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Select Writings for Judges

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INDEX

1	**Plain English** (It is an excerpt from the book **'The Closing Chapter'** by **Lord Denning** at page 67)	1
2	**On the Writing of Judgements** (by **Justice Michael Kirby**; (64) The Australian Law Journal 691)	8
3	**Plain Language** (It is an excerpt at page 661 from the book **A Dictionary of Modern Legal Usage**, Second Edition by **Bryan A. Garner)**	34
4	**Law and Literature** (by **Justice Cardozo**, (52) Harvard Law Review 472. This is also available at page 339 in the book **'Selected Writings of Benjamin Nathan C')**	44
5	**Judicial Writing** (An Observation by a Teacher of Writing by **Glenn Leggett**; (58) Law Library Journal 114)	59
6	**A Primer of Opinion Writing for Four New Judges** (by **George Rose Smith**; (21) Arkansas Law Review 197)	67
7	**Literary Minds and Judicial Style** (by **Walker Gibson**; (36) New York University Law Review 915)	85
8	**The Form And Language of Judicial Opinions**	102

ACKNOWLEDGEMENT

Judges, particularly those at threshold of their career must inculcate a habit of good deal of reading. In law things change very quickly and get obsolete and stale very soon. For competence and success of Judges continuous reading is a must and it is imperative that the fresh knowledge replenishes the old one. In the age of knowledge explosion, we are living in, so much is available for reading – right from literary works of very high order of reputed authors to voluminous books and from case laws to articles – the variety is endless. Neither all these materials are available to Judges nor do they get enough time to go through all of them. In such a scenario selectivity is the only silver lining.

My Lord Hon'ble Mr. Justice Yatindra Singh, Judge, Allahabad High Court has done a great service to judiciary in general and for subordinate judiciary in particular by selecting some very good writings from classic works of celebrities and elsewhere. The articles and writings chosen by Hon'ble Mr. Justice Yatindra Singh are bound to provide insight to judicial officers and arouse interest for further reading.

The Institute feels obliged and takes pride in publishing these collections for the benefit of judicial officers. For this, we respectfully acknowledge and express our enormous debt of gratitude to Hon'ble Mr. Justice Yatindra Singh.

Allah Raham
Director

PLAIN ENGLISH

(It is an excerpt from the book 'The Closing Chapter' by Lord Denning at page 67)

On 9 December 1982 we went to make the Plain English Awards at the Waldorf Hotel. The sponsors were the Plain English Campaign and the National Consumer Council. I presented six genuine awards for good English: and six booby prizes for bad English.

In *The Discipline of Law* I told you something of the value of plain English. Now I enlarge upon it.

1. Brings in Humpty Dumpty

i *The key to success*

To my mind command of language is the key to success, not only in the law, but in the other professions in which words count. It is a sine qua non for statesmen and politicians. Hardly less so for authors and journalists. Lecturers and teachers should have it. So should ministers of religion. Civil servants should be specially versed in it.

ii. *A perfect instrument*

Yet we have to our hand a perfect instrument. In his Preface to *The Oxford Book of English Prose*, Sir Arthur Quiller-Couch wrote:

> Our fathers have, in the process of centuries, provided this realm, its colonies and wide dependencies, with a speech malleable and plaint as Attic, dignified as Latin, masculine, yet free of Teutonic guttural, capable of being precise as French, dulcet as Italian, sonorous as Spanish, and captaining all these excellencies to its service.

iii. *It has become blunted*

This fine instrument has, however, become blunted in use. The reason is because many a person, whether speaker or writer, is thinking too much of *himself*: whereas he ought to be thinking much more of *his hearers or readers.* He uses a word in the meaning which *he himself* puts on it: whereas he should be using it in the meaning which *his hearers or readers* put upon it. He is convinced that his meaning is correct : but he does not realise that it may be incorrect. In so doing he is himself abusing our language.

iv. *Humpty Dumpty sat on a wall*

This is the truth which underlies the allegory so delightfully drawn by Lewis Carroll in *Through the Looking-Glass:*

'There is glory for you!' said Humpty Dumpty.

'I don't know what you mean by "glory",' Alice said.

'I meant, "there's a nice knock-down argument for you!"'

'But "glory" doesn't mean "a nice' knock-down argument". Alice objected.

'When I use a word, Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean – neither more nor less".

'The question is, ' said Alice, 'Whether you *can* make words mean different things.

'The question is, 'said Humpty Dumpty, ' which is to be master – that's all'.

v. *Had a great fall*

So in the allegory Humpty Dumpty makes the word mean just what *he* chooses it to mean. When he does that, he is riding for a fall. He does fall and is broken in pieces. We all know the nursery rhyme:

Humpty Dumpty sat on a wall.
Humpty Dumpty had a great fall;
All the king's horses,
And all the king's men,
Couldn't put Humpty together again.

vi *Lord Atkin sees him fall*

One of our greatest judges, Lord Atkin, used that allegory with effect in his celebrated judgement in *Liversidge vs. Anderson*[1]. The question there was as to the meaning of Regulation 18B. It gave the Home Secretary the power to detain a person 'if he has reasonable cause to believe him to be of hostile origin or association'. Could the courts inquire into the validity of the Home Secretary's decision? The majority of the House of Lords said the courts could not do so. Lord Atkin dissented. He said:

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1 [1942] AC 206, 245 H.L. (E)* Liversidge..Appellant And Sir John Anderson and another ..Respondents.

I know of only one authority which might justify the suggested method of construction.

He then gave Humpty Dumpty as that one authority—and gave his own opinion in these words:

> After all this long discussion, the question is whether the words 'If a man has' can mean 'If a man thinks he has'. I am of opinion that they cannot.

2. Gives the central principle

i *The central principle*

The central principle is that when you speak or write, you should be thinking all the time of others; that is, of course, the people who are listening to you - in the court-room or the Parliament Chamber or the council-room: or the people who are reading your essay or your opinion or your book. Make their task as easy as you can. There are many pitfalls which you must avoid.

ii *Don't use long words*

The first is, 'Don't use long words', unless you are sure your hearers or readers understand them. You may understand them yourself, but they may not. If your hearer says to himself, 'That is a word I've never heard before. What does it mean?', you have failed. If your reader says, 'I must look it up in a dictionary', again you have failed. You have not conveyed your meaning to him.

A lot of speakers and writers do not appreciate that simple truth. They use long words so as to 'show off'. It gives them a feeling of superior knowledge or, at any rate, of a superior vocabulary. By so doing, they go wrong. Once a hearer says, 'He is a very able man but it was all above my head, then the speaker has failed. Even Macaulay was guilty when he said, 'In every human being there is a wish to *ameliorate* his condition. It was a mistake to use the word 'ameliorate' which some of his readers would not know. He should have used the simple words 'better'.

iii *A one-sided contract*

In many professions there are technical expressions in use. They are called 'terms of art'. But again these should only be used when they are well known in the profession. A little while ago I heard of a contract being a 'synallagmatic' contract. I had never heard of such a contract before. Nor had any other lawyer of my acquaintance. Nor had the textbook writers. At any rate, their books did not contain the word. I have since looked it up in the dictionary. I believe it only means a two-sided contract; but I am not quite

sure about it. Perhaps it is a contract such as that of which I heard my predecessor, Lord Evershed, once say:

> This contract is so one-sided that I am surprised to find it written on both sides of the paper.

iv *Humpty Dumpty pays it extra*

At this point I go back to the delightful Lewis Carrol:

> After a minute Humpty Dumpty began again.... 'Impenetrability That's what *I* say!'
>
> 'Would you tell me, please;, said Alice, 'what that means?,
>
> 'Now you talk like a reasonable child,' said Humpty Dumpty, looking very much pleased. 'I meant by "impenetrability" that we've had enough of that subject, and it would be just as well if you'd mention what you mean to do next, as I suppose you don't intend to stop here all the rest of your life.'
>
> 'That's a great deal to make one word mean.' Alice said in a thoughtful tone.
>
> 'When I make a word do a lot of work like that,' said Humpty Dumpty, 'I always pay it extra.'
>
> 'Oh!' said Alice. She was too much puzzled to make any other remark.

v. *I just say 'Oh!'*

Like Alice, when I come across a long word which I do not understand I am afraid I often just say 'Oh!' and pass on. This is a mistake. I ought to look it up in the dictionary and so extend my vocabulary.

Particularly if the long word is in a statute you must find out what it means. You must first look to see if there is a definition clause. If it is defined, you have next to see what the definition clause means. It is sometimes long-winded and not much help. If there is no definition clause, then you have to give it the most sensible meaning you can think of.

3. A little more advice

i *Don't use over-long sentences*

If you use an over-long sentence in your speech, you will lose your hearer before you get to the end of it. He will not be concentrating as much as you are. If you write an over-long sentence in your opinion or judgement, the reader will get bemused. He will say to himself, 'I must read that sentence again so as to get the hang of it.' That destroys its effect altogether.

ii *You might lose yourself*

Charles Dickens (who was the master of the short sentence) occasionally used the long sentence to give effect. When Mr. Micawber offered to show David Copperfield the way, he used this long one:

> 'Under the impression,' said Mr. Micawber, 'that your peregrinations in this metropolis have not as yet been extensive, and that you might have some difficulty in penetrating the arcana of the Modern Babylon in the direction of the City Road – in short, ' said Mr. Micawber, in another burst of confidence, 'that you might lose yourself—I shall be happy to call this evening, and install you in the knowledge of the nearest way.'

iii *A booby prize*

Now I would revert to the Plain English Awards of which I told you. I will not say anything of those for good English, but I would like to tell you of one which was awarded a booby prize.

A village had asked for a bus shelter to be provided near the school. This was a sentence in the reply:

> The stated requirement for a shelter at this location has been noted, but as you may be aware shelter erection at all locations within West Yorkshire has been constrained in recent times as a result of instructions issued by the West Yorkshire Metropolitan County Council in the light of the Government's cuts in public expenditure and, although it seems likely that the Capital Budget for shelter provision will be enhanced in the forthcoming Financial Year, it is axiomatic that residual requests in respect of prospective shelter sites identified as having priority, notably those named in earlier programmes of shelter erection, will take precedence in any future shelter programme.

iv *'Haigese' in the United States*

There is also a campaign in the United States in favour of plain English. Whereas I have advised you 'Don't use long words' and 'Don't use long sentences', their advice is 'Don't use multisyllabic jargon and verbal distortions.' Which advice do you prefer?

They have coined a new word to describe these contortions. They call them 'Haigese' because Mr. Haig, the former Secretary of State, used them so much. This is the illustration they give:

> One of Mr. Haig's aides asked him for a pay increase. Mr. Haig just could not say 'No' Instead he replied:

'because of the fluctuational predisposition of your position's productive capacity as juxtaposed to government standards, it would be momentarily injudicious to advocate an increment.'

The perplexed aide replied: 'I don't get it.'

Mr. Haig replied: 'That's right.'

4. The moral of it all

i. *Plain, simple words and sentences*

The moral of it all is that you should use plain, simple words and sentences which all your hearers and readers will understand. You should avoid the roundabout expression and use instead the direct thrust. Sir W[illegible]ll [illegible] broadcast on 17 June 1940: 'The position in regard to France [illegible]' [illegible]man: 'The news from France is very bad.' He did not end it: 'We have [illegible] the situation will be restored.' He ended: ' We are sure that in the end all will [illegible]'

ii *Present them well*

Not only should you choose your words well. It is also important that you should present them well. A good speech can be ruined by a bad delivery. The spoken word is very different from the written word. Prepare it beforehand. If you have not done much speaking, you may write it out in full. But do not read it. And do not learn it by heart. If you do, you will be thinking of the mechanism of delivery: whereas you should be thinking of the substance you wish to convey. When you have gained experience, you will find it best to make a note of each point that you are going to make. Speak on it for two or three minutes. Then go on to the next point. Always think of your hearers. Speak so that they can understand all you say.

iii *Split them up*

When writing a book or an essay or opinion, you should break up your pages into paragraphs: and your paragraphs into sentences. A massive unbroken page of print is ugly to the eye and repulsive to the mind. A long unbroken paragraph is indigestible. Split it up into sentences. If you find that you must have a long sentence, break it up with suitable punctuation. Sometimes a dash. At other times a colon or semi-colon. Often a comma. It enables the reader to get the sense more readily.

Never stop at your first draft. Always go through it. See how it reads. Not only to see whether it is accurate but, what is more important, to see if it is clear to the reader. As I have told you, I did this for *What Next in the Law*. So here if you saw my notebook for this book, you would see that I have read and reread it, corrected and recorrected it, a dozen times, before letting it go out.

A good example is to be found from the Law Reports. At one time the judges used to deliver long judgements covering many pages without a break. I was, I think, the first to introduce a new system. I divided each judgement into separate parts: first the facts: second the law. I divided each of those parts into separate headings. I gave each heading a separate title. By so doing the reader was able to go at once to the heading in which he was interested: and then to the passage material to him.

iv *Avoid unparliamentary language*

There is much variation in the language used in Parliament. In debates it is, or should be, plain and courteous. In statutes it is obscure and complex. In debates it is governed by rules evolved over the centuries. *Erskine May* says that:

> Good temper and moderation are the characteristics of parliamentary language. Parliamentary language is never more desirable than when a Member is canvassing the opinions and conduct of his opponents in debate.[2]

He gives examples of expressions which are unparliamentary and call for prompt interference, such as charging a Member with uttering a deliberate falsehood or using abusive language likely to create disorder. *Erskine May* gives a list of 46 expressions which have caused the Chair to intervene from time to time, either by compelling the withdrawal of the offending words, or, in default, by suspension. They include calling an honourable member a 'blackguard', 'cad' 'cheeky young pub', coward', 'dog', 'guttersnipe' or 'rat'; or describing his conduct as behaving like a jackass' or 'lousy;'[3]

You will do well to avoid the use of unparliamentary language.

2*Parliamentary Practice* (20th edn) p 432.

3(19th edn) p 445. These expressions are, sadly, not included in the most recent, 20th edition.

ON THE WRITING OF JUDGEMENTS[4]

{by the Hon. Justice Michael Kirby CMG, President of the New South Wales Court of Appeal(64) The Australian Law Journal 691}

An Empire of Individualists

Who would be so bold as to write on the writing of judgements? As many lawyers as there are, so many opinions and more exist about what makes a good judgement. No primer on the way to do it, this essay is, instead, a reflection on some of the features of judgement writing in Australia today. It begins with a few practical considerations to be kept in mind in assessing particular judgements. It proceeds to a consideration of the old controversy about whom a judgement is written for. it acknowledges the different characteristics of judges and their writing, before embarking on the illustration of some of the stable and some of the changing features of judgement writing in that empire of individualists. It closes with a reflection on brevity, simplicity and clarity - the blessed trinity of good judgement style. Where I refer to 'judges' I mean, of course, judicial officers of every rank. Doubtless many others who labour away in the numberless tribunals which are now such a feature of the modern administration of justice are equally involved. And where I use 'judgement' I mean not the formal order which is the judgement properly so called, but the reasons for judgement—what United States lawyers call the 'opinion': the explanations given by the judge for the order finally proposed or made.

The daily experience of the courts demonstrates the differing skills of Advocates and Judges in oral communication. It also demonstrates that on some days the most brilliant advocate is tongue-tied and the sharpest judicial mind, listless or distracted. It should therefore not surprise the reader of judgements that some who write them are better than others, or that the quality of the same pen varies over time and even changes from day to day.

The second practical consideration with which I preface these remarks is pressure. Pressure upon modern judges—at first instance and on appeal—is, in most instances, much greater than it was in the case of their forebears. True, the High Court of Australia can now, by the requirement of special leave, control its workload. But for most judges there is much less control. The backlog increases.

4Text of a paper on which was based a lecture to the First Australian Conference on literature and the Law held at the University of Sydney, 20-22 April 1990 on the initiative of the Department of English in the University of Sydney and the Faculty of Law of Monash University, Melbourne. Opinions expressed in the paper are the personal opinions of the author.

Community and institutional pressure for speedier justice is relentless.[5] The time for reflection, for careful planning, thoughtful research and for polishing prose, is strictly limited. And diminishing. It is in this world of unprecedented stress and pressure that most judges, today, complete their judgements.

A third practical consideration is the change in the mode of trial and in the modern understanding of the judicial obligation to give reasons. Even when I was young in the law, jury trial was far the commonest means of resolving factual disputes at common law. The skill of the advocate, and of most trial judges, lay in communicating with juries: in addressing or instructing them. Juries were then abolished in Motor Vehicle Accident cases, and later in a wider range of cases.[6] Now, there are proposals for and even more radical reduction in the role of the jury. These changes have imposed upon judges at first instance an increasing obligation of fact finding. Combined with the growing insistence upon the giving of reasons by judicial officers,[7] the burden of judgement writing for trial judges has increased. What would once be left safely to the sphinx-like jury[8] must now be attempted by the first instance judge. He or she must find facts, record any relevant findings on credibility and provide atleast sufficient exposition of the applicable law to permit a disappointed litigant to consider and if so advised, exercise any rights of appeal for which the law provides.

The functions of judgement writing at first instance and on appeal differ. There are, of course, common elements. Furthermore, appellate courts sometimes sit in trial function, as when the court of Appeal or a Full Court hears proceedings for contempt or for the removal of the name of a legal practitioner from the roll of practitioners. Some appeals are limited to points of law. Some, substantially to points of law or rulings on evidence.[9] But increasingly appeals are by way of rehearing, requiring the appellate court to review not only findings of law, but findings of fact as well.[10] Appellate courts today are rarely confined to consideration of short questions of law. They must typically sift the facts. Proper

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5Even in the courts themselves, this is acknowledged. See, eg, Gaudron J in *Jago vs. District Court of New South Wales* (1989) 63 ALJR 640 at 662.

6See *Pambula District Hospital v. Herriman* (1988) 14 NSWLR 387 where the history of these developments in New South Wales is set out.

7See *Public Service Board (NSW) v. Osmond* (1986) 159 CLR 656; *Pettitt v Dunkley* [1971] 1 NSWLR 376. See also below.

8*In Ward v. James* [1966] 1 QB 273 at 301 Lord Denning MR described the jury's verdict to be 'as inscrutable as the sphinx.' See *Quinn v. Rocla Concrete Pipes Limited* (1986) 6 NSWLR 586 at 587.

9See, eg, *Land and Environment Court Act*, 1979 (NSW), s 57(1); cf *Compensation Court Act* 1984 (NSW), s 32.

10*Warren v. Coombes* (1979) 142 CLR 531. See also *Viscount de L'Isle v. Times News Papers Limited* [1988] 1 WLR 49 at 62 (CA)

sifting may add to the length of judgements and to their complexity. That is the price of providing a second look at the facts.

Judgements, at least of Judges of superior courts, can establish binding precedents of legal authority. Even in courts lower in the hierarchy, the specialised nature of the jurisdiction and conventions of judicial comity may make it useful to study earlier decisions, to guide judges and legal practitioners or other repeat players towards the proper resolution of like cases. This said, an important distinction between judgements of an appellate court and of a trial judge lies in the fact that it is more likely that the ruling of an appellate court will not only dispose of the appeal before it but establish a binding legal principle. This is not necessarily so. Many decisions of the New South Wales Court of Appeal involve no question of principle (for example, damages appeals) or no novel application of legal rules (for example, disputes over motor vehicle negligence). Yet many do. These are more likely to be reported than judgements at first instance. In a time of rapid change in both statute and common law, many novel points arise for judgements. The reasons given by the judge must therefore serve many purposes.

The Readers of Judgments

The Litigants

It is interesting to reflect upon the fact that, despite the seven-century tradition of the common law, there is no agreement upon the audience for whom a judge writes his or her judgement. The losing party is frequently said to be a primary focus of concern. The winner will often have little interest in the reason for success, usually being convinced of the rightness of the cause anyway. But in closely - fought and expensive litigation, the loser is entitled to have from the judge a candid explanation of the reasons for the decision. This is not only for the exercise of any appeal rights that may exist . It is also to uphold the intellectual integrity of our system of law which must daily demonstrate, by its performance in particular cases, its adherence to the law, attentiveness to argument, impartiality and logical reasoning. True, some disappointed litigants will not bother to read the laboured reasons of the Judge. Successful appellants have their own entitlement to the judge's candid reasons, for these may immure the judgement against unwarranted appeal or even reversion on grounds abandoned at first instance. Clearly then, the parties, as the principal players in the drama of litigation, are entitled to the judge's reasons. This affects the way in which a judgement at first instance, or at the first level of appeal, should be written.

Legal Profession

The judgement is also written for the legal representatives of the parties and for the profession generally. Even if the parties themselves do not persist and read the lengthy exposition of the facts, their lawyers will usually do so, if only to test the judgement for the accuracy and fairness of its fact-finding. Even if the litigants do not fully understand the analysis of legal precedent and the exposition of legal principles, their lawyers are entitled to have it demonstrated that the judge had the correct principles in mind and properly applied them. The legal profession is entitled to examine the body of judgements for the learning and precedents that they provide and for the reassurance of the quality of the judiciary which is still the centrepiece of our administration of justice. It does not take long for the profession to come to know, including through the written pages of published judgements, the lazy judge, the judge prone to errors of fact-finding, the judge without understanding of the laws of evidence or the judge who has difficulties with complex propositions of law. These reputational considerations are important for the exercise of appellate rights, for the judge's own self-discipline, for attempts at improvement and for the maintenance of the integrity and quality of our judiciary, It is principally through the pages of written judgements that that quality may be assessed.

Other Judges

Then judgements are certainly written for other judicial officers. At first instance they may be written for judges lower in the hierarchy facing common legal problems. They may be written for judges in the same specialised court. An important point may be decided which will not be taken on appeal because of the obvious correctness of the decision or because the parties cannot afford it. No judge of a superior court can approach his or her functions without an awareness, that a judgement may be reported and that it may establish a legal principle, binding until set aside by an appellate court. The opportunities of creativity and exposition of legal principle are by no means confined to appellate courts in banc. Knowledge of this fact imposes a discipline and quality control upon all judges, but especially judges of the superior courts. In the appellate courts, judges are writing for other judges. If they are subject to review or the possibility of appeal, a judgement must be written with this possibility in mind. That is not to say that an intellectually dishonest attempt should be made, for example by formulae on the credibility of witnesses, to render a judgement 'appeal - proof'. The best judges perform their reasoning function honestly and to the best of their ability without undue concern that an appellate court may find

error or reach a different conclusion. Nevertheless, it is obviously desirable that sufficient should be stated in the judgement to ensure that it does not fall victim on appeal to an issue that was abandoned or otherwise not litigated before the court in question.[11]

That consideration apart, the legal duty of a judge who is subject to appeal, to state his or her reasons in deference the right of appeal is not now in doubt in Australia. The judge must state explicitly and concisely the facts as they are found and the reasons for the decision. The duty is not confined to cases where an appeal lies. It may arise as an incident of the nature of the decision in question. But it takes on a particular force where there is an appeal—whether by right or by leave. There are exceptions to the duty as where a decision is "too plain for argument". Or where a procedural decision is made and the reasons for it are clear from the context or from the preceding exchanges with the parties or their representatives. However, the failure of a trial judge to state findings and reasons, and of any judge to state reasons, amounts to derogation from the right to appeal and to abdication of the judicial function. Such a failure makes it impossible for the appellate court to give effect to the appellate right and so to carry out its functions.

All of this was said in a series of decisions which came together in the New South Wales Court of Appeal in *Pettitt v Dunkley*[12]. Justice Asprey there explained important legal functions which are fulfilled by the reasons which support judicial orders:

> "The rights of appeal are statutory rights granted by the legislature to the parties and the failure of a trial judge in the appropriate case to state his findings and reasons amounts, in my view, to an encroachment upon those rights. The omission of the trial judge makes it impossible for an appellate court to give effect to those rights, either for one party to the appeal or another, and so

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11 *Coulton and Ors v Holcombe and Ors* (1986) 162 CLR 1; *Water Board v Moustakas* (1988) 62 ALJR 209 and *Banque Commercial SA, en Liqun v Akbil Holdings Ltd* (1990) 64 ALJR 244.

12 [1971] 1 NSWLR 376 (CA). The passage from the judgement of Asprey JA appears at 381-382. The decision has been applied in numerous cases, See eg *Housing Commission of New South Wales v Tatmar Pastoral Company Pty Ltd* [1983] 3 NSWLR 378; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247. It has been accepted in other States of Australia. See eg *Watson v Anderson* (1976) 13 SASR 329. It has been followed in the Federal Court of Australia. See eg, *Australian Timber Workers' Union v Monaro Sawmills Pty Ltd.* (1980) 42 FLR 369 at 374, 380. It was accepted as the Law in New Zealand. See *R v.Awatere* [1982]. NZLR 644 at 648 (CA); *R v MacPherson* [1982] 1 NZLR 650. In the High Court of Australia it appears who have been accepted as stating the law. See Obiter remarks of Giffds CJ in *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 666-667.

carry out its own appellate functions, It is unnecessary to stress the prime importance to a party to an appeal, whether he be appellant or respondent, of the findings and reasons at first instance and this is not limited to the acceptance or rejection of evidence on the basis of demeanour for, in arriving at his conclusions, the trial judge may simply have preferred one possible view of the primary facts to another as being in his opinion the more probable, or he may have preferred the evidence of one witnesses to another for a variety of reasons, although both were considered by him to be telling the truth as they may have observed the facts to be ...Just as it is impossible to confine the grounds upon which an appellate court will order a new trial within rigid categories ... so the ambit of the difficulties confronting parties to an appeal will place the appellate court to which they look for the exercise of their statutory rights in many cases in a position which may prevent the court from giving effect to the paramount consideration of obviating a miscarriage of justice.

In my respectful opinion the authorities to which I have referred and the other decisions which are therein mentioned establish that wherein a trial without a jury there are real and relevant issues of fact which are necessarily posed for judicial decision, or where there are substantial principles of law relevant to the determination of the case dependent for their application upon findings of fact in contention between the parties, and the mere recording of a verdict for one side or the other leaves an appellate tribunal in doubt as to how those various factual issues or principles have been resolved, then, in the absence of some strong compelling reason, the case is such that the judge's findings of fact and his reasons are essential for the purpose of enabling a proper understanding of the basis upon which the verdict entered has been reached, and the judge has a duty, as part of the exercise of his judicial office, to state the findings and the reasons for his decision adequately for that purpose."

Judges Reversed

Appellate courts must also keep in mind the fact that the judges appealed from will usually read their judgements. At least, they will usually do so where the appeal is upheld. The appellate court has, inescapably, an executive function which it performs through its written judgements. The expression of error detected can be frank without that hurtfulness which will cause unnecessary offence. The history of different conclusions upon the same legal point, as famous cases proceed through the judicial hierarchy, offers sufficient proof of the fact that even highly talented lawyers will quite often reach different

conclusions, and for different reasons, upon the same question. Upon some matters a simple mistake may be detected. A basic error of law may be demonstrated, perhaps a statute overlooked. Most judges will readily acknowledge such mistakes when they are pointed out, however embarrassing they may be. Often, they will be entitled to blame counsel for failing to direct them to the point. However, on many matters of legal principle, minds simply differ.[13] On others, the law is obscure or is expressed in terms of such generality that different results may quite readily be derived from its application to particular facts. The realisation of these inescapable features of our legal system provides a balm for the sting of appellate reversal. it also provides to appellate courts a reason for intellectual modesty and the avoidance of arrogance or insensitivity of expression.

Test of Conscience

Finally, a judgement is ultimately written for the judge who writes it. It must have integrity and carry with its words the evidence of the manifest impartiality and intellectual honesty of the writer. Judges, at least in Australia, are members of an independent branch of government. They are uncorrupted and enjoy high public standing. They are protected from removal from office by constitutional and statutory guarantees and by the common law.[14] Out of self-regard for the privilege of membership of this elite band with its ancient lineage and high responsibilities, judges of our tradition should always strive to perform their functions with lawfulness, neutrality and dispassion. These are our traditions. Written judgements provide the opportunity for each judicial officer to demonstrate to his or her own conscience a worthiness to be a participant in such a high tradition of moral integrity and social utility.

Categories of Judges

Numerous attempts have been made to classify judges according to their differing approaches to the writing of judgements. In 1979, Lord Justice Templeman (as he then was) in a BBC interview said:[15]

13A notable example is *Oceanic Sun Line Special Shipping Co Inc v. Fay* (1988) 165 CLR 197.

14See *Macrae and Ors v Attorney General for New South Wales* (1987) 9 NSWLR 268; *Quin v Attorney General for New South Wales* (1988) 28 IR 244. But see now *Attorney General for New South Wales v Quin* (1990) 64 ALJR 327. Cf MD Kirby, "The Removal of Justice Staples and the Silent Forces of Industrial Relations" (1989) 31 JL Indl Rels 334.

15Interviewed by H' Young, *Talking Law*, BBC, 16 September 1979, 3, cited in MD Kirby, *the Judges, Boyer* Lectures, 1983, ABC, at p 41. A good example of Lord Denning's style is *Beswick v Beswick*

"Judges and their judgements—I think you can divide into three categories; there are the philosophers, the scientists and the advocates. The present Lord Chancellor, Lord Hailsham, I would put in the category of philosopher; Lord Wilberforce and Lord Diplock I would put into the scientific vein and Lord Denning is one of the advocates. And in common with those other judges whose judgments are feats of advocacy, you can see some traces of the eloquence in the advocacy which they used when they were at the Bar, and these three elements are all therein in Lord Denning's judgments."

There are difficulties in this, or any such classification. Indeed, this is acknowledged in the final comment that Lord Denning's judgements show evidence of all three 'categories'. So do those of most judges. A judgement in one case may involve the predominance of one of the qualities identified. Care must be taken to avoid stereotyping judges, any more than other subgroups of the community.

Yet it is probably true that different judges show different proportions of the three qualities which Lord Justice Templeman had selected as criteria. Bringing the classifications closer to home, one might say that Justice Windeyer in the High Court of Australia evidenced a bias to a philosophical approach. Certainly his profound knowledge of, and interest in, legal history turned his attention to fundamental concepts of the common law where he felt most at home. Chief Justice Dixon was probably our greatest 'scientist', espousing as he did 'complete legalism' and believing that the law would lose its meaning if it were not the limited function of the judge to find the pre-existing law and to declare it.[16] Amongst the chief 'advocates' one might name Chief Justice Isaacs, Chief Justice Barwick and Justice Murphy. Yet none of them—philosopher, scientist or advocate—could wholly escape his background of training and professional experience in the law. No Australian judge has entered upon office without such training and background. The functions of Australian judges, deprived of a Bill of Rights or the Charter of Freedoms of their Canadian counterparts, are more limited. Their work is less likely to take Australian judges into the byways of philosophy, sociology and economics. Yet all of these disciplines can be relevant, from time to time, to common law reasoning and to the interpretation of statutes.

(1966) Ch 538. His judgement begins: 'Old Peter Beswick was a coal merchant in Eccles, Lancashire. He had no business premisses. All he had was a lorry, scales and weights ...' ibid, at 549.

16Sir Owen Dixon, concerning Judicial Method; in Woinarski (ed), *Jesting Pilate* (1965) at p 155.

Judgements of the Supreme Court of the United States have been analysed according to the recorded influence of great philosophers and writers upon the thinking of the Justices.[17] Thus between 1790 and 1986 the 71 members of the Supreme Court referred to the writings of Plato in nine opinions, to Locke in 11, to Montesquieu in 27 and to the *Federalist Papers* in no fewer than 317 judgements. Shakespeare was mentioned in 24 opinions. Surprisingly, even Sigmund Freud was referred to in four.[18] It is mainly in the elaboration of the fundamental rights in the Bill of Rights that references to literature and philosophy appear. Thus in the *United States v. Loud Hawk*[19] Justice Powell, citing Homer's *Odyssey* in a case involving the claim to speedy trial alluded to Penelope's promise that she would not choose a husband until the shroud she was weaving was finished. Her technique involved working on it in the day but then secretly unravelling it at night. Justice Powell suggested that the defendants were up to Penelope's trick:

> 'At the same time defendants were making a record of claims in the District Court for speedy trial they consumed 6 months by filing indisputably frivolous petitions for rehearing and for certiorari... [and] filled the District Court's docket with repetitive and unsuccessful motions.'

Only a judge with wide reading, an imaginative research staff on whose experience had taken him or her outside the law would have the intellectual capital to draw upon such philosophical and literary allusions. Even if the judge has such experience, the legal tradition (and concern about the reaction of the profession or of other judges) may still the pen that moves to a literary allusion. Alternatively, such references may fall victim to the blue pencil and disappear into oblivion in the penultimate draft by the miracle of word processing. No Penelopes appeared in the recent expositions in the High Court of Australia about the right to a speedy trial.[20] Yet it is not unknown to see literary allusion; though more frequently in the judgements of English judges than of members of the Australian judiciary.[21]

17F Snyder, 'The Great Authors and Their Influence on the Supreme Court' (1987) 7 Leg Ref Services Q 285.

18 See, eg, *Boutilier v Immigration and Naturalisation Service* (1967) 387 US 118 at 130 (per Douglas J, dissenting).

19(1986) 474 US 302 (per Powell J). See Snyder, op cit, n 14, at ante, 288.

