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Appeals from Civil Contempt in Kentucky--Does $200 Limitation Apply?

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In *O'Byrne* v. *Henley*, where premises were leased for saloon purposes, it was said:

> "He (lessee) could in law and in fact have continued to use the premises as a saloon though he could not have sold intoxicating drinks or beverages. His business might not, and, as it was shown by the evidence, would not, have continued to be as profitable as if he could sell intoxicants; nevertheless he could have continued to sell soft drinks, cigars, cigarettes, tobacco, etc., as he did before. That his business would not be as good after as before the law went (into) effect was no more the fault of the landlord than it was of the tenant. The contract of lease not having provided against such contingency, which both parties knew could happen, as it provided against other contingencies, we must leave the liability and loss, if any, where the law leaves it, to wit, upon the tenant. The mere fact that the law might cause the tenant to suffer a loss when without it he would have made a profit is no more reason to annul the contract on that account, or to allow the tenant to avoid it, than the passage of a law which increased the tenant's profits, and thereby made the lease more valuable, would authorize the landlord to annul the lease, and require a new one under the new law."

It may be noted in passing, however, that it has been held that where there was a lease for saloon purposes *only* and the prohibition law prevented further use of the premises for that purpose, the tenant would be relieved of his liability to pay rent.[14] It is said that the purpose of the contract has now become illegal and that the tenant will not be made to perform by doing an unlawful act. But there is a failure to distinguish between performance of the contract and the purpose of that contract. Performance is the payment of rent, not the carrying on of the saloon business.

It appears that despite the apparent hardship upon the lessee of a garage, he will have no standing in a court of law either upon the theory of impracticability or of commercial frustration. Whether or not equity would afford him a remedy is another question and not within the scope of this paper.

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APPEALS FROM CIVIL CONTEMPT IN KENTUCKY—DOES $200 LIMITATION APPLY?

The plaintiffs, owners of a franchise granted by the state authorizing the operation of passenger busses over certain routes, obtained a temporary injunction restraining the defendant taxi-cab operators from picking up passengers along the routes covered by the franchise belonging to the plaintiffs. On motion of the plaintiffs a rule was issued requiring the defendants to show cause why they

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[13] 161 Ala. 620, 50 So. 83, 85 (1909).

[14] Doherty v. Monroe-Eckstein Brewing Co., 198 App. Div. 708, 191 N.Y. Supp. 59 (1921), Heart v. East Tennessee Brewing Co., 121 Tenn. 69, 113 S.W 364 (1908), The Stratford Inc. v. Seattle Brewing Co., 94 Wash. 125, 162 Pac. 31 (1916).

should not be adjudged in contempt. From the judgment of contempt and the fine of $30, an appeal was taken. The plaintiffs moved to dismiss the appeal on the ground that Section 347 of the Criminal Code allows an appeal only where the judgment is for a fine of $50 or more. Furthermore, plaintiffs contend that if the contempt is civil, Section 950-1 of the Kentucky Statutes controls, and the court is without jurisdiction since the amount in controversy is less than $200. The Court held that the contempt was civil and that an appeal would lie, notwithstanding Section 950-1, and therefore the motion to dismiss the appeal was overruled. *Allen et al.* v. *Black Bus Lines,* 291 Ky 278, 164 S. W (2d) 482 (1942)

Since the Court in the principal case has decided that this is a case of civil contempt, plaintiff contends that Section 950-1 governs the situation. In order to ascertain whether plaintiff's contention is sound, it will be necessary to see what that section contains. Kentucky Statute, Section 950–1, provides:

> " but no appeal shall be taken to the court of appeals as a matter of right from a judgment for the recovery of money or personal property, or any interest therein, or to enforce any lien thereon, if the value in controversy is less than $500, exclusive of interest and costs, nor to reverse a judgment granting a divorce, or punishing contempt; In all other civil cases the court of appeals shall have appellate jurisdiction over the final orders and judgments of the circuit courts: provided, however, that the court of appeals may grant an appeal when it is satisfied from an examination of the record that the ends of justice require that the judgment appealed from should be reversed; or when construction or validity of a statute or the construction of a section of the Constitution is necessarily and directly put in issue, and a correct decision of the case cannot be had without passing on the validity of the statute or construing the section of the Constitution or statute involved, if the value of the amount or thing in controversy, exclusive of interest and costs, is as much as two hundred dollars."

