

# RUMINATIONS

## A Species of Contempt

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In the relations of parent and child, or teacher and pupil, or the court and its bar, the decisions of the superior, for the time being, are final and are to be respected, whether wise or foolish, in fact. And they cannot be encountered with sneers and sarcasm, however just and appropriate the weapon may seem to those who use it, or to others.

Chief Judge Isaac Redfield, *In re Cooper* (1859).<sup>1</sup>

The whole thing started innocently enough. On the 10th day of June, 1857, Jesse Cooper was defending James Bergen for a small offense, in Irasburgh. The case was heard by Thomas Guild, a Justice of the Peace. Jesse raised a question of law, which triggered some discussion, and then a ruling by Justice Guild. Then Guild said, "It might be convenient enough for you, Mr. Cooper, to have the supreme court sit here all the time."<sup>2</sup>

Cooper responded, "I don't think that is necessary, for I think this magistrate wiser than the supreme court." In the next words that were spoken, Justice Guild fined Cooper ten dollars for contempt of court.

Cooper never paid the fine. He treated the incident as one of those best-forgotten exchanges that occur in courtrooms from time to time. But Justice Guild remembered. He ordered the Sheriff to arrest Jesse and place him in Irasburgh jail until he paid the fine.

Cooper was arrested in October. Irasburgh, where the offense was committed, was the county seat of Orleans County from 1818, when the county was formed, until 1917, when Newport City took over the role.<sup>3</sup> Jesse appealed to the Supreme Court, believing soundly that a JP did not have the power to punish for contempt, and certain that what he had said was not contempt anyway. In his view, his answer was defensive, responding in kind to the Justice's sarcasm with some of his own.

Chief Judge Isaac Redfield wrote the opinion for the Court. Judge Redfield understood Cooper's shock at the severity of his punishment, "in consequence of the loose habits of forensic etiquette which almost universally prevail in justice courts," and even though the Defendant "has before known far greater indignities to pass unpunished."<sup>4</sup> But contempt was contempt, in whatever court it appeared, even in Irasburgh. Sarcasm, wrote Redfield upholding the fine, has no place

in a courtroom. Cooper must accept that he was in error:

And in that respect he is in a condition very similar to many who have failed to convince others of the soundness of their own views, or to become convinced themselves of their fallacy. Even though vanquished by mere authority, he can argue and is of the same opinion still. His argument in this case seems to breathe a spirit of respect for, and submission to, the decisions of the constituted tribunals of the State. It only remains to be known whether his conduct will be made to conform to that spirit, of which, from a long personal acquaintance, I am happy to say I have not the slightest doubt. It is, perhaps, to be regretted that any such collision should have occurred between counsel and any court.<sup>5</sup>

Jesse Cooper is one of a long line of stubborn lawyers. Unlike most, he went to jail for a principle. His exchange with Guild occurred in June. In October, the Sheriff had come to take him away, and he stayed in Irasburgh jail while his appeal was pending. His brief, written in March 1859, when the Court arrived in town, was addressed from the jail. For refusal to pay a \$10 fine, he spent at least eighteen months in jail. The sheriff would let Cooper out during the day to attend his law business, but through two winters Jesse slept on a bed provided by the county. Justice Guild was offended by this soft treatment of Cooper and threatened the sheriff with a civil lawsuit unless he relented, but the sheriff was a reasonable man, and continued the practice.

Justice Guild was right. It would have been more convenient for Jesse to have the Supreme Court in Irasburgh every day. His appeal might have been as swift as his punishment, and he would have had his answer without all those months of dis-

comfort.

Jesse Cooper had no jury trial of his contumacious statement. There was no record. This was a Justice Court. There was no indictment or information. His type of contempt was, and continues to be, an offense regulated by summary punishment.<sup>6</sup> It is a creature of the common law, court rule, and statute.

### The Nature of Contempt

Vermont courts have seen unruly behavior by defendants, plaintiffs, witnesses and lawyers, no less than other jurisdictions. These moments are among the most dramatic that occur in a courtroom. "We'll certify that the defendant has just conducted himself in contempt of court; swearing at the court in the presence of an open courtroom. We would add additional ninety days to the sentence."<sup>7</sup> The report speaks for itself. Another defendant earned up to ninety days for saying to the Court, "I told you I didn't want to stay in this trial; — it is all phoney! I told you that this morning." When he asked for a jury trial, the Supreme Court denied his request.<sup>8</sup> This species of contempt is not entitled to a jury trial.

