Of Writing by Lawyers

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I

We lawyers are in general poor writers of English. The observation is not new; almost two hundred years ago a similar judgment was passed by Henry Fielding, also a lawyer, when he said, "And as to the lawyers, they are well known to have been very little acquainted with the commonwealth of literature, and to have always acted and written in defiance to its laws".[1] Fielding's phraseology is probably better, since "poor" is a vague word in need of explanation. We are poor writers, not by comparison with the followers of other callings, who often write as badly or worse, but in the sense that we write, most of us, in defiance of accepted standards of correct and graceful English.

I have been asking myself why this should be so. If the old saw about practice making perfect were true, we might be expected to write well, for we have more occasion to use words than the members of any other profession; as others have said before, words are the tools of the lawyer's trade. Yesterday he drafted a private agreement or a legislative bill; today he speaks in the give and take of a trial; tomorrow he will dictate letters to clients; the day after, start a brief or a law-review article. Perhaps part of the trouble is that he uses words so much. His tools are employed in different circumstances and for different purposes and the principles governing one use are not necessarily the principles governing another; if he practises in one the habits appropriate to another, or at least defensible in another, he is likely to write poorly.

My subject is what I think of as the ordinary writing of the lawyer, as a lawyer: a letter of advice to a client, for example,

[1] Fielding: The Commonwealth of Letters (1752). In this essay, first published in the Covent Garden Journal, Fielding was presumably speaking of English lawyers. We live in a new world of easy communication, when a Canadian journal may be read almost anywhere, and I should add that I presume to speak only of (and to) Canadian lawyers.

or a brief, or a judgment (if he is a judge), or a law-review article. When the lawyer's ordinary writing is poor it is usually poor for one or both of two reasons: because he is writing as if he were drafting a legal instrument or because he is writing as he would talk informally, say, in court. I know that the language of some legislative draftsmen, and it is perhaps the best, would not be inappropriate in ordinary writing, and that the words of the rare orator will read well when transcribed to paper exactly as they fell from his lips. It is still true that the overriding aim in drafting is certainty and if certainty is achieved some sacrifice of literary grace can be tolerated; on the other hand, the circumstances surrounding advocacy in court tend to repetition and a looseness of organization and phrasing that may be tolerable there but intolerable on paper. Somewhere in between comes the lawyer's ordinary writing; it must manage to avoid both the formality common in legal instruments and the informality of the spoken language.

The keeping of a balance between the two extremes is often a matter of personal judgment and taste, and no one should presume to be dogmatic about it. There are no binding precedents in the matter of good writing; no rules not subject to exception; no formulas that cannot be ridden to excess. Nevertheless, most of us can recognize good writing when we see it and some guiding principles have received general acceptance.

The qualities the lawyer should strive for in his writing are conditioned by the kind of writing he does. Not for him are the tenuous "feelings" of the poet or the imaginative flights of the novelist and playwright; his is, comparatively, a pedestrian kind of writing. Where they make their primary appeal to the emotions, the lawyer, when he is writing as a lawyer, makes his to the reason. Where they strive to create an effect, an artistic impression, the lawyer tries to convince by the soundness of an argument; he would hardly write at all unless he wanted to convince someone of something. Essentially his writing is factual, expository, analytical, argumentative. And so, without any claim to originality, I suggest that the lawyer should choose words that are familiar, concrete and precise, and that, in a broader sphere, he should try to make his writing clear, concise and simple.

II. *The Choice of Words*

Lawyers have been heard to lament the unpopularity of their profession with the lay public. Whether they exaggerate the

public's attitude or not, certain it is that the writing habits of lawyers have made them the butt of literary men for centuries. The truth is that the layman judges the legal profession largely on what lawyers write. Out of their writing has grown the tradition that they are dull dogs thrashing about in a net of fine distinctions and verbose obscurities. In that cutting poem of Carl Sandburg's, The Lawyers Know Too Much,[2] appears this stanza:

> In the heels of the higgling lawyers, Bob,
> Too many slippery ifs and buts and howevers,
> Too much hereinbefore provided whereas,
> Too many doors to go in and out of.

Too many *ifs, buts, howevers, hereinbefores, provideds, whereases;* therefore, lawyers are higgling and slippery.

In an early seventeenth century play by John Webster, The White Devil, there is a satiric scene in which the heroine, Vittoria Corombona, is being tried for behaviour thought a trifle too unconventional — her virtue was easy, it was alleged, and she had murdered her husband. The lawyer-prosecutor is made to open his case in Latin and when Vittoria's objection to his choice of language is sustained he continues:

> Most literated judges, please your lordships
> So to connive your judgements to the view
> Of this debauched and diversivolent woman;
> Who such a black concatenation
> Of mischief hath effected, that to extirp
> The memory of't, must be the consummation
> Of her and her projections,—

Naturally enough, Vittoria cannot see that this is much improvement over the initial Latin and she turns to her judges with:

> Surely, my lords, this lawyer here hath swallowed
> Some pothecaries' bills, or proclamations;
> And now the hard and undigestible words
> Come up, like stones we use give hawks for physic:
> Why, this is Welsh to Latin.

In the sequel, the lawyer's "learn'd verbosity" leads to his exclusion from the court.

