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CONTEMPT—Conduct Tending To Defeat the Effect of Appeal Pending in Federal Circuit Court Held To Be Civil Contempt Even Though Not a Resistance to a Formal Court Order—*Griffin v. County School Board**

Appellants applied for an injunction in a federal district court in Virginia to prevent the Prince Edward County Board of Supervisors from paying out tuition grants to parents whose children attended private segregated schools.[1] The district court refused to issue the injunction, and the appellants appealed. They asked to have their appeal accelerated, but, since the Court of Appeals for the Fourth Circuit was not then in session, the Chief Judge requested the Clerk of Court to ask the Board of Supervisors to stipulate that no tuition grants would be paid pending the appeal. The Board refused to make the stipulation. Instead, on the very day that the Chief Judge made his request, the Board substantially increased the amount of the tuition grants, and by nine o'clock the next morning it had distributed about $180,000 to white parents, most of whom cashed their checks at that time. In their appeal, appellants moved for an order that the Board show cause why it should not be cited for civil contempt, and for an order requiring the Board to restore the money distributed after the requested stipulation. The Court of Appeals directed the district court to enjoin the Board from paying any tuition grants to parents sending children to private segregated schools, but it remanded the question of contempt to the district court for further findings of fact.[2] The district court found that the payments were not violative of any formal court order, and therefore dismissed the motion to order the Board to show cause.[3] On appeal from this dismissal, *held*, reversed, two judges dissenting.

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* Griffin v. County School Board, 363 F.2d 206 (4th Cir.), *cert. denied*, 385 U.S. 960 (1966) [hereinafter cited as principal case].

1. This development occurred during the enforcement of district court decrees requiring the County to reopen its public school system. The County had previously voted to close the system rather than to operate it on an integrated basis. For a more complete description of this background, see Griffin v. County School Board, 377 U.S. 218 (1964).

2. Griffin v. Board of Supervisors, 339 F.2d 486 (4th Cir. 1964).

3. The district court had, however, enjoined the Board of Supervisors from reimbursing parents for tuition expenses incurred during the previous year (1963-1964), and the question considered by the district court on remand was whether the challenged payments constituted a retroactive payment of tuition grants and, as such, were a violation of that earlier injunction. Finding no evidence that the money had been paid with respect to school years prior to 1964-1965, the district court held that the Board could not be adjudged in contempt, apparently regarding its authority to punish for contempt as extending only to cases in which a specific court order has been ignored or violated. Thus, the district court concluded that the Board was not in contempt despite the fol-

The court rested its decision on two alternative grounds. First, making the assumption that the federal contempt statute[4] applies to civil as well as to criminal contempt, it held that the Board's action, which in effect put the subject matter of the litigation beyond the reach of the court, was contemptuous because it seriously impaired the purpose of the appeal by making possible the continuation of the private segregated school system through the very sort of payment which was at issue in the case. These payments were considered to be an anticipatory resistance to the court's ultimate order or to its process as these terms are used in section 401(3) of the contempt statute.[5] Second, making the assumption that the statute only applies to criminal and not to civil contempt, the court alternatively held that the Board's action still constituted contempt on the ground that it was an unwarranted interference with property in the custody of the court. Thus, the Board and its constituent members were ordered jointly and severally to restore to the county treasury, through recapture or otherwise, a sum equal to the amount disbursed to the parents, and the case was continued for ninety days from the date of decision for a report by the Board of what had been done toward compliance with that order.

The first legislation dealing with the contempt power was the Judiciary Act of 1789, which gave federal courts the "power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any case or hearing before the same."[6] While this act supposedly codified the common law power of courts to punish those in contempt,[7] it offered no clear guide as to when

lowing findings: (1) that after the Board's refusal of the requested stipulation, a petition containing 1,004 signatures and requesting the Board to allocate additional funds for public education had been submitted to the Board by five Negro citizens; (2) that no Board action was taken on this petition; (3) that the members of the Board, the County Attorney, and interested citizens combined thereafter to devise and effect a plan to pay the challenged tuition grants before the Court of Appeals could enter an order staying such payments; (4) that both the County Attorney and the Board's special counsel were of the opinion that payment of the tuition grants prior to the appeal would be legal, although special counsel advised the Board against taking such action; (5) that a citizens' committee notified the parents of children then attending the private segregated schools that if they came to the Board offices that evening and applied for grants, they would receive half of the requested amount the next morning; (6) that county bonds were sold in Richmond the following morning in order to finance the payment of these tuition grant checks; (7) that 1,217 tuition grants were paid, each applicant receiving one-half the amount for which he had applied.