"It is a jurisdiction as old as the common law itself," wrote Lord Russell, of the office of contempt, in 1900.<sup>9</sup> Justice Harlan Slack distinguished two types of contempt in *State v. Morse* (1924). A criminal contempt, he wrote, "is one committed directly against the authority of the court, tending to impede or interrupt its proceedings or lessen its dignity, while a civil contempt is one which operates mainly to deprive another party to a suit of some right, benefit, or remedy to which he is entitled under an order of the court." But he admitted the "line of demarcation" between the two was "shadowy."<sup>10</sup> The more common of the two is civil contempt.<sup>11</sup> But criminal contempt has its time and place.

Criminal contempt falls into two categories as well. One type is illustrated by V.R.Cr.P. 42(a), which provides the basic authority for summary punishment when the judge certifies that he saw or heard conduct constituting contempt in the actual presence of the court.<sup>12</sup> Jesse Cooper experienced that variety of contempt. Eleven years later, a man named Mahoney tasted the other kind, for something he had written in a newspaper.<sup>13</sup>

### Not Much Surprise

Chief Judge Homer Royce was first elected to the Supreme Court in 1870, after careers in law and public service, including two terms in Congress. After John Pierpoint's death in 1882, Homer Royce, the nephew of former Chief Judge Stephen Royce, became Chief. Homer's son, Stephen E. Royce, had studied law with his father and after his admission to the bar in 1880 opened an office in St. Albans, where he attracted business clients including the Central Vermont Railroad, whose central offices were located in the city. Stephen was also for a time the editor of the *St. Albans Daily Advertiser*.<sup>14</sup>

The Chief by virtue of his office was the presiding judge of the County Court in Franklin County, and a chancellor of the court, and had ruled on several Central Vermont Railway cases both at the trial bench and on the appellate court.

On June 5, 1884, a man named Mahoney published an item in the *Richford Gazette*.

It is quietly going the rounds in St. Albans railroad circles that Chief Justice Royce will resign from the supreme bench, and that he and his son will form a law partnership, and will attend to the extensive law business of the Central Vermont Railroad Company. It has been suspected for years that Mr. Royce was retained by the railroad company. Therefore this proposed open espousal of their cause will not occasion much surprise.<sup>15</sup>

Mahoney was prosecuted for contempt. This was not the only time there was bad blood between Mahoney and Chief Royce. In 1885, M. L. Mahoney and H. M. Goff were sued for libel by the Chief Justice for having written these lines in the *Gazette*: "He has received presents and favors from leading litigants." The Vermont Supreme Court concluded this was an implication that the Chief was guilty of bribery, and

upheld the verdict against the defendants.<sup>16</sup>

The contempt case came before the Vermont Supreme Court in 1886 upon appeal, and was affirmed. The lawyers for Mahoney claimed as a defense that there were no cases presently pending before the high court, that nothing in the publication alleged that the Chief was a lawyer, and that it was not libelous because it merely alleged something, rather than stating it as a fact. They did the best with what they could, but the fine was upheld.

Where was the First Amendment? The subject never came up. The first time the Vermont Supreme Court even mentioned the First Amendment in the context of a freedom of the press case, was *State v. Greaves* (1914), where a city ordinance prohibiting the selling of literature without a peddler's license, as applied to a lady selling religious pamphlets, was found unconstitutional.<sup>17</sup>

### "No Use for a Democrat . . ."

In 1900, E. M. Sutton was disgusted when he learned that his friend Cosgrove's conviction had been upheld by the Vermont Supreme Court. Somebody heard him say, "There is no use for a Democrat to bring anything to the supreme court of Vermont where politics is involved, and there is an unbroken line of just such procedure for the last forty years." He was indicted for defaming the Supreme Court, and convicted.<sup>18</sup>

On appeal, Sutton claimed the language should be taken *in mitiori sensu*, meaning in its mildest application, having a meaning quite different from its innuendo. But innuendo is enough, wrote Judge John Rowell. "If the words are legally capable of the meaning ascribed to them by the innuendo, it is for the jury to say whether the innuendo is supported or not, and that question cannot be tested by demurrer."<sup>19</sup>

### He Got It All Wrong

David W. Hildreth tested the limits of criminal contempt as it applies to published statements in 1909 and lost. He was found guilty of contempt for writing an article that "entirely misconceived and misstated the ground and reason" of a recent decision of the Court and suggested the Court was corrupt.<sup>20</sup>

Precisely what Hildreth wrote is not included in the Supreme Court decision, nor in the briefs of the counsel for the parties. We know it was published in the *Newport Express and Standard* on March

5, 1909, and that it criticized the Court's recent decision in *State v. Boston & M.R.R.*, involving a skirmish over the installation of a telephone at the Barton Landing station.<sup>21</sup> In his brief, Hildreth retracted what he had said, and admitted that his article was written in haste and without awareness of what the Court had ruled.

