# THE REVIEWABILITY OF SUPERIOR COURT ORDERS

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[*In any given common law system of justice there are likely to be courts of general jurisdiction. Such courts rightly enjoy very wide powers and immunities. From time to time however there are suggestions that these courts have unlimited jurisdiction or unlimited powers and that their orders are always to be obeyed without question. In this article the rule requiring unquestioning obedience and the notion of unlimited jurisdiction are examined and a more qualified set of principles are suggested.*]

Apart from sovereign parliaments, where they exist, the institution which enjoys the widest measure of protection from judicial review is the one which is normally on the dispensing end, and that is the superior court. In most cases where a public authority issues an invalid order, the person affected may disobey the order and challenge its validity if prosecuted for its breach. There are frequent suggestions[1] that superior courts are immune from this kind of challenge, which is often called collateral attack.

This alleged immunity rests on two foundations, the virtual outlawry of a contemnor who acts in breach of a defective court order and the unlimited jurisdiction of the superior courts. The first foundation has been largely stripped of its most damaging effects but, fortified by the second foundation, it seems to linger on in supporting a categorical rule against collateral attack. Yet their combined strength is not sufficient to maintain a rule which does not admit of some exceptions or qualifications. In this article the rule imposing incapacity on contemnors will first be examined and after that the rule against collateral attack on superior court orders will be discussed under various heads, with a view to suggesting the position the law ought to take.

## 1. *INCAPACITY OF THE CONTEMNOR*

This principle provides that a person in contempt may not be heard in court until the contempt is purged. It was stated in an uncompromising way by Lord Bacon:

> they that are in contempt are not to be heard neither in that suit nor any other except this Court of special grace suspend the contempt.[2]

A rule of this width is certainly capable of supporting the proposition that an order may not be collaterally challenged in proceedings for contempt, but it went much further. Taken literally it prohibits direct challenge to the order by way of application to discharge or appeal. It also makes the contemnor a virtual outlaw in that he or she cannot sue to obtain relief or defend himself or herself if sued for

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1 *E.g. Cameron v. Cole* (1944) 68 C.L.R. 571, 590 *per* Rich J.; *Sanders v. Sanders* (1967) 116 C.L.R. 366, 376 *per* Barwick C.J.; *McLachlan v. Pilgrim* [1980] 2 N.S.W.L.R. 422, 431 *per* Yeldham J.

2 78th Ordinance (1618) noted 1 Coop. *temp.* Cott. 208; 47 E.R. 821. See also *Vowles v. Young* (1803) 9 Ves. 172; 32 E.R. 567.

any conduct or alleged conduct however far removed from the order of which he or she is in contempt. Such a state of affairs could hardly be tolerated and exceptions came to be grafted onto the rule.

One major exception is that a person in contempt may directly challenge the order on which the contempt is founded. In *Stone v. Byrne* (1722)[3] the House of Lords held that those committed by Courts of Equity for pretended contempts should have the right to apply to those courts to set aside the orders and if those courts should continue to detain them wrongfully they were to have the right to apply to the House of Lords where the erroneous orders would be discharged. The Court of Chancery soon provided its own remedy. In *Hill v. Bissel* (1730)[4] Lord King L.C. said 'You may move to discharge an order, though you are in contempt for not obeying it'. The same rule applies to appeals. In *Brown v. Newall*,[5] the Vice Chancellor issued an injunction against the defendants ordering them to give judgment at common law in ejectment proceedings. The defendants refused to do so and an attachment was issued against them for contempt. The defendants sought discharge of the order. The Vice Chancellor refused to discharge it and the defendants appealed to the Lord Chancellor. The plaintiffs objected to the defendants' being heard because they were in contempt. Lord Cottenham L.C. overruled the objection, heard the case, and set aside the injunction on the ground that there was no ground on which he could support the order. In this kind of case, the challenge to the order is direct rather than collateral and so, once the incapacity arising from being in contempt is overcome, there is no reason to restrict the grounds on which the order may be challenged. As will appear below, a distinction is frequently drawn in cases of collateral attack between mere irregularities and defects which render the order void. While collateral attack, if available at all, is frequently limited to defects of the latter kind, there is no reason why direct attacks should be limited in the same way. In the main, the authorities support this wide approach. In *Green v. Green*[6] the Court ordered the defendants to deliver up possession of their estates to a receiver. The defendants disobeyed the order and were committed for contempt. They subsequently applied to discharge the order of commitment for irregularity. The plaintiffs argued that the defendants could not challenge the order for irregularity until they had cleared their contempt. Shadwell V.C. rejected this contention, discharged the order, freed the defendants and awarded costs against the plaintiffs. In this context, irregularity has a wide meaning. This was the view taken by the Court of Appeal in *The Messiniaki Tolmi*.[7] In a contract case, Parker J. made an order directing the purchasers to release certain money. The purchasers disobeyed the order and appealed against it. The sellers argued that the purchasers could not appeal because they were in contempt. The Court of Appeal held that

[3] 5 Bro. Parl. Cas. 209; 2 E.R. 632; and noted (1846) 1 Coop. *temp.* Cott. 210; 47 E.R. 822.

[4] Mos. 258; 25 E.R. 383. See also *Fennings v. Humphery* (1841) 4 Beav. 1; 49 E.R. 237; *McM. v. C. (No. 1)* [1980] 1 N.S.W.L.R. 1.

[5] (1837) 2 My. & Cr. 558; 40 E.R. 752. See also *Re Feit and Drexler*, 760 F. 2d. 406 (1985). A contemnor can also apply for extension of time for making an appeal: *Price v. Price* [1962] N.S.W.R. 819.

[6] (1828) 2 Sim. 394; 57 E.R. 836.

[7] [1981] 2 Lloyd's Rep. 595.

the purchasers could appeal, not only on the ground of procedural error but on any ground which showed that the order was wrongly made.

Though the grounds for application to discharge or appeal may be as wide as if there were no contempt, the fact that there is a contempt does leave the court with a discretion whether to hear the application or appeal. In *Clarke v. Heathfield*,[8] Nicholls J. ordered a union to pay a sum of money to a receiver. The union disobeyed the order and appealed against it. The Court of Appeal heard the appeal but only on the ground that the interests of members of the union as beneficiaries were affected. In the event, the Court held that the order was a correct exercise of the judge's discretion. A court might exercise its discretion not to hear the application or appeal where the contempt substantially deprives it of its power to enforce its orders effectively. In *Schumann v. Schumann*,[9] a mother who was in breach of an Australian custody order applied to have the order set aside. As the child was still in Australia, and so within the jurisdiction of the court, Hogarth J. heard the application. If the mother had removed the child from the Australian court's jurisdiction it seems likely that the judge would not have heard the application until the child had been returned.[10]

A second exception to the rule, that those in contempt cannot be heard, is that a contemnor may make applications or bring proceedings in relation to matters other than the order of which he or she is in contempt. So in *Wilson v. Bates*,[11] Lord Cottenham L.C. allowed a plaintiff, who was in contempt for failure to pay costs, to seek attachment against the defendants for failure to put in their answer to his claim. His Lordship noted however that the defendants could have applied for a stay of proceedings because of the plaintiff's contempt.[12] The extent of this second exception to the general rule is, however, a matter of some doubt. In *Chuck v. Cremer*[13] the defendant applied to have an *ex parte* injunction discharged. The Vice Chancellor rejected the application. The defendant appealed, but before the notice of appeal had been lodged, attachment was issued against the defendant for failure to put in his answer to the plaintiffs' claim. At the appeal stage Lord Cottenham L.C. held that the defendant was not entitled to be heard. His Lordship said that a contemnor could be heard for the purpose of resisting or setting aside for irregularity any proceedings subsequent to the contempt. In this case the injunction was issued before the contempt occurred and so the exception did not apply. Lord Cottenham explained that the reason for the distinction in *Barker v. Dawson*[14] was that to extend the general rule to orders subsequent to the contempt would place the party in contempt too much at the mercy of his adversary.

The principle in the last two cases was questioned in two ways in *Gordon v. Gordon*.[15] A mother was held in contempt for removing a child out of the

[8] [1985] I.C.R. 203.
[9] (1964) 6 F.L.R. 422.
[10] *C.f. Hadkinson v. Hadkinson* [1952] P. 285 (*infra* n. 18, p. 606).
[11] (1838) 3 My. & Cr. 197; 40 E.R. 900.
[12] *Ibid.* 204; 902.
[13] (1846) 1 Coop. *temp.* Cott. 205; 47 E.R. 820.
[14] (1836) 1 Coop. *temp.* Cott. 207; 47 E.R. 821.
[15] [1904] P. 163.

jurisdiction. The judge made an order for costs out of her separate property. She appealed against the costs order. The Court of Appeal held that she was entitled to be heard. However the Court laid stress on the fact that the costs order was one made without jurisdiction and held that the case would have been different if she was alleging only that the discretion was exercised wrongly. Vaughan Williams L. J. relied on *Garstin v. Garstin*[16] but that case stands for the proposition that one in contempt cannot seek indulgences from the court. One who seeks to challenge an order for irregularity is not seeking an indulgence but claiming a right. There is no good reason for treating challenge to orders made after the contempt more narrowly than the order on which the contempt itself is based.

The second challenge in *Gordon v. Gordon* was to the distinction between orders made before and orders made after the contempt. In *Gordon v. Gordon* the contempt occurred before the order and so the case was within the exception in *Wilson v. Bates*. But Cozens-Hardy L.J.[17] said that he was unable to find any principle on which to distinguish cases of contempt committed before and contempt committed after the making of the order under challenge. As Lord Cottenham's explanation in *Barker v. Dawson*[18] had been quoted to the Court of Appeal it seems that Cozens-Hardy L.J. was not impressed by it. The reality is that the reason justifies the exception but not the rule. But, once the distinction between contempts before and contempts after is removed in favour of applications by the contemnor, little is left of the general rule. That is all to the good.

A somewhat different approach was taken in *Hadkinson v. Hadkinson*.[19] A mother took her child to Australia in breach of a court order made in 1950. A further order was made in May 1952 requiring her to return the child to England by August 1952. In July 1952 she appealed against the May order. As the order challenged was made after the contempt, the case was, from that standpoint, within the exception in *Wilson v. Bates*. The Court of Appeal refused to hear the appeal until the child had been returned to England. While there was some difference in detail between Romer and Somervell L.JJ. on the one hand and Denning L.J. on the other, the common approach was to treat the matter as one for the discretion of the court.