4. A court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
   (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
   (2) Misbehavior of any of its officers in their official transactions;
   (3) Disobediance or resistance to its lawful writ, process, order, rule, decree, or command.

62 Stat. 701 (1948), 18 U.S.C. § 401 (1964).

5. *Ibid.*

6. 1 Stat. 83 (1789).

7. *In re* Savin, 131 U.S. 267, 275-76 (1889).

that power might be exercised, and thus courts were left largely to their own discretion in applying the statute.[8] The courts themselves recognized that such an undefined power might prove a source of abuse,[9] and the impeachment trial of James H. Peck dramatically called this possibility to the public's attention. Peck was a federal district court judge who had punished an attorney for contempt by imprisoning and disbarring him after the attorney had published a criticism of one of Peck's opinions while an appeal was pending.[10] Although Peck was acquitted, the case provoked a widespread criticism of the summary contempt power and resulted in the passage of an act "declaratory of the law concerning contempts of court."[11] This act is for all practical purposes still in force today as section 401 of the present federal contempt statute. While it is clear that this statute restricts the use of criminal contempt proceedings by the lower federal courts, it is uncertain whether the statute should also be construed to limit these courts in their use of civil contempt proceedings.[12]

For the purposes of the principal case it made no difference whether the statute applied to cases of civil contempt, since the majority held the Board in contempt even under the restrictions imposed by the statute. To support that holding the majority relied on a line of cases, and particularly on two Supreme Court cases, *Merrimack River Savings Bank v. Clay Center*[13] and *Lamb v. Cramer*,[14] which have sanctioned the exercise of the contempt power when the *res* involved in a pending proceeding has either been destroyed by the defendant or removed by him from the court's jurisdiction, thereby rendering nugatory any ultimate decree in the pending pro-

8. Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1024 (1924).

9. *Ex parte* Kearney, 20 U.S. (7 Wheat.) 37, 44 (1822).

10. A complete record of the impeachment proceedings is contained in STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1833).

11. 4 Stat. 487-88 (1831).

12. Generally, civil contempt sanctions serve a remedial purpose. The available sanctions include the imposition of compensatory fines as well as conditional fines or imprisonment, but a defendant can relieve himself of the conditional penalties by complying with the court decree. Thus, in the case of civil contempt, it is said that a defendant "holds the keys to his prison," see, *e.g.*, Green v. United States, 356 U.S. 165, 194 (1957), although critics of summary civil contempt dispute this analogy. See GOLDFARB, THE CONTEMPT POWER 59-61 (1963). In the case of criminal contempt, the sanctions are essentially punitive rather than remedial, and fixed fines or imprisonment are commonly used by the court in order to vindicate its authority. For further discussion of the difference between civil and criminal contempt, see Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911); GOLDFARB, *op. cit. supra* at 49-67; Moskowitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780 (1943); Wright, Byrne, Haakh, Westbrook & Wheat, *Civil and Criminal Contempt in the Federal Courts*, 17 F.R.D. 167 (1955); Comment, 57 YALE L.J. 83 (1947). See also notes 39-45 *infra* and accompanying text.

