Student ID_____

Empire College School of Law
Professor Kerns
Legal Writing & Research
Final Examination
Wednesday, Decemeber 7, 2011

Exam Time: 3.0 Hours

This exam has 1 question, please read the entire question and fact pattern before you write your response.

Resources & Restrictions:

You may use the class materials, your own notes, and a dictionary if you wish, while taking this exam. **All other materials, computer research, and collaboration are forbidden.** You must write legibly; if I cannot read your writing, I will not grade your exam and you will receive a "No Pass" grade for your examination. Write on one side of the page only and "double space" your response by leaving one line blank between your handwritten text.

Grading Criteria:

Your grade will be based on: your clarity of thought; the quality of your legal writing; quality of your analysis (including your ability to present both sides of the same issue and your use of the materials); proper use of the IRAC format, and proper citation formats. Proper grammar, punctuation, spelling, are also part of your grade.

Student ID_____

ASSIGNMENT

Please draft a legal memorandum that analyzes whether or not Ms. Brown is in contempt of court and what her potential exposure is (ie: prison time, fines, etc.) Please be sure to consider whether or not Ms. Brown has any defenses that we can argue on her behalf.

Mrs. Brown is an eighty-five year old woman who lives with her two pet cats, Scooter and Snoopy, in Monte Rio. Mrs. Brown inherited her house from her parents, who inherited the house from their parents. Mrs. Brown was born in and grew up in the house and she dearly loves it. As the result of last winter's rains, the earth beneath Mrs. Brown's house moved, making the house unstable. Without any warning to Mrs. Brown, County officials inspected and red-tagged the house. A red tag means that the owner must cease using the house and must stay out of the house. When Mrs. Brown called the County to ask what a red tag means, County officials told her that she is prohibited from entering the house for any reason. Mrs. Brown asked for permission to get Scooter and Snoopy out of the house and the County official said no, but offered to call animal control. Fearing that Snoopy and Scooter would be taken to the pound and euthanized, Mrs. Brown entered the house and retrieved Snoopy and Scooter, who were delighted to see her.

County officials then obtained a court order barring Mrs. Brown from entering the house for any reason because County engineers believe that the house is unsafe. Mrs. Brown has a copy of this order.

Mrs. Brown's insurance company hired an engineer to evaluate the house and the insurance company's engineer issued a written opinion saying that he believes the house needs major repair work, but is not imminent danger. Upon reading a copy of the insurance company's engineer's report, Mrs. Brown promptly went home and is there to stay. She is frightened, confused, and has no where else to go and can't afford to buy another house.

While County officials are genuinely sympathetic to Mrs. Brown's situation, they are also concerned for her safety. Thus, they have asked the court to declare that Mrs. Brown is in contempt of court because she is living in the house and refuses to leave.

* * *

Your memo must follow our firm's standard memo format:

I.
ISSUES

II.
BRIEF ANSWERS

III.
FACTS

**In your facts, do not simply copy the facts that have been given to you. Your job is to summarize the relevant facts.

IV.
DISCUSSION
** use subheadings in this section.

V.
CONCLUSION

Attachments:

This exam packet consists of thirteen pages. Your exam should include the following attachments (if you do not have these attachments please see the proctor immediately):

Code of Civil Procedure § 1209
Code of Civil Procedure § 1218
In re Alfred Cardella (1941) 47 Cal.App.2d 329
In re H. Peter Young v. Hayes, (1995) 9 Cal.4th 1052
Uhler v. Superior Court (1953) 117 Cal.App.2d 147

CODE OF CIVIL PROCEDURE
PART 3. OF SPECIAL PROCEEDINGS OF A CIVIL NATURE
TITLE 5. OF CONTEMPTS

§ 1209. Acts or omissions constituting; stay of sentence pending appeal

(a) The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;

2. A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding;

3. Misbehavior in office, or other willful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person, appointed or elected to perform a judicial or ministerial service;

4. Abuse of the process or proceedings of the court, or falsely pretending to act under authority of an order or process of the court;

5. Disobedience of any lawful judgment, order, or process of the court;

6. Rescuing any person or property in the custody of an officer by virtue of an order or process of such court;

7. Unlawfully detaining a witness, or party to an action while going to, remaining at, or returning from the court where the action is on the calendar for trial;

8. Any other unlawful interference with the process or proceedings of a court;

9. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness;

10. When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action, to be tried at such court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court;

11. Disobedience by an inferior tribunal, magistrate, or officer, of the lawful judgment, order, or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate, or officer.

