CONTEMPT OF COURT

C. J. MILLER

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CRIMINAL AND CIVIL CONTEMPT OF COURT

A. Introduction

2.01 The general characteristics of criminal and civil contempt of court have been noted in the previous chapter. Here it is proposed to consider the nature of the distinction between these two forms of contempt in more detail and to examine the practical consequences which flow from it. It may be said at the outset that these are far less important than was once the case although the distinction retains a residual importance. As Lord Scarman explained in *Home Office* v. *Harman*:[1]

> The distinction between 'civil' and 'criminal' contempt is no longer of much importance, but it does draw attention to the differences between on the one hand contempts such as 'scandalising the court', physically interfering with the course of justice, or publishing matter likely to prejudice a fair trial, and on the other those contempts which arise from non-compliance with an order made, or undertaking required, in legal proceedings. The former are usually the business of the Attorney General to prosecute by committal proceedings (or otherwise): the latter,

[1] [1983] 1 AC 280, 310, [1982] 1 All ER 532, 542, HL.

> constituting as they do an injury to the private rights of a litigant, are usually left to him to bring to the notice of the court. And he may decide not to act: he may waive, or consent to, the non-compliance.

B. Punishment and Coercion

2.02 Although criminal contempt of court differs from the ordinary crimes in several significant respects, proceedings for criminal contempt are nevertheless intended to serve a punitive function to the same extent as proceedings for any other offence. Thus if it is alleged that a person committed an assault in court, or that he tampered with a witness, the purpose of instituting proceedings against him and of any penalty ultimately imposed is the same whether the conduct is charged as a criminal contempt punishable by committal, or as an assault or attempt to pervert the course of justice punishable on indictment. However, in cases of civil contempt where the complaint is of non-compliance with a court order or an undertaking, the purpose and intended outcome of the proceedings will typically be remedial or coercive. In the words of a leading American case:[2]

> It is not the fact of punishment but rather its character and purpose that often serves 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.[3]

2.03 Although this general distinction is helpful, it has long been recognized that it is an oversimplification. It may also be misleading when applied to English law in that it obscures the punitive element which may lie behind civil contempt proceedings. In particular it is now clearly established that a fine or committal order may be imposed as a punishment for past disobedience even though the contemnor has by then complied with the original order or undertaking.[4] The same is true of a case in which the original complainant no longer has an interest in coercing the contemnor into compliance,[5] or where the defendant by his

[2] *Gompers* v. *Bucks Stove and Range Co.*, 221 US 418, 441 (US Sup. Ct., 1911). See also Goldfarb, *Contempt Power*, pp. 49–67; J. Moskovitz, 'Contempt of Injunctions, Civil and Criminal' (1943) 43 Col. LR 780, 785–6 and cases there cited; E. C. Dudley, 'Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts' (1993) 79 Va. LR 1025.

[3] See also Fox, *History of Contempt*, p. 1; *Oswald*, p. 8; *Wellesley* v. *The Duke of Beaufort* (1831) 2 Russ. & M. 639, 665–8, 39 ER 538, 548 per Lord Brougham LC; *Re Freston* (1883) 11 QBD 545, 552–3, per Brett MR, CA.

[4] Cf. *Phonographic Performance Ltd.* v. *Amusement Caterers (Peckham) Ltd.* [1964] Ch. 195, [1963] 3 All ER 493; *Steiner Products Ltd.* v. *Willy Steiner Ltd.* [1966] 2 All ER 387, 390–1.

[5] Cf. *Jennison* v. *Baker* [1972] 2 QB 52, [1972] 1 All ER 997 where the tenant no longer wished to return to the flat from which he had been evicted although an injunction had been obtained restraining eviction. For more general discussion see also *Re Barrell Enterprises* [1972] 3 All ER 631, [1973] 1 WLR 19, CA; *Danchevsky* v. *Danchevsky* [1974] 3 All ER 934, CA; *Enfield London Borough Council* v. *Mahoney* [1983] 2 All ER 901, [1983] 1 WLR 749, CA; below, paras. 2.13–2.17, 14.112–14.123 and 14.127–14.128.

actions in breach of the order or undertaking has rendered future compliance impossible.[6]

2.04 This recognition of a punitive element does not mean that civil contempt is a crime, although it may coincidentally be so, as when breach of an order against molesting a person takes the form of an assault. Thus it seems, according to Lord Atkinson in *Scott* v. *Scott*, that:[7]

