SUPREME COURT OF THE UNITED STATES

No. 453.—October Term, 1946.

The Penfield Company of California and A. W. Young, Petitioners, *v.* Securities and Exchange Commission.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February —, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

The Securities and Exchange Commission, acting pursuant to its authority under § 20 (a) of the Securities Act of 1933, 48 Stat. 74, 86, 15 U. S. C. § 77t, issued orders directing an investigation to determine whether Penfield Company had violated the Act in the sale of stock or other securities. In the course of that investigation it directed a subpoena *duces tecum* to Young, as an officer of Penfield, requiring him to produce certain books of the corporation covering a four year period ending in April, 1943. See § 19 (b) of the Act. Upon Young's refusal to appear and produce the books and records, the Commission filed an application with the District Court for an order enforcing the subpoena.[1] After a hearing, the court ordered Young, as an officer of Penfield, to produce them.[2] Young

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[1] Sec. 22 (b) provides:

"In case of contumacy or refusal to obey a subpoena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof."

[2] That order was affirmed by the Circuit Court of Appeals. 143 F. 2d 746.

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persisted in his non-compliance. The Commission then applied to the District Court for a rule to show cause why Young should not be adjudged in contempt. The District Court delayed action on the motion until after disposition of a criminal case involving Young, Penfield, and others. When that case was concluded, the court, after hearing, adjudged Young to be in contempt. It refused, however, to grant any coercive relief designed to force Young to produce the documents but instead fined him $50.00 which he paid.[8]

That was on July 2, 1945. On September 24, 1945, the Commission filed a notice of appeal in the District Court and subsequently a statement of points challenging as error the action of the District Court in imposing a $50.00 fine, instead of a remedial penalty calculated to make Young produce the documents. The Circuit Court of Appeals reversed, holding that the District Court erred in

[8] The request of the Commission and the ruling of the court are made clear by the following colloquy:

"MR. CUTHBERTSON: So far as the punishment which the Court might see fit to impose, that is up to the Court. We are still anxious to get a look at these books and records, so I suggest to the Court, if he be so disposed, whatever punishment the Court might see fit to impose would be in connection with or so long as he refused to produce his books and records for our inspection.

"THE COURT: I don't think that I am going to be disposed to do anything like that. I sat here for six weeks and listened to books and records. The Government produced people from all over the United States in connection with the Penfield matter.

"MR. CUTHBERTSON: I might say, your Honor, that we have in mind that these books and records may disclose certain acts other than those charged in the indictment. We don't propose to go over the same matter that the Court went over in connection with the criminal case.

"THE COURT: The Court can take judicial notice of its own books and records, and in that trial the evidence was clear and definite and positive from all of the Government's witnesses, that during one period of time this defendant had nothing whatsoever to do with the Penfield Company. Whether that period of time is covered by what the Securities and Exchange Commission seeks or not, I don't know.

"The judgment and sentence of the Court is that the defendant pay a fine of $50, and stand committed until paid."

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imposing the fine and directing that Young be ordered imprisoned until he produced the documents. 157 F. 2d 65. The case is here on a petition for a writ of certiorari filed by Penfield Co. and by Young. Neither the District Court nor the Circuit Court of Appeals rendered judgment against Penfield. Nor is any relief sought by or against it here. Accordingly the writ is dismissed as to Penfield.

First. It is argued that since no application for an allowance of an appeal was made, the Circuit Court of Appeals had no jurisdiction to entertain it.[4] If the appeal was a suit of a civil nature, the filing of the notice of appeal with the District Court was adequate under the Rules of Civil Procedure.[5]

It is the nature of the relief asked that is determinative of the nature of the proceeding. *Lamb* v. *Cramer*, 285 U. S. 217, 220. The relief which the Commission sought was production of the documents; and the only ~~punishment~~ sanction asked was a penalty designed to compel their production. Where a fine or imprisonment imposed on the contemnor is "intended to be remedial by coercing the defendant to do what he had refused to do", *Gompers* v. *Bucks Stove & Range Co.*, ~~221 U. S. 418, 442~~ supra, p. 442, the remedy is one for civil contempt. Then "the punishment is

[4] Section 8 (c) of the Act of February 13, 1925, 43 Stat. 936, 940,

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This was not a proceeding in which the United States was a party and in which it was seeking to vindicate the public interest. See Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 445. The contempt proceedings were instituted as a part of the proceedings in which the Commission sought enforcement of a subpoena.