(b) No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings.

(c) Notwithstanding Section 1211 or any other provision of law, if an order of contempt is made affecting an attorney, his agent, investigator, or any person acting under the attorney's direction, in the preparation and conduct of any action or proceeding, the execution of any sentence shall be stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order, the violation of which is the basis of the contempt, except for such conduct as may be proscribed by subdivision (b) of Section 6068 of the Business and Professions Code, relating to an attorney's duty to maintain respect due to the courts and judicial officers.

(d) Notwithstanding Section 1211 or any other provision of law, if an order of contempt is made affecting a public safety employee acting within the scope of employment for reason of the employee's failure to comply with a duly issued subpoena or subpoena duces tecum, the execution of any sentence shall be stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order, a violation of which is the basis for the contempt.

As used in this subdivision, "public safety employee" includes any peace officer, firefighter, paramedic, or any other employee of a public law enforcement agency whose duty is either to maintain official records or to analyze or present evidence for investigative or prosecutorial purposes.

CODE OF CIVIL PROCEDURE
PART 3. OF SPECIAL PROCEEDINGS OF A CIVIL NATURE
TITLE 5. OF CONTEMPTS

§ 1218. Determination of guilt; punishment; restrictions on enforcement of orders by party in contempt

(a) Upon the answer and evidence taken, the court or judge shall determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he or she is guilty of the contempt, a fine may be imposed on him or her not exceeding one thousand dollars ($1,000), or he or she may be imprisoned not exceeding five days, or both. In addition, a person who is subject to a court order as a party to the action, or any agent of this person, who is adjudged guilty of contempt for violating that court order may be ordered to pay to the party initiating the contempt proceeding the reasonable attorney's fees and costs incurred by this party in connection with the contempt proceeding.

(b) No party, who is in contempt of a court order or judgment in a dissolution of marriage or legal separation action, shall be permitted to enforce such an order or judgment, by way of execution or otherwise, either in the same action or by way of a separate action, against the other party. This restriction shall not affect nor apply to the enforcement of child or spousal support orders.

(c) In any court action in which a party is found in contempt of court for failure to comply with a court order pursuant to the Family Code, the court shall order the following:

(1) Upon a first finding of contempt, the court shall order the contemner to perform community service of up to 120 hours, or to be imprisoned up to 120 hours, for each count of contempt.

(2) Upon the second finding of contempt, the court shall order the contemner to perform community service of up to 120 hours, in addition to ordering imprisonment of the contemner up to 120 hours, for each count of contempt.

(3) Upon the third or any subsequent finding of contempt, the court shall order both of the following:

(A) The court shall order the contemner to serve a term of imprisonment of up to 240 hours, and to perform community service of up to 240 hours, for each count of contempt.

(B) The court shall order the contemner to pay an administrative fee, not to exceed the actual cost of the contemner's administration and supervision, while assigned to a community service program pursuant to this paragraph.

(4) The court shall take parties' employment schedules into consideration when ordering either community service or imprisonment, or both.

In re ALFRED CARDELLA, on Habeas Corpus

Crim. No. 1780

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

47 Cal. App. 2d 329; 117 P.2d 908; 1941 Cal. App. LEXIS 1164

October 14, 1941, Decided

PRIOR HISTORY: [***1] PROCEEDING in habeas corpus to secure release from custody after commitment for contempt.

