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**JUDGMENTS AS LITERATURE: SOME THOUGHTS**  
**ON MASTERS OF THE CRAFT**

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I have to confess that I have been addicted to the great judgments of history for a very long time and have always felt that their remarkable language and intellectual and verbal richness have cast a spell much like the language of the great literary masters, such as Shakespeare, the anonymous authors of the King James version of the Bible, Milton, Dickens, Joyce, O'Neill and so many others.

I suppose my own interests in this area arise from my background in college days when I majored in English and then taught English briefly while doing post-graduate work. Once one dives into the unfathomable depths of literature, one never really recovers, even when one moves on from literature to the law and then judging.

In short, I believe there is a significant crossover effect or cross-pollination between literature and judgment-writing at its best. I say this as a sort of unabashed judgment junkie.

What I am going to do is give some examples of great and even not-so-great judgments in my effort to make out my thesis that the masters of the judicial craft have had influences far beyond the eras within which they worked and that their long-term impact is a result, in part, of the inherent quality of their styles and power with language.

I could start with some of the famous judgments from the early English reports in the 15<sup>th</sup> and 16<sup>th</sup> centuries but I, mercifully, will not.

Anyone who has survived law school will know that the early famous judgments of the English common law were mostly incomprehensible and were couched in impenetrable prose. Shakespeare, Ben Jonson and Kit Marlow had not yet had their leavening influence on English prose style.

Think of the famous or infamous *Shelley's Case*, first reported by Sir Edward Coke in 1600 before he became a judge.

That fabled decision from so long ago had a dramatic effect on property law in the English-speaking world for several centuries and, ironically, was probably wrongfully decided. The rule drawn from the case reads this way:

The rule is, that when by some instrument in which a life estate is given, the remainder is limited to the heir or heirs of the body of the tenant for life, whether immediately or subject to other estates, the life estate and remainder shall unite, and the intended tenant for life shall be entitled to an estate in fee simple or fee tail, but so as not to prejudice any intervening interests.

Law professors have lived off this rule for generations in teaching property law but, as Professor Brian Simpson notes in his highly entertaining book, *Leading Cases of the Common Law*, (Oxford: Clarendon Press, 1995), it was undoubtedly one of those notorious contrived test cases dreamt up by lawyers to get a resolution of an abstruse family dispute.

Professor Simpson finishes his commentary with a witty passage which bears repeating (p. 41):

Elsewhere in the common law world the rule in *Shelley's Case* still enjoys a curious twilight existence. In legal education it flourishes in the American law schools; its archaic nature and sheer incomprehensibility positively attracts some students of property law, who are fascinated by the absurd, whilst utterly repelling others. Outside the classroom its status resembles that of the Big Foot, the Yeti or the Tasmanian Tiger, sightings are still possible.

It is interesting to note that it was seriously considered in the Ontario Court of Appeal in *Re Rynard* (1980), 118 DLR 530 so that the ghost-like quality of this decision lingers on in the memory banks of modern lawyers

and judges who like their law professors of the past do not wish to reject ancient things.

One might say similar unkind things about another equally famous doctrine of the early judge-made property law, namely *The Rule Against Perpetuities*.

It is interesting to find that all the textbook writers have no difficulty in stating the rule and saying that it was developed by the early judges to promote alienability of land and prevent the so-called “dead hand” of the past to control dispositions into distant future generations, but it is rather hard to find an early judgment which articulates the rule as it has come down to us.

The rule has been broadly stated in this form in most of the textbooks:

As a general rule no interest in property is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest, allowance being made of gestation only when it exists. The vesting required by the rule is of course vesting in interest, not vesting in possession.

One of the most famous legal textbooks ever written, Morris and Leach’s *The Rule Against Perpetuities* (London: Sweet & Maxwell, 1986, 2<sup>nd</sup> ed.) purports to find judgments going back into the 1400’s which identify this principle but, again, Professors Morris and Leach dodge the bullet of quoting grandly from some specific judgment as laying down the rule. I suspect a conspiracy here by law professors and think that the rule was really created in academe and then slavishly followed by judges who did not really understand it but pretended to.

We all know that it has done as much mischief as *Shelley’s Case* and, in combination with it, has undoubtedly driven innumerable law students into other lines of employment and lawyers into nights of dark despair.

I want to move on and show you some remarkable judgments which, using any standard, had intrinsic merit but have also lived through the centuries as hallmarks of what I would call legal literature.

### **A Comment on Sir Edward Coke**

Edward Coke is famous for many things; today he would be called a curmudgeonly polymath. He lived from 1552 to 1634 and, rather remarkably, died in his own bed. When he was Chief Justice of England he became famous for his clashes with James I.

In one of his judgments he ruled “No man may be punished for his thoughts, for it both hath been said in the Proverbs, thought is free”. More controversially, he held that “When an Act of Parliament is against right and reason, the common law will control it and adjudge such Act to be void.” This remarkable statement was never followed in England but it is said that it had its influence on the drafters of the U.S. Constitution.