The leading judgment was given by Romer L.J. with whom Somervell L.J.[20] agreed. Romer L.J. began with a proposition that an order of a competent court must be obeyed until discharged.[21] From this general proposition he identified two consequences. First that one who disobeyed could be punished for contempt and secondly that no application by the contemnor to the court would be entertained until the contempt was purged. His Lordship held that none of the exceptions to the latter principle applied, seemingly because the appeal was on the merits rather than on the ground of irregularity.[22] He did however contemplate that the mother could have been heard, notwithstanding her contempt, if she had

16 (1865) 4 Sw. & Tr. 73; 164 E.R. 1443.
17 *Gordon v. Gordon* [1904] P. 163, 174.
18 (1836) 1 Coop. *temp.* Cott. 207; 47 E.R. 821 (*supra* n. 13).
19 [1952] P. 285.
20 *Ibid.* 287.
21 *Ibid.* 288.
22 *Ibid.* 291.

wished to inform the court that it was dangerous, impossible or impracticable to bring the child from Australia to England for reasons of health or otherwise. This, though it is not put in so many words, appears to recognise an overall discretion to hear where no established exception to the rule against hearing applies. Denning L.J. based his judgment expressly on the existence of a discretion.[23] His Lordship held further that the discretion should be exercised against hearing the contemnor only when the disobedience impeded the course of justice. In this case the disobedience did impede the course of justice as the court would not have been able to enforce the order in the event that the appeal failed, unless the child had been brought within its jurisdiction.[24]

Lord Denning's general discretionary approach has been followed in two Australian cases but with shades of difference on how the discretion should be exercised. In *Schumann v. Schumann*,[25] Hogarth J., in exercising his discretion, considered whether there was some way of enforcing the order other than refusing to hear the contemnor who had disobeyed a child custody order. As the child was in Australia and so within the jurisdiction of the court the problem in *Hadkinson* did not arise and the duty of the court to give paramount consideration to the welfare of the child argued in favour of hearing the contemnor.

In another custody case, *Short v. Short*[26] the Full Court of South Australia also adopted Lord Denning's general approach but Bray C.J.[27] pointed out that the other judges in *Hadkinson v. Hadkinson* had not concurred with Denning L.J. that the discretion should be exercised against hearing only when contempt impedes the course of justice. While, following the view in *Schumann v. Schumann*, his Honour held that the paramount interests of the child justified hearing the contemnor on the custody matter, he took the view that he might have refused to hear her on any question of property settlement arising in the same proceedings.[28]

A third exception to the rule that a party in contempt is not to be heard was also adumbrated in *Wilson v. Bates*.[29] Lord Cottenham said that it was well settled that if a party in contempt were brought into court by any proceedings, he had a right to be heard in his defence. So in *Morrison v. Morrison*,[30] a report was served on the defendants who were in contempt for non-payment of costs. They took exceptions to the report and petitioned for the exceptions to be set down. The plaintiffs argued that the defendants could not plead the exceptions as they were in contempt. The defendants argued that the taking of the exceptions was a measure of defence and not of attack and so Lord Bacon's ordinance did not apply to prevent the defendants' being heard. Wigram V.C. accepted this view and permitted the exceptions to be set down.

In this kind of case the defence is being made not to proceedings arising out of

23 *Ibid.* 297-8.
24 *Ibid.* 298.
25 (1964) 6 F.L.R. 422.
26 (1973) 22 F.L.R. 320.
27 *Ibid.* 330.
28 *Ibid.* Contrast the narrower view of the discretion taken by Young J. in *Young v. Jackman* (1986) 7 N.S.W.L.R. 97.
29 (1838) 3 My. & Cr. 197; 40 E.R. 900.
30 (1844) 4 Hare, 590; 67 E.R. 783.

the contempt but to some other, though related, proceedings. But the exception is expressed widely enough to cover defences to the contempt proceedings themselves. Some ways in which the exception might apply were mentioned by Romer L.J. in *Hadkinson v. Hadkinson.*[31] A person might be heard for the purpose of purging the contempt. The alleged contemnor can also argue that his or her actions are not in breach of the order or that in the circumstances he or she ought not to be treated as being in contempt. *Scott v. Scott*[32] provides support of high authority for the latter proposition. In that case the trial court ordered that nullity proceedings should be held in camera. The petitioner published some of the evidence given in the closed proceedings. Lord Shaw held that she was entitled, when prosecuted for contempt, to argue that the order did not prevent the publication of the evidence once the proceedings in camera were over.[33]

The remaining question is whether a defendant to contempt proceedings can successfully mount a defence that the order of which he or she is alleged to be in contempt is one which ought to have been made, or otherwise collaterally attack the order. This is a question to which a rich variety of conflicting answers have been given and so it will be treated separately in its own right.

## 2. *COLLATERAL ATTACK ON COURT ORDERS*

Lurking behind Lord Bacon's 78th Ordinance[34] is a notion that those subject to court orders are to obey now and argue later. Among the many consequences a literal application of the Ordinance would produce would be the rule that a person in contempt could not challenge the order, of which he or she was in contempt, in the contempt proceedings themselves. While other aspects of Lord Bacon's ordinance are in tatters, this last proposition is still supported by authority ancient and modern. It cannot be denied that the rule continues to exist. The question is what limitations if any there are on its scope. In this part of the article the general rule will first be outlined. Secondly, the notion of unlimited jurisdiction on which it is largely based will be challenged. Thirdly some possible limitations on the rule will be suggested. Fourthly the reasons advanced for the rule will be examined. The last section will suggest an overall solution to the problem of collateral attack of superior court orders.

### A. *The General Rule*

The general duty to obey a court order was stated in emphatic terms by Lord Cottenham L.C. in *Chuck v. Cremer.* [35] While the statement did not occur in the course of a prosecution for contempt, it articulated a principle which was ready-made for incorporation into that context -

> A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it . . . It would be most dangerous to hold that the suitors or their solicitors, could themselves judge whether an order was null or valid.

31 [1952] P. 285, 289.
32 [1913] A.C. 417.
33 *Ibid.* 486. See also Lord Loreburn at 444 and Lord Atkinson at 453.
34 *Supra* n. 1.
35 (1846) 1 Coop. *temp.* Cott. 338; 47 E.R. 884.

This is a theme which recurs regularly where a defendant to contempt proceedings seeks to show that the order of which he or she is alleged to be in contempt is wrong. Lord Cottenham's dictum was applied in a contempt setting by the Privy Council in *Isaacs v. Robertson.*[36] Glasgow J. of the High Court of Saint Vincent granted an interlocutory injunction against the defendant prohibiting him from trespassing on certain land. The defendant made no application to have the injunction set aside. The plaintiff sought the committal of the defendant for contempt in failing to obey the order. The judge dismissed the contempt motion on the ground that the order was a nullity because the case was deemed to have been abandoned by the time that the order was made. The Court of Appeal held that, though the order ought not to have been made, the defendant was still guilty of contempt in disobeying it. The Privy Council agreed with the Court of Appeal and dismissed the defendant's further appeal, relying *inter alia* on the dictum in *Chuck v. Cremer.* It is interesting that the quotation from *Chuck v. Cremer* was contained within one from Romer L.J.'s judgment in *Hadkinson v. Hadkinson.*[37] That case, as has been noted above, was concerned with the rule that one in contempt cannot be heard until the contempt is purged. By the time *Hadkinson v. Hadkinson* was decided the rule had been very largely eaten away by exceptions and may have become more an exception than a rule itself. It is unlikely that the principle laid down by the Privy Council in *Isaacs v. Robertson* will suffer a similar fate, but there must be some limitation to it.

If there had been no more to the reasoning in *Isaacs v. Robertson* than appears above, it might have been easy to give it a fairly restricted application. It would have been possible to distinguish between orders which were merely erroneous, wrong exercises of discretion, irregular or voidable and those which were beyond jurisdiction or void. The argument would then run that the defect in the order in *Isaacs v. Robertson* was one which made the order only voidable and that, despite the width of the statement in *Chuck v. Cremer*, adopted in the later case, defects which rendered the order void could be pleaded by way of defence to proceedings for contempt. The argument would be that there can be no contempt of a void order and so any disability attaching to a contemnor will not be applicable.

The Privy Council has endeavoured to cut off this line of reasoning by holding that the distinction between void and voidable orders is inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation.[38] Instead, the Board recognised a distinction between regular and irregular orders. Irregular orders can be set aside by the court making them but regular orders can be set aside only on appeal, if appeal is available.[39]

The key to this sweeping protection of court-orders lies in the term 'unlimited jurisdiction'. There is no such creature as a court of unlimited jurisdiction. In any

[36] [1985] A.C. 97. Followed by the Full Court of Victoria in *Little v. Lewis* [1987] V.R. 798. See also *Damoulakis v. Murchie* (1986) 84 F.L.R. 413. Contrast the more cautious statement by Dixon J. in *Ex parte Williams* (1934) 51 C.L.R. 545, 550 and see Brennan J. in *Re Superintendent; ex parte Pelle* (1983) 48 A.L.R. 225, 228.

[37] [1952] P. 285, 288.

[38] *Isaacs v. Robertson* [1985] A.C. 97, 103.

[39] *Ibid.*

common law country or state there is likely to be a court or set of courts of general jurisdiction, whose ability to try cases is not dependent upon a statute conferring a closed list of powers, but that is not to say that such courts enjoy unlimited as opposed to general jurisdiction.

### B. *Jurisdictional limits on Courts of General Jurisdiction*

In order to meet the argument that there are courts of unlimited jurisdiction it is not necessary to draw up an exhaustive list of matters beyond the jurisdiction of any given court. It is enough that a few examples should be given. It is possible to give hypothetical examples which illustrate the limit to jurisdiction beyond argument. It is also possible to cite cases which point to limitations but in the nature of things the real cases are generally more borderline than the hypothetical ones. Nonetheless for the sake of clarity both hypotheticals and actual cases will be used.