> if a person be expressly enjoined by injunction, a most solemn and authoritative form of order, from doing a particular thing, and he deliberately, in breach of that injunction, does that thing, he is not guilty of any crime whatever, but only of a civil contempt of Court.[8]

The same point was made by Sir John Donaldson P when dealing with counsel's suggestion that in adopting a policy of open non-compliance with orders of the National Industrial Relations Court, officials of the Amalgamated Union of Engineering Workers were 'as much anarchists as the members of the Angry Brigade'. Sir John responded by saying:[9]

> No official of the union would for one moment take part in or condone a criminal act, and to suggest that Mr Hugh Scanlon (General Secretary of AUEW) or any of his colleagues have anything in common with those who are responsible for actions of the type associated with the Angry Brigade is disgraceful. The policy of the union is *unlawful*, but it is in no way criminal.

2.05 It has been similarly held in another case involving breach of court orders in an industrial dispute that wilful disobedience may properly be described as 'illegal'. The point arose in *Clarke* v. *Chadburn* where Sir Robert Megarry VC said:[10]

> Wilful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal. If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of court for doing what they did, nevertheless those acts were validly done. Of course, if an act is done, it is not undone merely by pointing out that it was done in breach of the law. If a meeting is held in breach of an injunction, it cannot be said that the meeting has not been held. But the legal consequences of what has been done in breach of the law may plainly be very much affected by the illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them. Accordingly, I think that in their essentials the contentions of counsel for the plaintiffs are right, and the

[6] As in Salmon LJ's example in *Jennison* v. *Baker* of the flagrant breach of an injunction not to kill an elderly spinster's cat: see ibid. at pp. 65 and 1004–5 respectively.

[7] [1913] AC 417, 456, HL.

[8] See also *Pooley* v. *Whetham* (1880), 15 Ch.D. 435; *O'Shea* v. *O'Shea and Parnell, ex p. Tuohy* (1890) 15 PD 59, 62 per Cotton LJ.

[9] *Goad* v. *AUEW (No. 3)* [1973] ICR 108, 111 (NIRC). Emphasis supplied.

[10] [1985] 1 All ER 211, 213, [1985] 1 WLR 78, 80–1.

> resolutions of the N.U.M. changing their rules at their conference held on 11 and 12 July are void for illegality.

2.06 In several modern cases courts have gone further and have suggested that civil contempt of court is a common law misdemeanour. It seems that such statements originated in the unreported decision in *Danchevsky* v. *Danchevsky (No. 2)*[11] and were then repeated, apparently with approval, in later decisions of the Court of Appeal.[12] However, more recent decisions have concluded that civil contempt is not a common law misdemeanour,[13] although proceedings for civil contempt have many of the safeguards usually associated with criminal proceedings. It is submitted that this is the better view, although it may be subject to an exception where disobedience is openly defiant.[14]

C. Criminal Safeguards in Civil Contempt Proceedings

2.07 Recognition of the quasi-criminal nature of proceedings for civil contempt has led to a gradual assimilation of the two branches of contempt. This has been particularly marked in the application of criminal standards and safeguards to civil contempt proceedings. *Re Bramblevale Ltd.*[15] is a case in point. The appellant was the managing director of a property company which had gone into liquidation, and he had failed to comply with a registrar's order calling on him to produce the company's cash book and the creditors' ledger. The case came before Megarry J, who regarded the defendant's explanation that the books had been soaked in petrol in the boot of his car, and had then found their way into a dustbin before the deadline for producing them as a 'cock and bull story'. He committed him to prison for an indefinite time, evidently being of the opinion that the books were still in his possession. On appeal the Court of Appeal regarded this conclusion as being based on 'surmise rather than proof',[16] and ordered his immediate release, Lord Denning MR saying:[17]

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the

[11] (1977) 121 Sol. Jo. 796, [1977] CA Bound Transcript 416A per Lawton LJ.

[12] See (e.g.) *Lee* v. *Walker* [1985] QB 1191, 1201, [1985] 1 All ER 781, 785 per Cumming-Bruce LJ; *Linnett* v. *Coles* [1987] QB 555, 561, [1986] 3 All ER 652, 656 per Lawton LJ; and *Dean* v. *Dean* [1987] 1 FLR 517, 520, 523 per Dillon and Neill L JJ.

