F.2d 98 (C.C.A. 9th 1943); In re United Hatters of North America, 110 N.J. Eq. 42, 158 Atl. 435 (1932); State ex rel Anderson v. Daugherty, 137 Tenn. 125, 191 S.W. 974 (1916).

72. Gompers v. Buck Stove and Range Co., 221 U.S. 418 (1910); Parker v. U.S., 153 F.2d 66 (C.C.A. 1st 1946); Eastern Fruit Growers v. Gottfried, 136 F.2d 98 (C.C.A. 9th 1943); Root v. McDonald, 260 Mass. 344, 157 N.E. 684 (1927); State ex rel Anderson v. Daugherty, 137 Tenn. 125, 191 S.W. 974 (1916).

73. Coca Cola Co. v. Feuler, 7 F. Supp. 364 (S.D. Tex. 1934); State v. Frolich, 316 Ill. 77, 146 N.E. 733 (1935).

74. Telling v. Bellows-Claude Neon Co., 77 F.2d 584 (C.C.A. 6th 1935); Coca Cola Co. v. Feuler, 7 F. Supp. 364 (S.D. Tex. 1934); Morgan v. National Bank of Commerce, 90 Okla. 280, 217 Pac. 388 (1923).

75. State v. Frolich, 316 Ill. 77, 146 N.E. 733 (1935); People v. Buconich, 270 Ill. 290, 115 N.E. 185 (1917).

sequent to the issuance of the order, liability for contempt may depend upon the nature of the proceeding. A settlement between the parties in the main cause, said the Supreme Court in the *Gompers* case, would preclude liability for civil contempt, but that "if this had been . . . criminal contempt to vindicate the authority of the court . . . it could not in any way have been affected by any settlement which the parties to the equity cause made in their private litigation."[76] The purpose of civil contempt is remedial. After a settlement, the complainant would not be entitled to any remedy for the violation of an injunction. But since the purpose of criminal contempt is to vindicate the authority of the court, a settlement could not affect that purpose.

Improvidently Issued Order

The violation of an order erroneously issued has given rise to prolific litigation involving the distinction between civil and criminal contempt. When an order is subsequently reversed on appeal, there is no civil contempt liability for a violation of the order occurring prior to the reversal.[77] This is because a party not entitled to the benefit of a court order can suffer no legal consequences as a result of its violation. The theory of civil contempt is that it is to remedy a wrong done. It would seem, then, that a person could violate the order with impunity and without resorting to legal processes to have the order reversed. Although such a procedure is condoned, it would seem wiser to file a bill of review to have the order vacated.[78] From the viewpoint of counseling it would be wiser to obey the order until it is reversed because the party would not only bear the risk of an affirmance of the validity of the order, but such conduct, if intentional, would constitute criminal contempt.[79] The subse-

76. Gompers v. Buck Stove and Range Co., 221 U.S. 418, 451 (1910).
77. Salvage Process Corp. v. Acme Tank Cleaning Process Corp., 86 F.2d 727 (1936); Newton Rubber Works v. De Las Casas, 198 Mass. 156, 84 N.E. 119 (1908); Red River Potato Growers Assoc. v. Bernardy, 128 Minn. 153, 150 N.W. 383 (1915); Kaehler v. Dobberpuhl, 56 Wis. 497, 14 N.W. 631 (1883).
78. See Newton Rubber Works v. De Las Casas, 84 N.E. 119, 120 (Mass. 1908).
79. Merrimac River Savings Bank v. Clay Center, 219 U.S. 527 (1911); Securities Exchange Commission v. Okin, 137 F.2d 862, 863 (C.C.A. 2d 1943); Ex parte Fortenbury, 38 Cal. App.2d 284, 101 P.2d 105 (1940); Lyon and Healy v. Piano O. and M.I.W. International Union, 289 Ill. 176, 124 N.E. 443 (1919); Red River Potato Growers Assoc. v. Bernardy, 128 Minn. 153, 130 N.W. 383 (1915); State v. Nathan, 49 S.C. 199, 27 S.E. 52 (1897).