Chief Judge John Rowell began the decision with a look at the history of common law contempt for authority. He looked back to the first Vermont statute on contempt, adopted in 1787, and the words of its preamble, resolving that "defaming the civil authority of the state greatly tends to bring the same into contempt and enervate the government, for the prevention whereof . . ." The Chief had no doubt the article was defamatory and therefore contempt. He found no mitigation in the claimed defense that the case was no longer pending before the Court. The article "impugned the motives of the court and charged it with corruption," and this was sufficient.<sup>22</sup>

Rowell recited an "important qualification," reciting Lord Hardwick's sentiments "that courts and judges are alike open to criticism, and, if reasonable argument or expostulation is offered against any judicial act as contrary to law or to the public good, no court could nor would treat that as contempt of court; that the law ought not to be astute in such cases to criticise adversely what is published in such circumstances and with such an object."<sup>23</sup>

But Hildreth was guilty of contempt.

### Final Thoughts

In the courtroom, the raised bench, the robe, the seal, the flags and other symbols of authority give off an aura of sobriety and seriousness. It is not just the Orange Superior Court that is meeting today; it is all courts of justice, from all time. What happens there this morning is not just somebody's boundary dispute, but the administration of justice, in all its myriad guises.

Order is the first prerequisite. Outside the courthouse, anarchy may reign. People may treat each other rudely. Rules may be ignored. But at the door of the courthouse knives and other weapons are taken away. Inside different rules apply.

Inside the courthouse, they are not kidding. There will be order and respect. To the black robe all people owe obeisance. "Your honor" is not just a name; it signi-

fies an attitude of respect for the institution. We speak so carefully, in formal terms, avoiding familiarity.<sup>24</sup> When this respect is found wanting, courts have inherent power to punish it. These are the broad and curious powers of contempt.

The court really has no choice. It cannot prevaricate on order. It may overlook a remark or a look. It may develop bad hearing, as in the familiar, "Would you repeat that remark?" – which gives everyone time for reconsideration. But what are you going to do with a criminal defendant who will not behave? You can bind and gag the defendant, eject the defendant from the courtroom until the behavior improves – or you can cite for contempt, summarily.<sup>25</sup>

Courtrooms get hot. People get wound up, including lawyers. Too much emotion, too much anger or hostility are breeding grounds for contempt. Regular and lengthy recesses are sometimes the most appropriate remedy for hard feelings.<sup>26</sup>

The question has to be asked, whether a judge can be objective when he or she has been the object of a remark or gesture that offends the dignity of the bench? Whatever concerns some may have of the due process of summary punishment, it appears to be constitutional, and an approved practice in the courts. On review the appellate court will look hard at what happened, analyze the judge's conduct scrupulously, but in the end, the interests of justice necessarily overcome process.

For their contumely,<sup>27</sup> Jesse Cooper slept in jail for a year and a half, and he, Mahoney, Sutton, and Hildreth paid fines. Oral contempt, inside the courtroom, is something to guard against in every appearance, every day. Since Hildreth, there are no reported Vermont Supreme Court cases of contempt based on writings in the newspapers or in other media. In times of such varied opinion as ours, people are freer with their words, and some may think themselves immune from prosecution. This may be an imprudent judgment.

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<sup>1</sup> *In re Cooper*, 32 Vt. 258, 263-264 (1859).

<sup>2</sup> Until the 1890s, the Vermont Supreme Court moved weekly throughout the state, shire town by shire

town, hearing appeals.

<sup>3</sup> ESTHER MUNROE SMITH, VERMONT PLACE NAMES 361 (1977, 1996).

<sup>4</sup> *Cooper*, 32 Vt. at 264.

<sup>5</sup> *Id.*

<sup>6</sup> *State v. Allen*, 145 Vt. 593 (1985) (summary punishment not an abuse of discretion).

<sup>7</sup> *Id.* at 599.

<sup>8</sup> *State v. Dragon*, 131 Vt. 500, 501 (1973).

<sup>9</sup> *The Queen v. Gray* [1900] 2 Q. B. 36, *quoted in State v. Hildreth*, 82 Vt. 383, 386 (1909). The best discussion of the origins and nature of contempt is found in an 1826 Virginia decision. *Commonwealth v. Dandridge*, 4 Va. Cases 408 (1824), stemmed from an incident that occurred on the steps of the Courthouse. The Judge wished Dandridge "Good morning," to which Dandridge replied, "I do not speak to any one who acted so corruptly, and in so cowardly a manner, as to attack my character, when I was absent, and so entirely defenseless." In *Dandridge*, the Court was not in session. *See Hildreth*, 82 Vt. 383, on how contempt can be found for criticisms of cases that are no longer pending.