20See *Jago*, loc cit, n 2, ante.

21See, eg. Russell LJ in *Sydall v. Castings Ltd* [1967] 1 QB 302 at 321: "I may perhaps be forgiven for saying that it appears to me that Lord Denning MR has acceded to the appeal of Bassanio in the Merchant of Venice ... 'To do a great right, do a little wrong'. But Portia retorted: ... ' It must not be; ... I am a Portia man.' On the other hand Chief Judge [later Justice] Cardozo counselled caution: " In days not far remote, judges were not unwilling to embellish their deliverances with quotations from the poets. I shall observe towards such a practice the tone of decent civility that is due to those

Stable and Changing Features

The Basic Format

There are some stable and some changing features of judgement writing. The stable features derive from the very nature and purpose of a reasoned judgement. Fundamentally, this is to explain an order formally entered by the court as an enforceable rule between the parties in the litigation before it. For that purpose, a judgement will typically begin with a statement of the relevant facts. It will follow with an exposition of the principles of law perceived to be applicable. In the manner of the logical syllogism, it will then express conclusions derived from the application of the law, as expounded to the facts as found.[22]

Literature and Humour

Within this basic format, there is much room for variation and indeed variety. I have already referred to allusions to literature and learning beyond the law books. Humour is also sometimes evident. There are some authors who suggest that it has no place at all in judgement writing, the issues between the parties being too serious.

> "For a judge to take advantage of his criticism-insulated, retaliation-proof position to display his wit is contemptible, like hitting a man when he is down."[23]

Others, to the contrary, suggest that humor has a proper place in enlivening the prose and communicating the ideas of a judge. Just as humour can be effective in the ordinary communications of life so, it is urged, it has a place (although necessarily limited) in judicial communication.[24] Justice Wallach of the Supreme Court of New York put it this way:[25]

> "It must immediately be conceded that the place of judicial opinions is rather low in the literary pantheon; as an art form they probably rank slightly above a political speech and just below a sermon. ...Despite all this I would urge that a touch of humor, carefully controlled, can properly

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departed".: *Law and Literature and Other Address Essays and Addresses* (1931). at p 29.

22 See per Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374-375, applied in *New South Wales Bar Association v Muirbead* (1988) 14 NSWLR 173 at 197.

23G R Smith "A Primer of Opinion Writing for Four New Judges" in GR Winters, *Handbook for Judges*, American Judicature Soc, 1975, at pp 123, 137. See also W Prosser, *The judicial Humorist* (1952) at p vii: "Judicial humor is a dreadful thing."

24A Jordan, "Imagery, Humor, and the Judicial Opinion" in (1987) 41 Uni Miami L. Rev 693.

25R Wallach, "Let's Have a Little Humor" [1984] NYLJ 2, Col 3.

find a place in judicial writing. At best, it can be useful in deflating the overblown argument; at worst (provided it is not nasty and therefore not humorous at all) it is probably harmless. And at least I can attest that over my fourteen years of judicial opinionating it has relieved the tedium of the writer. Whether it will ever relieve the tedium of the reader can [only] be tested by time."

On the other hand, some United States judges have clearly gone too far in their indulgence in humour. Thus in *Fisher v Lowe*[26] a Judge Gillis dealt with the claim by the owner of a tree who sued the driver and owner of a car who had crashed into it, in the following way:

"We thought that we would never see
A suit to compensate a tree
A suit whose claim in tort is press'd
Upon a mangled tree's behest;
A tree whose battered trunk was pressed
Against a Chevy's crumpled chest;
A tree that faces each new day
With bark and limb in disarray;
A tree that may forever bear
A lasting need for tender care
Flora lovers though we three,
We must uphold the court's decree".

There are many other attempts at opinions in the verse in the United States. Some of them have resulted in disciplinary action against the judge involved, when deemed to have gone too for even for the tolerant test of American lawyers.[27]

In Australia humour is definitely confined to the minor key. Doubtless, this is because most Australian Judges share Prosser's view that

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26(1983) 122 Mich App 418, 333 NW 2D 67-The headnote was also written in lyrics.

27*In re Inquiry relating to Rome* (1975) 218 Kan 198; 542 P 2d 676. In that case a Kansas State Court trial judge placed a prostitute on probation for soliciting an undercover policeman. He expressed his reasons in an opinion written in verse which led to an inquiry into alleged improper judicial conduct. See Jordan, op cit, n 21, ante, at 702. Lord Mansfield tried poetry in *The Kind v Shipley* (1784) 4 Dougl 73. 99 ER 774.

"the bench is not an appropriate place for unseemly levity. The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig."[28]

Nevertheless attempts at humour occasionally appear.[29]

Views will doubtless differ about the suitability of judicial humour in the record of a judgement and at the expense of parties or their legal representatives or witnesses. Clearly a judge, tempted by such humour must consider the permanency of the record, the potential harm to reputation of the subject of the humour, the difficulty of affording an adequate answer or correction and the attention thereby given to the comment, precisely because of its pithy humorous expression indeed. Yet judges are supremely individuals. Their expression is, in part, a reflection of their personalities and individual values.

Dangers of Irony

Irony is more common in judgement writing of our tradition than other forms of humour. Perhaps irony, a more restrained form of humour, is thought to be more in keeping with the sober purposes of the judiciary. Perhaps it simply reflects the characteristics of the English personalities who left their indelible mark upon our image of what a good judge is. Just the same, irony, being frequently hurtful, can get the judicial writer into difficulties.

Perhaps the best known instance of this danger is Lord Atkin's allusion to Lewis Carroll in his notable dissent in *Liversidge v Sir John Anderson and Anor.* After a vigorous but dispassionate dissection of the opinion of the majority, his Lordship's speech reached its stinging point:[30]

"I know of only one authority which might justify the suggested method of construction: 'When I use a word', Humpty Dumpty said in a rather scornful voice, 'it means just what I choose it to mean, neither more nor less'. 'The question is', said Alice, 'whether you can make words mean so many different things'. 'The question is', said Humpty Dumpty, 'which is to be master - that's all' (*Through the Looking Glass,* c VI). After all this long discussion the question is whether the

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28Prosser, op cit, n 20, ante.

29See, eg, *G & J Shopfittings & Refrigeration Pty Ltd (In Liq) v Lombard Insurance Co. (Aust) Ltd.* (1989) 16 NSWLR 363 at 377.

30[1942] AC 206 at 245. Lord Denning frequently used irony to good effect. See, eg *In re Vandervell's Trusts [No. 2]* [1974] Ch 269, when he said at 321; "Even a court of equity would not allow him to do something so inequitable and unjust".

words 'if a man has' can mean 'if a man thinks he has'. I am of the opinion that they cannot, and that the case should be decided accordingly."

It is now known that, as a result of this passage, Lord Atkin was sent to judicial Coventry by the other Law Lords. They refused to meet him or eat with him. At one point they even refused to speak to him. Before the speech was delivered, the Lord Chancellor (Viscount Simon) who had not participated in the case, put great pressure upon Atkin to change the tone, if not the content of his judgement. Atkin refused. Lord Maugham, who had presided, made a bizarre attack upon Atkin in the legislative session of the House of Lords. The opinion has been expressed that Lord Atkin never really recovered from this treatment before his death in 1944.[31] He did not live long enough to see his opinion of the law vindicated.[32] Indeed, it cannot be denied that the vigorous expression of his point of view helped to capture the attention of law commentators and judges. Perhaps it thereby contributed to the ultimate ascendency of the important legal concepts which Atkin was espousing. The power of vivid language to do this should never be underestimated.

Another instance of the use of judicial irony (and of literary allusions) which caused no end of trouble for the judicial officer employing them can be seen in the case of Justice Staples of the Australian Conciliation and Arbitration Commission. Justice Staples, from his days as a barrister, was given to the use of vivid prose unusual in the grey and detailed area of industrial decision-making to which he was appointed. In an important case, a recommendation by him to the Broken Hill Pty Co Ltd (BHP) and a union for the settlement of a long-standing maritime dispute was rejected by the company. Justice Staples wrote:[33]

"Let them, then, twist slowly, slowly in the wind, dead and despised, as a warning to the Commission of the limits of the persuasion of a public authority upon those who zealously

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31See R Stevens, *The Law and Politics: The House of Lords as a Judicial Body 1800-1976* (1979), at p 287.

32See, eg, *Nakkuda Ali vs M F De S Jayaratne* [1951] AC 66 at 76 (PC); *Salemi vs Mackellar* [No. 2] (1977) 137 CLR 396.

33*The Broken Hill Pty Co Ltd V Seamen's Union of Australia (BHP Case)* (1975) 171 CAR 711. See also *Federated Storemen and Packers Union of Australia v Albany Woolstores Pty Ltd* (1979) 231 CAR 388, where Staples J concluded his decision with an allusion to Joseph Furphy's book about the wool trade by declaring the way in which he had fixed the figures he arrived at "I shall simply select a figure as Tom Collins selected a day from his diary and we shall see what turns up. Such is life."

uphold the privileges of property and who exercise the prerogatives of the master over those of our citizens whose lot falls to be their employees."

The company regarded this use of language as insulting to it. It was one of the matters which led to the removal of Justice Staples by the President of the Commission from his panel in charge of the maritime industry. His ultimate isolation and final removal from judicial duties, even judicial office, followed a further ironic reference, this time to a novel about the shearing industry in resolving an industrial dispute concerning shearers. Perhaps the fate of Justice Staples stands as a warning of the dangers to judges in Australia of what may happen to those who use excessively florid prose and irony found hurtful by the powerful interests on the receiving end.[34]

Nonetheless, subtle irony, detectable only by the *cognoscenti* can certainly be useful in conveying a key point in the reasoning of a judge. It is a legitimate technique of argumentation if properly used. Thus, Justice Meagher is most faithful to the doctrine of precedent and stare decisis (the principle that earlier judicial decisions of high authority provide a rule binding on later judges who are bound to apply it). He is probably closer to the "scientific" ideal of Chief Justice Dixon than many modern judges. Yet, in a recent case, he was able to reach a conclusion which appeared to two of his colleagues (Justice Clarke and myself) to fly in the face of a series of settled decisions of the Court of Appeal. It therefore gave me more than a little satisfaction to begin my reasons in the case with reference to the settled procedure by which an authority of the Court might later be overruled by it.[35]

"This motion tests the Court's fidelity to its own earlier holdings and to the procedure which it has laid down for the overruling of earlier determinations of questions of law, when they are subsequently challenged : (see *Proctor v Jetway Aviation Pty Ltd* {(1984) 1 NSWLR 166 at 171, 185)}. It also raises the approach which the court takes to the construction of legislation. Is it to be strict and literalist, taking words in isolation, out of their context and apart from their clearly intended operation? Or is it to be purposive, so that the meaning is given to the words in order to effect their intended purpose? The latter is the approach now required by Parliament itself ... It is increasingly that adopted by the courts of common law both in this country and elsewhere".

34See discussion by MD Kirby, "The Removal of Justice Staples - Contrived Nonsense or Matter of Principle?" in (1990) 6 Aust Bar Rev 1.

35*National Employers' Mutual General Insurance Association Ltd. v Manufacturers Mutual Insurance Ltd* (1988) 17 NSWLR 223 at 225.

Nothing daunted, Justice Meagher expressed his view succinctly and with force.[36]

> "The result, startling and inconvenient though it may be, in my opinion is that leave is required for an appeal from any decision on a separate issue, whether that decision be final or interlocutory. I am not deterred from this conclusion by the circumstance that in the past the Court of Appeal has stumbled into the opposite conclusion in four cases, in none of which the present point was really argued."

Changes in judgement Style

Opening Words

The foregoing passages illustrate some of several changes in judgement writing style which have begun to emerge in Australian judgements in recent years.

It is not now uncommon to see in the opening words of a judgement an expression of the key issues which fall to be decided. In a sense this passage provides a headline to the judgement. Its purpose is to invite readers to an interest in the issues discussed by capturing their attention at the outset. This has long been a common technique in the writing of judicial opinions in the United States. Indeed, it is recommended in a standard text on judicial opinion writing in that country.[37] It has not been common in Australia where, as in England, judgements have commonly begun with those tedious words: ' This is an appeal...' or 'This is an action ...' If only to avoid such cliche expressions, such dull phrases should never be used. The writer who loses the opportunity to state clearly at the outset the issue in hand (as he or she sees it) has lost a vital chance to communicate effectively with the potential audience and to grasp its interest and favour. Today there is so much to read that the effective communicator, bidding for attention to his or her ideas, will work at the task of ensnaring the busy, distracted reader. There is no reason why legal prose should be tedious and boring, whatever the writing style adopted. Judge Learned Hand expressed the ideal:[38]

> 'I like to think that the work of a judge is an art ... After all why isn't it in the nature of an art? It's a bit of craftsmanship, isn't it? It is what a poet does, it is what a sculptor does. He has something vague, he has some vague purposes and he has an indefinite number of what you might call frames of preference amongst which he may choose; for choose he has to, and he does.'

36Ibid, at 242.

37JJ George, *Judicial Opinion Writing Handbook* (2nd ed, Hein & Co, Buffalo 1986). Cf Roman N Komar, *Reasons for Judgment* (Butterworths, Toronto, 1980).

38L Hand, quoted in Jordan op cit, n 21 ante, at 693.

Subheadings

A second change that is occurring in Australian judgements is the introduction of headings in reasons both at first instance and on appeal. Once it was rare in Australia to see a heading interrupt an appellate judgement. It is still comparatively rare in England. But in the New South Wales Court of Appeal, a number of judges have introduced headings or clear division of their texts. I did so from the outset, following the conventions brought with me from the Law Reform Commission.[39] Justice McHugh experimented at first with divisional sections of judgements. Later he too introduced headings in his judgements in the Court of Appeal. He has followed the same technique since his appointment to the High Court of Australia.[40]

Subheadings provide an especially useful means of taking the reader efficiently to that section of the judgement which he or she wishes to find. It is a common method of communication in written texts in other disciplines. It would be unthinkable in commercial and economic material today to provide a dense unbroken text without such simple keys to unlocking the meaning and reasoning of the author. Presentation to the reader of unbroken passages of judicial prose, unrelieved by the merest symbol and uninterrupted by headings which provide the guideposts for the journey displays in my opinion a want of real concern about the processes of communication. It may even sometimes hide a lack of structure or plan. Disclosure of headings reveals, even to the most cursory reader, the plan followed by the judicial writer. Headings also provide an opportunity for the writer to convey key ideas. Tedious, elementary headings such as 'The facts' and 'The law' should certainly be avoided. But the opportunity should be used to display the logical progression of the reasoning of the judgement and to do so, if possible, with words which add to the process of persuasion.

Exit Latin

A third change is the gradual abandonment of Latin and the virtual elimination of Greek in judicial texts. Once it was necessary in Australia (as it still is in South Africa) to be trained in Latin to

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39In the first reported judgement in the Court of Appeal following appointment, headings appear. See *Brian Cassidy Electrical Industries Pty Ltd (In Prov Liq) and Anor v. Attalex Pty Ltd [No 2]*/[1984] 3 NSWLR 52 at 54. See also in the judgement of McHugh JA, then also recently appointed ibid, at 73.

40See judgement of McHugh J, eg, in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 63 ALJR 561 at 576 et seq. Other Justices have now increasingly adopted the same style. See eg. Gaudron J loc cit, Brennan J in *South Australia v Tanner* (1989) 63 ALJR 149 at 154. Toohey and Gaudron JJ in *Mickelberg v. The Queen* (1989) 63 ALJR 481 at 495 et seq.

secure entrance to the law school. Latin was considered essential for an understanding of Roman Law, usually the sole intruding example of comparative law to disturb the self-contained universe of the common law. But now Roman Law is not compulsory. A diminishing number of law students has studied Latin at school. The proportion in the community at large is smaller still. If the purpose of reasons for judgement is to communicate effectively with the various audiences identified, it is highly desirable that Latin expressions should be dropped - or where still useful at least translated. Otherwise a barrier is placed between legal expression and an important section of the audience for whom the judgement is written. Such barriers serve only to alienate judges and lawyers from the community they serve. The flourish of Latin as an illustration of classical learning is unnecessary. Learning can quite readily be demonstrated, by those anxious to do so, in other ways.

Gender Neutrality

The avoidance of gender specific language, unwarranted by the context, is a fourth feature of recent times. In the High Court of Australia sensitivity on this score has followed the appointment of Justice Mary Gaudron to the Court[41]. It is now perfectly normal to find in the text of High Court judgements care in avoiding the single personal pronoun "he". Instead, "he or she" is now typically used.[42] Other expedients are sometimes adopted (such as the use of the plural) to secure a gender neutral expression. As this technique of legal expression has now reached the statute book and reflects a matter keenly felt in some circles in the community, it is desirable that judges should wherever possible avoid discrimination in the language they use. Hidden away in language may be a world of inappropriate attitudes and prejudice. The use of gender neutral language tends to evidence a gender neutral attitude to legal tasks.

There is an increasing number of women judges appointed in Australia. Yet there is still confusion as to whether they should be called "Miss Justice", "Mrs Justice", "Madam Justice" or simply "Justice". At least in this country we do not have the problem, as elsewhere throughout the Commonwealth of Nations, of titling a woman judge "My Lord". Nor do we need to approach the

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41See, eg, Mason CJ and Toohey J in *Mills v Meeking* (1990) 64 ALJR 190 at 194 ("One would expect such a person to remain in the company of the member or officer until he or she has furnished a sample of breath for analysis..."). However, the practice is not universal. Thus Dawson J in the same case (loc cit, at 195) refers to "a person" as "he" . So does McHugh J (at 202), although he is elsewhere at pains to repeat the noun to avoid gender designation.

42See, eg, the extract from the judgement of Mason CJ and Wilson, Dawson and Toohey JJ n *Federated Insurance Ltd Vs. Wasson* (1987) 163 CLR 303 at 313 extracted in n 76, below.

eccentricity of the English in the Court of Appeal where Dame Elizabeth Butler-Sloss is styled "Her Ladyship, Lord Justice Butler-Sloss". Nearly a decade ago I proposed that all judges of superior courts in Australia - male and female - should, as then in South Australia following the appointment of Justice Roma Mitchell, adopt the simple style "Justice".[43] Sadly, when Dame Roma retired, the Judges of the Supreme Court of South Australia who had given such a worthy lead reverted to 'Mr Justice'. The High Court, following the appointment of Justice Gaudron, changed the title of the Justices by dropping 'Mr' in every case. So has the Family Court. However, in the Supreme Courts and in the Federal Court confusion reigns. In due course, it may be expected that the solution of the High Court will be adopted throughout the Australian judiciary. Meantime, in their daily expression, individual judges should also follow the High Court's lead and avoid 'sexist' pronouns and expressions.

Schedules and Footnotes

A fifth recent innovation in Australian judgement writing is the increasing tendency of judges to use appended schedules of cases or other material relied upon and to use footnotes. Such techniques are commonplace in the opinions of United States Judges.[44] They occasionally appear in judgements of the High Court of Australia. Thus, in Barwick CJ's very useful synthesis of case-law on the jurisdiction of court summarily to terminate an action in *General Steel Industries Inc v Commissioner for Railways* (NSW) and *Ors*[45] the Chief Justice appended a list of the case-law which he had "examined on the subject" in coming to his conclusions.[46] The appendix comprises 16 cases, some only of which are referred to in the reasons.[47] In the New South Wales Court of Appeal, the use of appendices and footnotes has so far largely been confined to the reasons of Justice Priestley.[48] Because unusual in this country, the judicial footnote can be a way of making a telling point strictly peripheral to the issues in

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43See M D Kirby, *The Judges*, op cit, a 12, ante. at p 13.

44Probably the most famous footnote in United States legal authority is footnote 4 to the opinion of Stone J in *United States v Carolene Products Co* (1938) 304 US 144. The history of the footnote, the correspondence between Hughes CJ and Stone J about it and editorial comments on it are found in W F Murphy, J Fleming and W F Harris, *American Constitutional Interpretation* (Foundation Press NY, 1986) at pp 482 et seq.

45 (1964) 112 CLR 125.

46Ibid, at 129.

47Appendix at 138. See also the schedule to the reasons of Priestley JA in *Silovi Pty Ltd v Barbaro and Ors* (1988) 13 NSWLR 466 at 476. Powell J annexed an appendix of books on security and intelligence matters tendered in evidence to his judgement in *Attorney General for the United Kingdom v Heinemann Publishers Australia Pty Ltd and Anor* (1987) 8 NSWLR 341 at 386-387.

48See, eg Priestley JA in *Commissioner for Motor Transport v. Kirkpatrick* (1988) 13 NSWLR 368 at 392-393.

hand but important in the writer's process of reasoning and perhaps for the future. In the United States, footnotes have sometimes played a very important function in digesting a body of law or in synthesising an opinion in a way that is highly influential upon later decisions. Many American texts appeal for restraint in the use of footnotes;[49] just as local observers urge that citations should likewise be confined.

Summary and Index

Sixthy, another technique of increasing use to be mentioned in this context is the summary and index to help readers through a particularly long judgement. The Judgment of the High Court of Australia in the *Tasmanian Dams Case*[50] was a decision of high controversy. It involved consideration of many separate arguments in the seven separate reasons of the judges. In that case, a statement was issued by the Court, at the time judgement was delivered, summarising the effect of the decision of the Court reached in relation to each question by a majority of the judges. That statement is reproduced in the authorised report.[51] So is the table of contents which refers to the subdivisions of each separate judgement.[52] Such subdivisions have also been used in the New South Wales Law Reports, for example, in the *Spycatcher* litigation.[53]

Brevity, Simplicity and Clarity

Judicial Trinity

Brevity, simplicity and clarity. These are the hallmarks of good judgement writing. But the greatest of these is clarity. Of course, some people see the world as exceedingly simple. There are some lawyers and not a few judges of this persuasion. They are blind to the complexities that lie hidden in facts or the subtleties of the law and the ambiguities of language in statutes and other documents. Still others, perfectly aware of such subtleties, have mastered a writing style notable for simplicity of expression. To avoid invidious local examples but to illustrate the point, it is useful to compare[54] the

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49Note discussion in G R Smith, op cit, n 20, ante at p 137.

50*Tasmania v the Commonwealth (The Tasmanian Dams Case)* (1983) 158 CLR I.

51Idbid, at 58-59.

52Idbid, at 56-58

53*Attorney General for the United Kingdom v Heinemann Publishers Australia Pty Ltd and Anor* (1987) 10 NSWLR 86 at 91 (Street CJ).

54This is done in DR Klinck, "Style, Meaning and Knowing: Megarry J and Denning MR" in (1987) 37 Uni Toronto LJ 358.

writing styles of Justice Meagarry and Lord Denning MR in describing the same facts in *In re Vandervell's Trusts [No 2]*.[55] Justice Megarry Wrote:[56]

> "An important consideration was that under the articles the VP Company could distribute its profits as dividends among the ordinary shares, the 'A' shares or the 'B' shares, or to any one or two of these classes to the exclusion of the others or other, as the Company determined in general meetings; and in practice this meant that Mr. Vandervell had complete control over whether or not any dividends were paid on any of these shares."

Lord Denning expressed the same facts in these words:[57]

> "In 1949, he set up a trust for his children. He did it by forming Vandervell Trustees Limited - the trustee company, as I will call it. He put three of his friends and advisers in control of it. They were the sole shareholders and directors of the trustee company. Two were chartered accountants. The other was his solicitor."

The Megarry passage comprises one sentence of approximately 75 words. The Denning passage comprises six sentences, 57 words in all.

Writing Style

It might be said that the appellate judge, with the benefit of the trial judge's exposition to work on, can reduce the relevant facts to those necessary to illustrate the legal concepts thought to govern the case. But every lawyer knows that out of the choice of facts will frequently emerge the applicable legal rule. And appellate second sight does not explain so radical a change of style. Lord Denning's is the style of the evangelist, the advocate. Some writers disapprove of the staccato of his short sentences.[58] Others do not find his style to be as effective as the Megarry exposition.[59] They fear that

> "simple syntax may reflect over-simplification and ... a failure to distinguish the more important [facts] from the less important".[60]

55(1974) Ch 169 (Ch D); [1974] Ch 269 (CA).
56Ibid, at 273-274.
57Ibid, at 316.
58A G Griffith, review of Lord Denning's book *The Discipline of Law* (1979), in (1979) 42 Mod I. Rev 348. See discussion, MD Kirby, "Lord Denning: An Antipodean Appreciation" in [1986] Denning Law J 103 at 107.
59Klinck, op cit, n 51, ante, at 367.
60Ibid, at 370.

Writing, including judicial writing, has been analysed for indications of a tendency to absolute expression as against recognition that things are usually more complex and thus in need of qualification. By this measure, Lord Denning's style places him in the category of absolute writers. Justice Megarry's places him amongst the qualifiers.[61] In Lord Denning's prose, many are the adverbs of intensification, such as "very", "extremely", "only", "really" and so on. Justice Megarry, on the other hand, is more prone to use qualified determiners.

> ("'most of the facts of the case are undisputed but some are in issues'... It was Mr Robbins who in *many* of the matters ... acted *almost* as Mr Vandervell's alter ego").

Analysis such as this simply catalogues writing as we tend, in everyday life, to categorise human personalities along a "confident" or "cautious" spectrum.

It should not surprise us that writing, with its tendency to reflect the complex, diverse personalities about us should exhibit features as varied as is human personality itself. Yet some common features are evident. Its very diversity is clearly a strength of the common law judicial system. Judges, with gifts of communication, writing in a simple, straightforward and "magisterial"[62] style tend to have the greatest influence because of their clarity of expression. On the other hand, rhetoric and the use of vivid phrases play an important part in persuasion. In this way such language may come to have a disproportionate impact on the development of the law. Benjamin Cardozo once pointed out:[63]

> "The (appellate) opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the tenseness and tang of the proverb and the maxim. Neglect the help of these allies, and it may never win its way."

From the legal profession and academic lawyers (and not a few judges) come constant calls for brevity of appellate court reasons. The same appeals usually include, if possible, a request for a single reason stating a clear holding. I entirely agree that these are ideals to be pursued wherever possible and appropriate. There are few tasks more unrewarding than searching amongst the verbiage of multiple

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61Ibid, at 385.

62R Weisberg, "How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor with an Application to Justice Rehnquist" (1982) 57 NY Uni L Rev 1 at 49. See also analysis by B Cardozo, op cit n 18, ante, at p 342: "It eschews ornament. It is meager in illustration and analogy. If it argues, it does so with a downward crush and overwhelming conviction of the syllogism and seldom with tentative gropings towards the inductive apprehension of a truth imperfectly discerned."

63Cardozo, loc cit.

judicial opinions, offering different reasons, for a binding rule which can be readily applied in the hectic activities of a workaday court. A notable illustration of the inconvenience of multiple opinions, where a clear and simple rule is imperative (or at least highly desirable) is the current authority of the High Court of Australia onforum non conveniens.[64]

Single Opinions

In the United States of America, recognising the key role in government played by the Supreme Court there has, virtually from the start, been a tradition of a single majority and (where applicable) a single minority opinion.[65] The Australian judicial hierarchy saw an extreme version of this thirst for clarity in the rule followed almost to its dying days by the Judicial Committee of the Privy Council, in tendering but one opinion to the Crown.[66] This extreme example of the magisterial style was doubtless influenced by early attitudes in Downing Street to the laws of the colonies, the available time of the Law Lords and their legislative function. To this day, Privy Council decisions are admirably brief. Yet they can sometimes be expressed in language of power and even emotion.[67] Dissents are still rare. Many Australian lawyers, surveying the increasing length of the opinions of appellate courts, yearn for a return to the certitudes of the Privy Council style and the similar style of the early days of the High Court of Australia. Various expedients have been suggested to produce brevity including writing judgements by longhand (Justice Kitto) whilst standing up (Chief Justice Dixon) and with pen and inkwell (Justice Meagher).

Perhaps in response to these calls, a slight movement can recently be detected towards single or joint judgements in Australia's appellate courts, thereby reversing the trend of the heyday of judicial individualism. The latter probably reached its apogee in the 1980s. Yet against these considerations it is important to bear in mind the pressures which tug in the opposite direction. The growing body of binding authority, including that of the High Court of Australia itself, intellectual honesty in response to

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64See the *Oceanic Sun Line* case, loc, cit n 10, ante. See also *Voth v Manildra Flour Mills Pty Ltd* (1989) 15 NSWLR 513 and notes at (1987) 103 LQR 398 and (1989) 64 ALJ 219, (1989) 13 NZ Uni L Rev 337 at 357 et seq and (1990) CLJ 37.

65The calls for single opinions are by no means confined to Australia. Justice William O Douglas of the Supreme Court of the United States alluded to the pressure when he wrote: 'All of us in recent years have heard and read many criticisms of dissenting ... opinions. Separate opinions have often been deplored. Courts have been criticised for tolerating them.' See Justice Douglas cited in JL Campbell, ' The Spirit of Dissent' (1983) 66 *Judicature* 305 at 312.

66See discussion in J Crawford, *Australian Courts of Law* (Oxford UP, Melbourne, 1982), pp 169 et seq.

67See, eg *Jeyaretnam v Gob Chok Tong* [1989] 1 WLR 1109 (PC).

counsel's arguments and the demonstration of appropriate judicial neutrality may today require a more detailed review of binding decisions than was earlier the case. The facility of reference to a wider range of extrinsic aids to construction also adds to the length of oral hearings, written submissions and judgements. Yet this may be a price willingly paid for the escape from the rigidities of a strictly textual interpretation.[68] Increasing candour in the acknowledgment of judicial choices[69] invites a more candid discussion of questions of principle and policy than would have been common, even a decade ago. This will also have a price for the length of opinions. It may be a price worth paying, in preference to a return to the 'fairytale' of completely value-free judicial decision-making.

Concurrent Opinions

There is another consideration. It is in the variety of judicial opinions that the pool of ideas is provided from which the common law system draws its vitality and strength. The diversity actually symbolises the independence of the judiciary, and all its members. It permits the light and shade of reasoning, even where a common conclusion is achieved. Justice Kitto revealed that Chief Justice Dixon once told him that he never agreed with the judgement of another judge 'without having some cause to regret it afterwards'.[70] Even if collectively judges of appellate courts wish to reduce the length and complexity of their judgements, it is a characteristic of the people appointed to such courts, and of their training, that they will rarely be willing to forsake their own unique opinions in the name of an institutional ideal. They will continue to perform their duties in their own way. Save for the impermissible exclusion of particular judges from the exercise of their commissions or the organisation of sitting arrangements to avoid the embarrassing expression of individual opinions, there is nothing much that courts or their presiding judges can do about the individualism of judges, except by persuasion and example.

68See, eg, McHugh JA in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421 et seq and the cases there cited.

69See Lord Reid, 'The judge as Lawmaker' in (1972) 12 *Journal of Public Teachers of Law* at 22. For useful discussion of Realpoltik in the present context see W Sadurski, 'It All Comes Out in the End. Judicial Rhetorics and The strategy of Reassurance; (1987) 7 Oxford J Legal Study 258 and J Goldsworthy, 'Realism about the High Court' (1989) 18 Fed l. Rev 27.

70F Kitto in Law Foundation (NSW) *Judicial Essays*, p 9.

Dissenting Opinions

The most acute form of the individual opinion is the dissent. Some famous judges including Lord Reid, have expressed the view that the writing of dissenting judgements should be conserved for very important points of principle. I do not agree. A judge is duty bound to offer his or her reasons for the order that is made by the Court. If in a collegiate court, those reasons differ in any matter of substance, the judge must identify the difference. The statistics demonstrate that dissenting opinions in Australian courts are much lower in number and proportion than in equivalent courts of the United States[71]. Perhaps this is a reflection of different tradition and different judicial functions of the judiciary in each country. The dissent must be disregarded for extracting from the decision of a court its binding rule[72]. But that does not mean that the dissent has no value for the long-term development of the law. In the United States, dissents have played a very important part in the development of constitutional law. Thus, Justice Harlan's dissent in *Plessy v Ferguson*[73] concerning the doctrine of "separate but equal" treatment of "coloured" people on trains came, in time, to sustain the Court's switch of opinion in *Brown et at v Board of Education of Topeka et al*[74]. Similarly the dissent of justices Black, Douglas and Murphy in *Betts vs Brady Warden*[75] provided the intellectual foundation for the Court's later holding in *Gideon v Wainright*[76] that a poor person facing a serious criminal charge had a right to counsel. There have been many similar instances in Australian legal history. The passage of time, changes in the membership of a court and even the ascendency of the dissenter can explain the shift of legal authority[77].

71For disussion See SS Ulmer, 'Exploring the Dissent Pattern of the Chief Justices: John Marshal to Warren Burger' in S Coldman and CM Lamb, *Judicial Conflict and Consensus: Behavioural Studies of Americal Appellate Courts.* (Uni Kentucky, 1982) p. 53. There has been no equivalent analysis of dissent patterns in appellate courts in Australia. For figures on dissents in the New South Wales Court of Appeal See *Annual Review* (1986), at p 53, according to which the highest rate of dissent was Mahoney JA (14) followed by Kirby P (13); Samuels JA (7); McHugh JA (6); Priestly JA (2); Glass JA (1) and Hope JA (nil). The 1987 statistics were Kirby P (18); Mahoney and Samuels JJA (5); McHugh JA (2) and Priestlley and Glass JJA (1). Hope JA was again nil. See *Annual Review* (1987), at p 38. For 1988 the figures were Mahoney JA (16), Kirby P (13); McHugh JA (10); Samuels JA (3); Clarke JA (3) and Street CJ, Hope JA and Priestley JA one each. See *Annual Review* (1988) at p 29.