quent reversal of the order would not excuse liability for criminal contempt but could be considered in mitigation of the penalty.[80] The spirited attitude of the courts in this matter is forcefully stated in an early English case: "It is not open to any party to question the orders of this court, or any process issued under the authority of this court, by disobedience. I know of no act which this court may do which may not be questioned in a proper form and on a proper application; but I am of the opinion that it is not competent for anyone . . . to disobey an injunction or any other order of the court on the ground that such orders were improvidently made . . . I consider the rule to be of such importance to the interests and safety of the public and to the due administration of justice that it ought, on all occasions, to be inflexibly maintained."[81] Another court has thought this was the only way to maintain law and order.[82] It is not for the defendant to flout the processes of the courts according to his own notion of his rights. It is not for him to decide whether the order was valid or not. Even the violation of an order erroneously issued is an affront to the authority of the court, and it is the duty of the court to vindicate its authority, no matter how ill advised was the issuance of the order.

III. SEPARATE OR COMBINED PROCEEDINGS

"It may not always be easy to classify a particular act as belonging to either one of these two classes . . . (since) . . . it may partake of the characteristics of both."[83] Indeed,

80. Shuler v. Raton Waterworks, 247 Fed. 634, 638 (C.C.A. 8th 1917); Cape May and S.L. R.R. v. Johnson, 35 N.J. Eq. 422, 425 (1882); Sullivan v. Judah, 4 Paige (N.Y.) 444, 447 (1834); Russel v. East Anglian R.R., 3 Mac. and G. 104, 42 Eng. Rep. 201 (1850).

81. Russel v. East Anglian R.R., 3 Mac. and G. 104, 117, 42 Eng. Rep. 201, 206 (1850). In the United States, the courts state the proposition as follows: "An injunction or restraining order must be obeyed until vacated or modified by the court awarding it or by superior authority or until the order or decree which granted it has been reversed on appeal, no matter how unreasonable and unjust the decree may be in its terms and no matter how flagrantly the rules of equity have been violated by the court in ordering it to issue." Seaboard Airline R.R. v. Tampa Southern R.R., 134 So. 529, 533 (Fla. 1931).

82. Wireless Specialty Apparatus Co. v. Priess, 140 N.E. 793, 794 (Mass. 1923).

83. Bessette v. W. B. Conkey Co., 194 U.S. 324, 329 (1904); Bangs v. Northern Indiana Power Co., 211 Ind. 628, 636, 6 N.E.2d 563, 566 (1937).

every civil contempt, if an intentional violation, is an affront to the authority of the court, thus constituting also a criminal contempt. There is nothing unique about this. Assault and battery not only makes a person liable in a civil action, but, in certain circumstances, also constitutes a violation of the criminal law. Where contumacious conduct does constitute both civil and criminal contempt, it would seem that, as in the case of assault and battery, separate proceedings would be required.

But in the *United Mine Workers* case, evidently influenced by the convenience of the procedure, the Supreme Court held that civil and criminal contempt proceedings could be tried together.[84] In reaching this conclusion, it was necessary for the Court to interpret Rule 42(b) of the Federal Rules of Criminal Procedure.[85] This rule requires that notice of the proceedings describe them as criminal. Justice Rutledge in his dissent stated that he thought that Rule 42(b) required separate proceedings.[86] Although the Rule does not specifically require separate proceedings, such an inference would be reasonable and proper. Although there was an obvious noncompliance with the rule, the Court refused to make a "rigourous" interpretation of it, stating that the defendants sustained no prejudice by the noncompliance.[87] The Court expressed the opinion that the defendants were adequately informed of the nature of the charge. Justice Rutledge's dissidence with the combined procedure is exemplified by the following language: "In any other context than one of con-

84. U.S. v. United Mine Workers, 330 U.S. 258, 299 (1947).

85. Fed. R. Crim. P., 42(b): "Disposition Upon Notice and Hearing. 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 the 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 to arrest. The defendant is entitled to a trial by jury in any case in which an Act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

86. U.S. v. United Mine Workers, 330 U.S. 258, 372, especially n. 45 (1947).

87. Id. at 297.

tempt, the idea that a criminal prosecution and a civil suit for damages or equitable relief could be hashed together in a single criminal—civil hodgepodge would be shocking to every American lawyer and to most citizens."[88]

