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Criminal Contempt--Witnesses--Grand Jury (Spector v. Allen, Judge, 281 N.Y. 251 (1939))

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other branch of the law of illegal contracts, namely, *ultra vires* contracts of corporations. Where a corporation has made a *malum prohibitum* contract which is subsequently partially executed, both the New York and federal jurisdictions have permitted recovery after the repeal of the statute making the contract illegal; the proper remedy in the former courts being an action on the contract, while in the latter it is in *quasi*-contract.[9] In New York there is a distinction between a *malum prohibitum* contract and one which is *malum in se*, recovery only being permitted in the former case after the repeal of the violated statute. In the case under consideration, the Prohibition Amendment was repealed which prohibited such acts as the sale and transportation of liquor, which activities are not inherently immoral and are not *mala in se*.[10] For this reason recovery though denied in the federal courts would have been permitted in New York State. The case of *Bloch* v. *Frankfort Distillery* is directly in point.[11] There plaintiff sued to recover damages for breach of contract for the sale of 470 cases of whiskey made when the Eighteenth Amendment was still in force. On motion for summary judgment, the defense of illegality based on the Prohibition Amendment was held invalid in view of the repeal of this Amendment. This interpretation is a satisfactory one, for when a prohibitory statute is repealed, it is usually due to one of two reasons, either its accomplishments have been unsatisfactory or there is no longer any need for it. Since the interests of the state no longer require the enforcement of the repealed statute, it is wise to hold the parties to the bargain which they made.

M. M. S.

CRIMINAL CONTEMPT—WITNESSES—GRAND JURY.—Appellant was served by the district attorney with a subpoena *duces tecum* to appear *forthwith* before the New York County Grand Jury in a John Doe proceeding, and to produce a considerable list of enumerated account books, ledgers, etc., bearing on the business of the appellant. The appellant, unfamiliar with the nature of the matter under investigation, appeared forthwith at the office of the district

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not be taken away by a similar statute, and that a repeal of a law which gave such right of action or defense, terminated all claim to such defense, although the contract was made previously.

"This rule is applicable to the present case. The defense to the contract was given by the statute against stockjobbing. That statute was repealed after the contract was made. The repeal of the statute has taken away the defense of illegality, the same as if such statute had never existed."

[9] PRASHKER, CASES AND MATERIALS ON PRIVATE CORPORATIONS (1937) 401.

[10] Matter of Birner v. Santa Lucia Wineries, Inc., 155 Misc. 722, 282 N. Y. Supp. 257 (1935).

[11] Bloch v. Frankfort Distillery, 247 App. Div. 864, 288 N. Y. Supp. 749 (1st Dept. 1936).

attorney and was questioned by an assistant who explained the nature of the evidence sought. He was then given a personal subpoena requiring him to appear again at a later definite date but not requiring him to bring any books or records. Appellant answered this subpoena, gave information concerning his business, and explained his method of keeping his records on yellow sheets of paper. He was then directed *verbally* by the foreman of the Grand Jury to appear on the following Monday and bring whatever notes, records or yellow sheets "you have". Appellant stated to the district attorney that he understood what was meant by the yellow sheets and would bring them on the following Monday. No further subpoena was served. On Monday, appellant brought a yellow paper but had torn from it the names of the people with whom he did business. Upon stating that he had a duplicate at home, he was ordered *verbally* by the foreman to produce it the following day. The following day appellant appeared and stated that he had sent the sheet out of the jurisdiction to a friend in another state. The foreman of the Grand Jury directed the district attorney to bring proceedings to punish the appellant for contempt. Appellant was adjudged guilty of constructive criminal contempt and denied permission to purge himself. The determination was affirmed by the Appellate Division. On appeal, *held,* reversed. Appellant did not disobey a lawful mandate of the court. *Spector* v. *Allen, Judge,* 281 N. Y. 251, 22 N. E. (2d) 360 (1939).

Contempt of court is civil or criminal, depending upon whether it is incidental to a civil action and prejudices, impedes, or obstructs the rights and remedies of the parties, or is an affront to the dignity of the court or a defiance of its authority.[1] It is direct or constructive, depending upon whether or not it is committed in the presence and view of the court. If criminal contempt is direct, it is punishable summarily by the court; if constructive, then by a special proceeding and the party charged must be notified of the accusation and given a reasonable time to make his defense.[2] He is not, except where the right is granted by statute, entitled to a trial by jury.[3] Generally speaking, a civil contempt is not considered an offense against the dignity of the court. It is more of an offense against a party in whose favor an order or decree has been made and who is entitled to have the order or decree performed.[4] But the distinction between civil and criminal contempts is not always clear and definite, for in criminal contempt there is frequently involved a question of a private right,

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[1] People *ex rel.* Munsell v. The Court, 101 N. Y. 245, 4 N. E. 259 (1886).

[2] N. Y. JUDICIARY LAW § 751.

[3] See 35 C. J. (1935) p. 194, § 99. In New York a jury trial is allowed in contempt proceedings arising out of labor disputes—N. Y. JUDICIARY LAW § 753-a. A bill is now pending in the New York Legislature that would allow trial by jury as a matter of right when the contempt is not committed in the view and presence of the court: SENATE INT. No. 918, PRINT No. 1044—1940. The right to a trial by jury in contempt proceedings did not exist at common law. It is a right that has been created by statute in some jurisdictions.