His clash with James I was startling for the times. He ruled that “The King is under God and the Law”, these being fighting words, if not treason, from the King’s perspective.

In Star Chamber, Coke told the King that “The Common Law protecteth the King”. James responded in anger that this was “A traitorous speech, the King protecteth the law, and not the law the King! The King maketh judges and bishops. If the judges interpret the laws themselves and suffer none else to interpret, they may easily make, of the laws, shipmen’s hose.”

In his own Law Reports, Coke had the nerve to go on about their battle publicly, noting that “His Majesty was not learned in the Laws of his Realm of England.”

It is said that this contretemps with King James led the King to fall into a rage and that he threatened to attack Coke physically. Later, in 1613, Coke was removed as Chief Justice and placed in the Court of King's Bench where it was thought he would be less troublesome.

Coke proved cantankerous to the end of his storied life. He had later clashes with the Lord Chancellor and King James and, in 1616, the King's Council dismissed him from office. Then, he was elected to Parliament, where he continued his fight against the King and injustice.

### **Lord Mansfield**

As we move forward to the era of William Murray, 1<sup>st</sup> Earl of Mansfield and Chief Justice of the King's Bench from 1756 to 1786, we find judgment writing becoming more eloquent. Lord Mansfield has been rightly called the "Father of Commercial Law" but one of his most famous judgments involved a black slave, James Sommersett, who had been confined in chains on a ship lying in the Thames and bound for Jamaica.

In *Sommersett's Case*, decided in 1772 (20 St.Tr.1) the issue was whether habeas corpus lay to discharge Sommersett from his chains on the ship and set him free even though he had been purchased by a slaveholder, Stewart, in Africa. Stewart argued on the hearing that slavery was analogous to the feudal status of villeinage.

In a judgment for the ages, Lord Mansfield is reported to have said this:

What ground is there for saying that the status of slavery is now recognised by the law of England? That trover will lie for a slave? That a slave-market may be established in Smithfield? I care not for the supposed dicta of judges, however eminent, if they be contrary to all principle. Villeinage, when it did exist

in this country, differed in many particulars from West India slavery. The lord never could have thrown the villain 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, villeinage has ceased in England and it cannot be revived. Every man who comes into England is entitled to the protection of the English law, whatever oppression he may heretofore have suffered and whatever may be the colour of his skin. The air of England is too pure for any slave to breathe. Let the black go free. [Emphasis added.]

There are commentators who say that Lord Mansfield either stole or adopted the last justly famous phrase from one of the lawyers in the case, Serjeant Davy, but, whatever its origins, the phrase and this judgment stands as a bedrock of English liberties.

In a judgment written over half a century later in *Forbes v. Cochrane* (1824) 1 B & C 448, Mr. Justice Best said this about Lord Mansfield's ruling and its effect on the institution of slavery in England:

...It is matter of pride to me to recollect that, whilst economists and politicians were recommending to the legislature the protection of this traffic, and senators were framing statutes for its promotion, and declaring it a benefit to the country, the judges of the land, above the age in which they lived, standing upon the high ground of natural right, and disdaining to bend to the lower doctrine of expediency, declared that slavery was inconsistent with the genius of the English constitution, and that human beings could not be the subject matter of property. As a lawyer I speak of that early determination, when a different doctrine was prevailing in the senate, with a considerable degree of professional pride.

There is another remarkable Mansfield judgment in which he expounds upon the doctrine of the independence of the judiciary in his own inimitable way. It was the case of *R. v. Wilkes* (1770) 4 Burr. 2527 and 2563.

John Wilkes was a controversial journalist and Member of Parliament of the day. He eventually was expelled from Parliament and charged with seditious libel. Wilkes had been thrown in jail and it is said that mobs were rioting in the streets of London outside the courthouse as Lord Mansfield and his colleagues dealt with the case.

Here is his remarkable statement in which he throws down the gauntlet and famously says, “Let justice be done though the heavens fall”:

The constitution does not allow reasons of State to influence our judgments: God forbid it should! We must not regard political consequences; how formidable soever they might be: if rebellion was the certain consequence, we are bound to say *‘fiat justitia, ruat caelum’*. The constitution trusts the King with reasons of State and policy: he may stop prosecutions; he may pardon offences; it is his, to judge whether the law or the criminal should yield. We have no election. None of us encouraged or approved the commission of either of the crimes of which the defendant is convicted: none of us had any hand in his being prosecuted. As to myself, I took no part, (in another place) in the addresses for that prosecution. We did not advise or assist the defendant to fly from justice: it was his own act: and he must take the consequences. None of us have been consulted or had any thing to do with the present prosecution. It is not in our power to stop it; it was not in our power bring it on. We cannot pardon. We are to say, what we take the law to be: if we do not speak our real opinions, we prevaricate with God and our own consciences.

