1952
*Nov. 25, 26, 27.
1953
*Apr. 28

TONY POJE AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

ATTORNEY GENERAL FOR BRITISH COLUMBIA ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contempt of Court—Disobedience to ex parte labour injunction—Proceedings pursued by Court of own motion—Whether Criminal or Civil contempt—Whether right of appeal.

On a motion to commit the appellants for disobedience to an *ex parte* injunction obtained by a steamship company restraining a labour union and its representatives from picketing a certain vessel, the trial judge, when informed by the parties that they had settled their differences and wished to discontinue the motion, proceeded *ex mero motu* to find on the evidence that the appellants had been guilty of contempt. This finding was upheld by a majority in the Court of Appeal for British Columbia.

Held: The appeal should be dismissed. There was evidence to warrant the finding of contempt and there was no substance to the objections raised as to the granting of the injunction, the jurisdiction of the trial judge and the procedure adopted by him.

Per Rinfret C.J., Rand and Kellock JJ.: The large numbers of men involved and the public nature of the defiance of the injunction rendered the conduct in question contempt of Court criminal in character. Consequently no appeal lay to the Court of Appeal.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming, O'Halloran J.A. dissenting, a committal order (2) for breach of an *ex parte* labour injunction.

R. J. McMaster and A. B. MacDonald for the appellants.

D. M. Gordon Q.C. for the respondent.

The judgment of the Chief Justice, Rand and Kellock, JJ. was delivered by:—

KELLOCK J.:—The question which lies at the threshold of this appeal is one as to the jurisdiction and practice of the court with respect to contempt in circumstances such as are here involved.

*PRESENT: Rinfret C.J. and Kerwin, Rand, Kellock and Estey JJ.

(1) [1952] 7 W.W.R. (N.S.) 49. (2) [1952] 6 W.W.R. (N.S.) 473.

The Court of Chancery has for centuries enforced its orders by contempt proceedings, but it is well settled that such orders, when made merely in aid of execution of process for the benefit of a party, are to be regarded as purely civil in nature. It is equally well settled that conduct which renders appropriate contempt proceedings in aid of execution may have a criminal aspect as well.

In *Wellesley* v. *The Duke of Beaufort* (1), Lord Brougham had occasion to deal with the matter in a case of the clandestine removal from the proper custody of a ward of court. In holding that the contempt there in question was criminal and not civil and that no privilege attached to a Member of Parliament in such cases, the Lord Chancellor said at page 665:

> The line, then, which I draw is this; that against all civil process privilege protects; but that against contempt for not obeying civil process, if that contempt is in its nature or by its incidents criminal, privilege protects not:

There are many statements in the books that contempt proceedings for breach of an injunction are civil process, but it is obvious that conduct which is a violation of an injunction may, in addition to its civil aspect, possess all the features of criminal contempt of court. In case of a breach of a purely civil nature, the requirements of the situation from the standpoint of enforcement of the rights of the opposite party constitute the criterion upon which the court acts. But a punitive sentence is called for where the act of violation has passed beyond the realm of the purely civil.

In *Ambard* v. *Attorney-General of Trinidad* (2), not an injunction case, Lord Atkin at page 74 said:

> Everyone will recognize the importance of maintaining the authority of the Courts in restraining and punishing interferences with the administration of justice, whether they be interferences in particular civil or criminal cases or take the form of attempts to depreciate the authority of the Courts themselves. It is sufficient to say that such interferences when they amount to contempt of Court are quasi-criminal acts, and orders punishing them should, generally speaking, be treated as orders in criminal cases, . . .

(1) (1831) 2 Russ. & My. 638. (2) (1936) 105 L.J.P.C. 72.

1953

POJE AND OTHERS v. A.G. FOR B.C.

Kellock J.

In *Izuora* v. *Reginam* (1), Lord Tucker, in delivering the judgment of the Privy Council, uses the following language:

> It is clear that the appellant's conduct was treated by the judge as being contempt of a criminal kind, viz:
>
> "any act done . . . calculated to bring a court or a judge of the court into contempt or to lower his authority"
>
> or something "calculated to obstruct or interfere with the due course of justice or the lawful process of the courts": see *R.* v. *Gray* (2) (1900) 2 Q.B. 40.