DISPOSITION: Writ granted and petitioner discharged.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner father brought a proceeding in habeas corpus to secure release from custody after commitment. The trial court (California) had ordered the father held for contempt for failure to make child support payments.

OVERVIEW: The father contended that the commitment was wholly insufficient, in that the lower court failed to find the facts, which were the basis of the finding that he had the present ability to pay. The commitment failed to state sufficient facts to enable the court to say whether or not the lower court was justified in making the order. From the findings it did not affirmatively appear that the father had the ability to comply with the order regarding child support, at the time of the hearing on the order to show cause on the contempt proceedings. The lower court was deprived of jurisdiction to find the father in contempt or to commit him in punishment thereof as a result of the lack of such an affirmative finding regarding his ability to pay.

OUTCOME: The court granted the writ of habeas corpus and discharged the father.

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Sanctions > Contempt > General Overview

[HN1] Since proceedings in contempt are in their nature criminal in character, and the court exercises but a special and limited jurisdiction in such matters, the record of the court upon which the party is adjudged guilty of contempt should show affirmatively upon its face the facts upon which the judicial action is based and upon which jurisdiction depended, the purpose of the requirement being to enable the appellate court to determine by an inspection of the record, whether a contempt has in fact been committed. No presumptions and intendments will be indulged in favor of the order; and the charge and finding thereon, and the judgment

of the court, are to be strictly construed in favor of the accused.

Civil Procedure* > *Sanctions* > *Contempt* > *General Overview
[HN2] The facts constituting the contempt must be stated in some appropriate form, either in an affidavit in the case of a constructive contempt, or in the order adjudging contempt, in the case of a direct contempt.

Civil Procedure* > *Sanctions* > *Contempt* > *General Overview
[HN3] Disobedience of an order of court is not contempt where it is due to the inability of the accused to comply with the order and such inability is not due to voluntary and fraudulent conduct on the part of the contemner. Accordingly, it is an essential of an adjudication of contempt that it appear in the commitment that the party found guilty had the ability to perform.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Divorce--Enforcement of Awards--Contempt--Hearing--Finding of Ability to Pay. --A finding in a commitment for disobedience of an order directing the making of alimony payments that "the party has the present ability to pay" is more of a conclusion than a finding, and is insufficient to support an adjudication of contempt. The question of ability to pay is one of fact within the province of the trial court.

(2) Contempt--Review, etc.--Presumptions. --On *habeas corpus* to review a commitment for nonpayment of alimony which states merely a conclusion as to the contemner's ability to pay, no intendments or presumptions can be indulged in in favor of upholding the adjudication.

COUNSEL: R. R. Sischo for Petitioner.

Earl Warren, Attorney General, J. Q. Brown, Deputy Attorney General, and Chas. R. Garry for Respondents.

JUDGES: TUTTLE, J. Thompson, Acting P. J., and Ross, J. *pro tem.* , concurred.

OPINION BY: TUTTLE

OPINION

[**909] [*329] TUTTLE, J. -- Petitioner seeks release from confinement in the county jail through *habeas corpus*.

In answer to the writ, the sheriff filed his return, which shows that the authority for detaining petitioner is based upon the following order of the court:

"The court orders motion for modification of the divorce decree denied, both as to the custody of the child and the amount of the monthly payments, and further orders that if payment is not made as previously ordered by the court, that defendant is adjudged in contempt of court, as the court finds that he has the present ability to pay and orders him to pay the amount of $ 185.00 immediately; $ 105.00 on account of counsel fees, and $ 80.00 delinquent payments on the $ 60.00 [*330] per month alimony. Defendant is ordered confined in [***2] the Merced County Jail until the amount of $ 185.00 is paid."

The contention of petitioner is that the foregoing commitment is wholly insufficient, in that the court fails to find the *facts* which are the basis of the finding that "he (petitioner) has the present ability to pay." Petitioner urges that the language quoted is, in reality, a mere conclusion.

