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## THE "RECKONABILITY" OF APPEALS: THREE COMMENTS ON LLEWELLYN'S *DECIDING APPEALS*†

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*In Deciding Appeals, the late Professor Karl N. Llewellyn presents an American realist's account of the "reckonability" of appellate courts' decisions in the United States and an analysis of the various factors which influence courts in deciding cases.*

*In response to a request by the editors, Sir Henry Slessor comments on the applicability of Professor Llewellyn's views to the English appellate tribunals. Chief Justice Ilesley considers the "reckonability" of the results of Canadian appeals and mentions several problems of stare decisis peculiar to Canadian jurisprudence. Mr. Justice Kelly then gives a personal opinion as to the factors influencing Canadian judges in deciding appeals.*

### 1. *Sir Henry Slessor*

Although many books have been written on the subject of the Judicial Office, few, if any, have been devoted to the consideration of appeals. It may be of interest at the outset to enquire why the protection of appeals first arose. In all probability the demand for review derived from the ancient privilege of the subject to seek redress from the sovereign; this is peculiarly exhibited in the old Equity petitions before the practice became formalized. Similarly, in the Civil Law of Rome there was an appeal from the judgment of a criminal court to the "People"—the *provocatio*, and later, the Emperor became the final Court of Appeal—"the appeal to Caesar" of which we read in the Bible.

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† *The Common Law Tradition: Deciding Appeals*. By Karl N. Llewellyn. Boston: Little Brown and Company 1960. 565 pp.

The Senate, like the High Court of Parliament—in practice the House of Lords—is recognized in the Digest as having appellate jurisdiction and in the Privy Council of the British Commonwealth we see the Royal Prerogative, exercised on the advice of the Judicial Committee, functioning as a court of appeal—being of such a prerogative nature its opinions are not bound by previous decisions as are those of the House of Lords.

The Canon Law recognizes appeals to the Roman Papal Consistory, and political as well as legal considerations on the respective jurisdiction of Princes and Pontiffs are shown in the English legislation of Provisors and Praemunire. Attempts to limit the authority of the Supreme Court of the United States may perhaps fall into the same category.

The actual term “appeal” is rarely found in the British system before the passing of the Judicature Acts of the seventies. Before that time the Common Law appeals usually arose through consideration of the Record by “Writ of Error”, to be heard in the Exchequer Chamber. In Chancery it was by way of, “re-hearing” and in the United States both methods obtained.

The question of error on the face of the Record necessarily limit the jurisdiction of the Court—the difference in practice in England, where all Civil Appeals are now by way of re-hearing, distinguishes the practice in England from much of the procedural limitations still obtaining in the United States. But beyond this, the acknowledged power of the Supreme Court to declare acts of Congress unconstitutional and its authority to decide between conflicting claims of Federal and State Law have no counterpart in the United Kingdom, where the sovereignty of Parliament is absolute. In these circumstances the opinion of a Lord Justice or Law Lord on United States appellate problems can only be advanced with very considerable diffidence.

Yet this being conceded, there are many observations in this work which are of such general application that they call for comment. It is surprising for an Englishman to read that there is so much disquiet in legal circles, and even among the public at large, about the performance of the appellate courts: in England criticisms of the Judiciary are confined, for the most part, to the Voluntary Magistracy and the Jury system.

It has been pointed out by Pollock and others that lawyers, in advising their clients, must assume a certain predictability, based for the most part on the consideration of decided cases. It would appear from the author that the chief criticism of the United States' Bar is that many of the decisions of the Judges are no longer what he calls “reckonable”; that is that many appeals are decided by judges who do not follow precedent sufficiently but “decide as they please”.

How far this anxiety is justified—Llewellyn seems to think that it is deep-rooted—it is difficult to say, certainly there are not wanting

American jurists who seem almost to welcome it. Thus Frank in his *Law and the Modern Mind* believes that "a judge after brooding over the case, waits a 'hunch', deciding the case by feeling rather than by reason and afterwards seeks a reason for it".

Hutcheson, a judge, and others write to the same effect; it is a view much influenced by Behaviourism, Pragmatism and Applied Psychology; an assumption almost unknown in the United Kingdom, where, so far as I know, a full confidence in judicial rationality still exists.

This work may be regarded as an attempt to destroy this subjective heresy. The object of the author is one which every British lawyer will appreciate: Pragmatism has made its influence felt in England, but so far has not corrupted judicial principles to any serious extent. It has been otherwise in the United States—"they can it up as they want to and then write it up to suit" became a decided opinion, we are told, of many law schools there. "A Freudian interpretation of judicial opinions broke upon the little world of legal scholarship", and again, "the danger to-day is that an older generation of the Bar may be losing all confidence in the steadiness of our courts in their work and that the younger ones may lose confidence in the law itself."

