

“CONTEMPT OF COURT”

BY

CHARLES E. FLANDRAU

FOREWORD

BY

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Charles E. Flandrau was stimulated to write the following essay on the power of courts to “punish for contempt” by a controversy surrounding its exercise during, as he put it, “recent events in the administration of justice in Chicago.” Those “events” are known to students of American history as “The Pullman Strike.” The court case in which the contempt power was exercised is known to students of constitutional law as *In re Debs*, 158 U. S. 564 (1895). And today very few scholars of any discipline apply the phrase “administration of justice” to those events.¹

Flandrau argued that courts must have broad powers of contempt for such authority is essential to the administration of justice. Without it, courts would become a “laughing stock of every one.” It is not surprising that he took this position. Having served on the Minnesota Territorial Supreme Court in 1857 and 1858 and, after

¹ For an introduction to the “events in Chicago,” see David Ray Papke, *The Pullman Case: The Clash of Labor and Capital in Industrial America* (Lawrence: University of Kansas Press, 1999). On *Debs*, see Owen M. Fiss, *Troubled Beginnings of the Modern State. 1888-1910* 53- 74 (New York, Macmillan Pub. Co., 1993) (Vol. 8 of the *Oliver Wendell Holmes Devise History of the Supreme Court of the United States*). For the trial strategy of Debs’ defense attorney, Clarence Darrow, see Kevin Tierney, *Darrow: A Biography* 108-116 (New York: Thomas W. Crowell Pub., 1979).

statehood, on the Minnesota Supreme Court from 1859 to 1864, he obviously felt that he could write with authority on the subject of “contempt of court.” It likely never occurred to him that the contempt power may have been misused in the *Debs* case.

In any event, it is Charles Flandrau’s writing style that strikes anyone who reads this essay today. Lawyers no longer write like he did—nowadays they document their essays with copious references, quotes and footnotes whereas he did not cite a single case. He did, however, quote a long passage from Shakespeare’s *Henry IV, Part II*.

There are countless differences between the way lawyers practiced in the nineteenth century and how they practiced in the late twentieth and early twenty-first, and among the most obvious is how lawyers use literature, especially poetry, in their writings and speeches. In the nineteenth, lawyers quoted poems to express emotion and sentiment, to illuminate a person’s character or, as in Flandrau’s essay, to illustrate a point. Poetry was then so familiar to the bar that lawyers usually did not even name the poet they quoted because they assumed their audience knew who it was.

In the nineteenth century lawyers and jurists were masters of funerary addresses. Charles Flandrau died on September 9, 1903, and the following month a memorial service was held for him in the state supreme court. In his remarks, United States District Court Judge Rensselaer R. Nelson quoted *Hamlet*, while St. Paul lawyer Christopher D. O’Brien quoted “the great poet’s” *Julius Caesar*.² As was the fashion, they did not give the titles of these plays.

There are multiple reasons why poetry is no longer a feature of the everyday language of the bar—teaching methods in law schools, the diminished role of oratory in trial practice, and the availability of other sources, particularly the social sciences, to perform the task poetry once did, as well as changes in poetry itself.³

² *Proceedings in Memory of Associate Justice Flandrau*, 89 Minn. xxi, xxxiii, xxxv (1904).

³ A website, *Strangers to Us All: Lawyers and Poetry*, established and maintained by Professor James R. Elkins of the College of Law, West Virginia University, identifies this country’s “lawyer/poets.” It has a “state index” of

Most lawyers who read Flandrau's essay on contempt of court in *The Minnesota Law Journal* in October 1895 would not have been surprised that one-fourth of it was a lengthy excerpt from Shakespeare, but a few with long memories would have shaken their heads in amusement. They would have recalled that Cushman Kellogg Davis used the same quotation from *Henry IV, Part II* to illustrate the importance of a court's contempt power in his famous summation to the state senate in the impeachment trial of Judge Sherman Page in June 1878.⁴

Ten articles of impeachment were lodged against Judge Page; Article VIII charged him with abusing his contempt powers.⁵ Davis,

lawyers who have published poetry, and lists the following as Minnesota's lawyer/poets: Charles S. Bryant (1808-1885); Ignatius Donnelly (1831-1901); Patrick Cudmore (1831-1916); Hanford Lennox Gordon (1836-1920); Henry Anson Castle (1841-1916); Howard S. Abbott (1862-1944); Rollin Leonard Smith (1887-1942); Benjamin Whipple Palmer (1889-1964); and Amos Spencer Deinard (1898-1985).

