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SINGLE SALES AS VIOLATION OF LIQUOR INJUNCTION

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That a single sale of liquor without other circumstances does not amount to a nuisance is not new as a matter of law,¹ but a recent holding of the Circuit Court of Appeals for the Eighth Circuit,² that a single sale is not a contempt of an injunction not to sell liquor, is of interest because it intimates an underlying limitation upon the Volstead law and foreshadows a termination of certain practices that have prevailed in the prosecution of liquor-law violators.

There is a dissenting opinion urging that in view of the words of the injunction such is a contempt. But as both opinions intimated unconstitutionality of phases of the Volstead law, the writer feels that the situation presented by the facts reveals a subconscious view upon the part of the court that the basis of the decision is depriving a defendant of a jury trial, rather than that the defendant's conduct was not a nuisance. The facts of the case suggest themselves as an opportunity for a reconciliation of what is said by the Supreme Court of the United States in *Gompers v. Buck Stove & Range Co.*,³ and the rule announced in *Mugler v. Kansas*.⁴

Ever since the latter case it has been assumed in both state and federal courts that a court of equity has the power to punish for contempt without a jury trial, as proceedings by the common law for contempt of court were never tried by jury.⁵ The question presented is whether one who is accused of an alleged contempt which is committed not in the presence of the court is entitled to a jury trial.⁶ This seems to have been settled for the federal courts in the *Mugler* case,⁷ *supra*, as well as in *Eilenbecker v. Plymouth County*,⁸ in the

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¹ *Schechter v. U. S.* (1925) 7 F (2nd) 881; *Hermansky v. U. S.* (1925) 7 F. (2nd) 458.

² *Webb v. U. S.* (1926) 14 F. (2nd) 574.

³ *Gompers v. Buck Stove and Range Co.* (1910) 221 U. S. 418, 55 L. Ed. 797.

⁴ *Mugler v. Kansas* (1887) 123 U. S. 623.

⁵ One of the attributes of a court of justice is that it should have the power of vindicating its dignity without calling upon a jury to assist it in the exercise of this power.

⁶ This comment is confined to the class of contempts not committed in the presence of the court.

⁷ *Mugler v. Kansas* (1887) 123 U. S. 623.

⁸ *Eilenbecker v. Plymouth County* (1889) 134 U. S. 31.

negative. Such is due process of law as contemplated by the 14th Amendment, and, in a proper case, not criminal as contemplated by the 5th Amendment. If it were not for what the court has said in the *Gompers* case the intimation in the opinion of *Webb v. United States*⁹ would seem startling in view of the previous decisions following the *Mugler* case.

The instant case is this: Two and one-half years previously the defendant has been found to be maintaining a liquor nuisance as defined in Section 21 of the Volstead Act, on described premises, and the court, following the power recited in Section 22 (Federal Statutes Anno. 1919 Supp. 212) ordered that no liquor should be manufactured, sold, bartered or stored on the premises, and the premises were, by order of court, "padlocked" for a year. Some two years thereafter a waiter of defendant made a single sale of liquor on the premises and such was the contempt defendant was cited for. There was no proof of other circumstances indicating an intention to continue selling liquor. The majority of the court held (1) that the injunction was not perpetual and that the nuisance which the court ordered abated had been wiped out long before this sale and the decree of the court wholly executed, and (2) even if the order was still in force, the court, by fashioning the injunction after the language in Section 22, exceeded the intention of Congress, the only power conferred being to suppress the nuisance. That is to say, that Section 22 means that the court can enjoin sales, etc., which tend to continue the nuisance, as distinguished from enjoining the sale of liquor.

Faris, J., dissented upon both propositions. A search of the authorities throws no special light upon the first proposition. While in some states injunctions granted under similar statutes are held to be permanent, such a result follows because the statute so states or the wording thereof makes the intention of the legislature clear.¹⁰ As far we can discover, the courts have not directly construed this particular statute and it seems that it is open to either construction as a matter of principle; and thus the first point is one merely of informational interest.