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wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to the offenses against the public." *McCrone* v. *United States,* 307 U. S. 61, 64. One who is fined, unless by a day certain he produces the books, has it in his power to avoid any penalty. And those who are imprisoned until they obey the order, "carry the keys of their prison in their own pockets." *In re Nevitt,* 117 Fed. 448, 461. Fine or imprisonment are then employed not to vindicate the public interest but as coercive sanctions to compel the contemnor to do what the law made it his duty to do. See *Doyle* v. *London Guarantee Co.,* 204 U. S. 599; *Oriel* v. *Russell,* 278 U. S. 358; *Fox* v. *Capital Co.,* 299 U. S. 105; *McCrone* v. *United States, supra.*

The Act gives the Commission authority to require the production of books and records in the course of its investigations. And in absence of a basis for saying that its demand exceeds lawful limits (*Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186), it is entitled to the aid of the court in obtaining them.[6] A refusal of the court to enforce its prior order for the production of the documents denies the Commission that statutory relief. The issue thus raised poses a problem in civil, not criminal, contempt.[7]

Where a judgment of contempt is embodied in a single order which contains an admixture of criminal and civil elements, the criminal aspect of the order fixes its character for purposes of procedure on review. *Union Tool Co.* v. *Wilson,* 259 U. S. 107. But there was no such admixture here. The District Court refused to grant any remedial relief to the Commission. The denial of that relief was the grounds of the Commission's appeal. The

[6] See § 22 (b), *supra,* note 1.

[7] This thus disposes of the further contention that the appeal was not timely under the Criminal Appeals Act, 18 U. S. C. Supp. II § 682. *United States* v. *Hark,* 320 U. S. 531.

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order of denial being final, was appealable, *Lamb* v. *Cramer, supra,* pp. 220–221, and the right to appeal from it was in no way dependent on an appeal from the imposition of the fine.

Second. The question on the merits is two-fold: (1) whether the Circuit Court of Appeals erred in granting the Commission remedial relief by directing that Young be required to produce the documents; and (2) whether that court exceeded its authority in reversing the judgment which imposed the fine and in substituting a term of imprisonment conditioned on continuance of the contempt.

As we have already noted, the Act requires the production of documents demanded pursuant to lawful orders of the Commission and lends judicial aid to obtain them. There is no basis in the record before us for saying that the demand of the Commission exceeded lawful limits. There is, however, a suggestion that the District Court was warranted in denying remedial relief since the contempt hearing came after a criminal trial of petitioners, in the course of which many of Penfield's books and records were examined. The thought apparently is that the Commission had probed enough into Penfield's affairs. But the District Court did not hold that the Commission's request had become moot, that the documents produced satisfied its legitimate needs, or that the additional ones sought were irrelevant to its statutory functions.[8] We agree with the Circuit Court of Appeals that at least in absence of such a finding, the refusal of the District Court to grant the full remedial relief which the Act places behind the orders of the Commission was an abuse of discretion. The records might well disclose other offenses against the Securities Act of 1933 or the other Acts which the Commission administers. The history of this case reveals a long, persistent effort to defeat the investigation. The

[8] See note 3, *supra.*

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fact that Young paid the fine and did not appeal indicates that the judgment of contempt ~~was for him an easy victory.~~ may have been an easy victory for him.
On the other hand, the dilatory tactics employed suggest that if justice was to be done, coercive sanctions were necessary.

When the Circuit Court of Appeals substituted imprisonment for the fine, it put a civil remedy in the place of a criminal punishment. For the imprisonment authorized would be suffered only if the documents were not produced or would continue only so long as Young was recalcitrant. On the other hand, the fine imposed by the District Court, unlike that involved in *Fox* v. *Capital Co.*, *supra*, pp. 106–107, was unconditional. ~~It awarded no relief to the complainant, the Securities and Exchange Commission.~~ Rider 6 It was solely and exclusively punitive in character. Cf. *Nye* v. *United States*, 313 U. S. 33, 42–43.