#### (a) *Control over foreign courts*

Even courts of general jurisdiction are limited to trying cases with at least some link with the country or state within which they are located. A sovereign Parliament could theoretically confer on its courts power to try entirely foreign causes but there is no inherent jurisdiction even in courts of general jurisdiction to do so.[40] A particularly clear example of this limit relates to foreign courts. Suppose a judge of the High Court in England were to issue an injunction on the application of a prisoner in the United States requiring the judges of the Supreme Court of the United States to quash the prisoner's conviction. Would a judge of that Supreme Court who visited England after deliberately ignoring the injunction, be prevented from raising the voidness of the order as a defence to any contempt proceedings brought against him or her? The example is an extravagant one but, if the argument that the injunction is void is accepted, the concept of unlimited jurisdiction is dissolved. The case is so clear that there is unlikely ever to be direct authority to support it but more borderline cases point in the same direction. In *Fryer v. Bernard*[41] the plaintiff sought sequestration against the defendant in Ireland. He argued that there was a precedent for doing so and that such process had even been awarded to the Governor of North Carolina. Lord Macclesfield L.C. doubted whether sequestration could be directed to the Governor of a colony because only the King in Council had power over decrees issued there. His Lordship allowed sequestration to go against the defendant in Ireland, however, on the basis that English courts had superintendency over those in Ireland. This reasoning was disapproved by Lord Brougham L.C. in *Lord Portarlington v. Soulby*[42] where the claim to superintendence over Irish Courts was described as a pretension. It now seems well settled that English courts of general jurisdiction cannot give orders to foreign courts. There is no reason to suppose

[40] For a recent example see *Re Tucker*, *The Times*, 17 November 1987.
[41] (1724) 2 P. Wms. 261; 24 E.R. 722.
[42] (1834) 3 My. & K. 104; 40 E.R. 40.

that because the High Court has common law, admiralty and divorce as well as chancery jurisdiction, its powers in this respect are any greater than those of the old Court of Chancery.

A different and more debatable question is whether courts of general jurisdiction can make orders against parties otherwise subject to their power where this will interfere with their rights to approach a foreign (or sister state) court. Different views can legitimately be held on this power. In *Bushby v. Munday*[43] for example Leach V.C. granted an injunction to prevent M's taking proceedings in the Court of Session in Scotland. The Vice Chancellor disclaimed any power over the Scottish Court itself and likened it to courts exercising independent jurisdiction in Paris or Vienna. In *Mead v. Merritt*[44] on the other hand, Chancellor Walworth refused to grant an injunction against parties within the jurisdiction who had brought proceedings in a sister state of the U.S.A. because of the danger of bringing the courts into collision with each other. These considerations however do not now go to the jurisdiction of the court to grant an injunction but lead to the exercise of caution in granting such injunctions.[45] What is clear from this brief examination of the subject is that, while the issue of an injunction against parties (with a local link) to proceedings in foreign courts may be a proper or erroneous exercise of jurisdiction, the issue of such an order against the foreign court itself is beyond jurisdiction.

(b) *Orders against Co-ordinate or Higher Courts within the Jurisdiction*

Again a strong hypothetical case can demonstrate another limit to the jurisdiction of a court of general jurisdiction. Suppose having made an order in favour of one of the parties to contentious litigation, the trial court grants that party an injunction directed against the appellate court directing the members of that court not to entertain any appeal by the other party. Would an appellate judge who entertained an appeal in contravention of the injunction be unable to challenge contempt proceedings collaterally? Surely collateral challenge would be available, though the matter would no doubt be dealt with in a different way in practice.

Real cases are less extreme. But the principle is clear enough. In *Holderstaffe v. Saunders*[46] the Court of Queen's Bench was dealing with a criminal matter in which the defendant had induced a court by fraud to evict a tenant in possession. Serjeant Hooper sought an order to prevent D from applying to Chancery for an injunction to halt the Queen's Bench proceedings. Holt C.J. declined to make the order on the ground that it would amount to sending an injunction into Chancery. By the same token however he indicated that if Chancery were to grant an

[43] (1821) 5 Madd. 297; 56 E.R. 908. For more recent discussion see *British Airways Board v. Laker Airways* [1985] A.C. 58; *Midland Bank v. Laker Airways* [1986] 1 Q.B. 689; *Societe Aerospatiale v. Lee Kui Jak* [1987] 3 W.L.R. 59.

[44] 2 Paige 402 (1831).

[45] *Medtronic Inc. v. Catalyst Research Corporation*. 518 F. Supp. 946 (1981); *Arpels v. Arpels* 170 N.E. 2d. 670 (1960); 43A. *Corpus Juris Secundum*, Injunctions, s. 59.

[46] (1706) Holt 136; 90 E.R. 974.

injunction in the matter the Court of Queen's Bench would break it and protect any party who acted in contempt of it.

In contrast to most of the cases involving foreign jurisdictions considered in (a) above, Holt C.J. equated injunctions against the parties with injunctions against the court. Unlike the case of a foreign court hearing a party in breach of an injunction, a court in the same country or state could be regarded as aiding and abetting the breach by the party if the order against the party were regarded as valid. To avoid this it could be held that an order against the party is as much beyond jurisdiction as an order against the court directly.

Chancery courts saw the matter differently however and persuaded themselves that they could issue orders preventing parties from taking proceedings in other courts without making an order which operated on the court itself.[47] Implicit in the Chancery view is a recognition that Chancery could not issue injunction against other superior courts. On this point common law and equity were in agreement and this is the position in modern law.

(c) *Interference in Parliamentary Proceedings*

A court cannot easily have unlimited jurisdiction where there is a sovereign Parliament, especially where such a Parliament has expressly prohibited the courts from interfering in its affairs. Suppose a member of parliament undertakes not to speak or vote in the House of Commons against a certain measure but later indicates that she will do so. If the High Court grants an injunction against her or against the Speaker requiring him or her to refuse to allow the member of parliament to speak or vote on the issue, can the member of parliament or Speaker be punished for contempt without any opportunity to challenge the order collaterally if they act in defiance of it? In such an extreme case it is the judge rather than the member of parliament or Speaker who would be likely to face contempt proceedings[48] but should proceedings be brought against the parliamentarians for contempt, it is suggested that they would be able to plead that the injunction was beyond jurisdiction.

Case law supports this view. In *Attorney-General v. Manchester and Leeds Railway Co.*,[49] the company undertook to deal with certain works as the court should afterwards direct. In breach of that undertaking, the Company petitioned the House of Commons for leave to bring in a bill, part of which would remove the power of the courts to direct the works. The petition was received and the bill introduced into the House. Lord Cottenham L.C. held that he could not interfere as things stood because the matter was by then a parliamentary one. The courts have however been prepared to issue injunctions against non-parliamentary parties who may wish to seek parliamentary action but they are careful to disclaim any jurisdiction over parliament itself.[50]

[47] *The Stockton & Hartlepool Railway Company v. The Leeds & Thirsk and the Clarence Railway Companies* (1848) 2 Ph. 666, 671; 41 E.R. 1101, 1102 *per* Lord Cottenham L.C.

[48] *Jay and Topham's Case* (1689) 12 State Tr. 822. The contempt would be contempt of Parliament.

[49] (1838) 1 Ry. & Can. Cas. 436; 55 R.R. 820.

[50] *Rivlin v. Bilainkin* [1953] 1 Q.B. 485; *Bilston Corp. v. Wolverhampton Corp.* [1942] Ch. 391; *Re London Chatham and Dover Railway Arrangement Act 1867* (1869) 20 L.T. 718, 720, *per* Selwyn L.J.; *Ware v. Grand Junction Water Works Co.* (1831) 2 Russ. & M. 470, 483; 39 E.R. 472, 477, *per* Lord Brougham L.C.

This limitation on the jurisdiction of courts is more difficult to maintain in cases where the parliament is not sovereign but is subject to constitutional limitations. In such cases the courts can point to a higher authority than parliament to justify intervention in the affairs of parliament itself. In Australia, for instance, the present position seems to be that there is jurisdiction to intervene but that the jurisdiction should be exercised with great caution.[51]

(d) *Illegal Orders*

The limitations on the jurisdiction of the courts discussed above are cases where the court has no jurisdiction over the parties or over the subject matter (or both). But there are cases where the court has jurisdiction both over the parties and the subject matter and yet acts beyond jurisdiction in making an order which it has no power to make. A few examples will be enough to bring out the point.

(i) *Illegal punishments*

First, a court might order a punishment which is unknown to the law. In a country where capital punishment has been abolished by valid legislation, for example, it would be beyond the power of a court to sentence a convicted defendant to death. In *R. v. Collyer and Capon*,[52] prisoners convicted of assault were sentenced by Quarter Sessions to one month's imprisonment and ordered to ask pardon of the victim on their knees and to remain in prison until they had done so. The Court of King's Bench granted *habeas corpus* in relation to that part of the order which kept the prisoners confined beyond the month. In that case the contempt in disobeying the order to ask pardon was visited with an automatic punishment of imprisonment but this imprisonment was held illegal because the order was illegal. It may be argued that a court of quarter sessions is not a court of general jurisdiction but on the point of a punishment unknown to the law there seems to be no valid distinction to be drawn on this basis.

A later English case departs to some extent from this position but the situation was more borderline. In *Brenan and Galen's* case[53] the Royal Court of Jersey had sentenced two prisoners to transportation. They sought *habeas corpus* and wished to argue that the Jersey court had no power to transport. The Court of Queen's Bench refused to listen to evidence on the point. The prisoners had argued that they would have been entitled to *habeas corpus* if the sentence had been one of torture or some other punishment unauthorised by law.[54] The Court did not deal directly with this argument but there are two passages in the judgment which suggest that *habeas corpus* would have been granted to prevent an illegal sentence of torture being carried out. Lord Denman said 'We are bound to assume, *prima facie*, that the unreversed sentence of a court of competent jurisdiction is correct'[55] and referred to criminals convicted of 'a crime well known to

[51] See Sykes, E. I., Lanham, D. J., and Tracey, R. R. S., *General Principles of Administrative Law*, (2nd ed. 1984) 233.
[52] (1752) Sayer 144; 96 E.R. 797.
[53] (1847) 10 Q.B. 492; 116 E.R. 188.
[54] *Ibid.* 501; 191.
[55] *Ibid.* 502; 191.

our laws, condemned to a punishment equally known to them'.[56] Given that torture was (and is) a punishment unknown to English law the court could not have assumed *prima facie* that the judgment of a court of competent jurisdiction ordering torture was correct.