13. 219 U.S. 527 (1911)

14. 285 U.S. 217 (1932).

ceeding. The majority reasoned that these cases indicate that conduct which removes the res from the jurisdiction of the court constitutes a violation of the court's "process" under section 401(3).[15]

In *Merrimack*, a federal district court issued a temporary injunction, pending a hearing on a bill in equity, to prevent a municipality from destroying a utility's poles and wires. The district court subsequently dismissed the bill on jurisdictional grounds; however, the injunction was continued pending an appeal to the Supreme Court. The Supreme Court affirmed the dismissal, but before the mandate of dismissal had issued, and in the period allowed for making an application for a rehearing, the municipality destroyed the poles and wires. The Supreme Court declared that this conduct constituted a technical contempt: "[a] willfull removal beyond the reach of the court of the subject-matter of the litigation [on appeal] . . . is . . . a contempt of the appellate jurisdiction of this court."[16] In the *Lamb* case, the defendant transferred to his lawyer property which was involved in a pending suit to set aside certain conveyances of land and dispositions of personal property. Thereafter, the trial court entered a decree declaring that the plaintiffs had liens on all the property involved in the action, and appointed a receiver to liquidate those liens. The Supreme Court held that the property received by the attorney was *in gremio legis*, and that as a result he could be cited for civil contempt and thus be forced to restore that property to the custody of the court.

As the dissent in the principal case pointed out,[17] there are difficulties with the majority's use of these two cases to support the proposition that the damage resulting from the Board's anticipatory action could be remedied under section 401(3) of the contempt statute. First, it can be maintained that these tuition grants did not "abort the appeal or frustrate the adjudication of the large issue"[18] in the case; that issue being the constitutionality of a continuing program of paying out tuition grants to parents for the purpose of maintaining a private segregated school system. Arguably both *Merrimack* and *Lamb* are distinguishable from the principal case on this point, since in those two cases the ability of the court to adjudicate the large issue was more substantially affected. Nevertheless, in the principal case, the majority's view that there was a frustration with regard to the large issue is also plausible:[19] the distribution of the tuition grants might have made possible the future existence of the private segregated school system by providing sufficient funds to tide the system over until an alternative mode of financing could be devised. Under

15. Principal case at 210.
16. 219 U.S. at 535-36.
17. Principal case at 213-15.
18. *Id.* at 215.
19. *Id.* at 211.

this view, these disbursements were comparable in effect to the destruction of the utility facilities in *Merrimack* and to the wrongful transfer in *Lamb*.

The second possible difficulty with using the *Merrimack* and *Lamb* cases to support the majority's interpretation of section 401(3) is that those two cases may not have been decided under that section of the contempt statute. Although section 401 does effectively limit and define the contempt powers of the lower federal courts including the circuit courts, it is doubtful whether the statute applies to the Supreme Court which derives its powers from the Constitution and not from Congress.[20] In *Merrimack* the Supreme Court did not refer to the statute, but rather spoke as if the conduct of the defendant was an affront to its own jurisdiction;[21] thus, the decision appears to rest on the ground that the contempt power of the Supreme Court is not restricted by the statute. If the case was decided on that basis, it would have no relevance to the principal case. It is also likely that the *Lamb* decision was based on the Supreme Court's inherent power to punish for contempt, since once again the statute was not mentioned in the opinion. However, even assuming that the Supreme Court was not acting in its own right but was instead asserting the authority of a lower court to exercise contempt powers in a way that is compatible with the restrictions of the statute, it is arguable that the decision was reached under section 401(2) of the statute rather than under section 401(3).[22] Prior to the *Lamb* decision, the Supreme Court had indicated in dictum that it would treat an attorney as an "officer" of the court within the meaning of section 401(2);[23] thus, if the court in *Lamb* was operating, *sub silentio*, within the confines of the contempt statute, it could have founded its decision on the

20. *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873).

21. Mr. Justice Burton, writing for the court said:

> It does not necessarily follow that disobedience of such an injunction, intended only to preserve the *status quo* pending on appeal, may not be regarded as a contempt to the appellate jurisdiction of this court, which might be rendered nugatory by conduct calculated to remove the subject-matter of the appeal beyond its control, or by its destruction. This we need not decide, since irrespective of any such injunction actually issued, the willful removal beyond the reach of the court of the subject matter of the litigation, or its destruction pending an appeal from a decree praying . . . an injunction to prevent such removal or destruction until the right shall be determined, is, in and of itself, a contempt of the appellate jurisdiction of this court.

219 U.S. at 535-36.

22. See note 4 *supra*.

23. We do not doubt the power of the court to punish attorneys as officers of the same, for misbehavior in the practice of the profession. . . . This is recognized in the act of 1831 . . . which, after providing for personal contempt in the presence of the court, authorizes attachments to issue, and summary punishment to be inflicted, for "the misbehavior of the officers of said courts in their official transactions."