It appears from a reading of the statute that no appeal lies from a judgment "punishing contempt." Since the defendants, in the case under discussion, were fined $30 each for civil contempt, it appears that no appeal would lie, but the Court of Appeals decided, as early as 1891,[1] that the statute applies only to criminal contempt.[2] In some cases of criminal contempt, an appeal has been allowed, but the Court has said that the appellate court has jurisdiction only to correct erroneous judgments and sentences and that it cannot re-try the question of contempt or no contempt.[3]

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[1] City of Newport, &c. v. Newport Light Co., 92 Ky. 445, 17 S. W 435, 13 K. L. R. 537 (1891).

[2] Roper v. Roper, 242 Ky. 658, 37 S. W (2d) 517 (1923), Adams v. Gardner, Judge, 176 Ky. 252, 195 S. W 412 (1917).

[3] Ketcham v. Commonwealth, 204 Ky 168, 263 S. W 725 (1924), Edge v. Commonwealth, 139 Ky. 252, 129 S. W 591 (1910), French v. Commonwealth, 30 K. L. R. 98, 97 S. W 427 (1906), Turner v. Commonwealth, 59 Ky. (2 Metc.) 619 (1859), Bickley v. Commonwealth, 25 Ky. (2 J. J. Marsh) 572 (1829).

From the construction placed upon the foregoing restriction by the Court of Appeals, it follows that an appeal in case of civil contempt might be maintained, unless prohibited by some other clause in the same section. The last sentence in the statute provides for an appeal in all other civil cases if the ends of justice require that the judgment appealed from should be reversed, or where the construction or validity of a statute or section of the constitution is necessarily put in issue. The cases assume that the clause providing that the amount in controversy must be as much as $200 applies to both preceding clauses. This conclusion as to Section 950-1 will be seen more clearly if we compare it with the corresponding section in the Kentucky Revised Statutes. KRS 21.060 lists the alternate ways in which appeals may be taken to the Court of Appeals. The first portion recites what appeals may be taken as a matter of right and the exceptions to that list. The second part provides that if the value of the amount or thing in controversy, exclusive of interests and costs, is as much as $200, the court may grant an appeal from the judgment or final order of the circuit court and adds to that requirement that the ends of justice must require the appeal or that a correct decision of the case cannot be had without the construction of a statute. It must be remembered that an appeal was allowed in the principal case from a judgment in which the defendants were adjudged in contempt and fined $30 each. This holding would seem to be in direct conflict with the statutory provision. Is there sufficient authority or justification for the ruling as laid down in that case? The Court has cited as its authority for the proposition that an appeal lies in civil contempt proceedings, notwithstanding Section 950-1 of the Kentucky Statutes, the cases of *Gibson* v. *Rogers*[4] and *Union Light, Heat & Power Co. et al* v. *Mulligan et al.*[5]

In the *Gibson* case, an injunction was obtained restraining the operation of a quarry in such a manner as to interfere with the reasonable enjoyment of the plaintiff's property. A rule was obtained to show cause why the defendant should not be punished for contempt for violation of the injunction. Upon appeal from an order discharging the rule, the appellate court held that an appeal would lie and in the opinion said:

> "It would be a rare doctrine if a party could obtain an order from a court commanding or prohibiting the doing of a thing, and could go no further if the court should fail to compel obedience to the order. For that reason we are committed in our more recent opinions to the rule that a party grieved by an order in a civil contempt proceeding may prosecute an appeal."[6]

At no place in the opinion is Section 950-1 cited. Although the court was met by the contention that an appeal would not lie from

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[4] 270 Ky. 159, 109 S. W (2d) 402 (1937).
[5] 177 Ky. 662, 197 S. W 1081 (1917).
[6] Gibson v. Rogers, 270 Ky. 160, 162, 109 S. W (2d) 402, 403 (1937) cited *supra* note 3.

the order discharging the rule, the case was held to be one of civil contempt. It would appear that the court looked only to the provision that an appeal shall not lie from a judgment punishing contempt. The Kentucky Court had already decided that the provision applied to criminal contempt only, and the present court granted an appeal because the contempt in the case at bar was civil. However it was not questioned whether the case came within the provision which states that the amount in controversy must be as much as $200. The court either decided that this provision was satisfied, or overlooked it entirely.