In *McCann v. New York Stock Exchange*,[89] Judge Learned Hand, speaking for the court, held that unless the defendant was advised that the proceeding was for criminal contempt, then the court would deem the proceeding to be for civil contempt. Rule 42(b) was adopted because of this holding.[90] Since the defendant had not been advised that this was a criminal contempt proceeding, the court held the proceeding to be civil contempt. It is worthy of note that in this case there was filed a notice of a motion for an order "punishing the defendant for contempt of court through wilful violation" of the injunction.[91] The notice in the *McCann* case was as informative to that defendant as to the nature of the charge as were the factors relied upon in the *United Mine Workers* case.[92] A different result was reached because the court in the *McCann* case adopted a "rigorous" interpretation of its own requirement. Even before the *McCann* case and twenty-seven years before the *United Mine Workers* case, the Supreme Court had stated that "due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges."[93]

Such a combined proceeding in Indiana would not be permitted. In the *Denny* case, the court stated "that even though a single act of disobedience of an order of injunction may constitute both a criminal and civil contempt, a proceeding in contempt for enforcement of civil rights and remedies is legally as independent of a criminal proceeding as a civil action for assault and battery is independent of a criminal prosecution based upon the same facts."[94] This is really the only sound conclusion. Innumerable difficulties

88. Id. at 364.
89. 80 F.2d 215 (C.C.A. 2d 1935).
90. United States Supreme Court Advisory Committee on Rules of Criminal Procedure, Notes to the Rules (March, 1945) at p. 34.
91. McCann v. New York Stock Exchange, 80 F.2d 215, 217 (C.C.A. 2d 1935).
92. See U.S. v. United Mine Workers, 330 U.S. 258, 297 (1947).
93. Cooke v. U.S., 267 U.S. 517, 537 (1925).
94. Denny v. State, 203 Ind. 682, 707, 182 N.E. 313, 321 (1932).

which apparently did not arise in the *United Mine Workers* case would be sure to arise in other combined proceedings for civil and criminal contempt. For example, in a combined proceeding should the defendant be compelled to be a witness against himself? In a single proceeding should the state prosecute one action and a private party another? Under Rule 42(b) sometimes a jury trial is permitted in criminal cases. In such a case, in a single proceeding, would it be feasible to have a jury trying the criminal contempt and the court trying the civil contempt? From the viewpoint of expediency and convenience a negative answer to these questions is patent.

However, there would be no prejudice to constitutional rights since such rights theoretically can be safeguarded even in a single proceeding. For example, in a civil proceeding both legal and equitable issues may be litigated, the legal issues being tried by a jury and the equitable issue being tried by court. Manifestly, constitutional rights are adequately protected in such a proceeding. It might be concluded that such an example demonstrates the expediency of a combined proceeding. But, clearly, this is distinguishable from the contempt problem. In the example given the legal and equitable issues are separate; therefore, it is impossible to get two different results on any given issue. However, in a civil and criminal contempt proceeding, some of the issues may be the same; *e.g.*, did the defendant violate the order? Conceivably, a jury might reach an affirmative answer in a criminal contempt proceeding and the court reach a negative answer in a civil contempt proceeding. Further, in the civil and criminal contempt cases, differences of burden of proof, self incrimination, and quantum of evidence are involved; while in a case involving both equitable and legal issues, the only difference pertains to the right to trial by jury.

The interpretation of Rule 42(b) is unfortunate. It has been stated in reference to the decision of the lower court in the *United Mine Workers* case that "this is not the first time that judicial action had responded to impelling considerations of public need, and it is safe to assume that it will not be the last."[95] The prophecy was accurate. Al-

95. Note, 45 Mich. L. Rev. 469, 508 (1947).

though the same source stated "the Supreme Court . . . can now consider the legal questions involved in an atmosphere freed of the tension which was present when the strike was still on,"[96] it sems more realistic so far as the interpretation of Rule 42(b) is concerned to say that judicial action once again "responded to impelling considerations of public need." It seems reasonable to expect that the Supreme Court will confine its sanction of the combined proceeding in the *United Mine Workers* case to the facts of the case. Rule 42(b) still has some efficacy in that, even as interpreted, the defendant must not be prejudiced by a failure to notify him that the proceeding is one for criminal contempt. Under the facts in the case, this means at least that the defendant must have actual knowledge of the nature of the proceeding.

