THE CANADIAN BAR REVIEW

VOL. XXVI March No. 3

THE WRITING OF JUDGMENTS

LORD MACMILLAN

The Editor has prescribed my topic for me. He no doubt conceives that I must have formed some views on the writing of judgments after fifteen years of producing judgments of my own and fifty years of studying the judgments of others. I shall try to set down the result of the reflections which he has stimulated.

A judgment may be defined as a reasoned pronouncement by a judge on a disputed legal question which has been argued before him. It is a literary composition, but a composition subject to certain conventions. It possesses its own characteristics and its own standards of merit. The art of composing judgments is not taught; it is acquired by practice and by study of the models provided in the innumerable volumes of the law reports in which are recorded the achievements of past masters of the art.

The style of any composition is necessarily dominated by its purpose. A work of imagination, such as a poem or a romance, aims at enthralling the reader by its appeal to the aesthetic and emotional side of his mind. A patent specification, to take an example from the opposite pole, makes no such appeal. It is a strictly business document and the merit of a business document is to be prosaically clear and unambiguous. A judgment pronounced on the bench, regarded as an intellectual product, stands in a class by itself. The judge speaks with authority and what he says should therefore be spoken with befitting dignity. He should not affect grandiloquence but he should be impressive. The strength of a judgment lies in its reasoning and it should therefore be convincing. Clarity of exposition is always essential. Dignity, convincingness and clarity are exacting requirements but they are subservient to what, after all, is the main object of a judgment, which is not only to do but to seem to do justice. In addition to these cardinal qualities of a good judgment there are the attributes of style, elegance and happy phrasing which are its embellishments.

In framing a judgment attention to its structure is of high importance. The theme should be developed in logical sequence from the opening to the conclusion, so that the mind of the reader can follow the progress of the argument with ease. The normal course is first to set out the facts which have given rise to the question at issue. The selection and arrangement of the facts is a matter requiring no little skill. Unessential details have to be discarded and prominence should be given to the material circumstances. It is often a good plan to preface the statement of the facts by posing broadly at the outset the nature of the problem to be solved and so to give the reader a clue to what is to follow. The facts having been duly set out, the next step is to formulate and apply the law to them. This generally involves a critical examination of principle and precedents and is the core of the judgment. The conclusion follows.

Every judge no doubt develops his own method of composition. Some dictate their judgments to a shorthand writer and then revise the typescript. The drawback to this method is its tendency to diffuseness. To write out a judgment with one's own hand promotes conciseness by the automatic operation of the economy of labour. For myself, my invariable practice has been to write a rough draft first in which I endeavour to get on to paper all that I want to say, without much attention to style or arrangement, and then utilise this as the basis of a fair copy in which I can attend to the details of order and expression. It is perhaps rather a laborious way, but the double process of first assembling and then arranging your matter has some advantages. It enables you to get the case into perspective, to discard superfluities and to ensure that nothing essential is omitted.

In the pattern of a judgment the art of the paragraph is too often neglected. I remember John Buchan, himself a master of style, once admonishing me on the importance of observing this art. Let each topic in your composition, if possible, be opened, discussed and disposed of in a compartment by itself. Nothing is more depressing and discouraging than an unbroken expanse of print over which half a dozen ideas straggle in disorder, to the confusion of the reader. Each paragraph should be complete and self-contained. Then the general conclusion to be drawn should be expressed in a separate final paragraph. Within each paragraph long sentences should be avoided and especially an accumulation of relative clauses. The criterion of good syntax is that it should never be necessary to read a sentence twice in order to make out its meaning.

So far I have expressed very elementary commonplaces. When I approach the more subtle qualities which lend distinction to a judgment I enter on difficult territory. No one has yet succeeded in defining literary style though many have tried to do so. It is an emanation of personality. We recognize it instinctively. But it is a gift rather than an acquisition and no rules can be laid down for it. Still, it is profitable to study the judgments of the masters of judicial style in the hope of acquiring some inspiration from them. If we consort with good company we may insensibly improve our own manners. I have elsewhere expressed myself on the relation of "Law and Letters" in an address which I had the honour of delivering at the meeting of the American Bar Association at Chicago in 1930, and I must not repeat myself. But I may quote just one sentence. "The deliverances", I said, "of the judges of England in the leading cases of the law are distinguished by the highest qualities of literary craftsmanship; witness the historic judgments in which Lord Mansfield enunciated the principles of the common law in their application to commerce, the commanding brevity of Jessel, Master of the Rolls, the elegant irony of Lord Bowen and those delightful passages in which Lord Macnaghten contrived to illumine with humanity and humour the most accurate exposition of the technical doctrines of the law. Of him it could certainly never be said, as was said of another Law Lord, that he was not only dull himself but the cause of dullness in others."

