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Civil Contempt in Federal Courts

like early cargo owners, should not be required to prove the negligent source of their injury. Since an injured crewman is not required, under *Mahnich*, to prove negligence on the part of the mate who selected deficient rope, it would be illogical and contrary to the Supreme Court's gear-personnel equivalence to require him to prove the mate's negligence in selecting a deficient crew. Negligence is no more a part of the doctrine of unseaworthiness for the crewman than it was for the cargo owner.[30] Failure of the shipowner, therefore, to allocate sufficient personnel to a particular task, regardless of his exercise of due care, should render his ship unseaworthy.

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CIVIL CONTEMPT IN FEDERAL COURTS

The federal contempt statute, which prescribes those acts for which a federal court may hold a party in contempt, states that there must be "disobedience or resistance to . . . [the court's] lawful writ, *process*, order, rule, decree, or command" [1] to hold a party in contempt. Whether this statute makes a holding of civil contempt for the unauthorized removal of the subject matter of the litigation[2] contingent upon the existence of a previously issued specific court mandate forbidding the party's conduct has led to conflict and confusion among the federal courts.

In *Griffin v. County School Bd.*,[3] the United States Court of Appeals for the Fourth Circuit held that the members of the Prince Edward County School Board, in Virginia, were guilty of civil contempt for disbursing tuition grants to parents of white children enrolled in private schools, while an appeal from the district court's denial of an injunction against the disbursement was pending.[4] The Court of Ap-

[30]See, Ondato v. Standard Oil Co., 210 F.2d 233 (2d Cir. 1954).

[1]18 U.S.C. § 401 (1964) (Emphasis added.) § 401 also has two misbehavior provisions which are not herein discussed.

[2]Generally speaking, interference with property in the custody of the law is contempt of court. Lamb v. Cramer, 285 U.S. 217, 219 (1932); *In re* Lowenthal, 74 Cal. 109, 15 Pac. 359, 360 (1887); Clear Creek Power & Dev. Co. v. Cutler, 79 Colo. 355, 245 Pac. 939, 940 (1926); Walling v. Miller, 108 N.Y. 173, 15 N.E. 65, 66 (1888).

[3]363 F.2d 206 (4th Cir. 1966).

[4]*Griffin* is the last of a long line of decisions concerning the reopening of the Prince Edward County public schools. The events leading up to *Griffin* are summarized in Griffin v. County School Bd., 377 U.S. 218, 224 (1964), where the Supreme Court approved the District Court's order to reopen the schools and upheld its injunction forbidding the School Board and the State from disbursing tuition grants while the public schools remained closed. The School Board com-

peals held that it possessed the power to hold the members of the board in contempt even though the lower court had refused to issue a specific order forbidding the disbursement of the tuition grants. The majority in *Griffin* said:

> That these acts of the Board of Supervisors constituted a contempt of this court is beyond cavil. The Board undertook to put the money then available for tuition grants—and then wholly subject to its orders—beyond its control as well as that of the court. . . . Obviously, the aim was to thwart the impact of any adverse decree which might ultimately be forthcoming on the appeal. In effect it was a "resistance to its (this court's) lawful writ, process, order, rule, decree, or command." [5]

The majority held that the appeal was itself a *process* within the meaning of the federal contempt statute and that such process was resisted by the disbursements.[6]

The dissenting judges argued that the federal contempt statute was intended to limit the contempt powers of the federal courts,[7] that the

plied with the order, reopened the schools for the 1964 term but, in addition, appropriated a large sum for the 1964-65 tuition grants. The plaintiffs, on June 29, 1964, moved the District Court to enjoin permanently the payment of tuition grants. The District Court issued a permanent injunction against retroactive payments but declined to enjoin future grants. The plaintiffs appealed, but while the appeal was pending the School Board on August 5, 1964, disbursed one-half of the appropriated tuition grants. On August 13, 1964, the plaintiffs moved the Court of Appeals to cite the School Board for contempt. The Court of Appeals remanded the case to the District Court for further inquiries into the circumstances surrounding the disbursements. Judge Lewis found the Board was not in contempt because it disbursed only future grants as opposed to retroactive grants. However, after receiving the findings of Judge Lewis, note 5 *infra*, the Court of Appeals held the members of the Board in civil contempt. Griffin v. County School Bd., 363 F.2d 206, 208-210 (4th Cir. 1966).