Ex parte Bradley, 74 U.S. (7 Wall.) 364, 374 (1868). Lower court decisions which adopted this view that an attorney is an officer of the court for purposes of contempt are Tanner v. United States, 62 F.2d 601 (10th Cir. 1932), and *Ex parte* Davis, 112 Fed. 139, 142 (C.C. Fla. 1901).

ground that the attorney was subject to the court's statutory contempt power because he was an "officer" of the court who engaged in conduct that tended to nullify any decrees the court might ultimately make.[24] Neither *Lamb* nor *Merrimack*, therefore, provides substantial support for the majority's position that the language of section 401(3) has been extended to encompass action taken in anticipation of a court's decree.

Even if it is assumed, *arguendo*, that *Lamb* and *Merrimack* were decided under the provisions of section 401(3), it is still possible to distinguish those cases factually from the situation in the principal case. The Second Circuit, in *Berry v. Midtown Service Corp.*,[25] held that it could not cite a corporate judgment creditor for contempt, even though that creditor had, after obtaining a stay of execution without giving a bond, made itself execution proof by conveying substantially all of its assets to affiliated corporations. The court in *Berry* interpreted the *Lamb* and *Merrimack* decisions as not standing for the broad proposition that the contempt powers may be used to prevent anticipatory resistance to judicial decrees, but rather as creating a narrow exception to the statutory restriction of the use of contempt powers to apply only in situations in which specific or unique property is either removed from the jurisdiction of the court or destroyed with an intent to subvert the effect of pending litigation.[26] Thus, the exception did not apply to the *Berry* fact situation, since the assets that were conveyed to avoid execution had not been the specific subjects of the litigation—the suit itself only being concerned with general personal liability.[27] Once it had disposed of *Merrimack* and *Lamb*, the Second Circuit then rejected the argument that the judgment debtor could be held for contempt under section 401(3), on the ground that with the exception of one district court case,[28] precedent

24. Recently, however, the Supreme Court has held that the term "officer" in § 401(2) does not encompass attorneys. The Court's rationale seems to be that the summary power to punish criminal contempt ought to be minimized. Cammer v. United States, 350 U.S. 399 (1956).

25. 104 F.2d 107 (2d Cir. 1939).

26. *Id.* at 109-10.

27. *Ibid.*

28. Lineker v. Dillon, 275 Fed. 460 (N.D. Cal. 1921). On facts similar to *Berry*, the court held that when a judgment debtor, who had obtained a stay of execution, removed property beyond the reach of the court's process in order to nullify the effect of the adverse judgment, he rendered himself as guilty of violating its order as if the stay order had in positive terms required that his assets be maintained at the same value as at the date of judgment. Thus, although there was no outstanding order, the district court was not of the opinion that the language of the statute precluded using civil contempt as a means of forcing the defendants to indemnify the judgment creditor when an order could reasonably be inferred from the circumstances. Apart from the fact that this is a district court opinion, the strength of the decision as authority is questionable on another count. The *Lineker* court relied on a statement in Toledo Newspaper Co. v. United States, 247 U.S. 402, 418 (1918), that the federal contempt statute "conferred no power not already granted and imposed no limitations not already existing"—a statement, the accuracy of which, has been disproved. See Frankfurter & Landis, *supra*

established that a party must have violated an *express* court order before he can be cited for contempt under that provision. Arguably the principal case presents essentially the same fact pattern as was found in *Berry*. The majority in the principal case, however, ruled that *Berry* presented no obstacle to their decision; they reasoned that the principal case involved conduct fitting within the narrow confines of the *Lamb* and *Merrimack* exception as interpreted by *Berry*, since "the suit and appeal were directed to a specific subject, the Board's right to apply to a certain purpose moneys within its power."[29] Furthermore, the majority apparently went beyond the *Berry* court's narrow reading of *Lamb* and *Merrimack* and instead interpreted those cases as authorizing so broad a reading of the word "process" in section 401(3) that any resistance taken in anticipation of a decree is brought within the statutory contempt power.[30]

The majority did not devote significant discussion to its alternative holding which is founded on the assumption that the restrictions imposed by the federal contempt statute do not apply to civil contempt situations such as the principal case.[31] The scope of section 401

note 8, at 1029-38. Furthermore, the *Toledo* case was expressly overruled in Nye v. United States, 313 U.S. 33, 52 (1941).