Lawyers need look no farther for the cause of a large part of their unpopularity than their own choice of words, their vocabulary. Let us therefore resolve to avoid the cant and pedantic terms so beloved of the profession. Paradoxical though it may seem, the ideal for the lawyer in his ordinary writing should be to sound as little like a lawyer as he can, or at least as little like

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[2] From: Smoke and Steel (1920).

the layman's conception of a lawyer. Naturalness should be the goal; not what happens to seem natural to the man who is writing but what would be likely to seem natural to any educated person who picks up what he has written. "The words in prose", said Samuel Taylor Coleridge, "ought to express the intended meaning, and no more; if they attract attention to themselves, it is, in general, a fault".[3]

Of two words that accurately express the intended meaning, prefer the familiar word. Adherence to this rule will not in itself guarantee naturalness, because of course there are some technical and, to the general public, unfamiliar words that a lawyer cannot avoid using when writing on legal subjects: *ex parte, mandamus, tort* and *ultra vires,* for example. But the strict avoidance of the unnecessarily unfamiliar word will improve our writing. Besides the *hereinbefore* and *whereas* mentioned by Sandburg, examples of words (and word-phrases) to avoid are *aforesaid; de novo;* combinations of *here* like *hereinafter, hereto* and *heretofore; inter alia* and *inter se; ipso facto; onus; per* (in such phrases are *per year* and *per se); said* (as an adjective); combinations of *there* like *thereafter, thereat, thereby, therefor, therein, thereof, thereon, thereupon* and *therewith;* combinations of *where* like *whereby* and *whereunder.* I am tempted to add to the list abbreviations like *e.g.* (*exempli gratia,* for example), *etc.* (*et cetera*), *i.e.* (*id est,* that is) and *viz.* (*videlicet,* namely), particularly in a text having any pretensions to the literary. Some of the examples given are more objectionable than others, but all could be dropped from the lawyer's vocabulary with advantage. Most of them find their way into ordinary English from the conventionalized language of statutes and legal instruments. Possibly the lawyer uses them from some vague feeling that they will add distinction to his writing and impress his readers; if this be his reason, he had better find some surer way of impressing them. To anyone with an ear for English prose they are ugly, and to the layman they are a hall-mark of the mannered writing he calls "legalese".

An unfamiliar word in a different category is *same* when used as a pronoun, as in the phrase, ". . . the police officer tore a couple of pages out of his note-book and handed *the same* to one of the accused". This usage is not peculiar to lawyers, though it appears often enough in their writing to justify comment. Most cultivated readers will think it ugly, which is a sufficient reason for avoiding it. The example just quoted would have been better

[3] Coleridge: Table Talk (1835).

as ". . . the police officer tore a couple of pages out of his note-book and handed *them* to one of the accused" (it might have been still better had the officer torn the pages *from* rather than *out of* his note-book, but the subject of circumlocutions must remain for later discussion). Another example occurs in the sentence, "Payment of the premiums was secured by a promissory note of the mortgagor and, upon his failure to honour *same*, the insurance company cancelled the policy and sued the mortgagee for the earned premium", where *it* or *the note* should be substituted for *same*.

Nothing that has been said is intended to imply that the lawyer should not always strive to find the precise word to convey his meaning. Indeed, in the realm of vocabulary, the requirement of precision should, I think, override the advantages of naturalness; if the only word that exactly expresses the intended meaning is an unfamiliar word, then it must be used, however regretfully. What I have been arguing for, let it be repeated, is the avoidance of the *unnecessarily* unfamiliar word. Law needs to move closer to the people, not farther from them. As Mr. Charles Morgan has recently written, in a vivid passage:

> A reason for this [the loss of our principal means of communicating with one another] is the centrifugal movement of modern knowledge into remote and distinct compartments, each with its own cipher. The ambition of converging and universal knowledge, the ambition of Plato and Leonardo and Bacon, has had to be abandoned. Learned men are driven to apply themselves more and more exclusively to their own specializations. Each branch of philosophy, of physics, of mathematics, has its own terms and symbols which are, as it were, blocked currencies, not intended to be used in exchange. For want of a common speech, the learned are, in a sense, trapped within their special areas of knowledge, and knowledge itself, in its technical development, has grown farther and farther away from language. The area of experience which cannot be described in the ordinary language of cultivated men extends year by year. We are beginning to make signs at one another across impassable gulfs, for the subjects which cannot be spoken of, except in dialects peculiar to them, continuously increase. Less and less can there be a confluence from the many sources of knowledge into wisdom, for the channels of communication are silting up.[4]

From time to time pleas are made for a more precise legal terminology.[5] If by this is meant that one word should symbolize only one concept, a good deal can be said for the suggestion. Some expansion in the technical vocabulary of the law may well be

[4] Morgan: The Death of Words, in 7 English: The Magazine of the English Association (Summer 1948), at p. 56.