[13] See (e.g.) *Garvin* v. *Domus Publishing Ltd.* [1989] Ch. 335, 345, [1989] 2 All ER 344, 349 per Walton J; *Cobra Golf Inc.* v. *Rata* [1998] Ch. 109, 155, [1997] 2 All ER 150, 191 per Rimer J; also *El Capistrano SA* v. *ATO Marketing Ltd.* [1989] 2 All ER 572, 584, [1989] 1 WLR 471, 485 per Balcombe LJ.

[14] See further below, paras. 2.36–2.38.

[15] [1970] Ch. 128, [1969] 3 All ER 1062.

[16] Ibid. at pp. 137 and 1064 respectively, per Lord Denning MR.

[17] Ibid. at pp. 137 and 1063 respectively.

man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence.

2.08 The requirement that proof be 'beyond reasonable doubt' is highly unusual when applied to proceedings which are not strictly criminal in nature. In such cases English courts have usually applied the civil standard, requiring proof on the balance or preponderance of probabilities, but according to a flexible scale which recognizes the gravity of the decision which is being taken.[18] Although this lesser flexible standard has been applied in at least one subsequent English case,[19] it is now firmly settled that the criminal standard of proof beyond reasonable doubt applies.[20] The same position has been adopted in Canada,[21] although in the United States of America the standard appears to depend on the primary purpose of the proceedings. Where this is coercive or remedial, as opposed to punitive, an intermediate standard of 'clear and convincing proof' appears to be sufficient.[22] In Australia some courts, particularly in New South Wales, have proceeded on the basis that the civil standard of proof applies, albeit that its application 'may vary according to the gravity of the fact to be proved.'[23] However, the High Court of Australia has now followed *Re Bramblevale Ltd.*[24] and held that the criminal standard is to be applied in all cases.[25] The possibility of confining this to cases where the primary purpose of the proceedings was punitive was considered but rejected, as being 'a course fraught with practical difficulties'.[26] It is submitted that this decision represents the better view even if theoretically it makes the coercive power of contempt more difficult to employ where the primary purpose of the proceedings is remedial.[27]

[18] The leading case is *Secretary of State for the Home Department, ex p. Khawaja* [1984] AC 74, [1983] 1 All ER 765, HL; see generally *Cross & Tapper*, pp. 140–43.

[19] *West Oxfordshire District Council* v. *Beratec Ltd.*, *The Times*, 30 Oct. 1986.

[20] See (e.g.) *Churchman* v. *Joint Shop Stewards' Committee of the Workers of the Port of London* [1972] ICR 222, 229, [1972] 3 All ER 603, 608 per Lord Denning MR; *Heatons Transport Ltd.* v. *TGWU* [1973] AC 15, 50, [1972] 2 All ER 1237, 1247 per Lord Denning MR, CA; *Deborah Building Equipment Ltd.* v. *Scaffco Ltd.*, *The Times*, 5 Nov. 1986; *Dean* v. *Dean* [1987] 1 FLR 517, CA.

[21] See (e.g.) *Northwest Territories Public Service Association* v. *Commissioner of the Northwest Territories* (1980) 107 DLR (3d) 458, 479 per Laycraft JA (NW Territories CA); *Tilden Rent-A-Car Co.* v. *Rollins* (1966) 57 WWR 309 (Sask. QB); *Jetco Manufacturing Ltd.* (1987) 31 CCC (3d) 171; *Borrie & Lowe*, p. 565, n. 16.

[22] *Oriel* v. *Russell*, 278 US 358 (1929) (US Sup. Ct.); *United Mine Workers* v. *Bagwell*, 512 US 821, 826 (1994) (US Sup. Ct.); J. Moskovitz, 'Contempt of Injunctions, Civil and Criminal' (1943) 43 Col. LR 780, 818–19, and cases cited by McHugh J in *Witham* v. *Holloway* (note 25, below), at pp. 545–6.

[23] *Jendell Australia Pty. Ltd.* v. *Kesby* [1983] 1 NSWLR 127, 136–7 per McLelland J (NSW Sup. Ct.), citing *Rejfek* v. *McElroy* (1965) 112 CLR 517, 521. See also *Windsurfing International Inc.* v. *Sailboards Australia Pty. Ltd.* (1986) 69 ALR 534; *New South Wales Egg Corporation* v. *Peek* (1987) 10 NSWLR 72, 81–3 (NSW CA).

[24] [1970] Ch. 128, [1969] 3 All ER 1062, above, para. 2.07.

[25] *Witham* v. *Holloway* (1995) 183 CLR 525; noted by C. J. Miller (1996) 112 LQR 539.