The second proposition is the one that at first seems startling and deserves the attention of those interested in the power of courts of

⁹ *Webb v. U. S.* (1926) 14 F. (2nd) 574.

¹⁰ *State v. Durien* (1891) 46 Kans. 695, 27 Pac. 148; *Dickinson v. Eichorn* (1889) 78 Iowa 710, 43 N. W. 620.

equity. While the prevailing opinion proposes to determine the intention of Congress, since the reason for selecting a particular intention is that the other alternative would be unconstitutional, the decision reduced to its last analysis is either of two things: (1) A legislative body cannot confer upon a court of equity, where a nuisance exists, power to enjoin single acts which collectively make up the nuisance, as distinguished from the inherent equity power to enjoin or abate the nuisance; or (2) if equity does so order, the power to enforce that decree does not exist in equity where there has been only a single violation of the decree.

1. Concerning the first analysis, investigation reveals little authority. Cases which declare the power not to exist are distinguishable in that the legislation involved taking property without due process of law.¹¹ There is dictum sustaining the power,¹² although such power is questioned in *United States v. Cohen*.¹³ But if one has built so close to the house of another that the snow collects upon his roof and slides upon the other's premises, the court will not only enjoin the wrong of allowing snow to slide, but will order snow guards built.¹⁴ So, a liquor nuisance existing, because Congress declared it to be such (section 21), equity has power to enjoin or abate the nuisance because of its inherent power, and, to get federal jurisdiction, Congress declared this power in section 22; but if Congress intended to say that the court should go beyond this power and grant an order restraining a single act not commensurate with the wrong complained of, was that authorizing equity to exceed an equity function? The above cases by analogy would seem to justify it, since equity jurisdiction as distinguished from law is a matter of policy rather than of power. Is it not the same thing as saying that Congress did not intend to encourage equity to engage in this additional remedy, because to do so would violate some rights guaranteed a defendant by the Constitution?

In the Florida case¹⁵ where the legislature gave jurisdiction to equity which the Supreme Court of that state thought it did not previously have, it was not extended to awarding damages for the wrong already done, "since the defendant is entitled to a jury trial

¹¹ *City of Janesville v. Carpenter* (1890) 77 Wis. 288, 46 N. W. 128, 8 L. R. A. 808.

¹² *Cowan v. Skinner* (1906) 52 Fla. 486, 42 So. 730.

¹³ *U. S. v. Cohen* (1920) 268 Fed. 420.

¹⁴ *Hollenbeck v. St. Mark's Lutheran Church* (1912) 138 N. Y. Supp. 1063.

¹⁵ *Cowan v. Skinner* (1906) 52 Fla. 486, 42 So. 730.

on the question of damages according to the course of the common law where they can not be ascertained and awarded as incidents to equitable relief upon established equitable grounds independent of the statute." Thus, even if the legislature did say that in case a nuisance existed, individual acts short of the whole nuisance could be enjoined, where a single act is enjoined, the doing of that act in violation completes the contempt and any further procedure upon the part of the court is punishment, and as such calls for a criminal proceeding with all of its constitutional guarantees.

2. The second analysis provides a more satisfactory principle upon which the decision may be explained, namely, that even though the court may enjoin a single act where it has taken jurisdiction for some other reason, it may violate a constitutional right of defendant if it tries to enforce its decree by the usual equity procedure, of summary punishment. What was said in previous cases (*Mugler v. Kansas*) to be an inherent power of the court of equity to punish for contempt was intended to apply to enforcing a decree in the future rather than to punishing for what had already been done where there were no circumstances showing a threat to continue.