I pass over many anonymous letters I have received. Those in print are public: and some of them have been brought judicially before the court. Whoever the writers are, they take the wrong way. I will do my duty, unawed. What am I to fear? That *mendax infamia* from the press, which daily coins false facts and false motives? The lies of calumny carry no terror to me. I trust, that my temper of mind, and the colour and conduct of my life, have given me a suit of armour against these arrows. If, during this King’s reign, I have ever supported his government and assisted his measures; I have done it without

any other reward, than the consciousness of doing what I thought right. If I have ever opposed, I have done it upon the points themselves; without mixing in party or faction, and without my collateral views. I honour the King; and respect the people: but, many things acquired by the favour of either, are, in my account, objects not worth ambition. I wish popularity: but, it is that popularity which follows; not that which is run after. It is that popularity which, sooner or later, never fails to do justice to the pursuit of noble ends, by noble means. I will not do that which my conscience tells me is wrong, upon this occasion, to gain the huzzas of thousands, or the daily praise of all the papers which come from the press: I will not avoid doing what I think is right; though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow. I can say, with a great magistrate, upon an occasion and under circumstances not unlike, *Ego hoc animo semper fui, uti invidiam virtute partam, gloriam, non invidiam, putarem.*

The threats go further than abuse: personal violence is denounced. I do not believe it: it is not the genius of the worst men of this country, in the worst of times. But I have set my mind at rest. The last end that can happen to any man, never comes too soon, if he falls in support of the law and liberty of his country: (for liberty is synonymous to law and government). Such a shock, too, might be productive of public good: it might awake the better part of the kingdom out of that lethargy which seems to have benumbed them; and bring the mad part back to their senses, as men intoxicated are sometimes stunned into sobriety.

Once for all, let it be understood, 'that no endeavours of this kind will influence any man who at present sits here'. If they had any effect, it would be contrary to their intent: leaning against their impression, might give a bias the other way. But I hope, and I know, that I have fortitude enough to resist even that weakness. No libels, no threats, nothing that has happened, nothing that can happen, will weigh a feather against allowing the defendant, upon this and every other question, not only the whole advantage he is intitled to from substantial law and justice; but every benefit from the most critical nicety of form, which any other defendant could claim under the like

objection.

Here I would like to interject with the judgment of the U.S. Supreme Court in *Scott v. Sandford*, 60 U.S. (19 How) 393, 404 (1857) as a sharp contrast to what Lord Mansfield did in *Sommersetts Case*.

Dred Scott, of course, was a black slave who sought his freedom on the ground that his master had taken him out of Missouri, which was a slave state, and into the American West where slavery had been outlawed by what was called the Missouri Compromise.

The majority judgment against Scott was written by the long-time Chief Justice Roger Taney who ironically had freed his own slaves but obviously was fearful of the threat that the case presented to the entire Southern way of life.

It may not be unfair to say that this decision precipitated the Civil War three years later.

Chief Justice Taney's whole judgment is riddled with special pleading and what might now be called an "originalist" interpretation of what the Constitution and Declaration of Independence really meant when they were written.

At one point, in dealing with the meaning of the phrase "people of the United States" in the Constitution, Taney blithely says this about the "negro" (p. 700):

We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can, therefore, claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not yet remained subject to their

authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

Later he quotes from the majestic words of the Declaration of Independence:

- We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among them is life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted, deriving their just powers from the consent of the governed. –

and then disingenuously attempts to explain away that language by simply saying “it is too clear for dispute” that the negro race was not part of the whole human family.

What is not well known about this case is that it contains a ringing dissent of some 30,000 words written by Justice Curtis in which he powerfully argued that the black race were equally protected with the white race under the Constitution. The whole of Justice Curtis’ judgment is a *cri de coeur* for a colour-blind Constitution and has echoes in the judgments of that same court 100 years later. As he says at p. 771:

I can find nothing in the Constitution which, proprio vigore, deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native-born citizens of any State after its adoption; nor any power enabling Congress to disenfranchise persons born on the soil of any State, and entitled to

citizenship of such State by its constitution and laws. And my opinion is, that, under the Constitution of the United State, every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States.

### **The Grand or Formal Style of Judging**

I now move on to discuss some judgments reflecting what the late Professor Karl Llewellyn of the University of Chicago identified as the grand or formal style of judgment writing in his well-known book *The Common Law Tradition* ( Boston, Little Brown, 1960).

Professor Llewellyn spends hundreds of pages in discussing the somewhat Churchillian style which developed both in England and America in the 19<sup>th</sup> century. It was a style which predominated in the House of Lords, the U.S. Supreme Court and among a group of famous appellate-court judges in both countries. Its influence was carried forth well into the 20<sup>th</sup> century and remnants of it have been detected by court-watchers down to the present.

Two judgments from the English House of Lords in the 1930s will nicely serve as samples of the Grand Style in England. These judgments were written by very great judges, as one can readily see from the language that they unleashed.

First, let me deal with Lord Atkin's almost fabled judgment in the snail-in-the-bottle case of *Donoghue v. Stevenson*, [1932] All E.R. 1 (H.L.)

The judges who sat on this appeal must surely represent one of the most talented group of judges who ever sat together: they were Lord Buckmaster, Lord MacMillan, Lord Tomlin, Lord Thankerton and, of course, Lord Atkin.