In *in re Armstrong* (2), Vaughan Wiliams, J., as he then was, indicated the distinction between the two classes of contempts at page 329 as follows:

> But I do not think in the present case there is any element of personal contempt, or any offence committed for which Mr. Isaacson could be sent to prison *as a punishment*. I think that any imprisonment ordered in the present case would be by way of civil process, and would determine *ex debito justitiae* as soon as the person committed yielded obedience to the order of the Court and paid the costs.

The question arises as to the characteristics of criminal contempt of court as distinguished from mere disobedience of process. Halsbury, Vol. 7, 2nd edition, page 2, treats the subject thus:

> Contempt of court is either (1) criminal contempt, consisting of words or acts obstructing, or tending to obstruct, the administration of justice, or (2) contempt in procedure, consisting of disobedience to the judgments, orders, or other process of the Court, and involving private injury.

That this division is not, in the view of the editors, a mutually exclusive one, is clear from the following appearing on page 24:

> Contempt in procedure, unaccompanied by circumstances of misconduct, . . . is a contempt in theory only, . . . In circumstances involving misconduct, contempt in procedure partakes to some extent of a criminal nature, and then bears a twofold character, implying as between the parties to the proceedings merely a right to exercise and a liability to submit to a form of civil execution, but as between the party in default and the State, a penal or disciplinary jurisdiction to be exercised by the Court in the public interest.

Reference is made in support of the text last quoted to the judgment of Lindley L.J. in *Seaward* v. *Patterson* (3).

(1) [1953] 1 All. E.R. 827 at 829. (2) [1892] 1 Q.B. 327.
(3) [1897] 1 Ch. 545 at 555.

The statement in the note to the text quoted from page 2 that

> The distinction between criminal contempt and contempt in procedure appears *in some cases* to be a narrow one; e.g., if a party to an action disobeys a prohibitory order, such disobedience, even though wilful, is contempt in procedure, whereas persons who aid and abet such disobedience, and are not parties to the action, are guilty of criminal contempt. . . . The true distinction seems to be that one offender is seeking, though under a mistaken view, to enforce his rights, while the other is simply obstructing the course of justice.

is, therefore, not to be read without keeping in mind that "contempt in procedure" may itself be criminal if accompanied by "circumstances involving misconduct."

It does not therefore follow from the statement in the note that, even in the view of the editors, disobedience by a party to a prohibitory order, can never be more than a civil contempt.

In *Seaward* v. *Paterson* an injunction had been granted restraining the use of certain premises in a particular manner. The appellant was not a party to the proceedings but was aware that the injunction had been granted. It was held by the Court of Appeal that although not bound by the injunction any more than any other member of the public, the appellant was, like other members of the public, bound "not to interfere with and not to obstruct, the course of justice."

In his judgment in *Scott* v. *Scott* (1), the question in that case being whether the conduct there in question amounted to criminal contempt, if so, there being no right of appeal, Lord Atkinson reiterates that mere disobedience to an order of the court, even though wilful, does not amount to criminal contempt. In his view the conduct of the appellant in question in Seaward's case was purely civil contempt. Lord Atkinson criticized the judgment of Lindley L.J., in that case at pages 555-6 with respect to disobedience to an injunction by a person not a party to the proceedings. He regards the language of Lindley L.J., which he quoted, as failing to "grapple with the absurdity"

(1) [1913] A.C. 417.

1953

POJE AND OTHERS v. A.G. FOR B.C.

Kellock J.

of considering conduct on the part of a non-party as criminal while considering the same conduct by a party as civil. He said at p. 459:

> It is difficult to conceive that a judge of Lord Lindley's well-known knowledge, ability and acuteness of mind would have gone through this long analysis of the subject without ever suggesting that either or both, of the kinds of contempt of Court with which he dealt was *necessarily* criminal, if he had so regarded it.