While it is quite fitting to mitigate the austerity of a judgment by employing the arts and graces of literary composition, restraint should be exercised in doing so. Elegance of expression, aptness of illustration, well-chosen metaphors and an occasional happy literary quotation are both legitimate and desirable. But a judgment is not the appropriate vehicle for wit and pleasantry at large. To the parties concerned a litigation is no laughing matter and they may well complain if the judge gives the impression of treating their case too light-heartedly. He must not allow himself to yield to the temptation of playing to the gallery and the press by comments which may distress the suitors who have come to his court not for entertainment but for justice. It will be observed that in all the best examples of judicial levity the lighter passages are not dragged in by the ears for the mere purpose of display but are strictly relevant to the issue and really advance the argument. Everyone can recall instances of what I mean. Perhaps there has never been a greater artist in combining relevance with lightness of touch than Lord Robertson, whose

style was once described as like a pearl dissolved in vinegar. His judgments when he was Lord President of the Court of Session in Scotland may not be generally familiar so I may give as an example of his neat and witty phrasing an extract from his disquisition on the question whether rabbits were vermin within the meaning of a statute of 1870. Referring to the Ground Game Act of 1880 he said: "The title tells its own story. This is the darkest hour in the legislative history of the rabbit but his fortunes are still linked with the hare. Every provision of the Act applies to both animals; and both incidentally gain a close time on moorlands although it must be confessed that they appear to owe this privilege less to favour for either of themselves than to a regard to the safety of the grouse. Still I own to finding it inconceivable that the Legislature should have shown all this ceremony to the rabbit in 1880 if he had already in 1870 been cast out among the vermin."[1] Again, in another case, he lit up the unpromising topic of the proper method of assessing the "existing" value of a tramway undertaking by observing that it had been argued that "time is exhaustively divided into past and future and the present is merely a dividing line between the two". "This", he went on to say, "is of course a profound and impressive truth but there are times and places for everything and I should not have thought a Tramway Act exactly the occasion which Parliament would choose for teaching men metaphysics unawares."[2] I quoted this passage in a case dealing with the question of survivorship in a common calamity in which the House of Lords was regaled with much fine-spun argument on section 184 of the Law of Property Act, 1925.[3] Irony is probably the literary form most frequently illustrated in judgments and very effective it can be on suitable occasions, witness the sustained and brilliant performance in this manner by Lord Greene, the Master of the Rolls, in a recent judgment of his in which he appositely quoted Voltaire.[4]

For vigour and picturesqueness of expression the old Scots judges were hard to surpass, as when Lord Pitfour, disagreeing with an authority which had been quoted to him, remarked, "Some judges are like the old bishop who having begun to eat the asparagus at the wrong end did not choose to alter".[5] In our

[1] *Lord Advocate* v. *Young* (1898), 25 R. 778, at p. 785.
[2] *Edinburgh Street Tramways Company* v. *Edinburgh Magistrates* (1894), 21 R. 688, at p. 704.
[3] *Hickman* v. *Peacey*, [1945] A.C. 304, at p. 323.
[4] *Associated Portland Cement Manufacturers* v. *Commissioners of Inland Revenue*, [1946] 1 All E.R. 68.
[5] *Sinclair* v. *Sinclair* (1768), Hailes' Decisions 247, at p. 248.

own day Lord Sands well maintained this tradition and I cannot forbear to quote him on the infallibility of the House of Lords. "The House of Lords", he observed, "is an infallible interpreter of the law. A batsman, who, as he said, had been struck on the shoulder by a ball, remonstrated against a ruling of l.b.w., but the wicket-keeper met his protest by the remark 'It disna' maitter if the ba' hit yer neb; if the umpire says ye'r oot, ye'r oot'. Accordingly if the House of Lords says this is the proper interpretation of the statute — then it is the proper interpretation. The House of Lords has a perfect legal mind. Learned Lords may come and go, but the House of Lords never makes a mistake. That the House of Lords should make a mistake is just as unthinkable as that Colonel Bogey should be bunkered twice and take 8 to the hole. Occasionally to some of us two decisions of the House of Lords may seem inconsistent. But that is only a seeming. It is our frail vision that is at fault."[6] I do not commend this caustic irreverence for general imitation! In Ireland the national sense of humour is not banned in the law courts. A characteristic judicial effort is enshrined in the judgment of Sir Peter O'Brien C. J. in a case dealing with the disallowance by the official auditor of items in the accounts of the Dublin Corporation incurred in connection with a luncheon on the occasion of the annual inspection of the water-works. The gusto with which the Chief Justice enumerates and comments on the merits of the various liquors at this municipal junketing is eminently diverting and his unconventional judgment was no doubt justified by the hilarity of the proceedings.[7]