[5] *E.g.*, Arthur T. Vanderbilt: Men and Measures in the Law (1949), at pp. 47-9; 57.

necessary, and useful results should come from sorting out the different meanings of those words, like *right*, that have several distinct meanings and giving to each meaning a separate name. But to invent a new vocabulary is not necessarily to invent a more precise one.[6] If the suggestion is, not only that one word should symbolize one concept, but that the word should be capable of exact definition as in mathematics or the physical sciences, it is impracticable.[7] I do not know that any useful purpose is served by drawing too close an analogy between law and the exact sciences. As Professor Williams points out, apart from words of multiple meaning like *right*, many words (perhaps most words) have what he calls a "penumbra of uncertainty". Here part of the difficulty of exact definition is inherent in the limitations of language itself; and for the lawyer the difficulty is further complicated by the fact that law is a living and a growing thing, and the concepts the lawyer seeks to symbolize by exact terms living and growing too. Perhaps the answer will be made that, equally with a precise legal terminology, we need a realistic analysis and clarification of concepts, and certainly we do, but if the concept cannot be fixed once and for all can the definition of the word standing for it be fixed?

An appreciation of the plea for a more precise legal terminology, in all its implications, would lead too far into the study of meaning, semantics, for this article. Although that study certainly deserves the attention of lawyers,[8] I think it can fairly be said for us that we are more aware than most people of the dangers implicit in words; with our training and experience it would be strange if we were not. Here it will have to be enough to emphasize the particular danger of abstract words, of which *democracy, duty, freedom, justice, possession, property, right, state, wrong,* and *law* itself, are examples familiar to every lawyer. The danger in such words is that they have no "correct meaning"; each of us is likely to use them in a different sense, and sometimes we use them in different senses in the same passage. Although the nature of a lawyer's writing is such that he cannot avoid them altogether, he can use them only when he has no alternative, and then with care. A writer should be sure of the sense in which he intends to use an abstract word; he should

[6] I am reminded of the famous headline in the theatrical magazine, Variety — Stix Nix Hix Pix — which to initiates means that small-town moviegoers are against farm, or hick, pictures.

[7] See Glanville L. Williams: Language and the Law (1945), 61 L.Q.R. at pp. 179-80 and 301-2.

[8] See Williams: Language and the Law (1945), 61 L.Q.R. 71, 179, 293, 384; (1946), 62 L.Q.R. 387; and the authorities cited there.

make clear to his reader the sense in which he is using it; and then he should use it consistently in that sense.

Two abstract words I should hope will disappear from the vocabulary of Canadian lawyers are the adjectives *practical* and *academic* when applied to members of the profession or their works. A lawyer who speaks of himself as "practical" and of a confrère as "academic" may defend his distinction by saying that he is a member of the practising branch of the profession and the confrère, of the teaching branch; if these are the meanings in which he intends to be understood, he would do better to say so. By different people *practical* and *academic* are used in so many senses (often they are used as opposites, though they are not opposites), they have acquired so many overtones, that to the average reader they have come to be little more than vague terms of approval or disapproval. Not only do they convey the writer's judgment on the subject to which he applies them, which is legitimate enough, but they disguise the grounds on which he arrived at the judgment, often from himself as well as the reader. And such is the influence of words on thinking that their continued currency leads us to assume unthinkingly that the profession is in fact divided into two opposing camps.

The difficulties caused by abstract words have been explored by most of the recognized authorities on the writing of English. Many lawyers will be familiar with the sound sense and gentle humour of *The King's English* by H. W. and F. G. Fowler.[9] After advising readers to "Prefer the familiar word to the far-fetched", the Fowlers state as their second rule in the domain of vocabulary: "Prefer the concrete word to the abstract". Sir Arthur Quiller-Couch was even more emphatic. In his charming lectures to the students of Cambridge, published as *On the Art of Writing*, he advised them, "Always always prefer the concrete word to the abstract". The same principle is put in the latest, and to the lawyer most useful, brief study of writing, the *Plain Words* of Sir Ernest Gowers:

> Use words with a precise meaning rather than those that are vague, for they will obviously serve better to make your meaning clear; and in particular prefer concrete words to abstract, for they are more likely to have a precise meaning.[10]

To these books the reader should turn for illustrations of the obscurity that results from the excessive use of abstract words.

[9] The surviving of the two brothers, H. W. Fowler, was the author of another useful book, A Dictionary of Modern English Usage (1926).

[10] Plain Words: A Guide to the Use of English (London: His Majesty's Stationery Office, 1948).

Here a few examples, from my own experience, must suffice:

> Such expressions as 'shooting war' and 'cold war' are creeping into common usage and the influence of their significations is making itself felt in the legal aspects of the conditions they reflect.
>
> Apart from the question whether a person is an independent contractor, other problems have come before the Board in this connection.
>
> Having already considered the position in respect of an agency between the parties, it remains to consider whether the situation under discussion...
>
> As long as the situation exists as at present the matter must be most embarrassing and confusing to the police . . .
>
> This condition of affairs has led all those vitally interested to raise the question whether it would not now be opportune to restate both the substantive and administrative law in the light of modern conditions.

Even in their contexts passages like these make the reader pause and ask himself what is meant. Some of them may be open to other objections, but the chief cause of the obscurity of all is the use of such abstract, and therefore vague, words as *significations, aspects, conditions, question, problems, connection, position, situation, matter, affairs.* "Questions" and "problems" are always arising in law, and it is difficult to avoid these and like words, but the writer who makes the attempt will find his writing improving in precision.