[26] *Witham* v. *Holloway* (1995) 183 CLR 525, 545 per McHugh J.

[27] A point noted by McHugh J in *Witham* v. *Holloway* (ibid. 548).

2.09 There are other respects in which proceedings for civil contempt have been held to have acquired safeguards associated usually with a criminal trial. Thus it has been held that the alleged contemnor cannot be compelled to answer interrogatories or to give evidence against himself, and that the presiding judge has a discretion to disallow cross-examination on an affidavit where this would operate unfairly.[28] Presumably, the analogy with criminal proceedings does not operate to the disadvantage of the alleged contemnor so that adverse inferences should not be capable of being drawn from a failure to give evidence.[29]

2.10 A privilege against self-incrimination has been similarly recognized in recent cases,[30] although the reasoning in support of it—which depends on a decidedly strained interpretation of the Civil Evidence Act 1968, s. 14(1)(a)[31]—is not wholly convincing. The privilege may be removed by statute,[32] and respondents to contempt proceedings may be required to disclose statements of witnesses etc. in advance, although they cannot be used by the applicant unless and until they are deployed by the respondent.[33] There are doubts surrounding the question whether the privilege may be invoked in respect of any contempt which may have been committed in the very proceedings in which the privilege is sought to be asserted. In a recent case,[34] the defendant, who was subject to a 'freezing' or *Mareva* injunction, had been ordered to attend for cross-examination as to his assets. Arden J held that he was entitled to rely on the privilege against self-incrimination in those proceedings in that his answers might expose him to future proceedings for contempt. Some may find the result distinctly odd if, as it seems, a person may decline to answer questions (or resist an application for disclosure of particular documents) on the ground that compliance would establish a breach of an earlier order and hence a contempt.[35]

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[28] *Comet Products UK Ltd.* v. *Hawkex Plastics Ltd.* [1971] 2 QB 67, [1971] 1 All ER 1141, CA. The decision was followed in *Exagym Pty. Ltd.* v. *Professional Gymnasium Equipment Co. Pty. Ltd.* [1994] 2 Qd. R. 6 (Qld. Sup. Ct.).

[29] Cf. Criminal Justice and Public Order Act 1994, s. 35(2), which permits such inferences on the 'trial of any person . . . for an offence'.

[30] See (e.g.) *Cobra Golf Inc.* v. *Rata* [1998] Ch. 109, [1997] 2 All ER 150 (Rimer J); *Bhimji* v. *Chatwani (No. 3)* [1992] 4 All ER 912, [1992] 1 WLR 1158 (Knox J); *Vidéotron Ltée* v. *Industries Microlec Produits Electroniques Inc.* (1993) 96 DLR (4th) 376 (Can. Sup. Ct.); *contra Garvin* v. *Domus Publishing Ltd.* [1989] Ch. 335, [1989] 2 All ER 344 (Walton J).

[31] Although civil contempt proceedings were not proceedings for 'an offence' they were regarded as 'proceedings' . . . for the recovery of a 'penalty': *sed quaere*?

[32] As in the *Cobra Golf* case (above, n. 30) where it was removed by the Supreme Court Act 1981, s. 72 (infringement of intellectual property rights). *Quaere* whether this would infringe Art. 6 of the European Convention on Human Rights? See above, paras. 1.65–1.67.

[33] *Re B (contempt: evidence)* [1996] 1 FLR 239 (Wall J).

[34] *Memory Corporation PLC* v. *Sidhu* [2000] 1 All ER 434.

[35] In the *Cobra Golf* case Rimer J saw 'much force' in a submission that the privilege should not be available on similar facts: see [1998] Ch. 109, 158, [1997] 2 All ER 150, 193; also A. Zuckerman, *All ER Rev. 1997*, pp. 350–4; *Cross & Tapper*, pp. 460–61 and *Crest Homes PLC* v. *Marks* [1987] AC 829, 859, [1987] 2 All ER 1074, 1082 per Lord Oliver.