All that Lord Atkinson is insisting on is that *mere* disobedience, whether by a party or a stranger, is not *necessarily* criminal. But it may be so, depending upon the nature and quality of the conduct involved. At p. 461 he repeats (in speaking of *In re Freston* (1), a case involving the authority of the court to discipline its officers) that

> this case, so far from being an authority that disobedience *per se* of an order of Court, irrespective of the nature of the thing ordered to be done, is a criminal offence, is an authority to the contrary.

I think, however, having regard not only to the judgments in *Seaward's* case, but to the position taken by counsel for the appellant, that both court and counsel considered they were dealing with a case of criminal contempt.

At p. 554, Lindley L.J., points out that it was argued for the appellant that

> the only course to pursue would be to proceed against him by *indictment*.

This, of course, is not language appropriate to civil contempts, although no objection to entertainment of the appeal was raised by the respondent. A similar situation had occurred in *Reg.* v. *Jordan* (2), as Lindley L.J., himself had pointed out in *O'Shea* v. *O'Shea* (3).

The judgments in *Seaward's* case are relevant to the case at bar only from the point of view that conduct in the face of an injunction, while not *necessarily* criminal, is not necessarily purely civil either. It may be either, depending upon the nature and quality of the conduct in question in any particular case.

At page 555, Lindley L.J., said:

> A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing; and a motion to commit a man for contempt of Court, not because he is

(1) (1883) 11 Q.B.D. 545. (2) (1888) 36 W.R. 797.
(3) (1890) 15 P.D. 59 at 64.

bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice, is another and a totally different thing. The difference is very marked. In the one case the party who is bond by the injunction is proceeded against for the purpose of enforcing the order of the Court for the benefit of the person who got it. In the other case the Court will not allow its process to be set at naught and treated with contempt. In the one case the person who is interested in enforcing the order enforces it for his own benefit; in the other case, if the order of the Court has been contumaciously set at naught the offender cannot square it with the person who has obtained the order and save himself from the consequences of his act. The distinction between the two kinds of contempt is perfectly well known, although in some cases there may be a little difficulty in saying on which side of the line a case falls.

While the contrast Lord Lindley draws is between contempt proceedings as mere process against a party for the purpose of compelling obedience to an order of the court in the interests of the party obtaining it and proceedings against a person not a party who has "contumaciously set at naught" the order, and while he does not indicate that in the latter case the contemp again may be either civil or criminal, I think the apparent omission is explained by the fact, already pointed out, that the court was in fact dealing with conduct which all concerned regarded as criminal. Lord Lindley, at p. 553, said that he regarded the case as "not anywhere near the line. It seems to me a plain straight forward case."

At p. 558, Rigby L.J., said:

I will only say a few words on the argument of Mr. Seward Brice with reference to the jurisdiction of the Court in matters of contempt of Court with relation to injunctions. Unless I entirely misapprehended that argument, it went so far as this, that the Court has no jurisdiction to commit for contempt *by way of punishment;* but that the jurisdiction is an ancillary or subsidiary jurisdiction in order to secure that the plaintiff in a suit shall have his rights. I do not think that that can be for a moment maintained . . . That there is jurisdiction to punish for contempt of Court is undoubted. It has been exercised for a very long time . . . and it is a punitive jurisdiction founded upon this, that it is for the good, not of the plaintiff or of any party to the action, but of the public, that the orders of the Court should not be disregarded, and that people should not be permitted to assist in the breach of those orders in what is properly called contempt of Court.

Rigby L.J., was not speaking, and did not find it necessary to speak of civil contempt. It would appear that North J., the judge of first instance, had also regarded the appellant's contempt as criminal. The actual committal

1953

POJE AND OTHERS v. A.G. FOR B.C.

Kellock J.

was for a definite term. This is punishment as opposed to an order of the civil type exemplified in *Avery* v. *Andrews* (1).