IV. THE EFFECT OF LACK OF JURISDICTION

A consequence of the distinction between civil and criminal contempt which deserves separate consideration is presented by the violation of an order void for lack of jurisdiction. It seems clear that the violation of such an order issued without juridiction would not be civil contempt. Since the complainant would not be entitled to the benefit of the order, he can have suffered no legal damages. A substantial number of cases hold this also is not criminal contempt.[97]

In the *United Mine Workers* case, the Supreme Court stated that even if the District Court did not have jurisdiction under the Norris-La Guardia Act to issue the order, the defendant would be guilty of criminal[98] but not civil[99] contempt. Justice Frankfurter took the position that the District Court did not have jurisdiction, but he also joined in affirming the conviction of criminal contempt.[100]

Traditionally, any action taken by a court which did not have jurisdiction has been considered void, not merely voidable. From a policy point of view, the disregard of it

96. Ibid.

97. Ex parte Sawyer, 124 U.S. 200 (1888); Ex parte Fisk, 113 U.S. 713 (1885); Ex parte Rowland, 104 U.S. 604 (1881); Beauchamp v. U.S., 76 F.2d 663 (C.C.A. 9th 1935); Abbott v. Eastern Mass. St. Ry., 16 F.2d 463 (C.C.A. 1st 1927); Old Dominion Telegraph Co. v. Powers, 140 Ala. 220, 37 So. 195 (1904); Hoffman v. State, 207 Ind. 695, 194 N.E. 331 (1935).

98. U.S. v. United Mine Workers, 330 U.S. 254, 294 (1947).

99. Id. at 295.

100. Id. at 311.

by the Court in this type of case is certainly justified, since in such cases the choice is between order and disorder. Our law provides an orderly process of review and contemplates the use of such process so that courts, and not individuals, should determine whether or not a given order is or is not properly issued. As stated by Justice Brewer in *In Re Debs*,[101] "It is a lesson which cannot be learned too soon or too thoroughly that under this government by and for the people the means of redress of all wrong are through the court and the ballot box, and that no wrong carries with it legal warant to invite as a means of redress"[102] nonjudicial action.

The conclusion that the defendants in the *United Mine Workers* case were guilty of criminal contempt even if the district court did not have jurisdiction was based primarily upon *United States v. Shipp*.[103] In that case, an appeal from an order denying a petition for habeas corpus was taken to the Supreme Court. The order allowing the appeal also ordered that all proceedings against the defendant be stayed and that the custody of the defendant be retained pending the appeal. Shipp, who was the sheriff, of the county where the defendant was confined, was notified of this order. Subsequently the defendant was lynched and Shipp was charged with criminal contempt for the violation of that part of the order requiring the defendant be retained in custody. In the contempt proceeding, Shipp maintained that he was permitted to violate this order with impunity because the order allowing the appeal was void for want of jurisdiction. In holding the defendant guilty of criminal contempt, Justice Holmes stated the rule as follows: "It has been held, it is true, that orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt." (At this point the opinion cited *Ex parte Sawyer*, *Ex parte Rowland*, and *Ex parte Fisk*, discussed below.) "But even . . . if this court had no jurisdiction . . . this court and this court alone could decide that such was the law. It and it alone necessarily had jurisdiction to decide

101. 158 U.S. 564 (1895).

102. Id. at 598.

103. 203 U.S. 563 (1906). For another consideration of this case in which the author argues that it is not applicable to the United Mine Workers case, see Watt, "The Divine Right of Government By Judiciary" 14 U. of Chi. L. Rev. 409, 436 (1947).

whether the case was properly before it . . . Until its judgment declining jurisdiction should be announced, it had authority from the necessity of the case to make orders to preserve existing conditions."[104] Thus, since a court had jurisdiction to decide whether or not it has jurisdiction of the main cause in a particular proceeding, it may issue orders necessary to preserve existing conditions until that issue can be decided; and the validity of the issuance of such orders is in no way dependent upon the ultimate determination of the jurisdictional issue. It would seem then, that so long as those orders were issued to preserve existing conditions, jurisdiction to issue those orders was absolute, although it might be ultimately determined that the court did not have jurisdiction over the main cause. Further, the violation of orders issued to preserve existing conditions would constitute criminal contempt in spite of the subsequent determination that the court had no jurisdiction over the main cause.