There is more apprehension to the like effect, but we may turn to the constructive attempt of Professor Llewellyn to restore the integrity of the law with appreciation, and in particular, note his plea for the revival of the guiding principles to be derived from precedents.

An excursus, as he calls it, on certainty, predictability and "reckonability" endeavours to clear the way: as to the first, he is at pains to declare that juridical certainty can never be absolute—it is a question of degree, varying from pure chance—this surely could apply only to a jury—to the "experienced guess of the skilled counsel". The "reckonability" in appropriate cases should at least be equivalent to a "good business risk"; neither absolute certainty nor complete uncertainty can be accepted in any system worthy of the name of Law.

He cites elements which obtain in appellate courts having "a steadying effect". The first is that of personnel—"the law-conditioned officials." "The judges" says Llewellyn, "are not mere Americans, they have been "Law-conditioned." But although they think as lawyers, they do not always act as such, but specifically as American ones. Nowhere, it is to be observed, does he discuss the effect of the very varying means by which lawyers in the United States are nominated or elected to the Bench, methods which differ very notably from the British system of promoting barristers of standing and excluding all other practitioners. He notes the great authority of the Supreme Court, not only over people and governments (a power implicit in the Constitution of the United States), but also over "the

rules and manner of our laws". There has developed in various ways; sometimes deliberately learned and sometimes subconsciously assumed, a doctrine which in time formulates precedent—a process called by the author "leeways", and this not merely in following decisions, but in procedural thinking as well.

Where there is no room for doubt, the legal doctrine, established over long years, will decide the issue. In novel cases, a departure from precedent may be necessary, but even in such a contingency the author emphasises the importance of Prudence—"conscience and good motive restrain the judge from abuse of his freedom of adjudication; in every instance the judgment must fit into the 'flavour' of the law—neither wild men nor fools must dominate the Bench, and the public and the Bar must feel a confidence which only good judges can produce."

Above all, there must be "a deep felt need, duty and responsibility for bringing out a result which is just". The meaning of justice will vary from court to court, the older idea that there is only one answer to an appeal, he maintains has had unhappy results, though in very many cases, as Cardozo has declared, the answer is almost certain. He estimated the predetermined at nine-tenths of the suits, the author says eight out of ten.

Although there is a tendency to reformulate ill-drawn issues where necessary, as a rule they have been settled by trained lawyers, and, therefore, the court is reluctant on appeal to stray beyond the Record. Unlike the British practice, argument is addressed in writing as well as orally. The system of "briefs", placed before the court, often discloses inadequate presentation unlikely to survive oral interrogation by the Bench, and this marked disparity in the competence of the multitudinous American Bar is most obvious in its written work. In this respect there is much to be said for the British method of separating the very limited number of barristers, most of their leaders being known to the Bench, from the far greater number of solicitors, for here it is recognized more fully that in the United States that the work of advocacy and the preparation of pleadings for trial is a very specialized one.

As to the specialization of the judges themselves, the author points out that the general approach is influenced by the age in which they live—I have ventured to discuss this matter in my London University lecture on the "Art of Judgment"—Llewellyn, speaking of Mansfield, Marshall and their disciples speaks of the "Grand Style". This, he says relates to the manner of "doing the job with craftsmanship in a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need".

This pre-pragmatic responsible habit is called by Roscoe Pound "our classic period"; a time creative yet based on principle. According to the author it lasted in the United States down to 1860. He calls it the "*authordox* ideology, the formative time."

There followed the era of "obsolete doctrine", the over-pedantic application of the classic idea, not uninfluenced by social prejudice, producing such injustices as the notorious injunctions against progressive labour and social legislation.

A revulsion from this ultra-academic attitude, in order to accept modern notions of communal equity produced an over violent practicality of political order resulting in the decay of case-precedent—"a random irregularity jumped legal fences". He sums up this departure from earlier tradition by declaring that "a change of style had begun".

"From now onwards the laws passed by Congress are rarely resisted on judicial grounds but, as regards the Bar, there has grown up a feeling of uncertainty—most of them are in the dark—they still use methods of *authorodox* ideology though they do not study recent development and so are confused." In the manner which the author has deplored in his earlier chapters, the judges tend to decree what seems to them right in particular cases—Llewellyn calls it "a half-baked technique and one which strains towards discontinuity and unwisdom".

