LAW AND LITERATURE *

FOREWORD

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

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

J. M. Landis.

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I AM told at times by friends that a judicial opinion has no business to be literature. The idol must be ugly, or he may be taken for a common man. The deliverance that is to be accepted without demur or hesitation must have a certain high austerity which frowns at winning graces. I fancy that not a little of this criticism is founded in misconception of the true significance of literature, or, more accurately perhaps, of literary style. To some a clearer insight has been given. There are those who have perceived that the highest measure of condensation, of short and sharp and imperative directness, a directness that speaks the voice of some external and supreme authority, is consistent, none the less, with supreme literary excellence. A dictum of Henri Beyle's, recalled not long ago by Mr. Strachey, will point my meaning. The French novelist used to say that "there was only one example of the perfect style, and that was the Code Napoléon; for there alone everything was subordinated to the exact and complete expression of what was to be said." The poor man succumbed to its charm to such an extent that he was in the habit of reading a few paragraphs every morning before breakfast. I do not seek to substitute this regimen for the daily exercise in calisthenics. Some of us prefer our literature like our food in less concentrated tablets. I do no more than suggest that the morsel hastily gulped down may have a savor all its own for the discriminating palate.

But I over-emphasize and exaggerate if I seem to paint the picture of any active opposition that is more than sporadic and exceptional to so amiable a weakness as a love of art and letters. A commoner attitude with lawyers is one, not of active opposition, but of amused or cynical indifference. We are merely wasting our time, so many will inform us, if we bother about form when only substance is important. I suppose this might be true if any one could tell us where substance ends and form begins. Philosophers have been trying for some thousands of years to draw the distinction between substance and mere appearance in the world of matter. I doubt whether they succeed better when they attempt a like distinction in the world of thought. Form is not something added to substance as a mere protuberant adornment.

The two are fused into a unity. Not long ago I ran across a paragraph in the letters of Henry James in which he blurts out his impatience of these attempts to divide the indivisible. He is writing to Hugh Walpole, now a novelist of assured position, but then comparatively unknown. "Don't let any one persuade you — there are plenty of ignorant and fatuous duffers to try to do it — that strenuous selection and comparison are not the very essence of art, and that Form *is* not substance to that degree that there is absolutely no substance without it. Form alone *takes*, and holds and preserves substance, saves it from the welter of helpless verbiage that we swim in as in a sea of tasteless tepid pudding." This is my own faith. The argument strongly put is not the same as the argument put feebly any more than the "tasteless tepid pudding" is the same as the pudding served to us in triumph with all the glory of the lambent flame. The strength that is born of form and the feebleness that is born of the lack of form are in truth qualities of the substance. They are the tokens of the thing's identity. They make it what it is.

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

I suppose there can be little doubt that in matters of literary style the sovereign virtue for the judge is clearness. Judge Veeder in his interesting and scholarly essay, "A Century of Judicature," quotes the comment of Brougham upon the opinions of Lord Stowell: "If ever the praise of being luminous could be bestowed

upon human compositions, it was upon his judgments." How shall his successors in the same or other courts attain that standard or approach it? There is an accuracy that defeats itself by the over-emphasis of details. I often say that one must permit oneself, and that quite advisedly and deliberately, a certain margin of misstatement. Of course, one must take heed that the margin is not exceeded, just as the physician must be cautious in administering the poisonous ingredient which magnified will kill, but in tiny quantities will cure. On the other hand, the sentence may be so overloaded with all its possible qualifications that it will tumble down of its own weight. "To philosophize," says Holmes in one of his opinions — I am quoting him from uncertain and perhaps inaccurate recollection — "to philosophize is to generalize, but to generalize is to omit." The picture cannot be painted if the significant and the insignificant are given equal prominence. One must know how to select. All these generalities are as easy as they are obvious, but, alas! the application is an ordeal to try the souls of men. Write an opinion, and read it a few years later when it is dissected in the briefs of counsel. You will learn for the first time the limitations of the power of speech, or, if not those of speech in general, at all events your own. All sorts of gaps and obstacles and impediments will obtrude themselves before your gaze, as pitilessly manifest as the hazards on a golf course. Sometimes you will know that the fault is truly yours, in which event you can only smite your breast, and pray for deliverance thereafter. Sometimes you will feel that the fault is with counsel who have stupidly misread the obvious, in which event, though you rail against the bar and the imperfect medium of speech, you will be solaced, even in your chagrin, by a sense of injured innocence. Sometimes, though rarely, you will believe that the misreading is less stupid than malicious, in which event you will be wise to keep your feelings to yourself. One marvels sometimes at the ingenuity with which texts the most remote are made to serve the ends of argument or parable. But clearness, though the sovereign quality, is not the only one to be pursued, and even if it were, may be gained through many avenues of approach. The opinion will need persuasive force, or the impressive virtue of sincerity and

fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of the proverb and the maxim. Neglect the help of these allies, and it may never win its way. With traps and obstacles and hazards confronting us on every hand, only blindness or indifference will fail to turn in all humility, for guidance or for warning, to the study of examples.

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

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

John Marshall and the Constitution, shows how even his contemporaries, the bitterest critics of his aggrandizement of federal power, were touched by this illusion. "All wrong, all wrong," lamented John Randolph of Roanoke, "but no man in the United States can tell why or wherein." I have reread a few of the most famous of his judgments: Marbury *vs.* Madison; Gibbons *vs.* Ogden; McCulloch *vs.* Maryland; they are all in the grand style.

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

One will find this same suggestion of sure and calm conviction in some of the judgments of Lord Mansfield. The slave Somerset captured on the coast of Africa, is sold in bondage in Virginia, and brought to England by his master. The case comes before Mansfield on the return to the writ of habeas corpus: "The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only positive law, which preserved its force long after the reasons, occasions, and time itself from whence it was created, are erased from memory. It is so odious that nothing can be suffered to support it, but positive

law. . . . I care not for the supposed *dicta* of judges, however eminent, if they be contrary to all principle. The *dicta* cited were probably misunderstood, and at all events they are to be disregarded. Villainage, when it did exist in this country, differed in many particulars from West India slavery. The lord never could have thrown his villain, whether *regardant* or *in gross*, into chains, sent him to the West Indies, and sold him there to work in a mine or in a cane field. At any rate villainage has ceased in England, and it cannot be revived. The air of England has long been too pure for a slave, and every man is free who breathes it. Every man who comes into England is entitled to the protection of English law, whatever oppression he may heretofore have suffered, and whatever may be the color of his skin. '*Quamvis ille niger, quamvis tu candidus esses.*' Let the negro be discharged."

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

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

One cannot face the law in this spirit of cautious seeking with-

out showing the changing point of view in a changing style and form. Universals will be handled more charily under the dominance of such a philosophy than in days when the law of nature supplied us with data that were supposed to be eternal and unyielding. Yet there are times even now when the magisterial method is utilized by men who know that they are masters of their calling. It is still utilized in fields where some established principle is to be applied to new facts or where the area of its extension or restriction is fairly obvious or narrow. But alas! even then it is the masters, and no others, who feel sure enough of themselves to omit the intermediate steps and stages, and leap to the conclusion. Most of us are so uncertain of our strength, so beset with doubts and difficulties, that we feel oppressed with the need of justifying every holding by analogies and precedents and an exposure of the reasons. The masters are content to say, "The elect will understand, there is no need to write for others." Perhaps there are opinions by Mr. Justice Holmes in which this mood can be discerned. The sluggard unable to keep pace with the swiftness of his thought will say that he is hard to follow. If that is so, it is only for the reason that he is walking with a giant's stride. But giants, after all, are not met at every turn, and for most of us, even if we are not pygmies, the gait of ordinary men is the safer manner of advance. We grope and feel our way. What we hand down in our judgments is an hypothesis. It is no longer a divine command.

