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## Criminal Law and Procedure—Consecutive Citations For Criminal Contempt Allowed

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that envisions insanity as affecting the volitional and emotional aspects of the human mind as well as the intellectual. If criminal responsibility is to continue to be prerequisite to a criminal act; and if, as has been suggested, true insanity is more than the M'Naghten Rule admits with its standards phrased in terms of intellect alone; then the conclusion is inescapable that in New York, where intellectual capacity alone controls the determination of legal insanity, truly insane persons have been and are being found guilty of and punished for "criminal acts" for which they are not responsible. Modernization of section 1120 of the Penal Law to include volitional and emotional impairments which bear upon mens rea would seem well in order.

Thomas C. Mack

CONSECUTIVE CITATIONS FOR CRIMINAL CONTEMPT ALLOWED

On November 1, 1961 petitioner was initially jailed for contempt by giving "don't remember" answers at a grand jury hearing.<sup>1</sup> After serving 30 days in jail the defendant was subsequently asked similar questions before the same grand jury, and was sentenced to an additional 30 days by again replying "don't remember." The Appellate Division affirmed. On appeal, *held*, affirmed, one judge dissenting. The New York Court of Appeals, applied lower court law and persuasive law from other jurisdictions to affirm the lower courts in holding that a witness could be adjudged in contempt of a grand jury on two consecutive occasions even though the interrogatories were nearly identical at both hearings. *Second Additional Grand Jury v. Cirillo*, 12 N.Y.2d 206, 188 N.E.2d 138, 237 N.Y.S.2d 709 (1963).

Contempts are neither wholly civil nor entirely criminal, and this characteristically legal entanglement often results in a fundamental misunderstanding of the concepts. Punishment per se does not aid in distinguishing the terms, however the purpose to be served often separates the particular proceedings.<sup>2</sup> In civil contempt the punishment is remedial, and for the purpose of benefiting the complainant and/or the court.<sup>3</sup> But in criminal contempt the sentence is punitive, to vindicate the authority of the court.<sup>4</sup> The problem of discerning criminal from civil contempt is further alleviated by statutes which enunciate the specific contempt to be utilized for certain proceedings and hearings. In the instant case Cirillo was cited for criminal contempt under the provisions of a specific state statute.<sup>5</sup>

Even though immunity from state prosecution will not immunize a witness from prosecution in other jurisdictions, the witness may nevertheless be charged with contempt, in the state court granting protection, for refusing

1. *People ex rel. Cirillo v. Warden of City Prison*, 11 N.Y.2d 51, 181 N.E.2d 424, 226 N.Y.S.2d 398 (1962).

2. *Bessette v. Conkey Co.*, 194 U.S. 324 (1904).

3. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911).

4. *Ibid.*

5. N.Y. Judiciary Law § 750. Compare N.Y. Civ. Prac. Act § 406(3) for an example of a civil contempt statute.

to furnish suitable answers.<sup>6</sup> Moreover, in New York a witness cannot avoid punishment for contempt by merely providing obviously evasive answers, as in the present case where the petitioner conveniently replied "don't remember"; an evasive answer is held in law to be the same as a refusal to answer.<sup>7</sup> Interesting however, and a reasonable ground for questioning the rule in the instant case, is the fact that a witness can only be cited once for contempt if all of the negations occur at one proceeding;<sup>8</sup> *i.e.*, "the prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry within which a recalcitrant witness already has refused answers."<sup>9</sup>

Undeniably the courts have the power to repeatedly interrogate a witness at successive hearings in an effort to maintain the integrity of the courts. Furthermore any witness is deemed to have a public duty to answer any questions within his power.<sup>10</sup> Applying this tenet in the instant case, a case of first impression for the Court of Appeals, the majority was at liberty to determine the law applicable to the defendant. The general rule in the United States, based upon scanty case law, favors the position that recurring refusals to answer a grand jury at successive hearings will constitute separate punishable contempts.<sup>11</sup> The only applicable New York law is from a lower court which held on facts similar to those in the instant case that, "wilful refusals to answer legal and proper interrogatories is a separate and distinct act of criminal contempt even though the witness may already have been punished for his refusal to answer the same or substantially the same questions."<sup>12</sup>

Having found defendant's answers evasive at both grand jury hearings, the Court then proceeded to the main issue of whether there was only one contempt or two separate contempts. In holding that the defendant was properly punished for two separate contempts the majority apparently relied upon two public policy considerations.<sup>13</sup> First, the majority accepted without reservation the principles developed in the lower court opinion, "the public has a right to every man's evidence. . . . Moreover it is a duty not to be grudged or evaded."<sup>14</sup> Second, by discussing the two *Valenti* (Appalachin) cases, where the defendants were jailed indefinitely for civil contempt, they in essence condoned the practice

6. *Mills v. Louisiana*, 360 U.S. 230 (1959); *New York v. Lombardo*, 5 N.Y.2d 1026, 158 N.E.2d 250, 185 N.Y.S.2d 550 (1959).