The right solution, he maintains, is to search for "the recurrent problem-situation of which the instant case is typical". This process compels the court to seek some guiding rule, to consider the heritage of the doctrine to be applied; while pedantic formulation is to be avoided, so also is a wholly empirical, pragmatic approach.

It is pleasing to note, however, that whatever the tendencies of some appellate courts to depart unduly from principle, the author speaks highly of their character. "Despite all mistakes and passions of to-day, they have either maintained or speedily regained a standing with the lay public hardly rivalled by any scattered, unorganized aggregation of equivalent nature in all recorded history." The only period he cites to the contrary concerns "government by injunction" in the age of Theodore Roosevelt, which resulted in a movement for the recall of many judges.

In most cases "the office shapes the man". The saying that the judges decide as they like, whether prompted by prejudice, psychology or the bitterness of disappointed litigants, is a foolish exaggeration. Discretion is one thing, judicial idiosyncrasy another. Professor Llewellyn calls upon university teachers "to unmask the pretenders". The sophistical sceptic is not so easily dealt with.

This type of doubter would argue that the court (often of five to seven individuals) would decide not any law, but that which they might conjure up to meet the exigencies of the case, thus the only safe practice, this conservative would allow, is to follow ancient practice—all else is guess-work or personal prejudice masquerading as principle.

But is there not a *via media*, our author asks? He points out that since 1930 there has arisen a more critical study of the earlier opinions of the court. "Fear of Socialism" wrote Holmes "affected many earlier decisions and must be interpreted in terms of then existing issues; History cannot be ignored. The adjudication must take place in the soil of common knowledge, practice and common sense." In his colloquial language the author speaks of "isness and oughtness" to cover these various requirements.

Yet, though both influences present themselves to the judge, the present and past considerations, one decision only can be reached in his judgment. There are cases where the rule is so firmly established that it cannot be disturbed, even though doubts as to its soundness may exist. Next, the theory underlying the rule may be accepted, but it may allow a certain elasticity in application, or it may be that the previous interpretation may be reconsidered and qualification admitted. Finally, there are cases where previous decisions are inapplicable and do not bind.

In this last case "a new start must be made from old material" or in the last resort there may be "a deliberate and important re-direction of the rule". What, however, he does emphatically condemn is an evasion of precedent under the excuse that the facts are different when they are really parallel—to ignore an established rule altogether is even worse.

There remains the "fresh start from old material"—a requirement which is often produced by legislation or new evidential matter hitherto unexplored, as in the case of newly discovered scientific knowledge. Judicial reason may be carried into new territory and may have to be invoked not only in the "key cases" that are decisive, but also in the creative effect of day to day decisions which develop an ever-growing corpus and modification of extant law.

Nevertheless, to appreciate the general tendency of the times, there is no better criterion than is obtainable from the study of the Supreme Courts. Considering them as a whole, the author notes a general reversion to the methods of a hundred years ago; what he calls the "Grand Style". Present throughout again is not only the pressure of authority, "but also open willingness to canvass a situation present in unusual degree". The practice of referring to the opinions of distinguished judges by name has revived. He cites many examples and appears optimistic as to the recovery of sound adjudication.

The revival of the sense of "craft" in judicial work is recognized—"a significant body of working knowledge, transmissible in practices which can be learned, illiciting ideals, pride and responsibility"—appellate judgment is a part of the craft of "government by law" and in the United States, the judges have again recovered their rightful status.

The disquiet shown by the Bar and commentators, which is acknowledged by Professor Llewellyn, albeit, as he thinks, superficially, and the jeopardy of jurisprudence when it is no longer regarded as an art, is implicit in this book, and is understandable when the more hopeful recent developments are ignored. As has been suggested, I cannot detect any like apprehension in Britain; what is here more alarming is the constant supersession of the courts by ministerial tribunals which often are required by statute to perform, in addition to their proper administrative duties, quasi-judicial functions, for which they are often untrained. This is the result of Britain being a semi-collectivist society, in contrast with the United States. For this reason a British lawyer or judge is not well-fitted to assess the gravity of Professor Llewellyn's assertions and fears. Nevertheless, it is interesting to observe how the Common Law of both countries has differently developed, raising very divergent problems, perils, and remedies.