72See *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 188.

73(1896) 163 US 537.

74(1954) 347 US 483.

75(1942) 316 US 455.

76(1963) 372 US 335.

77See, eg the apparent influence of the earlier dissenting opinions about the meaning of s-92 of the Australian Constitution upon the unanimous opinion of the High Court in *Cole v Whidfield* (1988) 165. CLR 360.

A dissent expressed within the institutions of the law provides a legitimate means of protest against opinions which are, at the moment, in the majority[78]. It helps to reflect the diversity of contemporary society, of which a diverse judiciary is but a muted reflection. It appeals to the present generation of lawyers, and to the future. Hence, Chief Justice Hughes' perception that the dissent appeals to the "brooding spirit" of the common law.[79] Justice Cardozo expressed the same thought..[80]

> "The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years. Read some of the great dissents ... and feel after the cooling time of the better part of a century, the flow and fire of a faith that was content to bide its hour. The prophet and martyr do not see the hooting throng. Their eyes are fixed on the eternities."

Even those who will not accord such high ambitions to the topical dissent in Australian judgements, may be willing to acknowledge their social value as "one of the processes that aids the development as the law meets and solves new situations"[81].

Conclusions

Courts are public theatres in which many of the human dramas of society are played out in an abbreviated and somewhat stylised fashion. In the necessarily artificial circumstances of a courtroom and judicial technique it is impossible entirely to suppress the human drama. judgements and legal opinions record some of these performances. They therefore provide opportunities for skilful writing. But it is writing always under the constraint, imposed by the purpose at hand, to detail the refinements of fact and law that need to be dealt with for that purpose and form of decision-making. The characteristics of the judicial opinion at first instance and on appeal are different. Yet they enjoy many common features. There are many practical constraints which inhibit creative writing by a judge. Some of these have been identified.

78Campbell, loc cit, n 62, ante, at 307.

79Hughes CJ as quoted in J Edwards, "Dissenting opinions of Mr Justice Smith" (1956) 34 U Det LJ 82. The expression was used by the High Court of Australia by Mason CJ, Wilson, Dawson and Toohey JJ in *Federation Insurance Ltd v Wasson and Ors.* (1987) 163 CLR 303 at 314 ("A dissenting Judge will often see his or her judgement as an appeal to the brooding spirit of the law, waiting for judges in future cases to discover its wisdom").

80The Cardozo, op cit, n 18, ante, at p 36. See also Justice Douglas cited in Canpbell, loc, cit, n 62, ante, at 311.

81J Simmons, "Use and Abuse of Dissenting Opinions" (1956) 16 LAL Rev 498. See also E McWhinney, "Judicial Concurrences and Dissents: A Comparative View of Opinion-Writing in Final Appellate Tribunals" (1953) 31 Canadian Bar Rev 609.

It is important to keep in mind the audience for whom the reasons are written. Yet there is no unanimity of opinion as to who that audience should be. To some extent a basic structure of opinion writing is stamped on judicial reasons by their fundamental purpose. Yet within that structure there is much room for individual variance: to exhibit skills of communication, a familiarity with the great writings of literature and of philosophy, the deft use of irony and even, occasionally, restrained humour.

Styles of judicial writing are constantly changing. Some of the changes have been collected. The use of headings. The demise of Latinisms and legal cliches. The avoidance of words or expressions showing gender-bias. The occasional use of footnotes, appendices and other aids to communication. Clearly, there are more changes still to come. Yet it is more remarkable to note the familiarity of a two centuries old than to mark the changes that have lately crept, almost imperceptibly, into their expression.

Brevity, simplicity and clarity are the watchwords for effective judicial writing. However, a number of constraints on brevity have been acknowledged. Brevity at the price of a return to a mechanistic view of the law would be unacceptable to many judges today. The use of extrinsic aids to construction and the candid acknowledgement of policy choices which must be made tend to add to the length of judicial reasons. At a price worth paying, most would say. And on conditions, such as the general availability of the extrinsic 'aids' others would add[82].

Individual opinion-writing and the dissenting judgement are the hallmarks of a system of justice which truly respects the independence of its judges and acknowledges the judge's only masters to be the law and conscience. Diversity of opinion—and one might add of judgement writing style—is a great strength of the common law judicial tradition. It provides a never-ending stream of ideas and of ways to communicate them. Ideas are the most powerful engines for change and progress. Continuity amidst constant change of substantive law and orthodoxy amidst experimental variety in its exposition have helped to develop the law of a rural society of feudal England into the formidable body of the common law today. It is a body of law laid down by the succeeding centuries of judicial opinion writing. It is this happy mixture of stability and movement which explains why that most lasting institutional legacy of the British Empire—the common law— continues to flourish in so many corners of the world and to serve in these fast-changing times the legal needs of a third of humanity. It is the privilege of each succeeding generation of judges of the common law to nurture and advance this precious legacy.

82See, eg, *Fotbergill v Monarch Airlines Ltd* [1981] AC 251 at 278 (HL).

PLAIN LANGUAGE

(It is an excerpt at page 661 from the book A Dictionary of Modern Legal Usage Second Edition by Bryan A. Garner)

A. Generally. Albert Einstein once said that his goal in stating an idea was to make it as simple as possible but no simpler. If lawyers everywhere adopted this goal, the world would probably change in dramatic ways.

But there is little reason for hope when so many legal writers seem to believe that to seem good or competent or smart, their ideas must be stated in the most complex manner possible. Of course, this problem plagues many fields of intellectual endeavor, as the philosopher Bertrand Russell noted:

> I am allowed to use plain English because everybody knows that I could use mathematical logic if I chose. Take the statement: 'Some people marry their deceased wives' sisters'. I can express this in language [that] only becomes intelligible after years of study, and this gives me freedom. I suggest to young professors that their first work should be written in a jargon only to be understood by the erudite few. With that behind them, they can ever after say what they have to say in a language 'understanded of the people.' In these days, when our very lives are at the mercy of the professors, I can not but think that they would deserve our gratitude if they adopted my advice.]
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> Betrand Russel, "How I Write," in *The Basic Writings of Bertand Russel* 63, 65 (Robert E. Egner & Lester E. Denonn eds, 1961).

But the professors have not heeded Russell's advice. Since Russell wrote that essay in the mid 1950s, things have gotten much worse in fields such as biology, linguistics, literary criticism, political science, psychology, and sociology. And they have gotten worse in law.

Consider the following statutory provision, a 272-word tangle that is as difficult to fathom as any algebraic theorem:

> 57AF(11) Where, but for this sub-section, this section would, by virtue of the proceeding provisions of this section, have in relation to a relevant year of income as if, for the reference in sub-section (3) to $18,000 there were substituted a reference to another amount, being an amount that consists of a number of whole dollars and a number of cents (in this sub-section referred to as the 'relevant number of cents').—

(a) in the case where the relevant number of cents is less than 50—the other amount shall be reduced by the relevant number of cents:

(b) in any case—the other amount shall be increased by the amount by which the relevant number of cents is less than $1.

(12) where, but for sub-section (5), this section would, by virtue of the preceding provisions of this section, have effect in relation to a relevant year of income as if, for the reference in sub-section (3) to $18,00, there were substituted a reference to another amount, being an amount that consists of a number of whole dollars and a number of cents (in this sub-section referred to as the 'relevant number of cents') then, for the purposes of the application of paragraph 4(b)—

(a) in a case where the relevant number of cents is less than 50—the other amount shall be reduced by the relevant number of cents, or

(b) in any case—the other amount shall be increased by the amount by which the relevant number of cents is less than $1.

Income Tax Assessment Act [Australia] 57AF(11), (12)
(as quoted in David St. I. Kelly, "Plan English in Legislation," in *Essays on Legislative Drafting* 57,58)
(David St. L Kelly ed. 1988)

That is the type of DRAFTING that prompts an oft-repeated criticism: "So unintelligible is the phraseology of some statutes that suggestions have been made that draftsmen, like the Delphic Oracle, sometimes aim deliberately at obscurity ..." Carleton K. Allen, *Law in the Making* 486 (7th ed. 1964).

With some hard work, the all-but-inscrutable passage above can be transformed into a straightforward version of only 65 words:

If either of the following amounts is not in whole dollars, the amount must be rounded up or down to the nearest dollar (or rounded up if the amount ends with 50 cents):

(a) the amount of the motor-vehicle-depreciation limit; or

(b) the amount that would have been the motor vehicle depreciation limit if the amount had equated or exceeded $18,000.

Revision based on that of Gavin Peck (quoted in Kelly, *supra* at 59).

Few would doubt that the original statute is unplain and that the revision is comparatively plain. True, the revision requires the reader to understand what a 'motor-vehicle-depreciation limit' is, but some things can be stated only so simply.

When it comes to the legislative jungle of the tax code, as Justice Robert H. Jackson once wrote, "it can never be made simple, but we can try to avoid making it needlessly complex." *Dobson vs CIR*, 320 U. S. 489, 495 (1943).

Still, some might protest that, after all, the law is a learned profession. Some seem to find an insult in the suggestion that lawyers should avoid complex verbiage. They want to express themselves in more sophisticated ways than nonprofessionals do.

Their objection needs a serious answer because it presents the most serious impediment to the plain-language movement. There are essentially four answers.

First, those who write in a difficult, laborious style risk being unclear not only to other readers but also to themselves. When you write obscurely, you are less likely to be thinking clearly. And you're less likely to appreciate the problems that are buried under such involuted prose. For the private practitioner, this could increase the possibility of malpractice.

Second, obscure writing wastes readers' time—a great deal of it, when the sum is totalled. An Australian study conducted in the 1980s found that lawyers and judges take twice as long deciphering legalistically worded statutes as they do plain-language revisions. Law Reform Comm'n of Victoria, *Plain English & the Law* 61-62 (1987).

Third, simplifying is a higher intellectual attainment than complexifying. Writing simply and directly is hard work, but a learned profession ought not to shrink from the challenge. In fact, the hallmark of all the greatest legal stylists is the precisely that they take difficult ideas and express them as simply as possible. No nonprofessional could do it, and most lawyers can't do it. Only extraordinary minds are capable of the task. Still, every lawyer—brilliant or not—can aim at the mark.

Fourth, the very idea of professionalism demands that we not conspire against nonlawyers by adopting a style that makes our writing seem like a suffocating fog. Unless lawyers do the right thing and reform from within, outside forces may well cause a revolution that will marginalize the legal profession. See LEGALESE, LEGALISMS AND LAWYERISMS & OBSCURITY.

B. Definitions :

"Plain language," generally speaking, is "the idiomatic and grammatical use of language that most effectively presents ideas to the reader". Garner, *The Elements of Legal Style* 7 (1991). Some have tried to reduce "plain language" to a mathematical formula, but any such attempt is doomed to failure. And that is no indictment of the idea: "[I]it is no criticism that Plain English cannot be precisely, mathematically defined. Neither can 'reasonable doubt' or 'good cause.' Like so many legal terms, it is inherently and appropriately vague". Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 Thomas M. Cooley L. Rev. 1,14 (1992).

The fundamental principle is that anything transferable into simpler words in the same language is bad style. That may sound like a facile oversimplification that fails when put into practice — but it isn't and it doesn't.

C. An Old Idea :

Of course, legal discourse has long been ridiculed for its incomprehensibility. Jonathan Swift skewered LEGALESE when he wrote of a society of lawyers who spoke in "a peculiar cant and jargon of their own, that no other mortal can understand." *Gulliver's Travels* 154 (1726; repr.1952).

What is less well known than the ridicule is that good legal writers have long advocated a plain-language style. In the mid-19th century, for example, the leading authority on legislative drafting said that most legal documents can be written in "the common popular structure of plain English." George Coode, *On Legislative Expression* xxx (1842). A generation later, an English lawyer explained that good drafting "says in the plainest language, with the simplest, fewest, and fittest words, precisely what it means." J.G. Mackey, *Introduction to an Essay on the Art of Legal Composition Commonly Called Drafting*, 3 Law Q. Rev 326, 326 (1887). Other writers could be cited, decade by decade, up to the present day. In short, there is nothing new about the idea.

D. Plain-Language Principles :

"No lawyer can now safely navigate," writes a well-known law professor, "without knowing the problems of legalese and the principles of plain English." Robert W. Benson, *The End of Legalese*, 13 N.Y.U. Rev. Law and Soc. Change 519, 573 (1984-1985). Experienced editors have arrived at these

plain-language principles through induction—through carrying out the principles again and again. Once you have revised hundreds of legal documents for the purposes of clarifying and simplifying, you can fairly accurately predict what problems the next document might hold in store.

Of these principles, perhaps the most important is to reject the MYTH OF PRECISION. Traditionally, lawyers have aimed for a type of "precision" that results in cumbersome writing, with many long sentences collapsing under the weight of obscure qualifications. That "precision" is often illusory for two reasons: (a) ambiguity routinely lurks within traditional, legalistic language; and (b) when words proliferate,ambiguities tend to as well.

Of course, where clarity and precision are truly at loggerheads, precision must usually prevail. But the instances of actual conflict are much rarer than lawyers often suppose. Precision is not sacrificed when the drafter uses technical words where necessary and avoids JARGON that serves no substantive purpose. As one commentator puts it, "[W]hat is often called 'legal phraseology' is no more than inept writing or the unnecessary use of obscure or entangled phrases." Samuel A. Goldberg, "Hints on Draftsmanship," in *Drafting Contracts and Commercial Instruments, 7,8* (Research and Documentation Corp. ed., 1971).

As a rule, whether one is drafting legislation, contracts, or other documents, clarity is just as important as precision. In fact, clarity helps ensure precision because the drafter with an obscure style finds it less easy to warrant what the draft itself says.

The main work of the legislative drafter is "to state the law in a form clearer and more convenient than that in which it has hitherto existed, and that is a task for experts...:" J.L. Brierly, *The Law of Nations 80* (5th ed 1955). Of course, some influences leading to complexity cannot be overcome; among these are the difficulty of the subject matter itself and the fact that a final draft may reflect a compromise between different points of view. But, with hard work, other obscurantist influences—the ones that are linguistically based — can be overcome: long-windedness, needless jargon, and inconsistent style resulting from collaborative efforts.

The chief guidelines are as follows:

1. Achieve a reasonable average sentence length. Strive for an average sentence length of 20 words—and, in any event, ensure that you are below 30 words. Doing this involves following a maxim that, unfortunately, makes some legal drafters unnecessarily nervous: "[I]f you want to make a statement with a great many qualifications, put some of the qualifications in separate

sentences." Bertrand Russell, "How I Write," in *The Basic Writings of Bertrand Russell* 63, 65 (Robert E. Egner & Lester E. Denonn eds, 1961). See SENTENCE LENGTH.

2. Prefer short words to long ones, simple to fancy. Minimise jargon and technical terms so that you achieve a straightforward style that nonlawyers as well as lawyers can understand. This means rejecting LEGALISMS such as *pursuant to* (under, in accordance with), *prior to* (before), *subsequent to* (after) *vel non* (or not, or the lack of it).

3. Avoid double and triple negatives. No reader wants to wrestle with a sentences like this one: "The investments need not be revalued at intervals of not more than two years if the trustee and beneficiaries do not disagree." [Read : *If the trustee and beneficiaries agree, the investments need not be revalued every two years*] See NEGATIVES (A).

4. Prefer the active voice. *Notice must be given* compares poorly with *The tenant must give notice* because (a) the first version does not spell out who must give notice, and (b) readers take in a sentence more easily if it meets their expectation of a subject-verb-object structure. See PASSIVE VOICE.

5. Keep related words together. In well constructed sentences, related words go together—especially subject and verb, verb and object. See PHRASING.

6. Break up the text with headings. Headings and subheadings make the structure of a document overt, allowing readers to find their way around the document quickly and easily. See DOCUMENT DESIGN (C).

7. Use parallel structures for enumerations. See PARALLELISM, ENUMERATIONS & DOCUMENT DESIGN. (F)(G).

8. Avoid excessive cross-references. The writer who becomes zealous about cross-referencing usually creates linguistic mazes. The problem is that readers are asked to hold in

mind the contents of several different provisions simultaneously. For a choice example, see WOOLLINESS.

9. Avoid overdefining. Although definitions are sometimes helpful, legal drafters grossly overuse them. Whenever you send the reader elsewhere in a legal document to understand what you're saying in a a given provision, you impede understanding. And many drafters "pass the buck" in this way repeatedly for a single term, by using cross-references in definitions. See—if you like, but this is not intended as a pass-the-buck cross-reference—DEFINITIONS (A).

10. Use recitals and purpose clauses. In contracts, recitals help the reader understand what the drafter hopes to accomplish; in legislation, purpose clauses serve this function. Except in simplest drafting projects—such as straightforward buy-sell agreements—you should generally presume that these orienting devices are necessary. And even simple documents should have descriptive titles (not *Agreement,* but *Agreement Restricting Stock Transfers*).

Finally, to gauge how effectively the principles are carried out, plain-language advocates recommend that certain documents be tested on typical readers. For documents that go out by the thousands and hundreds of thousands (like government forms) and for major legislation, time spent in testing at the front end can save enormous amounts of time and money in the long run.

E. Efforts to Use Plain Language :

Since the 1970s, most American states have passed some type of plain-language legislation, and several federal statutes exist as well. See Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 Thomas M. Cooley L. Rev. 1, 31-35 (1992). Statutes of this type have not caused the problems that skeptics once warned of —unworkable standards, fatal ambiguities, decline in the quality of drafting. In fact, an empirical study would probably confirm precisely the opposite effects.

In addition to plain-language legislation, lawyers in many English-speaking jurisdictions have formed commissions and committees to promote plain language. In the U.S., for example, the State Bar of Michigan formed such a committee in 1979 and the State Bar of Texas in 1990; other state bar

associations have begun to follow suit. In Australia, the Centre for Plain Legal Language has done much to promote the movement. In British Columbia, the Plain Language Institute thrived for a time and produced much good literature before being disbanded in 1993 for lack of governmental funding; other Canadian groups soon took up the slack. In England, the Plain English Campaign—a grassroots consumer organisation—has met with considerable success. England is also the home of Clarity, an international organization that studies and promotes plain language in law. All these efforts have depended primarily on the determination of specific individuals.

Their opponents—the naysayers—have an increasingly difficult time as more and more excellent work is published in the field of plain language. For example, in 1994 Martin Cutts, an English writing consultant, redesigned and rewrote an act of Parliament: the Timeshare Act 1992. In doing so, he convincingly showed what immense improvements are possible in legislative drafting if only the official drafters approached their task with a greater command of plain-language principles. See Martin Cutts, *Lucid Law* (1994). The enduring problem—here as elsewhere—is whether reform can take place while the old guard remains in place.

In some places, though, official and semi-official bodies are changing standard forms. Four examples, the English Law Society's 1990 and 1992 editions of the Standard Conditions of Sale use "language that is as direct as the subject-matter allows, sentences that are relatively short and jargon-free, and a layout that is clear." Peter Butt, *Plain Language and Conveyancing*, Conveyancer and Property Lawyer, July-August 1993, at 256, 258. Similarly, in 1992 the Law Society of New South Wales issued a "plainer" form of contract for the sale of the land—"plainer" than its predecessor, though not yet quite "plain" *Id.* In the early 1990s, the Real Estate Forms Committee of the State Bar of Texas issued plain-language forms for deed, deed of trust, leases, and other forms. These are but a few examples.

For a challenging but partly tongue-in-cheek approach to a legislative mandate for plain-language, see David C. Elliott, *A Model Plain-Language Act,* 3 Scribes J. Legal Writing 51 (1992).

F. The Trouble with the Word "Plain" :

It is unfortunate that the SET PHRASES *plain language* and *plain English* contain the word *plain*. For that word, to many speakers of English, suggests the idea of "drab and ugly." But plain language is not drab: It is powerful and often beautiful. It is the language of the King James Version of

the Bible, and it has a long literary tradition in the so-called Attic style of writing. See Garner, *The Elements of Legal Style* 7-15 (1991).

Despite the unfortunate associations that the word *plain* carries, it has become established and is without a serious competitor. As a result, plain language advocates must continually explain what they mean by "Plain" language—or else critics and doubters will misunderstand it.

G. Prospects :

We can point to significant progress in this area, but it remains sporadic. In the end, E.B. White may have been prescient: "I honestly worry about lawyers. They never write plain English themselves, and when you give them a bit of plain English to read, they say, 'Don't worry, it doesn't mean anything,' " E.B. White (as quoted in Thomas L. Shaffer, *The Planning and Drafting of Wills and Trusts,* 149 (2d ed. 1979).

There are those who say that "lawyers spend half their time trying to understand what other lawyers wrote; and the other half of their days writing things that other lawyers spend half their time trying to understand." Samuel A. Goldberg, Hints on Draftsmanship," in *Drafting Contracts and Commercial Instruments* 7,10 (Research & Documentation Corp. ed., 1971). That cynical view holds true only when poor writing becomes pervasive; and, alas, there is some truth in it today.

Beyond the mere inconveniences of obscurity, however, people actually suffer from it. Not least among the sufferers are judges who must try to make sense out of nonsense. But the vexation that judges feel pales in comparison with the economic and emotional suffering that clients often experience.

It is hardly an overstatement to say that plain language reform is among the most important issues confronting the legal profession. And until this reform occurs, the profession will continue to have a badly tarnished image—no matter how many other altruistic endeavours it carried out. If we want the respect of the public, we must learn to communicate simply and directly.

H. A Plain-Language Library :

Those wishing to consult further sources in the field may find the following books helpful:

- Mark Adler, *Clarity for Lawyers: the Use of Plain English in Legal Writing* (1990).
- Robert D. Eagleson, *Writing in Plain English* (1990).
- Carl Felsenfeld & Alan Siegel, *Writing Contracts in Plain English* (1981).

- Rudolf Flesch, *The Art of Plain Talk* (1951; repr. 1978).
- Rudolf Flesch, *The Art of Readable Writing* (1949).
- Rudolf Flesch, *How to Write Plain English : A Book for Lawyers and Consumers* (1979).
- Ernest Gowers, *The Complete Plain Words* (Sidney Greenbaum & Janet Whitcut eds., 3d ed. 1986).
- Robert Gunning, *The Technique of Clear Writing* (rev. ed. 1968).
- *How Plain English Works for Business: Twelve Case Studies* (U.S. Dep't of Commerce, Office of Consumer Affairs, 1984).
- Richard Lauchman, *Plain Style : Techniques for Simple, Concise, Emphatic Business Writing* (1993).
- *Plain English and the Law* (Law Reform Commission of Australia, Report No.9, 1990).
- *Plain Language: Principles and Practice* (Erwin R. Steinberg ed., 1991).
- *The Plain English Story* (Plain English Campaign, rev. ed. 1993).
- Richard Wincor, *Contracts in Plain English* (1976).

Richard Wydick, *Plain English for Lawyers* (3d ed. 1987).

LAW AND LITERATURE[83]

(by Justice Cardozo, (52) Harvard Law Review 472. This is also available at page 339 in the book 'Selected Writings of Benjamin Nathan C')

Foreword

It is fitting to number Mr. Justice Cardozo among the contributors to an issue dedicated to his memory. That memory has so many facets, that it is difficult to make a choice of one. But reprinting *Law and Literature* seems singularly appropriate. Too many may have failed to see it when it appeared in 1925 in the Yale Review, or missed reading the volume of essays that contained it, published in 1931. It deserves the notice of all those who would pursue the law, as Mr. Justice Holmes put it, in the grand manner.

Here Cardozo's style, uncanalized—to borrow his phrase—by the fear of dicta or the querulousness of legal brethren, flows with quite excitement across the printed page. He explores for us the literary returns attributable to judicial labor. As one reads, some tinge of regret accompanies the thought that Cardozo turned judge, for here is an essayist rare enough to rank with Hazlitt or Lamb, opening in the friendliest of manners the treasure chest that derives from the said necessity that judges must not only judge but also write. And there are treasures here, utterances that serve as majestic conductors for that galvanic current of life that we honour as the law, homilies that remind of the immanence that is its characteristic, touches of wisdom that put mere learning to shame. So the regret passes, for here a great judge has made confession of the secret of his greatness, that a profession of words can have grandeur only if also there exist artistry. If this be the equation of the great judge, this essay illumines his creed.

JM Landis.

I am told at times by friends that a judicial opinion has no business to be literature. The idol must be ugly,or he may be taken for a common man. The deliverance that is to be accepted without demur or hesitation must have a certain high austerity which frowns at winning graces. I fancy that not a little of this criticism is founded in misconception of the true significance of literature, or, more accurately

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perhaps, of literary style. To some a clearer insight has been given. There are those who have perceived that the highest measure of condensation, of short and sharp and imperative directness, a directness that speaks the voice of some external and supreme authority, is consistent, none the less, with supreme literary excellence. A dictum of Henri Beyle's, recalled not long ago by Mr. Strachey, will point my meaning. The French novelist used to say that "there was only one example of the perfect style, and that was the Code Napoleon; for there alone everything was subordinated to the exact and complete expression of what was to be said." The poor man succumbed to its charm to such an extent that he was in the habit of reading a few paragraphs every morning before breakfast. I do not seek to substitute this regimen for the daily exercise in calisthenics. Some of us prefer our literature like our food in less concentrated tablets. I do no more than suggest that the morsel hastily gulped down may have a savor all its own for the discriminating palate.

But I over-emphasise and exaggerate if I seem to paint the picture of any active opposition that is more than sporadic and exceptional to so amiable a weakness as a love of art and letters. A commoner attitude with lawyers is one, not of active opposition, but of amused or cynical indifference. We are merely wasting our time, so many will inform us, if we bother about form when only substance is important. I suppose this might be true if any one could tell us where substance ends and form begins. Philosophers have been trying for some thousands of years to draw the distinction between substance and mere appearance in the world of matter. I doubt whether they succeed better when they attempt a like distinction in the world of thought. Form is not something added to substance as a mere protuberant adornment. The two are fused into a unity. Not long ago I ran across a paragraph in the letters of Henry James in which he blurts out his impatience of these attempts to divide the indivisible. He is writing to Hugh Walpole, now a novelist of assured position, but then comparatively unknown. "Don't let any one persuade you—there are plenty of ignorant and fatuous duffers to try to do it—that strenuous selection and comparison are not the very essence of art, and that Form *is* not substance to that degree that there is absolutely no substance without it. Form alone *takes*, and holds and preserves substance, saves if from the welter of helpless verbiage that we swim in as in a sea of tasteless tepid pudding". This is my own faith. The argument strongly put is not the same as the argument put feebly any more than the "tasteless tepid pudding" is the same as the pudding served to us in triumph with all the glory of the lambent flame. The strength that is born of form and the feebleness that is born of the lack of form are in truth qualities of the substance. They are the tokens of the thing's identity. They make it what it is.

Up to this point at least, I have little fear of opposition. We shall, most of us, be agreed, I think, not merely that style is not an evil in the Sahara of a judicial opinion, but even that it is a positive good, if only it is the right style. *There* is the disquieting condition which checks the forward movement of triumphal demonstration. What is to be deemed the right style, or the right styles if there are more than one of them? Do the examples of the great masters reveal some uniformity of method for the instruction of the tyro? If uniformity is not discoverable, may there not at least be types or standards? If types or standards do not exist, shall we not find stimulus and interest in the coruscations of genius, however vagrant or irregular? If at times there is neither stimulus nor interest, may there not in lieu of these be the awful warning of example?

I suppose there can be little doubt that in matters of literary style the sovereign virtue for the judge is clearness. Judge Veeder in his interesting and scholarly essay. " A Century of Judicature," quotes the comment of Brougham upon the opinions of Lord Stowell: "If ever the praise of being luminous could be bestowed upon human compositions, it was upon his judgements." How shall his successors in the same or other courts attain that standard or approach it? There is an accuracy that defeats itself by the overemphasis of details. I often say that one must permit oneself, and that quite advisedly and deliberately, a certain margin of misstatement. Of course, one must take heed that the margin is not exceeded, just as the physician must be cautious in administering the poisonous ingredient which magnified will kill, but in tiny qualities will cure. On the other hand, the sentence may be so overloaded with all its possible qualifications that it will tumble down of its own weight. "To philosophize," says Homes in one of his opinions—I am quoting him from uncertain and perhaps inaccurate recollection—"to philosophize is to generalize, but to generalize is to omit." The picture cannot be painted if the significant and the insignificant are given equal prominence. One must know how to select. All these generalities are as easy as they are obvious, but, alas! the application is an ordeal to try the souls of men. Write an opinion, and read it a few years later when it is dissected in the briefs of counsel. You will learn for the first time the limitations of the power of speech, or, if not those of speech in general, at all events your own. All sorts of gaps and obstacles and impediments will obtrude themselves before your gaze, as pitilessly manifest as the hazards on a golf course. Sometimes you will know that the fault is truly yours, in which event you can only smite your breast, and pray for deliverance thereafter. Sometimes you will feel that the fault is with counsel who have stupidly misread the obvious, in which event, though you rail against the bar and the imperfect medium of speech, you will be solaced, even in your chagrin, by a sense of injured innocence. Sometimes, though rarely, you

will believe that the misreading is less stupid than malicious, in which event you will be wise to keep your feelings to yourself. One marvels sometimes at the ingenuity with which texts the most remote are made to serve the ends of argument or parable. But clearness, though the sovereign quality, is not the only one to be pursued, and even if it were, may be gained through many avenues of approach. The opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of the proverb and the maxim. Neglect the help of these allies, and it may never win its way. With traps and obstacles and hazards confronting us on every hand, only blindness or indifference will fail to turn in all humility, for guidance or for warning, to the study of examples.

Classification must be provisional, for forms run into one another. As I search the archives of my memory, I seem to discern six types or methods which divide themselves from one another with measurable distinctness. There is the type magisterial or imperative; the type laconic or sententious; the type conversational or homely; the type refined or artificial, smelling of the lamp, verging at times upon preciosity or euphuism; the type demonstrative or persuasive; and finally the type tonsorial or agglutinative, so called from the shears and the pastepot which are its implements and emblem.

I place first in order, for it is first in dignity and power, the type magisterial or imperative. It eschews ornament. It is meager in illustration and analogy. If it argues, it does so with the downward rush and overwhelming conviction of the syllogism, seldom with tentative gropings towards the inductive apprehension of a truth imperfectly discerned. We hear the voice of the law speaking by its consecrated ministers with the calmness and assurance that are born of a sense of mastery and power. Thus Marshall seemed to judge, and a hush falls upon us even now as we listen to his words. Those organ tones of his were meant to fill cathedrals or the most exalted of tribunals. The judicial department, he tells us, "has no will in any case . . . . Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law." The thrill is irresistible. We feel that mystery and the awe of inspired revelation. His greatest judgements are framed upon this plane of exaltation and aloofness. The movement from premise to conclusion is put before the observer as something more impersonal than the working of the individual mind. It is the inevitable progress of an inexorable force. Professor Corwin in an interesting volume, *John Marshall and the Constitution,* shows how even his contemporaries, the bitterest critics of his aggrandizement of federal power, were touched by this illusion. "All wrong, all wrong," lamented John Randolph of Roanoke, "but no man in the United States can tell why or

wherein." I have reread a few of the most famous of his judgements: Marbury vs Madison; Gibbons vs Ogden; McCulloch vs Maryland; they are all in the grand style.

Listen to the voice of the Magistrate in Marbury vs Madison: "The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on which they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested: that the Constitution controls any legislative act repugnant to it; or that the legislature may alter the Constitution by an ordinary act. Between these alternatives there is no middle ground . . . . If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty". Nothing is here of doubt; nothing of apology; no blurred edges or uncertain lines. "There is no middle ground." The choice that is made is "of the very essence of judicial duty.". The voice has pealed forth. Let the wicked heed it and obey.

One will find this same suggestion of sure and calm conviction in some of the judgements of Lord Mansfield. The slave Somerset captured on the coast of Africa, is sold in bondage in Virginia, and brought to England by his master. The case comes before Mansfield on the return to the writ of habeas corpus: "The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only positive law, which preserved its force long after the reasons, occasions, and time itself from whence it was created, are erased from memory. It is so odious that nothing can be suffered to support it, but positive law . . . . I care not for the supposed *dicta* of judges, however eminent, if they be contrary to all principle. The *dicta* cited were probably misunderstood, and at all events they are to be disregarded. Villainage, when it did exist in this country, differed in many particulars from West India slavery. The lord never could have thrown his villain, whether *regardant* or *in gross*, into chains, sent him to the West Indies, and sold him there to work in a mine or in a cane field. At any rate villainage has ceased in England, and it cannot be revived. The air of England has long been too pure for a slave, and every man is free who breathes it. Every man who comes into England is entitled to the protection of English law, whatever oppression he may heretofore have suffered, and whatever may be the color of his skin. *'Quamvis ille niger, quamvis to candidus esses.'* Let the negro be discharged."