The record of the hearing which resulted in the order is not before us. In 5 Cal. Jur. 952, 953, sec. 48, it is said:

[HN1] "Since proceedings in contempt are in their nature criminal in character, and the court exercises but a special and limited jurisdiction in such matters, the record of the court upon which the party is adjudged guilty of contempt should show affirmatively upon its face the facts upon which the judicial action is based and upon which jurisdiction depended, the purpose of the requirement being to enable the appellate court to determine by an inspection of the record, whether a contempt has in fact been committed. No presumptions and intendments will be indulged in favor of the order; and the charge and finding thereon, and the judgment of the court, are to be strictly construed in favor of the accused."

In the [***3] same volume, page 937, sec. 37, it is stated:

[HN2] "The facts constituting the contempt must be stated in some appropriate form, either in an affidavit in the case of a constructive contempt, or in the order adjudging contempt, in the case of a direct contempt."

The affidavit, if there was one, is not in the record. Thus, we have for consideration the commitment alone, which constitutes the judgment. Also, from the same volume, pages 948, 949, sec. 44, we quote the following:

[HN3] "Disobedience of an order of court is not contempt where it is due to the inability of the accused to comply with the order and such inability is not due to voluntary and fraudulent conduct on the part of the contemner. Accordingly, it is an essential of an adjudication of contempt that it appear in the commitment that the party found guilty had the ability to perform."

(1) From the foregoing statement of the law governing the question at issue, we are of the opinion that the commitment fails to state sufficient facts to enable this court to say whether or not the lower court was justified in making the order. That question is one of fact, within the province [*331] of the trial court. **(2)** However, no intendments [***4] or presumptions can, as in the case of an ordinary judgment, be indulged in by us in favor of upholding the adjudication. In *In re Meyer, 131 Cal. App. 41 [20 P.2d 732]*, the identical point was presented. There, the court held that a finding that "petitioner has had, and now has the ability to comply with said order of the court made October 6, 1932," was "more of a conclusion than a finding." The court states:

"There is no record of the testimony taken at the contempt hearing before us, and it therefore becomes necessary for us to look to the findings and to the face of the order for the necessary support of the judgment (*Merritt v. Superior Court, 93 Cal. App. 177 [269 P. 547]*). From the findings it does not appear affirmatively that petitioner did have the ability, at the time of the hearing of the order to show cause on the contempt proceedings, to comply with the order, and the lack of such affirmative finding of ability to pay deprives the trial court of jurisdiction to find petitioner in contempt or to commit him in punishment thereof."

The writ is granted and petitioner discharged.

Thompson, Acting P. J., and Ross, J. *pro tem.* [***5] , concurred.

9 Cal. 4th 1052, *; 892 P.2d 148, **;
40 Cal. Rptr. 2d 114, ***; 1995 Cal. LEXIS 2178

In re H. PETER YOUNG on Contempt. THE PEOPLE, Plaintiff and Respondent, v. ROYAL KENNETH HAYES, Defendant and Appellant.

No. S004725.

SUPREME COURT OF CALIFORNIA

9 Cal. 4th 1052*; *892 P.2d 148*; *40 Cal. Rptr. 2d 114*; *1995 Cal. LEXIS 2178*; *95 Cal. Daily Op. Service 2954*; *95 Daily Journal DAR 5078

April 4, 1995, Decided

SUBSEQUENT HISTORY: As Modified April 12, 1995.

CASE SUMMARY:

PROCEDURAL POSTURE: The matter was before the court (California) on an order to show cause why an attorney had failed to file an appellant's opening brief in his criminal case after 19 extensions. The court had ordered the attorney to appear and to produce a copy of that part of appellant's brief that had been completed if the brief had not been filed earlier.