The *Berry* result has been preferred to the *Lineker* holding for several reasons. First, the *Lineker* doctrine, allowing contempt in the absence of a formal court order, would be hard to limit. Secondly, contempt proceedings would deprive defendants of procedural protections to which they would otherwise be entitled. Finally, this broad interpretation of the statutory contempt power was unnecessary because a fraudulent conveyance action was available to the judgment creditor. See 49 YALE L.J. 580 (1940).

29. Principal case at 211.

30. See principal case at 211 where the majority states that the statute does not limit contempt to extant decrees, and that an appeal which is "alive" at the time of resistance constitutes a "process" within the meaning of the statute. The dissent, however, maintains that "process" in the context of the statute "can reasonably be understood to mean no more than the sum of more explicit terms, such as 'original process' . . . all of which clearly refer to papers issuing from the court and embodying its command or judgments, or notice of them. Construed so expansively as the majority's suggestion . . . it would entirely contravene the clearly limiting purpose of the congressional act." *Id.* at 213.

The majority failed to mention a decision of their own circuit, predating both *Lamb* and *Merrimack*, which seems to dictate a result contrary to that reached in the principal case. In *Ex parte* Buskirk, 72 Fed. 14 (4th Cir. 1896), plaintiff alleged that defendant in a pending action of ejectment was disobeying a stipulation that had been made in open court by removing timber from the land in question. The Fourth Circuit held that there was no statutory jurisdiction for contempt proceedings, since the defendant had not been *formally* ordered to refrain from removing the timber prior to the time he was proceeded against for contempt. It is not clear whether the principal case impliedly overruled the apparent holding of *Buskirk* that there is no extra-statutory basis for a lower court contempt conviction. The case could be reconciled on the theory that the principal case adhered to the *Berry* interpretation of the *Lamb* and *Merrimack* cases: disbursement of the tuition grants could be considered a question of unique importance in determining the future of the county's schools, whereas the removal of the timber could be deemed a less irreparable kind of harm for which financial compensation at a later date might fully satisfy the injured party. It is doubtful, however, that the principal case limited itself to the *Berry* interpretation.

31. Principal case at 211. The majority suggests that the failure of the court in *Lamb* to mention the statute should not affect the result in the principal case. The

is unclear. In enacting the predecessor to section 401 after the Peck trial in 1831, the House unanimously resolved "that the Committee on the Judiciary be directed to inquire into the expediency of defining, *by statute, all* offenses which may be punished as contempts of the courts of the United States, and also to limit the punishment of the same."[32] This inquiry resulted in a bill "declaratory of the law concerning contempts of court," which later became the Act of 1831.[33] The broad language of the direction to the Committee on the Judiciary and the title of the bill suggest that the Congress intended no distinction between civil and criminal contempt, and that the bill was passed to restrict judicial power in both cases. Such a conclusion is bolstered by the fact that in 1831 the public had a great mistrust for all applications of the summary contempt power.

On the other hand, it is possible to marshal several arguments in support of the proposition that section 401 applies only to cases of criminal contempt. Historically, the contempt statute was enacted against the background of public furor resulting from the alleged abuse of the *criminal* contempt power in the Peck trial. In addition, the language of the present statute speaks in terms of limiting "the power to punish by fine or imprisonment."[34] This language of punishment sounds as if it were designed to refer to criminal contempt and not to civil contempt, which normally is imposed for remedial purposes. Furthermore, since courts are sometimes said to have an inherent power to remove obstructions to the discharge of their duties,[35] and since the Judiciary Act of 1789 recognized a broad judicial power to punish for contempt,[36] it can be contended strongly that any subsequent statutory limitation of the power should be explicit.