2.11 On related issues it has been held that the usual inability of a court to call evidence in a civil case without the consent of the parties does not apply to a committal motion for civil contempt. A subpoena may be issued irrespective of the wishes of the parties concerned.[36] More recent English cases have recognized that in principle the defences of *autrefois acquit* (or the rule against double jeopardy) and *autrefois convict* apply to civil contempt,[37] as by analogy do the rules as to the joinder of two or more defendants in one indictment.[38] Other cases have allowed the alleged contemnor to benefit from the more generous rules as to the admissibility of fresh evidence on appeal associated with criminal, as opposed to civil, proceedings,[39] and, in the absence of a formal limitation period, have drawn on the analogous power to stay a criminal prosecution and struck out much delayed contempt proceedings as an abuse of process.[40] No doubt there are other respects in which the safeguards associated with criminal proceedings may be applied by analogy.[41] However, this will not always be so and the Court of Appeal has held that an application for committal following breach of an order in civil proceedings is civil in nature, with the result that the provisions of the Civil Evidence Act 1968 relating to the admissibility of hearsay evidence apply.[42] Similarly, it has been said that in giving particulars of alleged breaches of orders the analogy of counts in an indictment does not have to be followed and the rules as to duplicity do not apply.[43]

[36] *Yianni* v. *Yianni* [1966] 1 All ER 231 n., [1966] 1 WLR 120.

[37] See *Jelson Estates Ltd.* v. *Harvey* [1984] 1 All ER 12, [1983] 1 WLR 1401, CA. On the facts of this case the plea was unavailable since the alleged contemnor had never been in jeopardy on the first notice of motion to commit for alleged breaches of an injunction covering, *inter alia*, depositing of industrial waste; *El Capistrano SA* v. *ATO Marketing Ltd.* [1989] 2 All ER 572, [1989] 1 WLR 471 (where the defence again failed as the defendant had not been in jeopardy on the first application). See also *Lamb* v. *Lamb* [1984] FLR 278, CA (no power to sentence a contemnor twice for the same contempt). But *autrefois convict* is not available when a defendant is charged in the Crown Court, having been found to have been in contempt in a county court in respect of the same assault: see *Green* [1993] Crim. LR 46; also *Sherry* [1993] Crim. LR 536, and above, para. 1.35.

[38] *Re A Company*, *The Times*, 27 Dec. 1983 (Nourse J).

[39] *Irtelli* v. *Squatriti* [1993] QB 83, [1992] 3 All ER 294, CA (breach of *Mareva* injunction).

[40] *Taylor* v. *Ribby Hall Leisure Ltd.* [1997] 4 All ER 760, CA, applying *Tan* v. *Cameron* [1992] 2 AC 205, [1993] 2 All ER 493, PC.

[41] Possibly (e.g.) the limited compellability of spouses of defendants (cf. Police and Criminal Evidence Act 1984, s. 80) and the ability to waive the rules of evidence.

[42] *Savings and Investment Bank Ltd.* v. *Gasco Investments (Netherlands) BV (No. 2)* [1988] Ch. 422, [1988] 1 All ER 975; cf. *Re C (minors) (hearsay evidence: contempt proceedings)* [1993] 4 All ER 690, [1993] 1 FLR 220. *Aliter* in a case of criminal contempt: see *Shokoya*, *The Times*, 10 June 1992. The substantive provision for admissibility in civil proceedings, including those for civil contempt of court, are now contained in the Civil Evidence Act, 1995. In *Comet Products UK Ltd.* v. *Hawkex Plastics Ltd.* [1971] 2 QB 67, 75–6, [1971] 1 All ER 1141, 1146, Megaw LJ doubted whether a defendant in civil contempt proceedings would be entitled to make an unsworn statement as in ordinary criminal proceedings (see now Criminal Justice Act 1982, s. 72, which abolishes the right). Similar doubts were expressed in the Supreme Court of Victoria in *La Trobe University* v. *Robinson* [1972] VR 883, 895–6 per McInerney J. For further respects in which the rules governing civil proceedings may apply, see *Borrie & Lowe*, p. 660.

[43] *Harmsworth* v. *Harmsworth* [1987] 3 All ER 816, 823, [1987] 1 WLR 1676, 1686 per Woolf LJ. See, however, Practice Direction 'Committal Applications', supplemental to RSC Ord. 52 and CCR Ord. 29 (Scheds. 1 and 2 to the Civil Procedure Rules 1998), paras. 2.5(2) and 2.6(2).

D. Consequences of the Distinction between Criminal and Civil Contempt[44]

2.12 In spite of this welcome tendency to assimilate the two branches of contempt the designation of a given contempt as civil, rather than criminal, or vice versa, may continue to have certain practical consequences even though these are of diminishing importance. Formerly the distinction affected the term of imprisonment or fine which might be imposed and the entitlement to appeal. These consequences of the distinction have now disappeared. Other consequences include the ability of the parties to institute proceedings and settle the dispute, and privilege from arrest.