OVERVIEW: An attorney was granted 19 extensions of time to file an appellant's opening brief in a criminal case. The attorney appeared before the court in response to an order to show cause why he should not be held in contempt for failure to comply with the court's prior orders to file the brief, and was ordered to file the brief by March 1, 1995. The order was modified until April 4, 1995 and the attorney was further ordered to produce a copy of that part of the appellant's opening brief, which had been completed by that date, if the brief had not been filed earlier. The attorney appeared on that date and the court found that he had not complied with the court's orders. The court also found that the attorney was aware of and had the ability to comply with the orders and failed to do so. The court held that willful failure to comply with an order of the court constituted contempt. The clerk was directed to notify the Texas State Bar by forwarding a copy of the judgment of contempt. The court sentenced the attorney to a five-day jail term.

OUTCOME: The court found an attorney guilty of contempt of court because he willfully failed to comply with an order of the court requiring him to file appellant's opening brief in a criminal case.

LexisNexis(R) Headnotes

Criminal Law & Procedure* > *Criminal Offenses* > *Miscellaneous Offenses* > *Contempt* > *General Overview

[HN1] Willful failure to comply with an order of the court constitutes contempt. *Cal. Code Civ. Proc., ß 1209(a)* 5.

Criminal Law & Procedure* > *Criminal Offenses* > *Miscellaneous Offenses* > *Contempt* > *General Overview

[HN2] The failure to comply with orders of the court is an act occurring in the immediate view and presence of the court within the meaning of *Cal. Code Civ. Proc. ß 1211*.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

After granting an attorney 19 extensions of time to file his client's opening brief, the Supreme Court ordered him to file the brief on a certain date. The attorney failed to comply with that order and instead sought a 20th extension of time to file the brief. In response to an order to show cause why he should not be held in contempt for failure to comply with the order, the attorney appeared before the court and was ordered to file the brief at a later date. The attorney failed to file the brief. The Supreme Court found that the attorney had not complied with the court's orders, that the attorney was aware of and had the ability to comply with those orders, and that the failure to comply with the orders was an act occurring in the immediate view and presence of the court within the meaning of *Code Civ. Proc., ß 1211*. Thus, the Supreme Court found the attorney guilty of contempt (*Code Civ. Proc., ß 1209, subd. (a)*5) and sentenced him to serve five days in the county jail. (Opinion by The Court.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Contempt ß 2--Acts Constituting--Attorney's Failure to Comply With Supreme Court Orders to File Client's Opening Brief. --An attorney was guilty of contempt (*Code Civ. Proc., ß 1209, subd. (a)*5) and was sentenced by the Supreme Court to serve five days in county jail for his failure to comply with the Supreme Court's orders to file his client's opening brief. After granting the attorney 19 extensions of time to file his client's opening brief, the Supreme Court ordered him to file the brief on a certain date. The attorney failed to comply with that order and instead sought a 20th extension of time to file the brief. In response to an order to show cause why he should not be held in contempt for failure to comply with the order, the attorney appeared before the court and was ordered to file the brief at a later date. The attorney failed to file the brief. The Supreme Court found that the attorney had not complied with the court's orders, that the attorney was aware of and had the ability to comply with those orders, and that the failure to comply with the orders was an act occurring in the immediate view and presence of the court within the meaning of *Code Civ. Proc., ß 1211*.

[See 7 **Witkin,** Cal. Procedure (3d ed. 1985) Trial, ßß 182, 192.]

COUNSEL: H. Peter Young, in pro. per.

OPINION

[*1053] [**149] [***115] **THE COURT.**

On November 4, 1994, after granting Attorney H. Peter Young 19 extensions of time to file the appellant's opening brief in the case of *People v. Hayes* (S004725, app. pending), this court ordered Young to file the brief on or before December 5, 1994. Young failed to comply with that order and, instead, sought a 20th extension of time to file the brief.

On January 11, 1995, in response to an order to show cause why he should not be held in contempt for failure to comply with the November 4, 1994, order, Young appeared before this court and was ordered to file the brief on or before March 1, 1995, and to appear before this court on March 7, 1995.