The authorities make it plain that a party and a non-party are on exactly the same footing so far as contempt of court is concerned. In *Wellesley* v. *The Earl of Mornington* (2), the court refused to commit a servant of the defendant, who was not a defendant, for breach of an injunction but, as appears at page 181, on a motion to commit him for contempt the court did so. Again, as pointed out by Lord Atkinson, the view taken as to the nature of the contempt does not appear from the report and that is not important from the standpoint of the case at bar. *Avery* v. *Andrews* (1), may also be referred to.

In *re Eede* (3), the appellant had been struck off the roll of solicitors for having permitted his name to be made use of in an action by an unqualified person. The Court of Appeal held that an appeal lay as the order was not made in a criminal cause. Lord Esher referred to the pertinent section of the *Attorneys and Solicitors Act* 1843, which authorized the striking off and also authorized the unqualified person to be committed to prison. He pointed out that the section recognized that in dealing with a solicior the court was merely exercising its disciplinary powers but that

> it is easy to see that that punishment inflicted on the unqualified person must be in a criminal matter; but the Act obviously draws a clear distinction between the two cases.

In *re Freston, supra,* is an example of the first class of case.

In my opinion the statement in Oswald, the 3rd edition, at page 36, correctly distinguishes between civil and criminal contempts:

> And, generally, the distinction between contempts criminal and not criminal seems to be that contempts which tend to bring the administration of justice into scorn, or which tend to interfere with the due course of justice, are criminal in their nature; but that contempt in disregarding orders or judgments of a Civil Court, or in not doing something ordered to be done in a cause, is not criminal in its nature. In other words, where contempt involves a *public* injury or offence, it is criminal in its nature, and the proper remedy is committal—but where the contempt involves a private injury only it is not criminal in its nature.

(1) (1882) 30 W.R. 564. (2) (1848) 11 Beav. 180.
(3) (1890) 25 Q.B.D. 228.

It is with this distinction in mind that the judgment of Chitty J., in *Harvey* v. *Harvey* (1), is, I think, to be read. The learned judge there said:

> Interference with a ward of Court, interfering with the due administration of justice, as by intimidating witnesses, or ill-treating a process server, and breaches of an injunction, were and still are all alike treated as in the nature of offences punishable by committal.

Interference with a ward of court, *Wellesley* v. *Duke of Beaufort, supra;* intimidation of witnesses, *R.* v. *Steventon* (2); ill-treating a process server, *Lewis* v. *Owen* (3); are all criminal contempts.

It should be said that the conduct in question in *Scott* v. *Scott* involved nothing in the nature of a "public" injury if it could be considered to be contempt at all. In the view of Viscount Haldane and of Lord Shaw, the order for hearing in camera was ultra vires and therefore there could be no contempt of that order at all. Earl Loreburn considered that the publication "in good faith" of the evidence by the petitioner could not be treated as in contempt of an order she had herself obtained "for her protection". Lord Atkinson arrived at the same result as Viscount Haldane, but considered the order for hearing in camera to have been "spent when the case terminated."

In the case at bar the plaintiff's ship had arrived at the government dock in Nanaimo on the 7th of July, 1951, for the purpose of loading lumber then piled upon the dock. It appears that a strike of members of a union, known as The International Wood Workers of America, was then in progress but it was not the members of that union but longshoremen who were required for the purpose of loading the ship on its arrival. It appears, however, that the woodworkers had established a "picket line" at the entrance to the bridge leading to the government dock, by reason of which the plaintiff company was unable to have the loading continued, the longshoremen refusing to cross. So far as the evidence shows, the Woodworkers Union had no interest in the actual lumber on the dock to be loaded nor in the ship nor its crew.

(1) (1884) 26 Ch. D. 644 at 654. (2) (1802) 2 East 362.
(3) (1894) 1 Q.B. 102.

1953

POJE AND OTHERS v. A.G. FOR B.C

Kellock J.

In this situation the plaintiff applied *ex parte* to Clyne J., and obtained an injunction restraining the defendants, their servants and agents, from

(a) "watching or besetting, or causing to be watched or beset, the M.S. *Vedby* at the government assembly dock in the City of Nanaimo and the approaches thereto by land or sea;"

(b) "from preventing or interfering with the loading of the said M.S. *Vedby*;"

(c) "and from preventing access to and from the said ship by any persons seeking to embark or depart from the said ship."