The majority and dissenting opinions were in substantial disagreement as to the application of the *Shipp* case to the *United Mine Workers* case. This would seem to be entirely a matter of statutory interpretation. The issue to be decided was whether or not the Norris-La Guardia Act was intended to require a federal court to determine its jurisdiction under the Act before it issued any restraining orders in labor dispute cases. Neither the majority opinion nor the concurring opinion of Justice Frankfurter expressly decided this question. For example, Justice Frankfurter did decide that the Norris-La Guardia Act deprived the district court of jurisdiction over the main cause, but he did not expressly decide whether or not the Act deprived the district court of the power to issue orders to preserve existing conditions while it determined the application of the Norris-La Guardia Act to the main cause. On the contrary, Justice Frankfurter apparently assumed that the Act did not restrict the *Shipp* rule to non-labor dispute cases. This apparently was the assumption of the majority for it stated "in these circumstances, the District Court *unquestionably* had the power to issue a restraining order for the purpose of *preserving existing conditions* pending a decision upon its own jurisdiction."[105] (Italics added.)

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104. U.S. v. Shipp, 203 U.S. 563, 573 (1906).
105. U.S. v. United Mine Workers, 330 U.S. 258, 290 (1947).

In his dissenting opinion Justice Rutledge adopted a more restricted interpretation of the *Shipp* rule by taking a different view of the meaning of "preserving existing conditions."[106] The effect of Shipp's contempt was to moot the habeas corpus proceeding, thus depriving the Supreme Court of jurisdiction to determine the issues in that appeal. Consequently, Justice Rutledge would confine the application of the *Shipp* rule to those situations where the effect of the contempt would be to moot the main cause. The effect of the defendant's contempt in the *United Mine Workers* case did not deprive the district court of jurisdiction, since that court, if it ever had jurisdiction to issue an injunction, retained that jurisdiction after the violation of the restraining order; therefore, Justice Rutledge concluded that it was not issued to "preserve existing conditions." No doubt Justice Rutledge was also influenced by the fact that an order which purported to preserve existing conditions in the *United Mine Workers* case was necessarily identical to the kind of order that would be issued if it was subsequently determined that the district court did have jurisdiction over the main cause. On this ground he might have concluded that the Norris-La Guardia Act did restrict the application ot the *Shipp* rule to non-labor dispute cases.

There is one federal and two state decisions which are very similar on their facts to the *United Mine Workers* case. *Carter v. United States*[107] involved a conviction for criminal contempt growing out of the violation of a labor injunction. On appeal from the contempt conviction, it was held that the defendant was properly convicted even if the trial court had no jurisdiction.[108] This case was approved in the *United Mine Workers* case. In *Reid v. Independent Union of All Workers*[109] and in *People ex rel Sandnes v. Sheriff of King's County*,[110] a labor injunction was issued in spite of state statutes which were models of the Norris-La Guardia Act. After violations of these orders, contempt proceedings were instituted. In both cases, it was contended that the lower court had no jurisdiction. In the *Sandnes* case, the New

106. Id. at 395.
107. 135 F.2d 858 (C.C.A. 5th 1943).
108. The conviction was reversed on rehearing for other reasons.
109. 200 Minn. 599, 275 N.W. 300 (1937).
110. 164 Misc. 355, 299 N.Y. Supp. 9 (S.Ct. 1937).

York court held that the trial court was without jurisdiction; therefore, the conviction of contempt was reversed. In the *Reid* case, the Minnesota court affirmed the conviction, stating "As long as nothing more infallible than human beings can be found wherewith to implement our courts . . . jurisdiction implies, as a matter of regrettable but inescapable necessity, that jurisdiction to decide is the power to decide erroneously as well as correctly."[111]

