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## Judicial Draftmanship

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## JUDICIAL DRAFTSMANSHIP\*

CHARLES A. BEARDSLEY†

NINE YEARS AGO, when I was president of the American Bar Association, I said out loud what members of the bar had long been whispering throughout the country—I said that the judges of our appellate courts were casting an all but unbearable financial burden upon the lawyers, by steadily and unnecessarily increasing the length of their opinions—printed copies of which opinions the lawyers must buy and store, if they are to continue to practice law. I did not then refer to any specific opinion, but I did point out that, on the average, the opinions are about six times as long as they were a century ago, and that, year by year, they are getting longer and longer.

I understand that this session of this section on Judicial Administration is devoted to a consideration of the question as to whether anything should and can be done about it. I vote “aye” on the “should,” and I vote “aye” on the “can.”

I take it that the invitation extended to me to speak to you is in the nature of a request, if not a challenge, to explain, and if possible to justify, my vote on these two questions. In responding to this request—in meeting this challenge—necessarily, I shall be critical of your opinions. Nothing that I shall say, however, should be construed as indicative of disrespect. I shall try to make the criticism constructive. I hope it will not hurt. If it does, permit me to remind you that you have asked for it.

It has occurred to me that, on this occasion, instead of talking exclusively about opinions generally, I had better talk about some specific opinions—as illustrative of opinions generally. As illustrative of the brief opinions of a century ago, I refer you to the opinion of the Supreme Court of California in a case I recently had occasion to cite—*Robinson v. Pioche*, 5 Cal. 460. Robinson fell into a hole in the sidewalk in front of Pioche’s store. When he sued Pioche for damages for his injuries, the evidence showed that, at the time of the fall, he was drunk. The trial court instructed the jury that, if his drunkenness con-

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\* An address delivered before the section on Judicial Administration, American Bar Association meeting, Seattle, September 6, 1948.

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tributed to his injuries, he could not recover. He didn't. He appealed. The opinion of the Supreme Court of California, by Mr. Justice Heydenfeldt, was only six lines long, as follows:

The Court below erred in giving the third, fourth and fifth instructions. If the defendants were at fault in leaving an uncovered hole in the sidewalk of a public street, the intoxication of the plaintiff cannot excuse such gross negligence. A drunken man is as much entitled to a safe street, as a sober one, and much more in need of it.

The judgment is reversed and the cause remanded.

Refreshing, isn't it?

I was somewhat uncertain as to where I should look for an example of a present day opinion—one to lay along side this six-line California Supreme Court opinion of a century ago. I rejected the idea of using one of the recent opinions of the Supreme Court of California. I wasn't sure that any of the judges of that court would be here to defend themselves. And, besides and more important, my law firm practices regularly before that court; and I did not desire to cause any undue resentment that might work to the disadvantage of a client. The Supreme Court of Washington seemed to be the best prospect. Not only was it extremely unlikely that I shall ever have occasion to practice before that court, but also it was the court that was most likely to be well represented at this meeting—the court that was most likely to have judges here who could defend themselves, if it should appear to them that any defense is available.

But what opinion of the Supreme Court of Washington? In order to avoid the possible temptation to search for the most horrible example of a present day opinion, I decided to select it by chance—to take the last opinion of that court in the last *Pacific Reporter* advance sheet—whatever that opinion might be.

I took the then last advance sheet off the shelf—this was as of about two months ago—I hadn't looked inside the cover before—and I found that the last Washington case there reported was *Thilman v. Thilman*, 193 P.(2d) 674.

The opinion is seventeen printed pages long as compared with the six line opinion in *Robmson v. Pioche*. I searched for the reason for its great length. I found that there was no substantial conflict in the evidence. I also found that the case involved very few questions of law—the industrious editorial staff of the West Publishing Company

could find in the seventeen pages material for only four paragraphs of syllabus.

What were these four legal questions, the decision as to which required seventeen printed pages? Were they new, doubtful, or difficult? No.

Here they are:

1. The opinion of the trial judge, as to the competency of one whom he saw and heard testify, is entitled to great weight.
2. The evidence sustained the trial judge's finding of competency, there being no evidence of incompetency
3. The evidence sustained the trial judge's finding that there was no undue influence, there being no evidence of undue influence.
4. *A* granted farm land to *B*, subject to *A*'s life estate, in consideration of *B*'s agreement to operate the farm, so long as he was physically able to do so, during *A*'s lifetime; *B*'s death in *A*'s lifetime did not result in a partial failure of consideration, since the agreement expressly provided that it should not so result.

I have studied the seventeen-page opinion carefully—I have read it at least a half dozen times. And I found no other legal point decided therein—only these four simple and self-evident legal points.