This order was served upon the appellant Tony Poje on the 15th of July and a copy was posted on the bridgehead in the presence of Poje and six pickets. On the following day, July 16, the Sheriff returned at noon and found at approximately 12.25 p.m., one hundred and fifty men at or near the landward end of the bridge and another thirty at its end nearest the ship. The bridge is some forty or fifty feet wide and its landward end was completely blocked. The legend "I.W.A. is on Strike for Better Wages and Conditions" was displayed on posters being carried and was also posted on the railing of the bridgehead as well as chalked on the asphalt road.

The Sheriff informed the men at the bridgehead that longshoremen would report to load the ship at approximately 12.30 p.m., and shortly before that, when the pickets showed no sign of dispersing, he announced to the men at both ends of the bridge that he was the Sheriff of the county and read the material parts of the order of Clyne J., informing them that he considered them all to be in contempt of court but the pickets paid no attention to him. Shortly after this several cars carrying longshoremen entered the area, one driving directly to the bridge. The occupants of this car were interrogated by the appellant Tony Poje as to who they were. On being informed that they were longshoremen and being asked if they were to load, Poje replied in the negative. Matters remained in this situation until about 2.15 when the Sheriff left, the longshoremen remaining in the area outside the picket line.

On returning at 4.30 p.m., the Sheriff found the situation the same, with the longshoremen still waiting. On returning at 7 p.m. he found no longshoremen and six pickets only.

On July 18 and 19 the Sheriff went to the locality on a number of occasions and found on each occasion only six pickets patrolling the bridgehead. He found none on Sunday, July 20. On the following day he again attended on a number of occasions throughout the day and found only six pickets at the bridgehead.

On July 22, at 8.30 a.m. the situation was the same. Later in the morning the Sheriff was instructed that longshoremen would be reporting for work at 1 p.m. At 10 a.m., on going to the area, he found sixteen pickets there, and at 12.15, he found fifty men assembled at the bridgehead and along the roads leading to it with the appellant Tony Poje apparently in charge. At approximately 12.30 p.m. the number of men at the bridgehead increased to approximately seventy. The Sheriff again read the operative parts of the injunction order, told those present they must disperse, but that did not occur, there being some "snickers" at the Sheriff's statement. On this occasion all of the appellants were in the group. At this time the longshoremen were present on the other side of the street opposite the bridgehead.

On July 22 the defendants served notice of motion for an order setting aside the order of Clyne J., and on the following day the plaintiff moved to commit those concerned for disobedience to the said order. These motions were returnable on the 24th of July, but on that day the parties to the action settled their differences, it being agreed that the plaintiff would discontinue his action and the motion to commit, and that the motions would be spoken to on the 29th.

On the last mentioned day the matter came before the learned Chief Justice of British Columbia, who was informed by counsel of the position. The learned Chief Justice indicated to counsel, however, that on the material, it appeared that there might have been a contempt of which the court should take notice. He, therefore, adjourned the matter to the 8th of September, informing counsel that the Sheriff would be asked to report and that the Court might decide to initiate contempt proceedings of its own motion.

1953

POJE AND OTHERS v. A.G. FOR B.C.

Kellock J.

On the 8th of September, the Sheriff was called and deposed to the facts set out above, and the learned Chief Justice then announced that he proposed to direct the issue of writs of attachment, directed to the appellants and others, under which they would be taken into custody and brought before the court on September 15, but that they would be allowed to remain in the custody of counsel for the appellant upon his undertaking that they would be brought before the court on that day, or they might be permitted to enter into their own recognizance.

Writs of attachment were accordingly issued and the matter came before court (1) again on the 15th of September. The appellants were represented by counsel, the Sheriff repeated the evidence he had given on the previous occasion. He was cross-examined and counsel for the appellants on this occasion admitted that the Sheriff's "evidence" as to the congregation of men on the various occasions was in accordance with the fact. The orders here in question were made on the following day.