In the other case cited, *Union Light, Heat & Power Co., et al.* v. *Mulligan et al.*,[7] suit was brought by several plaintiffs who contested the right of the defendant company to require deposits and advance payments saying that this requirement in fact raised the rates. The plaintiffs' claims ranged from $3 to $25 and no one claim was of a sufficient amount to give the circuit court jurisdiction. In order to determine whether or not the requirement was reasonable, the defendant was ordered to produce certain of the company's books. An officer of the company refused to comply with the order and for this refusal was adjudged in contempt of court. A writ of prohibition was granted because, as was contended by the defendant, the circuit court was proceeding without jurisdiction. The appellate court said that as the circuit court had no jurisdiction, the judgment punishing contempt was void and prohibition would be granted. The court further said this being a case of civil contempt, an appeal would lie, notwithstanding Section 950-1. It is submitted that the Court of Appeals had a right to hear the case, not because of the issue of contempt, but on the basis that the circuit court was proceeding without jurisdiction. Since the facts did not require a construction of Section 950-1, the case is not very persuasive authority for the proposition for which it is cited in the principal case.

From a discussion of these cases, it is clear that neither case is authority for the proposition that an appeal will lie in civil contempt proceedings, notwithstanding Section 950-1. If the judgment for a fine in a civil contempt proceeding is a final order or judgment within that portion of the statute, then it is subject to the requirement that as much as $200 must be involved in order to give the court jurisdiction. As there is no case directly in point, we must look to the cases wherein the court has construed this provision and see whether or not the final orders and judgments in those cases are of a different nature from a judgment for a fine in the principal case. The Court of Appeals has said that it does not have jurisdiction where the cases involved a judgment for a debt of $137;[8] judgment for $75 damages for a fraudulent conveyance of minerals;[9] judgment

[7] 177 Ky. 662, 197 S. W 1081 (1917).

[8] Thompson v. McAtee's Admx., 158 Ky. 746, 166 S. W 210 (1914).

[9] Adkins v. Williams et al., 25 K. L. R. 1768, 78 S. W 870 (1904).

on a bail bond for $150;[10] judgment for Clerk of Circuit Court fees for $55;[11] judgment for collection of $10 corporation tax;[12] judgment to recover boom fees of $100;[13] and a judgment for recovery of $24 license fee and penalty;[14] and a judgment for $55 damages for failure to transport goods;[15] not because the judgments were not final orders or judgments but for the simple reason that the amount in controversy was not as much as $200. Are the judgments in those cases of a different character than a judgment for a fine of $30? We can see by looking to the cases where the court did not grant appeals that the judgments in question were of the same type as a judgment for a fine. The judgments were of the same degree of finality and issued by the same court. However, an appeal was refused because the amount in controversy was not as much as $200. Why then does not this same requirement apply to a judgment for a recovery of a fine for contempt? There is no reason why it should not be applicable as it is clear from the form and phraseology of the statute that it was intended to apply to a contempt proceeding.

It will be noticed that Section 950-1, which authorizes appeals, is negative in its form. Primarily it does not grant appeals; on the contrary, it prohibits appeals in certain specified cases, and allows them in all other cases only if the construction or validity of a section of a statute or the Constitution is necessarily put in issue or if the ends of justice require it, provided that the amount in controversy is as much as $200. If the appeal was not expressly prohibited, then it was to be granted if the amount was satisfied.

It is evident that as an appeal from a proceeding of civil contempt is not expressly prohibited, it is to be allowed, as in any other civil case, over the final order of the circuit court, *if* the amount is as much as $200. Every requirement for an appeal in the principal case is satisfied except the provision as to the amount. Therefore, it is submitted that the Court of Appeals should have dismissed the appeal from a judgment for a recovery of a $30 fine rendered in a civil contempt proceeding.

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[10] Speckert v. Commonwealth, 111 Ky. 375, 23 K. L. R. 707, 63 S. W 752 (1901).

[11] Spalding v. Wathen, Mueller & Co., 136 Ky. 495, 124 S. W 791 (1910).

[12] Thompson Straight Whiskey Co. v Commonwealth, 157 Ky. 393, 163 S. W 201 (1914).

[13] American Car & Foundry Co. v. Jones, &c., 139 Ky. 167, 129 S. W 564 (1910).

[14] Hill Top Laundry Co. v. Commonwealth, &c., 138 Ky 758, 129 S. W 299 (1910).

[15] C. N. O. & T. P Ry. v. Lawrence, 31 K. L. R. 429, 102 S. W 298 (1901).