Seventeen printed pages! Why is it so long? There are several reasons. One reason is that the opinion cites, and quotes extensively from, the authorities in support of these self-evident legal propositions. Another reason is that the opinion sets forth several legal descriptions of tracts of country lands—none of which descriptions has anything to do with the decision in the case. Another reason is that the opinion quotes in full numerous pieces of documentary evidence, none of which, except a half dozen lines of one of them, has any pertinency whatever. And, primarily, the great length is due to the detailed family history—the family history of the Thilman family

I have taken the liberty of rewriting the opinion in *Thilman v. Thilman*.‡ I believe that the rewritten opinion adequately serves every purpose that could be served by an appellate court opinion in that case.

I would be glad if all of you who are interested in this problem would compare it with the seventeen page opinion in 193 P.(2d) 674. I doubt if any of you will feel that anything has been omitted that is necessary, or even useful.

This rewritten opinion is shorter. Its length is slightly less than 4

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‡ Mr. Beardsley's rewritten opinion appears at the end of this article.

per cent of the length of the original—the original more than twenty-five times as long as the revision!

It is because of such things as this that, nine years ago, I raised the issue as to the cost to the American lawyers of buying and storing printed copies of unnecessarily long opinions.

Serious as is the problem presented by this cost, it is only a part, and probably a comparatively small part, of the problem.

It would be well for us to consider the waste of time—waste of time of the legal profession, present and future—resulting from these long opinions—the waste of time incident to court opinions that are twenty-five times longer than necessary, as is this opinion in *Thilman v. Thilman*. This waste is apparent from many angles. First, there is the waste of time of the draftsman—the time spent in drafting a twenty-five unit opinion, when a one unit opinion would serve all useful purposes. Second, there is the waste of time of the other judges on the same court, who must read and comprehend twenty-five units instead of one unit in order to decide whether to concur or to dissent. Third, there is the waste of time of the editorial staff of the law publishers who must read the twenty-five units in search of syllabus and digest material. And, finally, and of the most far-reaching importance, there is the waste of time of every American lawyer, every American judge, and every American law student, who will ever have occasion to use that opinion in determining and applying the law as announced and applied therein. And that waste will continue as long as our civilization lasts.

It is impossible to measure accurately the cumulative effects of this waste. In the first instance, as I have observed, there is the waste of time of the judges of the court that hand down the opinion. There are nine judges on the Supreme Court of Washington, besides the author of the opinion, there are eight other judges to read and comprehend the twenty-five unit opinion, if the court sits in banc, four if in department. How many judges of other courts, how many lawyers, and how many law students will be victims of the waste caused by this twenty-five unit opinion nobody knows. This much, however, we do know—this opinion is supposed to be useful to members of our American society, as long as our civilization lasts, and every member of that society, who is served by it, will pay twenty-five times as many units of time for the service as the service is worth.

The twenty-five to one is a low estimate. Actually, it will cost them

more than twenty-five units, because a twenty-five unit opinion must be read several times before it is adequately understood. As I said before, I read the opinion in *Thilman v. Thilman* at least a half dozen times before I was sure I understood it. That raises the ration from twenty-five to one to one hundred and fifty to one. Maybe, that is too high as applied to long opinions generally—I don't know. So suppose we leave it at twenty-five to one. That, we may be sure, is the absolute minimum. That, surely, is bad enough.

Time is mankind's most precious asset. It is limited. It is irreplaceable. When twenty-five units of time are consumed in doing something that could be better done in one unit, the loss is very, very heavy. The result to society is incomprehensible; it could be fatal.

Yes, I vote "aye" on the proposition that something should be done about the great length—the obviously unnecessary length—of judicial opinions.

I now invite your attention to the second part of the question, on which I also voted "aye"—the question as to whether or not anything can be done about it.

The first thing that is necessary is for our appellate court judges to become persuaded that something should be done about it—to stop trying to brush aside criticism by the observation (which I have heard on more than one occasion) that there is nothing to it, because "I never heard a lawyer complain about the court's opinion, if the judgment is in his favor"—an observation that obviously avoids the issue—an observation that merely indicates that, in a particular case in which he appears, the lawyer is more concerned with the judgment of the court than with its opinion in that particular case—a concern that has nothing whatever to do with his concern, or with his lack of concern, with the mass of opinions in cases in which he does not appear—opinions that he must use in his service to his clients, as long as he practices law.

The judges can write shorter—much shorter—opinions, if they want to—if they will recognize the need, and apply themselves to meeting that need.

They can, if they will, leave out of their opinions numerous details that serve no useful purpose, such, for instance, as the long family history of the Thilman family.

They can announce long-established rules of law without long citation or quotation of supporting authority, and without long elabora-

tion. If a judge desires to make the point that two plus two equals four, it is unnecessary to do it like this: .