From the standpoint of precedent, judicial confusion as to the scope of the statute is evident: some courts have assumed that section 401 applies in the context of civil as well as criminal contempt proceedings;[37] other courts have implicitly assumed that the statute does

majority reasons that if the *Lamb* decision was not impliedly based on the majority's statutory interpretation, then it must have rested on the theory that the statute applies only to criminal contempt and, therefore, has no relevance to a court's power to use civil contempt in order to recover a res involved in pending litigation from a defendant who has interfered with the constructive possession of the court.

32. 7 CONG. DEB. 560-61 (1831) [1830-1831]. (Emphasis added.) See notes 10-12 *supra* and accompanying text.

33. H.R. JOUR. 382 (1831).

34. See note 4 *supra*.

35. Bessette v. W. B. Conkey Co., 194 U.S. 324 (1904); *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873). The inherent character of the contempt power is discussed by Frankfurter & Landis, *supra* note 8, at 1016-24.

36. See note 6-10 *supra*.

37. In Raymor Ballroom Co. v. Buck, 110 F.2d 207 (1st Cir. 1940), the First Circuit assumed that the statute applied to a proceeding for civil contempt and ordered a judgment debtor, who had interfered with levy of execution in the sum of about $600, committed to jail until he paid a fine of $600 to indemnify his judgment creditor or

not apply in the civil contempt situation[38]—this may in fact explain why there is no reference to the statute in either *Merrimack* or *Lamb*. It has been suggested that in terms of policy there is no reason why section 401 should not be equally applicable to all contempts,[39] and that the ambiguity of the statute should be resolved by holding that the statute does control civil contempt. Arguably, however, it may not be as necessary to restrict the courts in their use of the contempt powers in civil contempt cases as it is in criminal contempt cases. In the classic civil contempt proceeding, the court does not bring the action to vindicate its own honor, but rather to impose conditional penalties which aid the other parties in the case,[40] although an element of enhancing the respect of the court may still remain. Conversely, criminal contempt involves fixed penalties primarily designed to vindicate disrespect for the judicial process, although a civil element may also be present, such as extracting the cooperation of a recalcitrant witness.[41] Thus, it can be argued that there is less objection to the use of summary procedure in the civil contempt context than in the case of criminal contempt: dispensing with an indictment and a jury trial seems more justifiable in civil cases, not only because of the conditional nature of the penalty imposed, but also because of the interest of the injured party in having a prompt resolution of the contempt question and the defendant's lack of a substantial interest in having a full-fledged hearing on that question.[42] Nevertheless, there are policy reasons for broadly interpreting the

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until further order of the court. In Penfield Co. v. SEC, 330 U.S. 585, 594 (1947), the Supreme Court assumed, *arguendo*, that the statute governed civil as well as criminal contempt proceedings. Certainly the opinions in *Lineker* and *Buskirk*, see notes 27 & 29 *supra*, involve an implicit assumption that a defendant may not be cited for civil contempt except within the limitations of the statute. *But see In re* Sixth & Wis. Tower, 108 F.2d 538, 542-46 (7th Cir. 1939), where Justice Evans, concurring in part, argues that the statute does not restrict the power of a court sitting in equity to control the conduct of litigants in pending proceedings or to protect property within its custody. He maintains that the civil contempt power is an inherent power of equity courts, and that abridgement of this power would be inconsistent with Congress' grant of equitable jurisdiction.

38. The Eighth Circuit in Clay v. Waters, 178 Fed. 385 (8th Cir. 1910), did not refer to the statute when it held that an adjudication in bankruptcy operates as a transfer to the court of all the property in the possession of the bankrupt at the time of the adjudication in which he has any interest; that thereafter such property is to be considered part of a trust estate in the legal custody of the court for the benefit of the creditors of the bankrupt; and that if the bankrupt disposes of that property for the purpose of withdrawing it from the jurisdiction of the court, he can be held subject to civil contempt proceedings. The Second Circuit, however, would apparently apply the statute under these circumstances, for it has held that since the bankrupt has violated no specific court order, the court of bankruptcy has no contempt jurisdiction. *In re* Probst, 205 Fed. 512 (2d Cir. 1913).