There is a conflict in Australian cases on the proper solution to this problem. In *Re Price*[57] the Full Court of New South Wales granted *habeas corpus* to a prisoner sentenced to penal servitude for a crime for which penal servitude was not a lawful punishment. The right to challenge an illegal punishment by *habeas corpus* was reaffirmed by the Full Court in *Re Forbes*[58] but the writ was not issued in that case as there was no more than a possible erroneous exercise of sentencing discretion rather than an illegal sentence. In *R. v. White*[59] a case of an illegal sentence of hard labour, the Full Court held that the right to apply for *habeas corpus* was not taken away by the provision of a statutory appeal by way of writ of error.

This line of New South Wales cases is supported by a Victorian decision which, however, seems to have taken the principle too far. In *R. v. Governor of the Metropolitan Gaol, Coburg; ex parte Kimball*,[60] a court of Petty Sessions imposed a sentence of imprisonment for larceny. On appeal the Court of General Sessions varied the sentences to detention in a reformatory prison during the Governor's pleasure. On an application for *habeas corpus*, Martin J. held that general sessions had no power to impose the sentence of reformatory treatment and as the original sentence had been quashed the prisoner should be released immediately. It is suggested that the writ should not have run until the lawful sentence imposed by Petty Sessions had expired but that the Court's declaration that the general session order was invalid should have empowered the prisoner to appeal again in the unlikely event that he wanted to do so. Were General Sessions to refuse to consider an appeal, on the ground that they had already dealt with the matter, *mandamus* would have been available to meet the problem.

There is however a deeper difficulty, not with the proposition that an illegal sentence is void and can be attacked collaterally, but with the use of *habeas corpus* to remedy the problem. In most cases where an illegal punishment of death, torture, hard labour or the like has been imposed on a person validly convicted, the prisoner will be liable to a lawful sentence of imprisonment. On an application for *habeas corpus* the court can set the applicant free or refuse to do so but it cannot impose the sentence which should have been imposed. This seems to have been the main reason why the Full Court of South Australia took a different view of the law from that adopted by the New South Wales and Victorian courts in the cases above. In *R. v. Allen*[61] a prisoner was sentenced by Wearing J. to hard labour for libel, and applied for *habeas corpus*. As the sentence was by a Supreme Court judge, no writ of error was available. The Full Court of South Australia held that *habeas corpus* was not available either.

56 *Ibid.* 503; 192.
57 (1885) 6 N.S.W.R. 140.
58 (1887) 8 N.S.W.R. 68.
59 (1875) 13 S.C.R. (N.S.W.) 339.
60 [1937] V.L.R. 279.
61 (1868) 2 S.A.L.R. 54.

Hanson C.J. pointed out that the prisoner could have objected at the time of sentence and the question of its legality could have been reserved for the opinion of the judges, who could then have said what sentence was to be imposed. As it was, if the application for *habeas corpus* was successful, the prisoner would have escaped the consequences of his crime. As the other remedy had been available and not sought, *habeas corpus* was refused.[62] The illegal sentence was overcome by an exercise of the Royal Prerogative on the recommendation of Wearing J., who was also one of the members of the Full Court.[63] Justice was accordingly done but by the executive rather than directly by the judiciary. The admission of judicial impotence implied in the proceedings is not very attractive.[64]

A nice point of hierarchy arises in the use of *habeas corpus* to review void sentences. As *habeas corpus* is directed to the gaoler, rather than the court which makes the illegal order, there is not the formal difficulty, noted above, that one court has no jurisdiction to make orders against another of coordinate or superior status. But the reality is that the court granting *habeas corpus* is in effect making a declaration against the sentencing court. There is no difficulty where the sentencing court is lower in the hierarchy and little where it is of equal status. But where the sentencing court is superior to the *habeas corpus* court, the grant of the remedy undermines the very system which is set up to protect legal rights.

In some cases courts have used this danger as an argument against allowing *habeas corpus* to be used to review an illegal sentence at all. In *Re Millar*,[65] the Full Court of Victoria referred to the inconvenience which would arise if a judge in chambers reviewed the decision of the Full Court. In more dramatic terms Ritchie C.J. in *Re Sproule*,[66] having pointed out that even the Supreme Court of Canada could be subjected to review by a single judge, asked whether this would not be subversive of all law and order.

These arguments paradoxically stand as authority to support the assertion made earlier that there is no such thing as a court of unlimited jurisdiction. Courts of Appeal, Full Courts and final courts like the House of Lords and the High Court of Australia are not courts of unlimited or even general jurisdiction and yet within their limited, mainly appellate, jurisdiction they are able to give orders to courts of general jurisdiction like the English High Court or State Supreme courts. Since those courts cannot, consistently with the fact that they are subordinate to the appellate courts, issue orders against them, they cannot be courts of unlimited jurisdiction. Once that is accepted, there is no difficulty in building that limitation into the powers of courts with power to issue *habeas corpus*. That would still leave those courts free in appropriate circumstances to issue *habeas corpus* against gaolers who act on the orders of courts of coordinate of lower status.

In practical terms the provision of a wide ranging right of appeal is likely to

62 *Ibid.* 57.
63 *Ibid.*
64 See also Sharpe, R. J., *The Law of Habeas Corpus* (1976) 144-5.
65 (1866) 3 W.W. & A'B. 41.
66 12 S.C.R. 140, 200-1 (1886). See also *Ex parte Boucher* 50 C.C.C. 161 (1886); *Re Day* 62 N.S.R. (2d.) 67 (1984).

render application for *habeas corpus* unnecessary. Indeed some of the cases[67] appear to say that the provision of an appeal, or other effective method of review, removes the jurisdiction to grant *habeas corpus* (another limit on courts of general jurisdiction) or at least makes it erroneous to grant *habeas corpus* to review illegal sentences in most cases. This latter approach is preferable since it leaves open the possibility of swift action where appeal might not provide an effective remedy.

A judge of a court of general jurisdiction, overcome by pressures of work and depressed by the crime rate, orders a convicted murderer to be executed by shooting in the police cells and refuses to stay the order pending appeal. While bemused police officers drag the prisoner towards the cells pondering their position, defence counsel rushes to the court next door, interrupts its orderly proceedings, outlines the facts to the judge (another judge of general jurisdiction) and seeks *habeas corpus*. Can the success of the application be in doubt?

(ii) *Subversion of the Jury System*

One of the most fundamental rules of criminal procedure is that a judge has no power to order a jury to convict a criminal defendant. There is direct authority on the point. In *Bushell's* case,[68] a judge of oyer and terminer (a superior court) directed a jury to find criminal defendants guilty of unlawful assembly. The jury acquitted the defendants and were committed for contempt of court. The Court of Common Pleas held the committal illegal and discharged the jurors by writ of *habeas corpus*. A more modern example was given by Lord Bridge in *Re McC*.[69] His Lordship made the point that the holder of any judicial office, who acts in bad faith and does what he has no power to do, is liable in damages. He went on to say that if the Lord Chief Justice himself on the acquittal of a defendant charged with a criminal offence were to reject the verdict and pass a sentence of imprisonment he could be sued for trespass. The example is a strong one because if there is a judge of unlimited jurisdiction the Lord Chief Justice is that judge. But even the Lord Chief Justice cannot overrule a jury's verdict of acquittal.

(iii) *Secret trials*

Another fundamental rule of criminal procedure is that a trial should generally be held in public. No judge, however wide his or her jurisdiction, has power to order that a trial take place behind closed doors in order to protect his or her summing up from criticism. Much more respectable grounds for ordering a secret trial may still be insufficient to give the judge power to do so. In *Scott v. Scott*[70] the English High Court ordered that a nullity suit should be heard in camera because evidence of impotence might prove embarrassing to the respondent. The petitioner published copies of the transcript of the case and was held to be in

[67] *E.g. R. v. Allen* (1868) 2 S.A.L.R. 54.
[68] (1670) Vaughan 135; 124 E.R. 1006.
[69] [1985] A.C. 528, 540. See also Lord Keith at 533 and Lord Elwyn Jones at 533. Contrast Lord Templeman at 559.
[70] [1913] A.C. 417.

contempt. The House of Lords held that she was not in contempt. The authority of this case is weakened by the fact that there were two main issues (apart from whether the alleged contempt was civil or criminal). The first question was whether the court had power to order a secret trial. The second was whether, even if there were such power, the order prohibited publication after the trial had finished. Viscount Haldane L.C.[71] and the Earl of Halsbury[72] held that there was no power to order a secret trial in the circumstances. Earl Loreburn was prepared to assume there was such power and that the order prohibited perpetual silence but held that the court had no power to treat disobedience of the order as contempt if the publication was in good faith and for the purpose of defending the petitioner's reputation.[73] Lord Loreburn was alive to the distinction between lack of power and erroneous exercise of power and emphasised that the court lacked power to punish in these circumstances. Accordingly, though the point was made in a different way from Lords Haldane and Halsbury, Lord Loreburn based his judgment on lack of power rather than the construction of the order. Lord Atkinson held that the petitioner was not guilty of contempt because the order did not extend to publication after the trial.[74] Lord Shaw condemned the order most emphatically as a usurpation and beyond the power of the Court.[75] In the end, however, his Lordship appears to have recognised that the contempt conviction could be quashed on the ground that the order did not extend to publications after the trial had finished.[76] This may reduce his earlier observations to dicta,[77] though they were certainly very powerful dicta. Overall then, a majority of the House of Lords recognised that the High Court's power to order secrecy was limited but, because of the different approaches, no clearly binding ratio is readily discernible. Even so the case does seem to be binding authority for the principle that the High Court has no inherent power in nullity proceedings to forbid publication of a transcript after the trial is finished, where the purpose of the order is to avoid embarrassment and the purpose of the publication is to protect the reputation of the publisher. Even where the principle is stated as restrictively as this, it stands as direct House of Lords authority for the proposition that the power of the High Court, a court of general jurisdiction, is not unlimited.

That is not to say that the rule against secret trials is an absolute one. In *Scott v. Scott* itself, the House of Lords recognised that there were exceptions, *e.g.* where the subject matter of the litigation is secret and would be destroyed by a trial in public.[78] There is no need for present purposes to draw the line between cases where the courts have, and cases where they lack, power to order secret trials. It is enough to record that there are cases of both kinds and that, as so frequently is the case, the borders may be difficult to pinpoint with accuracy.

[71] *Ibid.* 438.
[72] *Ibid.* 442.
[73] *Ibid.* 448.
[74] *Ibid.* 453.
[75] *Ibid.* 476.
[76] *Ibid.* 486.
[77] See also Miller C.J., *Contempt of Court* (1976) 254 who treats the case as weaker authority than is suggested in this article.
[78] [1913] A.C. 417, 437-8 *per* Viscount Haldane L.C.

