

*For Dissent
and hold for Lewis*

File

The Penfield Company v. SEC

I think this case is all wrong.

1. I think it was in the discretion of the District Court to make the contempt criminal not civil. If the District Court believed there was not necessity now to enforce its order but only wanted to punish the petitioner for non-compliance, I think it should be entitled to do so.

2. Although the matter may not have been raised, as Douglas says, in a case of this sort we should determine whether the CCA was correct in ordering imprisonment instead of a fine. I think it was not. Even assuming the contempt was civil and not criminal, it should have remanded the case to the District Court for a determination whether fine or imprisonment was proper in the circumstances. (A fine can be used in civil contempt.)

3. The net effect of the holding is to violate the rule of *In re Bradley*, 318 U.S. 50 that when, at least in criminal contempt, a fine has been paid there can be no imprisonment. *In re Bradley* is, I think, equally applicable to civil contempt, since the governing statute is the same, 28 U.S.C. sec. 385, and since civil contempt, although not punitive, is really a "criminal" punishment. Note, however, that *In re Bradley* does not rest upon the double jeopardy constitutional provision.

4. In any case, this opinion should be held for the Lewis case which will deal with contempt at length.