39. Wright, Byrne, Haakh, Westbrook & Wheat, *supra* note 12, at 169-70.

40. The most recent Supreme Court statement on the character of civil contempt is found in Shillitani v. United States, 382 U.S. 913 (1966).

41. See GOLDFARB, *op. cit. supra* note 12, at 57-58.

42. This civil/criminal distinction is drawn in 73 HARV. L. REV. 353 (1959).

statute so as to limit the courts' use of both criminal and civil contempt powers. Some commentators feel that the inherent differences between civil and criminal contempt are so attenuated that treating the two kinds of defendants differently is unjustified.[43] It cannot be ignored that civil contempt does seem more like a criminal proceeding than does ordinary civil litigation, since the defendant may be subject to a fine or to imprisonment if he does not comply with the order, and since to some extent a finding of civil contempt attaches a criminal stigma to the defendant.

The Supreme Court has apparently adopted the view that summary procedures are less obnoxious in the civil contempt setting. It has recently held that criminal contempt sentences of more than six months may not be imposed by federal courts unless the defendant has had a jury trial or has waived his right to such a trial;[44] however, at the same time it has also ruled that civil contempt proceedings can be conducted absent the safeguards of indictment and jury, provided that the usual due process requirements are met.[45] Certainly the same distinction might be made in determining the scope of section 401. If criminal contempt defendants are given procedural safeguards not conferred upon civil contempt defendants, consistency might suggest that the protection that section 401 affords should apply only to criminal contempt.

Despite the disagreement as to the propriety of treating civil and criminal contempt differently, the above discussion does at least suggest that there is some basis in policy and precedent for the court's alternative holding that the civil contempt power is not subject to the same statutory limitations as is the criminal contempt power. However, it appears from the scheme of the opinion in the principal case that the court intended to emphasize its holding of contempt under section 401(3). It would have been preferable for the court to reach its decision exclusively on the basis of the alternative holding, for the language that the court used in upholding its decision within the framework of section 401(3) would seem to leave the door open for a similar expansion in the reach of the criminal contempt power. There is no indication that the court's broad interpretation of the section's terminology—namely, "resistance to its lawful writ, process, order, rule, decree, or command"—should apply to anticipatory resistance in the civil context and not in the criminal context. Clearly, such an extension of the sweep of criminal contempt would be inconsistent with the Supreme Court's general policy of construing criminal contempt powers strictly.[46] Despite the language of the opinion,

43. See GOLDFARB, *op. cit. supra* note 12, at 49-67; Nelles, *The Summary Power To Punish for Contempt*, 31 COLUM. L. REV. 956, 961 (1931).

44. Cheff v. Schnackenberg, 382 U.S. 917 (1966).

45. Shillitani v. United States, 382 U.S. 913 (1966).

46. In Nye v. United States, 313 U.S. 33 (1941), the Supreme Court held that the

however, it should be remembered that the facts of the principal case and of the other cases on which the court relied in making its decision within section 401(3), do suggest a possible interpretation which would in large measure eliminate the objection that the decision has widely broadened the sweep of both civil and criminal contempt.[47] It may be that the word "process" should be given a broad reading only when contempt is used to protect the jurisdiction of the court over specific or unique property, as was suggested in the *Berry* case. Viewed from this perspective, the principal case could be said to open the possibility of statutory contempt for anticipatory resistance to decrees in only a narrowly limited class of cases.

It is submitted, however, that on balance history and policy suggest that the court should have denied that it possessed jurisdiction to cite the defendants for contempt at all. The following considerations all support the contention that the statute applies to civil as well as criminal contempt: the broad language of the House resolution, and of the bill which gave rise to the statute;[48] the general disfavor of summary judicial power both when the original statute was passed and among some contemporaneous commentators;[49] the inevitable criminal overtones which accompany a civil contempt citation with its possible sanction of conditional imprisonment; the number of decisions which have assumed that the statute does apply to civil contempt;[50] and the general proposition that jurisdictional statutes should be strictly construed. Moreover, it is unquestionable that the statute was designed to limit severely those uses of the contempt power to which it applies. Thus, the statute should have been interpreted to prohibit the use of contempt in the principal case, since no substantial authority prior to the case has held unequivocally that an anticipatory resistance to process should be considered a violation of the statute.