Like many others of his time, Flandrau once tried his hand at poetry. After they left the bench in 1864, he and Isaac Atwater moved to Nevada to prospect for gold. There he occasionally published romantic verse in a local newspaper. One, dedicated to a "beautiful and accomplished lady," read in part:

Gorgeous tresses, exquisitely arrayed;
Nobel brow where intellect displayed;
Liquid eyes that penetrate the heart;
teeth of pearl, whose brilliancy impart
To the whole expression of the face
a ray of love, a fascinating sense of grace.
A bust — but here presumptuous mortal stay;
Let artist gods this beauteous bust portray...

Quoted in Larry Haeg, *In Gatsby's Shadow: The Story of Charles Macomb Flandrau* 24 (Iowa City: University of Iowa Press, 2004).

⁴ For other commentary on the Page impeachment trial, see *History of Mower County, Minnesota* (1884), posted separately on the MLHP.

⁵ I *Journal of the Senate of Minnesota, Sitting as a High Court of Impeachment, for the Trial of Hon. Sherman Page, Judge of the Tenth Judicial District* 18-19 (St. Paul: Ramaley & Cunningham, 1878). The trial transcript was published in three volumes and are commonly cited as *Trial of Page*. In Article VIII, Page was accused of issuing a warrant for the arrest of

one of the defense team, delivered the closing argument.⁶ He was a devotee of serious literature and would publish *The Law in Shakespeare* five years later. In that book, Davis illustrated how the word “committed” was used by Shakespeare in the scene from *Henry IV, Part II* that he quoted in his summation:

In this scene the law of contempt of court is stated by the chief justice, and recognized by the king, who when prince had struck the chief justice open court, and was committed therefor *instanter* in to prison. This mode of proceeding has been exercised from the earliest times. If the contempt be committed in the presence of the court the offender may be instantly apprehended, and imprisoned at the discretion of the judges without any further proof or examination. (*4 Bl. Comm. marg. p. 286.*) The writer had occasion to use this scene in his argument before the senate of Minnesota in defense of Judge Page, against whom articles of impeachment had been presented. The action of the judge, in which he punished in a very summary manner an officer of the court for contempt, was made the basis of one of the articles. The proceeding was so summary that it was felt necessary by his counsel to labor greatly in defending him on that particular article. Accordingly, Shakespeare was pressed into service...⁷

Judge Page was acquitted. But Flandrau is guilty, not of plagiarism, but of failure to credit Davis for inspiring his use of

Deputy Sheriff David H. Stimpson, holding a summary hearing to determine whether he should be held in contempt of court, and then dismissing the charge a month later.

⁶ William Watts Folwell, III *A History of Minnesota* 406 (Minnesota Historical Society Press, 1969)(First edition 1924) (“Because of the illness of a colleague, ex-Governor Davis was obliged to make the argument for the defense unaided.”).

⁷ Cushman Kellogg Davis, *The Law in Shakespeare* 173-74 (Washington, D.C.: Washington Law Book Co., 1883).

Shakespeare in “Contempt of Court,” published almost two decades after the Page impeachment trial.⁸

Flandrau’s essay appeared on pages of 219-221 of the October, 1895, issue of *The Minnesota Law Journal*. Though reformatted, it is complete. His punctuation and spelling have not been changed.

The complete section on the word “committed” from Cushman Kellogg Davis’s *The Law in Shakespeare* appears in an Appendix, immediately following Flandrau’s article. ■

⁸ Perhaps, if we follow the example of Benjamin Franklin, we will not be too critical of Flandrau for borrowing from Davis. In his *Autobiography*, published in France in 1791, Franklin describes a Presbyterian minister who arrived in Philadelphia in 1734 and began delivering powerful sermons that were widely admired. Unfortunately, an “adversary” heard one, thought it sounded familiar, and, after some research, discovered that it was the same as a sermon published in a British journal. This “detection” led many to “abandon his cause,” but not Franklin, who wrote, “I stuck by him, however, as I rather approv’d his giving us good sermons compos’d by others, than bad ones of his own manufacture, tho’ the latter was the practice of our common teachers.”

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CONTEMPT OF COURT

From recent events in the administration of justice in Chicago and elsewhere, the power of courts to punish for contempt has been brought into more than usual prominence, and has received much comment and criticism from various sources, the general tenor of which, has been against its exercise.