It is Lord Atkin's judgment which will live forever in the common law world. After a brilliant organizing effort at putting the strands of prior negligence cases together, he laid down the "neighbour test" as the great organizing principle for identifying the duty of care in any given factual situation.

He writes these remarkable words at p. 11 in arriving at his brilliant effort at rationalizing the whole law of negligence (p. 11):

And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist. To attempt a complete logical definition of the of the general principle is probably to go beyond the function of the judge, for, the more general the definition, the more likely it is to omit essentials or introduce non-essentials. The attempt was made by Lord Esher in *Heaven v. Pender* (8) in a definition to which I will later refer. As framed it was demonstrably too wide, though it appears to me, if properly limited, to be capable of affording a valuable practical guide.

At present I content myself with pointing out that in English law there must be and is some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law: You must not injure your neighbour, and the lawyers' question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be

persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

This passage is philosophy, morality, law and literature, all at once. It has always reminded me of the Sermon on the Mount. There have been critics, of course, who were offended by its moralizing tone and ambiguities but surely this dictum represents judgment writing at its best.

Another judgment from this period is *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 481. Any of you who were fortunate enough to study criminal law under the late Arthur Martin will vividly recall how Justice Martin lovingly allowed the words of Lord Sankey to fall from his lips:

Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. [Emphasis added.]

I cannot leave the golden thread theme without referring to a famous passage in the argument of Sir Geoffrey Lawrence, later a very fine judge, in his closing address to the jury in the murder trial of Dr. Adams where he explains how reasonable doubt operates with startling simplicity and clarity:

Justice is of paramount consideration here, and the only way in which this can be done is for you to judge the matter on

what you have heard in this court and in this court only.

What you read in the papers, what you hear in the train, what you hear in the cafés and restaurants, what your friends and relations come and tell you; rumour, gossip, all the rest of it, may be so wrong.

The possibility of guilt is not enough, suspicion is not enough, probability is not enough, likelihood is not. A criminal matter is not a question of balancing probabilities and deciding in favour of a probability.

If the accusation is not proved beyond reasonable doubt against the man accused in the dock, then by law he is entitled to be acquitted, because that is the way our rules work. It is no concession to give him the benefit of the doubt. He is entitled by law to a verdict of not guilty.

As noted above, great judgment-writing was not limited to the English courts in the 19<sup>th</sup> and 20<sup>th</sup> centuries.

In the early years of the U.S. Supreme Court it was led by Chief Justice John Marshall from 1801 until 1835. Marshall was not only a strong leader and unifying influence on the court; he was also one of the great judicial writers and thinkers of history. His judgments are models of grace and clarity and have withstood the test of time.

The first of his famous cases was *Marbury v. Madison*, 1 Cranch 137 (1803) where he laid down the doctrine of judicial review. This holding was controversial in its day and remains somewhat controversial today because many academics and politicians still feel that the ruling was unsupported by the Constitution.

The case had its innocent origins in the appointment by President John Adams of four justices of the peace just before Thomas Jefferson succeeded him as President in March, 1801. While the appointments were made, the commissions validating them were not delivered before Adams' term expired and the new administration refused to recognize the appointments.

The result was that the four J.P.s sued for a writ of mandamus requiring the new Secretary of State, James Madison, to compel the production of the missing commissions.

What Chief Justice Marshall had to do in this case was perform an act of magic, making it appear that the Court was not assuming a power of judicial review over federal statutes while actually doing just that. The judgment shows Marshall's powerful intellect at work as he systematically demolishes all arguments against his position.

Let me demonstrate, with a short passage, the compelling nature of his prose and logic:

Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of, in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow, in fact, what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. 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, conformable to the law, disregarding the constitution; or

conformable 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. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces to nothing, what we have deemed the greatest improvement on political institutions, a written constitution, would, of itself, be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection. The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say, that in using it, the constitution should not be looked into? That a case arising under the constitution should be decided, without examining the instrument under which it arises? This is too extravagant to be maintained. In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

...Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law

repugnant to the constitution is void; and that courts, as well as other department, are bound by that instrument.

The rule must be discharged.

A short passage from one further decision of Marshall's will show his persuasive powers. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) the Court had to deal with the exercise of implied national powers to accomplish national purposes. Here, the issue was whether the state of Maryland could impose a tax on the operations of a federal bank created by Congress.

This judgment, like so many of Marshall's, reads like a brilliant exposition on political and governmental powers. At times, he seems like Aristotle in modern garb. There is one passage which I will quote:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the 1<sup>st</sup> article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a *constitution* we are expounding. [Emphasis added.]

The last climatic phrase of Marshall's – “we must never forget that it is a *constitution* we are expounding” has been described by Justice Felix

Frankfurter as “the single most important utterance in the literature of constitutional law...”

It must be said that the United States enjoyed a sort of Golden Age of judges in the period running from Oliver Wendell Holmes’ arrival on the Supreme Court in 1902 down to about 1990 or so when Justice Brennan left the Court.