It is thus men speak when they are conscious of their power. One does not need to justify oneself if one is the mouthpiece of divinity. The style will fit the mood.

I have said that in dignity and power there is no method that can be matched with the method which I have chracterized as magisterial or imperative. A changing philosophy of law has tended, none the less, to the use of other methods more conciliatory and modest. The development of law is conceived of, more and more, as a process of adaptation and adjustment. The pronouncements of its ministers are timid and tentative approximations, to be judged through their workings, by some pragmatic test of truth. I find in a dissenting opinion by Mr. Justice Brandeis a striking statement of this attitude of mind. Arguing for the restriction of a rule which had proved itself unworkable, he says: " Such limitations of principles previously announced and such express disapproval of *dicta* are often necessary. It is an unavoidable incident of the search by courts of last resort for the true rule. The process of inclusion and exclusion, so often applied in developing a rule, cannot end with its first enunciation. The rule as announced must be deemed tentative. For the many and varying facts to which it will be applied cannot be foreseen. Modification implies growth. It is the life of law."

One cannot face the law in this spirit of cautious seeking without showing the changing point of view in a changing style and form. Universals will be handled more charily under the dominance of such a philosophy than in days when the law of nature supplied us with data that were supposed to be eternal and unyielding. Yet there are times even now when the magisterial method is utilized by men who know that they are masters of their calling. It is still utilized in fields where some established principle is to be applied to new facts or where the area of its extension or restriction is fairly obvious or narrow. But alas! even then it is the masters, and no others, who feel sure enough of themselves to omit the intermediate steps and stages, and leap to the conclusion. Most of us are so uncertain of our strength, so beset with doubts and difficulties, that we feel oppressed with the need of justifying every holding by analogies and precedents and an exposure of the reasons. The masters are content to say, "The elect will understand, there is no need to write for others." Perhaps there are opinions by Mr. Justice Holmes in which this mood can be discerned. The sluggard unable to keep pace with the swiftness of his thought will say that he is hard to follow. If that is so, it is only for the reason that he is walking with a giant's stride. But giants, after all, are not met at every turn, and for most of us, even if we are not pygmies, the gait of ordinary men is the safer manner of advance. We grope and feel our way. What we hand down in our judgements is an hypothesis. It is no longer a divine command.

I pass to other types which run into each other by imperceptible gradations, the laconic or sententious and the conversational or homely. There has been no stage of our legal history in which these methods have been neglected. The Year Books are full of wise saws and homely illustrations, the epigram, the quip, the jest. Perhaps this is but a phase of that use of the maxim or the proverb which is characteristic of legal system in early stages of development. Dean Pound in a recent paper has traced the growth and function of the maxim with all the resources of his learning. If the maxim has declined in prevalence and importance, now that the truths of the law have become too complex to be forced within a sentence, there has been no abatement of recourse to the laconic or sententious phrase, to drive home and imbed what might otherwise be lost or scattered. Who will resist Lord Nottingham's adjuration: "Pray let us so resolve cases here, that they may stand with the reason of mankind when they are debated abroad"? Is there any armor proof against a thrust like the dictum of Lord Bowen's: "The state of a man's mind is as much a fact as the state of his digestion"? Next door to the epigram is the homely illustration which makes its way and sinks deep by its appeal to everyday experience. In the wielding of these weapons, the English judges have been masters. The precept may be doubtful in the beginning. How impossible to fight against it when the judge brings it down to earth and makes it walk the ground, the brother of some dictate of decency or of prudence which we have followed all our lives. Perhaps the kinship is not so close or apparent as it is figured. Who of us will have the hardihood to doubt the reality of the tie when it is so blandly assumed to be obvious to all? The common denominator silences and satisfies. The rule that is rooted in identities or analogies of customary belief and practice is felt and rightly felt to be rooted in reality. We glide into acquiescence when negation seems to question our kinship with the crowd. Something must be set down also to the sense of fellowship awakened when judges talk in ways that seem to make us partners in the deliberative process. "I entirely agree with my right honorable and learned friend upon the woolsack". We seem to be let into the mysteries of the conference, the sacrosanct "arcana," to quote Professor Powell's phrase, to which "the uninitiated are not admitted." Given such an atmosphere, with point and pungency thrown into it, the produce makes its way into every crack and crevice of our being.

I limit my illustrations, though many are available. Take this by Lord Bramwell: "It does not follow that if a man dies in a fit in a railway carriage, there is a *prima facie* case for his widow and children, nor that if he has a glass in his pocket and sits on it and hurts himself, there is something which calls for an answer or explanation from the company." Take this by Lord Blackburn: "If with intent to

lead the plaintiff to act upon it, they put forth a statement which they know may bear two meanings, one of which is false to their knowledge, and thereby the plaintiff, putting that meaning upon it, is misled, I do not think they can escape by saying he ought to have put the other. If they palter with him, in a double sense, it may be that they lie like truth, but I think they lie, and it is a fraud." One could cite other examples without number. What a cobweb of fine-spun casuistry is dissipated in a breath by the simple statement of Lord Esher in *Ex parte Simonds,* that the court will not suffer its own officer "to do a shabby thing." If the word shabby had been left out, and unworthy or dishonorable substituted, I suppose the sense would have been much the same. But what a drop in emotional value would have followed. As it is, we feel the tingle of the hot blood of resentment mounting to our chicks. For quotable good things, for pregnant aphorisms, for touchstones of ready application, the opinions of the English judges are a mine of instruction and a treasury of joy.

Such qualities on the whole are rarer close at home, yet we have one judge even now who can vie with the best of his English brethren, past as well as present, in the art of packing within a sentence the phosphorescence of a page. If I begin to quote from the opinions of Mr. Justice Holmes, I hardly know where I shall end, yet fealty to a master makes me reluctant to hold back. The sheaf will be a tiny one, made up haphazard, the barest sample of the riches which the gleaner may gather where he will. Some hint of the epigrammatic quality of his style may be found in this : "The Fourteenth amendment, itself a historical product did not destroy history for the States and substitute mechanical compartments of law all exactly a like." In this: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." In this :"Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." And finally in this, words of solemn dissent, their impressiveness heightened by the knowledge that the cause has been already lost: "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of

the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system. I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save country."

There is another type or method which I have spoken of as the refined or artificial, smelling a little of the lamp. With its merits it has its dangers, for unless well kept in hand, it verges at times upon preciosity and euphuism. Held in due restraint, it lends itself admirably to cases where there is need of delicate precision. I find no better organon where the subject matter of discussion is the construction of a will with all the filigree of tentacles, the shades and nuances of differences, the slender and fragile tracery that must be preserved mutilated and distinct. Judge Finch of the Court of Apeals of New York was an adept in the writing of opinions which carried with them this suggestion of precision and refinement. Occasionally, it shades into a faint and gentle sarcasm which is sometimes the refuge of the spokesman of a minority expressing his dissent. As an illustration, let me quote from the dissenting opinion in an election controversy which provoked in its day no little warmth of difference. The majority had held that despite the provisions of the Constitution making each house of the legislature the judge of the elections, returns, and qualifications of its own members, the courts would refuse affirmative aid to a claimant for such an office if it found him ineligible in its own view of the law. Judge Finch protested against this holding. "And so," he said, " I deny the asserted doctrine of 'Invocation'; of a right do evil that good many come; of excusable judicial usurpation; and if the doctrine has anywhere got its dangerous and destructive hold upon our law, which I do not believe, it should be resolutely shaken off. But let us not deceive ourselves; The excess of jurisdiction is not even excusable, for it has neither occasion nor necessity." A moment later, he has his fears that he has been betrayed into excessive warmth. His closing words are those of apology and deference: "If what I have said does not convince the majority of the court, nothing that I can say will do so. I have tried faithfully, and, I hope, with proper respect, for certainly I have not meant to be wanting in that, to point out the mistake which, it seems to me, they are about to make. Theirs, however, must be both the responsibility and its consequences;"

Such a method has its charm and its attraction, though one feels at times the yearning for another more robust and virile. It is here that I passed into the type which I have characterised as demonstrative or persuasive. It is not unlike the magisterial or imperative, yet it differs in a certain amplitude of development, a freer use of the resources of illustration and analogy and history and precedent, in brief, a tone more suggestive of the scientific seeker for the truth and less reminiscent of the priestess on the tripod. One might cite many judges who have used this method with distinction. I think the work of Charles Andrews, for many years a judge and then the Chief Judge of the New York Court of Appeals is a shining illustration. I can best describe the quality of his opinion in the words of a memorial written upon his death: "The majesty of his personal appearance," it was said, "is reflected in the majesty of his judicial style, the steady and stately march of his opinions from established premises to inevitable conclusions. "Such a method, well pursued, has a sanity and clarity that make it an admirable medium for the declaration of considered judgements. The form is no mere epidermis. It is the very bone and tissue.

My summary of styles may leave a cheerless impression of the solemn and the ponderous. Flashes of humor are not unknown, yet the form of opinion which aims at humor from beginning to end is a perilous adventure, which can be justified only by success, and even then is likely to find its critics almost as many as its eulogists. The story is told by Bernard Shaw of a man who wished to consult the writings of the great naturalist Buffon, and who startled the clerks in the bookstore by the pompous and solemn query, "Have you the books of the celebrated Buffoon?" One of the difficulties about the humorous opinion is exposure to the risk of passing from the class of Buffons where we all like to dwell and entering the class of the celebrated Buffoons. The transition at times is distressingly swift, and when once one has entered the new class, it is difficult, if not indeed impossible, to climb over the fences and back into the old. None the less, there are subjects which only the most resolute have been able to discuss without yielding to the temptation of making profert of their sense of humor. A dog or a cat, or a horse if it is the occasion of a horse trade, has been the signal for unexpected outbursts of mirth and occasionally of pathos from judges slowly stirred to emotion by the cinema of life.

Judge Allen's opinion on the "code duello" among dogs, was on the whole a fine success, but it has been responsible for the writing of some others that were not. There is an opinion by Baron Bramwell which deals with the propensities of pigs. A fence was defective, and the pigs straying did mischief to a trolley car. The decision was that the barrier should have been sufficient to protect the

adjoining owner against the incursions, not of all pigs, but of pigs of "average vigour and obstinacy." "Nor do we lay down," said the learned Baron, "that there must be a fence so close and strong that no pig could push through it, or so high that no horse or bullock could leap it. One could scarcely tell the limits of such a requirement, for the strength of swine is such that they would break through almost any fence, if there was a sufficient inducement on the other side. But the company are bound to put up such a fence that a pig not of a peculiarly wandering disposition, nor under any excessive temptation, will not get through it." Perhaps the humor of this ruling was more unwitting than designed. Some may agree with Sir Frederick Pollock that the decision is "almost a caricature of the general idea of the 'reasonable man'." In all this I would not convey the thought that an opinion is the worse for being lightened by a smile. I am merely preaching caution. Other flights and digressions I find yet more doubtful than the humorous. In days not far remote, judges were not unwilling to embellish their deliverances with quotations from the poets. I shall observe towards such a practice the tone of decent civility that is due to those departed.

I have had in mind in this excursus a humor that was conscious and intended. Perhaps I should have classed the opinion that is humorous or playful as an independent type, but I have preferred to treat it incidentally since I am not aware that any judge has employed it consistently or except on rare occasions. Humor also that is unconscious and unintended may be dug out of the reports if we take the trouble to extract it. I once gathered together for my own edification and amusement some gems that I had unearthed from the opinions of one of our local courts in days when it had an appellate branch of its own and handed down opinions which were faithfully reported. Unluckily, I have lost my memorandum, but a few of the items are still vivid in my mind. The question to be determined was the extent of the amendment of a pleading to be permitted upon the trial. The decisive principle was thus expounded: 'The bed that litigants make and lie in up to the trial, should not be then vacated by them. They should continue to lie therein until the jury render their verdict." I understand that the modern Practice Acts have swept this principle away, and that the suitor, who seems to his adversary to be innocently somnolent, may now jump out of bed at the last moment and prove to be very much awake. This is the new doctrine, but where will you find a more vivid statement of the doctrine of an elder day which decried surprise and haste, and was satisfied that justice herself should have the privilege of a nap? I recall, too, a charge to a jury, never reported, but surely fit to be preserved. "In this case," said the trial judge, "I believe that Mr. A (the counsel for the plaintiff) knows as much law as Mr. B (the counsel for the defendant), and I believe that Mr. B knows as much law as Mr. A, but I believe that I in my judicial

capacity know as much law as both of them together.' Whereupon he forgot to tell the jury anything else, but said they were to consider of their verdict and decide the case in accordance with the rules he had laid down. Well, his charge was sparse, but it enunciated an important truth. Our whole judicial system is built upon some such assumption as the learned judge put forward a trifle crassly and obscurely. This is the great convention, the great fiction, which makes trial in court a fair substitute for trial by battle or by casting lots. The philosopher will find philosophy if he has an eye for it even in a "crowner's" court.

I must not forget my final type of judicial style, the tonsorial or agglutinative. I will not expatiate upon its horrors. They are known but too well. The dreary succession of quotations closes with a brief paragraph expressing a firm conviction that judgement for plaintiff or for defendant, as the case may be, follows as an inevitable conclusion. The writer having delivered himself of this expression of perfect faith, commits the product of his hand to the files of the court and the judgement of the ages with all the pride of authorship. I am happy to be able to report that this type is slowly but steadily disappearing. As contrasted with its arid wastes, I prefer the sunny, though rather cramped and narrow, pinnacle of a type once much in vogue: "We have carefully examined the record and find no error therein; therefore the judgement must be affirmed with costs." How nice a sense of proportion, of the relation between cause and effect, is involved in the use of the illative conjunction " therefore," with its suggestion that other minds less sensitively attuned might have drawn a different conclusion from the same indisputable premises.

I have touched lightly, almost not at all, upon something more important than mere felicities of turn or phrase. Above and beyond all these are what we may term the architectonics of opinions. The groupings of fact and argument and illustration so as to produce a cumulative and mass effect; these, after all, are the things that count above all others. I should despair, however, of any successful analysis of problems at once so large and so difficult within the limits of this paper. One needs a larger easel if one is to follow such a map. Often clarity is gained by a brief and almost sententious statement at the outset of the problem to be attacked. Then may come a fuller statement of the facts, rigidly pared down, however, in almost every case, to those that are truly essential as opposed to those that are decorative and adventitious. If these are presented with due proportion and selection, our conclusion ought to follow so naturally and inevitably as almost to prove itself. Whether if succeeds in doing this or not is something about which the readers of the opinion are not always in accord. To gain a proper breadth of view, one should consult counsel for the vanquished as well as counsel for the victor.

The thought of the vanquished brings me to the opinion that voices a dissent. The protests and the warnings of minorities overborne in the fight have their interest and significance for the student, not only of law itself, but of the literary forms through which law reaches its expression. Comparatively speaking at least, the dissenter is irresponsible. The spokesman of the court is cautious, timid, fearful of the vivid word, the heightened phrase. He dreams of an unworthy brood of scions, the spawn of careless *dicta*, disowned by the *ratio decidendi*, to which all legitimate offspring must be able to trace their lineage. The result is to cramp and paralyse. One fears to say anything when the peril of misunderstanding puts a warning finger to the lips. Not so, however, the dissenter. He has laid aside the role of the hierophant, which he will be only too glad to resume when the chances of war make him again the spokesman of the majority. For the moment, he is the gladiator making a last stand against the lions. The poor man must be forgiven a freedom of expression, tinged at rare moments with a touch of bitterness, which magnanimity as well as caution would reject for one triumphant.

A French judge, M. Ransson, a member of the Tribunal of the Seine, wrote some twenty years ago an essay on the art of judging, in which he depicts the feelings of a judge of the first instance when a judgement is reversed. I suppose the state of mind of one reversed is akin in quality to the state of mind of one dissenting, though perhaps differing in degree. "A true magistrate," says M. Ransson, "guided solely by his duty and his conscience, his learning and his reason, hears philosophically and without bitterness that his judgement has not been sustained; he knows that the higher court is there to this end, and that better informed beyond doubt, it has believed itself bound to modify his decision. Ought we even to condemn him, if having done his best, he maintains in his inmost soul the impression that perhaps and in spite of everything he was right? *Causa diis victrix placuit, sed victa Catoni."* Cato had a fine soul, but history does not record that he feared to speak his mind, and judges when in the minority are tempted to imitate his candor. We need not be surprised, therefore, to find in dissent a certain looseness of texture and depth of colour rarely found in the *per curiam*. Sometimes, as I have said, there is just a suspicion of acerbity, but this, after all, is rare. More truly characteristic of dissent is a dignity, an elevation, of mood and thought and phrase. Deep conviction and warm feeling are saying their last say with knowledge that the cause is lost. The voice of the majority may be that of force triumphant, content with the plaudits of the hour, and recking little of the morrow. The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years. Read some of the great dissents, the opinion, for example, of Judge Curtis in Dred Scott *vs.* Sandford, and feel after the cooling time of the

better part of a century the glow and fire of a faith that was content to bide its hour. The prophet and the martyr do not see the hooting throng. Their eyes are fixed on the eternities.

I shall be travelling away from my subject if I leave the writing of opinions and turn to arguments at the bar. A word of digression may be pardoned, however, for the two subjects are allied. One is called upon often to make answer to the question, what sort of argument is most effective in an appellate court? Shall it be long or short, terse or discursive? Shall it assume that the judges know the rudiments of law, or shall it attempt in a brief hour to supply the defects in their early training? Shall it state the law or the facts? Shall it take up the authorities and analyse them, or shall it content itself with conclusions and leave analysis for the study? There is, of course, no formula that will fit all situations in appellate courts or elsewhere. If, however, I had to prepare a list of "Don'ts" for the guidance of the novice, I think I would say that only in the rarest instances is it wise to take up one decision after another for the purpose of dissection. Such autopsies have their value at times, but they are wearisome and gruesome scenes. In my list of Don'ts, I would add, don't state the minutiae of the evidence. The judges won't follow you, and if they followed, would forget. Don't attempt to supplement the defects of early training. Your auditors are hardened sinners, not easily redeemed. Above all, don't be long-winded. I have in mind a lawyer, now lifted to the bench, who argued the appeals for one of the civil subdivisions of the State. His arguments lasted about a quarter of dan hour. He told us his point and sat down. The audience in the rear of the court room might not applaud, but the audience in front did—at least in spirit—and since the latter audience has the votes, it is best to make your play for them. If you faithfully observe these cautions, let not your spirits droop too low when the decision is adverse, even though there be the added gall and wormwood of a failure of the court to crown your brilliant effort with the dignity of an opinion. Many a gallant argument has met the same unworthy fate.

Young men as they approach admission to the bar must sometimes say to themselves that the great problems have been solved, that the great battles of the forum have been fought, that the great opportunities are ended. There are moods in which for a moment I say the same thing to myself. If I do, the calendar of the following day is as likely as not to bring the exposure of the error. It is a false and cramping notion that cases are made great solely or chiefly by reason of something intrinsic in themselves. They are great by what we make of them. McCulloch vs Maryland— to choose almost at random—is one of the famous cases of our history. I wonder, would it not be forgotten, and even perhaps its doctrine overruled, if Marshall had not put upon it the imprint of his genius. "Not one of his great opinions," says Professor Corwin, speaking of Marshall's work, "but might easily have been

decided on comparatively narrow grounds in precisely the same way in which he decided it on broad, general principles, but with the probable result that it would never again have been heard of outside the law courts." So, too, the smaller issues await the transfiguring touch. "To a genuine accountant,: says Charles Lamb, "the difference of proceeds is as nothing. The fractional farthing is as dear to his heart as the thousands which stand before it. He is the true actor, who, whether his part be a prince or a peasant, must act it with like authority." That is the spirit in which judge or advocate is to look upon his task. He is expounding a science, or a body of truth which he seeks to assimilate to a science, but in the process of exposition he is practising an art. The Muses look at him a bit impatiently and wearily at times. He has done a good deal to alienate them, and sometimes they refuse to listen, and are seen to stop their ears. They have a strange capacity, however, for the discernment of strains of harmony and beauty, no matter how diffused and scattered through the ether. So at times when work is finely done, one sees their faces change, and they take the worker by the hand. They know that by the lever of art the subject the most lowly can be lifted to the heights. Small, indeed, is the company dwelling in those upper spaces, but the few are also the elect.

JUDICIAL WRITING :AN OBSERVATION BY A TEACHER OF WRITING

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(58 Law Library Journal 114)

Before me are four appellate opinions: (1) *Meinhard v Salmon*[84]; (2) *Baltimore & Ohio Railroad company vs Goodman,* Administratrix[85]; (3) *Lamb vs Halt*[86] and (4) *Brown v. Board of Education of Topeka*[87]; Cardozo and Andrews wrote the first, Holmes the second; Lumpkin the third; and Warren the last. They do not represent the whole range of legal writing, certainly, but they do illustrate some characteristics worth commenting on. They also suggest an often ignored point of view about the pedagogy of writing: getting a person to write well is like making him intelligent, industrious, sensible, disciplined, controlled, imaginative, thoughtful or others, and modest. The platitude "the style is the man" means that what makes writing good is really the quality of the mind and character behind it; as the ancient Quintilian says, "a good oration is a good man speaking." This is why the writing of Judge Cardozo and Judge Andrews is better than that of Judge Lumpkin. Their jurisprudence or grammar is not necessarily better or more correct, but their minds are richer, more perceptive, their authority surer and more persuasive. Their styles reflect intelligence and character that have been working together for a long time.

This is not to say that good writers, like heroes, are born not made, or that writing cannot really be taught. Writing can be taught, if the pupil is disciplined and amenable, with an ability to read and imitate. But we need to dissipate the general misunderstanding of what is involved in writing decently and clearly and what it takes to get a human being to do it. As I once said in another essay,[88] far too many people look upon the process of writing as a task somewhat similar to the one a garage mechanic faces in reassembling an automobile engine. According to their assumption, the first job of the writer is to see that all necessary parts are on hand (in writing, these are thought to be the equivalent of "ideas"). Then he must see that all parts are clearly labeled, at least in the mind (these are "words," and a

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84294 N.Y. 458, 164, NE 545 (1928).
85275 US 66 (1927).
86145 Ga 331, 89, S.E. 193 (1916)
87347 US 483 (1954)
88Bowen, Robert O, ed, "A Conservative View," *The New Professors*, Holt, Rinehart. Winston, 1960.

dictionary has a large supply if he needs more). Then he must see that he has the proper tools (this is merely "grammar"; either he has it or he doesn't, and if he doesn't he can borrow it or make something else do). Then he must see that the parts go in the right order (sentences) and are properly connected (paragraphs). Then he steps on the starter and drives off (final sentence and happy conclusion).

Nothing could be further from the truth. In the first place, "ideas" are not things having an existence independent of words themselves, and it is people who think they have and say such things as "If I could only find the words to express the ideas I have" who have put permanent creases in our foreheads. Until an idea exists in the form of words that say something, it probably isn't an idea at all, but merely a grunt in the mind. In the second place, in the process of writing itself, grammar and punctuation and sentences and so forth are not separately packageable items, like carburetors and spark plugs. Before and after writing they can be discussed as things apart, but once the writing itself begins they need to lose their separate identities and work together nicely, like the ingredients in a good soup: if they don't, the result is not writing, but a kind of lumpy or watery hash, indigestible to all but the cook himself (and even he may have his doubts about it). Finally, and most important of all, writing clearly demands so much from the thinking, sorting, and focusing powers of the human mind that it is inseparable from being educated in general. It is no wonder that most people want to believe it is something else and try to operate on the basis that writing clearly is only a matter of memory or of exhortation or of "creative self expression."

The truth is that writing is very hard work. That is one of the first things I tell my students, chiefly to get vanities softened up. Art is long, life is brief; a person writing for any kind of audience he respects finds that he must figuratively chain himself to his desk to get it done. On the one hand, there are the wide-ranging, the disorganising, the loose and imaginative aspects of his mind, all busily turning up details, examples, exceptions, wishing to be free, dreaming of mellifluous rhetorical periods. On the other hand, there is the excising, the organising, the focusing side of his mind, trying to bring some order to the here-and-present, working to make sense out of all the chaos, yet not over simplifying or being sensational or journalistic. If he is like most good writers I know, he will do almost anything to escape, even to mowing the lawn or taking his mother-in-law for a drive.

He escapes the agony finally, of course, only by completing the writing, by having it before him. What is before him and how it is put together—it vocabulary, the length or brevity of his sentences, the way he handles subordination and coordination, his transition or lack of them, in sort his structure—what is before him is a rather good reflection of himself, of how the world is composed and what he

thinks it is composed of: not his denominational dogmas or his obvious political affiliation or his visible and public morality, but those unexpressed assumptions, hidden attitudes, unarticulated notions which he has about things and which make up what philosophers would call his 'system', his own climate of opinion, his own little island of personality.

I do not mean that clear writing always reflects a good moral man and that bad writing always reflects a less respectable one. Murderers, thieves, adulterers and law breakers of every description have been known to write well, and law abiding and modest and even brilliant men have been known to write poorly. I mean only that when a man writes he adopt a rhetorical position as a speaker, as a speaking voice, as it were, and that in doing so, he puts a good part of his personality on the line, he puts a foot forward. Though a certain imagination is involved in manipulating this position effectively, and though some people can do it better than others, either because of inherited gifts or training, no man can escape his own personality, completely. If he reaches his generalisation by ignoring a part of reality or by a sloppy use of details, or if he has a trick of passing off assumptions as facts and insights as eternal truths, of using all the *ad hominem, ad populum,* begging-the-question devices which have their sweet plausibility, all of these will indicate how much the agony of writing brings out any latent crookedness in a writer. His over-concern with the mere sound of what he writes will indicate how big a stuffed shirt he really is. And how thoroughly he can submit himself to revision, to cutting out, will indicate the actual toughness of his spirit, his real sense of mercy for the reader, who symbolises a helpless and deserving humanity.

My point has been to suggest the limits of instruction in writing. The world is crowded with teachers of writing and full of brochures and essays and books and workshops and summer conferences about writing. All of the teachers earn their money, I believe, and a very little of the written advise is useless. Writing as an art may be beyond the reaches of the school teachers and the text books, but writing as an adequate and necessary skill is a process and a habit: people can be taught through drill and through the study of models (and occasionally through inspiration). Such elements of writing as basic sentence structure, punctuation, spelling, and even the devices of how to begin a piece of writing and how to end it. Most people, in short, if they are reached in time, can be taught the elements that raise writing from illiteracy to adequacy, to respectability. All that they need, in addition to good advice and criticism, is time and desire, practice, practice, and practice.

But the problem for the legal profession is the same one that faces academics or any group that depends on clear communication for sustenance and viability. The important questions are something

like these: how do we make writing graceful instead of merely adequate; how do we make what is ponderously clear into something lucid; how do we excise the rambling and the clumsy and get something sweet, short, and concise; how do we make what is flat and impersonal into something lively and human and concrete? These are not easy to answer for they involve attitude as well as things, personality as well as facts. But a number of people within the legal profession have expressed themselves on writing, and quite sensibility.[89] They concern themselves not only with advice about words (don't use a long one where a short one will do) and sentences (be brief and simple), but one of them, *Internal Operating Procedures of Appellate Courts*, goes to some length in giving advice about the structure of a good opinion. The most useful of all, however, I find to be by George Rose Smith, "The Current Opinions of the Supreme Court of Arkansas: A Study in Craftsmanship," published in the *Arkansas Law Review* in the spring of 1947.

Nonetheless, advice about writing which tells us to be concrete, simple, brief, to pick the short word instead of the long one, to begin at the beginning, to be interesting, is essentially exhortation, pleasant music but not meat. It lacks the element of comparability; it doesn't exist in a context that lets us deal with the real world. Consider, for instance, the matter of simplicity. We known it is a virtue and respect it; we should like to write English that is to the point. But it is sometimes not possible to be both simple and honest; the world is an enormously complicated place and sometimes writing has to reflect it. The opinions given down by Judge Cardozo and by dissenting Judge Andrews in *Meinhard vs Salmon* represent a case in point. The problem here really hangs on the definition of "fiduciary loyalty." Cardozo goes into long flights of analysis about it; he probes into traditions, motives. He is a complex man, trained to go behind appearances, and he sends his inquiring mind over the whole issue. He comes

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89Beardsley, C.A. "Judicial Draftsmanship," 24 Wash. L. Rev 146 (1949).
Carroll, B.F. "The Problems of a Legal Reporter—Views on Simplifying Appellate Opinions, " 35 A.B.A J. 280 (1949).
Gerhart, E.C. "Improving Our Legal Writing: Maxims from the Masters," 40 A.B.A.J. 1057(1954).
Gregory, H.B. : Shorter Judicial Opinions," 34 Va. L.Rev 362 (1948).
Hardy, G. W. , Jr "A Brief Opinion on Brief Opinions," 20 La. L Rev. 559 (1960).
Leflar, R. A. " Some Observations Concerning Judicial Opinions, "61 column. L. Rev 810 (1961).
McComb, M.F. "A Mandate from the Bar: Shorter and More Lucid Opinions," 35 A.B.A.J. 382 (1949).
McComb, M.F. "The Writing and Preparation of Opinions," 10 FRD (Dec, 1951).
Simmons, R.G. "Better Opinions—How?" 27 A.B.A.J. 109 (1941).
Wall, M.K. "What Courts are Doing to Improve Judicial Opinions," 32 J. Am. Jud. Soc. 148 (1949).
Weissman, D.L. "Supreme Court Cases: A Note on Legal Style," 14 Law. Guild. Rev 138 (1954).
Internal Operating Procedures of Appellate Courts, report by a Committee of the Section of Judicial Administration of the American Bar Association, 1961.

up finally with a definition of fiduciary loyalty that appears to make it extend far beyond any commercial arrangement between two people. But Judge Andrews, the dissenting one, is clearly a sophisticated man, too, and he finds Cardozo's opinion much too involved; the question, he says, is not really complex, and his explanation of his position is a model of excised clarity.

Indeed, the two opinions reflect the eternal debate between honest and sophisticated men about the nature of things. Judge Cardozo is obviously a man of great refinement and learning, wide ranging, with literary ambitions. There is a touch of Dr. Johnson about him. He writes a sentence as a proposition and then adds several more sentences, refining the proposition, buttressing it, qualifying it. He likes adjectives and formal rhetorical structure.

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty, alone, but the punctilio of an honour the most sensitive, is then the standard of behaviour. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgement of this court.

There is a feeling for suspense here, even for melodrama. Andrews, on the contrary, is Occam's razor; his sentences tend to be short; they fall like hammer blows, each one driving the nail further. His job is to show that what is seemingly complicated is not really so, that the issue must not be allowed to get out of hand but must be kept simple:

> Under the circumstances here presented, had the lease run to both the parties. I doubt whether the talking by one of a renewal without the knowledge of the other would cause interference by a court of equity. An illustration may clarify my thought: A and B enter into a joint venture to resurface a high way between Albany and Schnectady [sic]. They rent a parcel of land for the storage of materials. A, unknown to B, agrees with the lessor to rent that parcel and one adjoining it after the venture is finished, for an iron foundry. Is the act unfair? Would any general statements, scattered here and there through opinions dealing with other circumstances, be thought applicable? In other words, the mere fact that the joint venturers rent property together does not call for the strict rule that applies to general partners.

It is possible to say, of course, that Cardozo is windy and pretentious, that Andrews is tight and controlled. But is not the statement a gross over-simplification? With both jurists, we are dealing with the legal mind at its best, full of details that come from formal learning and a knowledge of the world itself but also of all of the individual cases which bear upon the question. At the same time, we sense the enormous compulsion toward generalization, of making a statement that sums up and explains all the details and makes them applicable. Who is the better writer? Both Cardozo and Andrews operate with great skill and honesty, and perhaps this is judgement enough.

The point is that flat advice about being simple, about being direct in writing is not always relevant. It depends on the context, and the context depends on one's view of the world. One finds this tension between complication and simplicity running through a great deal of legal writing. Literary critics like to take a piece of simple sheet music and make an orchestration of it; lawyers, on the other hand, or at least the ones I have been reading here, like to work a symphony down into something that will go into a player piano. Consider, for instance, the opinion of Justice Holmes in the *Baltimore & Ohio Railroad Company v Goodman.* Holmes certainly writes with remarkable and plausible clarity, even though one feels occasionally that he is purposefully making phrases for posterity. But he is brief and uncluttered; he is to legal writing what Hemingway is to the American novel. His rhetorical position is always that of the sensible man trying to cut away the underbrush and come to the issue. When he is successful, what he writes is indeed quotable, as I think this is: "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him." It would be interesting to see what Holmes would have done with *Meinhard v Salmon;* clearly he would have been on the side of Andrews, at least, rhetorically, but I doubt that he would have found the solution so quickly.