It is quite natural that in free America, where personal rights, and the liberty of the citizen are held in such sacred reverence—where trial by jury is regarded as the citadel of every man's protection from arbitrary or capricious punishment, and where the exercise of authority by any branch of the government which infringes upon the natural rights of the citizen, is watched with jealous care, that imprisonment without the usual forms and solemnities of trial, should excite, alarm, and engender apprehension among our people—yet with all persons who are conversant with legal procedure, it is well known that courts have always possessed the power to inflict summary punishment for contempt of their dignity, by disobedience to their orders, or offensive conduct committed in their presence, or in obstruction of their proceedings, and also that it would utterly impossible to administer the law in the absence of such power.

Contempt of court is defined in law dictionaries to be “where a person who is party to a proceeding in a court of record, fails to comply with an order made against him, or an undertaking given by him, or where a person, whether a party to a proceeding or not, does any act which may tend to hinder the course of justice, or

show disrespect to the court's authority." "Contempt of court is an offense punishable summarily by fine or imprisonment or both."

It must be understood that the whole majesty and power of the State is vested in its courts. The legislature enacts what the law shall be, and the courts administer, and (with executive aid when necessary,) enforce it. A court that was powerless to enforce its orders and decrees, would be the laughing stock of every one; it could not even hold its sessions; it would be degraded to utter insignificance, and cease to exist by its inherent weakness. The functions of a court are to decide what is right and what is wrong, where such results cannot be arrived at by convention and agreement; and to decide between guilt and innocence, punishing one, and protecting the other. It must possess all the power necessary to command respect, and enforce obedience. It must be largely the arbiter of the conduct of its own proceedings. Its potentiality must be so unquestionable as to inspire awe in rulers as well as subjects. It can show no partiality or respect for persons, but must treat all alike; In a word, a Judge to perform successfully the duties of his high office, must be clothed with sufficient power to strike down at once and without discussion all attempts to impede the full and effectual administration of the law.

To curtail these powers would be to emasculate the law, and destroy the State. They have always existed wherever civilization held sway, and will only cease when anarchy prevails.

The recent fearless exercise of the power to punish for contempt by our courts will do more to keep the peace, allay the fears of the public, and maintain good government, than anything that has happened since the suppression of the Rebellion. Of course, parties whose avocation is law breaking, and inciting others to its violation, will not agree with me.

"No rogue ere felt the halter draw,
With good opinion of the law."

An illustration of the vigor with which the courts of England have maintained their dignity by the aid of this power, is found in the exercise of it which occurred under very exceptionable circumstances. The Prince of Wales, who became afterwards King of England, as Henry the Fifth, was provoked at a decision of Sir William Gascoigne, then a judge of the King's Bench, which in some way involved the Princes' servant. He was insolent to the Judge in court, and was immediately committed to prison. The incident has been rendered immortal by Shakespeare who refers to it in his play of Henry the Fourth. Second part. After the prince has become King he meets the Judge, who evidently thinks the King will resent the punishment he had inflicted upon him when a prince, and in vindication of his conduct addressed him thus.

Chief Justice—

I then did use the person of your father,
The image of his power then lay in me;
And in the administration of his law,
Whiles I was busy for the commonwealth,
Your highness pleased to forget my place,
The majesty and power of the law and justice,
The image of the King whom I presented,
And struck me in my very seat of judgment,
Whereon, as an offender to your father
I gave bold way to my authority
And did commit you.

The King answers like a just ruler, and not only upholds the judge, but heaps new honors on him.

King—

You are right, Justice, and you weigh this well:
Therefore still bear the balance and the sword;
And I do wish your honors may increase,
Till you do live to see a son of mine
Offend you, and obey you as I did,
So shall I live to speak my father's words,
Happy am I, that have a man so bold
That dares do justice on my proper son:

And no less happy, having such a son,
That would deliver up his greatness so
Into the hands of justice. You did commit me;
For which I do commit your hand
The unstained sword that you have used to bear;
With this remembrance—That you use the same
With the like bold, just, and impartial spirit
As you have done against me. There is my hand.

We have here an expression of the sentiment that was entertained for the purity and fearlessness of the courts by the people of England as far back as the time of the Henry's. While it is to be hoped that the occasions for the exercise of this necessary power by the courts, may be few and far between, it is also to be desired that when the necessity does arise, our courts will meet it with the fearlessness and promptitude that has characterized them in both ancient and modern times.

CHAS. E. FLANDRAU.

APPENDIX
FROM
THE LAW IN SHAKESPEARE

MLHP: The book has two sections: The first is a 59 page “Introduction” in which Davis discusses the question of who was the real author of Shakespeare’s plays—Davis concluded that Shakespeare was—and the second is a 194 page compendium of 312 legal words or phrases illustrated by excerpts from the plays in which they appear. The word “committed” is the 141st word and is discussed on pages 171-180. One sentence in that discussion explains why he and other lawyers were attracted to Shakespeare:

It is the prerogative of Shakespeare that whatever he stoops to touch becomes authoritative in quotation.