C. *Limitations to the Immunity of Superior Courts Against Collateral Attack*

While there is ample authority for the general principle that orders of superior courts may not be attacked collaterally, the discussion above shows that the principle cannot be regarded as absolute or unlimited. Possible limits to the principle will be examined under the following heads.

(a) Void orders
  (i) Orders beyond power or jurisdiction
  (ii) Frivolous orders
(b) Coercive orders
(c) Routine orders
(d) Orders involving immediate and permanent loss of right
(e) Unappealable orders
(f) Sentencing matters

(a) *Void Orders*

If the immunity against collateral attack is not absolute, some shorthand label is desirable to differentiate between those cases where it exists and those where it does not. Over the centuries various terms have been used to make this distinction. Those challengeable collaterally have been described for instance as void, void *ipso facto*, null, nullities, beyond or without jurisdiction, *ultra vires*, or beyond power, whereas those which may generally be attacked directly but not collaterally are described as voidable, erroneous, irregular, improvident, wrongful exercises of discretion or simply wrong. The word 'void' is a short simple label which states a result rather than a test and so can be given whatever content is appropriate to the context in which it appears. The need for a term with these qualities arises from the fact that some authorities, while recognising that a court may act beyond power or jurisdiction, still refuse to allow collateral attack on that basis alone. Others equate voidness with lack of power or jurisdiction. The two lines of cases will be examined in section (i) and (ii) below.

(i) *Lack of jurisdiction or of power*

Most of the cases examined above, which recognise that a superior court may act beyond jurisdiction, regard acting beyond jurisdiction as enough to allow collateral attack.[79] This approach has the support of a line of early Supreme Court of the United States decisions. In *Ex parte Fisk*,[80] for example, a circuit court made an order requiring a defendant to be examined before trial of a civil matter. He refused to be examined and was convicted of contempt. The Supreme Court of the United States held that the circuit court had no power (or jurisdiction) to make the order, that the order was void and that the defendant was

[79] *E.g. Holderstaffe v. Saunders* (1706) Holt 136; 90 E.R. 974 (*supra* n. 45); *R. v. Collyer and Capon* (1752) Sayer 44; 96 E.R. 797 (*supra* n. 51); *Re Price* (1885) 6 N.S.W.R. 140 (*supra* n. 56); *Bushell's Case* (1670) Vaughan 135; 124 E.R. 1006 (*supra* n. 67); *Re McC.* [1985] A.C. 528 (*supra* n. 68); *Scott v. Scott* [1913] A.C. 417 (*supra* n. 69).

[80] 28 L. Ed. 1117 (1885). See also *Ex parte Rowland* 104 U.S. 604 (1881). Cox, H. B., 'The Void Order and the Duty to Obey' (1948) 16 *University of Chicago Law Review* 86; Watt, R. F., 'The Divine Right of Government by Judiciary' (1947) 14 *University of Chicago Law Review* 409.

entitled to *habeas corpus*. The earlier cases are in their turn supported by one relatively recent Supreme Court decision, *Re Green*[81] but as will appear below, later cases in the Supreme Court adopt a more restrictive approach to collateral attack. Despite this later development, some state courts continue to equate lack of jurisdiction or of power with voidness allowing collateral attack. There is a useful analysis in *State v. Coe*[82] where the Supreme Court of Washington *in banc*, approving earlier authority, recognised that a judgment of a superior court could be void for lack of jurisdiction of the parties, lack of jurisdiction of the subject matter or lack of power to make the particular order. In that case the order was one prohibiting the broadcasting of tapes played in open court. The Washington Supreme Court held the order invalid and reversed the defendant's contempt conviction.

(ii) *Frivolous orders*

As the discussion earlier indicates, there are some orders which are obviously beyond the jurisdiction or power of courts of even the most general jurisdiction and there are others which may be held to be beyond jurisdiction when the matter is fully discussed but are not obviously so. Most of the limitations to the powers of the courts present difficult borderline cases. In practice it is the borderline case rather than the extreme and obvious one which is likely to arise. That being the case it would be possible to find a compromise between the claim that nothing is beyond the jurisdiction of superior courts and the right to attack collaterally all decisions beyond jurisdiction or power. The compromise would be to limit collateral attack to cases of obvious or patent excesses of jurisdiction. *Brenan and Galen's* case[83] is consistent with this compromise position, since there was nothing obviously wrong at that time with a sentence of transportation, whereas there would have been an obvious excess of power if the court had ordered torture as a punishment. The decision was not based on this reasoning, however, so the case is weak authority for the compromise position.

The Supreme Court of the United States, however, has adopted this position expressly. In *United States v. United Mineworkers of America*,[84] the Court held that, even if an order was beyond the jurisdiction of a court because an Act of Congress had removed the court's jurisdiction over the subject matter of the order, the order still had to be obeyed and could not be attacked collaterally. The Court held that there could be collateral attack where the claim to jurisdiction was frivolous or the order transparently invalid. The order in question did not fall within this category. Indeed there was a division of opinion in the Court on whether the Act removed the jurisdiction of the Court which made the order.

Despite the fact that this approach was a departure from the position taken by the Supreme Court in earlier cases,[85] that the case has been vigorously criticised,[86] that a later Supreme Court case appeared to revert to the rule that orders

81 369 U.S. 689 (1962).
82 679 P. 2d. 353 (1984).
83 (1847) 10 Q.B. 492; 116 E.R. 188 (*supra* n. 52).
84 330 U.S. 258 (1946).
85 *Supra* n. 79.
86 See Watt, R.F., 'The Divine Right of Government by Judiciary' (1947) 14 *University of Chicago Law Review* 409.

beyond jurisdiction could be attacked collaterally,[87] the Court has reaffirmed the *Mineworkers* case. In *Walker v. City of Birmingham*[88] a state court issued an *ex parte* injunction against eight negro ministers, prohibiting a procession. The defendants defied the injunction and were prosecuted for contempt. They claimed that the injunction was invalid because it was contrary to the First and Fourteenth Amendments. By a majority the Supreme Court held that the defendants could not raise breach of the Constitution as a defence. The position is a curious one because, as the dissenting judges point out, the decision empowers superior courts to override the Constitution itself even if only for a short time.[89] Whether this is nonetheless the best approach to the subject will be considered later but a few further problems must be discussed first.

(b) *Coercive orders*

When a person disobeys a court order, someone, *e.g.* the court or the party benefitting from the order, is likely to want to apply some sanction. Whether the person disobeying the order is able to plead that the order was wrongly made will depend in large measure on the motive for seeking the sanction. If the motive is to punish the contemnor for his or her past conduct, the considerations examined above come into play. But the motive may be to coerce the contemnor into obeying the order in future. Where this is the sole motive, different considerations are relevant and the law provides a different set of rules. Where the motive for the sanction is a combination of punishment and coercion, the sanction should be split into two parts and the appropriate set of rules applied to each part.

In so far as the motive for applying the sanction is coercive, a full right to collateral attack is in principle appropriate. While it may be proper to punish a person for disobeying an order which is wrong, it is not proper to insist that he or she continue to obey the order. This seems to have been the view adopted by the courts of common law in dealing with disobedience to orders of *mandamus*.

A line of early English cases established that a person ordered by *mandamus* to do something could challenge the validity of the order, even after putting in an insufficient return, in other words, while in disobedience to the order.[90] The line was broken for several years by the case of *R. v. Mayor of York*.[91] *Mandamus* was issued against the defendants requiring them to certify the election of one Withers as recorder of York. The defendants made a return arguing that the election was invalid. They also argued that the writ of *mandamus* was defective. The Court of King's Bench held that once the return to the writ had been made it was too late to object to the writ itself: the defendants should have applied earlier to quash the writ.

This restrictive view did not last long. In *R. v. Margate Pier Co.*[92] after

87 *Re Green* 369 U.S. 689 (1962).

88 388 U.S. 307 (1967).

89 *Ibid.* 349 *per* Brennan J. (with whom Warren C.J. and Douglas and Fortas JJ. concurred).

90 See the authorities collected in *R. v. Margate Pier Company* (1819) 3 B. & Ald. 220, 221; 106 E.R. 642.

91 (1792) 5 T.R. 66; 101 E.R. 38.

92 (1819) 3 B. and Ald. 220; 106 E.R. 642, cited with approval in *Lord Delamare v. The Queen* (1867) 2 L.R.H.L. 419, 426 *per* Lord Chelmsford L.C. See also *R. v. Powell* (1841) 1 Q.B. 352; 113 E.R. 1166.

making a return to a writ of *mandamus* the defendants argued that the writ was defective. The applicant admitted that it was defective but argued, relying on *R. v. Mayor of York*, that it was too late to object. Abbott C.J. refused to follow the *York* case and quashed the writ. The learned Chief Justice agreed with the judges in that case that it would be more convenient if objections were taken at an early stage but held that these considerations did not preclude challenge after return.

The court went even further in *R. v. Ledgard*[93] and held that the validity of the writ could be challenged even after a peremptory (final) order of *mandamus* had been made. Lord Denman (with whom Littledale and Patteson JJ. agreed) held that the disobedience to the writ had been fully proved but the validity of the writ could still be challenged. On the merits, the Court held that the writ was invalid because it required the defendant not merely to pay debts incurred but to levy a rate to pay the debt. There was no reason to require payment to be made out of any particular fund.

The *Ledgard* case points the way to a wider principle. Had the case been one of a mandatory injunction rather than a *mandamus* the material considerations would have been the same. If a mandatory injunction wrongly requires payment of a debt out of a particular fund, it cannot be proper to use the coercive powers of the law to seek to fulfil that wrongfully imposed obligation. It may be proper to punish the contemnor for disobedience but that is a different matter. That punishment must be finite and linked to the degree of blame in disobeying the order. It must not be indeterminate[94] and imposed for such time as the contemnor remains disobedient.

This was the view taken by the United States Court of Appeals in *American Greetings Corp v. Dan Dee Imports Inc.*[95] A district court issued a preliminary injunction against Dan Dee prohibiting the use of tummy graphics on pastel teddy bears in contravention of the Lanham Trade Marks Act. In contempt proceedings to enforce compliance with the injunction the district court found that the injunction was wrongly issued because tummy graphics were functional and so outside the Act. The district court dealing with the contempt held that even so Dan Dee could not challenge the correctness of the order. The United States Court of Appeals reversed the decision on the ground that the contempt proceedings were civil proceedings for the purpose of coercing the defendant into obedience, rather than criminal proceedings to punish for contempt. Once it was found that the injunction was wrongly issued, there could be no question of coercing obedience and the injunction was vacated.