Be precise; omit all words, particularly adjectives and adverbs, that are not essential to communicate the intended meaning. Adjectives and adverbs, properly used, add life to writing; superfluous adjectives and adverbs contribute to obscurity. Among the adjectives most commonly abused by lawyers are *clear, considerable, definite, due, essential, necessary, qualified, real, reasonable, serious, substantial, such* and *undue;* among the adverbs, *clearly, comparatively, completely, considerably, definitely, duly, essentially, necessarily, perfectly, really, relatively, quite, somewhat, substantially, unduly* and *very.* A few living examples will illustrate the point:

> This table will be *very* useful to a beginner but, with respect, would be *more* useful if the exact date were given, and not merely the year. [What is the difference between "*very* useful to a beginner" and "useful to a beginner", and if there is a difference then what is "*more* useful"?]
>
> A study of certain sections of the Unfair Competition Act makes it *perfectly* clear that a trade mark must be used in Canada or made known in Canada as a *necessary* prerequisite for valid registration. [Every schoolboy knows about "*most* unique" and so I make no comment on "*necessary* prerequisite", but is there enough difference between "clear" and *perfectly* clear" to justify another word?]

> He said to me that the Canadian Bar Review has such a high standard that *very* few have the time to give to the question of studying and getting up polished articles that would be acceptable. [What did the writer's informant mean — I mean where precisely did he intend the line to be drawn between "few" and "*very* few"?]
>
> In *due* time provision was made for a judge of the Supreme Court to sit as Deputy for the Governor. [If the writer of this intended to say that "At the *appropriate* time provision was made . . .", the italicized adjective serves a purpose, but if, as is more likely, he intended to express no opinion on the length of time that elapsed, *due* should have been omitted.]
>
> The conference was *in every way* an *unqualified* success. [Did the writer mean that "The conference was *in every way* a success", that "The conference was an *unqualified* success" or merely that "The conference was a success"?]

Adjectives and adverbs used over and over again in this way give an atmosphere of school-girlish breathlessness to a composition that annoys the fastidious reader. They are meaningless, and therefore superfluous, unless a standard of comparison is expressed or implied in the context. Their authors appeared to offer no standard and the italicized words should have been omitted, as they might well have been in the following passages also:

> Moreover the present state of the law leaves collateral issues in a *completely* unsatisfactory state.
>
> Mr. Doe's book is *considerably* livened by the *liberal* use of striking metaphors and similes.
>
> In all cases the time limits should be *carefully* observed since the Board tends to be *rather* strict in the matter.
>
> *Considerable* light is shed on the status of employers of less than three employees by . . .

The adjective *such* so pervades legal writing that it deserves separate treatment. To avoid repetition that would otherwise be necessary, *such* is sometimes legitimate in legislative drafting where its noun has previously been used with a series of qualifying adjectives or a long qualifying clause. The following subsection, taken at random from the Statutes of Canada for 1948, is a good illustration:

> (2) Whenever it is made to appear to the satisfaction of a judge of any Superior or County Court that any person who resides out of Canada is able to give material information relating to an offence for which a prosecution is pending under this Part, or relating to any person accused of *such* offence, *such* judge may by order under his hand, appoint a commissioner or commissioners to take the evidence, upon oath of *such* person.

Of the three uses of *such* in this subsection, the first is probably

legitimate, the second is superfluous and the third is doubtful. Be that as it may, the lawyer who is tempted to use the word should always pause to ask himself if it is necessary. Many of us seem to tack it automatically to any noun we have already used in the same passage:

> I therefore take it that the informant, Constable Doe, laid the information and attended at the prosecution in the magistrate's court, in performance of his duties as *such* constable. [Substitute *a* for *such*.]
>
> This is an attempt to remedy the situation already outlined, whereby it was held in the *Doe* case and in *Roe* v. *Brown* that the mortgage clause was of no effect if the insurance clause was void ab initio. But *such* attempt would only succeed if *such* invalidity arose from anything contained in, or omitted from, the application or proposal for insurance. [Substitute *the* for *such* in both cases.]

Such are some of the objectionable uses of *such*.

The excessive use of the relative *which* seems to be an endemic disease among lawyers. Relative clauses are common in our writing, perhaps inevitably, but it is not inevitable that they should all be introduced with *which*. "Whichitis" is a troublesome rather than a fatal disease; sentences like the following are certainly ungraceful though perhaps they cannot be called incorrect:

> Whether this provision is a wise one and one *which* should be retained in the law is a question *which* I shall discuss later.

The Fowlers recommend a cure while conceding that it is not always easy to apply. The problem is to decide when to introduce a relative clause with *that* and when with *which* (or *who*). For this purpose they[11] divide relative clauses into what they call "defining" and "non-defining". A defining clause, they say, should be introduced, generally, with *that* and a non-defining clause, always, with *which* (or *who*). The function of a defining clause is to limit the application of the antecedent; of a non-defining clause to give independent comment, description, explanation, anything but limitation of the antecedent. A defining clause is essential to and inseparable from its antecedent; on the other hand, a non-defining clause can always be rewritten as a parenthesis or lifted out and made a separate sentence without disturbing the truth of what remains. Here is the test: if when you detach a relative clause from its sentence the remaining part is left either with no meaning or a wrong meaning the clause is a defining clause. In the spoken language, add the Fowlers, a relative in the objective case can be dropped at the

[11] The King's English, pp. 75ff. Their explanation is not as clear as it might be, perhaps, but the numerous illustrations will assist the reader.

beginning of a defining clause, though never of a non-defining clause; I should add that it can often be omitted with advantage from a defining clause in the written language too.