Think of the dazzling array of great judges this period produced, including Holmes, Brandeis, Cardoza on the Supreme Court itself and such other great jurists as Learned Hand on the New York Circuit Court of Appeals. All of these judges were blessed with unmatched writing styles and were prolific writers on and off the bench. Think of Holmes’, *The Common Law*, a masterly exposition on the common law written in 1881; Brandeis’s seminal article entitled “*The Right to Privacy*” written in 1890 and his powerful dissents in so many cases – dissents which eventually became the law of the land in many instances; Cardoza’s profound works such as *The Nature of the Judicial Process* (1921), *The Growth of the Law* (1924), and *The Paradoxes of Legal Science* (1928).

Holmes, of course, is immortal and passages from his great judgments have crept in the language of civilized discourse much in the manner of Shakespeare. His judgments are usually couched in simple English but his aphoristic style contains depths of matchless ideas.

Here is a sampling of his classic lines and statements:

- (1) When logic and the policy of the state conflict with a fiction due to historical tradition, the fiction must give way.  
- *Blackstone v. Miller*, 188 U.S. 189.
- (2) Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping

the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.

- *Northern Securities v. U.S.*, 193 U.S. 197

- (3) Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

- *Missouri v. May*, 194 U.S. 267

- (4) The precise scope of admiralty jurisdiction is not a matter of obvious principle or very accurate history... But a very little history is sufficient to justify the conclusion that the Constitution does not prohibit what convenience and reason demand.

- *The Blackheath*, 195 U.S. 361

- (5) The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court... Some of these statutes laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen of the State or of laissez faire. It is made for people of fundamentally different views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question of whether statutes embodying them conflict with the constitution of the United States.

- *Lochner v. N.Y.*, 198 U.S. 45

- (6) There is no statute covering the case; there is no body of precedent that by ineluctable logic requires the conclusion to which the court has come. The conclusion is reached by extending a certain conception of public policy to a new sphere. On such matters we are in perilous country. I think

that, at least, it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear...

- *Dr. Miles Medical Co. v. Park*, 220 U.S. 373

- (7) The provisions of the constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.

- *Gompers v. U.S.*, 233 U.S. 604

- (8) We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic.... The question in every case is whether the words used 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 congress has a right to prevent. [Emphasis added.]

- *Schenck v. U.S.*, 249 U.S. 47

I have already briefly mentioned Justice Learned Hand as amongst my pantheon of iconic judges. I do not have the time to cite all of his remarkable decisions while sitting as a federal district court judge and then on the Second Circuit Court of Appeals between 1909 and 1961. If you are interested you might read Hershel Shanks, *The Art and Craft of Judging: The Decisions of Judge Learned Hand*, (New York: MacMillan, 1968). The book contains a wonderful cross-section of Justice Hands decisions ranging over a breathtaking sweep of legal and constitutional issues.

My favourite quip about Learned Hand is that he was the greatest judge who was not appointed to the Supreme Court.

When he was honoured at having served 50 years on the bench he said these words which nicely fit in with my theme:

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 is a bit of craftsmanship isn't it? It is what the poet does. It is what a sculpture does. He has some vague purposes and he has an indefinite number of what you might call frames of preference among which he must choose, for choose he has to, and he does.

Permit me to quote here from a very well known speech delivered by Judge Hand in 1944 at an American Day ceremony in Central Park, New York. I quote from it because it epitomizes a continuing theme of his opinions over the years; in a very real sense it translates the ideals and philosophy of the man over his lifetime on the bench:

What do we mean when we say that first of all we seek liberty? I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it. And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few; as we have learned to our sorrow.

What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, near two thousand

years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest. And now in that spirit, that spirit of an America which has never been, and which may never be; nay, which never will be except as the conscience and courage of Americans create it; yet in the spirit of that America which lies hidden in some form in the aspirations of us all; in the spirit of that America for which our young men are at this moment fighting and dying; in that spirit of liberty and of America I ask you to rise and with me pledge our faith in the glorious destiny of our beloved country,!

It has been said by several commentators that Hand's words on that occasion can be favourably considered alongside Lincoln's legendary Gettysburg Address. Both are short and are shot through with biblical cadences and rhythms. Beneath the surfaces are ideals and passions which will live on.

### **Lord Denning**

I move on in this final section of my comments to discuss some judgments of that most quotable of modern judges, Lord Denning, along with but a few from some Canadian judges.

People forget that Lord Denning briefly and rather ineffectively served on the House of Lords between 1957 and 1962. He was never able to control the House as he could the Court of Appeal with the result that he decamped back to the Court of Appeal and the centre seat of Master of the Rolls in 1962.

There is an interesting decision in the House of Lords in *The Siskina*, [1997] 3 All E.R. 803 which I expect explains why he chose to leave that august body for the Master's seat. The case involved a procedural point

under the court rules and, rather typically, Lord Denning felt he could pass through the chains of procedure undeterred.