[4] Witmer v. District Ct., 15 Iowa 244, 136 N. W. 113 (1912).

while in civil contempt there is frequently encountered the element of punishment as distinguished from the mere enforcement of a remedy.[5] So if the failure of a witness to appear, although calculated to prejudice the rights and remedies of the parties, does not do so, then the court may not impose a fine to compensate a party to the action for damages on account of the witness not appearing. But under such circumstances the court can and should adjudge the witness guilty of contempt and fine him the cost of the proceeding plus an additional fine as a punishment.[6]

In New York, as in many other jurisdictions, statutes prescribe and limit the powers of courts to punish for criminal contempts.[7] The appellant herein was adjudged guilty of criminal contempt by the court by reason of his "wilful disobedience to its lawful mandate". There is no question that the appellant wilfully and deliberately refused to produce the yellow sheet and placed it beyond the jurisdiction of the court after being requested by both the foreman of the Grand Jury and the district attorney to bring it in for examination. Despite his deliberate act to embarrass and obstruct the administration of justice, he was allowed to escape punishment on what might appear to be a technicality. But the oral direction of the district attorney was not a lawful mandate of the court although the district attorney as an officer of the court has power to issue a valid subpoena.[8] A strict compliance with the statute is essential to protect liberty and to avoid abuses.[9]

A subpoena *duces tecum* must be clear and specific and must demand only the production of such records as are necessary and ma-

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[5] King v. Barnes, 113 N. Y. 476, 21 N. E. 182 (1889).

[6] People v. Reid, 139 App. Div. 551, 124 N. Y. Supp. 205 (1st Dept. 1910).

[7] N. Y. JUDICIARY LAW § 750 provides:

"A court of record has power to punish for a criminal contempt, a person guilty of either of the following acts, *and no others:*

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.
2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.
3. Wilful disobedience to its lawful mandate.
4. Resistance wilfully offered to its lawful mandate.
5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.
6. Publication of a false, or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt, the publication of a true, full and fair report of a trial, argument, decision, or other proceeding therein."

[8] People *ex rel.* Drake v. Andrews, 197 N. Y. 53, 90 N. E. 347 (1909).

[9] "The power which courts possess of punishing for contempt, and for refusal to give evidence is, in its nature, an exception to the provision of the constitution. It is a power to deprive a man of his liberty without a jury and without a regular trial. It cannot therefore be extended in the least degree beyond the limits which have been imposed by statute." Rutherford v. Holmes, 5 Hun 317 (1875), *aff'd*, 66 N. Y. 368 (1876).

terial to the investigation, otherwise it will be void.[10] And there can be no oral extension of the requirements of a subpoena for such oral addition will not be a lawful mandate of the court,[11] and will therefore be void. Disobedience of a void mandate clearly cannot be a contempt.

L. D. B.

EQUITY—INJUNCTION—ESTABLISHMENT OF A UNIFORM PLAN OF DEVELOPMENT.—Plaintiffs were induced to purchase a lot and dwelling from the defendants upon their oral representations, printed circulars and newspaper advertisements, to the effect that the entire tract being developed by the defendants was to be devoted to private residences only. No mention of the restriction was made in the contract or deed, nor was a map filed. Plaintiff now seeks to enjoin the erection of an apartment house upon the tract. *Held,* injunction granted. Defendants' representations were sufficient to establish a uniform plan. *Hofmann* v. *Hofmann,* 172 Misc. 378, 14 N. Y. S. (2d) 565 (1939).

Restrictive building covenants are recognized as valid and enforceable in equity.[1] These covenants are enforced even though oral,[2] generally on the ground of estoppel.[3] Furthermore, such an oral statement is binding on a subsequent purchaser with notice.[4] To constitute an estoppel it is not necessary that there be false representations or concealment of material facts. It is sufficient if the act is voluntary and calculated to mislead and does mislead one who acts thereon.[5] Such statements are as effectual as a deed from the party estopped.[6] It has been held that where the purchaser takes in reli-

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[10] 70 C. J. (1935) p. 51, § 38.

[11] N. Y. GEN. CONSTR. LAW § 28-a; People *ex rel.* Donelly v. Miller, 213 App. Div. 88, 209 N. Y. Supp. 717 (1st Dept. 1925).

[1] Flynn v. New York, W. & B. Ry., 218 N. Y. 140, 112 N. E. 913 (1916); Pound, *Progress of the Law—Equity* (1920) 33 HARV. L. REV. 813.

[2] Tallmadge v. East River Bank, 26 N. Y. 105 (1862); Lewis v. Gollner, 129 N. Y. 227, 29 N. E. 81 (1891); Bimson v. Bultman, 3 App. Div. 198, 38 N. Y. Supp. 209 (2d Dept. 1896).

[3] Philips v. West Rockaway Land Co., 226 N. Y. 507, 124 N. E. 87 (1919); Nissen v. McCafferty, 202 App. Div. 198, 195 N. Y. Supp. 549 (2d Dept. 1922); Brown v. Hoag, 35 Minn. 373, 375, 29 N. W. 135, 137 (1886) ("The change of situation necessary to create the equitable estoppel, must, of course have been made in reliance upon, and in pursuance of, the oral agreement, and so connected with the performance of the contract, that, from the nature of the case, the defendant should understand it was done in reliance upon his agreement"); Johnson v. Mt. Baker Park Presbyterian Church, 113 Wash. 458, 194 Pac. 536 (1920).

[4] Lewis v. Gollner, 129 N. Y. 227, 29 N. E. 81 (1891).

[5] Trustees of Brookhaven v. Smith, 118 N. Y. 634, 23 N. E. 1002 (1890).

[6] Nissen v. McCafferty, 202 App. Div. 528, 195 N. Y. Supp. 549 (1922)