[5] 363 F.2d at 210. A detailed account of the acts which took place during the pending of appeal was made by Judge Lewis of the District Court at the direction of the Court of Appeals. Judge Lewis found that the Board of Supervisors held a meeting on August 4, 1964, at which time a petition was filed by Negro citizens requesting an allocation of additional funds to be used for public education, and further:

> Shortly after adjournment of the Board meeting, Supervisor Jenkins and Supervisor Steck met a Mr. Taylor and other interested citizens for the purpose of finding a way to pay the '64-'65 tuition grants prior to the time the Court of Appeals could enter an order staying these payments. . . .
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> The Commonwealth Attorney and two other members of the Board of Supervisors were then called. Those assembled agreed that if the Board of Supervisors would increase the tuition grants to $310.00 . . . and authorize the immediate payment thereof, this could be done before the Court of Appeals could do anything about it." *Id.* at 209.

[6] *Id.* at 210.

[7] *Id.* at 215.

majority's interpretation of process was so broad as to render the statute meaningless,[8] and that traditionally the term process had been used to encompass such things as a summons, a subpoena, a mandate, or other written order of the court.[9]

The *Griffin* dissent is representative of the reasoning of those federal courts which strictly construe the statute. They typically require that there be a violation of some specific mandate.[10] The rationale be-

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[8]*Ibid.*

[9]*Id.* at 213. For example, in *Ex parte* Savin, 131 U.S. 267 (1889), which involved a subpoena, the Court said: "[W]hereas, in case of misbehavior of which the judge cannot have such personal knowledge, and is informed thereof only by the confession of the party . . . the proper practice is, by rule or other process to require the offender to appear and show cause why he should not be punished." In Burtch v. Zeuch, 200 Iowa 49, 202 N.W. 542, 543 (1925), which involved a search warrant, the court said: "The act of Burtch was an attempt to make futile a process issued by a court of competent jurisdiction, and therefore constituted a criminal constructive contempt, being directed against the dignity and authority of the court."

[10]The following cases require a violation of a specific order before the party may be held in contempt for the removal of the subject matter of the litigation:

NLRB v. Deena Artware, Inc., 261 F.2d 503 (6th Cir. 1958), held that the statute limits the contempt power of the courts in that there must have been a specific order in existence prior to the commission of the alleged contemptuous act. The court said that any acts prior to the issuance of a specific order can not constitute contempt "regardless of the intentions of the respondent to avoid the impact of an order or judgment expected by him to be thereafter entered." *Id.* at 509.

Denver-Greeley Valley Water Users Ass'n v. McNeil, 131 F.2d 67 (10th Cir. 1942), held that, although the property (tax sale certificates) was in the custody of the court, the contempt charge could not lie because no injunction had been issued forbidding the defendant's acts.

Parker v. United States, 126 F.2d 370, 380 (1st Cir. 1942), involved an action by the United States to enforce a milk marketing order. Prior to the issuance of a decree, the defendant committed acts which allegedly contributed to the insolvency of the business. The court held that regardless of how much these acts contributed to the insolvency the defendant could not be held in violation of the interlocutory or final decree.

In *In re* Sixth & Wisconsin Tower v. Aitkin, 108 F.2d 538, 539 (7th Cir. 1939), the defendant, during a reorganization proceeding, sent to creditors letters allegedly containing false information designed to cause the creditors to refuse to adopt the reorganization plan. Plaintiff contended that the subject matter of the letters was included in the petition submitted to the court and "that the subject matter being before the court for consideration, had the same effect as an order enjoining appellant from doing that which is complained of." The court held that the proceeding did not constitute an order and, therefore, there was no violation.