In his closing “peroration”, he delivered one of his classic rulings, quoting even from the poetry of William Cowper (p. 815):

It was suggested that this course is not open to us because it would be legislation; and that we should leave the law to be amended by the Rule Committee. But see what this would mean: the shipowning company would be able to decamp with the insurance moneys and the cargo owners would have to whistle for any redress. To wait for the Rule Committee would be to shut the stable door after the steed had been stolen. And who knows that there will ever again be another horse in the stable? Or another ship sunk and insurance moneys here? I ask: why should the judges wait for the Rule Committee? The judges have an inherent jurisdiction to lay down the practice and procedure of the courts; and we can invoke it now to restrain the removal of these insurance moneys. To the timorous souls I would say in the words of William Cowper:

‘Ye fearful saints fresh courage take,  
The clouds ye so much dread  
Are big with mercy, and shall break  
In blessings on your head.’

Instead of ‘saints’, read ‘judges’. Instead of ‘mercy’, read ‘justice.’ And you will find a good way to law reform!

One of his judicial colleagues (Lord Bridge) disagreed and uttered this deathless retort in his judgment at p. 821:

For these reasons I am clearly of opinion that we should not allow the urgent merits of particular plaintiffs... to tempt us to assume the mantle of legislators. The clouds in my Lord’s adaptation of William Cowper may be big with justice but we are neither midwives nor rainmakers. [Emphasis added.]

Leave was granted and the House of Lords in a unanimous ruling accused Lord Denning of conducting a “usurpation” of the powers of the rules committee!

The important thing to remember about Lord Denning is that while he never entirely captured the minds of his judicial colleagues, he most certainly became an almost revered public figure in England in the late 20<sup>th</sup> century and undoubtedly did much good with his more famous judgments and his liberalizing views on the law. The series of popular books he wrote about his family and the law can hardly be criticized and contain much stimulating material.

In his book, *The Family Story*, (London: Butterworth, 1981), he describes his technique in judgment-writing in this way (p. 207):

I try to make my judgments live – so that it can be readily understood – by the parties in particular: and by others who hear it...

I start my judgment, as it were, with a prologue – as the chorus does in one of Shakespeare’s plays – to introduce the story. Then I go on from act to act as Shakespeare does – each with its scenes – drawn from real life... But I do it by dividing my judgment up into main headings (corresponding to the acts) and sub-paragraphs (corresponding to the scenes) – each with a caption – so as to catch the eye. I draw the characters as they truly are – using their real names – so that I never get them mixed up... In telling the story I set out the merits – I rely on them – I do not scorn them. Because the merits go to show where justice lies...

... I avoid long sentences like the plague: because they lead to obscurity. It is no good if the hearer cannot follow them. I strive at all costs to be clear... I refer sometimes to previous authorities because I know that people are prone not to accept my views unless they have support from the books. But never at such length. Only a sentence or two. I avoid all reference to pleadings and orders... They are mere lawyer’s stuff. They are

unintelligible to anyone else. I finish with a conclusion – an epilogue – again as the chorus does in Shakespeare. In it I gather the threads together and give the result. I never say “I regret having to come to this conclusion but I have no option!” There is always a way around. There is always an option – in my philosophy – by which justice can be done.

So there is Denning’s remarkable and revealing credo for judgment-writing.

Let me move on to cite a few judgments demonstrating his credo and his unmistakable style:

- (1) *James v. Minister of Pensions*, [1947] K.B. 867  
 Gunner James joined the army on July 24, 1941, at the age of thirty-two. In January 1943, he had a swelling on the right side of his neck which gradually spread. He was sent to hospital, when a diagnosis of Hodgkin’s disease was made. In April 1943, he was discharged on account of it. He claimed a pension. It was rejected by the Minister. In February, 1946, he died on account of the disease. His widow claimed a pension. Her claim was also rejected by the Minister. She appealed to a tribunal who, on September 18, 1946, rejected her appeal. She did not apply to the tribunal for leave to appeal within the six weeks allowed by the rules of the tribunal. On November 21, 1946, the case of *Donovan v. Minister of Pensions*, which was also a case of Hodgkin’s disease was decided in favour of the widow. When knowledge of this decision came to Mrs. James’ advisers they sought from the tribunal leave to appeal out of time. The tribunal itself and the President of the Pensions Appeal Tribunals refused the application, refusing to extend the time or to grant leave. The widow now applies for leave to appeal.
  
- (2) *Lloyds Bank v. Bundy*, [1975] 1 Q.B. 326:  
 Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy, the defendant, was a farmer there. His home was at Yew Tree Farm. It went back for 300 years. His family had been there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the bank.

Up to the very hilt. Not to borrow money for himself, but for the sake of his son. Now the bank have come down on him. They have foreclosed. They want to get him out of Yew Tree Farm and to sell it. They have brought this action against him for possession. Going out means ruin for him. He was granted legal aid. His lawyers put in a defence. They said that, when he executed the charge to the bank, he did not know what he was doing: or at any rate that the circumstances were such that he ought not to be bound by it. At the trial his plight was plain. The judge was sorry for him. He said he was a 'poor old gentleman.' He was so obviously incapacitated that the judge admitted his proof in evidence. He had a heart attack in the witness-box. Yet the judge felt that he could do nothing for him. 'There is nothing', he said, 'which takes this out of the vast range of commercial transactions'. He ordered Herbert Bundy to give up possession of Yew Tree Farm to the bank. Now there is an appeal to this court. The ground is that the circumstances were so exceptional that Herbert Bundy should not be held bound.