I pass to other types which run into each other by imperceptible gradations, the laconic or sententious and the conversational or homely. There has been no stage of our legal history in which these methods have been neglected. The Year Books are full of wise saws and homely illustrations, the epigram, the quip, the jest. Perhaps this is but a phase of that use of the maxim or the proverb which is characteristic of legal systems in early stages of development. Dean Pound in a recent paper has traced the growth and function of the maxim with all the resources of his learning. If the maxim has declined in prevalence and importance, now that the truths of the law have become too complex to be forced within a sentence, there has been no abatement of recourse to the laconic or sententious phrase, to drive home and imbed what might other-

wise be lost or scattered. Who will resist Lord Nottingham's adjuration: "Pray let us so resolve cases here, that they may stand with the reason of mankind when they are debated abroad"? Is there any armor proof against a thrust like the dictum of Lord Bowen's: "The state of a man's mind is as much a fact as the state of his digestion"? Next door to the epigram is the homely illustration which makes its way and sinks deep by its appeal to everyday experience. In the wielding of these weapons, the English judges have been masters. The precept may be doubtful in the beginning. How impossible to fight against it when the judge brings it down to earth and makes it walk the ground, the brother of some dictate of decency or of prudence which we have followed all our lives. Perhaps the kinship is not so close or apparent as it is figured. Who of us will have the hardihood to doubt the reality of the tie when it is so blandly assumed to be obvious to all? The common denominator silences and satisfies. The rule that is rooted in identities or analogies of customary belief and practice is felt and rightly felt to be rooted in reality. We glide into acquiescence when negation seems to question our kinship with the crowd. Something must be set down also to the sense of fellowship awakened when judges talk in ways that seem to make us partners in the deliberative process. "I entirely agree with my right honorable and learned friend upon the woolsack." We seem to be let into the mysteries of the conference, the sacrosanct "arcana," to quote Professor Powell's phrase, to which "the uninitiated are not admitted." Given such an atmosphere, with point and pungency thrown into it, the product makes its way into every crack and crevice of our being.

I limit my illustrations, though many are available. Take this by Lord Bramwell: "It does not follow that if a man dies in a fit in a railway carriage, there is a *prima facie* case for his widow and children, nor that if he has a glass in his pocket and sits on it and hurts himself, there is something which calls for an answer or explanation from the company." Take this by Lord Blackburn: "If with intent to lead the plaintiff to act upon it, they put forth a statement which they know may bear two meanings, one of which is false to their knowledge, and thereby the plaintiff, putting that

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

Such qualities on the whole are rarer close at home, yet we have one judge even now who can vie with the best of his English brethren, past as well as present, in the art of packing within a sentence the phosphorescence of a page. If I begin to quote from the opinions of Mr. Justice Holmes, I hardly know where I shall end, yet fealty to a master makes me reluctant to hold back. The sheaf will be a tiny one, made up haphazard, the barest sample of the riches which the gleaner may gather where he will. Some hint of the epigrammatic quality of his style may be found in this: "The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike." In this: " We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." In this: " Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." And finally in this, words of solemn dissent, their impressiveness heightened by the knowledge that the cause has been already lost: " Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech

seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

There is another type or method which I have spoken of as the refined or artificial, smelling a little of the lamp. With its merits it has its dangers, for unless well kept in hand, it verges at times upon preciosity and euphuism. Held in due restraint, it lends itself admirably to cases where there is need of delicate precision. I find no better organon where the subject matter of discussion is the construction of a will with all the filigree of tentacles, the shades and nuances of differences, the slender and fragile tracery that must be preserved unmutilated and distinct. Judge Finch of the Court of Appeals of New York was an adept in the writing of opinions which carried with them this suggestion of precision and refinement. Occasionally, it shades into a faint and gentle sarcasm which is sometimes the refuge of the spokesman of a minority expressing his dissent. As an illustration, let me quote from the dissenting opinion in an election controversy which provoked in its day no little warmth of difference. The majority had held that despite the provision of the Constitution making each house of the legislature the judge of the elections, returns, and qualifications

of its own members, the courts would refuse affirmative aid to a claimant for such an office if it found him ineligible in its own view of the law. Judge Finch protested against this holding. "And so," he said, "I deny the asserted doctrine of 'Invocation'; of a right to do evil that good may come; of excusable judicial usurpation; and if the doctrine has anywhere got its dangerous and destructive hold upon our law, which I do not believe, it should be resolutely shaken off. But let us not deceive ourselves. The excess of jurisdiction is not even excusable, for it has neither occasion nor necessity." A moment later, he has his fears that he has been betrayed into excessive warmth. His closing words are those of apology and deference: "If what I have said does not convince the majority of the court, nothing that I can say will do so. I have tried faithfully, and, I hope, with proper respect, for certainly I have not meant to be wanting in that, to point out the mistake which, it seems to me, they are about to make. Theirs, however, must be both the responsibility and its consequences."