Berry v. Midtown Serv. Corp., 104 F.2d 107 (2d Cir. 1939), involved a restraining order to prevent a county from levying tax deeds on the plaintiff's land sold by the county during the pendency of the appeal. The defendant was not held in contempt of court since no order was issued forbidding such activity.

In re Probst, 205 Fed. 512 (2d Cir. 1913), involved a bankrupt, who during the stay of execution, sold some of his property and appropriated money to his own use. He was not held in contempt as no order was issued forbidding the act.

hind the strict interpretation is that the Act of March 2d, 1831,[11] which is very similar to the present statute, was designed to curtail abuses[12] of the broad discretionary contempt power vested in federal judges.[13] Writers have argued that the statute restricts only the criminal, as opposed to the civil, contempt powers because the abuse which prompted the statute involved criminal contempt. Furthermore, civil contempts, which are remedial in nature, do not prompt a judge to abuse his contempt power in order to effect a personal vendetta.[14] Nevertheless, the few courts which have considered the question uphold the applicability of the statute to civil contempt.[15]

The *Griffin* majority follow the approach taken by other federal courts in not requiring violation of a specific mandate.[16] These courts have resorted to three basic lines of reasoning: (1) broad construction of the terms of the contempt statute,[17] as in *Griffin*, which equates

[11]"Be it enacted . . . that the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of said courts." Act of Mar. 2d, 1831, ch. 99, § 1, 4 Stat. 487.

[12]Judge Peck imprisoned and disbarred a lawyer for publishing a criticism of an opinion written by him, while an appeal of his decision was pending. Impeachment proceedings were brought against Judge Peck for abuse of his discretionary contempt power, but he was acquitted on January 31, 1831. The following day, legislative action was initiated to change the law of contempt. This legislation resulted in the Act of March 2d, 1831. Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempt in "Inferior" Federal Courts*, 37 HARV. L. REV. 1010, 1024-30 (1924).

[13]The Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83, provided: "And be it further enacted, that all the said courts of the United States shall have the power to . . . punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."

[14]See Comment, 19 B.U.L. REV. 668, 672 (1939); 54 HARV. L. REV. 137, 138 (1940).

[15]Penfield Co. v. SEC, 330 U.S. 585, 594 (1947); United States v. Montgomery, 155 F. Supp. 633, 637 (D. Mont. 1957); *Cf. In re* Sixth & Wisconsin Tower v. Aitkin, 108 F.2d 538, 540-41 (7th Cir. 1939). See Wright, *Civil and Criminal Contempts in the Federal Courts*, 17 F.R.D. 167, 169-70 (1955). Most courts assume without question that the statute applies to both civil and criminal contempt. See, *e.g.*, Raymor Ballroom Co. v. Buck, 110 F.2d 207 (1st Cir. 1940); Berry v. Midtown Serv. Corp., 104 F.2d 107 (2d Cir. 1939).

[16]Converse v. Highway Constr. Co., 107 F.2d 127, 129 (6th Cir. 1939); Clay v. Waters, 178 Fed. 385, 394 (8th Cir. 1910); *In re* Portland Elec. Power Co., 97 F. Supp. 903, 916 (D. Ore. 1947); Lineker v. Dillon, 275 Fed. 460, 470 (N.D. Cal. 1921). That there need not be a specific order for contempt of the Supreme Court see Merrimack River Sav. Bank v. City of Clay Center, 219 U.S. 527 (1911).