American courts frequently use the term 'civil' to describe contempt proceedings which are intended to coerce and 'criminal' to describe those which are intended to punish. English law does not reflect this distinction by using these labels, partly because at one time appeals lay against civil but not criminal contempts and it thus became desirable to treat as many kinds of contempt as

[93] (1841) 1 Q.B. 616; 113 E.R. 1268.

[94] In principle a coercive order is indeterminate, though the law may prescribe a maximum, *e.g.* Contempt of Court Act (Eng.) 1981 s. 14. For a criticism, see Cremonini, C., 'An Italian Lawyer Looks at Civil Contempt' (1984) 3 *Criminal Justice Quarterly* 133, 157.

[95] 807 F. 2d. 1136 (1986). See also *U.S. v. Spectro Food* 544 F. 2d. 1175 (1976).

possible as civil contempts.[96] The position in Australian law is less clear, but is closer to that in American law.[97] But whatever label is used the distinction in this context is clear. As the words 'civil' and 'criminal' carry, in relation to contempt, a degree of ambiguity, the words 'coercive' and 'punitive' provide a better basis for analysis and will be used in the discussion below.

Not all American courts are attracted to the distinction between criminal (punitive) and civil (coercive) contempt proceedings. So in *Bonser v. Courtney*[98] the town of Nottingham obtained an injunction to prevent the defendant from keeping mobile homes in the town contrary to a zoning order. The defendant disobeyed and was subjected to civil contempt proceedings. He sought to challenge the constitutionality of the zoning order and the injunction. This defence was rejected and the defendant sought *habeas corpus*. The Supreme Court of New Hampshire held that he could not challenge the injunction except on the ground that the court issuing had gone beyond its jurisdiction. The court reasoned that as he had not challenged the order itself by direct appeal he could not challenge it collaterally in the contempt proceedings nor in the *habeas corpus* proceedings. This reasoning fails sufficiently to distinguish between the rules governing punitive and coercive proceedings. While there may be good reasons for punishing one who disobeys an erroneous order, those reasons do not justify coercing that person into obeying it in future.

Every case of disobedience to an order is potentially capable of giving rise to punitive contempt proceedings but not every case is capable of giving rise to coercive ones. In most cases where coercive proceedings are appropriate, the order breached will be a mandatory order but sometimes a mandatory order will not be capable of giving rise to coercive proceedings and sometimes prohibitory orders will. For instance, an order to return an article to the plaintiff will not be capable of coercive enforcement if the defendant destroys the article. Conversely an order prohibiting the pollution of a river is capable of coercive enforcement because the act prohibited is a continuing course of conduct.

The fact that an order has been improperly made does not mean that it may never be coercively enforced. The court with power to enforce the order has a discretion which may lead to its enforcement despite some defect. The High Court of Australia exercised a discretion to enforce a defective mandatory order in *Rubie v. Rubie*.[99] In 1901 a divorce petition which included a claim for alimony was served on the defendant, who entered no appearance. A decree nisi was granted which directed the defendant to pay maintenance. The decree nisi was served on the defendant. In 1910 the decree absolute was served on the defendant and the wife sought attachment against him for non-payment of maintenance. Gordon J. made the order of attachment and the defendant appealed to

[96] See particularly *Scott v. Scott* [1913] A.C. 417.

[97] Contrast the view of Dixon J. in *R. v. Metal Trade Employers Assocation* (1951) 82 C.L.R. 208, 253 with that of Windeyer J. in *Australian Consolidated Press Ltd v. Morgan* (1965) 39 A.L.J.R. 32, 38-9. See also *Australian Building Construction Employees' and Builders Labourers' Federation v. David Syme and Co. Ltd* (1982) 40 A.L.R. 518; *Australasian Meat Industry Employees Union v. Mudginberri Station Pty Ltd* (1987) A.T.P.R. 48, 210.

[98] 481 A. 2d. 524 (1984). For another example see *In the Matter of Scott* 517 A. 2d. 310 (1986). The question was left open in *Re Contempt of Reeves* 733 P. 2d. 795 (1987).

[99] (1911) 13 C.L.R. 350.

the High Court. He argued that the order for maintenance was beyond jurisdiction because it should have been made in a separate order and not as part of the decree nisi. The High Court held that, as the defendant had had notice of the proposed order there was no breach of natural justice. The order was, however, irregular as it should have been made separately. But the Court refused to discharge the order on this ground because, with the passage of ten years, it was probably too late to make an original application for alimony under the decree.

(c) *Routine Orders*

Some orders are made after long argument and deliberation. Others are made after the briefest consideration. Into the latter category fall orders which are made as a matter of routine in the course of the trial. In such cases the most efficient form of challenge to void or irregular orders may be by disobedience followed by collateral attack if those orders are subject to punitive or coercive enforcement.

There is some rather oblique recognition of this proposition in *Hadkinson v. Hadkinson*.[1] Having said that one who disobeys an irregular or even void order is in contempt and liable to punishment, Romer L.J. expressly exempted orders relating merely to matters of procedure.[2] The problem was discussed fully in *U.S. v. Ryan*[3] where, however, it arose in a rather borderline form. A district court ordered R to seek the consent of the Kenyan authorities to the production of documents in Kenya for the purpose of complying with a subpoena. R appealed against the order and the United States Court of Appeals reversed it. On an application for *certiorari* the Supreme Court of the United States held that the district court order was not appealable. The court said that, to be effective, judicial administration must not be leaden-footed and that its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.[4]

The borderline nature of the case is brought out when the judgment of the Court of Appeals, reversed by the Supreme Court, is considered. In *In the matter of Grand Jury Subpeona Duces Tecum of Ryan*,[5] the Court of Appeals pointed out that the district court order required R to produce two tons of documents at his own expense, and amounted to a mandatory injunction.[6] There is much to be said for this view and room for a principle which allows an appeal from an irregular procedural order where its effect is so substantial as to give the order a kind of free-standing status.

1 [1952] P. 285. See also *Nissim v. Nissim*, *The Times*, 11 December 1987, where a High Court order transferring a divorce case back to the county court was held to be without jurisdiction and a nullity. The conclusion that there was nothing to appeal against was, however, wrong in principle; see later.

2 *Ibid.* 288. See also Crick, C. M., 'The Final Judgment As A Basis for Appeal' (1931) 41 *Yale Law Journal* 539.

3 402 U.S. 530 (1971).

4 *Ibid.* 325.

5 430 F. 2d. 658 (1970).

6 *Ibid.* 659.

(d) *Orders involving immediate and irrevocable loss of rights*

Certain rights are placed, whether by constitution, statute or common law, beyond the reach of court orders. Where a court erroneously purports to interfere with those rights, and compliance with the court's order would lead to an immediate and irrevocable loss of those rights, it should be possible to challenge the order collaterally in contempt proceedings. *Bushell's* case[7] could be rationalised along these lines. The direction to convict in that case purported to take away the criminal defendants' right to have their guilt determined by their peers, and at the same time purported to deprive the jury of its right to determine whether the criminal defendants were guilty. While it might have been possible to take some form of corrective action later to protect the defendants from the effect of a coerced verdict, the fundamental right to receive and give a valid verdict would have been lost irrevocably by compliance with the invalid direction.

This limitation on the rule against collateral attack was recognised by the Supreme Court of the United States in *Maness v. Meyers*.[8] A witness in a civil action to suppress obscene literature was subpoenaed to produce certain magazines. The witness's lawyer advised him not to produce the magazines, on the ground that they might incriminate him. The witness disobeyed a further order to produce the magazines the same afternoon and pleaded his privilege against self-incrimination. Both the witness and the lawyer were convicted of contempt. The Supreme Court quashed the convictions on the ground that compliance with the order might have caused irreparable injury, because appellate courts could not always 'unring the bell' once the information had been released.[9] The Court emphasised that the privilege against self-incrimination was enshrined in the Fifth Amendment and left open its attitude towards privileges based on statute or common law, as in the case of legal, medical, priest and penitent or husband and wife privilege.[10] There is no good reason to distinguish constitutional and other privileges. As long as the privilege is created or recognised by an authority superior to the court making the order, it is binding on that court and the court cannot take it away. In framing the general rule that erroneous decisions must be obeyed, the Supreme Court has held that the fact that constitutional rights are affected by the order does not provide an excuse for disobedience.[11] Where the right in question is irrevocably defeated by the order, the constitutional status of the right should equally make no difference.

There is some support for this exception in the case of a non-constitutionally protected privilege (or rather alleged privilege) in *Attorney-General v. Mulholland*.[12] A journalist giving evidence before a Tribunal of Inquiry refused to reveal the sources of his information and was cited for contempt. In the contempt proceedings he pleaded journalists' privilege. Gorman J. held that there was no

7 (1670) Vaughan 135; 124 E.R. 1006 (*supra* n. 67).
8 419 U.S. 449 (1975). See also *In Re Contempt of Reeves* 733 P. 2d. 795, 801 (1987); *Kleiner v. F.N.B.A.* 751 F. 2d. 1193, 1208 (1985).
9 419 U.S. 449, 460 (1975).
10 *Ibid.* 461, n. 8 of the case.
11 *Walker v. City of Birmingham* 388 U.S. 307 (1967).
12 [1963] 2 Q.B. 477.

such privilege. The witness appealed. The Court of Appeal affirmed the view of Gorman J. and dismissed the appeal.

The case is of limited authority because the body making the order to reveal sources was not a court of general jurisdiction but a Tribunal of Inquiry with limited powers. Even so the Tribunal was acting within the scope of its subject-matter jurisdiction and for contempt purposes was to some extent equated with the High Court.[13] Once that equation is accepted, the case is of significance because, although the Court of Appeal denied the existence of a journalists' privilege, it allowed the matter to be raised in the contempt proceedings. The implication is that if there had been such a thing as journalists' privilege the witness would have been entitled to an acquittal of the contempt charge.