...

Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influence or pressures brought to bear on him by or for the benefit of the other....

...I have no doubt that the assistant bank manager acted in the utmost good faith and was straightforward and genuine. Indeed the father said so. But beyond doubt he was acting in the interests of the bank – to get further security for a bad debt. There was such a relationship of trust and confidence between them that the bank ought not to have swept up his sole remaining asset into its hands – for nothing – without his having independent advice.

We rejected the claim of the bank. We allowed Herbert Bundy to stay on.

(3) *Hinz v. Berry*, [1970] 2 Q.B. 40:

It happened on 19 April 1964. It was bluebell-time in Kent. Mr. and Mrs. Hinz had been married some ten years, and they had four children, all aged nine and under. The youngest was one. Mrs. Hinz was a remarkable woman. In addition to her own four, she was foster-mother to four other children. To add to it, she was two months pregnant with her fifth child.

On this day they drove out in a Bedford Dormobile van from Tonbridge to Canvey Island. They took all eight children with them. As they were coming back they turned into a lay-by at Thurnham to have a picnic tea. The husband, Mr. Hinz, was at the back of the Dormobile making the tea. Mrs. Hinz had taken Stephanie, her third child, aged three, across the road to pick bluebells on the opposite side. There came along a Jaguar car driven by Mr. Berry, out of control. A tyre had burst. The Jaguar rushed into this lay-by and crashed into Mr. Hinz and the children. Mr. Hinz was frightfully injured and died a little later. Nearly all the children were hurt. Blood was streaming from their heads. Mrs. Hinz, hearing the crash, turned round and saw this disaster. She ran across the road and did all she could. Her husband was beyond recall. But the children recovered.

An action has been brought on her behalf and on behalf of the children for damages against Mr. Berry, the defendant. The injuries to the children have been settled by various sums being paid. The pecuniary loss to Mrs. Hinz by reason of the loss of her husband has been found by the judge to be some £15,000; but there remains the question of the damages payable to her for her nervous shock – the shock which she suffered by seeing her husband lying in the road dying, and the children strewn about.

The law at one time said that there could not be damages for nervous shock: but for these last 25 years, it has been settled that damages can be given for nervous shock caused by the sight of an accident, at any rate to a close relative.... Somehow or other the court has to draw a line between sorrow and grief for which damages are not recoverable, and nervous

shock and psychiatric illness for which damages are recoverable. The way to do this is to estimate how much Mrs. Hinz would have suffered if, for instance, her husband had been killed in an accident when she was 50 miles away: and compare it with what she is now, having suffered all the shock due to being present at the accident. The evidence shows that she suffered much more by being present....

At the trial, five years after the accident, she frequently broke down when giving her evidence. She brought the children to court. They were very well turned out. The judge awarded £4,000 on the head of nervous shock. I do not think it is erroneous. I would dismiss the appeal.

In his wonderful article about Lord Denning's judgments "It all started with Gunner James" (1983) *The Law Society Gazette* 279, Professor Cameron Harvey does a brilliant job of categorizing his judgments depending on context. He uses such phrases as "The Intriguing Opener", "The Historical Opener", "The Fatal and Deadly Opener", "The Editorial Opener", "The Non Sequitur Opener", the "This is an interesting case" opener and the "Whimsical Opener".

They are all worth the reading. Think of his magical and whimsical "opener" in *Post Office v. Crouch*, [1973] 1 W.L.R. 766 at 770:

This cases reminds me of the story of David and Goliath, with a difference. Goliath is winning all along the line. David has sought to find some stones in the brook called the Industrial Relations Act 1971, but every one of them has so far bounced off the invincible Goliath.

I am afraid we will not see Lord Denning's like again.

### JUDGMENT WRITING IN CANADA

In this paper, I have tried to universalize my themes, going largely to some of the great judicial names of history.

Canada has had its great judges but I confess that the Canadian judicial voice was rather muted until the 1950s and afterwards when such remarkable Justices as Rand, Laskin, Spence and Dickson stepped forward with judgments containing unique themes and verve.

Justice Rand is a classic example of a Canadian judge of the new order. He was prepared, in an appropriate case, to forge a new path and use vital and incisive language in pushing the envelope.

*R. v. Boucher*, [1951] S.C.R. 265 is a justly renowned case and it represents Rand moving to the top of his game.

This was a case where seditious libel was charged against a member of the Jehovah's Witness religious group in Quebec. The accused had been convicted at trial by a jury and the Court of Appeal affirmed.

Writing for the majority, Justice Rand wrote these bracing and liberating words:

There is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency: what is the degree necessary to criminality? Can it ever, as mere subjective condition, be so? Controversial fury is aroused constantly by differences in

abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in mortals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability. Similarly in discontent, affection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search for the constitution and truth of things generally...