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and not relief of a coercive nature such as the Commission sought.

however,

to punish contempts of their authority, Judicial Code § 268, 28 U. S. C. § 385, and the decisions construing it. The statute gives the federal courts power "to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority", including violations of their lawful orders. At least in a criminal contempt proceeding both fine and imprisonment may not be imposed since the statute provides alternative penalties. *In re Bradley*, 318 U. S. 50. Hence if a fine is imposed on a contemnor and he pays it, the sentence may not thereafter be amended so as to pro-

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vide for imprisonment. The argument here is that after a fine for criminal contempt is paid, imprisonment may not be added to, or substituted for the fine, as a coercive sanction in a civil contempt proceeding. If that position is sound, then the statutory limitation of "fine or imprisonment" would preclude a court from imposing a fine as a punitive measure and imprisonment as a remedial measure, or *vice versa.*

The dual function of contempt has long been recognized—(1) vindication of the public interest by punishment of contemptuous conduct; (2) coercion to compel the contemnor to do what the law requires of him. *Gompers* v. *Bucks Stove & Range Co., supra,* pp. 441 *et seq.* As stated in *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 327, "The purpose of contempt proceedings is to uphold the power of the court and also to secure to suitors therein the rights by it awarded." Judgments of contempt have frequently been an admixture of the two. Thus fines have been imposed payable in part to the government as penalties and in part to the complainant as remedial relief for wrongs suffered. *Matter of Christensen Engineering Co.*, 194 U. S. 458; *In re Merchants' Stock Co.*, 223 U. S. 639; *Farmers Nat'l Bk.* v. *Wilkinson*, 266 U. S. 503. And a contemnor has been ordered imprisoned until he does the required act and in addition to be imprisoned for a fixed term as punishment for his past acts. *In re Swan*, 150 U. S. 637.

We assume, *arguendo*, that the statute allowing fine or imprisonment governs civil as well as criminal contempt proceedings. If the statute is so construed, we find in it no barrier to the imposition of both a fine as a punitive exaction and imprisonment as a coercive sanction, or *vice versa.*[9] That pratice has been approved. *Kreplik* v.

[9] Some rules governing criminal contempts are, of course, different from those governing civil contempts. *Gompers* v. *Bucks Stove & Range Co., supra,* pp. 444, 446–449. If those differences are satisfied

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Couch Patents Co., 190 Fed. 565, 571. And see *Phillips S. & T. P. Co.* v. *Amalgamated Ass'n*, 208 Fed. 335, 340. When the court imposes a fine as a penalty it is punishing yesterday's contemptuous conduct. When it adds the coercive sanction of imprisonment, it is announcing the consequences of tomorrow's contumacious conduct. At least in that situation the offenses are not the same. And the most that the statute forbids is the imposition of both fine and imprisonment for the same offense.

The Circuit Court of Appeals, for reasons not disclosed, set aside the penal fine and substituted coercive imprisonment. Since reversal of the order imposing the fine has at no time been assigned as error or challenged, we find no occasion for reviewing the action of the Circuit Court of Appeals in that respect.

Young raises objections that go to the merits of the judgment of contempt. These were considered and determined against him by the District Court. Since he did not appeal from that adverse judgment, he is precluded from renewing the objections at this stage. *Le Tulle* v. *Scofield*, 308 U. S. 415, 421–422; *Helvering* v. *Pfeiffer*, 302 U. S. 247, 250–251.

Affirmed.

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and if, as in *Matter of Christensen Engineering Co., supra; In re Merchants' Stock Co., supra; Farmers Nat'l Bk.* v. *Wilkinson, supra; In re Swan, supra*, the criminal penalty and the remedial relief are segregated, no problem of the adequacy of the order for purposes of appellate review is presented. No question is presented here as to the propriety of combining civil and criminal contempt in the same proceeding.

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