Young failed to file the brief on or before March 1, 1995, as ordered on January 11, 1995. On his representation that he was unable to appear on March 7, 1995, the order of January 11, 1995, was modified and Young was ordered to appear before this court on Tuesday, April 4, 1995. He was further ordered to produce a copy of that part of the appellant's opening brief which had been completed by that date if the brief had not been filed earlier.

(1) Young appeared before the court on this date. The court finds that he has not complied with the court's orders of November 4, 1994, and January 11, 1995. The court also finds that Young was aware of and had the ability to comply with those orders and failed to do so. [HN1] Willful failure to comply with an order of the court constitutes contempt. (*Code Civ. Proc., ß 1209, subd. (a)*5.)

[HN2] The failure to comply with the November 4, 1994, and January 11, 1995, orders of this court is an act occurring in the immediate view and presence of [*1054] the court within the meaning of *Code of Civil Procedure section 1211*. (Cf. *Arthur v. Superior Court (1965) 62 Cal.2d 404, 409 [42 Cal.Rptr. 441, 398 P.2d 777]*; *Lyons v. Superior Court (1955) 43 Cal.2d 755, 759-760 [278 P.2d 681]*.)

The court finds H. Peter Young guilty of contempt of this court. Having been adjudged in contempt of the California Supreme Court, H. Peter Young is sentenced to serve five (5) days in the Los Angeles County jail. Pursuant to *Code of Civil Procedure section 1209, subdivision (c)*, execution of this judgment is stayed until 9 a.m., Saturday, April 8, 1995, at or before which time H. Peter Young is to surrender himself to the Sheriff of Los Angeles County, or his representative, at the Los Angeles County jail, 4411 Bauchet Street at Vignes, Los Angeles, California.

Pursuant to *Business and Professions Code section 6086.7*, the clerk is directed to notify the State Bar of this action by forwarding to the State Bar a copy of this judgment of contempt.

[*Modification of judgment of contempt; filed April 12, 1995*.]

On April 4, 1995, the court adjudged H. Peter Young in contempt of court and imposed a term of five days' imprisonment. H. Peter Young appeared at the Los Angeles County jail on April 8, 1995, as ordered by this court, to surrender himself to serve the term of five days imposed in the judgment of contempt made on April 4, 1995. Although the judgment of contempt committing H. Peter Young to serve a five-day jail term had previously been delivered to the jail, the Inmate Reception Center of the Los Angeles County jail could not locate that commitment and, believing that the commitment had not been delivered, directed H. Peter Young to return to this court for further instructions. He has done so.

The jail term is reduced to four days, reflecting credit for April 8, 1995.

[**150] [***116] H. Peter Young, having served one (1) day of the sentence imposed on April 4, 1995, is to surrender himself to the Sheriff of Los Angeles County, or his representative, at the Inmate Reception Center, Los Angeles County jail, 4411 Bauchet Street at Vignes, Los Angeles, California, at 9 a.m. on Saturday, April 29, 1995, to serve the remaining term of four (4) days.

MAURICE UHLER, Petitioner, v. SUPERIOR COURT OF FRESNO COUNTY and STROTHER P. WALTON, Judge thereof, Respondents

Civ. No. 4639

Court of Appeal of California, Fourth Appellate District

117 Cal. App. 2d 147*; *256 P.2d 90*; *1953 Cal. App. LEXIS 1789

May 1, 1953

SUBSEQUENT HISTORY: [***1] *117 Cal. App. 2d 147 at 155*. Respondents' Petition for a Hearing by the Supreme Court was Denied May 28, 1953. Carter, J., was of the Opinion that the Petition Should be Granted.

PRIOR HISTORY: Original Opinion of April 2, 1953, Reported at *117 Cal. App. 2d 147*.

CASE SUMMARY:

PROCEDURAL POSTURE: Respondent Superior Court of Fresno County and judge thereof petitioned the court for a rehearing contending that two important questions of law were left undecided: (1) Whether or not the superior court's order was a "valid order," and (2) whether petitioner auditor has any right or duty to consider or pass upon the legality of such a grand jury expense.