When a nuisance exists over which a particular court has jurisdiction (the Eighteenth Amendment gave the Federal government jurisdiction and Congress thereunder made a certain act a nuisance and placed the jurisdiction in the District courts), that court may enjoin it and then enforce its decree.¹⁶ Congress, in section 22, clearly declared that the court should enjoin, not only the nuisance but, sales of liquor. A sale was enjoined, and if this injunction was valid and was violated there was a contempt. Thus it is questioned: can equity enjoin a single act, or when so enjoined, will the commission of a single act violate the injunction; or, can a court of equity punish a contempt which consists in a single act where no circumstances constitute a threat to repeat the act? It would seem more logical, although it would produce no different result than the court reached, to say that Congress intended for the court to enjoin the single act, but that although they did it, after a single act is enjoined a punishment could not be inflicted by a court of equity for a single past violation. It would be a useless act for the court to make a decree that it did not have the power to enforce, and therefore the

¹⁶ U. S. Comp. Stat. (1925) sec. 10138½k; *Kling v. U. S.* (1925) 8 F. (2nd) 730.

prevailing opinion reached the correct conclusion, that Congress never intended for the court to enjoin the single sale.

Because the court gave as its reason for its construction of the statute the possible unconstitutionality of the act unless so construed, we believe the court thought that the act, if construed as contended by the dissenting opinion, would deprive a defendant of a jury trial in a criminal case. Such a construction would confer upon a court of equity complete jurisdiction over the crime of selling liquor. This statement should not be confused with the oft-stated but erroneous idea that equity will not enjoin a crime. The fact that selling liquor is a crime is immaterial so long as equity has jurisdiction for some other reason, such as the existence of a nuisance.

The case of *Mugler v. Kansas* does not settle the question that equity can punish a single past sale without a jury trial, as is sometimes supposed. A comparison of the *Mugler* case with what is said in *Gompers v. Buck Stove & Range Co.* serves to illustrate the distinction between the instant case and the *Mugler* case. The distinction between a civil and a criminal contempt has arisen in various forms often to determine whether an appeal or a writ of error would lie to review the case, as in *Bessette v. W. B. Conkey Co.*,¹⁷ where contempt was treated as criminal in determining the method of review; or it was held a criminal case for the purpose of determining whether one could be compelled to give evidence against himself.¹⁸ But where coercive relief was an object, a contempt was held not to be a criminal case in determining whether it was reviewable by the Supreme Court of the United States;¹⁹ and in the *Gompers* case, *supra*, in determining whether a bill of exceptions was necessary to the contempt proceeding, it was held to be criminal, and review was refused because no bill of exceptions was made as required in criminal cases; and in determining whether a trial shall be had under Article 3, section 2 of the Constitution, contempt was held not to be a criminal proceeding.²⁰ And in a recent West Virginia case proof was required beyond a reasonable doubt, as in criminal cases, but the court held defendant not entitled to trial by jury;²¹ but the object was "to punish the defendant therein as a preventive measure to stop future instigations."²²

¹⁷ *Bessette v. W. B. Conkey Co.* (1904) 194 U. S. 421.

¹⁸ *Boyd v. U. S.* (1866) 116 U. S. 616.

¹⁹ *Worden v. Searls* (1887) 121 U. S. 14.

²⁰ *Nashville C. & St. L. Ry. Co. v. Alabama* (1888) 128 U. S. 96.

²¹ *State v. Bittner* (1926) 136 S. E. 202.

²² See also *U. S. v. Jose* (1894) 63 Fed. 951.

Regardless of whether a contempt is civil or criminal for other procedural purposes, it is definitely settled that for the purpose of determining whether a defendant is entitled to a jury trial for the violation of an order of a court of equity, it is civil in the sense that neither state nor federal constitutions guarantee him a jury trial.²³ But in such cases there were acts which constituted a threat to repeat or continue the violation. In *Eilenbecker v. Plymouth County*²⁴ it was said that one of the attributes incident to a court of justice was that it should have the power of vindicating its dignity . . . without calling upon a jury to assist in the exercise of this power,²⁵ and this has been taken as settling the question as to jury trials in equity contempt cases.