(e) *Unappealable orders*

The case for permitting collateral attack of court orders is greatly strengthened if there is no other means of challenging the order. In *Russell v. East Anglia Railway Company*[14] a sheriff, acting on a writ of *fieri facias* issued at common law, seized property which had been vested in a receiver by order of the Court of Chancery. In contempt proceedings brought against him, the sheriff argued that the order appointing the receiver was illegal. Lord Truro L.C. held that the sheriff could not challenge the order in the contempt proceedings. His Lordship's decision was largely based on the fact that it was open to those whose rights were affected by an order made in Chancery to apply to the court to have their rights taken into account.[15] His Lordship's further assertion that it was to be presumed that justice would be duly administered on such an application looks a trifle boastful, but the existence of a further appeal to the House of Lords[16] fortifies the general argument.

The effect of the presence or absence of a right of appeal on the possibility of collateral attack was considered by the Supreme Court of the United States in *Walker v. City of Birmingham*.[17] In that case the defendants were not allowed to attack the validity of the injunction when they were prosecuted for contempt. The Supreme Court relied heavily on the fact that there was time for them to apply for the discharge of the injunction and to appeal if that application failed. The Court suggested that the collateral attack might have been successful if, before disobeying the order, the defendants had attempted to challenge it in the state courts, and had met with delay or frustration.[18]

More directly in *U.S. v. Ryan*[19] it was the absence of a right of appeal against the order to produce documents which led to the court to accept that collateral attack would have been appropriate in that case.

13 Tribunals of Inquiry (Evidence) Act, 1921, 11 Geo. 5, c. 7, s. 1.
14 (1850) 3 Mac. and G. 104; 42 E.R. 201.
15 *Ibid.* 118-9; 206.
16 See Spence, G., *The Equitable Jurisdiction of the Court of Chancery* (1846) I, 396.
17 388 U.S. 307 (1967) (*supra* n. 87).
18 *Ibid.* 318-9.
19 402 U.S. 530 (1971). See also *Carroll v. President and Commissioners of Princess Anne* 393 U.S. 175 (1968); *U.S. v. Dickinson* 465 F. 2d. 496 (1972); *U.S. v. Seale* 461 F. 2d. 345 (1972); *In Matter of Scott* 517 A. 2d. 310 (1986).

While the unavailability of a right of appeal is a strong argument for allowing collateral attack, the possibility of collateral attack should not be regarded as a good argument for restricting a right of appeal. In *Nissim v. Nissim*,[20] divorce proceedings were begun in a county court and transferred to the High Court. The High Court transferred the case back to the County Court which made a decree nisi and another order. The husband appealed against the order. The Court of Appeal held that the High Court's order transferring the case to the County Court had been made without jurisdiction and so was a nullity. It followed, the Court held, that the County Court's order was also a nullity so that there was nothing against which to appeal. Accordingly the Court of Appeal dismissed the appeal.

This reasoning is unsatisfactory. While it may be appropriate to allow collateral attack in cases where a court acts without jurisdiction that does not mean that an appeal is an inappropriate mechanism for correcting the error. Collateral attack is a necessary safety valve against judicial illegality but it can be a dangerous and inconvenient remedy. If a right of appeal is given against the orders of a court it should not be rejected on the ground that the order appealed against is a nullity. Though in retrospect it may look harmless, it has an apparent potential for mischief which justifies the intervention of an appellate court if a suitable appellate structure is provided.[21]

(f) *Sentencing matters*

Even where the defendant in contempt proceedings cannot plead the wrongfulness of the order as a complete defence, it is a relevant factor for the court to take into account on sentencing. In *Drewry v. Thacker*,[22] Leach V.C. said that an order had to be obeyed but that, where an application was made to punish contemnors, the court would be failing in its duty if it did not give them the benefit of the fact that the order ought not to have been made. Lord Truro in *Russell v. East Anglia Railway Co.*[23] cast some doubt on this observation by asking what benefit should be conferred on a contemnor where, though the order was erroneous, it was one which ought to have been obeyed. The obvious answer that the erroneous nature of the order was a mitigating but not an exculpating factor does not appear to have occurred to the learned Lord Chancellor but Leach V.C.'s more humane approach seems to have been the one to survive.

So in *Re Wilde (A solicitor)*[24] a country solicitor obtained an order against W, a town solicitor, requiring the delivery of certain documents. W refused to deliver the documents and served notice of a motion to discharge the order for irregularity. At much the same time the country solicitor served notice of attachment. The two motions were heard together. Neville J. refused to discharge the order because it was correct. However he refused to order attachment because W had raised a legitimate question. But finally, as it had turned out that W had

[20] *The Times*, 11 December 1987. See also the discussion of *U.S. v. Ryan supra* nn. 2–3, p. 623.
[21] See, in the context of administrative tribunals, *Calvin v. Carr* [1980] A.C. 574.
[22] (1819) 3 Swans 529, 546; 36 E.R. 963, 966; *Rubie v. Rubie* (1911) 13 C.L.R. 350, 354.
[23] (1850) 3 Mac. & G. 104, 123; 42 E.R. 201, 208.
[24] [1910] 1 Ch. 100.

wrongly resisted the order costs were awarded against him. Similarly in *Partington v. Booth*,[25] a party disobeyed a prohibitory order which had been made erroneously. Lord Eldon refused to commit for contempt but ordered the contemnor to pay costs. Analysed in criminal law terms, these cases look like ones in which the defect (or alleged defect) in the order is a factor which has persuaded the court to impose a fine (costs) instead of imprisonment as a punishment for the contempt.

### D. *Reasons for the Rule Against Collateral Attack*

A number of separate but overlapping reasons have been given for the general rule that superior court orders cannot be attacked collaterally.

#### (a) *Orderly procedure*

This reason is clearly articulated in *U.S. v. Dickinson*.[26] Having pointed out that one may lawfully disobey unconstitutional statutory, executive, police and Congressional commands, the U.S. Court of Appeals held that a different rule applied to judicial commands because of the judiciary's unique role. The court held that compliance with invalid judicial orders was necessary for the system to work. Refusal to obey a court order without testing its validity through established processes required further action by the judiciary and therefore affected its ability to discharge its duties and responsibilities. Without the power to punish for contempt, the courts would become mere boards of arbitration whose decrees would be merely advisory.

There are three main points which need to be taken up in meeting these arguments. First, unless an invalid order when first made is unquestioningly to be obeyed, the courts will always face the possibility of having to take further action in the event that the person subjected to the order wishes to challenge it. If there is a right of appeal the person affected will generally exercise that right. If there is no right of appeal (or of seeking discharge) the person affected can only disobey the order and test it if necessary when prosecuted for contempt. In either event, the judiciary will be involved in further proceedings before the order can be enforced.

Secondly, though applications for discharge or appeals may generally be the more efficient ways of handling challenges to allegedly invalid orders, that may not always be the case. In *U.S. v. Ryan*[27] the Supreme Court of the United States held that an appeal process which seemed to be available was not to be used in relation to procedural orders because it would make justice leaden-footed. In this type of case collateral attack in contempt proceedings seems to be regarded as a superior method of challenge.

Thirdly there is the point about advisory opinions. An unlimited right of

[25] (1817) 3 Mer. 148; 36 E.R. 57. See also *Railroad Co. v. Johnson* 35 N.J. Eq. 424 (1882); *U.S. v. Dickinson* 465 F. 2d. 496, 513 (1972).
[26] 465 F. 2d. 496, 510 (1972). See also *Rubin v. State* 490 S. 2d. 1001 (1986).
[27] 402 U.S. 530 (1971); supra n. 2, p. 623.

collateral attack would certainly have a tendency to destroy the coercive authority of the judicial system. A court makes an order against A which A considers void. A challenges the order either directly by application to discharge or collaterally in contempt proceedings and exercises all the appeal rights which the system allows. In the end the highest appellate court rules that the order was valid. If A now still insists that the order was invalid, disobeys it and seeks to attack its validity in further proceedings, he or she is in effect claiming the right to be the ultimate judge of the validity of any order affecting him or her. The cases allowing collateral attack do not however contemplate such an unlimited operation for that remedy. Once the case has gone as far as it can, or as far as A is prepared to take it up the judicial ladder, A has no legal alternative but to obey the order or face the sanction. This leaves the theoretical possibility that the highest appellate court will affirm an order which for instance is transparently illegal, like an order for the execution of a person convicted of a non-capital offence, but there being *ex hypothesi* no higher court to correct that order the remaining remedy would have to be political or legislative rather than judicial.[28]

These arguments suggest that limits should be placed on collateral attack as a remedy against allegedly void orders. They do not justify its complete abandonment.

(b) *Respect for authority*

This second reason overlaps with the first but concentrates more on the longer term effects of allowing collateral attack than on the day-to-day inconvenience of doing so. The older version of this idea is that it is an unwarranted attack on the dignity of a superior court to challenge its decision at all. Such an argument seems to have been put to the Court of Common Pleas in *Bushell's* case,[29] though the Court had no difficulty in dismissing it.[30] Much more recently in *Clark v. Atkins*,[31] the Indiana Court of Appeals refused to allow collateral attack of a court order in contempt proceedings, in part because contempt proceedings were intended to vindicate the court's dignity.

Appeals to the dignity of the courts are rare, however. In democratic times the courts are more likely to refer to the dignity of the law than that of the courts. Indeed in *Ex parte Fernandez*[32] Willes J. upheld a conviction for contempt but expressly declared that he was not conscious of the vulgar desire to elevate himself or the court of which he was a member. In the same case Erle C.J. regarded contempt as punishable as sinning against the majesty of the law.[33] In similar vein, the U.S. Court of Appeals in *U.S. v. Dickinson*[34] expressly asserted that the rule against collateral attack was not the product of self protection or arrogance of judges. And in *Kleiner v. First National Bank of Atlanta*,[35] the U.S.

28 This hierarchical point has been recognised in a number of cases refusing to allow collateral attack; *supra* nn. 64-5.
29 (1670) Vaughan 135, 138; 124 E.R. 1006, 1007.
30 *Ibid.*
31 489 N.E. 2d. 90, 96 (1986).
32 (1861) 10 C.B.N.S. 3, 56; 142 E.R. 349, 370.
33 *Ibid.* 38; 363.
34 465 F. 2d. 496, 510 (1972).
35 751 F. 2d. 1193, 1208 (1985).

Court of Appeals spoke of the unravelling of the rule of law. Putting the matter even more strongly in *Rubin v. State*,[36] the District Court of Appeal of Florida pointed out that if persons may with impunity disobey the law, it will not be long before there is no law left to obey.