[17]*In re* Portland Elec. Power Co., 97 F. Supp. 903 (D. Ore. 1947), United States

the word process with an appeal; (2) interpretation of a legal action, such as the filing of a petition in bankruptcy, as an implied order prohibiting the unauthorized removal of the subject matter of litigation;[18] (3) inapplicability of the statute as a limitation on the power of the courts to punish for the unauthorized removal of property in the custody of the court.[19]

The first approach, broad construction, is illustrated in *United States v. Zavelo*.[20] In *Zavelo*, out-of-state witnesses were subpoenaed by the United States to testify in a criminal proceeding. Immediately upon acquittal, the defendant instituted civil actions against the witnesses for malicious prosecution, causing process to be served on them at the trial. The court held that the witnesses were immune from the service of process while attending the trial. The purpose of this immunity, or privilege, is to insure the attendance of witnesses. Furthermore, the subpoena is an order which not only requires attendance but also includes the protection of the court against interference with the witnesses' privilege. When the defendant caused service of process to be issued, he violated the privilege, thereby violating the order within the meaning of the contempt statute.

Another broad construction of the terms of the statute is illustrated in *In re Portland Elec. Power Co.*[21] *Portland* construed the terms "rule" and "order" as referring to the duty of the court to protect property committed to it. Any unauthorized interference with this property is violative of a rule and order of the court, and the acting party may be held in contempt.[22]

The second approach, implied court order, is most often used in bankruptcy proceedings.[23] Here, the authority for a contempt citation is based on the well established principle that the filing of a petition in bankruptcy embodies, in itself, a caveat and an injunction to all the world against interference with the bankrupt's property.[24] Since this principle was derived from the laws of bankruptcy,[25] it seems ques-

v. Zavelo, 177 Fed. 536 (C.C.N.D. Ala. 1910); Bridges v. Sheldon, 7 Fed. 17 (C.C.D. Vt. 1880).

[18]Converse v. Highway Constr. Co., 107 F.2d 127, 129 (6th Cir. 1939); Clay v. Waters, 178 Fed. 385, 394 (8th Cir. 1910); Lineker v. Dillon, 275 Fed. 460, 470 (N.D. Cal. 1921).

[19]Lamb v. Cramer, 285 U.S. 217 (1932); Merrimack River Sav. Bank v. City of Clay Center, 219 U.S. 527 (1911).

[20]177 Fed. 536 (C.C.N.D. Ala. 1910).

[21]97 F. Supp. 903 (D. Ore. 1947).

[22]*Id.* at 917.

[23]Converse v. Highway Constr. Co., 107 F.2d 127 (6th Cir. 1939); Clay v. Waters, 178 Fed. 385 (8th Cir. 1910).

[24]*Ibid.*

[25]Converse v. Highway Constr. Co., 107 F.2d 127, 129 (6th Cir. 1939).

tionable whether the implied court order should be used in other than bankruptcy litigation. However, the implied order has been used in other contexts to enable the court to preserve the subject matter of the litigation. In *Lineker v. Dillon*,[26] a judgment debtor, during a stay of execution, disposed of her property in a manner that would have made it difficult for the court to execute the judgment. The court held that the stay of execution order was intended to maintain the status quo and that such an order was implied in the stay of execution despite the absence of a specific order forbidding the acts of the defendant.[27]

The third approach, that, irrespective of the statute, the federal courts have the power to hold a party in civil contempt for the unauthorized removal of property in the custody of law, finds support in *Lamb v. Cramer*.[28] In *Lamb*, the Supreme Court of the United States affirmed a decision holding an attorney in contempt for his receipt, during the course of litigation of a creditor-debtor action, of property in payment of legal fees. Although there was no express order forbidding the attorney's conduct, the Court found that his receipt of the property tended to defeat a subsequent decree of the court, and he was held in contempt for the removal of property in the custody of law. *Lamb*, while upholding the contempt charge, did not resort to a broad interpretation of the terms of the statute, nor did the court expressly rely on the implied court order principle. It is significant to note that the statute was not mentioned. *Lamb* might therefore stand for the proposition that the statute imposes no limitation on the lower federal court's power to punish for the unauthorized removal of property in its custody. However, it is difficult to reconcile this view with a previous Supreme Court holding that the statute *does* limit and define the contempt powers of the inferior federal courts.[29] Moreover, the Court's failure even to consider the statute makes it

[26]275 Fed. 460 (N.D. Cal. 1921).