It should be observed that such a decision would not necessarily leave the appellants in the principal case without a remedy against the clearly wrongful action of the Board. A taxpayer is not helpless when municipal or county officials improperly disburse public

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language "in its [the court's] presence or so near thereto as to obstruct the administration of justice" which appears in § 401(1) should be strictly construed so as to require geographical proximity to the court. Prior to this decision, the language had been more broadly interpreted to include almost any conduct obstructing the administration of justice. See Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918). Similarly, in Cammer v. United States, 350 U.S. 399 (1956), the court narrowly construed the term "officer" of the court in § 401(2) so as to exclude attorneys, although attorneys had theretofore been held to fall within the scope of the statute. See note 22 *supra*.

47. See text accompanying notes 13–16 *supra*.

48. See notes 32-33 *supra*.

49. See note 43 *supra*.

50. See note 37 *supra*.

funds.[51] In Virginia, it has been held, in *Johnson v. Black*,[52] that a court of equity could compel a Board of Supervisors to restore county funds which the Board had improperly appropriated to its own use, in addition to enjoining the Board from further depletion of the county treasury. In other jurisdictions, recovery of improper disbursements has been upheld on the theory that the taxpayers are the equitable owners of the diverted public funds, and that therefore the officers responsible for such disbursements have breached a fiduciary duty owed to the taxpayers.[53] Knowing recipients of the wrongful payments may be liable under this latter theory along with the public officers.[54] Therefore, since the parents who accepted the tuition grants in the principal case would seem to have had notice from the unusual manner of distribution that the propriety of the payments was questionable, recovery from them, as well as from the Board, would appear possible under this public trust theory.

The Fourth Circuit, perhaps, took into account the possibility that some jurisdictions would not allow such relief. Furthermore, the court may have reasoned that obtaining restitution from the parents would prove particularly difficult, since many had probably already spent the money in reliance upon the legality of the grant, and that therefore the treasury would more likely be replenished if it forced the Board to make a dramatic appeal for the return of the money based on the plea that its members were going to go to jail unless the money was raised. That the resolution of this case may be best explained by such reasoning demonstrates that judicial contempt, which has always been a suspect procedure, has not remained as precisely limited and defined as the Congress of 1831 intended. The case sug-

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51. See, *e.g.*, Mines v. Del Valle, 201 Cal. 273, 257 Pac. 530 (1927).

52. 103 Va. 477, 49 S.E. 633 (1905). Complainants were taxpayers who discovered that the County Board of Supervisors had for eleven years been violating the law with respect to the compensation of its members. The court held that it had jurisdiction not only to enjoin future payments, but also to compel the restitution of funds distributed to recipients having notice of the illegality of the distribution. The case is discussed in Hill, *Tort and Contracts Claims Against Counties*, 7 WM. & MARY L. REV. 61 (1966).

53. *E.g.*, Golden v. City of Flora, 408 Ill. 129, 96 N.E.2d 506 (1951).

54. It is said that when a third party participates in a breach of trust by receiving trust property with knowledge of the breach, he is equally liable with the fiduciary. The theory is that the third party commits a wrong against the beneficiary rather than against the trustee, and an action may be brought against him in equity by the beneficiary, even though the fiduciary may also have a right to recover against him. Hammond, *Fiduciary Liability for Erroneous Distributions*, in CURRENT TRENDS IN STATE LEGISLATION 1955-56, 139, 142 (1957). See also Jackson v. Norris, 72 Ill. 364 (1874), a case not unlike the principal case, and 3 SCOTT, TRUSTS § 294.1 (2d ed. 1956). In *Jackson*, the authorities of a municipal corporation misappropriated funds of the municipality in order to pay debts which a private corporation owed to a bank—the bank collusively receiving the misappropriated funds. The court, relying on a breach of public trust theory, ruled that the taxpayers were entitled to equitable relief, holding the bank as well as the municipal officers responsible for the amount misappropriated.

gests at least that the language of the statute should be redrafted to make clear whether section 401(3) should be interpreted to include anticipatory resistance to ultimate decrees and whether the statute should be construed to apply to civil as well as criminal contempt.