"This volume" writes the author "gathers together the substance of four earlier sets of lectures"; they culminated in an invitation to lecture in Leipzig on American Case Law, a system, like the British, very different from that practiced by European countries under the influence of Roman Law. There was a need "to explain to the lawyers of completely different background and training, not what our case results were, but how we got them". Although the United States has developed in a manner very different from that of the British system, yet, in his endeavour to expound American principles to Germans, he used arguments which may usefully be studied in this country, threatened as we are, by the influence of Roman Law if Britain joins the European Community.

Llewellyn quotes "without change" and therefore, it is assumed with present approval, what he told law students in 1930; an address which summarized his whole argument as regards responsible criticism of judicial practice:

"Whatever has gone, the law is yet left to you. Left to you as the fixed sure order of society. Left to you as that which controls the judges, which clothes the judge with a certain majesty even while and indeed because it does control him, which lifts him and his work to a level he could not attain alone. Left to you as the million of sonorous sentences that in a million cases expound the inescapable logic under which the judgment is dictated by the law. And we? These fabrics we seize and tear as idle cobweb. These mirrors of old dear-held truth, we shatter. The law itself dissolves before our acids. Right and justice come to figure as pretty names for very human acts done on often the less human of human motivations. I have said before that this tendency of our teaching has caused me worry, in its aspect as developing the technician at the cost of the whole man. It gives me double pause in this connection—in its effect on young men already disillusioned beyond the portion of young men.

In the first place, iconoclasm can be a sport as well as a condition; even when not so viewed, the fact of smashing calls disproportionate attention to the broken pieces; revolt is seldom characterized by balanced judgment. We of the teaching world are still as full of our discovery as once was tortured Galileo: move, move it *does*, the law. And if, to make you see the movement, we must shout down the pious words with which



courts have pretended that no change occurred—then we must shout, shout disbelief. We must blaspheme the legal oracles. Well, then, we do. We strip the trappings, verbal and other, off the courts. We turn the spotlight on the places where the tinsel gaps, where you see cheap cotton, or see sweaty skin beneath. These are the crucial cases or the argument—but are they type or caricature of the run of legal work? The tendency of the teaching has its worry. To get across a vital lesson one must risk distortion.

The sight of falling tinsel, too, may seem to argue falling dignity. It is a vicious seeming. It is as false as the ill supersition that the tinsel is the measure of a man. Rather are measures and dignity of man and office to be found when folderol and claptrap are stripped off; when, free of pomp, on the record and the naked fact, they stand four-square. So must we strip the courts; so must we test them. The stripping is a tribute. An institution we could not honor naked we should not dare to strip. You are to remember, too, the dignity and measure of a critic: they lie in that he sees the record whole; in that his judgment and his tone of judgment weigh the accomplishment against the difficulty, weigh partial flaws against the fullness of what has been done. Seen thus, judged as you would judge a man upon his life, law and the courts stand up. It may be that as your knowledge grows your disillusion will be tinged with wonder, as has mine. The heaped-up cases through the centuries; the heaped-up wisdom. As I watch the succession of the cases—moving, rising, taking form eternally—as I see the sweep of them entire, I find old formulae of tribute rising to my tongue: 'the full perfection of right reason!' The closer I can come to seeing law whole, the more nearly do I, of the skeptic's clan, find myself bordering on mysticism. There is such balance and such beauty and skill beyond the little powers of the individual judges. It is the little powers you are watching in the individual cases. Loose logic, or even bad, lies open to your sight; the wisdom of the holding when set in the rhythm of the pillaring years—to see that is not so simple.

Single case after single case there is, that irks me, that I would pluck out. Yet take them: what is it that offends? Here is the case whose reasoning is wretched, grotesque. Yet how of the outcome, on the *facts*—was it not rather sane? Systematizing conclusions is after all the business of the second or the fourth case in a series, not of the first; our law has grown by trial, and then correction. This same court which has mangled the authorities; may it not when the need comes mangle this one, too—and reach another sane result? Here is another case; it seems outrageous. Yet stay—why so outrageous? Because it cuts across *my* opinions. But how many are there here beside the judges who do not square with my opinions? These judges may judge social values differently from me: no sign that they are fools; opinions differ. A third type of case: a technical problem; a crazy decision; the court has utterly failed to see the point. Look to the counsel: has a Root misled the court? Yet even so, that would be but an excuse. But now the question rises of perspective. How often does it happen, in the large? How often, too, in the light of the maze of matters that in a year are brought before a court? Criticize such a decision, attack it—yes; attack it with all vigor that is in us, as we attack the others that we doubt. The courts need such attacks. The court requires attack on its decision, because the court is strong. The law requires detailed surgery, the law can stand up under major operations, because the law is strong to stand the shock. Four-square it stands, upon its whole performance. He who helps cut out error gives it strength."<sup>1</sup>

I cite this homily to law students as an example of the author's outlook, expressed in a boisterous phraseology, so unlike the austere utterances of British jurists, even when addressed to students.