(1) Imprisonment

2.13 In a case of criminal contempt the superior courts have the power both to fine or impose a term of imprisonment, and, it has been held, to order the giving of security for good behaviour.[45] According to the decision in *Attorney-General* v. *James*[46] the imprisonment must be for a fixed term although it remains open to the offender to apply thereafter for earlier release.[47] These points have since been confirmed by the Contempt of Court Act 1981, s. 14(1), which imposes a statutory maximum of two years in the case of committal by a superior court, or one month in the case of an inferior court. Also, the Crown's power to pardon an offender extends to a case of criminal contempt.[48]

2.14 Formerly civil contempt through non-compliance with a court order could be dealt with by committal for a fixed or for an indefinite term. The form of the committal order and the duration of the term of imprisonment depended upon the

[44] See, in general, H. Fischer, 'Civil and Criminal Aspects of Contempt of Court' (1956) 34 Can. Bar Rev. 121; E. Harnon, 'Civil and Criminal Contempts of Court' (1962) 25 MLR 179; J. H. Beale, 'Contempt of Court, Criminal and Civil' (1908) 21 Harv. LR 161; J. Moskovitz, 'Contempt of Injunctions, Civil and Criminal' (1943) 43 Col. LR 780; Sir John Fox, 'The Practice in Contempt of Court Cases' (1922) 38 LQR 185, 197–200; the Phillimore Committee report, paras. 168–76; *Borrie & Lowe*, pp. 655–64. A full and illuminating discussion is contained in the decision of the Court of Appeal of the Supreme Court of Victoria in *Broken Hill Proprietary Co. Ltd.* v. *Dagi* [1996] 2 VR 117, below, paras. 2.28–2.29.

[45] *Skipworth and the Defendant's Case* (1873) LR 9 QB 230 is a case in which an order was made for the giving of security for good behaviour; RSC Ord. 52, r. 9, now located in the Civil Procedure Rules 1998, Sch. 1.

[46] [1962] 2 QB 637, [1962] 1 All ER 255, DC. Cf. *Re B (J. A.) (an infant)* [1965] Ch. 1112, 1123, [1965] 2 All ER 168, 175 per Cross, J.

[47] Application for release is made under RSC Ord. 52, r. 8(1).

[48] See *Seaward* v. *Paterson* [1897] 1 Ch. 545, 559, CA; *Halsbury*, vol. 9(1), para. 525. It has been suggested that in a case of civil contempt the Crown might intervene and grant a pardon, but that it would be unconstitutional for it to do so: see Sir Charles Russell AG *arguendo* in *In the Matter of a Special Reference from the Bahama Islands* [1893] AC 138, 145, PC. See also A. T. H. Smith, 'The Prerogative of Mercy. The Power of Pardon and Criminal Justice' (1983) 42 CLJ 398, 411–12.

purpose for which committal was being employed. Committal for a fixed term was appropriate where the objective was punishment for past disobedience. However, where committal was being employed for a remedial or coercive purpose an indefinite term might be preferable as carrying the maximum incentive to comply with the original order. On compliance the contemnor could expect to be released *ex debito justitiae*.[49] Lord Denning MR expressed the distinction with particular clarity in *Danchevsky* v. *Danchevsky*,[50] a case in which a husband had refused to comply with an order for the sale of the matrimonial home. According to his Lordship:[51]

> It seems to me that when the object of the committal is punishment for a *past* offence, then, if he is to be imprisoned at all, the appropriate order is a fixed term. When it is a matter of getting a person to do something in the future—and there is a reasonable prospect of him doing it—then it may be quite appropriate to have an indefinite order against him and to commit him until he does do it.[52]

2.15 That an indefinite term is appropriate as an aid to coercion has been emphasized in a number of American cases. For example in *Re Nevitt* Judge Sanborn observed that the person subjected to such a term 'carries the keys of his prison in his own pocket',[53] and in *Gompers* v. *Bucks Stove and Range Co.* the United States Supreme Court viewed a fixed term as being inappropriate as an aid to coercion, for then 'the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offence'.[54] Whatever the force of these arguments, committal for an indefinite term is no longer permissible in English law even in the case of civil contempt. Parliament has taken the view that 'any one put into prison for contempt should know the maximum period for which he is liable to be kept in custody'.[55] Accordingly the committal must be for a fixed term and the maximum penalties are as set out in the Contempt of Court Act 1981, s. 14.[56] However, the possibility of an earlier discharge provides an incentive for compliance[57] as does the fact that a committal order for a fixed term may be suspended.[58]

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[49] See *Re Freston* (1883) 11 QBD 545, 557 (Fry LJ), 554–5 (Brett MR). On the facts the solicitor's disobedience was 'accompanied by criminal incidents' and the attachment was not mere process.