The English Law Reports abound in telling aphorisms, as when Lord Lindley in an Admiralty case observed that "this is an illustration of attempting to navigate ships by Act of Parliament". Lord Chelmsford in another case remarked that "this appears to me to be determining what has been done by a conjecture of what was likely to have been done". Lord Davey commented thus on a fallacious argument: "My Lords, to use the language of a distinguished judge of the last generation, the appellant's case seems to me as full of holes as a colander". Lord Macnaghten said of a solicitor of whose conduct he disapproved that he "was a gentleman 'devoted', as he says, 'to public work', meaning by that, I suppose, that his proper business as a solicitor was a matter of secondary consideration with him". These quotations chosen at random could be multiplied indefinitely; they may serve to

[6] *Assessor for Aberdeen* v. *Collie*, [1932] S. C. 304, at pp. 311-12.
[7] *Reg.* (*Bridgeman*) v. *Drury*, [1894] 2 Ir. R. 489, at p. 496.

show how tellingly the essence of a judgment may be distilled into a single sentence.

A question often discussed is whether judges in their pronouncements ought to confine themselves strictly to dealing with and deciding the particular point at issue in the case before them or may legitimately take the opportunity when it arises of laying down general principles of law. There are two views about this. Some think that it is within the province of a judge to clarify the law and assist its development by the formulation of legal doctrine. Others think that the judge ought not to stray outside the confines of what is required for the decision of the case in hand and that general pronouncements are liable to cause future embarrassment. There must of course be a *ratio decidendi* in every judgment, which it ought to be easy to discern and extract, though this is not always so. Incidentally I would refer the reader to Professor Goodhart's valuable paper on Determining the Ratio Decidendi of a Case in his "Essays in Jurisprudence and the Common Law". The discrimination between what is dictum and what is *ratio decidendi* is of vital importance, for the latter is binding and the former is not and the judge in composing his judgment ought to have the distinction clearly in mind.

I was myself taken to task recently by a reviewer in a legal journal for having in a judgment of mine used these words: "Your Lordships' task in this House is to decide particular cases between litigants and your Lordships are not called upon to rationalise the law of England. That attractive if perilous field may well be left to other hands to cultivate. It has been necessary in the present instance to examine certain general principles advanced on behalf of the appellant because it was said that consistency required that these principles should be applied to the case in hand. Arguments based on legal consistency are apt to mislead for the common law is a practical code adapted to deal with the manifold diversities of human life and as a great Amercian judge has reminded us 'the life of the law has not been logic; it has been experience'."[8] In expressing myself so broadly I perhaps afforded an example of the danger of committing oneself to generalities in a judgment. My critic's point was that it is the part of a judge to assist in clarifying the law and clearing up apparent discrepancies. I can only plead in mitigation that in the earlier part of this same judgment I had not flinched from laying down very broad doctrine on the law of liability for negli-

[8] *Read* v. *J. Lyons and Co. Ltd.*, [1947] A.C. 156, at p. 175.

gence and that I was really concerned only to assert that I was not to be confuted by the possible existence of inconsistent exceptions which authority required me to acknowledge, although I could not logically reconcile them with the general doctrine I had enunciated.

Lord Dunedin, one of the greatest judges of our day and generation, had a predilection for educing from the particular case before him the general principle of law which he conceived to be involved and formulating it in general terms. In the leading case of *Sorrell* v. *Smith* there is a characteristic passage in the opening paragraph of his judgment.[9] The case raised the most far-reaching problems in the law of conspiracy at common law. The judges in the Court of Appeal, said Lord Dunedin, "had embodied in their judgments an appeal for guidance so touching, as to recall the prayer of Ajax—ἐν δε φαει και ὅλεσσον, Reverse our judgment an it please you, but at least say something clear to help in the future". The quotation is from the Iliad, xvii, 647. Darkness had shrouded the field of battle between the Greeks and the Trojans and Ajax invoked Zeus to clear the sky so that if he and his comrades must die they might do so in the light. As Zeus responded to the supplication of Ajax, so Lord Dunedin responded to that of the Court of Appeal without, however, claiming divine inspiration. "It may not be easy to comply with", he said, "but for my own part I shall do my best" and he proceeded to provide a valuable exposition of the principles of the law of conspiracy. The propensity of Lord Dunedin to deal with general principles in his judgments may have been due to his training in the law of Scotland which has always been less hidebound by precedent than the law of England. Speaking at a meeting of the American Bar Association in Chicago on August 21st, 1930, he said: "I confess I am not one of those who attach an enormous value to the mere question of precedents. I think reported cases are only really valuable when, in what is said by a judge, they give you in a crystallized form some of those great principles on which law depends". We should certainly have been the poorer had we been deprived of the many illuminating passages which enrich his judgments and which we owe to his liberal conception of the judicial function.