The sentence last quoted could therefore, and I think should, be rephrased as:

> Whether this provision is a wise one and one *that* should be retained in the law is a question I shall discuss later.

Both relative clauses here are defining. So is the relative clause in the sentence, "There are other criteria *which* can be offered", which should be rephrased, "There are other criteria *that* can be offered" (or better still, perhaps, "Other criteria can be offered"). Similarly, "An innocent person might be prevented from making a statement *which* might assist to clear him of the charge . . ." becomes "An innocent person might be prevented from making a statement *that* might assist to clear him of the charge . . .", and "The board has from time to time laid down the general principles *which* it follows in deciding the appropriate unit" becomes "The board has from time to time laid down the general principles it follows in deciding the appropriate unit".

III. *The Arrangement of Words*

Some years ago a college freshman approached a professor with a request. The freshman, later to become the editor of a Canadian legal periodical, wanted to write during the summer vacation and asked for a subject to practise on. Now the professor was Dr. Archibald MacMechan of Dalhousie College, a great teacher and a master of English, and it was not his habit to discourage even the most callow student. It appeared that he had a subject to suggest; he had intended to write on it himself, but other things had prevented and the freshman was welcome to it. There was a condition however. He proposed that the freshman should follow the lines of inquiry he outlined, prepare a first draft, and let him look at it. Then they might take a walk together through Halifax's Point Pleasant Park and discuss what had been done. The procedure was followed, and it was during that first visit to the park that the student began to see what was involved in the business of writing and, incidentally, of great teaching. The draft was revised, and other walks followed and other revisions until the manuscript met the teacher's minimum standards, and the summer had passed. And later still, when the essay was published — the work of my hand but of another's brain — it would be difficult to say whether the teacher or the student was the more pleased.

It may have been during one of those walks together, or perhaps after the results had appeared, that I asked "Archie" MacMechan to sum up in a sentence his advice to writers. His answer has remained with me through the years and I still believe it to be the key to good writing, at least of the kind I am here discussing: Before you begin to write and as you write, try always to put yourself in your reader's shoes. The rule has many applications: in the choice of words, vocabulary, as well as in the arrangement of words in phrases, sentences, paragraphs and groups of paragraphs — a more difficult skill to acquire.

Vocabulary aside, what has the reader a right to expect from a writer? The first quality required of a lawyer in his writing is clarity. Of course clear writing assumes clear thinking; the writer must have mastered his subject and arrived at definite conclusions about it. Then comes the communication of the thought. A lawyer's writing must be orderly. His facts, arguments and conclusions should be so arranged, so organized, that the reader can grasp them with a minimum expenditure of effort and time.

If we are to organize our material clearly, we must not hesitate to appear elementary. On the tip of the novice writer's tongue are a spate of facts tumbling over one another to get on paper, and at the back of his mind assumptions that he has never defined even to himself or, if he has, have become so obvious he no longer thinks much about them. Being full of his subject, he has a tendency to take fundamentals for granted and forget to state them. Then there is the writer, usually older, who writes entertainingly and whose style is good — even distinguished — but who never stops to clinch one phase of his argument before he moves to the next. He it is who is always about to say something decisive, but never quite comes to it; everything is left to vague and genteel implication. And there is still another writer, common in law, who starts writing before he knows what his final attitude to his subject is to be. He takes his reader through each step of the mental process by which he himself arrives, or hopes to arrive, at a conclusion; the facts of a series of cases are stated, and the judges' reasons summarized, but until the last page the reader never quite knows why. These writers put an unfair burden on the reader. Before he starts writing, and continually as he goes along, the writer must pause to ask himself what a reader coming to the subject for the first time, and unlikely ever to return to it, will want to know. The significance of what is being said must be spelled out continually.

Two mechanical devices, inappropriate to narrative, but almost essential in expository writing of any length, will help the reader to understanding. One is to tell him at the beginning the ground to be covered and the conclusion to be arrived at. What are the issues? Why is the writer inviting attention? Of what does he hope to persuade the reader? When these questions are answered early the reader is in a position to understand the significance of each statement as it is made, to appreciate how each paragraph and each sentence fits into the general pattern. Another helpful device is to erect, as it were, signposts along the way. At intervals what has gone before is summed up and a warning is given of what is to come, "Having established so-and-so", the writer says in effect, "I shall now turn to so-and-so". Like all "tricks", these devices will be annoying to the reader if they are used too obviously, but with practice will come the skill to disguise them.