For *Meinhard vs Salmon* is really far more complicated; it involves definitions of motives and relationships, whereas the *Baltimore v Goodman* case seems to me to involve merely an ability to fix upon the central determining circumstance and then to fix the responsibility for it. Here, Holmes is perhaps better compared with Judge Lumpkin in the *Lamb v Hall* case of 1916. Lumpkin is certainly no Holmes; his very name makes one suspicious of what he writes, but except for a couple of sentences which I shall quote for you in a moment, Lumpkin seems to have the traditional juristic skill in finding the point and coming to it. He is graceless and somewhat overdependent upon sources, but his sentences do move him ahead, though it is true that all of his decision might have been given in one paragraph instead of three long ones. Even though the sentences in the last half of the second paragraph reach an

awkwardness indicating that Judge Lumpkin must surely have two left feet, the awkwardness does not do any organic damage to the sense; it only postpones the final emergence of it. The sentence I'm speaking of particularly is this one: "The demurrer raised the point that the amended petition failed to set out what was the duty which the plaintiff alleged required him at any time to be at the place where he was injured, and that it failed to show what duty required him to be there at the particular time of the injury." This sentence requires at least three readings; one thinks he is reading underwater for a moment, and he finds nothing to match it until four or five sentences later when he comes upon:

> Mere general allegations that he was in the proper place, and that it was necessary and customary for him to be there in the performance of his duty and that this was one of the usual places in which he had to be in order to perform his duties, were not sufficient as against a special demurrer which called upon him to show what duties rendered it necessary or proper for him to be at that place (which was upon the railroad track) generally or at that particular time.

This time the reader almost drowns before he reaches the surface, but in truth one finds this kind of writing coming out of all sorts of places as well as courts of law.

The kind of writing I have been talking about here is expository prose; the form of writing is the essay. In its highest flights, the essay is usually categorised along with the poem, the play, the story as one of the four modes of literature. Moliere's character was pleased to discover that he had been speaking prose all of his life; lawyers may have been writing not only prose but literature as well. It is something to tell their children. But quite seriously, the line between communication and literature is not an arbitrary one; all the qualities necessary to make a piece of writing good communication are necessary to make it good literature. If the difference between literature and communication can be defined at all, it is a difference of degree, not of kind. Holmes is literature; Lumpkin is communication, but they faced similar problems and tried to answer them in similar ways. Chief Justice Warren in *Brown v The Board of Education* is half-and-half. He is not a particularly graceful writer but he is good, stout, sensible one, with the ability to marshal details to support his generalisation, and with knowledge about setting up a question clearly:

> Today, education is perhaps the most important function of state and the local governments. Compulsory school attendance laws and great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a

> principal instrument in awakening the child to cultural value, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is right which must be made available to all on equal terms.
>
> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

My own interest in Warren's opinion is that it illustrates a particular problem lawyers have in writing decent exposition. The two intellectual qualities necessary for such writings are in a certain warfare with each other: the first is the need to be specific and detailed, to have supporting facts, to have enough learning and experience to feel the reality of life, its complexity, its refusal to be simple. This is an attitude that poets, that cynics and realists, have in abundance. One of G.Lowes Dickinson's characters says it beautifully, "To my restricted vision, placed as I am upon the earth, isolated facts obtrude themselves with a capricious particularity which defies my powers of generalisation." It is a sentence to bring tears of regret also to the eyes of jurists, all of whom, whether they like it or not, must have a drive toward generalisation, a need to turn up the operating principle, to find the sum in addition, to state the law, so as to make the facts something more than capricious particularities. A respect for richness and variety in the real world, and a feeling for order, for policy, for the principle of action the ideal one: in a sense this is why jurists will always have a writing problem. They have to be sure their rhetoric reflects a solution justified by the facts of yesterday and today and yet suitable for what may happen tomorrow. It is not, accordingly, an easy rhetoric to manage.

A PRIMER OF OPINION WRITING, FOR FOUR NEW JUDGES

(by George Rose Smith; (21) Arkansas Law Review 197)

INTRODUCTORY NOTE

Judge Smith showed me this "primer" in 1966, soon after he wrote it. He told me it was not written for publication, but only for the use of the four judges to whom it was addressed. I asked him, first, to let me make copies of it for the members of my New York University appellate Judges seminars, most of whom face the same opinion-writing problems that lie before the new Arkansas Supreme Court judges. He consented to that. Then I suggested that the members of the bar of Arkansas are as interested in the opinion-writing process on the Arkansas court as are the judges themselves, and are entitled to know what he tells the other judges about it. Under this pressure he agreed to publication. I was also motivated by the thought that advice concerning expository writing that is good for appellate judges might be good for ordinary lawyers also, though I did not mention this point to Judge Smith. Finally, I am entitled to the customary editorial disavowal that sponsorship of a publication does not necessarily indicate complete agreement with every view the author expresses. Even the oldest judge is entitled to no more than 98% agreement from his friends and colleagues.

ROBERT A. LEFLAR**

On January 1, 1967, the Supreme Court of Arkansas will for the first time in a century seat four new judges, all at once. A majority of the seven. This impending influx of the uninitiated led me, some months ago, to turn from the question I so often put to myself. "What can my country do for me?", to a different question: What can I do for these novitiates who are about to outnumber me? That reverie led to this primer. I have decided, not without diffidence, to try to say to you four the sort of thing that I wish my late colleague, Judge Frank Smith, then in his thirty- seventh year on the court, had said to me when as an infant of only thirty-seven years all told I became his devoted associate on the bench.

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To have much chance of being effective my words must reach you now, while you are still judges-elect. Once you have donned your robes and begun to circulate opinions of your own any suggestions must be limited to particulars, any criticisms must skirt the possibility of hurt feelings. Now, however, the range of discussion need not be limited; the prick of criticism need not be blunted. You may be humble disciples today, but with the oath of office you are apt to become self-assured apostles of your own doctrines.

Let's be clear at the beginning that my purpose is twofold. One, I want to help you. This primer should make it easier for you to write opinions. It should even make easier for you to write good opinions. But, two, I am thinking of the court as well. The quality of its work means much to me. And sound law, progressive law, is more likely to be found in painstaking opinions than in slovenly ones.

Why pick out the subject of opinion writing? It has been my pleasure to welcome more than a dozen other judges to our court and to work with perhaps another twenty-five at summer seminars. Again and again the same wails are heard: Surprise and dismay at the difficulty of writing an acceptable judicial opinion. Especially the difficulty of writing a crisp, clean, short opinion. ("Why it's actually harder to write a short opinion than a long one". True, alas.) Regret at how seldom those who have gone before have paused to jot down what they have learned.

This primer for the four of you is primarily a response to such laments. Primarily, but not solely. Twenty years ago I tried to analyse, from a practicing lawyer's point to view, the main characteristics of good and bad opinions. Smith, *The Current Opinions of the Supreme Court of Arkansas—A Study in Craftsmanship*, I ARK. L, REV. 89 (1947). That study was written by an outsider. It dealt largely with the goals to be sought in opinion writing. This primer takes up the subject from the inside and deals largely with the steps to be taken in attaining those goals. *Craftsmanship* and *Primer*, read together, are intended to present a fairly complete exposition of what underlies a workmanlike opinion.

The job of putting the primer on paper has taken more time and effort than I expected. The subject overlaps so many related ones that it's hard to know where to start and where to stop. Too, at times I have shared the wistfulness expressed by Adlai Stevenson in a commencement address at Princeton: "If I would guide you, I could not. What a man knows at fifty that he did not know at twenty is for the most part incommunicable" THE WIT AND WISDOM OF ADLAI STEVENSION, 66 (1965).

The primer will be devoted mostly to matters mainly mechanical: The planning of an opinion, its composition and arrangement, legalistic language, and other points about which knowledge won from experience is of special value. At the threshold, however, my conscience compels me to turn momentarily to broader and more theoretical aspects of this business of judging. Why will you—more important, why should you—decide a certain case in a certain way? What method of attacking a problem, even what attitude of mind, is most likely to lead to a *right* decision? After this brief flight into theory we'll get down to practicalities.

THE GRAND TRADITION OF THE COMMON LAW

In 1927, the late Karl N. Llewellyn found himself deeply troubled by the bar's outcry, echoed by the laity, that the courts had lost sight of ***stare decisis***, that judges were deciding cases just any way they wanted to, that the outcome of an appeal could not be reckoned with even a fair measure of certainty. Llewellyn set out to determine for himself whether the facts justified the criticism. For about thirty years he studied opinions of appellate state courts, not singly but in batches big enough to give him insight into what the courts were actually doing, not merely what they were saying.

Given the rare combination of Llewellyn's brilliance and his willingness to submit to drudgery, it was certain that his smelting of judicial ore would yield something. It proved to be gold. Those thirty years of effort went into his book, THE COMMON LAW TRADITION—DECIDING APPEALS, published by Little, Brown & Company in 1960. It is a magnificent work, one of the really great books that the law has produced. Upon even a third reading you can find excitement on almost every page. The depth of Llewellyn's perception into the judicial process was so great that it seems hardly possible to believe that he never served as a judge.

You four apprentices cannot better prepare yourselves for the bench than by studying Llewellyn. Doubtless because the book was written over a span of many years, it is oddly disjointed. An aspect of the subject is treated early in the book and then is taken up again later on in a different way. Perhaps this lack of strict continuity explains why a second reading is as productive as the first. You must know the later chapters to fully grasp the earlier ones. Countless nuggets are scattered through the pages, just waiting to be picked up. All I mean to do here is to make you aware that the book exists and to urge you to give particular attention to two of Llewellyn's points (which really blend into one).

First, the grand tradition of the common law. Llewellyn usually calls this the Grand Style, but he reminds you again and again that he is using Style not to mean a way of writing but a way of

considering and deciding cases. It was his belief, shared by Pound, that at about the middle of the last century American judges for the most part did their work in the grand tradition. Precedents were welcome and persuasive, but in cases not utterly routine there was nevertheless a constant and conscious search for a principle that would lead to a just result and that could be followed with confidence in similar cases. Rules were shaped and then reshaped to allow the law to grow with the times. Statutes were implemented beyond their strict letter in accordance with purpose and reason. Situation-sense and life-wisdom (Llewellyn's phrases) guided judges in their effort to find the best solutions to recurrent practical problems.

Cardozo's approach in *McPherson v Buick Motor Company*, 217 NY 382, 111 NE 1050, Ann. Cas. 1916 C, 440, LRA 1916 F 696 (1916), typifies the Grand Style. That Cardozo understood the grant tradition is plain enough from his own words: "What we are seeking is not merely the justice that one receives when his rights and duties are determined by the law as it is; what we are seeking is the justice to which the law in its making should conform." The Growth of the Law, p.87 (1924).

The Grand Style is to be contrasted with the Formal Style, which Llewellyn, at the time of his research, thought to be on the wane after half a century of ascendancy. In the Formal Style precedents are mechanically ribbon-matched to find the one most nearly approximating the shade of the case at hand. Principle and policy, situation-sense and life-wisdom, are secondary until the Formal Style threatens to inch its way to a result so patently wrong that some break with dry precedent becomes unavoidable. The Formal Style could never have produced *McPherson v Buick Motor Company*. The precedents, all pointing in the direction opposite to the court's conclusion, stood up well enough under that superficial analysis which characterizes the Formal Style.

Second, the true doctrine of precedents. This is actually an aspect of the Grand Style—a specific illustration of how well the Grand Style functions within the framework of the common-law case system. Llewellyn warns repeatedly against a slavish adherence to a case apparently in point when the outcome would be manifestly unjust. In his chapter on the Leeways of Precedent, Llewellyn goes far beyond our usual belief that a precedent can be treated in only three ways: Follow it, distinguish it, or overrule it. Llewellyn lists 64 techniques, with supporting citations, for handling a precedent.[90]

A question at once arises in any lawyer's mind: If precedent means so little as this how can there be any certainty, any reckonability, in the law? Llewellyn's answer is strong and sure. When a

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90In commenting on my article on Craftmanship, *supra*, Llewellyn says (p.288n) that it was "unhappily misguided on the matter of precedents." He was right . I was misguided (though I don't remember having been unhappy). But don't take my word for this. Let your study of Llewellyn convince you.

competent lawyer understands what the court is *doing*, how the Grand Style *actually works*, he can predict the outcome of an appeal more accurately than he can under the Formal Style, because the result of the Formal casematching process cannot be foreseen with accuracy. Too many divergent precedents are apt to be vying for precedence.

Llewellyn stresses the achievement of certainty *after* the fact:

> What is then needed is men—a bench—right-minded, learned, careful, wise, to find and voice from among the still fluid materials of the legal sun the answer which will satisfy, and which will render semisolid one more point, as a basis for a future growth. And the *certainty* in question is that certainty *after the event* which makes ordinary men and lawyers *recognize as soon as they see the result* that however hard it has been to reach, it is the right result. Then men feel that it has *therefore* really been close to inevitable. (Llewellyn's italics; p.185).

WHY AN OPINION AT ALL ?

Above all else to expose the court's decision to public scrutiny, to nail it up on the wall for all to see. In no other way can it be known whether the law needs revision, whether the court is doing its job, whether a particular judge is competent. A secondary reason, well stated by Traynor, is that there is no test of a decision equal to the discipline of having to compose an opinion. Without written opinions judicial mistakes would proliferate beyond knowing and beyond knowability.

Lawyers and judges often muse over the inquiry, for whom are opinions written—the litigants, the lawyers in the case, the bar as a whole, the trial court, the public, the newspapers, posterity? No inflexible answer is possible. An able and enlightened judge gives his best, under the pressure of his own conscience. He realizes, not always consciously, that at times it is vital for the impact of his words to hit a particular target, which may be one or more of the groups just mentioned. Much of the art of being persuasive lies in knowing who it is that must be convinced.

Occasionally in a system such as we use in Arkansas, where a decision-making conference invariably precedes the preparation of the opinion, a judge writes primarily to persuade his own colleagues. This may happen when he believes with heart and soul that his position is right, but he knows that his majority is shaky. Here persuasiveness must midwive the opinion if it is to come into existence at all. Such a case was *Alford v. State*, 223 Ark. 330, 266 S.W. 2d 804 (1954), though fortunately even the dissenters came to believe in later years that the decision had been right.

PREPARATION

It is not a digression for me to start with this premise: To the extent that you can shorten the lapse of time between the decision-making conference and the drafting of the opinion, to the same extent do you increase the efficiency of your labor. This is basic. You four are blessed in finding in smooth operation a procedure under which that time lapse is probably the shortest among all the appellate courts in the United States. A few years ago a survey showed that the Arkansas average lapse of two weeks between the submission of a case and the delivery of the opinion was the lowest in the nation. We haven't changed. When we recessed a few weeks ago the eleven cases decided on the last day of the term had been under submission a total of twenty weeks—an average of less than thirteen days each.

The reason for minimizing the interval between conference and opinion writing is quickly learned by experience. There is no more distasteful task, and none involving more duplication of effort, than that of having to write an opinion after the case has gotten cold in your mind. You must reread the briefs. You must re-examine the record. You must reassemble the facts. You must resurvey the authorities. In short, everything must be done twice. That lost motion can hardly be condemned too strongly.

Our procedure is simple. The briefs in, say, seven cases are distributed to every judge and every law clerk about ten days before the decision-making conference. That conference is always held on Monday. All the judges have read the briefs and have reached a tentative conclusion. You will usually know after the discussion of the case assigned to you (numerically, by the clerk) what the majority want your opinion to say. (If you end up in the minority you must trade cases with someone else, for we no longer allow a judge to write an opinion that he doesn't believe in.)

After the conference you ought to be at the job of drafting your opinion not later than the next morning. My own practice is to begin work at once, on Monday afternoon, and to stay with it as long as possible. More often than not I complete my final draft (pecked out at home on the typewriter) by ten or eleven O'clock that night. Most of the others begin their writting on Tuesday, but with all of us the time lag is normally so brief that the case is fresh in the writer's mind when he sits down to his task.

From time to time the suggestion has been made that the rapidity with which our court turns out its work must prevent its members from studying each case as carefully as a more deliberate court is able to do.[91] The truth is actually the other way around. Take a court where on the average three months go by between the submission of a case and the announcement of the decision. In that interval each judge necessarily has other cases—about a fourth of his annual output—assigned to him for opinion writing. He can't work on all of them simultaneously; so most of them will be cold when he gets to them. (There is also a human tendency to put off the hardest ones as long as one can). There is no way for such a court to avoid that unfortunate duplication of effort that we have already mentioned. Furthermore, each case will be even colder in the minds of the other judges when they finally get the opinion. Only two courses then exist: Either those joining in the opinion must consume their time in restudying the case or they must acquiesce in what becomes essentially a one-man opinion as to everything but the result. Hence, if we assume that the Arkansas judges and those in the three-month-interval court are putting in the same work day on the same number of cases, the blunt truth is that we are using our time more efficiently and are actually giving each case more study, not less, than the others are.

At a seminar for appellate judges held at the University of Alabama in 1964, I explained our procedure to judges from six or eight states. Without exception they thought it to be the best system that had ever heard of. Yet, for one reason or another, they doubted if it would work in their won courts. Their most frequent objection stemmed from the fact that our procedure entails two weekly conferences, one on Monday to decide the cases and one on Friday to discuss opinions already circulated. (It would not be practical to combine the two; such a session would be much too long for sustained concentration.). In most states the judges do not all live in the same city, as we do; so two weekly consultations might not be feasible. Even so, if judges elsewhere ever experienced the joy of drafting their opinions immediately after their conferences I'm certain they would find some way of improving their own procedure.

In Arkansas we can and do hold a case under submission for weeks or months if that much study is really needed. I mention two that fell to me to write. *Steele v Robinson,* 221 Ark. 58, 251 S.W., 2d 1001 (1952), was submitted in March 1952. It presented such knotty problems in the law of contingent

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91For instance, Walter Riddick, who had not then been appointed to the federal bench, complained in his address as president of the Arkansas Bar Association that "the court must keep up with its docket, while it falls behind with the law," *Proceedings of the Arkansas Bar Association for* 1938, p.176.

remainders that we eventually carried it over for the summer. During that recess I prepared a 30-page memorandum analysing every Arkansas case on the subject, as well as other authorities. When the decision finally came down in October it was based upon more study than a case ordinarily receives in our court or in any other with an equally heavy docket. More recently, *Norton v National Bank of Commerce*, 240 Ark. 143, 398 S.W. 2d 538 (1966), remained under submission for nine months, during which we considered *amicus curiae* briefs (which we had requested) and discussed the issues in a number of conferences. The case received far more attention than it is physically possible for us to give to every one of the 280-odd cases we decide annually. What we did in those two cases is what the three-month interval courts *appear* to be doing all the time. But they aren't, in reality.

All this preliminary discussion permits us to dispose quickly of the matter of Preparation for opinion writing. I think it a mistake, except in the simplest of cases, not to have in mind *before* the decision-making conference the authorities you except to rely on in writing your opinion. If you wait, as many judges do, until after the conference to complete your research, an added lapse of time intervenes. Furthermore, by coming to the conference with the pertinent precedents at your finger tips, not only can you present your case as it should be presented (we each lead the discussion in the cases assigned to us), but also you are able to elicit from the other judges a conclusion that has taken the earlier decisions into consideration. Of course it often happens that the conference develops new ideas that must be explored, but in most instances it is possible for you to leave the conference room in readiness to begin work on your opinion.

THE COMPOSITION OF AN OPINION

The conference is over. You know how the case is to be decided. You know what your reasoning is to be, what authorities will buttress your position. You have the essential facts in mind. (Caution: Always get your salient facts from the record, not from the abstracts or briefs. Counsel often let partisanship color their narrative of the case. Moreover, the losing lawyer may forgive you for making what he thinks to be a mistake about the law, but if you misstate the facts the petition for rehearing will lash you mercilessly, and with justification).

The rub: How do you get your thoughts down on paper? Most judges I have served with first write the opinion in longhand as a basis for dictating a rough draft, from which in turn the final copy is made. Others dictate from notes or from an outline. Holmes, in his later years, achieved brevity by writing his opinions in longhand while standing up. The only method *not* to use is that of dictating

without first putting anything on paper. Yet that method is used all too often. How do I know? The opinions themselves give unmistakable internal evidence of having been dictated, from the hip.

Llewellyn (pp. 296-297) believed that opinions would be "cleaner and briefer" if the judge first wrote his own headnotes, even though they were not to be used by the reporter. In cases of some complexity, involving perplexing questions of law, that approach is unquestionably of great value. But I have not found it quite worth the trouble in routine cases presenting only one or two simple issues.

Many opinions tend to follow what has become almost a set five-step formula. First, an opening paragraph identifying the type of case, aligning the parties, and giving the result in the trial court. Second, some indication of the issues on appeal. Third, a statement of some or all of the facts. Fourth, a discussion of the law, with additional facts as needed. Fifth, the conclusion, with whatever directions are necessary if the cause is being remanded.

This formula is not, and should not be, rigid. Variety is pleasing. Sometimes the question to be decided is so much more important than the actual litigation at hand that the opinion may well begin with a statement of the question. Sometimes it is best to state the controlling rule of law before the facts. For example, when the only question is whether the decree is or is not supported by clear and convincing evidence, that standard of proof should almost always be stated early, so that the reader can bear it in mind as he reads the narrative of the facts. Not infrequently it is advisable to state the court's conclusion near the beginning of the opinion. That practice often induces the reader to be on the court's side from the start; he is preconvinced that the decision is right.

The importance of the first paragraph cannot be overemphasised. Remember the advice to the cub reporter: Let the opening paragraph of a news story answer broadly such questions as Who? Where? When? What? Why? For judicial cubs there is similar advice. The readability of an opinion is nearly always improved if the opening paragraph (occasionally it takes two) answers three questions. First, what kind of case is this: Divorce, foreclosure, workmen's compensation, and so on? Second, what roles, plaintiff or defendant, did the appellant and the appellee have in the trial court? Third, what was the trial court's decision? The fourth question, What are the issues on appeal?, should also be answered unless the contentions are too numerous to be easily summarised.

Such an opening paragraph leads the reader into the opinion with enough information for him to understand it as he proceeds. By contrast, an opinion that begins with a two or three page narrative of the litigation, in chronological sequence, with a multitude of dates and other details, fails to tell the reader what to look for. More often than not some rereading becomes necessary when the opinion writer

finally lets the cat out of the bag by revealing the secret of what the case is all about. (I confess that many of my early opinions had this fault. An example is *Johnson v. Smith*, 215 Ark. 247, 219 SW 2d 926 [1949].

I can illustrate my conception of the opening paragraph by quoting that paragraph in each of my first three opinions in the latest bound volume of the Arkansas Reports. I don't imply they are perfect, but they do show how few words are needed to answer the three or four questions that should usually be answered at the outset.

"This is a suit by the appellant for specific performance of an option to buy the appellee's home in downtown Malvern. The chancellor dismissed the complaint, finding that the option could be exercised only by the United States of America for the purpose of acquiring the property as a site for a post office." *McClure Ins. Agency v. Hudson*, 238 Ark 5, 377 S.W. 2d 814 (1964).

"This is an application by the appellants, two lawyers living in Memphis, Tennessee, for a writ of certiorari to review a judgement finding them to be in contempt of the Pulaski Circuit Court. They contend that their conduct did not constitute contempt of court and, secondarily, that the punishment imposed is excessive." *Garner v Amsler*, 238 Ark. 34, 377 S.W. 2d 872 (1964).

"Under the authority of ARK. STAT. ANN 62-2402 (Supp. 1963) the appellee, as administrator of the estate of Sam Bell, deceased, brought this suit to set aside certain assertedly fraudulent conveyances made by Sam Bell during the last year of his life. The chancellor, in accordance with an excellent memorandum opinion that he prepared, entered a decree granting the relief sought. For reversal the appellants, who were the immediate and ultimate recipients of the property conveyed, contend principally that there was no proof of actual fraud on the part of the parties to the various conveyances. "*Dereuisseaux v Bell*, 238 Ark. 60, 378 S.W. 2d 208 (1964).

Until you have had the experience of writing a few opinions you cannot realise how much effort was required to turn out those short paragraphs. In most cases, if you are to do a workmanlike job, you must rewrite your first paragraph again and again, condensing it, rearranging it, clarifying it, and often throwing it away and starting all over. But I urge you to finish that process of revision before you go on the body of the opinion. This is because a properly written opening paragraph goes surprisingly far toward making the rest of the task comparatively easy.

I had an unusual experience in writing the opinion in *Pittman v Pittman*, 237 Ark. 684, 375 S.W. 2d 361 (1964). The case involved a rule of law that happened to be so familiar to me from an incident in my practising days that I hadn't bothered to reread the cases before beginning to draft the opinion. I

struggled with the opening paragraph for at least two hours. Finally, after the greatest travail, I brought forth the unheard of solution of stating the controlling rule of law in the very first sentence of the opinion. After that happy thought the rest of the paragraph almost wrote itself. Did I say "unheard of"? Not quite. When I gathered together the authorities I found that in an earlier case, involving *exactly* the same rule of law, I had resorted to the remarkable device of stating the rule at the very beginning, just as in the *Pittman* case. *Collins v. Fincher*, 235 Ark. 587, 361 SW 2d 86 (1962). I can remember no other instance, in the course of writing more than 800 majority opinions, when I have used this particular method of tackling the opening paragraph.

When several issues are to be discussed in the opinion you must think about the sequence in which you will take them up. Don't give the appearance of slavishly following the briefs, point by point; it makes the opinion seem mechanical. (That mannerism was especially noticeable in the opinions of the late Judge Tom M. Mehaffy of our court.). The most important question usually deserves first place. That is not true, however, if there is a preliminary point, usually procedural, that would be decisive of the appeal if decided in a certain way. To put such an issue last creates an anticlimax. Try to work out an order of treatment—logical, chronological, or whatever—that will take the reader smoothly from one point to the next, without needless repetition of facts or law.

TOWARD A MORE LITERARY STYLE

In college days my closest friend, Frank Newell, who was majoring in English, used to say, "Style is a way of thinking." His epigram had depth. The judge who writes long, rambling, hazy opinions is pretty sure to think and talk in the same way. Clarity and brevity of expression come from clarity and brevity of thought. To a large extent, then, your literary style was fixed long ago, perhaps even prenatally. But this does not mean that it can't be improved.

Traditionally, the advice to budding authors who seek to improve their style has been to read the works of the great English-speaking writers: The King James Version of the Bible, Shakespeare, Conrad, Hemingway, and others. Such advice, good as it is, comes too late for four middle-aged men abruptly entering a vocation where their own written words will be taken to be the best yardstick of their skill as judges and as craftsmen. If any of you four would like to undertake a critical examination of your own style, in the hope of improving it, are any aids available?

Yes. Decidedly yes. But here the point of the utmost importance is that you can't expect to make over your style in its entirety, all at once. Instead, improvement is a matter of little by little, point by

point, step by step. When you have learned to write *the question whether* rather than *the question as to whether* you've moved forward, however slightly. When you avoid, knowledgeably, a sentence that ends dozens of appellate court opinions every month, "Finding no error, the judgement is affirmed," you've become conscious of grammar. When you can see at a glance, without your attention having been called to it, that this sentence is badly constructed, "He plays good cricket, likes golf and a rubber of bridge," you're on your way toward understanding sentence structure. When a statement such as this one grates on your nerves, "The appeal must be dismissed, due to a fatal defect in the record," you've cleared another hurdle. When—but why go on? All I'm suggesting is that there are things to be learned.

Among the many books available I would direct your especial attention to two. First, THE ELEMENTS OF STYLE, by William Strunk, Jr. (Note the implication in the title that style is made up of elements, to be learned one by one.) Professor Strunk, who taught at Cornell, always referred to his treatise as "the little book." First published in 1918, it would be forgotten today if one of Strunk's students, E.B. White, had not reminisced about the book in *The New Yorker* magazine in 1957. At the publisher's request White revised the text for a new edition that was brought out in 1959.

It is still the little book, only 71 pages in all, but its brevity makes it all the more valuable. Nowhere else can you find so much wisdom on the subject in so few pages. In fact, its condensation is so great that you can't absorb it all in one reading. Go back to it every year or so, with pencil in hand to mark passages you particularly want to remember. And, mark you, it won't be a chore. Strunk's own style was delightful.

The other absolute *must* is H.W. FOWLER'S, MODERN ENGLISH USAGE, first published in 1926 but always available in new editions.[92] Fowler was a crotchety Englishman, outspoken in his beliefs and vehemently scornful of what he considered to be poor writing. Yet no one else ever studied English usage as deeply and as perceptively as did H.W. Fowler (and his brother, who helped plan the

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92In 1957 Margaret Nicholson prepared an Americanised version of Fowler, called A DICTIONARY OF AMERICAN- ENGLISH USAGE. She retained most of Fowler's best articles, either verbatim or slightly abridged. Unfortunately, Miss Nicholson never tells us what is Fowler and what is Nicholson. Consequently the true Fowler worshipper feels some prejudice against this revision, although it contains much good stuff.

[In 1966, in the interval between the completion of this primer and its minimal re-editing for publication in the ARKANSAS LAW REVIEW, there was published a new Fowler-type American-written book: MODERN AMERICAN USAGE, by WILSON FOLLETT. I implore every neophytic writer to read and re-read Follett's 20-page treatise, in the appendix, on the correct use of the comma. It is hard to believe, without having studied this discussion, the extent to which a deeply perceptive commentary about a commonplace punctuation mark can illuminate several important aspects of good writing.]

book but did not live to help write it). The book's complete title is A DICTIONARY OF MODERN ENGLISH USAGE, but it isn't really a dictionary in the ordinary sense. The entries are in alphabetical order. You needn't read them all. Look primarily for the longer articles; their titles are printed in capital letters.

Some of Fowler's articles can be grasped at a single reading. As a starter, try these three entries: Elegant Variation, Pronouns, and Respective (ly). Other entries must be studied. Some of those are Hyphens, Number, Position of Adverbs, and What.

Fowler covered about every aspect of writing: Grammar, style, punctuation, clarity, or what have you. In an effort to achieve a sound literary style your best bet is to devote particular attention to sentence structure. Judicial opinions unquestionably suffer more from excessively long and poorly constructed sentences than from any other one defect. Many of Fowler's articles relate in whole or in part to the matter of sentence structure. The principal pertinent entries are listed below.[93]

Aside from the study of sentence structure, your best opportunity to improve your work comes when you are revising the typewritten rough draft of an opinion. Compound sentences can be cut up into short sentences; active verbs can take the place of passive ones; phrases and clauses can be shifted to better positions; unnecessary adjectives and adverbs can be taken out. (You will be surprised at how often an adverb that is intended to intensify an adjective has exactly the opposite effect. This is especially true of *very*. Bernstein, *infra*, points that out saying, "Hemingway's prose is very lean and very strong," is not as forceful as saying, "Hemingway's prose is lean and strong").

There are many volumes that may be read with enjoyment and profit. THEODORE M. BERNSTEIN'S, THE CAREFUL WRITER, published in 1965, is made up of short entries alphabetically arranged. You may read as much or as little as you like at a sitting. A DICTIONARY OF CONTEMPORARY AMERICAN USAGE, by Bergen and Cornelia Evans (1957), is rather like Fowler except that Fowler was concerned almost entirely with good writing, while the Evanses are equally interested in good conversational speech. Thus they approve constructions that are acceptable in conversation but not in formal writing, such as: "Neither John nor Mary *were* there. Who did you talk to?"

93And; As; Be; Double Case; Ellipsis; Enumeration Forms; False Scent; Fused Participle; Haziness; However; Negative; Of; One; Pronouns; Repetition; Rhythm; Sideslip; Swapping Horses; Unattached Participles; Unequal Yokefellows; Walled-up Object.

Dr. Rudolf Flesch has written a number of short books on the subject of writing, the best of which I think to be THE ART OF READABLE WRITING (1949), His appeal, however, is more to the business man, unaccustomed to doing much writing, than to the professional such as a lawyer or a judge.

Caution: Don't take any of these works to be the final, inflexible, immutable truth. The authors often differ among themselves. The English language is constantly changing. What you must look for is ideas which you will at once acknowledge to be an improvement upon the way you have been talking and writing in the past. Little by little, point by point, step by step—but before long the cumulative progress becomes apparent.

A few reference books are essential. You will find in your offices the third edition of WEBSTER'S NEW INTERNATIONAL DICTIONARY, but if you can dig up a copy of the second edition you'll probably like it better. ROGET'S THESAURUS is the classic work for finding the exact word you want. In the older editions, however, you had to take two bites by going to the index first. For that reason I discarded ROGET some years ago in favour of RODALE'S SYNONYM FINDER (1961), which I still prefer. THE HARVARD BLUE BOOK, A UNIFORM SYSTEM OF CITATIONS (1958), obtainable from our librarian, solves many problems in the citing of authorities, but its foreword points out that the recommended forms should always be modified at the demand of clarity. Both the University of Chicago and the Government Printing Office publish style manuals that cover in detail capitalization, punctuation, and other matters relating to the preparation of a manuscript for publication.

LEGALISMS

A *legalism* is intended here to mean a word or phrase that a lawyer might use in drafting a contract or a pleading but would not use in conversation with his wife. I absolutely and unconditionally guarantee that the use of legalisms in your opinions will destroy whatever freshness and spontaneity you might otherwise attain. None of the Judges whose opinions can fairly be said to be really literate—Holmes and Cardozo come to mind—were addicted to this pernicious practice.

My advice, springing from a deep conviction, is a flat Never. Repeat, Never. Let's take a look at five of the legalisms most often seen in opinions. (There are many others).

Said in the sense of *aforesaid.* "Said statute provides . . . " Or, as a husband might say to his wife, "I can do with another piece of that pie, dear. Said pie is the best you've ever made." (I don't imply that *aforesaid* is any better. It isn't, being itself a legalism).