But a further question remains. In the circumstances, should the appellant be subjected to a second trial? Could a jury, properly instructed and acting judicially have found, beyond a reasonable doubt, a seditious intention in circulating the document?...

The writing was undoubtedly made under an aroused sense of wrong to the Witnesses; but it is beyond dispute that its end and object was the removal of what they considered iniquitous treatment. Here are conscientious professing followers of Christ who claim to have been denied the right to worship in their own homes and their own manner and to have been jailed for obeying the injunction to "teach all nations". They are said to have been called "a bunch of crazy nuts" by one of the magistrates. Whatever that means, it may from his standpoint be a correct description: I do not know; but it is not challenged that, as they allege, whatever they did was done peaceably, and, as they saw it, in the way of bringing the light and peace of the Christian religion to the souls of men and women. To say that is to say that their acts were lawful. Whether, in like circumstances, other groups of the Christian Church would show greater forbearance and earnestness in the appeal to Christian charity to have done with such abuses, may be doubtful. The courts below have not, as with the greatest respect, I think they should have, viewed the document as primarily a burning protest and as a result have lost sight of the fact that, expressive as it is of a deeper indignation, its conclusion is an earnest petition to the public opinion of the province to extend to the Witnesses of Jehovah, as a minority,

the protection of impartial laws. No one would suggest that the document is intended to arouse French-speaking Roman Catholics to disordering conduct against their own government, and to treat it as directed, with the same purpose, towards the Witnesses themselves in the province, would be quite absurd; in relation to the courts, it is, to use the language of section 133A, pointing out, “in order to their removal”, what are believed to be “matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty’s subjects.” That some of the expressions, divorced from their context, may be extravagant and may arouse resentment, is not, in the circumstances, sufficient to take the intention of the writing as a whole beyond what is recognized by section 133A as lawful.

Justice Rand’s second remarkable judgment of this period is *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

As is well known, in this case, the plaintiff restaurant owner, Roncarelli, sued Premier Duplessis personally for damages arising out of the cancellation of his licence by the Quebec Liquor Commission. Mr. Roncarelli was of the Jehovah’s Witnesses religion.

Rand J., and the majority with him, held that the cancellation of Roncarelli’s licence was done solely because of his association with the religious group and for no lawful reason.

It is a ground-breaking judgment and the judgment contains fire and logic. One of my favourite passages is this one:

In public regulation of this sort there is no such thing as absolute and untrammelled “discretion”, that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission

may not be mentioned in such statutes but they are always implied as exceptions. “Discretion” necessarily implies good faith in discharging public duty, there is always a perspective within which a statute is intended to operate, and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The legislature cannot be so distorted.

Unfortunately, in this paper I do not have time to discuss the judgments of Canada’s great dissenter, Chief Justice Laskin, Chief Justice Dickson and those who have followed them on the Supreme Court. Suffice it to say that they have set very high standards for Canadian judges of the present time and the public will be their beneficiaries.

## **TEMPLATES AND FORMATS FOR JUDGMENTS**

Up until 25 years ago or so, there were no rigid formats for judgment writing in Canada.

The Supreme Court of Canada has led the way with the new formatting and now seems to have adopted a fixed template with these elements:

(i) **Introduction**

In this section, the writing judge provides an overview of the case, identifying the key issues and arguments and even disclosing the result.

(ii) **The Facts**

This section speaks for itself.

(iii) **Relevant Statutory Provisions**

Sometimes these are reproduced here; sometimes they go in an Appendix.

(iv) **Judicial History**

Here, the judge recites the history through the lower courts with a summary of the key rulings.

(v) **Issues**

Here, the judge identifies the issues for the court.

(vi) **Analysis**

Here the court deals with the issues it has identified for itself and may move on to use sub-headings for particular points, as required.

(vii) **Conclusion**

This section simply explains the nature of the ruling e.g. “The appeal is allowed with costs awarded to the appellant.”.

Some of the SCC judges seem to bridle under this rather rigid structure but it is usually followed, subject to minor variations to suit the individual case and individual judge who writes.

It is interesting to see that more and more trial and appellate judges across Canada are adopting the SCC format, subject to the needed changes, reflecting the level of the court.

Comparing styles, it seems to me the SCC format is much clearer and more coherent than the format used in the U.S. Supreme Court, where the judgments seem to run on legalistically and abstrusely without too much regard for the public audience.

Generally speaking, the head-noting for our S.C.C. judgments is very good. I understand that the judges “sign off” on these headnotes and I have found them to be quite good in recent years.

From my perspective, while the new style format is somewhat inhibiting, there is nothing in it which prevents great judge writing.

**One Caveat:**

The longer the judgments are and, of course, the more judgments written in a given appeal case, the less likely they are to be read by the Bar.

Distressing as it may sound, I have had several experiences where counsel have somehow got mixed up in their reading of S.C.C. cases and have cited a dissent or concurrence as the controlling opinion in the case! I am sure this usually happens when last-minute preparation has been the order of the day.