Here is how Shakespeare's *Henry IV, Part II* was "pressed into service" by Davis in the Page trial:

No. 141.

King. You all look strangely on me: and you most;
[*To the Chief Justice.*

You are, I think, assur'd I love you not.

Ch. Just. I am assur'd, if I be measur'd rightly,
Your majesty hath no just cause to hate me.

King. No!

How might a prince of my great hopes forget
So great indignities you laid upon me?
What! rate, rebuke, and roughly send to prison,
The immediate heir of Engand! Was this easy?
May this be wash'd in Lethe, and forgotten?

Ch. Just. I then did use the person of your father;
The image of his power lay then in me;
And, in the administration of his law,
Whiles I was busy for the commonwealth,
Your highness pleased to forget my place,
The majesty and power of law and justice,
The image of the king whom I presented,
And struck me in my very seat of judgment;
Whereon, as an offender to your father,
I gave bold way to my authority,
And did commit you. If the deed were ill,
Be you contented, wearing now the garland,
To have a son set your decrees at nought;
To pluck down justice from your awful bench,
To trip the course of law, and blunt the sword
That guards the peace and safety of your person:
Nay, more, to spurn at your most royal image,
And mock your workings in a second body.
Question your royal thoughts, make the case yours;
Be now the father and propose a son:
Hear your own dignity so much profan'd,
See your most dreadful laws so loosely slighted,
Behold yourself so by a son disdain'd,
And then imagine me taking your part,

And, in your power, soft silencing your son:
After this cold considerance, sentence me;
And, as you are a king, speak in your state,
What I have done that misbecame my place,
My person, or my liege's sovereignty.

King. You are right, justice, and you weigh this well;
Therefore still bear the balance and the sword:
And I do wish your honours may increase,
Till you do live to see a son of mine
Offend you, and obey you, as I did.
So shall I live to speak my father's words,
"Happy am I, that have a man so bold,
That dares do justice on my proper son;
And not less happy, having such a son,
That would deliver up his greatness so,
Into the hands of justice." You did commit me:
For which, I do commit into your hand
The unstained sword that you have us'd to bear;
With this remembrance,—that you use the same
With the like bold, just, and impartial spirit,
As you have done 'gainst me.

2 Henry IV., Act 5, Scene 2.

In this scene the law of contempt of court is stated by the chief justice, and recognized by the king, who when prince had struck the chief justice open court, and was committed therefor *instanter* in to prison. This mode of proceeding has been exercised from the earliest times. If the contempt be committed in the presence of the court the offender may be instantly apprehended, and imprisoned at the discretion of the judges without any further proof or examination. (*4 Bl. Comm. marg. p. 286.*) The writer had occasion to use this scene in his argument before the senate of Minnesota in defense of Judge Page, against whom articles of impeachment had been presented. The action of the judge, in which he punished in a very summary manner an officer of the court for contempt, was made the basis of one of the articles. The proceeding was so summary that it was felt necessary by his counsel to labor greatly in defending him on that particular

article. Accordingly, Shakespeare was pressed into service, as follows:

“Nearly all of these articles of impeachment are so trivial as to seem, at first view, scarcely to warrant the serious discussion they have received. But as we have proceeded in our duties we have become persuaded that the danger in the charges is not what they allege, but lies in the principle upon which they are based; that the danger is not to this respondent but to the public itself—for the spirit which inspires them all is the spirit of revolt against constituted authority. It has appeared in that most dangerous form of an attack upon the judicial department of the state, upon its integrity, upon its independence. There is, after all, a wise conservatism in the people, and while they make and unmake with a breath the executive and the legislature, they instinctively refrain from subjecting the judiciary to the attacks of prejudice or disaffection. They do not require a judge to be popular. They require him to be honest and as firm as the system of law which he administers. They recognize the fact that there must exist in all forms of government an ultimate principle of absolutism and permanency, an impregnable barrier against the fitful mutations of the hour, an inexorable expounder of those laws of self-preservation which precede the formation of states, which preserve property, which secure liberty, which bear with unintermittent force upon the concerns of society with all the power of gravitation. In our system the judiciary is this principle. It is this cohesive principle of our system which is this day attacked, in the person of a judge whose integrity has not been questioned even by his enemies. Our entire policy is thus assailed at its strongest point. If you destroy that which is most permanent, the efficacy and independence -of the rest of the structure will fall in ruin without further attack, merely as the logical consequence of such a process. Is it not well for us to pause? Rude usurpers, aggressive kings have paused at this decisive point. Shall we be less wise than they?