Same in a similar sense, usually is a bad substitute for a pronoun. "We have studied the agreement and have concluded that same (it) is ambiguous." "I've mislaid my car keys. Have you seen same?"

Such in a similar sense. Forty years ago Fowler, in discussing several different uses of *such,* labeled its use to mean *that, these, it, them,* etc, as the *illiterate such.* I must confess, however, that the usage has become so common in pleadings and legal documents, and more recently in judicial opinions, that it must be promoted from an illiteracy to a legalism. It should nevertheless be avoided in every instance. "This case involves the will of John Deo. Such will was executed on April, 3, 1937." "Sharon Kay stubbed her toe this afternoon, but such toe is all right now."

We can easily surmise how this illiteracy arose. *Such,* properly used, implies that other similar things exist. A comparison, a classification, or the like is being made. When the noun referred to is singular in number there is no possibility of misunderstanding the literate writer's meaning. "This case involves a family settlement. Such a settlement is to be liberally construed." Obviously the writer is not restricting the rule of construction to the one settlement involved in the case.

The possibility of misunderstanding arises when the noun is plural or collective. "This case involves two successive family settlements. Such settlements are to be liberally construed." You and I know that the writer means that "Such settlements as *these* are to be liberally construed," the implication being that others do exist. But the illiterate reader is at liberty to take the statement to mean, "These two *particular settlements* are to be liberally construed." That reader finally passes the bar examination on the third try, later becomes a judge, and brings the *illiterate such* into his opinions. Regrettable.

Hereinafter called. "This is an action against Hartford Accident & Indemnity Company, hereinafter called Hartford." "You'll get a kick out of what happened today to my secretary, hereinafter called Cuddles." In opinion writing this stilted legalism can be avoided in many ways. One of the easiest is to use the shortened reference soon after the full name is first employed, putting the reader on notice at once. "This is an action against Hartford Accident & Indemnity Company upon a fire insurance policy issued to the plaintiff. Hartford's policy contained this pivotal clause: ..."

Inter alia. Some Latin phrases, such as *prima facie, re judicata,* and *stare decisis,* are acceptable because no brief translation conveys quite the same meaning. Not so with the overworked *inter alia*. Why not just say, *Among other things*? But, more important, in most instances *inter alia* is wholly unnecessary in that it supplies information needed only by fools. "The complaint alleged, *inter alia,* that the contract was in writing."No one likely to be reading an appellate court opinion would suppose that the complaint contained no allegation whatever except the bald statement that the contract was in writing. So you not only insult your reader's intelligence but go out of your way to do it in Latin yet!

JUDICIAL HUMOR

Again the advice must be a flat Never. Judicial humor is neither judicial nor humorous. A lawsuit is a serious matter to those concerned in it. For a judge to take advantage of his criticism-insulated, retaliation-proof position to display his wit is contemptible, like hitting a man when he's down. The longest opinion of this kind that I have encountered is that in *Hampton v. North Carolina Pulp Co.*, 49 F Suppl. 625 (E.D.N.C. 1943). The author of that opinion may have proved himself to be a humorist, but in my book he also proved himself unfit to be a judge.

FOOTNOTES

It is my firm conviction that a judge who habitually uses footnotes, one or more to about every opinion, reveals something basic about his attitude toward opinion writing. I have a suspicion that his interest may be not so much in what he is saying as in how he is saying it. I venture to think that Holmes had something of this sort in mind when, in a statement that I haven't bothered to hunt up, he compared his own opinions with those of Brandeis simply by saying, "He believed in footnotes, and I didn't."

At this point I am talking especially to you four newcomers and not to the members of the Supreme Court of the United States (nor with any intent to disparage the opinions of Mr. Justice Brandeis). The work and the opinions of that tribunal differ sharply from those of the state courts. We are engaged chiefly in settling disputes. Most of the time we merely apply rules of law already settled, so that the mission of the opinion is not to announce new law but simply to put an end to a lawsuit. Contrariwise, the dispute-settling aspect of the Supreme Court's work is often trivial. For example, *Erie Railroad Company v. Tompkins,* 304 U.S. 64 (1938), was insignificant as litigation, but the shock wave of the court's opinion was immediately felt in every federal court in the land. The Supreme Court

justices are, and properly so, constantly conscious of their responsibility as policy-making interpreters of the Constitution. Their opinions are state papers. If the justices find footnotes to be useful in the discharge of their burdensome duties, I have no quarrel with them.

Back to the state courts. Most heavily footnoted opinions would be more readable without the footnotes. When the text of an opinion is heckled again and again by footnotes there is almost certain to be a loss in simplicity, directness, and clarity. Why, then, the footnotes? The answer seems to be that the writer has some notion of casting an aura of scholarship about his work. If so, the effort is vain, the aura evanescent. Cardozo stands as one of the great scholars of the law, but he was not a footnoter.

To get down to specifics, most of the matter in judicial footnotes ought to be in the body of the opinion. If you're going to cite *Kelly's Heirs v. McGuire,* you must add, somewhere, the book and page (15 Ark. 555). (It's helpful to give the date as well). The practice, which seems to be becoming more and more popular in the lower federal courts, of putting the book and page in a footnote is indefensible. An ever-present objection to any footnote is that it compels the reader to interrupt his chain of thought by dropping his eyes to the bottom of the page. If the book-and-page citation is in the text, where it belongs, the practised reader skims over it without pausing.

Equally atrocious is a footnote that gives only the earthshaking message, *Italics supplied.* Whenever an alert reader encounters and italicized passage in a quotation he automatically expects to be told who inserted the emphasis. It's inconsiderate to make him search for that information in a footnote. In fact, there is much to be said in favour of bracketing in your (italics supplied) in the quotation itself when only a word or so is italicized in a longish passage.

(While we're on this subject let me point out that italics are most effective when only a word or a short phrase is italicized. "Let there be light, and there was *light*!" [Don't accent *was.*] Fowler's view is right: "To italicize whole sentences or large parts of them as a guarantee that some portion of what one has written is really worth attending to is miserable confession that the rest is negligible").

Another footnoting habit that can be annoying is that of tacking a footnote number to a word[94] before the writer's thought has been completed. Here the reader faces a distasteful choice: Either he must interrupt his thought by going for the footnote at once or he must carry that prospect in his mind while he tries to concentrate on the rest of the sentence.

All the same, my advice about footnotes is not a narrow-minded *Never.* Rather, it is a tolerant *Hardly ever.* In at least one situation the practice is useful. There the writer's reasoning does not require

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94Yoo hoo! Footnote! (see?)

that a statute, contract, or the like be quoted in full, but such a quotation might be helpful to someone having more than the average lawyer's interest in the opinion or not having ready access to the quoted matter. In that situation the opinion may well say, "We have set out the statute in full in the margin." But take note, the reader is not irritated, because he has been told in the body of the opinion what to expect if he pauses to look down. There may well be other legitimate uses for footnotes, but none occurs to me at the moment.

L'ENVOI

Surly it's time to stop, even though there are other aspects of opinion writing that we haven't talked about. Brevity is perhaps the main one; but, first, articles on that subject are too numerous to mention, and, second, they don't seem to have done a particle of good. Short opinions stem from the judge's own convictions in the matter, not from what he read somewhere.

Most of what I've left unsaid is expressed much better than I could put it in the three principal books that we've referred to. Hasten to your bookstore and order LLEWELLYN'S COMMON LAW TRADITION—DECIDING APPEALS, STRUNK'S ELEMENTS OF STYLE, and FOWLER'S DICTIONARY OF MODERN ENGLISH USAGE. Whether you have studied your lesson will be apparent next January. Welcome to the court!.

LITERARY MINDS AND JUDICIAL STYLE

(by WALKER GIBSON* : (36) New York University Law Review 915)

I

To the literary man, the language of the law is likely to seem abstract, cumbersome, and remote from life, though alarmingly powerful over the actions of human beings. On the other hand, the legal man, who often believes himself sympathetic to books and the arts, thinks of literary study nevertheless as irrelevant to his own profession, fuzzy in its definitions, and essentially a frivolous "escape." Both these judgements are more than half wrong. The two worlds of discourse are certainly different, and should be, but they may have something to learn from one another, and an effort to open communicatiohs might actually provide some useful consequences for both parties.

In this article, primarily devoted to judicial style, it will be argued that certain terms and attitudes familiar to modern students of literature and language can be of direct and practical use to writers of legal compositions.

What is it the specialist in literature and language can offer that might be useful to the legal writer? What connections are there between these two worlds? Twenty years ago, Chafee demonstrated a semantic approach to these questions, by attacking the "indissoluble link between the word and the thing" as he applied Ogden and Richards' *Meaning of Meaning* to some verbal difficulties of the law.[95] Since then, a number of law review articles have addressed themselves to problems of legal writing, usually at a level of sophistication several cuts below Chafee.[96] For some time the law schools

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95Chafee, The Disorderly Conduct of Words, 41 Colum. L. Rev. 381, 384 (1941).

96E.g. Beardsley, Judicial Draftsmanship, 24 Wash. L. Rev. 146 (1949); Chandler, Appellate Opinions: A Lawyer and a Reporter Offer Suggestions, 35 ABAJ 277 (1949); Gerhart, Improving Our Legal Writing: Maxims From the Masters, 40 ABAJ 1057 (1954); Hager, Let's Simplify Legal Language, 32 Rocky Mt. L. Rev. 74 (1959); Miller, On Legal Style, 43 Ky. LJ 235 (1955). To this list should be added a useful article by Judge Frederick G. Hamley of the Ninth Circuit Court of Appeals, as yet unpublished: The Techniques of Writing Opinions.

themselves have been expressing dismay over the illiteracy of the students they have been receiving,[97] and in a few cases have turned to undergraduate English departments for assistance. (It may be argued that it is these very English departments, or the admissions offices of their colleges, that encouraged the illiteracy in the first place.) As for concern over judicial style, the Seminar for Appellate Judges held at New York University in July 1960, was devoted in part to a discussion of style in judicial opinions, and the following remarks emerge from the writer's participation in those sessions.[98]

Attitudes toward language proceed from the activities of the language users. What is it the speakers are doing or trying to do with words? In the judicial world, of course, words and phrases are constantly defined and redefined in relation to specific human conflicts. Judges, assessing these conflicts, must render Yes or No decisions regarding the meanings of key terms, where their Yes or No will have immediate practical consequences on the behaviour of many people. What does "due process" mean? When are employment practices "fair"? These terms have been refined in specific responses to thousands of conflicts, with more thousands to come. In a difficult case, the problem of the appellate judge as he "composes" his words in writing an opinion might be expressed as follows: How can I give a Yes or No decision that will more or less consistently reflect the framework of the legal past (the definitions of my predecessors), and that at the same time will sympathetically affirm my own and my society's current notions of justice? This dilemma is at the heart of the judge's function, and what makes the dilemma particularly formidable (to a literary mind at least) is precisely the paradox that a complicated mass of human experience has to be reduced to the simplest possible terms. Yes or No. Affirmed or Reversed. There is no Maybe about it. The necessary crudeness of such decisions, their abstractness, their distance finally from the concrete, ambiguous, mysterious chaos that makes up the actual experience of living men and women—all this must be a familiar story to many a reflective judicial mind.

97Dean William C. Warren of Columbia has been particularly vigorous in pursuing this point in a number of Dean's reports. "Even the most tolerant of critics will concede that whatever be the arts of which the students are bachelors, writing is not one of them." Report of the Dean of the Columbia School of Law 9 (Colum. U. Bull. Information, 57th Ser., No. 41, Oct 12, 1957).

98It was the purpose of the Seminar directors to secure the services of a composition teacher who knew nothing of the law, and in the present writer they did not miss their mark.

For life as it is actually lived is a far cry from Yes or No decisions about "due process." It would seem of considerable importance that legal men should remind themselves from time to time of this essential difference. Life is a vast flood of unorganized sensations, flowing, more or less haphazardly, into the infinitely receptive consciousness of human beings. One contemporary writer has even expressed this unorganised shapelessness through image of semi-liquid, free flowing "gooeyness"—viscous and formless.[99] We have our ways of controlling this formless stuff: principally, we use words, and by doing so we select out what we think may serve our purposes and ignore the rest. The result is that experience *seems* orderly. I sit here at my typewriter, a woodlot drips outside my window, there is the not-too-distant sound of hammering, my stomach feels slightly uneasy from the pipe I have just laid down, and I am aware of vague memories of other woodlots, hammerings, pipes. But all these sensations I resolutely disregard, and return to my arbitrarily selected task: punching these keys, "dealing" with judicial and literary language. In this way, I give a flavor of logic, order and inevitability to an intelligence that is in fact rather a mess.[100]

Whitehead has described my situation admirably:

> The most obvious aspect of this field of actual experience is in its disorderly character. It is for each person a *continuum*, fragmentary, and with elements not clearly differentiated. The comparison of the sensible experiences of diverse people brings its own difficulties. I insist on the radically untidy, ill-adjusted character of the fields of actual experience ... To grasp this fundamental truth is the first step in wisdom ... This fact is concealed by the influence of language ... which foists on us exact concepts as though they represented the immediate deliverance of experience ... The result is, that we imagine that we have immediate experience of a world of perfectly defined objects implicated in perfectly defined events which, as known to us by the direct deliverance of our senses, happen at exact instants of time, in a space formed by exact points, without parts and without magnitude: the neat, trim, tidy, exact world which is the goal of scientific thought.[101]

99Jean-Paul Sartre, in The Age of Reason (1952), and other works.

100The legal analogy is obvious. "How better to give form and shape to amorphous custom, to give to law the appearance of definiteness and certainty, than to write it down in books?" Seagle, The Quest for Law 151 (1941).

101Whitehead, The Aims of Education 157-58 (1929). On the occasion of Whitehead's death in 1948, Mr. Justice Frankfurter wrote an appreciative letter to the New York Times which showed how well aware he was of Whitehead's repeated cautions about language. "He was fiercely on guard against the illusions of verbalization and did not confuse certainty with certitude. In short, he was tough-minded because he felt the universe as illimitable ... [H]e knew that even the most rigorous thought

For the literary man, the *continuum* remains as real as he can make it, and his half-successful effort not to be taken in by language might provide the legal mind with a useful example. The poet, in particular, finds in the disorderly character of actual experience the raw material of his trade. Disregarded sensations on the periphery of expressible life are brought back into view and defined, in the ironic knowledge that their description is finally impossible. The answer the modern poet usually makes to the questions he asks is not Yes or No, but Yes *and* No, or perhaps simply Maybe. The poet's goal is not the reduction of life to a simplicity where action can take place, but rather the contemplation of complexity, which he sees as inevitable and desirable. Suppose, says Wallace Stevens, one *were* able to simplify, to concentrate on one perfect, clear image.

> Clear Water in a brilliant bowl,
> Pink and white carnations. The light
> In the room more like a snowy air,
> Reflecting snow. A newly-fallen snow
> At the end of winter when afternoons return.

And he goes on to say that, even if this "complete simplicity" seemed to offer a kind of rejuvenation and escape from ego, still we would demand to be returned to the world as we know it, a world of chaos and complexity where the appropriate language consists of "flawed words and stubborn sounds."

> Still one would want more, one would need more,
> More than a world of white and snowy scents.
> There would still remain the never-resting mind,
> So that one would want to escape, come back
> To what had been so long composed.
> The imperfect is our paradise.
> Note that, in this bitterness, delight,
> Since the imperfect is so hot in us,
> Lies in flawed words and stubborn sounds.[102]

The paradoxical situation all writers share—poets and legal writers together—is the expression of chaotic complexity in language that is necessarily ordered and relatively simple. All words are lies. For

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cannot achieve fulness of comprehension." N.Y. Times, Jan. 8, 1948, p. 24, col. 6.
102Stevens, Collected Poems 193-94 (1954).

the literary man this means an interest in "flawed words and stubborn sounds," and in all the devices of rhetoric that say two things at once, Yes *and* No. Hence the modern literary man's concern with irony, ambivalence, ambiguity, metaphor: all techniques by means of which two or more views of experience may be expressed simultaneously.

It is, metaphor, in particular, through which we assert a likeness between things that are after all *un*like. The poet tells us that his love is like a red red rose, and if he knows his business he is able to remind us that his love is also *not* a red red rose—that the analogy is a partial attempt of a mortal man to express the inexpressible. Legal writers use metaphor too, constantly, but they are likely to be somewhat less self-conscious than poets about the rhetoric they are using, and sometimes their imperturbability can lead to serious trouble. Consider the process by which a "business" became identified with "property." Someone must have hazarded the statement that a business was *like* property, and it could not have been long before a business *was* property. Holmes tells us of the difficulty. "By calling a business 'property,' " he said, "you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed."[103] The same problem arises when you refer—through metaphor—to a business corporation as a human being. In *Garzo v. Maid of the Mist Steamboat Co.*,[104] the issue was whether a corporation could still be called "existing" after its fifty-year charter had inadvertently lapsed, though the company itself was still busily conveying tourists around Niagara Falls. The analogy with human mortality simply broke down; it was important to be reminded that a corporation is *not* a human being, since evidently a corporation can both "live" and "die" at the same time. Judge Fuld in his opinion quoted an earlier statement by Judge Sears which shows an awareness of the linguistic dilemma:

> If the analogy of physical death is sought to be applied to the expiration of the term of corporate existence of an organisation which the law recognizes as a person, it is easy to answer that there is no greater difficulty in considering the organization as existing after its death and before its birth . . . Such analogies are often misleading. . . .Corporate life rests upon legislative fiat, and there is no reason to apply such a doubtful analogy to such a case as this . . .[105]

103Truax v. Corrigan, 257 U.S. 312, 342 (1921) (dissenting opinion).

104303 N.Y. 516, 104, N.E. 2d 682 (1952).

105Wilson v. Brown, 107 Misc. 167, 174, 175, N.Y. Supp. 688, 692 (Supp. Ct. 1919). There is a penetrating analysis of the difficulties inherent in the corporation-human being analogy in Hart, Definition and Theory in Jurisprudence 24-28 (1953).

The fact is that judges must constantly make use of rhetoric that can be troublesome. Both as writers of opinions and as readers of statutes, they must be as skilled in the interpretation of words as any literary critic—maybe more so. At the same time, literary men have much to learn from judges, and though that is not my subject here, the fact should be at least briefly acknowledged. For the literary man, it is a refreshing, a heady experience to know of a world in which yes-no-decisions have practical consequences on the actions of living people. The judicial necessity of clear definitions, no matter how crude, may offer a useful moral to many a poet or critic. The much quoted remark of Dr. Johnson, reported to have been made to Jonathan Edwards, is worth repeating here: "You are a lawyer, Mr. Edwards. Lawyers know life practically. A bookish man should have them to converse with. They have what he wants." It is obvious that some literary writers take advantage of their freedom, and create a work of absurd complication, too close to 'actual experience'—just as judges will some times take advantage of their abstract and rigorous vocabulary to create a work of absurd simplicity, too remote from "actual experience.".

In any event it is wonderful to find Holmes, over seventy years ago, conscious of linguistic complication long before "semantics" became a fashionable concern:

> It is true that in theory any document purporting to be serious and to have some legal effect has one meaning and no other, because the known object is to achieve some definite result. It is not true that in practice (and I know no reason why reason should disagree with the facts) a given word or even a given collocation of words has one meaning and no other. A word generally has several meaning, even in the dictionary. You have to consider the sentence in which it stands to decide which of these meanings it bears in the particular case, and very likely will see that it there has a shade of significance more refined than any given word in the word-book....[And] when you let whatever galvanic current may come from the rest of the instrument run through the particular sentence, you still are doing the same thing.[106]

II

If words are necessary simplification of actual experience, then it follows that we can hardly expect to make manifest to others what is "really going on" in our minds. We cannot say what we mean, precisely, nor can we feel secure in our understanding of what someone else means. The concept of

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106Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417 (1899).

"intention" has proved to be awkward for both literary and legal minds, and for similar reasons. What did the legislature really mean? What did Shakespeare really mean? One lacks the evidence for answering either of these questions very satisfactorily, and the mere asking seems to be an invitation to irrelevance. In the case of the legislature's intention, the difficulty is that Time has gone barreling on, long after the legislature has spoken, and new situations have arisen about which the legislature clearly never had any intention at all. The question then becomes rephrased, into something like. "What *would* the legislature have intended *if* the legislature had known what was going to happen?" The difficulties with this line of conjuncture, both theoretical and practical, are immense.[107] The indicative verbs of the original question have been transposed into the subjunctive mood, "contrary to fact" (if they *had* known), and we enter an unreal world of guesswork. The prospect becomes even cloudier when we ask constitutional questions about intention. What did the "Framers" at the Constitutional Convention really mean? "[I]t is also impossible," says Hand, "to fabricate how the 'Framers' would have answered the problems that arise in a modern society had they been reared in the civilization that has produced those problems. We should indeed have to be sorcerers to conjure up how they would have responded."[108] For some literary critics, difficulties not entirely unlike these have resulted in a dismissal of the whole attempt with the phrase, "the intentional fallacy." "[T]he design or intention of the author," the most influential work on the 'fallacy' asserts, "is neither available nor desirable as a standard for judging the success of a work of literary art."[109]

If we do not know, then, what another writer intended, and if indeed we scarcely know what we intend ourselves—what do we know? What questions can the writer ask himself that might prove more useful than, "What do I really mean?" or "What did the legislature really mean?" For the writer in a rigorously defined and practical situation, such as the appellate judge, questions that seek information *from the context of the writing problem,* rather than from the contents of the writer's mind, would seem realistic and desirable. Here are four examples of such questions—questions familiar to the literary man and the teacher of composition:

107See Courtis, A Better Theory of Legal Interpretation, 3 Vand L. Rev. 407, 412 (1950). Professor Hart remarks, as a matter of obvious fact: "In no legal system is the scope of legal rules restricted to the range of concrete instances which were present or are believed to have been present in the minds of legislators . . . " Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 627 (1958).

108Hand, The Bill of Rights 34-35 (1958).

109Wimsatt, The Verbal Icon 3 (1954).

1) To whom am I talking—who is my reader?

2) What do I want my reader to do?

3) Who am "I"—that is, what sort of speaking voice shall I project by the manner in which I compose my language?

4) What relation should I express between this "I" and my reader—should I be formal or informal, distant or intimate? To use the literary term, what is my *tone*?

When appellate judges are prevailed upon to ask these questions of themselves, their answers have the most direct bearing on formation of judicial style.

The first question is a practical one of fact. Who actually does read a judicial opinion? Readers in the immediate situation include all the interested parties and all their lawyers, and the writer's colleagues on his own court, including the dissenters. The judge or judges on the lower court are addressed, particularly if the opinion states a reversal. A higher court may well be concerned. Newspaper reporters, usually fairly well-trained readers, are involved, and occasionally the judge writes with an awareness that his words may be displayed to the general public. Judges seem to agree that the awareness of a possible larger, non-professional audience can have an effect on writing style in particular cases, though they seem not to be sure that it *ought* to. In any event, it appears that while the actual readers of opinions do vary in different situations, the large majority are men highly trained and skilled, like the judges themselves. This is an educated and sophisticated audience—as audiences go. It is professional.

The answer to the second question—What do I want my readers to do?—is again flexible for different readers of different opinions, but ideally what the judge seems to be striving for is agreement. See it my way, he appears to be saying, and we remember that he is saying it to a knowledgeable fellow-professional. But the judge knows that he is unlikely to persuade at least two elements in his audience: the losing lawyer and the dissenting judges on his own court. The judge of the lower court who has just been reversed may also be expected to be a reader not entirely sympathetic. What does this suggest as to the writer's approach of these people? It suggests that he should at least persuade them that he has considered their points of view, that opposing evaluations of the case have been understood and seriously weighed. In persuading a sophisticated audience of fellow-professionals, it would seem the clear course of wisdom to include the other fellow in, perhaps even grant him point or two. When this suggestion is proposed to appellate judges, they nod in polite agreement. Is it not astonishing, then, how

many opinions are written as if there were only one, very obvious, and utterly inescapable position, and that the position of the writer himself?

The third question concerns the quality of the "I" or stylistic voice through which the judge speaks. Cardozo's pleasant essay on *Law and Literature*[110] is addressed to this subject, and he lists a number of possible roles that various judges adopt through their language. He speaks, for example, of "the type magisterial or imperative," and he even uses our term "voice" as he describes the way the reader is put in his place. "We hear," he says, "the voice of the law speaking by its consecrated ministers with the calmness and assurance that are born of a sense of mastery and power."[111] We might naturally expect that in looking for examples of this type, Cardozo should have to turn to the nineteenth and eighteenth centuries (Marshall and Lord Mansfield). In the terms of the argument I have been advancing here, there are at least two reasons why the "magisterial" voice should have fallen out of favour in our time. One is that the writer knows better: he knows, with Whitehead and Wallace Stevens, that actual life is chaotic and complex, and that no effort at expression in language can pretend to be authoritarian. The second is that the writer recognizes in his reader a man of sophistication and intelligence, a modern trained mind like himself who should not be patronized. It is not surprising, then, to find Cardozo pointing out that "a changing philosophy of law has tended ... to the use of other methods more conciliatory and modest,"[112] though any random reading of current judicial opinions will expose plenty of lingering "magisterial" voices.

Our fourth question—What is the proper relation or *tone* between the voice and the reader?—has already been virtually answered. If the reader is not in every sense an equal (and he often is), then he is at least an educated and serious person entitled to be treated with respect. It is obvious that he should not be slapped on the back with wisecracks and jocularity; neither should he be spoken to as if he were somehow intransigently stupid in the face of a "plain meaning." He should not be addressed at undue length, in paragraphs wordy and windy, for the tone should imply two busy men, writer and reader, both perfectly capable of following an argument that is succinct, and efficiently composed.[113] Most important

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110Cardozo, Law and Literature 3-40 (1931). See also Frank, Marble Palace: The Supreme Court in American Life 130-43, 295-302 (1958). Mr. Frank's terms for the stuffier judicial styles are "Legal Lumpy" and "Legal Massive." Id at 295, 297.

111Cardozo, supra note 16, at 10.

112Id. at 14-15.

113The length of opinions has already concerned a number of writers on the subject, though it seems doubtful that their call for brevity has yet had any very dramatic effect. She Beardsley, supra note 2; Gregory, Shorter Judicial Opinions, 34 Va. L. Rev. 362 (1948); Lavery, the Language of the Law, 7A.B.A.J 277. (1921); McComb, A Mandate From the Bar: Shorter and More Lucid Opinions, 35

of all, the writer must not assume that the reader is necessarily ready to adopt his position; the writer's own display of logic is not inevitably dazzling. It is in this sense that "good humor" is appropriate—a recognition of contrary yet reasonable conclusions. Indeed *style* may be our best way of suggesting exactly such recognitions. "It is style," Robert Oppenheimer has written, "which complements affirmation with limitation and with humility; it is style which makes it possible to act effectively, but not absolutely; it is style which enables us to find a harmony between the pursuit of ends essential to us, and a regard for the views, the sensibilities, the aspirations of those to whom the problem may appear in another light; it is style which is the deference that action pays to uncertainty; it is above all style through which power defers to reason."[114]

The great danger, surely, in the style of appellate judges is that "limitation" and "humility" are too often sacrificed in the interest of "affirmation." In their effort at dignified conviction, judges may lose a sense of life's mystery and complication, and by adopting too lofty a tone, they remove themselves from their readers. This metaphor of "loftiness" is familiar. Thus Wigmore speaks of the "removal of the Supreme Court on high," and he goes on to say: "The peculiar American separation of the trial judge from the appellate judge has tended to make the latter more and more of a legal monk, immured in a Carthusian cell and cultivating his little plot of the law's barren logic."[115] Most appellate judges would look upon this comment, and I think rightly, as decidedly unfair.[116] Still, it is a fact that

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A.B.A.J. 382 (1949). If it is true, as Beardsley claims, that a particularly windy opinion can be rewritten satisfactorily in 4% of the space required by the original, then the waste of time, talent, and money in preparing and reading such compositions is appalling indeed. As for prolixity in legal writing generally, Huntington Cairns has offered the following entertaining if horrendous theory: "From the exactness, brevity, and simplicity of the Twelve Tables to the wordiness of the Novels of Justinian, from the 1,321 words of the Declaration of Independence to the 12,962 words of the order of the Office of Price Stabilization establishing the ceiling price of manually operated foghorns and other manufactured items, legal prose seems in the grip of an iron law. Literary prose changes from the ornate to the plain, and back again, as men become tired of one or the other; more often the two streams run parallel. Official legal prose, however, seems an illustration of Herbert Spencer's evolutionary law of a development from homogeneity to heterogeneity; it appears to be an instance of unilinear evolution, perhaps the only known example." Language: An Enquiry Into Its Meaning and Function 237 (Anshen ed 1957).

114Oppenheimer, The Open Mind 54 (1955).

1151 Wigmore, Evidence 8a, at 246 (3d ed. 1940).

116 Judge Stanley H. Fuld of the New York Court of Appeals, in an entertaining speech at a recent bar association meeting (copy in author's files), vigorously attacked the assumption of the judge's cloistered cell. "There is no field of technical knowhow," he said, "no borderline profession or calling, no fugitive diversion, but invites our attention at one time or another. Astrology and fortune telling in all its forms, gambling games, such as Gee Far, Policy, and the casting of dice, do not long remain mysteries to men who sit on our bench. Worldly we soon become." It is also true, however, that even Judge Fuld's "worldliness" is expressed in a style whose Victorian rhythms tend to remove the

many judicial opinions, as they are actually composed, do give an impression of loftiness, assurance, and irrefutability that may very well misrepresent the judge's true feelings. Indeed, I am told, there is often the widest possible gap between the doubts and qualifications and delicate balances in the judge's head, and the bland conviction that he assumes in his opinion.[117] There may even be a direct relation between a judge's inner qualms and his outward show of undeniable logic! Thus it seems to be a familiar joke among some ironic observers that when a judge (some other judge) begins a sentence with a term of utter conviction ("Clearly," "Undeniably," "It is plain that ..."), the sentence that follows is likely to be dubious, unreasonable, and fraught with difficulties. To a layman, this is a very strange state of affairs.

III

The words of wisdom, then, that the judicial writer may expect to hear from a sympathetic literary observer may sound a good deal like those any freshman composition class might hear from the same source. Decide who your reader is and write to him. Decide who *you* are and act accordingly. But in the case of the judicial situation, descriptions of reader and writer are so rich, so technical, and so abundant in practical consequences for society, that we are very quickly a long way from the freshman classroom. In this highly professional world of communication with its sophisticated assumptions, more ambitious "words of wisdom" (however elementary still) may be attempted. If experience is complex and chaotic (and it is), say so. If your reader is your equal, and if he too recognizes the inevitable discrepancies between language and life, don't persuade him to your view of things by suggesting that

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speaker from the very world he claims to join. Note, for instance, the half-ironic but archaic inversion in that last sentence: "Worldly we soon become." A most unworldly sentence structure.

117 I am indebted to Mr. Justice Brennan for describing this gap to me in clear and unambiguous terms. Judge Scheafer of Illinois has suggested that this assumption of certainty in the judge's style is partly a matter merely of custom. "For a number of reasons, the opinion of a court does not always tell you why the court reached the result it did. In part, this is due to the prevailing style of opinion writing. However great the doubts with which the judge has wrestled in the process of reaching his decision, almost invariably those doubts fail to appear in his opinion. When he writes, he becomes an advocate." Schaefer, The Advocate, as a Lawmaker: The Advocate in the Reviewing Courts, 1956 U. Ill. L.F. 203, 204. Elsewhere Judge Schaefer has put it this way: "Many an opinion, fair upon its face and ringing in its phrases, fails by a wide margin to reflect accurately the state of mind of the court which delivered it." Schaefer, Precedent and Policy 5 (1956) (The Ernst Freund Lecture, delivered April 21, 1955, at the University of Chicago Law School).

yours is the only view, inevitably logical and right. Come down to earth, where things are hard to handle. The imperfect is our paradise.[118]

The foregoing will suggest a rudimentary standard for distinguishing good style from bad in judicial opinions. Such a standard may possibly seem less absurd if we undertake a comparison of two actual opinions—a good one and a bad. This is again a time-honored pedagogical technique of the teacher of English composition, who usually begins by heaping abuse on his example of the bad.

Our example of bad style, then, occurs in the case of *Prochnow v. Prochnow,*[119] and we will be considering both the majority and dissenting opinions. *Prochnow v. Prochnow* is a paternity case. A mother, who has had intercourse with her husband eight months before the birth of her child, swears that he is the father. However, the evidence of blood tests is that the husband could not be possibly be the father. There is considerable justification in the testimony for a worldly mind to conjecture that in fact the wife found herself pregnant by another man and flew quickly to the side of her husband in order to claim later a plausible case for the child's legitimacy. Nevertheless, the trial judge's decision was in favour of the wife, and the appellate court is faced with the father's appeal.