The commonest, and least excusable, cause of obscurity in the writing of Canadian lawyers is the use of a reference word like *it, they, this, that, here, there* or *which* without making clear the antecedent to which it refers. Sometimes the antecedent is grammatically uncertain, but otherwise obvious; sometimes the reader is left in genuine doubt of the intended meaning:

> It is of some interest that the Master of the Rolls retained the exceptional privilege of sitting in the House of Commons until *it* was abolished by the Judicature Acts, 1875. [Grammatically, the antecedent of *it* may either be "privilege" or "House of Commons", but since the House of Commons has not yet been abolished the reader is safe in concluding that the author intended to refer to the abolition of the privilege.]
>
> The judge found adultery proved, but exercised his discretion against granting the petition, basing *this* on the conduct of the husband over a term of years which he held was conducive to adultery. [Here *this* might refer either to the finding that adultery was proved or to the exercise of discretion; the reader would have been saved a momentary hesitation between the two had the author substituted "his refusal" for *this*.]
>
> Consider first the mortgagee's position where there is no mortgage clause. *It* is then either simply an insurance by the mortgagee at his own expense of his own interest or by the mortgagor as owner with loss payable to the mortgagee. [The antecedent of *It* in this quotation seems at a first glance to be either "position" or "clause", but it can be neither. The context suggests that the author used *It* instead of "insurance" to avoid repeating "insurance" too soon.]
>
> As mentioned previously, section 5(a) gives the Board power to decide the appropriate unit of employees for the purpose of bargaining collectively. *This* of course involves a consideration of the questions of jurisdiction and whether . . . [Here *This* might conceivably refer to giving the Board power, to deciding the appropriate unit or to bargaining collectively.]

This and *that*, *here* and *there*, are particularly dangerous in passages containing more than one case citation. When *this* is contrasted with *that* and *here* with *there* in conversation, *this* and *here* are usually applied to something close at hand, *that* and *there* to something more distant. In the two following sentences, *this* and *here* may or may not be preferable to *that* and *there*, but what the sentences really need is complete recasting:

> It is to be noted in the *Doe* case that the Supreme Court of Canada adopted *Rex* v. *Roe*. In *that* case the defence was accident. [Grammatically, the antecedent of *that* may be either the *Doe* case or the *Roe* case, with a presumption in favour of *Doe*, but the author had previously mentioned the defence in *Doe* and must by "*that* case" mean *Rex* v. *Roe*.]
>
> This case may be compared with the decision of the Court of King's Bench in *Smith* v. *Brown*. *There* lightning rods had been sold . . .

Legislative draftsmen are careful about reference words — sometimes overly careful — and where ambiguous references occur in the lawyer's ordinary writing they derive from speech rather than statutes. Usually they will be found where the author has dictated his material and failed to revise the transcript adequately. In speaking the fault may not be serious because the intonation of the voice helps to avoid an ambiguity that becomes noticeable only when external aids to understanding are absent. The safest course in writing is to be sure that each reference word has as antecedent a single and easily identified *word*.

Next the reader is entitled to ask that a writer be concise, which to me is not the same as being brief. We have a passion nowadays for brevity: be brief, we are told, use short words, short sentences, short paragraphs, get it on one sheet of paper. The advice may be given from a belief that the modern reader is too busy, or too lazy, to read anything he cannot understand at a single glance, and the belief has some grounds. But it is wrong for a writer to assume that if only he is brief meaning and style will take care of themselves; the stubborn meaning and the elusive style do not take care of themselves, and the brief statement is often so brief that it conveys an imperfect meaning or conveys it so ungracefully as to leave no lasting impression. Brevity is a fickle goddess to pursue too passionately. To be brief is not necessarily to write good English; if it were, a chemical formula or a ticker tape would be literature. Probably it would have been better, if less brief, had I stated the requirement by saying that the reader is entitled to ask that a writer be as concise as is consistent with ready and pleasurable understanding.

I was surprised at first when I came upon a passage of

Stephen Leacock's in which he rather belittled the paragraph, but the explanation is that he had in mind a particular kind of easy, informal writing making no great demands on the reader's intellect.[12] In newspaper writing, for example, the paragraph is used to mark a visual break rather than a break in sense; a reporter tends to be cynical about the intellectual attainments of his readers and ruthlessly to clip a paragraph short, regardless of meaning, whenever he thinks that they have reached the end of their capacity for sustained attention. The same purpose sometimes leads more leisurely writers to the absurdity of turning every sentence, or at most every two or three sentences, into a paragraph.

The closely reasoned argument of the lawyer requires different treatment. Like Aristotle's tragedy, a lawyer's paragraph should have, usually, a beginning, a middle and an end. Each paragraph should mark a clearly defined step advancing the argument along the way. In the first sentence or two the reader should be told, or better still should be put in a position to gather, what phase of the subject is to be dealt with in the paragraph; and the last sentence or two should lead him smoothly to the next step. Of course, paragraphs should not be too long; my point is that that they should be a matter of meaning rather than appearance. If the result is a degree of formality that the late Professor Leacock would have disliked the answer is that in the kind of writing the lawyer does some formality is inevitable.

Conciseness does mean avoiding another of the hall-marks of legalese, circumlocutions like *by reason of, by virtue of* (how tiresome virtue is sometimes), *for the purpose of, from the point of view of, in connection with, in regard to, in respect of, in the case of, in the event that, with a view to, with reference to,* and *with respect to.* Conciseness in the arrangement of words is the quality comparable with preciseness in the choice of words. Indeed, the Fowlers, Quiller-Couch and Gowers deal with circumlocutions under vocabulary, but classification does not matter greatly; everyone unites in warning against them. "Prefer the single word to the circumlocution" say the Fowlers, and "almost always prefer the direct word to the circumlocution" says Quiller-Couch. Gowers links them with superfluous adjectives and adverbs, already discussed, and says: "Use no more words than are necessary to express your meaning, for if you use more you are likely to obscure it and to tire your reader. In particular do

[12] Leacock: How to Write (1946), pp. 74-8. For this reason the book is not especially helpful to lawyers.

not use superfluous adjectives and adverbs and do not use roundabout phrases where single words would serve."