It is the prerogative of Shakespeare that whatever he stoops to touch becomes authoritative in quotation. He is the magistrate of both imagination and reason. There is scarcely a topic in the universe of human thought which that marvelous mind has not

compassed in its cometary sweep He has walked in the abyss of human nature and seen the thousand fearful wrecks, the unvalued jewels, and all the lovely and the dreadful secrets which lie scattered in the bottom of that illimitable sea The maxims of policy, the rules of war, the subtleties of love, the patient forecast of hate, the pangs of remorse, the ready wages which jealousy always pays to the miserable being it employs—all things over which the mind or the nature of man has jurisdiction, receive from him their definition and expression, excepting those awful topics of the hereafter, which, of all the children of men, he, greatest, has been too reverent to touch. He knew of the circulation of the blood. In instance after instance he has not only used the terms of the law with the strictest precision, but has stated its abstrusest principles with entire correctness. So wonderfully true is this assertion of his despotic empire, that conjecture, in its baffled extremity, had declared that the hidden hemisphere of this world of thought, must be Francis Bacon, who, in his youth ‘took all knowledge for his province,’ as if it were his heritage. Shakespeare has created an immaterial universe which will, like him, survive the bands of Orion, and Arcturus and his sons. He peculiarly knew the limitations of power and authority, and enforced them by many constitutional illustrations. And in that respect he has presented no finer exposition than that one where he magnifies the sacredness of judicial authority in the scene between Henry V., lately become king, and the chief justice, who had formerly committed him for contempt. The old magistrate stood trembling before the young king, whose life had given no warrant of wisdom or integrity; for he had in his reckless days been the boon companion of Falstaff and his disreputable associates.

Referring to his humiliation by the judge, the king asked,

May this be washed in Lethe and forgotten?

The judge interposed this memorable defense:

I then did use the person of your father;
The image of his power lay then in me!
And, in the administration of his law,

Whiles I was busy for the commonwealth,
Your highness pleased to forget my place,
The majesty and power of law and justice,
The image of the king whom I presented,
And struck me in my very seat of judgment,
Whereon, as an offender to your father,
I gave bold way to my authority,
And did commit you.

Whiles I was busy for the commonwealth,
Your highness pleased to forget my place,
The majesty and power of law and justice,
The image of the king whom I presented,
And struck me in my very seat of judgment,
Whereon, as an offender to your father,
I gave bold way to my authority,
And did commit you.

It prevailed, for the king replied:

You are right, justice, and you weigh this well;
Therefore still bear the balance and the sword;
And I do wish your honors may increase,
Till I do live to see a son of mine
Offend you, and obey you, as I did.
So shall I live to speak my father's words—
'Happy am I, that have a man so bold,
That dares do justice on my proper son:
And not less happy, having such a son,
That would deliver up his greatness so
Into the hands of justice.' You did commit me,
For which I do commit into your hands
The unstained sword that you have used to bear,
With this remembrance: That you use the same
With the like bold, just and impartial spirit
As you have done 'gainst me.

Of all the illustrations which Shakespeare has given to authority, in its highest or lowest estate, I know of none finer than this. Not Richard, sitting upon the ground and telling sad stories of the death of kings when all his fleeting glory seemed but a pompous

shadow; not Prospero, the ruler of two realms, who by virtue of his sway over his immaterial kingdom looked upon the great globe itself as a phantasma merely, which would vanish with all its cloud-capped towers, and gorgeous palaces, and solemn temples; not Lear, invoking from the elements themselves the abdicated regalities of his sovereignty, seem to me so imposing as this youth, once so wayward, respecting the majesty of the law in the person of its faithful servant. You can bow before this mob. You can lead an attack which will be repeated upon every department of our government by all the blatant and riotous law-breakers of time to come, who may rise up in rebellion against statutes enacted for their condemnation against magistrates who condemn them. Or you can make enduring the endangered functions of the state. You can quell forever that arrogant spirit of insubordination, before which no judge is sacred, no constitutional provisions are obstacles. Say to this respondent—

Therefore still bear the balance and the sword;

* * * * *

The unstained sword which you have used to bear
With this remembrance: That you use the same
With the like bold, just and impartial spirit
As you have done.

—and this proceeding will live memorable in our history as one of its preservative events.”

(Trial of Judge Page, vol. 3, p. 248.)

Committed. (See Nos. 77, 136, 146, 160.)



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