[50] [1975] Fam. 17, [1974] 3 All ER 934.

[51] Ibid. at pp. 21 and 937 respectively.

[52] For a case in which justification for continued imprisonment was discussed both in terms of punishment for past disobedience and as an aid to compliance through coercion, see *Re Barrell Enterprises* [1972] 3 All ER 631, [1973] 1 WLR 19. For further discussion of committal for civil contempt see below, ch. 14, esp. paras. 14.109–14.123.

[53] 117 F. 448, 461 (1902). The expression is criticized in Goldfarb, *Contempt Power*, pp. 59–60.

[54] 211 US 418, 442 (1911). The position in the USA is considered further below, paras. 2.41–2.43.

[55] *Enfield London Borough Council* v. *Mahoney* [1983] 2 All ER 901, 907, [1983] 1 WLR 749, 757, per May LJ. This case is discussed below, para. 14.121. See also *Linnett* v. *Coles* [1987] QB 555, [1986] 3 All ER 652, CA where the point had been overlooked by the first instance judge.

[56] See below, paras. 3.92 and 14.112–14.123.

[57] See *Enfield London Borough Council* v. *Mahoney* (above, n. 55).

[58] *Lee* v. *Walker* [1985] QB 1191, [1985] 1 All ER 781, CA; RSC Ord. 52, r. 7(1).

(2) The power to fine

2.16 While criminal contempt may be punished by the imposition of a fine for which there is no statutory limit in the case of a superior court,[59] the traditional view was that a fine was neither a permissible, nor indeed an appropriate, outcome to proceedings for civil contempt.[60] This view, which reflects the coercive function of such proceedings, was reiterated by the High Court of Australia in *Australian Consolidated Press Ltd.* v. *Morgan*.[61] However, once it is accepted that a committal order may be made as a penalty for past disobedience,[62] it must follow that a court has the power to impose the lesser penalty of a fine. So much was assumed in a number of English cases[63] before the matter was finally settled beyond doubt in *Heatons Transport (St. Helens) Ltd.* v. *Transport and General Workers' Union*.[64] Here Lord Wilberforce observed, in delivering the judgment of the House of Lords reinstating fines totalling £55,000 imposed on the defendant union, that 'the effective administration of justice normally requires some penalty for disobedience to an order of a court if the disobedience is more than casual or accidental and unintentional.[65] The same approach has since been adopted by Australian courts.[66] Indeed in one Australian case the ability to fine was used to great coercive effect since the court upheld both a fine of $10,000 for past disobedience and a further fine of $2,000 for each day that a picket line was maintained by the defendant union in breach of an injunction.[67] Hence both punitive and coercive purposes were combined in the same proceedings.

2.17 In principle there seems to be no reason why a suspended fine payable on continued disobedience after a specified period should not be imposed as an aid to coercion, although, as is rightly noted in *Borrie & Lowe*,[68] the possibility is not recognized explicitly in the Rules of the Supreme Court[69] or in the Contempt of

[59] Contempt of Court Act 1981, s. 14. The maximum in the case of an inferior court is £2,500: ibid. s. 14(2). Note, however, that by virtue of s. 14(4A) of the 1981 Act a county court is treated as a superior court for present purposes.

[60] See Fox, *History of Contempt*, p. 2; Justice, *Contempt of Court*, p. 23.

[61] (1965) 112 CLR 483, (1965) 39 AJLR 32.

[62] See above, paras. 2.03 and 2.14.

[63] See (e.g.) *Phonographic Performance Ltd.* v. *Amusement Caterers (Peckham) Ltd.* [1964] Ch. 195, 201, [1963] 3 All ER 493, 497 per Cross J; *Re the Agreement of the Mileage Conference Group of the Tyre Manufacturers' Conference Ltd.* (1966) LR 6 RP 49, [1966] 2 All ER 849; *Steiner Products Ltd.* v. *Willy Steiner Ltd.* [1966] 2 All ER 387: *Re W (B.) (an infant)* [1969] 2 Ch. 50, [1969] 1 All ER 594; *Re Galvanized Tank Manufacturers' Association's Agreement* [1965] 2 All ER 1003.