Lord Wright has expressed a stricter view in the Preface to his volume of "Legal Essays and Addresses". "The work of writing judgments", he says, "is in a sense the work of the miniaturist in law. He works with limited and definite facts and

[9] [1925] A.C. 700, at p. 716.

with limited and definite authorities and legal rules. Everything is directed to the particular result and everything not directly relevant should be excluded. The theory of economy forbids digressions into cognate rules of law or the enunciation of wider principles than are necessary for the particular case, or the attempt to reconcile and synthesize rules and achieve a more abstract and over-riding principle. There is the further difficulty that the judge speaks with authority. He is a magistrate. He must look into the future and consider how the words he uses are susceptible of being applied to other facts and conditions and he must guard against tying the hands of a future court which may have to determine what extensions are proper and what distinctions should be drawn. Thus the judge must neither speculate nor theorize."

There is probably not much real variance of opinion on the subject of the limitation of the judge's function. Lord Wright does not deprecate the formulation of legal principles in a judgment; what he deprecates is the "enunciation of wider principles than are necessary for the particular case". When Lord Dunedin enunciated a principle of law in a judgment it was always strictly relevant to the case in hand. I am sure he would have agreed that it is not for the judge to speculate or theorize.

The best judgments are those which clearly state the legal principle on which they are based. I dislike the method sometimes adopted of assembling an array of previous cases, like an excerpt from a Digest, and after painstakingly examining their points of resemblance to or distinction from the case in hand, deciding according to the precedent most nearly in point. In the process of reaching a decision precedents are very properly read and studied as evidence of the law, but they should be used for the purpose of extracting the law from them. It is undesirable to cumber a judgment with all the apparatus of research which Bench and Bar have utilised in ascertaining the principle of law to be applied.

Without entering upon the familiar controversy whether judges make law or only declare existing law, all will agree that the functions of the Judicature and the Legislature are distinct. But it is inevitable that the judge in deciding the cases that come before him must incidentally modify, adapt and develop the law by his interpretation of it. Yet he should always remember that his duty is to apply to the case in hand the law as he conceives it to be and not as he might wish it to be. Nevertheless there is an undefined intermediate zone within which the judge in effect

makes law and it is just here that restraint on his part is necessary if he is not to trespass outside his proper sphere. The attempt not infrequently made to escape from distasteful authority by resort to casuistical and unreal distinctions is not to be commended. Where a binding authority exists it must be followed, even if it leads in the judge's opinion to injustice, for, as Lord Bramwell said, "it is much better that a wrong decision should be set right by legislation than that idle distinctions should be drawn . . . and the law thrown into confusion".[10]

The judgment of a judge of first instance is properly framed on different lines from the judgments delivered in a court of appeal. The first judgment rightly covers the whole ground. In the court of appeal much is usually shed, but the first judge cannot foretell what points may commend themselves on appeal and he ought to provide all the material which may conceivably be regarded as relevant on a reconsideration of the case. In a court of appeal it is desirable if possible that there should be a single agreed narrative of the facts in the leading judgment and that the other appellate judges should not repeat them, but should confine themselves to dealing with any particular aspect of the case which they desire to emphasize or develop. The Law Reports are too often cumbered with unnecessary repetitions which add little of importance. A dissenting judge may of course find it necessary to give his own version of the facts as he sees them and to support his dissent by an independent argument.

Finally, let me plead for the avoidance of *clichés*. Every form of composition is prone to develop its own mannerisms and judges are no more immune from this tendency than other writers. Many otherwise excellent judgments are marred by the constant recurrence of such phrases as "I would venture to suggest", "I may be permitted to add", "speaking with all deference" and so on.

At this point I took down from my bookshelves Cardozo's lectures on "The Nature of the Judicial Process", which I had not re-read for some years. Turning over the pages I realize how admirably he brings his master mind to bear on some of the topics on which I have so inadequately discoursed, and perhaps the best service I can render is to direct to that work of genius those who are not already familiar with it.

[10] *New York Life Assurance Co.* v. *Styles* (1889), 14 App. Cas. 381, at p. 396.