There are three Supreme Court cases which at first seem contrary to the *United Mine Workers* case. In *Ex parte Sawyer*[112] a municipal official obtained from a United States Circuit Court an injunction restraining other municipal officials from proceeding to remove him from office. The injunction was violated and the defendants were punished for contempt. The Supreme Court issued a writ of habeas corpus releasing them from imprisonment on the ground that the circuit court was without jurisdiction to issue the injunction. The lack of jurisdiction was based upon alternate grounds; i.e., either this was restraining a criminal proceeding; or it was an interference with a judicial proceeding of the state; or it was an attempt to try title to a public office. Since the circuit court had no jurisdiction, the Court concluded, the injunction was void and its violation would not be contempt. Chief Justice Waite and Justice Harlan dissented on the ground that instead of lacking jurisdiction in every such case, the most that could be said was that the lower court had erorneously concluded that it had jurisdiction in this case; therefore, the circuit court was permitted "to enquire . . . whether the case is one that entitles the party to the relief he asks, and, if necessary to prevent wrong in the mean time, to issue in its discretion a temporary restraining order for that purpose . . . Such an order will not be void, even though it may be found on examination to have been improvidently issued."[113] The dissenting opinions thus

111. Reid v. Independent Union of All Workers, 200 Minn. 599, 601, 275 N.W. 300, 301 (1937). Both cases have been widely commented upon and variously interpreted. See Notes, 18 Boston L. Rev. 621 (1938); 51 Harv. L. Rev. 747 (1938); 23 Iowa L. Rev. 433 (1938); 36 Mich. L. Rev. 1208 (1938); 86 U. of Pa. L. Rev. 676 (1938).

112. 124 U.S. 200 (1888).

113. Id. at 223.

seem to anticipate the *Shipp* rule. In *Ex parte Rowland*[114] a Circuit Court of the United States issued an order to the defendant to levy a tax upon certain property to satisfy the claim of a creditor and to cause this tax to be collected. The tax was levied but the defendant did nothing to cause the tax to be collected; consequently, the defendant was punished for contempt by fine and imprisonment. As noted below, the fine and imprisonment were to be suspended if the claim of the creditor was paid. The Supreme Court held this conviction for contempt was void on the grounds that the issuance of the order to cause the defendant to collect the tax was beyond the jurisdiction of the court. In *Ex parte Fisk*[115] a proceeding was commenced in a state court to recover damages for fraudulent misrepresentations. Pursuant to its procedure, the state court ordered the defendant to answer, in a pre-trial procedure, interrogatories submitted by his adversary. The proceeding was removed to a United States Circuit Court where a similar order was issued. For failure to comply, the defendant was punished for contempt. In a habeas corpus proceeding, the Supreme Court held the contempt conviction was void because the order to submit to this examination was issued without jurisdiction.

It has been suggested that *Ex parte Sawyer* was a clear case in which the question of jurisdiction was obvious.[116] If this were true, then the case might be distinguished from the *United Mine Workers* case on the ground that it comes within the limitation upon the decision in that case, discussed below. But the distinction seems unlikely. Although today it may appear that the court was clearly without jurisdiction to issue the order involved in that case, at the time the decision was rendered there was some reasonable doubt.[117]

It has been suggested that *Ex parte Rowland* was a case involving civil contempt,[118] which it is conceded would not be sustained if the court had no jurisdiction to issue the order that was violated. This distinction is based upon the fact that fine and imprisonment were to be suspended if the

114. 104 U.S. 604 (1881).
115. 113 U.S. 713 (1885).
116. Note, 51 Harv. L. Rev. 747, 749 (1938).
117. The dissenting opinions demonstrate that the question was clearly not obvious.
118. Carter v. U.S., 135 F.2d 858, 861 (C.C.A. 5th 1943).

defendants complied with the order. This is a characteristic of civil contempt and the distinction would seem justified if the court had treated the case as one for civil contempt; however, no distinction was made between civil and criminal contempt.

These cases can be distinguished from the *United Mine Workers* case on the same ground that Justice Holmes apparently had in mind in the *Shipp* case. In neither the *Sawyer, Rowland,* nor the *Fisk* cases was a preliminary order issued for the purpose of preserving existing conditions while the court determined its own jurisdiction. In fact, only the order in the main cause was issued. This distinction is based upon the conclusion that the *Shipp* rule was properly applied in the *United Mine Workers* case. If this conclusion is erroneous, then some other basis for the *United Mine Workers* decision must be formulated. Should that basis be, as in the case of improvidently issued orders, that private individuals must resort to orderly processes of review, or else be subject to criminal contempt penalties, then these three cases would be inconsistent with the *United Mine Workers* case.