7. *People ex rel. Cirillo v. Warden of City Prison*, 11 N.Y.2d 51, 181 N.E.2d 424, 226 N.Y.S.2d 398 (1962); 12 *Buffalo L. Rev.* 126 (1963).

8. *People v. Riela*, 7 N.Y.2d 571, 166 N.E.2d 840, 200 N.Y.S.2d 43 (1960).

9. *Yates v. United States*, 355 U.S. 66 (1957). *But cf.* *People v. Saperstein*, 2 N.Y.2d 210, 140 N.E.2d 252, 159 N.Y.S.2d 160 (1957) (holding a witness guilty of five separate criminal contempts when he failed to give any answers concerning five entirely different occurrences).

10. *People ex rel. Sherwin v. Mead*, 92 N.Y. 415 (1883).

11. *Williams v. Davis*, 27 Cal. 2d 746, 167 P.2d 189 (1946); *In the Matter of Ward*, 295 Mich. 742, 295 N.W. 483 (1940); *State v. Kasherman*, 177 Minn. 200, 224 N.W. 838 (1929); *cert. denied*, 280 U.S. 602 (1929); *Ex parte Stice*, 70 Cal. 51, 11 Pac. 459 (1886). *But cf.* *Loy v. Loy*, 222 S.W.2d 873 (Tenn. App. 1949).

12. *Matter of Amato*, 204 Misc. 454, 124 N.Y.S.2d 726 (Sup. Ct. 1953).

13. Instant case.

14. *Matter of Amato*, 204 Misc. 454, 459, 124 N.Y.S.2d 726, 730 (Sup. Ct. 1953).

of confining uncooperative witnesses to lengthy confinements for non-compliance with court orders.<sup>15</sup>

Judge Van Voorhis in dissenting offered a logical common sense approach in rejecting the majority opinion, "It makes little difference whether a person is asked the same or related questions 17 times on one day, or on 17 different days. In each instance he should be found guilty of but a single criminal contempt."<sup>16</sup> The dissent was realistically concerned over the possible abuses that might result from zealous prosecutions, and the fundamental personal liberties that were being unnecessarily jeopardized by the majority's determination. According to Judge Van Voorhis any defendants confronted with successive criminal contempts ought to be granted a jury trial for perjury to finalize the issue.<sup>17</sup>

The instant case represents an inevitable, yet unfortunately common by-product of American jurisprudence—confusion. By an historically dictated method for splitting hairs between analogous factual situations the New York courts are now facing a dilemma: they must now uphold and defend opposing rules of law. At one extreme, a witness will only be in contempt once if the refusals to answer are confined to a single hearing.<sup>18</sup> If on the other hand an unfortunate witness, like defendant Cirillo, is recalled at a later date to testify he will be in danger of further incarceration.<sup>19</sup> Should this issue come before the courts again perhaps a closer scrutiny might help to amend the self imposed inconsistency.

*Thomas E. Webb*

## DECEDENTS' ESTATES AND TRUSTS

### SELF-DEALING BY TRUSTEE'S ATTORNEY DID NOT VITIATE REAL ESTATE SALE

The Chase Manhattan Bank petitioned Kings County Surrogate's Court to render and settle their intermediate account as sole surviving executor and trustee of the estate of Thomas A. Clarke. The Surrogate's Court confirmed the report of its appointed referee and dismissed the two objections of one of the beneficiaries. The two objections were that the sale of certain real estate by the executor was improvident and that the fee granted executor's attorney was improper. The basis of this latter charge was that the attorney had received a percentage of the brokerage commission. This improper payment to the attorney, however, was quite indirect. The property had been listed with one agent, Seward, with whom the attorney had agreed to split any commission. A second agent, Tilton, produced the ultimate purchaser but was nevertheless prevailed upon by the attorney to give part of his brokerage fee to the first agent, Seward, who, in

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15. Instant case at 209, 188 N.E.2d at 140, 237 N.Y.S.2d at 712.

16. *Ibid.*

17. *Ibid.*

18. *People v. Riela*, 7 N.Y.2d 571, 166 N.E.2d 840, 200 N.Y.S.2d 43 (1960).

19. See cases at note 11 *supra*.