Even worse are the circumlocutions that cluster about *as to* and *whether*. Examples are *as to how long, as to what, as to whether, about whether, irrespective of whether, with respect to whether*, often with *or not* added to the *whether*. In my experience *as to* has always been superfluous in the phrases in which it appears and all words except *whether* in those in which it appears. Here are some illustrations: "the question arises *as to what* the law should be"; "the only question remaining for consideration by the Judicial Committee of the Privy Council is *as to whether or not* the exemption provision is capable of the wide and all inclusive application given to it by the Supreme Court"; "it is clear that the majority of the court were of opinion that survivorship interests are taxable *irrespective of whether or not* a gift could be said to have been made"; and "a similar problem arises *with respect to whether* a certain person is an 'employer' within the meaning of the Act".

A mixed bag of circumlocutions can be disposed of together. *As to* itself should be avoided if for no other reason than that it is used frequently by lawyers and seldom if ever by respected authors. Always a single word can be substituted for it or the sentence reworded to omit it: ". . . and the case might arise where there was a dispute between the mortgagor and the mortgagee *as to* the amount of the loss" would be better as ". . . and the case might arise where there was a dispute between the mortgagor and the mortgagee *over* the amount of the loss"; and "It happened that Doe first made a confession *as to* these murders to a member of the Royal Canadian Mounted Police" might be rephrased as "It happened that Doe first confessed these murders to a member of the Royal Canadian Mounted Police". Again, *all of* or *both of* should not be used for a precise *all* or *both* in such a phrase as "In practically *all of* the cases where licensing powers have been vested. . .". Indeed, since in the context *cases* is an abstract word and not an equivalent for "court cases", the phrase might with advantage be rearranged, for example: "Almost always when licensing powers have been vested. . .". Lastly, there are *prior to* and *subsequent to*, those would-be impressive substitutes for a simple *before* or *after*.

An editor is sometimes asked about the propriety of using the personal pronouns in legal writing. Opinions may differ over the plural form — *we, us, our* or *ours* — but for an individual to use it when he speaks for himself alone may sometimes be mis-

leading and is always, it seems to me, an affectation. Different consideration apply to the singular, *I, me, my* or *mine*. Undoubtedly its excessive use communicates an impression of egotism, at best of monotony, and is objectionable. But many a lawyer writes of the law as if it were the Covenant revealed to Moses on Mount Sinai, upon which it would be impious to dare a personal comment; and if he finds himself in a position where comment is unavoidable then, at whatever sacrifice, it must be camouflaged with a circumlocution. Instead of "I think that . . .", or some such personal expression of opinion, he uses an impersonal construction and writes "it is submitted that . . .", "it seems clear that. . .", "it is considered that . . .", or even "it is conjectured that . . .". Where he might properly write "it seems to me", he writes instead "it seems to the writer" or sometimes even "it seems to the undersigned". This unrelenting exclusion of the writer's personality may be thought to be required in a dignified subject like the law, but it often leads the lawyer into over-formality, rigidity of style, stiltedness. If I mean that "I think so-and-so", why, in moderation, should I not be direct and write that "I think so-and-so"?

For myself I like to find some indication in my legal reading that his subject meant more to the writer than a syllogism of logic. This page, as it happens, is being written on a beautiful autumn afternoon in a room on the sixteenth floor of a Montreal office building. Directly below is the old quarter, with its small shops, its wholesalers and its docks. From around the corner come the noises of the Place d'Armes and the city's financial center. The industries of St. Henri lie just out of sight to the right and, of Maisonneuve, to the left. Across the St. Lawrence are the residential suburbs of St. Lambert and Longueuil, and then the rich farms of the Eastern Townships stretching right away to the horizon. These, and the people working and living there, are the stuff of the law.

Experience has taught lawyers, with civil servants and others, the danger of the unconditional statement, and they can hardly be blamed if sometimes they qualify what they say with such words as *generally, usually* and *probably*. It is when their timidity makes them half-apologize for what they are going to write by beginning with a hackneyed pad like *I venture to suggest* or *I would be inclined to surmise* that they invite criticism. Other examples are: *at the outset it may be useful, it is of some interest, it might be noted in this connection, one should not lose sight of the fact, it seems plain, it is interesting to note in passing, it is elemen-*

tary to state, and *it may usefully be recalled*. A writer need seldom apologize, by implication or directly. If he expresses, sincerely and after inquiry, something worth saying, no apology is necessary; if he does not, he should not be writing at all. And when in addition his expression is hackneyed, it is doubly damned.