[27]*But see* Berry v. Midtown Serv. Corp., 104 F.2d 107 (2d Cir. 1939). In *Berry* a judgment debtor transferred all of his assets to various affiliated corporations during a stay of execution. The plaintiff alleged that the transfer was in violation of an implied order. The court held that an order staying execution upon a judgment cannot be regarded as impliedly requiring defendent to maintain the status quo, so as to render his conduct of making himself execution-proof punishable as a contempt of court.

[28]285 U.S. 217 (1932).

[29]*Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510-11 (1873). The Supreme Court held that the statute restricts the contempt power of subordinate federal courts. However, the Court expressed doubt as to the applicability of the statute to itself. In Merrimack River Sav. Bank v. City of Clay Center, 219 U.S. 527 (1911), the Court held that it had power to hold a party in contempt for wilful removal of the subject matter of the litigation beyond the reach of the Court ir-

doubtful that the lower federal courts' powers were being so extended.[30]

In summary, there are three approaches used in refuting the position that there must be a specific court order forbidding the allegedly contemptuous act before the actor may be held in contempt: (1) the broad construction approach; (2) the implied court order approach; and (3) the *Lamb* approach. That the third approach exists in fact is questionable. It may be that *Lamb* employed the implied court order approach to substantiate the contempt holding even though the court did not specifically mention this concept.[31] The majority in *Griffin* suggested that *Lamb* might be an unmentioned interpretation of the statute, thus permitting a contempt holding under the statute even in absence of a specific order forbidding the attorney's conduct.[32] Whatever the case, it is obvious that clarification is needed as to the effect of the statute on the courts' contempt power. The strained statutory interpretation technique used in *Griffin* leads us to but one conclusion: the statute, as applied to the unauthorized removal of the subject matter of litigation, is meaningless; and the courts' power to punish for such acts is unhampered. Either the Supreme Court[33] or Congress should take a position as to whether the federal courts' power to protect property in litigation is contingent upon prior issuance of a specific order. Whatever the decision, a decision should be made.

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respective of the existence of an injunction. But the Court failed to discuss whether the subordinate federal courts had similar power.

[30]The *Griffin* minority suggested an explanation for *Lamb's* failure to mention the statute: "The Supreme Court wrote in Lamb v. Cramer as if the affront had been to itself. One can only suppose that it did so because the statute had not been called to its attention, for the Supreme Court had made it perfectly clear in *Robinson* that the subordinate, statutory federal courts are subject to the statute, and that their powers to punish contempts are effectively limited by it." 363 F.2d at 215.

[31]An examination of the authorities relied upon by *Lamb* suggests that *Lamb* employed the implied court order to bring the attorney's act within the disobedience provision of the statute. *Lamb* relied upon Clay v. Waters, 178 Fed. 385 (8th Cir. 1910), in holding that the attorney's receipt and diversion of the property, which was *in gremio legis*, tended to defeat the decree of the court. *Clay*, a bankruptcy proceeding, employed the implied court order approach to reject the defendant's argument that no order had been issued forbidding his conduct as required by the contempt statute. It is significant that the authorities cited by *Clay* for the implied court order principle were bankruptcy cases, which held that a filing of a petition in bankruptcy embodies a commanding injunction against interference with the property of the bankrupt. See Comment, 57 YALE L.J. 83, 100 n.97 (1947).

[32]363 F.2d at 211.

[33]Unfortunately the Supreme Court denied certiorari to the defendants in *Griffin*. Board of Supervisors v. Griffin, 87 Sup. Ct. 395 (1966).