OVERVIEW: Respondents argued that the auditor had no right or duty to consider or pass upon the legality of the grand jury expense at issue, that all discretion with respect to a claim arising under N.Y. *Penal Code ß 928*, as amended, was vested in the superior court, and that the evidence showed an intentional violation of the superior court's order and amply sustained the finding of contempt in their argument for rehearing. The court modified the opinion holding that the auditor should have been allowed a reasonable time in which to act and that there was no substantial evidence justifying a finding of contempt. While the superior court had inherent power to punish for contempt, this was a drastic remedy which should be used only when necessary in order to maintain law and order. It should have rarely, if ever, been used for the purpose of settling differences of opinion between conscientious officials with respect to close questions of civil law. Whether or not the power to do so technically existed here, in the court's opinion it was an abuse of discretion to punish the auditor for contempt under these circumstances.

OUTCOME: The court modified the order and held that it was an abuse of the superior court's discretion to punish the auditor for contempt.

LexisNexis(R) Headnotes

Civil Procedure* > *Sanctions* > *Contempt* > *General Overview

[HN1] While a trial court has inherent power to punish for contempt, this is a drastic remedy, which should be used only when necessary in order to maintain law and order. It should

rarely, if ever, be used for the purpose of settling differences of opinion between conscientious officials with respect to close questions of civil law.

OPINION

[*155] [**90] A petition for a rehearing was denied May 1, 1953, and the following opinion was then rendered:

THE COURT.

The respondents have asked for a rehearing, contending that two important questions of law were left undecided: (1) Whether or not the court's order of January 26th was a "valid order," and (2) whether the auditor has any right or duty to consider or pass upon the legality of such a grand jury expense. It is argued that the petitioner had no such right; that all discretion with respect to a claim arising under *section 928 of the Penal Code,* as [**91] amended, is vested in the court; and that the evidence shows an intentional violation of the court order and amply sustains the finding of contempt.

The controlling question presented to this court was not as to whether the order of January 26th was a valid order, and not as to whether it should eventually be decided that the auditor's duty, [***2] in such a case, is merely ministerial. It was unnecessary to decide either of those questions. Because one sentence, considered apart from the rest of the opinion, might be construed as having the effect of deciding the second of these questions, the opinion is modified by striking therefrom the sentence in the fifth from the last paragraph (containing the quotation from *Pen. Code, ß 928*) beginning with the words "In view of . . ." and ending with the words ". . . was illegal."

The question before us was as to whether the evidence in the record was sufficient to support and justify the finding that the petitioner wilfully and contemptuously refused to obey the court's order. The record clearly discloses that close legal questions with respect to the duties of the auditor were involved which had not been decided, so far as anyone knew or still knows; that there was an apparent inconsistency, if not a possible conflict, between various statutes relating to these duties; that the auditor was advised by the county counsel to await his search of the law, and told that the Attorney General had been asked for an opinion; that on the third [*156] day the auditor was cited for contempt; [***3] that at the hearing, the first opportunity for both sides to be heard, the auditor expressed his willingness to do whatever the court should order; and that he immediately complied when the court told him that it was his duty to draw the warrant.

It was and is our view that under these circumstances the petitioner should have been allowed a reasonable time in which to act [ILLEGIBLE TEXT] that the close legal questions involved should have been presented and handled in some manner more appropriate to a just decision than that afforded by a resort to a quasi-criminal proceeding [ILLEGIBLE TEXT] and that there was no substantial evidence justifying a finding of contempt.

(12) [HN1] While a court has inherent power to punish for contempt, this is a drastic remedy which should be used only when necessary in order to maintain law and order. It should rarely, if ever, be used for the purpose of settling differences of opinion between conscientious officials with respect to close questions of civil law. Whether or not the power to do so technically existed here, in our opinion it was an abuse of discretion [***4] to punish the petitioner for contempt under these circumstances.