The writer of the majority opinion chooses his ground carefully. "The trial judge." he says, "found the fact to be that Robert is the father of Joyce's child. The question is not whether, on this evidence, we would have so found: What we must determine is whether that finding constituted reversible error." Pointing out that the statute regarding blood testing does no more than admit its results as evidence, to be weighed "in competition with other evidence as the trier of the fact considers it deserves," the opinion cautiously refrains from trespassing on what it considers the trial judge's territory. "[T]rial courts and juries are the judges of the credibility of witnesses and the weight to be given testimony which conflicts with the testimony of others. ... The conclusion seems inescapable that the trial court's finding must stand," the writer affirms in his final paragraph—but as he affirms it, he must have been well aware that to three of his own colleagues, at least, that conclusion was by no means inescapable.

118To this general line of argument there is an objection, whose own words of wisdom run as follows: The voice of the judge is the Voice of the Law, and he must keep up the pretense even though he may know better. To the public, the Voice of the Law is absolute and inflexible, touched by the finger of God. (But does anyone worth talking to believe this?) Nothing said in this article, on the other hand, is meant to dispute the essentially serious, indeed solemn nature of the judge's job, and the properly formal quality of his tone.

119274 Wis. 491, 80 N.W. 2d 278 (1957).

The dissenting opinion[120] begins with a remark just as dubious as the majority's "inescapable" conclusion. "With all respect for the views of the majority." it reads, "[we] must dissent." As a matter of simple fact, the dissenting opinion shows almost no respect at all for the views of the majority, for it scarcely mentions, in a very long opinion, the most important "view" asserted by the majority—namely, the refusal to judge on the credibility of evidence already weighed by the trial court. Instead, what the dissenting writer offers is a lengthy defense of blood tests and the reliability of science generally, in order to maintain that Robert Prochnow did prove "beyond all reasonable doubt that he was not the father of the child." Textbooks are quoted, laboratory reports are duplicated, precedents are cited. It is all very convincing—though it seems unlikely that anybody needed convincing, for both sides on the court apparently agree that Robert was not in fact the father. What they disagree about is something else altogether, and only very seldom, in either opinion, does either writer address himself to this disagreement. It is not until near the end of its discourse that the dissent refers to the majority's stand, and then it appears in a subordinate—not to say disparaging—context: "Courts should not shut their eyes to advances in science which conclusively establish a fact, by simply repeating the age-old maxim that credibility of witnesses is for the trier of facts." What the dissenters are really disagreeing about is not easy to define with certainty, but one way to suggest the true issue might be by asking : Just what do we mean by "reversible error"?

We have, then, two opinions, both firmly expressed, both convincing, both logical. One affirms that its "conclusion seems inescapable," while the other, with equal assurance, warns that "courts should not shut their eyes to advances in science which conclusively establish a fact." But they disagree. What is to be done about this? To a layman—indeed perhaps to anyone—such a collision of two contradictory and strong-minded opinions presents a situation almost intolerable. This is the way wars get started! And as in war, the reason is the refusal of either party to include the other, to see the world as expressible in more than one way. The majority opinion painstakingly limits its jurisdiction, while the dissenters, almost as if they had never heard the majority make its stand, take off like Galahads after the dragon of Injustice. This is a clear violation of *style:* a refusal on both sides to view the situation as complex, to suggest the possibility of opposing positions, and to respect the reader's intelligence.

Professor Friedmann's recent *Law in a Changing Society* contains a comment on this case which, by standing a little apart, expresses the matter with some sense of its complexity. The case poses, Friedmann says, a "choice between two conflicting statutory provisions—one authorizing the

120Id. at 498, 80 N.W. 2d at 281.

receivability of blood group tests in evidence to determine the parentage of a child, the other burdening a party asserting the illegitimacy of a child born in wedlock with 'proof beyond all reasonable doubt'—when a mother, who had had intercourse with her husband eight months before delivery, swore that he was the father, while blood tests excluded all possibility of his fatherhood. The decision depended on a balancing of the respective weight of two conflicting legislative directives, not on a logical choice:"[121] Neither majority nor dissenting opinion came properly to grips with the problem, which was not one of expressing a clear-cut "logical choice" but one of "balance" between conflicting directives. The opinions present, then, examples of poor style, even though the commas are all in the right places and the arguments tremble with conviction. The result is confusion—until Professor Friedmann comes along to tell us, not about one side or the other, but about conflict.

An example of good style is the opinion of Judge Learned Hand in the case of *The T.J. Hooper.*[122] Judge Hand is never far from conflict. The case concerns two coal barges, towed by tugs, lost in a gale off the Jersey coast in March, 1928, and the question Hand must decide is the liability of the tugs. The judge of the lower court had found all the vessels unseaworthy, the tugs because they did not carry radios by which they could have got warning of the coming storm that might have influenced them to seek shelter in Delaware Breakwater en route. Throughout his opinion, Hand gives his reader not only a sense of his own problems in assigning liability, but also a sense of the problems of tug captains and the whole intricate business of seafaring.

"A more difficult issue," he candidly tells us, "is as to the tugs. We agree with the judge that once conceding the propriety of passing the Breakwater on the night of the eighth, the navigation was good enough. It might have been worse to go back when storm broke than to keep on. The seas were from the east and south-east, breaking on starboard quarter of the barges, which if tight and well found should have lived. True they were at the tail and this is the most trying position, but to face the seas in an attempt to return was a doubtful choice; the masters' decision is final unless they made a plain error. The evidence does not justify that conclusion; and so, the case as to them turns upon whether they should have put in at the Breakwater." Here we may admire the clarity with which Hand describes his own intellectual problem, but note too how he describes the problems of the tugboat masters, with a use of

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121Friedmann, Law in a Changing Society 35 (1959).

12260 F.2d 737 (2d Cir. 1932). I was directed to the charms of this opinion by Professor E.S. Godfrey of the Albany Law School, who has in addition lent me general assistance and enlightenment in the preparation of this article.

nautical language that makes all the difference. We can hear a hint, at least, of the chaos of "actual experience."

Turning to the question of the weather reports and the tugs' lack of radio receiving sets, Hand never lets us forget the vagueness and unpredictability of life as it is actually lived. Speaking of the weather broadcasts, "apparently, " he writes, "there are other reports floating about, which come at uncertain hours but which can also be picked up." Considering the testimony of another tugboat captain who, hearing the rather ambiguous report that never reached The Hooper, actually did turn in at the Breakwater, Hand does not let us leap to the simple conclusion that therefore The Hooper would have done likewise if it had been informed. "The glass had not indeed fallen much and perhaps the [other] tug was over cautious; nevertheless, although the appearances were all fair, he thought discretion the better part of valor."

The crucial question arises as to whether the carrying of radio receivers is "a general custom among coastwise carriers," and here again Hand respects his reader's capacity for complexity and realism by giving no easy answer. "One line alone did it; as for the rest, they relied upon their crews, so far as they can be said to have relied at all." "Is it then a final answer that the business had not yet generally adopted receiving sets?" (This was of course in 1928.) Hand concedes that his own court has "given some currency to the notion" that the general practice of a calling defines the standard of proper diligence. But here, in his final paragraph—since after all he must render his Yes or his No—we sense a controlled and self-conscious contrast between the chaos of life on the one hand and the judge's necessary decisiveness on the other. "[H]ere there was no custom at all as to receiving sets; some had them, some did not; the most that can be urged is that they had not yet become general. Certainly in such a case we need not pause; when some have thought a device necessary, at least we may say that they were right, and the others too slack. The statute ... does not bear on this situation at all." Finally, then since "we need not pause" (what has he been doing for several hundred words?), Hand renders his decision: "We hold the tugs therefore because had they been properly equipped, they would have got the Arlington reports. The injury was a direct consequence of this un-seaworthiness. Decree affirmed."

We may or may not agree with the wisdom of Hand's decision in this case. We may feel that "certainly in such a case we need not pause" may be just one more of those familiar judicial signals that a statement of some dubiety is about to emerge. But even if so, the self-conscious and deliberate manner in which the final step is taken has to be respected. There is a fairly constant sense of the pressure of the

opposing view—that since coastwise carriers generally did not require radios, the tugs could not be held. Even the losing lawyer would have to agree that the judge had seen the problem from more than one side. Most of all, the reader is respected because the whole story is presented as a complex one, not easy of solution. There is a flirtation here with the difficulties of daily life as it is daily lived, and that is almost as much as we can ask of any good writing.

IV

The problem of composing good judicial writing cannot finally be so very different from the problem of composing any kind of good writing. The issues to be faced are the same, and in the argument I have been presenting here, they come down pretty simply to a recognition of the virtues of one's reader. If I can *recognise* my reader, if I can see in him a person of discretion and taste, one who shares with me a sense of the world's multiplicity and a sense of the tenuous relation between language and experience, then I am all right. By recognizing him, I define him, and we may hope to communicate across the guarded boundaries that divide us.

The writer of legal documents, of whatever sort, may be doing himself an injustice if he fails to accept such an ambitious and highminded notion of his art, choosing instead to think of himself as a relatively mechanical and lowly worker in words. Not so. There is no reason why almost any piece of legal writing—and certainly judicial writing—may not move us with its sensitive and wise and gracious handling of language. It is true that the legal writer operates within limiting situations, and he must attend painstakingly to the minutiae of facts that confront him. Yet it is also true that he is engaged in expressing in words the chaos of life, and no poet can say more. Judicial opinions and poetry are obviously not identical forms of expression; yet, in Frost's memorable phrase about poets, the legal writer too is attempting "a momentary stay against confusion." It is hard to think of a finer thing for a man to do.

A curious humility, or an equally curious arrogance, is apparent in the attitude that legal writers sometimes express toward their performances in language. One hears a lawyer or a judge remark, "Oh I'm no stylist—I just write down the facts in plain words." this is both humble and arrogant—humble in surrendering elegance to the "creative artists," arrogant in suggesting that only "the facts" really matter. But the situation is surely quite otherwise. The poet or novelist, the historian, the physicist, the appellate judge are all deeply involved in one essential responsibility: the expression of life's complexities in mere man-made words. Wherever he starts, whatever trivial item of human experience he initially confronts,

legal writer can make his stab at eloquence. If Holmes was right, that "a man may live greatly in the law as well as elsewhere," then the consequence is that he must write greatly, for in law as well as in literature there is no other meaning of greatness.

THE FORM AND LANGUAGE OF JUDICIAL OPINIONS[123]

THE RT HON. LORD RODGER.

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A Lord President and Lord Justice General must spend much of his time writing opinions. It is, I believe, a perfectly respectable and comparatively harmless occupation for a judge. But it has at least made me think about the form that the opinions should take and the language that should be used. Since these are, by their very nature, problems that confront judges more than academic lawyers or even advocates, it occurred to me that I might usefully say something about them to an audience made up, predominantly, of academic lawyers. I am only too conscious that to some at least this will seem a trivial topic. After all, Brian Simpson has forecast that in this country "the individual judicial opinion will decline in significance, as has happened in the United States" because rambling and excessively detached opinions have degraded their own importance[124]. But, even in the decadent post-classical era which Professor Simpson describes, we may pause to contemplate the work of the giants who were our forebears and ponder why we fall so far short. Perhaps because we are aware of our failings, modern British judges have not, so far, as I can see, addressed the topic in public, at least. More surprisingly, perhaps, in this country academics have, for the most part, thought it unworthy of their attention[125]. And they may, of course, be right. In case they are, I shall touch on only a few of the many possible aspects of the topic. In that way I hope not to detain you too long.

When I became a judge in 1995, no one gave me any instruction or even tips on how to write a judgment. You just had to learn by trial and error. And, while nowadays some tips are given to new judges in Scotland, I understand that even today in England and Wales the Judicial

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[123] This is the slightly revised text of a lecture delivered to the Annual Conference of the Society of Public Teachers of Law in the Bute Hall, Glasgow University on September 12, 2001, during the celebrations to mark the 550th anniversary of the founding of the University by a Bull of Pope Nicholas V in 1451. I was particularly pleased to take part both as a Glasgow graduate and, more particularly, as the son of a professor at the time of the Fifth Centenary celebrations in 1951.

[124] B. Simpson, "Lord Denning as jurist" in J. L. Jowell and J. P.W. B. McAuslan, Lord Denning: the Judge and the Law (1984), 441 at pp. 450-451.

[125] Elsewhere, and particularly in America, the topic has attracted considerable academic attention. For the sake of brevity I refer to R.A. Posner, *Law and Literature* (rev. ed., 1998), Chap. 8 and to the literature cited there. As a judge, I was particularly struck by the observations of another judge, Patricia M. Wald. "The Rhetoric of Results and the Results of Rhetoric: Judicial Writings" (1995) 62 U. Chi.L.R. 1371 to which Chief Judge Posner replied in "Judges' Writing Styles" (And do they matter?) ibid. 1421. Judge Wald counter-attacked in a "A Reply to Judge Posner". Ibid. 1451. See also the works cited in n. 51 *infra*.

Studies Board do not regularly include opinion writing in their courses for new judges[126]. Of course, those appointed as judges will have spent their professional lives reading other judges' opinions and can be expected to know the kind of thing that is wanted. And usually that is enough. Before Lord Reid was appointed as a Lord of Appeal in Ordinary in September 1948 he had doubled as an ambitious Tory M.P. and as Dean of the Faculty of Advocates, the head of the Scottish Bar, but he had never sat as a judge. As a Law Lord, he delivered his first speech in January 1949, in *Millar v. Galashiels Gas Company*[127] on the absolute nature of the statutory duty to maintain a hoist or lift. To my eyes at least, the speech contains nothing tentative, nothing to suggest that he was other than a master of his craft from the outset.

In Continental systems future judges are trained in writing judgments. They are taught how to produce documents whose form and language conform to well-established patterns[128]. Writing such judgments demands great skill but the training is designed to ensure that the resulting products are uniform and impersonal, concealing the traits of the individual author though insiders may be able to detect particular styles. By contrast, in Britain there are no set rules and the law imposes no specific requirements. For the most part, since all judges are independent, they are free to choose both the form and language of their opinions. From time to time appeal court judges may try to impose certain requirements. For instance, in the 1980s, in the Court of Session, Lord Justice Clerk Ross insisted that in their opinions first instance judges should deal with all the arguments advanced by the parties even though they did not arise on the view of the facts taken by the judge[129]. If carried too far, this tends to produce unwieldy opinions which have a somewhat unreal air since they deal with purely hypothetical situations. Being only too well aware of this, quite often first instance judges have ignored the Lord Justice Clerk's injunction-even at the cost of a sharp, if ultimately ineffective, rebuke[130]. This very freedom of judges in English-speaking countries to shape their opinions a they wish means, however, that their form and language are liable to change, not only from judge to judge but over time and in different legal contexts. Precisely for that reason, it seems to me, anyone

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[126] In America they do things differently. There is much of interest to be found in J.J. George, Judicial Opinion Writing Handbook (4th ed. 2000).

[127] 1948 S.C. (H.L.) 31, January, 20, 1949. Lord Reid had been appointed as a Lord of Appeal in Ordinary on September 16, 1948.

[128] Inevitably, this is an over-simplification. In particular, the position in Italy is somewhat different. For a brief overview of the Continental situation from a Continental standpoint, see F. Ranieri, "Stilus Curiae: Zum historichen Hintergrund der Relationstechnik" (1985) 4 Rechtshistorisches Journal 75.

[129] See Morrow v. Enterprise Sheet Metal Works (Aberdeen) Ltd. 1986 S.C. 96 at p. 101.

[130] Hogan v. Highland Regional Council 1995 S.C. 1 at p. 2, again per Lord Justice Clerk Ross. The late Lord Morton of Shuna was perhaps the judge least likely to be moved by criticism of that kind.

interested in the working of common law legal systems and, in particular, in the role of the judges should find them worth studying.

I have not the skill-and I very much doubt whether you would have the patience-to explore the history of judges' opinions in Britain[131]. For my purposes, it is enough, however, to recall that up until the nineteenth century the decisions of the court of session were reported but, for the most part, the opinions of the individual judges were not. If we are to believe Lord Cockburn-by no means an impartial source, when the first steps were taken at the end of the eighteenth century to report the judges' actual opinions, Lord Eskgrove complained bitterly of the reporter that "the fellow taks doon ma' very words"[132].

The fact that in those days the judges' individual opinions were not reported means that the judges themselves are known to us, if at all, as little more than caricatures. Lord Auchinleck is the remote father of James Boswell; Lord Monboddo is for ever associated with his theory that men once had tails; Lord Braxfield is the cruel Lord Justice Clerk of Stevenson's *Weir of Hermiston.* But of their actual opinions when going about their work in the Court of Session we know little. In fact, however, a careful examination of the brief manuscript notes of judgments to be found in some of the cases in the Session Papers in the Advocates Library might give us a better insight into that period of our legal history. In particular we might be able to identify their views and assess their contributions and, in this way, get a better picture of the judges as individuals.

I give one example, in 1772, in *Somersett's Case*[133] Lord Mansfield freed the slave, James Somersett. Six years later the Court of Session had to consider the case of *Knight v. Wedderburn*[134] in which a slave, Joseph Knight, who had been brought to Scotland from Jamaica, sought a declaration of freedom. Incidentally, during the somewhat protracted proceedings, through his friendship with Boswell, Dr Johnson came to take an interest in the case and dictated an argument on behalf of the slave[135]. By a majority of seven votes to five, the court held in favour of the slave. In the written arguments reference was, of course, made to *Somersett's Case* which included Serjeant Davy's famous declaration that "this air is too pure for

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[131] For England see J.P. Dawson, The Oracles of the Law (1968).
[132] Lord Cockburn, Memorials of his Time (1909), p. 158. Cf. Will's Tr. v. Cairngorm School Ltd. 1976 S.C. (H.L.) 30 at p. 138 per Lord Hailsham of St Marylebone.
[133] 20 St. Tr. 1. See, for instance, E.Fiddes "Lord Mansfield and the Somersett Case" (1934) 50 L.Q.R. 499.
[134] (1778) Mor. 14545.
[135] See Sri Arnold McNair, Dr. Johnson and the Law (1948), pp. 61-64.

a slave to breathe in"[136]. Knight's counsel, John Maclaurin, took a manuscript note of the judges' opinions. As there recorded, Lord Monboddo, who was in the minority, somewhat tartly observed that an

> "eminent lawyer said the air of Britain was too pure for a slave to breathe in. The air of Britain is not purer than the air of Greece and Rome. Yet Slavery there reigned with more sovereign Sway than I contend for"[137].

Perhaps this comment would not enhance Lord Monboddo's general reputation, but it does give us a, glimpse of the working of a mind that sticks close to the legal issues and is not to be swayed by rhetoric, however powerful. On the other hand, a welcome corrective to the popular view of Lord Braxfield as a judicial tyrant is to be found in his declaration, when finding for the slave, that

> "The colour of persons is nothing: all have an equal title to liberty."

Similarly, the rhetorical question with which he ended his opinion could well have been taken from the deliberations of the recent United Nations conference on racism[138]:

> "Why should Africa labour to foster the Luxuries of America and Europe?"[139]

I wonder how many of us would have guessed that Lord Braxfield was the author of that question.

Obviously, the opinions of the eighteenth-century judges were delivered orally. And, until recently, both in Scotland and in England, the typical judgment, even of an appeal court, was given orally. Often the decision and the reasoning supporting that decision were given extempore at the end of the argument. Such a system gives great power to the judge who gives the first judgment: you have to be particularly sure of your ground and particularly skilful at

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[136] Benjamin Cardozo praised the well-known peroration attributed to Lord Mansfield in Lord Campbell's The Lives of the Chief Justices of England (1849), Vol. 2, p. 419 without noticing that his actual remarks were not so eloquent and that, in reality, the key passage occurred in counsel's argument. See "Law and Literature" (1931) in M.E. Hal (ed.). Selected Writings of Benjamin Nathan Cardozo (1947). P. 339 at pp. 343-344.

[137] Folio 12 of the manuscript note in the Dreghorn Collection of Session Papers, Vol. 49, Advocates Library. Maclaurin later took the judicial title of Lord Dreghorn. The note is in an abbreviated form which I have filled out.

[138] World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, August 31 to September 7, 2001.

[139] Folios 10 and 11 of the manuscript note. Lord Braxfield expressed these views in a case where the defender had contended (Information for John Wedderburn, July 4, 1775), for example, that a decision in favour of the pursuer

> "would subject us to a very shocking calamity, viz. the debasing of our own race, by a mixture with the woolly heads and sable skins of Africa. If they should happen to acquire money, which is not at all impossible, we may see some of them returned for Cornish (the defender will not suppose Scottish) Burrrows: and the second race, when improved by education, may arrive at the highest dignitaries of the state.

marshalling your arguments if you are to deliver a convincing extempore dissent. Acquiescence, more or less sullen, would often be a tempting option. Even if the court took time to consider its decision, usually the judges did not circulate a draft of the judgment that they proposed to deliver, for one thing, until recently copying the draft would have been a major undertaking. So the judge delivering the first judgment might have to add or to clarify a point as a result of what a colleague said after him,[140] while the later judges had to try to assess exactly how far they did or did not agree with what had been said before them. A degree of fudge was often the easiest way out. Of course, even where opinions are carefully prepared in advance, the judge who circulates his opinion first may hope to influence the others. So a judge who can type and produce his own drafts, while his colleagues wait to have theirs typed, may thereby enjoy some advantage in having his views accepted.

A system where judgments are delivered extempore will tend to produce reasoning that is very much directed to the facts of the particular case. It will be hard enough to deal promptly and convincingly with that case without trying to fit it into any grander scheme or to make any general statement about the law. In such a milieu there is nothing anificial in the judges' *cri de coeur*, when faced with an earlier inconvenient decision, that the facts were different, that the case can be distinguished and that the reasoning must be read *secundum subiectam materiam*-I can safely use the expression since, happily, the ban on Latin in courts does not run in Scotland. In that situation the judges are really only approaching the case in the way that the author of the judgment would himself have seen his decision. On the other hand, in the modern world, reasoning of that kind can seem somewhat artificial and can provoke a wry smile when used to get round an elaborate opinion produced after some weeks of (presumably) careful consideration of the relevant area of law.

This observation is simply one reason why we should pay great attention to the evolution in the form of judges' opinions, an evolution that is going on apace at the present time. Put briefly, the opinions are evolving from a form of communication that was normally oral to a form of communication that is normally written.[141] The change occurs for a variety of reasons. For instance, until recently the English Court of Appeal had to deal with many appeals that were wholly lacking in substance. Those cases could be disposed of comparatively easily in an extempore opinion. So the statistics would show that a high proportion of Court of Appeal

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[140] See, for instance, Cairncross v. Meek (1858) 20 D. 995, where Lord Justice-Clerk Inglis was anxious (at p. 1005), in the light of the opinion of Lord Cowan, to stress the narrowness of the ground on which he had intended to decide the case.

[141] For discussion of some of the differences between the two forms of communication see, for instance, W.J. Ong. Orality and Literacy (1982), esp. Chap. 3.

decisions were delivered extempore. Now parties have to get leave to appeal and so most of the cases that come on for a full hearing should involve a point of some substance. Appeals of that kind are likely to require more consideration and so now only roughly 30 per cent of judgments are given extempore. A similar decline in the proportion of unreserved judgments occurred in the Scottish Criminal Appeal Court after a system of leave to appeal was introduced some years ago.

The Scottish judges have always looked with unfeigned admiration on the skill of their English colleagues in giving judgment extempore. To give a good judgment of that kind requires a very special skill which even the most distinguished judges may not possess: I well remember seeing Lord Fraser in the Scottish Criminal Appeal Court, shortly before his elevation to the House of Lords, stumbling over his words, jamming the tape- recorder in his frustration and having to restart the opinion twice. For my own part I dislike producing extempore opinions, even when they are the obvious way to dispose of a case. To see the transcript of one's remarks, with repetitions, filler phrases, sentences without a verb or with some blatant error of syntax is a humiliating experience. Tidying the transcript to make it even vaguely presentable is an exercise in forgery that is as time-consuming as it is uncongenial. Experience suggests that, like television cooks, so far as possible judges should bring forth something they have prepared earlier so that the truly extempore element is kept to a minimum. But only the most skilful can fashion from that pre-cooked base an opinion that deals with the actual arguments advanced by counsel. Some, like Lord Justice General Emslie, go one better and polish those arguments so that they become unrecognisably compelling to the counsel who have, supposedly, advanced them some minutes before. To do this day after day, like Lord Denning, is an astonishing feat that requires not only extremely hard work, but intellectual attainments of the highest order.

An opinion that is delivered extempore in court will, inevitably, be very different from an opinion that is composed in the judge's chambers or study and then handed down. For one thing, when the judge gives his opinion extempore, he is very much addressing those who are present in court, the parties and their advisers who are familiar with the case and have just heard it argued. They are his audience. When the judge goes off and considers matters more deeply and hands down his opinion, his original audience may very well not be present. Having had time to reflect on the relevant law and on the implications of his decision, the judge will tend to address himself not simply to the parties but, especially in an Appeal Court decision, to the wider public who read the law reports. This may affect the form of the opinion. For instance, with an extempore judgment on a matter of no general importance, addressed to those in court who know what the point is, the judge may feel able to go directly to the point in issue without

setting out all the underlying facts and arguments. Where judgment is reserved and the opinion is written with one eye on the wider public, the judge may tend to set out the facts and arguments much more fully-making the opinion a free-standing exposition of the facts, the law, the contentions of the parties and, finally, of the decision. Being more conscious of this wider audience, the judge may also tend to try to put his decision in the particular case into the broader context of the pre-existing decisions on the topic. The legal reasoning will therefore tend to be more elaborate. And indeed both the parties-who have been forced to wait to hear the result-and any higher court will tend to expect the decision to be given in a more sophisticated form and with more elaborate reasoning than would have been expected if it had been delivered orally immediately after the argument was over.

While, until recently, most Court of Appeal judgments were delivered orally and extempore, for many years the speeches in the House of Lords have been printed in advance and then read out or, latterly, formally delivered without being read out. Again, it is not easy to pinpoint these developments in the House of Lords. Certainly, in the earlier part of the nineteenth century at least, the speeches appear to have been proper speeches, delivered presumably with the aid of notes, but not necessarily reduced to writing. This can be seen from the famous *Auchterarder* case in 1839,[142] which concerned the right of patronage to livings in the Church of Scotland and which led, in due course, to the creation of the Free Church and to ecclesiastical turmoil that was to last into the twentieth century. On this critical matter the House heard argument over five days in March and gave judgment in May. Lord Brougham said that his reasons for dismissing the appeal were "short and satisfactory to [his] mind".[143] Some 34 pages later he came to the end of those reasons, observing that he could have stated them more shortly if he "had had time to digest my judgment, and, as I usually do, reduce it to writing".[144] So saying, he proceeded to examine other aspects of the case for a further 30 pages.[145] Not surprisingly, after that Lord Lyndhurst L.C. decided to draw stumps for the day. The next afternoon he began by saying that he had thought it better to reduce his judgment to writing,

> "a course which. I am well aware that my noble and learned friend approves, inasmuch as I believe no judge before his time delivered so many written judgments, a course which is productive of the greatest benefit, which the profession have particularly experienced from the judgments of my noble and learned friend; and a practice which I

[142] The Presbytery of Auchterarder v. The Earl of Kinnoull (1839) Macl. & Rob. 220.
[143] Macl. & Rob. 251.
[144] Macl. & Rob. 285, Lord Brougham returns to the point at p. 350
[145] Macl. & Rob. 315.

am happy to say has been pretty generally adopted in all the courts of Westminster Hall".[146]

He then proceeded to rush through his judgment in a mere 34 pages.

But, for many years, the speeches in the House of Lords have been par excellence written compositions and that has inevitably affected their style. That is not to say that their form as speeches in the House is a mere irrelevant technicality. The late David Daube long ago taught us that various literary forms are the products of their "setting in life" *(Sitz im Leben)* and that those forms often remain unchanged even if subsequently the piece of literature is incorporated into a work of an entirely different nature.[147] Although Daube was concerned with Biblical and Roman law material, his basic insight can be applied in this and other modern contexts.[148]

For instance, any criticism of the speech of a fellow Law Lord is always courteous- unlike the more confrontational tone sometimes used among justices of the United States Supreme Court, for example. That courtesy is not special to the Law Lords but echoes the tone expected in peers' speeches in the ordinary work of the House of Lords. At least some of the shock felt at Lord Atkin's language in *Liversidge v. Anderson*[149] must have been due to his departure from the standards of mutual courtesy to be expected of all who participate in the work of the House.

To take a completely different point, the fact that the Law Lords make speeches and that the presiding Law Lord proposes a motion to the House is difficult to square with a single opinion of the House. So far as I am aware, there has only been one example in recent years, when in July 1972 the Law Lord then presiding, Lord Wilberforce, delivered what he described as "the joint opinion of their Lordships" in *Heatons Transport v. T.G.W. U.*[150] But that was a wholly exceptional case decided at a time when the ports of Britain were paralysed by a dock strike -as I well remember, since I was happily cut off in a reading party in the French Alps-and when the authority of the courts themselves appeared to be under challenge. The effect of the

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[146] Macl. & Rob. 316. For the position in England at the time, See Dawson, Oracles of the Law *1968), pp. 80 et. seq.

[147] D. Daube, forms of Roman Legislation (1956). pp. 2-3. This book on Roman Law was really a development from work which Daube had been doing on Biblical texts. Some of the results are to be found in his book, The New Testament and Rabbinic Judaism, published the same year. This and related material is now in C. Carmichael ed., Collected Works of David Daube, Vol. 2, New Testament Judaism (2000).

[148] A. Rodger, "The Form and Language of Legislation" (Holdsworth Club, 1998); a slightly revised version appears in (1999) 18 Rechtshistorisches Journal 601.

[149] [1942] A.C. 206

[150] [1973] A.C. 15 at p. 94. The speech was written in the first person plural and ended (at p. 15) "For the reasons given we would allow the appeal and restore the orders of the Industrial Court."

decision was to defuse the situation. The intention behind giving a joint opinion in a single speech was, presumably, to add *auctoritas* to the decision, especially when, at the time, there was ill-informed press comment arising from the fact that, some five months earlier, Lord Wilberforce had chaired a so-called "Court of Inquiry" into a wage dispute between the National Union of Mineworkers and the National Coal Board. That "court" had also defused a difficult situation by recommending substantial pay increases a small-p political rather than a legal decision. The suggestion in the press was that in his judicial capacity Lord Wilberforce might similarly reach a pragmatic, rather than a genuinely legal, decision.

The special circumstances in which the opinion was delivered and the need to make sure that the press and public should understand the decision were further reflected in the summary which, again exceptionally, Lord Wilberforce inserted towards the end of the opinion. In less troubled times, the underlying form of the proceedings has hitherto ensured that individual speeches rather than joint opinions are delivered and that summaries designed for press consumption are not a regular feature.

By contrast, of course, in the Privy Council the form of tendering the advice of the Board to Her Majesty for long meant that only one judgment was given. This form is no longer rigidly applied. In devolution cases, for instance, the members of the Board deliver individual opinions and the presiding judge simply indicates that the appeal should be allowed or dismissed.[151]

The origin of judgments as decisions given orally has affected their form in other ways. Even though the position is changing, those effects are still to be seen in this country. In other English-speaking jurisdictions, however, developments have been more far-reaching. In those countries, as a result, the traces of the origin of opinions as oral communications are being obliterated and, in some cases, have become almost undetectable. The judges' opinions have taken on forms that are typical of documents composed in writing.

For instance, the use of footnotes or endnotes in opinions is a topic that would merit a lecture in itself.[152] In Britain they have yet to feature in opinions, although in one recent case in the Court of Session.[153] Lord, Penrose went so far as to put the references to particular pages of the notes, of evidence into footnotes. The notes appear in the version of the opinion which he signed. But, mysteriously, they were banished even from the "version that appeared on the Scottish Courts

[151] See, for instance, Brown v. Stott 2001 S.C. (P.C.) 43.
[152] On footnotes generally see the entertaining study, A. Grafton, The Footnote (1997)
[153] Ferguson Shipbuilders Ltd. v. Voith Hydro GmbH & Co. Kg. Outer House, September 25, 1999.

website[154] and they are not to be found in the report in the *Scots Law Times.*[155] In the United States Supreme Court the first numbered footnote appeared in an opinion of Gray J. in 1887[156] but for a long time they were simply used to set out citations. In 1915 Brandeis was appointed to the court. He wrote heavily documented and annotated opinions along similar lines to the briefs which he had compiled as an advocate and which are associated with his name. Not surprisingly, the arch-stylist Oliver Wendell Holmes, who revelled in his skill in writing concise opinions, disapproved-just as he disapproved of the use of headings,[157] which are now a standard feature even of British opinions. In Holmes's world "gentlemen must write as they rode-with great skill but no apparent effort".[158] But even the disapproval of Holmes could do nothing to check the onward march of the footnote, which is now a standard feature of most Supreme Court opinions, except those of Sandra Day O'Connor J.[159] The footnotes are used-exactly like footnotes in academic books and journals-to carry out raids on enemy territory and to mount rearguard defences of the author's own dearly loved, if shaky, positions. As David Daube advised me, if you want to find what is wrong with the argument in a book or article, you need only look at the footnotes. Presumably, the same goes for judgments. Unfortunately, the method breaks down if the author is not honest enough to mention the weak points even in a footnote. *Quod haud raro accidit.*

As late as 1993 the retired Chief Justice of the High Court of Australia, Sir Harry Gibbs, could tell the Judges' Conference in Hobart that "the use of footnotes which contain observations not thought fit to be included in the judgment" was to be avoided and that the American use of footnotes was "not our tradition".[160] But even as he spoke, that tradition was being eroded and now their Honours' opinions in the High Court are regularly furnished with footnotes which, like academic footnotes, contain material that goes beyond mere references but

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[154] www.scotcourts.gov.uk/opinions/CA35_14_97.html
[155] 2000 S.L.T. 229.
[156] Viterbo v. Friendlander 120 U.S. 707 at p. 714 (1887). See W. Domnarski, In the Opinion of the Court (1996), p. 62.
[157] Letter of Holmes to Laski, January 16, 1918 in M. De Wolfe Howe, Holmes-Laski Letters (1916-1935)(1953), p. 128. It appears that Laski was more concerned with the appearance of the partisanship than with the form of the Brandeis's opinions. See his letters to Holmes of January 13, 1918 (at p. 127) and January 24, 1918 (at p. 130) – which makes Holmes J.'s comment all the more pointed.
[158] cf. Grafton, The Footnote (1997), p. 225.
[159] In the Opinion of the Court (1996). pp. 64-65.
[160] "Judgment Writing" (1993) 67 A.L.J. 494 at p. 500.

which the author of the opinion does not wish to put in the body of the text.[161] The editors of the *Law Reports of the Commonwealth* clearly share Holmes J.'s distaste for footnotes for, when the Australian High Court opinions are reproduced in their reports, they appear in a purified form, without the footnotes and with their contents placed in the body of the opinion but secluded in brackets.[162] The same treatment is meted out to the opinions of the South African Constitutional Court.[163] Britain is not alone, however, in resisting the onward march of the footnote. The New Zealand courts have yet to succumb and even the judges of the Supreme Court of Canada-who know few equals when it comes to throwing in the odd reference to Aristotle-have so far preferred to conduct any disputes within the body of their opinions rather than in footnotes.