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

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

Judge Allen's opinion on the " code duello " among dogs, was on the whole a fine success, but it has been responsible for the writing of some others that were not. There is an opinion by Baron Bramwell which deals with the propensities of pigs. A fence was defective, and the pigs straying did mischief to a trolley car. The decision was that the barrier should have been sufficient to protect the adjoining owner against the incursions, not of all pigs, but of pigs of " average vigour and obstinacy." " Nor do we lay down," said the learned Baron, " that there must be a fence so close and strong that no pig could push through it, or so high that no horse or bullock could leap it. One could scarcely tell the limits of such a requirement, for the strength of swine is such that they would break through almost any fence, if there were a sufficient inducement on the other side. But the company are bound to put up such a fence that a pig not of a peculiarly wandering disposition, nor under any excessive temptation, will

not get through it." Perhaps the humor of this ruling was more unwitting than designed. Some may agree with Sir Frederick Pollock that the decision is "almost a caricature of the general idea of the 'reasonable man.'" In all this I would not convey the thought that an opinion is the worse for being lightened by a smile. I am merely preaching caution. Other flights and digressions I find yet more doubtful than the humorous. In days not far remote, judges were not unwilling to embellish their deliverances with quotations from the poets. I shall observe towards such a practice the tone of decent civility that is due to those departed.

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

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

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

I have touched lightly, almost not at all, upon something more important than mere felicities of turn or phrase. Above and beyond all these are what we may term the architectonics of opinions. The groupings of fact and argument and illustration so as to produce a cumulative and mass effect; these, after all, are the things that count above all others. I should despair, however, of any

successful analysis of problems at once so large and so difficult within the limits of this paper. One needs a larger easel if one is to follow such a map. Often clarity is gained by a brief and almost sententious statement at the outset of the problem to be attacked. Then may come a fuller statement of the facts, rigidly pared down, however, in almost every case, to those that are truly essential as opposed to those that are decorative and adventitious. If these are presented with due proportion and selection, our conclusion ought to follow so naturally and inevitably as almost to prove itself. Whether it succeeds in doing this or not is something about which the readers of the opinion are not always in accord. To gain a proper breadth of view, one should consult counsel for the vanquished as well as counsel for the victor.

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

A French judge, M. Ransson, a member of the Tribunal of the Seine, wrote some twenty years ago an essay on the art of judging, in which he depicts the feelings of a judge of the first instance when a judgment is reversed. I suppose the state of mind of one reversed is akin in quality to the state of mind of one dissenting,

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

I shall be traveling away from my subject if I leave the writing of opinions and turn to arguments at the bar. A word of digression may be pardoned, however, for the two subjects are allied. One is called upon often to make answer to the question, what sort of argument is most effective in an appellate court? Shall it be long or short, terse or discursive? Shall it assume that the judges know the rudiments of law, or shall it attempt in a brief hour to supply the defects in their early training? Shall it state the law or the facts? Shall it take up the authorities and analyze them, or shall it content itself with conclusions and leave analysis for the study?

There is, of course, no formula that will fit all situations in appellate courts or elsewhere. If, however, I had to prepare a list of "Don'ts" for the guidance of the novice, I think I would say that only in the rarest instances is it wise to take up one decision after another for the purpose of dissection. Such autopsies have their value at times, but they are wearisome and gruesome scenes. In my list of Don'ts, I would add, don't state the minutiae of the evidence. The judges won't follow you, and if they followed, would forget. Don't attempt to supplement the defects of early training. Your auditors are hardened sinners, not easily redeemed. Above all, don't be long-winded. I have in mind a lawyer, now lifted to the bench, who argued the appeals for one of the civil subdivisions of the State. His arguments lasted about a quarter of an hour. He told us his point and sat down. The audience in the rear of the court room might not applaud, but the audience in front did — at least in spirit — and since the latter audience has the votes, it is best to make your play for them. If you faithfully observe these cautions, let not your spirits droop too low when the decision is adverse, even though there be the added gall and wormwood of a failure of the court to crown your brilliant effort with the dignity of an opinion. Many a gallant argument has met the same unworthy fate.

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

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