These are legitimate concerns but there are considerations on the other side. First, collateral attack is a perilous way to challenge an order. If the order turns out to be valid, and in most cases it will, the person in breach will be guilty of a criminal offence. For this reason collateral attack is not likely to prove attractive in many cases.[37] Secondly, where collateral attack is seen to be an efficient method of review, little account seems to be taken of its potential to unravel the rule of law.[38]

Thirdly, respect for the authority of an institution is likely to be weakened if that institution is seen to be acting in disobedience to orders binding upon it. The point is made forcefully by Fletcher Moulton L.J. in *Scott v. Scott*:

> We claim and obtain obedience and respect for our office because we are nothing other than the appointed agents for enforcing upon each individual the performance of his obligations. That obedience and that respect must cease if, disregarding the difference between legislative and judicial functions, we attempt ourselves to create obligations.[39]

The Lord Justice was in dissent in the Court of Appeal but the majority judgment of that court was reversed by the House of Lords.[40]

(c) *Protection of third parties*

It is highly desirable that judges who issue orders and third parties who rely on those orders should be protected from civil and criminal proceedings should those orders turn out to be wrong. A rule which prohibits collateral attack goes far towards conferring that protection. This consideration featured prominently in the reasoning of Lord Truro L.C. in *Russell v. East Anglia Railway Company*.[41] His Lordship said that he could not see how the court could expect its officers to do their duty if they might meet with resistance and that resistance were justified on grounds tending to the impeachment of the order under which they were acting. It is ironical that the person threatened with dire consequences if he disobeyed the order of the Court of Chancery was a sheriff, who was acting in obedience to an order from a common law court. The Lord Chancellor made no allowance for the difficulty the sheriff faced. However the general point was well made and has to be faced.

The answer to this problem is to provide a direct protection to those who act on court orders. The law does so where the order is merely erroneous. In *Tarlton v. Fisher*, Buller J. said that 'if a sheriff has acted in obedience to the mandate of the court, he is excused. If he arrest a peer,[42] the writ is erroneous, yet he is not a

36 490 S. 2d. 1001, 1005 (1986).
37 *Little v. Lewis* [1987] V.R. 798, 805; *State v. Sperry* 483 P. 2d. 608, 611 (1971); *State v. Coe* 679 P. 2d. 353, 358 (1984).
38 *E.g. U.S. v. Ryan* 402 U.S. 530 (1971) (*supra* n. 2, p. 623)
39 [1912] P. 241, 273.
40 *Scott v. Scott* [1913] A.C. 417.
41 (1850) 3 Mac. and G. 104; 42 E.R. 201 (*supra* n. 13, p. 000).
42 See also *Countess of Rutland's Case* (1606) 6 Co. Rep. 52b, 54a; 77 E.R. 332, 335.

trespasser for executing it.'[43] That leaves the question of the position of third parties where the court order is beyond jurisdiction. In *Gosset v. Howard*,[44] Parke B. implied that an order of a superior court made without jurisdiction would provide no protection if the lack of jurisdiction appeared on the face of the order, *e.g.* a writ of *capias* in a criminal matter issued from Common Pleas. What distinguished superior from inferior courts was that the orders of superior courts were to be presumed to be within jurisdiction unless the absence of jurisdiction appeared on the face of the order.

Superior Court judges themselves are given further protection even if they do act outside jurisdiction, provided that they believe in good faith that they are acting within their jurisdiction.[45] It would seem appropriate to afford this same degree of protection to court officials and others who do no more than act upon the orders of a court. Alternatively, it may be that those obeying court orders are liable if they know or ought to have known that the order was made without jurisdiction. This rule could impose liability where an order is made without jurisdiction even if the order itself is drawn up in such a way as to disguise this fact. Some American cases[46] make the liability of those acting in pursuance of an order made without jurisdiction turn on knowledge or imputed knowledge rather than the form of the order. It is not necessary for the purpose of this article to explore the precise limits of immunity which should be granted to those acting in obedience to or on the authority of a judicial order. It is enough to record that here as elsewhere the law recognises that in some circumstances the order is void in the sense that it is so defective that the rights of those opposing it are to be preferred to the rights of those relying on it.

The points of principle discussed here can now be outlined in a modern context by developing the hypothetical example given by Lord Bridge in *Re McC*.[47] It will be recalled that his Lordship suggested that the Lord Chief Justice would be liable if in bad faith he or she were to reject the verdict of acquittal given by a jury and to sentence the defendant to imprisonment. The sentence would clearly be one beyond the jurisdiction of the Lord Chief Justice and bad faith would be easy to infer. A court officer who was present when the acquittal occurred and sentence was given and was ordered to arrest the acquitted person would be guilty of assault in obeying the order. The acquitted person who resisted the court officer would be entitled to plead self-defence if sued or prosecuted for assault. If a written order committing the acquitted person to imprisonment were to give the misleading impression that he or she had been convicted by the jury and duly sentenced, a person like a prison officer acting in good faith and without notice of the illegality of the order would probably be protected, at least if he or she had no reason to know or suspect that anything was wrong.

[43] (1781) 2 Doug. 671, 677; 99 E.R. 426, 429; *Turner v. Felgate* (1663) 1 Lev. 95; 83 E.R. 315; *Cotes v. Michill* (1681) 3 Lev. 20; 83 E.R. 555.

[44] (1845) 10 Q.B. 411, 453; 116 E.R. 158, 173. See also *Parsons v. Loyd* (1772) 3 Wils. 341, 345; 95 E.R. 1089, 1091 (*per* Lord Chief Justice de Grey who also points out that the party moving the court does not have the same immunity as officers where the order is erroneous).

[45] *Re McC.* [1985] A.C. 528, 540 *per* Lord Bridge; *Sirros v. Moore* [1975] Q.B. 118, 134 *per* Lord Denning M.R.

[46] *E.g. McCurry v. Tesch* 738 F. 2d. 271 (1984) (contrast the dissenting judgment of Circuit Judge Fagg); *Farmer v. Lawson* 510 F. Supp. 91 (1981); *Malley v. Briggs* 106 S. Ct. 1092 (1985).

[47] [1985] A.C. 528, 540.

## 3. *CONCLUSION*

There are so many circumstances in which a person affected by the order of a superior court might wish to challenge it that it is difficult to suggest a simple rule which will do justice in all cases. So far as the person who is made the direct subject of the order is concerned there will normally be a right to appeal against the order or a right to apply to have it discharged with a right to appeal if the application for discharge is rejected. The existence of a right to appeal gives rise to three points in the context of collateral attack.

First, an order which purports to block off the right of appeal is at least to that extent beyond jurisdiction. It follows that lodgment of appeal in defiance of the order should not be capable of being punishable as contempt. Secondly, if the appeal right is exercised and the appellate court rules in favour of the order it should not, on the question of liability, be possible to challenge the order collaterally on any ground considered by the appellate court. To do so would be to permit a court of first instance, before which the order is later attacked collaterally, to overrule a court superior to it in the judicial hierarchy. The third point is more difficult. That is whether the existence of a right of appeal closes off the right to attack an order collaterally. The problem should not arise frequently. In general, appeal is a superior remedy to collateral attack. Normally it will allow the order to be challenged on its merits and if the order is discharged nothing done afterwards will be a contempt. In contrast, collateral attack is normally limited to errors which render the decision void. It is also more risky since, if the challenge fails, the person concerned will be guilty of contempt. Where the matter is clear beyond doubt, however, collateral attack (or its potential), if allowed, is a superior remedy. It does not involve any expense unless proceedings are actually brought, and, if the case is clear, there is no risk that the contempt proceedings will succeed. The question is whether collateral attack should be available only in clear cases or whether it should be available wherever the court acts beyond jurisdiction. It is submitted that the latter rule is preferable. The advantages of appeal should normally tempt the party to seek that remedy rather than rely on collateral attack. If he or she mistakenly regards the lack of jurisdiction as clear but the court before which collateral attack is launched regards the case as one of lack of jurisdiction but not a clear or frivolous lack of jurisdiction the party should have the benefit of the favourable part of that finding.

The above considerations apply whether the order is prohibitory or mandatory in so far as the motive for the contempt proceedings is to punish for disobedience. Where the motive is to coerce obedience to the order the grounds for collateral attack should not be limited to jurisdictional errors but should extend to cases where the order was the wrong one to make. If the right of appeal has been exercised and the appellate court has ruled that the order was right, it should not be open to the party to raise the same question in the later contempt proceedings. If the party has not exercised the right of appeal he or she should be able to raise the wrongness of the order as a defence to any coercive sanction.

The second situation arises where there is no effective right of appeal. This

may come about because there is no provision for appeal against the type of order made *e.g.* where members of a jury are directed to convict a criminal defendant but refuse to do so. It may come about because there is no time for an appeal because the order, if obeyed, would lead to an irrevocable loss of rights. It may be because some difficulty is put in the way of the party's exercising the right of appeal. In all these circumstances the case for collateral attack is strong. In the case where there is no right of appeal, the ground for challenge should be limited to cases of jurisdictional error. Where however there is a right of appeal but it has been blocked, the party should be permitted to raise in the collateral attack any ground which could have been raised on appeal. Alternatively, it should be open to a person prosecuted for contempt to apply for a stay pending the lodgment of an appeal against the order.

The third situation is one where a person found guilty of contempt wishes to challenge the correctness of the order on a question of sentence. It should always be possible to do so though the weight of this factor will vary with the circumstances. In particular if there has been an appeal against the order and it has been upheld by the appellate court, normally little or no weight should be given to the argument that the order was nonetheless wrong.

The situations considered so far are concerned with collateral attack by an alleged contemnor when prosecuted for contempt. Different problems arise when the alleged contemnor is sued or prosecuted in other proceedings or where the alleged contemnor is the plaintiff or prosecutor. Third parties will then generally be involved. There is room for a wide range of solutions in which good faith and actual or constructive knowledge will be as important as the fact that an illegal order has been made. The solution to these problems is outside the scope of the article. All that will be asserted here is that there is no more room for an unqualified rule in the case of third parties than there is where only the contemnor and the court are involved.

Nothing in this article claims to have discovered a new and developing field of judicial review. The wide powers conferred upon or inherent in superior courts make it unlikely that collateral attacks would often succeed. The limited right of collateral attack identified in this article may not have much day to day application but it stands as a safety valve and, at the critical theoretical level, the importance of safety valves is not to be underestimated.