In some states, even where a state constitution provides that in all criminal prosecutions the accused shall have a right to a speedy and public trial by an impartial jury,²⁶ the courts have held that a defendant charged with liquor contempt is not entitled to a jury trial.²⁷ But previous cases, both state and federal, can hardly be con-

²³ *Mugler v. Kansas* (1887) 123 U. S. 623; *Lewinsholm v. U. S.* (1922) 278 Fed. 421.

²⁴ *Eilenbecker v. Plymouth County* (1890) 134 U. S. 31.

²⁵ "In *Ex parte Robinson*, 19 Wall. 505, 510, this court speaks in the following language:

"The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and the enforcement of the judgements, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the act of Congress of March 2nd, 1921. 4 Stat. 487. . . ."

"It will thus be seen that even in the act of Congress, intended to limit the power of the courts to punish for contempts of its authority by summary proceedings, there is expressly left the power to punish in this summary manner the disobedience of any party, to any lawful writ, process, order, rule, decree or command of said court. This statute was only designed for the government of the courts of the United States, and the opinions of this court in the cases we have already referred to show conclusively what was the nature and extent of the power inherent in the court of the states by virtue of their organization, and that the punishments which they were authorized to inflict for a disobedience to their writs and orders were ample and summary, and did not require the interposition of a jury to find the facts or assess the punishment. This, then, is due process of law in regard to contempts of courts; was due process of law at the time the Fourteenth Amendment of the federal Constitution was adopted; and nothing has ever changed it except such statutes as Congress may have enacted for the courts of the United States, and as each State may have enacted for the government of its own courts." *Eilenbecker v. Plymouth County* (1890) 134 U. S. 31, 37 and 38.

²⁶ Art. 1, sec. 10, Iowa Constitution.

²⁷ *Mandercheid v. Dist. Court of Plymouth County* (1886) 69 Iowa 240, 28 N. W. 551.

sidered, in view of the way they were presented. Defendants have assumed that because selling liquor was a crime as well as a contempt of court, that a court of equity could not try them, and the previous decisions generally settled the proposition that equity will not enjoin an act merely because it is a crime, but that regardless of whether it is a crime or not, if the act is a nuisance equity has jurisdiction to enjoin the nuisance, and, having done so, to enforce its decree even to the extent of imprisonment for contempt.

The departure, however, of the instant case from the above statement might be justified because of the fact that the court did not enjoin the nuisance, but a single act which, not being nuisancesome was (and there being no other pretended ground of equity jurisdiction) (1) beyond equity jurisdiction, (2) beyond the relief required, or (3) beyond the right of the court to enforce. Because of this difference of fact, this case did not fall within the rule of the *Mugler* case and that long line of authorities, both state and federal, that hold with it. It seems that the reason for the court's conclusion was the question of the right of the court to enforce the order.

While the *Gompers* case, *supra*, did not involve the question of a jury trial, what the court said therein, if applied to a single sale of liquor, would reconcile the present case with previous authorities. In the *Gompers* case the court said:

"Contempts are neither wholly civil nor altogether criminal. And 'it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both.' But in either event, and whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the order, and a prayer that he be attached and punished therefor. It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two 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 contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had

refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order.

"For example: If a defendant should refuse to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance required by a decree for specific performance, he could be committed until he complied with the order. Unless there were special elements of contumacy, the refusal to pay or to comply with the order is treated as being rather in resistance to the opposite party than in contempt of the court. The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the law, but is remedial, and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said, 'he carried the keys of the prison in his own pocket.' He can end the sentence and discharge himself at any moment by doing what he had previously refused to do.

"On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done, nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. Such imprisonment operates not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience.

"The distinction between refusing to do an act commanded (remedied by imprisonment until the party performs the required act) and doing an act forbidden (punished by imprisonment for a definite term) is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment."