It is plain, I think that so far as the learned Chief Justice was concerned, he considered that the facts before him amounted to a criminal contempt of court. So far as the immediate parties to the action were concerned, all matters in question between them had been adjusted. The plaintiff was no longer interested in enforcement of the injunction and had agreed to drop the proceedings for enforcement by way of committal. It was the court which at that point stepped in, the proceedings from then on being purely punitive. In my opinion the learned Chief Justice had jurisdiction so to deal with the matter.

It is idle to suggest that on the evidence the presence of these large numbers of men blocking the entrance to the bridge was intended merely for the purpose of communicating information. That had been very efficiently done for a considerable time by the six pickets with their signs or cards, and the notices at the bridgehead. The congregation of the large numbers of men at the times that the longshoremen were to arrive had no other object or effect than to present force.

(1) [1952] 6 W.W.R. (N.S.) 473.

The context in which these incidents occurred, the large numbers of men involved and the *public* nature of the defiance of the order of the court transfer the conduct here in question from the realm of a mere civil contempt, such as an ordinary breach of injunction with respect to private rights in a patent or trade-mark, for example, into the realm of a public depreciation of the authority of the court tending to bring the administration of justice into scorn. It is to be observed that the nuisance created by the incidents referred to brought the appellants within the scope of s. 501 of the *Criminal Code*; *Reners* v. *The King* (1). S. 165 as well as s. 573 were also infringed. There is no doubt that the appellants and those associated with them were acting in concert. Their conduct was thus entirely criminal in character in so far as these specific offences are concerned. Over and above these offences, however, the character of the conduct involved a public injury amounting to criminal contempt.

In these circumstances, I think the order of the learned Chief Justice was properly made, and as the proceeding was a criminal proceeding, an appeal to the Court of Appeal was not competent; *Storgoff* v. *Attorney General* (2). It follows that the rules of court are inapplicable as they apply only in civil proceedings.

It is immaterial by what means the appellants were in court. The court had jurisdiction to deal with them when there; R. *v. Hughes* (3). Nor do I think the order of Clyne J., may be treated as in any sense a nullity. There is no application before us for leave to appeal directly to this court from the order of the learned judge of first instance under s. 41 of the *Supreme Court Act,* but having regard to my view as above expressed, I would not, in any event, be inclined to grant such leave.

The appeal should be dismissed.

KERWIN J.:—I am unable to discover any substance in the objections raised by the appellants to what are in my opinion mere matters of procedure so far as concerns the order of Mr. Justice Clyne granting an injunction. Furthermore, on any view of the matter, Chief Justice Farris (4)

(1) [1926] S.C.R. 499.
(2) [1945] S.C.R. 526.
(3) (1879) 4 Q.B.D. 614.
(4) [1952] 6 W.W.R. (N.S.) 473.

1953

POJE AND OTHERS v. A.G. FOR B.C.

Kerwin J.

had jurisdiction, sitting in a Court of record, to hear the application for attachment or committal for the alleged contempt in failing to obey that injunction, and I can find no merit in any of the objections raised to the procedure adopted by the Chief Justice. There was evidence sufficient to warrant the finding of contempt and I am unwilling to interfere with the orders made by him with respect to the various appellants. Without expressing any opinion as to the other matters argued, I would dismiss the appeal without costs.

ESTEY, J.:—I agree the appeal should be dismissed. The learned Chief Justice (1), in my opinion, upon this record had jurisdiction to hear the motion. I am in respectful agreement with the conclusions of the majority of the learned judges in the Court of Appeal (2), both with respect to the objections taken to the order as made by Mr. Justice Clyne and the findings of the learned Chief Justice. In view of the foregoing it is unnecessary to determine the nature and character of the contempt.

Appeal dismissed with costs.

Solicitor for the appellants: *A. MacDonald.*

Solicitor for the respondent: *E. Pepler.*

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(1) [1952] 6 W.W.R. (N.S.) 473. (2) [1952] 7 W.W.R. (N.S.) 49.