Other devices are coming into use which are consistent only with the opinion as a written rather than an oral form-for instance, the table of contents with which so many opinions of the Court of Appeal of New Zealand now begin,[164] schedules[165] and information set out in the form of a chart or table.[166] Perhaps most obviously, the fact that the versions of opinions downloaded from the internet all have different pagination has prompted the widespread introduction of paragraph numbers. This has had two interesting side effects.

First, it means that judges can now refer back and forward to specific passages within their opinions-again something that is impossible with an oral opinion. I confess that, influenced by the atavistic feeling that an opinion should be regarded as the written record of an oral performance, I hesitated for quite some time before plunging in with my first internal cross-reference.

The second effect is that the numbering has heightened our awareness of the paragraphing of opinions. Long ago Lord Macmillan noted that the art of the paragraph was too

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[161] See, for instance, Brott v. The Queen (1992) 173 C.L.R. 426 at p. 440. nn. 47 and 48 per Toohey and Gaudron JJ. And The Queen v. Glennon (1992) 173 C.L.R. . 593 at p. 598, n. 19, giving an account of Tuckier v. The King (1934) 52 C.L.R. 335 on pretrial publicity.

[162] For example, what appears as n. 83 in the dissenting judgment of Gaudron and Gummow JJ. in Osland v. The Queen (1998) 197 C.L.R. 316 at p. 333, para 42, is placed in the text of the judgment in Osland v. R. [2000] 2 L.R.C. 486 at p. 509, para 42.

[163] Note, for instance, how Ackermann J.'s approval of the views of McLachlin J. in the Canadian Supreme Court appears in n. 265 and in Ferreira v. Levin N.O. 1996 (1) S. A. 984 at p. 1071 (as in the original) but in the body of the opinion in [1996] 3 L.R. C. 527 at p. 617d-g

[164] e.g. R. v. Mahanga [2001] 1 N.Z.L.R. 641 at p. 643.

[165] e.g. R. v. Mako [2000] 2 N.Z.L.R. 170 at p. 184, para 61 and p. 186 in the judgment of the court delivered by Gault. J. In the case arising out of the Piper Alpha disaster, Caledonia North Sea v. London Bridge Engg. Ltd. 2000 S.L.T. 1123, in the First Division the parties agreed on a slightly amended version of the essential facts as found by the Lord Ordinary and these were incorporated in an appendix to the judges' opinions See 2000 S.L.T. at p. 1132 B per the Lord President. The appendix is not reproduced in the report but is to be found on the internet at www.scotcourts.gov.uk/opinions/appendix%20to%20Piper%20Alpha.html.

[166] e.g. R. v. H. (2000) 2 N.Z.L.R. 581 at p. 582 per Keith J.

often neglected in the pattern of a judgment.[167] That is, undoubtedly, correct but it is a comment that is particularly apposite if one thinks of judgments as essentially written rather than oral productions. Where extempore judgments are delivered orally, the formal paragraphing must be determined later. And indeed what we see in the reports may not be the work of the author alone but may, have been determined by the person who transcribed the judgment or by the reporter or partly by one and partly by the other. Often, however, the paragraphing will reveal which opinions were originally composed with the help of a dictating machine.[168] When revising the transcript the authors tend not to break the text up and so you find paragraphs covering a variety of topics and extending over more than one page of text. But now, with numbering, the paragraph has assumed much greater prominence and can contribute even more significantly to the effect of an opinion. In particuiar, a succession of short, staccato paragraphs can, whether intentionally or not, give a judgment an added appearance of decisiveness.[169]

These recent developments in the fonn of judgments are, as I say, a signal that the judges see their opinions in significant cases as, normally, written rather than oral productions. But they signal something more. The introduction of cross-referencing, tables, appendices and, above all, foot-notes is a sign that the judges who compose those opinions are producing what to all intents and purposes amount to academic articles, mini-treatises, on the point at issue. One therefore waits with a certain fascinated horror for the moment when judges choose to follow another. nauseating, academic habit and begin by thanking their "partners" and "kids" for tolerating their absence during the long hours needed to produce the opinion. Most self-respecting children would, I believe, regard such sentiments as good grounds for leaving home. One can only imagine what Maitland's wife, Florence Fisher, and his daughters, the formidably named Fredigond and Ermengard, would have thought if he had written such self- indulgent nonsense in a preface.[170]

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[167] "The Writing of Judgments" (1948) 26 Can. Bar. Rev. 491 at p. 492.

[168] Untill 1933 Court of Session Judges all had a person clerk who could take shorthand. The clerk would go to the judges' house after dinner to take down any opinions that the judge had to deliver. The prolix Lord Mackay would often still be dictating well after midnight. See J. C.K. M[iller], Fifty years of Parliament House (1977), pp. 13-14.

[169] See, for example, the judgement of Penlington J. in Rota v. Tukri (2001) 1 N.Z.LR. 715

[170] The phenomenon is well worth studying. An entertaining initial survey of the field in Germany is to be found in an Herberger. "Die Frau in Vorwort" (1987) 6 Rechtschistorisches Journal 235. Herberger traces the phenomenon back to work by Julius Binder in 1904 where he thanked his wife for her help in preparing the two indexes. I suspect that there are earlier examples of that particular kind. Very plausibly, he dates the rise of the mass phenomenon of wife thanking to the period after 1968. From a British point of view, at least, Herberger's short study is somewhat dated since it deals neither with the unmarried partner nor with the rise of the author's child as a subject of thanks.

In any event, even if the judges' opinions are not to be regarded as articles, their very form invites comparison with academic articles. In America, the growth in the use of footnotes in opinions has been associated with the rise of the young high-flying clerks, fresh from editing law reviews, with their obsession with footnotes in a preset form. Not surprisingly, they carried over the law review style into the judgments which they composed.[171] Perhaps a similar influence may in part lie behind the use of footnotes by the South African Constitutional Court since the judges' assistants were initially drawn, not from South African, but from American and German graduates. Germany is after all the *Heimat* of the footnote. In other jurisdictions these developments may be explained either by the background of certain of the judges as legal academics or else by the courts' heightened awareness of the role of academic lawyers and of their detailed analyses of the judges' opinions. These analyses are, inevitably, carried out from the standpoint of an academic lawyer and will generally take the form of a note or article with detailed references and footnotes. Judges, anticipating scrutiny of that kind, may produce a judgment which shows, on its face, that the judge too has read the literature and has got the academic tee-shirt. Whatever the reasons for these developments may be, however, judgments which mimic many of the external fonns of academic articles may more readily invite comparison with such articles. Whether such a development would be desirable is too large a topic to discuss here, especially before an audience of academic lawyers. It is sufficient to notice how far we have come from the traditional form of judgment that remained the norm in Commonwealth countries until only a few years ago.

This change in the form of a typical judgment from an oral to a complex written document must be borne in mind when we assess our predecessors. So far at least, *The Times* has not introduced a Fantasy Court of Appeal or House of Lords competition to accompany its Fantasy League for football. I do not know whether undergraduates and academics run such competitions in this country, though one Australian academic has given his version of what he calls a "Constitutional" All Stars "High Court" in which, happily and predictably, Sir Owen Dixon C.J. comes out top.[172] But most of us have thought from time to time about the judges whom we admire most. I suspect that most of our lists would contain many of the same names- e.g. Lord Atkin, Lord Reid, Lord Devlin- on condition that he did not do a bunk and Lord Wilberforce. Although he has received a bad mark from many Scottish academics in the past. I would put Lord Watson in my list. Would we wish to give Scrutton L.J. the promotion to the

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[171] In the opinion of the Court (1996), pp 65-66

[172] R. Smyth, "Who Gets Cited? An Empirical Study of Judicial Prestige in the High Court" (2000) 21 U. Queensland L.J. 7 at pp. 20-21.

House of Lords which he never achieved in his lifetime? Would we bother dragging Lord President Inglis to London despite his much-vaunted decision to remain on the Court of Session? And so on it goes.

The exercise is perhaps mainly interesting if we stop to think why, I exactly, we would choose particular names. Obviously, we would say that it is because of our perception of the contribution which those judges made. But that must simply prompt us to ask how we have assessed their contribution and I very much doubt whether those assessments, even when made by the same individual. are all made on the same basis. Or at least I doubt whether they should be.

Going back to nineteenth-century Scotland, we find the towering figure of Lord President Inglis. I say "towering" because that is certainly how he was regarded by the judges and advocates of his time. There is a duly elaborate memorial to him in St Giles Cathedral. And his dignified figure looks down on us from stained glass and from a huge full-length portrait in Parliament Hall. Some years ago the Faculty of Advocates were offered a copy of the portrait, with the suggestion that it might be hung in the First Division court room where he had once presided. The Lord President of the day-very wisely, in my opinion-rejected that suggestion, not least on the basis that he did not fancy having Inglis watching over him. The feeling that Inglis was the master of us all persists to this day.

But, I believe, that feeling depends, to a large extent at least, on professional tradition. If we were unaware of that tradition and had to assess him only on the basis of his opinions, as set out in volume after volume of the Scottish law reports, I very much doubt whether Inglis would be in anyone's Top Ten. This is not because his achievement was anything other than remarkable. It is simply that his opinions were composed to resolve the immediate problem and were often delivered extempore. Their form and style[173] reveal their origin. For instance, they contain remarkably little detailed legal analysis. As Lord McLaren noticed, the Lord President tends to deal with previous inconsistent authorities by the sovereign device of passing them over in silence.[174] And if his opinions appear somewhat drab, then doubtless that is how they were in reality. The Lord President was explaining his views to the parties and their advisers. Those who

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[173] On the style of judges' opinions I have derived much benefit from D.R. Klinck. "Criticizing the Judges': Some Preliminary Reflections on Style" (1986) 31 McGill L.J. 655. More generally, I have consulted E.C. Traugott, Linguistics for Students of Literature (1980); P. Simpson, Language through Literature; an introduction (1997 reprinted 1998) and J.A. Cuddon (ed.) The Penguin Dictionary of Literary Terms and Literary Theory (4th ed., 1998, by C.E. Preston).

[174] J. McLaren, "Lord President Inglis" (1892) 4 J.R. 14 at p. 16. He suggests that Inglis was too conservative to wish to put his own opinion forward against the published opinions of his predecessors.

heard them were struck by the clarity of his carefully prepared exposition,[175] As Judge Wald of the District of Columbia Circuit has observed, "litigants want judgments, not rhetoric, so that they can get on with their lives....".[176] So the parties in Inglis court would not have expected, and did not find, his opinions bespangled with epigrams.[177] Only the characters in an Oscar Wilde play speak in that way and, whatever else he may have been, Lord President Inglis was certainly not a character out of Oscar Wilde. Moreover, his opinions show remarkably little variation in tone: he treated cases of general importance in much the same way as trivial cases on the interpretation of some botched deed. Only rarely does one feel that he is aware of an audience wider than the parties.

But when roused to fury, as Lord Justice-Clerk, by the Court of Chancery in *The Bute Guardianship* case, Inglis could write powerfully indeed. Stung by a suggestion that the Court of Session had declined to follow a decision of the House of Lords in an English case to avoid sacrificing its dignity, Inglis used a wholly different register:

> "I am quite at a loss to understand how the dignity of this Court can have been truly involved-either compromised or enhanced-by its proceedings in this case. We are not in use to seek the promotion of our dignity, except by a simple and unpretending discharge of our duty. We have no opportunities for the display of magnanimity. We must be content to rest our reputation on a faithful observance of our oath of office, which binds us to administer the law of Scotland; and we strive to do so with the lights we have to the best of our ability. We have also another duty occasionally to perform, which is to carry out the orders of the House of Lords adversely to our own original opinions, and to this duty we address ourselves most cheerfully and with the fullest reliance on the wisdom of that most honourable House."[178]

As Lord President, he was to deploy similarly powerful language some 20 years later in the opinion which he wrote and circulated to the other judges in the *Orr-Ewing* case,[179] when again the position of the Court of Session seemed to him to be threatened by the English courts. But these were exceptional moments, requiring exceptional measures, For the most part, the

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[175] See the discussion in J. Crabb Watt, John Inglis (1893), pp. 265-270.
[176] (1995) 62 U. Chi.L.R. at p. 1385.
[177] Crabb Watt, supra at p. 268 remarks: "it must sorrowfully be admitted that it is as derogatory for a judge to indulge in tropes as for a prelate to dance .....".
[178] Stuart v. Crichton Stuart (1861) 4 Macq. 1 at p. 77
[179] Orr-Ewing v. Orr-Ewing's Trs. (1884) 11 R. 600 at pp. 626-637; reversed by the House of Lords: (1885) 13 R. (H.L.) 1. The fact that the Lord President's opinion had been circulated to the other judges emerges from the beginning of the opinion of Lord Deas (11 R. at p. 637).

nature of Inglis' work meant that his opinions were clear and workmanlike rather than elegant.[180] Plainly neither he nor his contemporar- ies thought that more was required.

How very different was Benjamin Cardozo's view about what was needed for a successful opinion. In a well known passage from his article on "Law and Literature" first published in 1925,[181] when he was an Associate Justice on the New York Court of Appeals, he says that, in writing a judicial opinion, clearness, though the sovereign quality, is not the only one to be pursued. He explains:

> "The opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness of the proverb and the maxim. Neglect the help of these allies, and it may never win its way."

It is unimaginable that Lord President Inglis would ever have written anything remotely similar. The reasons for the difference in approach lie in the utterly different kinds of work in which the two men were engaged.

As we have seen, Inglis was sitting day after day delivering judgment after judgment, with most opinions having to be issued either extempore or in any event without previous circulation in writing. In such a court the opinions produced will tend to have the hallmarks of essentially oral productions. So, hardly surprisingly, it was said of another Court of Session judge, Lord Young-who sat mainly in the late nineteenth century and who wrote all his judgments in his own hand-that his "style remained to the end a spoken, rather than a written, style".[182] By contrast, Cardozo was working on a court which sat in Albany for sessions of varying lengths during which the judges would hear argument in many cases. They would reserve judgment and, during the recess which soon followed, Cardozo would settle down in his office in Manhattan, latterly near the Algonquin Hotel, to write his opinions and consider his colleagues drafts.[183] So the resulting opinions were actually carefully prepared, written compositions. In producing such a literary work, Cardozo, if so minded, could indeed introduce the sophisticated effects of alliteration and antithesis and sharpen his language in the hope of coining a proverb or maxim. I do not for a moment suggest that the New York judges were engaged in a leisurely activity-for clearly the volume of work was prodigious-but, unlike the timetable of the Court of Session, the process was deliberately designed to allow for reflection

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[180] On the adjective see P. Stein, "Elegance in the Law" (1961) 77 L.Q.R. 242, reprinted in P. Stein. The Character and influence of the Roman Civil Law (1988), p. 3.
[181] Selected Writings of Benjamin Nathan Cardozo. p. 338 at p. 342.
[182] C.J. Guthrie, "Lord Young" (1907) 19 J.R. 209 at pp. 210 and 216. Lord Young's opinions were often robust, to say the least.
[183] See, for example, A.L. Kaufmann, Cardozo (1998) pp. 136-137.

and for the crafting of opinions. When, therefore, we compare the somewhat pedestrian prose in the opinions of Lord President Inglis with the mannered prose in the opinions of Cardozo, we are comparing opinions produced under wholly different circumstances.

Moreover, as Cardozo makes clear in the passage that I have just quoted, he thought of an opinion having to "win its way". In other words, he saw his opinions as being in a competitive struggle with other opinions on the same topic. That would, I think, be natural for a judge in the United States with a vast number of individual State systems and, at the time when he wrote, a federal system of common law. The law reporting system was well established and so lawyers and judges had ready access to competing decisions from all over the country. In that situation Cardozo rightly saw that, if attractive, or somehow arresting, the style in which he wrote might make his opinion, and hence the doctrine which it contained, more persuasive to courts and practitioners. And in this he was not wrong. Cardozo's opinions continue to be among those most cited in America to this day.[184]

Again, surely Lord President Inglis would have seen things very differently. If the subject matter was one of pure Scots Law, then he would almost always have the last word. There would be no rival stream of authority from outside Scotland. More particularly, especially in the later stages of his judicial career, Inglis enjoyed such authority on the Bench and among practitioners that few would even have thought of questioning what he laid down. So it would never have occurred to him, I imagine, that he should embellish his opinions with rhetorical devices in order to help them win their way[185]: in the nature of things his opinions enjoyed a pre-eminent position and need engage in no Darwinian struggle for survival and influence. And, indeed, his opinions have continued to be cited in the Scottish courts. A Cardozo might point out, of course, that they seem rarely to have been cited in other jurisdictions. Even the passage in *Batchelor v. Pattison & Mackersey,*[186] which did enjoy something of an international vogue after *Rondel v. Worsley,* can now be read only with the aid of some skilful renovation by Lord Hope.[187]

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[184] See the discussion in R.A. Posner, Cardozo: a study in reputation (1990), esp. Chap. 5, together with R.D. Friedman, "On Cardozo and Reputation: Legendary Judge, Underrated Justice?" (1991) 12 Cardozo L.R. 1923.

[185] cf. Lord Guthrie's comment (19 JU.R. at p. 211): "But I doubt whether considerations of near style ever entered Lord Young's head, when writing his judgments. There was scarce one of them which could not have been substantially improved by the revision of any senior press reader, in a printing office."

[186] (1976) 3 R. 914 at p. 918.

[187] Arthur J.S. Hall v. Simons (2000) 3 W.L.R. 543 at pp. 596-597.

This brings me to my final point. As I have already noted, I suspect that the enduring reputation which Lord President Inglis enjoys rests more on professional tradition than on any great enthusiasm for the written embodiment of his opinions as such. He is not, I think, alone in that.

Rightly, Lord Reid still has an enormous reputation among practitioners and judges in all parts of Britain, especially those who were in practice while he was still the absolutely dominant figure in any hearing in the House of Lords. Stories about his courteous but devastating questioning of counsel are still told wherever members of the Bar meet to gossip. In this way the tales pass down from generation to generation. So, if you find a passage by Lord Reid in your favour, you will tend to refer to that rather than to a similar passage in the speech of a judge who did not make such an impact. I suspect, however, that Lord Reid's greatness as a judge was displayed more in those legendary interventions during the hearing of the appeal than in the opinions which he subsequently wrote, clear though they invariably were. For instance, because of its form, the argument as set,out in Lord Wilberforce's speech in *Anisminic*[188] strikes me, at least, as more immediately compelling than the argument in Lord.Reid's. Of course, by his contribution at the hearing of the appeal, a judge like Lord Reid may well have determined the ultimate decision. But that will not necessarily emerge from the report of the case, *Littera manet.* And so the style and language of a judge's opinions may have a disproportionate influence on the way in which posterity ultimately assesses the work of that judge.

What, then, do we notice about judges' opinions?[189] Sometimes, of course, a particular passage stands out and is fr:equently cited simply because it contains a useful summary of the case law on a particular topic. In the Inner House of the Court of Session, for instance, all the copies of 1947 *Session Cases* fall open at the page of the report of *Thomas v. Thomas*[190] where Lord Thankerton summarises the approach which an appeal court should take when asked to review a first instance judge's findings in fact. Such summaries are extremely useful, especially in a field such as employment law where guidance has to be given to tribunals with lay members.[191] They can look rather dull, but anyone who tries to compile one soon discovers the

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[188] Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 A.C. 147.

[189] There is a splendid extended essay on various literary phenomenon by E. Kahn., "A Literary Peregrination through the Law Reports" starting at (1997) 114 S.A. L.J. 229 and concluding at (1999) 116 S.A.L.J. 190. See also Hon. Justice Michael Kirby, "Literature in Australian Judicial Reasoning" (2001) 75 A.L.J. 602 surveying the scene and calling for Australian judges to (read and) quote Australian writers.

[190] 1947 S.C. (H.L.)45 at p. 54.

[191] A notable example is to be found in the opinion of Mummery J. in the Employment Appeal Tribunal in Tydesley v. TML Plastics Ltd. (1996) I.C.R. 356 at pp. 361 and 362. Justifiably, it

pitfalls. So later judges tend to admire those who have even tried, far less succeeded. Quite properly, an accurate summary is a passport to remembrance. Sometimes, of course, the series of propositions is more challenging and becomes required reading for that reason. The most notable example in recent years is Lord Hoffmann's speech containing his five principles for the interpretation of contracts which catapulted *Investors Compensation Scheme Ltd v. West Bromwich Building Society*[192] to international prominence despite the decision of the editors of the Law Reports to exclude it from the Appeal Cases.

Perhaps the most memorable passages in judges' opinions, however, are those illustrating an important point with a commonplace example. In Britain pride of place surely goes to Bowen L.J. for "the state of a man's mind is as much a fact as the state of his digestion"[193] but, in these football obsessed days, Lord Justice-Clerk Thomson must get a high mark for his observation that, when the goal is to register a land transaction, "as in football, offside goals are disallowed".[194] Lord Reid himself will certainly be remembered for the passage in *Gollins v. Gollins*[195] where he demolishes, the doctrine that a person must always be taken to intend the natural and probable consequence of what he did:

> ".....no-one but a lawyer would say that I must be presumed to have intended to put my ball in the bunker, because that was the natural and, probable result of my shot."

Remarks such as these are memorable precisely because they (deliberately) refer to everyday things. They are therefore quite different from the striking sentences and phrases which are the hallmark of judges such as Cardozo J. While some of his seemed forced, especially to the modern ear, at their best they are superb: for instance, "We are not to close our eyes as judges to what we must perceive as men".[196] Holmes, who did not admire Cardozo's style is, of course, the master. The brilliance of his writing means that his judgments will be read as long as law is studied and practised. He had the genetic and other advantages of being the son of a writer, perhaps the most famous writer of his day in America. Probably the father is little read now, in this country at least, and certainly his poems are somewhat too rich for modern taste, But, even after the Archbishop of Westminster's extempore declaration that Christianity

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has often been praised. See, for example, Glassgow City Council v. Marshall 2000 S.C. (H.L.) 67 at p. 73 G per Lord Nicholls of Birkenhead ("a clear exposition").

[192] [1998] 1 W.L.R. 896 at pp. 912 H-913 G.

[193] Edgington v. Fitmaurice (1885) 29 Ch. D. 459 at p. 483.

[194] Rodger (Builders) Ltd. v. Fawdry 1953 S.C. 483 at p. 501.

[195] [1964] A.C. 644 at p. 664.

[196] People ex rel. Alpha Portland Cement Co. v. Knapp 230 N.Y. 48 at p. 63 (1920).

has almost been vanquished in Britain,[197] I shall risk pointing out that Holmes Senior was the author of the hymn "Lord of all being, throned afar". That hymn is really made up of a series of memorable phrases, not least "Our midnight is thy smile withdrawn", Perhaps the children of Isaac Watts or Charles Wesley would have made distinguished judges.

At all events, with such a father, it is not entirely surprising that, without any apparent effort, Holmes could encapsulate his thinking in original phrases that have entered not only the language of the law but the English language itself. He is certainly the only judge to have coined the title for a Hollywood blockbuster. In a case on freedom of speech in 1919 Holmes said that, under the First Amendment, the question was whether the words are used in such circumstances and are of such a nature as to create a "clear and present danger" that they will bring about the substantive evils that the Congress could prevent.[198] Via a turgid novel by Tom Clancy,[199] "Clear and Present Danger" became the title of a successful film starring Harrison Ford.[200] We may wait some time yet, I fear, before Tom Cruise stars in "Bluebell Time" inspired by Lord Denning's opening to *Herz v. Berry*.[201]

Even today the art of encapsulating an important insight in a neat sentence is not dead, For example, recently in the Supreme Court of Canada, when speaking of necessity and duress in criminal law, Le Bel J, elegantly observed: "The law is designed for the common man, not for a community of saints or heroes."[202]

Lord Denning is, of course, a subject in himself but not one to be embarked upon here. I shall only say that the famous openings, though great fun, do not, in my view, really work.[203]

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[197] In his address, "The State of the Church in England and Wales", delivered to the National Conference of Priests, Leeds, September 5, 2001. Inevitable, the unscripted comments were prominently reported in the broadsheet press the following day, while the rest of his address, which had been carefully scripted and is published on the Achdiocese website, was virtually ignored.

[198] Schenk v. United States 249 U.S. 47 at p. 52 (1919) somewhat surprisingly in the slightly later case, Abrams v. United States 250 U.S. 616 at p. 628 (1919) Holmes uses the much less effective phrase "the present danger of immediate evil"

[199] Clear and Present Danger (G.P. Putnam's Sons, 1989).

[200] Paramount Pictures, 1994.

[201] [1970] 2 Q.B. 40 at p. 42 B.

[202] R. v. Ruzic (2001) 1. S.C.R. 687 at p. 712, 197 D.L.R. (4th) 577 at p. 599, para 40. The equivalent French text is "La loi est conque pour s'appliquer aux personnes ordinaries et non a une collectivite de saints ou de heros". Which, though only 3 words longer, seems less crisp and so less compelling.

[203] They are examples of what linguistics scholar call "foregrounding". See the discussion of the opening of Lord Denning's opinion in Beswick v. Beswick (1966) Ch. 538 at pp. 549 C-550 C by Klinck (1986) 31 McGill L.J. at pp. 677-681. it is particularly interesting to compare Lord Denning's descriptions of the various dramatis personae with Salmon L.J.'s reduction of them to mere ciphers, A, B and C. See [1966] Ch. at p. 563 D-G.

They strike me as *faux* naif-something like the literary equivalent of the primitive paintings of Grandma Moses. But Grandma Moses was not an educated woman, whereas Lord Denning was a clever and highly educated man. No one ever spoke as Lord Denning wrote in these passages and no one ever wrote in that way except in fairy stories and tales for children. The style is so contrived that it alerts the reader to the fact that something is afoot. For me Lord Denning is at his incomparable best when, with self-confident aplomb and in straightforward language, he cheekily undermines some hallowed doctrine. *High Trees*[204] is the classic example.

But striking openings did not begin or end with Lord Denning.[205] The opening sentence of Lord Devlin's speech in *McCutcheon v. David McBrayne* Ltd.[206] is beautifully composed and leaves the reader in little doubt that the humble islander is going to triumph over the pettifogging shipping company:

> "When a person in the Isle of Islay wishes to send goods to the mainland, he goes into the office of MacBrayne (the respondents) in Port Askaig, which is conveniently combined with the local post office."[207]

Recently, in *Mirror Group Newspapers* v. *O'Brien*[208] *-the* facts of which concerned scratchcards and reminded her Ladyship of an examination problem- Hale L.J, opened her opinion with, if I may say so, great gusto:

> "The claimant suffered a cruel disappointment on Monday 3 July 1995. He thought that he had won £50,000 in the scratchcard game played in the Daily Mirror that day. Mirror Group Newspapers thought otherwise."

But these are simply my reactions. Questions of style can and should be analysed much more objectively.[209] People's reactions differ greatly. In 1975 the First Division of the Court of Session gave judgment in *Wills' Tr. v. Cairngorm School Ltd,*[210] a case in which the proprietors of an estate bordering the River Spey sought to prevent the defenders from canoeing down the stretch of river in which they owned valuable salmon fishings. Much of the argument both in the

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[204] Central London Property Trust Ltd. v. High Trees House Ltd. (1947) K.B. 130.
[205] See E. Kahn, "Memorable Opening Words of Judgments" (1996) 113 S.A. L.J. 537 and "More Memorable Opening Words of Judgments" ibid. at p. 727.
[206] 1964 S.C. (H.L.) 28 at p. 39; (1964) 1 W.L.R. 125 at p. 132.
[207] For a very brief and incomplete discussion see "The Form and Language of Legislation", supra, n. 26, at pp. 4-5; more accurately, (1999) 18 Rechtshistoricsches Journal at pp. 606-607.
[208] Court of Appeal (Civil Division), August 1, 2001.
[209] See, in particular, the article of Klinck cited in n. 51, supra.
[210] The session cases report of the speeches in the House of Lords is marred by barbarism in some of the Latin Needless to say, neither Lord Willberforce nor Lord Hailsham is to be blamed; the errors were introduced during the reporting process.

Court of Session and in the House of Lords turned on the significance of a case decided by the House of Lords in 1782,[211] which affirmed the right to float timbers down the Spey. Putting that case into its historical context, in the First Division Lord Cameron, who had a love of the Royal Navy and of naval history and had served with distinction at Dunkirk, said:

> "In 1781 the times were grave. The American Colonies were in revolt, Britain was at war with France, a war mainly fought at sea, and in the same year the Empress Catherine II formed the Armed Neutrality thus effectively cutting Britain off from any timber supplies from the Baltic."[212]

Turning to a case decided in 1804,[213] and warming to his theme, Lord Cameron said that it had been decided

> "at a time of even greater national need and crisis, when the Grand Army lay at Boulogne under the eyes of Nelson's cruisers and the invasion beacons were laid, ready for the torch."[214]

When Lord Cameron died, in his obituary Lord Emslie quoted this passage as typical of Lord Cameron's fine judicial style.[215] But *Wills' Tr.* had gone on appeal to the House of Lords and the passage had been read to their Lordships. Despite the best efforts of Lord Wilberforce to restrain him, when they reached the description of the Grand Army at Boulogne and the beacons laid, ready for the torch, it was all too much for Lord Hailsham who burst into uncontrollable laughter.[216] One moral might be that, in judgments as in most other literary endeavours, the safest thing to do with purple passages is to cut them out. But then life would indeed be dull if we only did what was safe.

In conclusion, as it seems to me, the form and style of their opinions are not matters which judges can safely neglect today. For one thing, many decisions now attract the attention of the media. The form in which they are expressed may in part detennine how they are reported. More importantly, we live in an age when significant decisions issue from English-speaking courts all over the world. They analyse and reanalyse the reasoning even-or especially-of courts, such as the House of Lords and Privy Council, which once could command assent merely by

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[211] Grant v. Duke of Gordon (1782) 2 Pat. 582; Mor. 12820.
[212] 1976 S.C. (H.L.) at p. 94.
[213] Feburary 15, 1804, unrep.
[214] 1976 S.C. (H.L.) at p. 94.
[215] The Royal Society of Edinburgh Yearbook 1998, 115 at p. 116.
[216] Ex rel. the Hon. Lord Davidson who was senior counsel for the successful respondents in the appeal.

their position. Counsel do not hesitate to bring these overseas authorities to the attention of the courts. In this new world, where courts may pick and choose among a variety of authorities, as Cardozo saw, the form in which the judges have expressed their views may well playa significant role in determining which of those views ultimately wins acceptance.[217]

The RT Hon. Lord Rodger*

POSTSCRIPT

Lord Hope of Craighead has kindly drawn my attention to R. v. Forbes [2001] 2 W.L.R. where in the House of Lords on December 14, 2000, Lord Bingham delivered what was described as "the considered opinion of the Committee" dismissing a criminal appeal. The single "opinion" is written in the first person plural. Lord Bingham was one of the counsel for the successful appellants in *Heatons Transports*.

[217] I derived much benefit from discussion with Lord Davidson while I was writing the lecture. Dame Elizabeth Butler-Sloss gave me some information about the position in England and Wales. Sir Neil MacCormick. M.E.P. to whom I sent a copy of the text, saved me from a notable blunder and Lord Hoffmann discussed one particular matter with me. I am grateful to all of them but they are not, of course, responsible for the errors which remain. (The origin and development of footnotes of this kind would also be a fruitful topic for research.)

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