Excluding acts committed in the presence of the court, contempts might be classified as (1) coercive and summarily triable, and (2) punitive and triable as crimes. The cases generally hold as does the *Gompers* case that where there is any threat to continue the wrong enjoined, the effort on the part of the court to try the defendant is coercive. But where a single act is accompanied by no threat to repeat or continue, when defendant is cited by the court his act is past. There is no hope of coercion and the effort is to punish him. In other words, he is accused of a crime. There being no excuse but punishment, he is entitled to all the incidents of a criminal trial. We do not mean to indicate that his is a crime because selling liquor is by statute a crime, but rather he is accused of a crime because the court is undertaking to punish him rather than to coerce him. The crime he is being punished for is that of past disobedience, not the crime of selling liquor.

The instant case should not be confused with that class of cases which hold that single sales of liquor may be nuisances when connected with other circumstances.²⁸ A single sale, together with other acts, might make a nuisance of the premises. Nuisance implies the continuation or threat to repeat a wrong. While the court used the expression that Webb's single sale did not constitute a nuisance and was thus not a contempt, we cannot help but feel that the court had in mind the repetition quality and, that quality being absent, the wrong was completed and equity had no power to punish for a past act. The way the injunction was worded there was a contempt, as pointed out by the dissenting opinion. But being past, and there being no threat to continue it, it was a kind of contempt equity had no power to try.

It may be difficult under given circumstances to determine whether or not the act is a complete one, and for all practical purposes there are but two situations where the distinction between a complete and a continuing act would be of importance. It is possible that a court of equity in the proper case, in order to maintain its own jurisdiction, would interpret a single sale as being a threat to continue. And if it did so, summary punishment would be permissible. In many cases the same problem would arise as occurred in the case of *The Milwaukee Social Democrat Publishing Co. v. Burleson*.²⁹ The Postmaster General had deprived Congressman Berger's *Milwaukee Leader* of the second-class mail privileges upon the charge that articles were constantly appearing in the paper which violated the Espionage Act. Justices Brandeis and Holmes dissented, principally on the ground that there was no authorization to deny second-class privileges because previous issues contained non-mailable matter. The opinion of the court was based, however, upon the theory that the Postmaster General was justified in assuming that when a paper has contained non-mailable matter for a considerable time it is reasonable to conclude that it will continue to do so. Thus when a defendant has been ordered not to sell liquor, a single sale violates that order. But it does not necessarily indicate an intention to continue to violate it, but it might under some circumstances do so. So we think the dissenting opinion in the principal case is right in that Webb was in contempt of court, but there being no circumstances threatening to

²⁸ *Shechter v. U. S.* (1925) 7 F. (2nd) 881; *Hermansky v. U. S.* (1925) 7 F. (2nd) 458; *Barker v. U. S.* (1923) 289 F. 249.

²⁹ *Milwaukee Publishing Co. v. Burleson* (1920) 255 U. S. 407.

continue, any action on the part of the court for the past acts would have been criminal prosecution rather than a summary proceeding. Under evidence conducing to proving divers sales the court would be justified in finding the ultimate fact of a threat to continue, but it seems that under an accusation stating only past acts without stating a threat to continue the defendant should not be tried summarily. In other words, the distinction is only important in that the contempt proceeding must accuse the defendant of threats to continue to violate the injunction, and there must be evidence enough to justify a finding of intention to continue. A single sale without more would hardly justify such a finding of fact. It is the distinction between an ultimate and an evidentiary fact. The ultimate fact that must be alleged in the accusation (usually a statutory information, or an order to show cause) is an act of violation continuing or repeated. It is this ultimate fact that makes it possible for equity to "coerce" as contempt. It must be alleged and proved. A single sale might, under proper circumstances, be sufficient evidence to prove the ultimate fact, and under other circumstances it might not. The instant case is one where it was not.

There are then two important requisites to a summary trial: (1) Allegation of continuance of disobedience with act in furtherance thereof, and (2) evidence to support a finding of intent to repeat or continue the disobedience. A single act may be sufficient as such evidence, or it may not; but certainly where one is accused in the information of merely a single act there is no basis for a summary trial.