<sup>10</sup> *State v. Morse*, 98 Vt. 85 (1924). There are statutes governing civil contempt in the Supreme, Superior, and District Courts. 12 V.S.A. § 121, 122. The civil rules empower a court to use the tool for enforcing discovery orders, subpoenas, affidavits in bad faith or only for delay in summary judgment proceedings, among other matters. V.R.C.P. 37, 45, 56.

<sup>11</sup> Superior judges have express statutory power to hold government officials in contempt for violating the Access to Public Records law. 1 V.S.A. § 320. The court may hold anyone in contempt for failing to respond to a legislative subpoena. 2 V.S.A. § 22(d). It is contempt of court to disobey an order to appear on a jury. 4 V.S.A. § 961(a). Contempt authority is scattered throughout the V.S.A. for failing to obey subpoenas or orders, but agencies have no direct power. *See* 3 V.S.A. § 309a. In each instance, the superior court issues an order, and failure to obey that order is punishable by contempt.

You can be found in contempt for what you do or what you do not do. If you refuse to obtain a subdivision permit, for instance, or remove an oil tank. *Persons v. LeHoe*, 150 Vt. 582 (1988); *Socony Mobil Oil Company v. Northern Oil Company*, 126 Vt. 160 (1966). An investigator in a murder trial who refused to divulge the results of an interview with a witness, and a reporter who refused to divulge information about a source, were both punished for contempt in recent years. *State v. Barrows*, 158 Vt. 445 (1992); *State v. Gunhlah*, 160 Vt. 193 (1993) (contempt punishment reversed as prospective). It was contempt of court for a party to subpoena a witness in one trial to serve him with process in another case. *In re Healey*, 53 Vt. 694 (1881). A court reporter can be found in contempt for failing to complete a transcript. V.C.J.C., A.O. 19(6). Practicing without a license is contempt of court. Vermont Rules for Licensing Attorneys, § 2. *See also State v. Morse*, 98 Vt. 85 (1924) (accountant's advice to business clients slips into lawyering); *In re Welch*, 123 Vt. 180 (1962) (land surveyor prepares deed description). Corporations may be found in civil contempt, as well as individuals. *In re Consolidated Rendering*, 80 Vt. 55 (1907).

Contempt is common in the family courts, usually as a result of failures to pay support. There is even an organization established to help fathers found in contempt of court defend themselves, and a web

page. *See* <http://www.fathersrightsinc.com/contempt.htm>.

<sup>12</sup> Other criminal rules also govern contempt. V.R.Cr.P. 17(g), 37, 41.1, 42.

<sup>13</sup> Under the present rule, criminal contempts occurring outside the actual presence of the Court are entitled to formal process, including the right to a jury trial. And in those cases, when the charge involves "disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent." V.R.Cr.P. 42(b).

<sup>14</sup> Frank Fish, *Homer E. Royce* and note on Stephen E. Royce, 5 VERMONT THE GREEN MOUNTAIN STATE 134-135, 311 (1922).

<sup>15</sup> *Royce v. Maloney*, 58 Vt. 437 (1886).

<sup>16</sup> *Royce v. Maloney & Goff*, 59 Vt. 325 (1885).

<sup>17</sup> *State v. Greaves*, 112 Vt. 222 (1941).

<sup>18</sup> *State v. Sutton*, 74 Vt. 12 (1901).

<sup>19</sup> *Id.* at 15.

<sup>20</sup> *State ex inf. Atty. Gen. v. Hildreth*, 82 Vt. 383 (1909).

<sup>21</sup> The Vermont People's Telephone Company insisted that a statute required the Boston and Maine to use its equipment. The Court thought otherwise. *State v. Boston & M.R.R.*, 82 Vt. 121 (1909). There appears to be no surviving copies of the *Express and Standard* for 1909 in any archive.

<sup>22</sup> *Hildreth*, 82 Vt. at 385.

<sup>23</sup> *Id.*

<sup>24</sup> Because we know that familiarity breeds contempt. *Nimia familiaritas contemptum parit.*

<sup>25</sup> *See* note to V.R.Cr.P. 43. *See also Illinois v. Allen*, 397 U.S. 337, 343-344 (1970).

<sup>26</sup> Still, things have improved. Fines and imprisonment are the modern punishment for contempt. Contempt of the King, and therefore his courts, was once a capital offense. Judge Dade, in *Dandridge*, 4 Va. Cases 408, described an ancient English statute that punished a person who strikes a juror in the presence of the court with loss of the right hand, and life imprisonment.

In another English case, the punishment included an order that the defendant visit all the courts in Westminster Hall wearing the written decision on his head, before he was imprisoned.

<sup>27</sup> "[T]he proud man's contumely" is one of the "whips and scorns of time" that led Hamlet to consider ending his own life. WILLIAM SHAKESPEARE, *HAMLET*, Act 3, sc.1.