[64] [1973] AC 15, 78, [1972] 3 All ER 101 (below, paras. 14.14–14.17).

[65] [1973] AC 15, 109, [1972] 3 All ER 101, 117.

[66] See (e.g.) *Flamingo Park Pty. Ltd.* v. *Dolly Dolly Creation Pty. Ltd.* (1985) 57 ALR 247; the discussion in ALRC, *Contempt*, para. 506.

[67] *Australasian Meat Industry Employees Union* v. *Mudginberri Station Pty. Ltd.* (1986) 161 CLR 98, (1986) 66 ALR 577 (Austral. High Ct.).

[68] At p. 637.

[69] Notably Ord. 52, r. 7(1) and Ord. 52, r. 9.

Court Act 1981, s. 16, which deals with the enforcement of fines. Certainly a suspended committal order for a fixed term is quite permissible.[70] Moreover the suspended fine is well known in the United States, as may be seen from the notorious *United Mine Workers* case[71] in 1947 when the Supreme Court ordered the payment of a $2,800,000 fine if the defendant union failed to comply with a labour injunction within five days. However, the permissibility of this approach has been re-examined in *United Mine Workers* v. *Bagwell*,[72] an important decision of the Supreme Court which is discussed below. A somewhat different approach is to be seen in the English case of *Con-Mech (Engineers) Ltd.* v. *Amalgamated Union of Engineering Workers*.[73] Here the National Industrial Relations Court ordered sequestration of assets to the value of £100,000, but postponed a final decision on the amount of the fine which would become payable so as to give the union time for further reflection. On continued disobedience of an order of the court restraining unlawful industrial action, a fine of £75,000 was imposed. This form of judgment differs somewhat from the suspended fine in that the defendant will know only the general, rather than the precise, price of non-compliance.

(3) Settlement of the dispute and institution of proceedings

2.18 Another consequence of the distinction between civil and criminal contempt lies in the ability to settle the dispute and to waive the contempt. In criminal contempt ultimate control over the proceedings lies in the hands of the Crown,[74] but in civil contempt the traditional view is that it is open to the opposing party to waive the breach.[75] As Lord Diplock has said, 'no sufficient public interest is served by punishing the offender if the only person for whose benefit the order was made chooses not to insist on its enforcement'.[76] However, this traditional view does not sufficiently reflect the fact that disobedience of a court order may lead to an imprisonment or fine which is intended to be punitive rather than

[70] *Lee* v. *Walker* [1985] QB 1191, [1985] 1 All ER 781; *Re W (B.) (an infant)* [1969] 2 Ch. 50, [1969] 1 All ER 594, CA. The powers of a magistrates' court are, however, limited to those conferred by the Magistrates' Courts Act 1980, s. 63(3) and no provision is made for suspending a committal order: *B (B. P. M.)* v. *B. (M. M.)* [1969] P 103, s.n. *B (B.)* v. *B (M.)* [1969] 1 All ER 891. This is now subject to exceptions contained in the Family Law Act 1996, s. 50(1) (breach of non-molestation orders etc.): see below, para. 14.164.

[71] *United States* v. *United Mine Workers of America*, 330 US 258 (1947).

[72] 512 US 821 (1994).

[73] [1973] ICR 620 (below, paras. 14.23–14.24).

[74] *Newton* (1903) 19 TLR 627.

[75] See (e.g.) *Roberts* v. *Albert Bridge Co.* (1873) LR 8 Ch. App. 753; *Seaward* v. *Paterson* [1897] 1 Ch. 545, 555 per Lindley LJ; *Anon* (1808) 15 Ves. Jun. 174, 33 ER 720; *Woodward* v. *Twinaine* (1839) 9 Sim. 301, 59 ER 373; *Yianni* v. *Yianni* [1966] 1 WLR 120, 124; *Halsbury*, vol. 9(1), para. 462. See also E. Harnon, 'Civil and Criminal Contempts of Court' (1962) 25 MLR 179, 182–4; *Adriatic Terrazzo* v. *Robinson* (1972) 4 SASR 294 (SA Sup. Ct.).

[76] In *AG* v. *Times Newspapers Ltd.* [1974] AC 273, 308, [1973] 3 All ER 54, 71. See also the statement of Lord Scarman in *Home Office* v. *Harman* [1983] 1 AC 280, 310, [1982] 1 All ER 532, 542 (quoted above, para. 2.01).