In addition to the requirement that the order be issued to preserve existing conditions, the Court recoguized another limitation upon the view that it would be criminal contempt to violate a void order. It was stated that a "different result would follow were the question of jurisdiction frivolous and not substantial."[119] A keener insight into the meaning of this limitation is found in the words of Justice Frankfurter: "Only when a court is so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities may an order issued by a court be disobeyed and treated as though it were a letter to a newspaper."[120] It is doubtful if this limitation is substantial since courts seldom act with such an obvious lack of jurisdiction; yet, this limitation is in form a restriction upon the *Shipp* rule. Further, it may provide a cue for Congress. A simple course for Congress to follow in order to avoid the result reached in the United Mine Workers case, if that is desireable, would be to enact legislation restricting the *Shipp* rule to non-labor dispute cases.

119. U.S. v. United Mine Workers, 330 U.S. 258, 293 (1947).
120. Id. at 309.

V. SUMMARY

The power to punish for civil and criminal contempt "is a necessary and integral part of the judicial power and is absolutely essential to the performance of duties imposed by law upon courts of equity. Without it, such courts are mere boards of arbitration, whose decrees and judgments are only advisory."[121] Since contempt of court is so necessary to the preservation of our courts, it is imperative that the state of confusion arising from the distinction between civil and criminal contempt be eliminated if possible.

The initial determination of the nature of the proceeding should be made in the trial stage and not the appellate stage of the proceedings. This suggests the need for the development and rigid adherence to procedural devices. The remedial nature of civil contempt and the vindicating nature of criminal contempt should be reflected in the pleadings. The pleadings should designate the proceeding either as criminal or civil contempt. The courts should tolerate no departure from this designation once made. The relief sought should conform to the characteristic relief granted in the particular proceeding. For example, a fine paid to both the government and to the complainant should not be sanctioned. Criminal contempt proceedings should be entitled in the name of the state and civil contempt proceedings should be entitled the same as the main cause. Government attorneys only should prosecute criminal contempt actions and the attorneys of the private parties should prosecute civil contempt proceedings. Of course, where the government or its agents is the complainant in civil contempt proceedings, an apparent exception from this rule would be necessary. Although a departure from the requirements might not in all cases constitute reversible error, once these rules were made plain and clear, the trial courts would certainly endeavor to secure compliance.

A combined civil and criminal contempt action in a single proceeding should not be sanctioned. Innnmerable difficulties have already been suggested. Although the Supreme Court concluded that the noncompliance with Rule 42(b) in the *United Mine Workers* case was not prejudicial to the de-

121. Seaboard Airline R.R. v. Tampa So. R.R., 134 So. 529, 533 (Fla. 1931).

fendants, it unquestionably was prejudicial to clear thinking about the distinction between civil and criminal contempt. A rigid interpretation is most desirable. Since Rule 42(b) does not specifically prohibit such a combined proceeding, in order to eliminate any doubt, it should be amended to do so. State courts which do not have a similar rule should adopt one.

From a policy point of view, the proposition that a defendant is guilty of criminal contempt for the violation of a void order is commendable. Our judicial system is founded upon the view that our courts, not individuals, must decide disputes involving correlative rights and duties. As noted, the violation of an order erroneously issued constitutes criminal contempt. An early English court thought the resort to orderly processes of review was so important that the judge stated "I consider the rule to be of such importance to the interests and safety of the public and to the due administration of justice that it ought, on all occasions, to be inflexibly maintained."[122] No sound distinction can be made between the necessity of preserving the interests and safety of the public and the due administration of justice in the case of an improvidently issued order and an order issued without jurisdiction. The choice between order and disorder is the same. The failure to obtain a reversal of an order before violating it produces equally undesirable consequences whether that order was void or improvidently issued. An extension of the *United Mine Workers* case so that all void orders must be obeyed until reversed or vacated by orderly process seems desirable.

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122. See n. 81. Compare the statement of Justice Brewer in In re Debs, 158 U.S. 564, 598 (1895), quoted above at n. 102.