Peculiar to lawyers are the similar phrases, *with respect, with great respect, with deference* and *with all deference*, which we interject when disagreeing with the bench or some other authority presumably entitled to respect. Sometimes a lawyer uses them without much thought; sometimes, intentionally because, to be frank, he fears that the bench will resent what he has written and retaliate later. It is right that we should respect the judges and word dissent with courtesy and restraint, but I doubt if the interjection of *with respect* turns a disrespectful into a respectful statement or that it adds much to one that is respectful anyway. When the respect is qualified by *due*, the compliment is decidedly doubtful. "With all *due* respect" or "all *due* deference" may mean no more than "with all the respect or deference that are due you, the judge, in the circumstances", which in the writer's mind may be little enough.

Some amusing words have been invented to describe the writing whose lack of conciseness, whose circumlocutions and padding, make understanding difficult. "Gobbledygook", my own favourite, is an invention of Mr. Maury Maverick, an ex-Congressman and civil servant, who was moved to protest by his experience of it in wartime Washington. "Gobbledygook", he says, "is talk or writing which is long, pompous, vague, involved, usually with Latinized words. It is also talk or writing which is merely long, even though the words are fairly simple, with repetition over and over again, all of which could have been said in few words". Of the origin of the term he says later: "It must have come in a vision. Perhaps I was thinking of the old bearded turkey gobbler back in Texas who was always gobbledygobbling and strutting with ridiculous pomposity. At the end of his gobble there was a sort of gook."

The last of the qualities required of the lawyer-writer is simplicity, simplicity in *how* he writes not of course in *what* he writes. It is the thread running through all that has been said and little remains to add. The thought is the important thing in a lawyer's writing and anything that obstructs the communication of it should be trimmed away or altered. Almost always what the first expression of thought needs is simplification, not embroidery, and simplification implies the choice of familiar,

concrete and precise words, and clarity and conciseness in the arrangement of them. But simplicity is a matter of attitude as well as rules, the closest synonyms here being honesty, genuineness, sincerity. How easy writing would be if we could approach what we have to say with the intellect of the adult and how we are to say it with the spirit of the little child.

IV

This article, like most writing on writing, has been concerned mainly with what to avoid. Achieving a style is another matter, for style is an emanation of the personality, which in turn is the intangible result of heredity, environment, upbringing and experience; in short, a writer's style depends on the sort of person he is. We admire, and rightly, the style of the great English judges and lawyers, but I think we make a mistake to mimic them. A Canadian lawyer is as likely to achieve the peculiar quality of the best English legal writing as he is to spread his gown and go soaring over the moon. Instead our aim should be to develop a good, honest Canadian style of our own, which will express our Canadian individuality. And the first step toward a sound style is to avoid those obvious defects that antagonize a reader, even if he does not know precisely why.

The student of law has been especially in my mind during the preparation of these pages and I want to end by addressing a few words directly to him. It would be pleasant if, in advising him to work at his writing, one needed only to say that for a member of a learned profession the doing of something well is in itself reward enough, but I shall put it differently. My argument is that an illiterate lawyer is a bad lawyer and that any lawyer becomes a better lawyer as his literacy increases. Lord Macmillan was right when he said a few years ago that "the possession of a good literary style . . . is one of the most valuable of all professional equipments".[13] To strive to write well, or at least competently, is not to be "academic" or "impractical". Facility in writing may not bring quick or obvious financial rewards, but want of facility is a handicap; for the lawyer writing is of the same order of importance as the multiplication table or the handling of one's knife and fork.

There are less useful skills than writing that a law student might spend his energies in acquiring. Never make the mistake of assuming that good writing is beyond your capacity. Many

[13] The Rt. Hon. Lord Macmillan in an address, Law and Letters, to the American Bar Association (1930), 16 A.B.A.J. 662, at p. 664.

students have been discouraged by the misconception that one either knows how to write or one does not. The Fieldings, the Bacons and the Sheridans may be born and not made — certainly inborn talent helps — but most of the good writers you will come upon in your legal studies were made. The truth is that learning to write is like learning any other of the lawyer's skills —a matter of instruction, practice, criticism, and more practice.

The usefulness of writing as an educational tool is sometimes overlooked.[14] In learning to write well we necessarily learn to think clearly. Indeed the two processes — thought and expression — cannot be separated. Did not the Greeks apply the same word *logos* to both: reason (or thought) and language (or expression)? In a well-known passage Francis Bacon, later Lord Chancellor of England, said that writing maketh an exact man, but I think it could be put even higher than that. The act of writing, or trying to write, does crystallize, refine, focus thought, but it does more; to some degree, it stimulates thought, even creates it.

Although the principles of competent writing are few and not difficult to learn, the act of writing itself, even for the man who knows them, is hard, hard work. There may be lawyers who can dictate at a first attempt a really adequate draft of a lengthy piece, but I have yet to meet them. ". . . easy writing's vile hard reading", said Richard Brinsley Sheridan, who himself had once studied law. When you find writing you instinctively know to be good, you can be almost sure that the writer has spent many hours on it — selecting, comparing, pruning, rearranging, patching, polishing — refining it always until the finished product reaches you. Perhaps writing comes easier with the years, but in my experience there is no royal road to a mastery of the King's English.

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[14] For an account of an interesting experiment at the University of Chicago Law School see Harry Kalven, Jr., Law School Training in Research and Exposition: The University of Chicago Program (1948), 1 Journal of Legal Education 107.