If, by the use of that arithmetical formula known as addition, we desire to arrive at the sum of two added to two, we will find—and we make this statement boldly, without fear of successful contradiction—we repeat, by the use of that arithmetical formula hereinbefore mentioned, we shall find—and we take full responsibility for the statement we are about to make—that the sum of the given two added to the other two will be four.

As someone has observed: “Another form of wastefulness is the expenditure of words beyond the income of ideas.”

The judges can also shorten their opinions by curing themselves of the practice—a cure that many lawyers might also profitably take—of using several words to express a meaning that is better expressed in one word. This is a common practice in opinion writing. Thus, in the opinion in *Thilman v. Thilman*, I note the following: “last will and testament,” meaning “will”, “vacating and setting aside,” meaning “vacating”, “cancel and set aside,” meaning “cancel”, “executed and delivered,” meaning “executed”, “made and entered into,” meaning “made”; “devising and bequeathing,” meaning “giving”, “named and appointed,” meaning “appointed”, and “adjudged and decreed,” meaning “decreed.”

They can also shorten, and otherwise improve, their opinions by using simple language—words of one syllable in preference to words of two or more syllables—in preference to long and little known words commonly used by lawyers and judges.

I have heard the argument advanced that simple language cannot properly be used in the law, because law is a “learned science,” and because “the higher level of culture, the less plain and simple the language.” I dissent, and in support of my dissent I quote the following authorities:

Longfellow: “In character, in manners, in style, in all things, the supreme excellence is simplicity”

Emerson: “Nothing is more simple than greatness; indeed, to be simple, is to be great.”

Philip J. Bailey: “Simplicity is Nature’s first step, the last of Art.”

St. Paul, a truly venerable authority, in his first epistle to the Corinthians, chapter 14, ninth verse: “So likewise ye, except ye utter

by the tongue words easy to be understood, how shall it be known what is spoken? for ye shall speak into the air."

The fact that law is a learned profession is no reason why, when what we mean is

"Twinkle, twinkle, little star,  
How I wonder what you are  
Up above the world so high,  
Like a diamond in the sky"

we should write or say

"Scintillate, scintillate, globule vivific,  
Fain would I fathom thy nature specific  
Loftily poised in ether capacious,  
Strongly resembling a gem carbonaceous."

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*Revision of Seventeen-Page Opinion of the Supreme Court of Washington*

130 Wash. Dec. 694, 193 P.(2d) 674 (1948)

The plaintiff, Margaret Thilman, deeded certain farm lands to her son, Francis Thilman. After Francis Thilman's death, this action was brought to set aside the deed, and contracts relating thereto, and to quiet title to the farm lands, upon three grounds, (1) Margaret Thilman's alleged incompetency (2) undue influence, and (3) partial failure of consideration.

The Superior Court decided (1) that Margaret Thilman was competent, (2) that there was no undue influence, and (3) that there was a partial failure of consideration, by reason of which the defendant, Myrtle Thilman, the widow of Francis Thilman, must pay \$5,350 to Margaret Thilman. Judgment was entered accordingly. The defendant appealed from the judgment, the plaintiffs cross-appealed. The questions presented for our decision are the propriety of the Superior Court's decision on these three points.

There was no evidence presented in support of the claims that Margaret Thilman was incompetent. All pertinent evidence indicated her competency. True, she was seventy-one years old, but, standing alone as it does, this fact has no tendency to impeach the trial court's finding. Furthermore the trial court saw and heard her testify, a fact which provides additional support for its finding of competency.

The finding that there was no undue influence is amply supported. In fact, there is no evidence to the contrary.

When Margaret Thilman deeded the farm to her son, she reserved a life estate in a fifty-two-acre parcel, and required him to work the parcel, she agreeing to pay him \$600 per year. The purported partial failure of consideration, and the consequent requirement of payment of \$5,350, are based on the fact that the son predeceased the mother. But the contract did not

impose upon the son the unqualified obligation to work the fifty-two acres as long as the mother lived, but only "so long as he is physically able" to do so, and it provided that, if during his mother's lifetime he should die, or become physically unable to work the farm, the only result would be that his \$600 per year salary should cease, and that otherwise "this agreement nevertheless in all respects shall remain in full force and effect and be enforceable by the parties hereto, their heirs," etc. Obviously, therefore, the son's death did not result in any partial failure of consideration, since the parties expressly agreed that it should not so result, and the Superior Court erred in deciding that the son's widow must pay the \$5,350.

The judgment is reversed, and the case is remanded to the superior court with instructions to dismiss plaintiff's action with prejudice, and to enter judgment quieting the title of the appellant, Myrtle Thilman, to the real estate described in the decree, subject only to the life estate of Margaret Thilman in the fifty-two-acre parcel.

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