<sup>1</sup> Llewellyn, *The Bramble Bush* (New York, Oceana Publications, 1951) at pp. 124-126.

But there is one further comment which I would make; the absence throughout the whole work of any fundamental enquiry into the nature of that Justice which he seeks to elucidate. No mention is made of that Natural Law recognized by the Constitution of the United States and by many of the earlier judges. There is a marked absence of any basic consideration of those assumptions which animated Holt and Mansfield whom he so much admires: the whole work, like so much American commentary, is over-pragmatic—concerned only with the actual working of the courts. That there are underlying canons of interpretation; historic, logical, sociological, comparative or ethical, nowhere are recognized. There is no reference to the learning to be found in the great system of Roman Jurisprudence and, a marked absence of anything approaching an international outlook, which is the more surprising as the work is chiefly interested in commercial problems, of all branches of law most dependent upon international jurisprudence.

It may be said that Professor Llewellyn deliberately confined himself to the activities or "reckonability" of the United States' appellate courts, but the considerations which I have mentioned have always figured prominently in the opinions of the Supreme Court, more particularly in the commentaries of their most illustrious judges, and cannot be ignored.

## 2. J. L. Ilsley

The first words of Llewellyn's *The Common Law Tradition: Deciding Appeals*, under the heading "The Why and What of This Book", are as follows:

This book starts with the fact that the bar is bothered about our appellate courts—not the much discussed Supreme Court alone, but our appellate courts in general. The bar is so much bothered about these courts that we face a crisis in confidence which packs danger.

A little later (p. 4) the author says:

You cannot listen to the dirges of lawyers about the death of *stare decisis* (of the nature of which lovely institution the dirge-chanters have little inkling) without realizing that one great group at the bar are close to losing their faith. You cannot listen to the cynicism about the appellate courts that is stock conversation of the semi- or moderately successful lawyer in his middle years without realizing that his success transmutes into gall even as it comes to him. You cannot watch generations of law students assume, two thirds of them, as of course and despite all your effort, that *if* the outcome of an appeal is not foredoomed in logic it *therefore* is the product of uncontrolled will which is as good as wayward, without realizing that our machinery for communicating the facts of life about the work of our central and vital symbol of The Law, the appellate courts, has become frighteningly deficient.

The author's thesis, if one can reduce a book of nearly 550 large pages to a thesis, is that the work of the appellate courts all over the United States is "reckonable". It is, he says (p. 4):

reckonable first, and on a relative scale, far beyond what any sane man has any business expecting from a machinery devoted to settling disputes self-selected for their toughness. It is reckonable second, and on an absolute scale, quite sufficiently for skilled craftsmen to make usable and valuable judgments about likelihoods, and quite sufficiently to render the handling of an appeal a fitting subject for effective and satisfying craftsmanship.

The author is concerned for the restoration of respect for judicial appellate action. It would appear from his book that there was a considerable loss of respect in the '20's and '30's of the present century for he says (p. 56):

And one has ever to bear in mind as among the possibilities of deflection the type of thing which infatuated the cynics of the '20's and '30's: If the opinion is a justification, nay, a 'mere rationalization' of a decision already reached, a justification intended 'only' for public consumption, its 'light' can be contrived delusion. Vital factors may go unmentioned; pseudo factors may be put forward; emphasis and weighing of factors may be hugely skewed; any statements of policy may be not for revelation but merely for consumption; the very alleged statement of 'the facts' may be only a lawyer's argumentative arranged selection, omission, emphasis, distortion, all flavored to make the result tolerable or toothsome.

The author elsewhere indicates that he is not impressed by those whom he calls "the jejune or jaundiced jibers at the courts" (p. 56).

To a Canadian judge it may come as a surprise that there is in the bar of the United States any substantial number of "jibers at the courts". I am not aware that there is any substantial number of such in Canada. However, to understand the situation in the United States, one must know something about the "school" of American Realists, so-called. On pages 45 to 49 of *Precedent in English Law*<sup>1</sup> by Cross the author discusses "the opinion of a body of American writers, among whom the late Judge Jerome Frank was prominent, and who are often spoken of as realists".<sup>2</sup> Cross's discussion is centred on his consideration of the distinction between *ratio decidendi* and *obiter dictum* and the following passage is worth quoting:

Before proceeding any further with our endeavour to elucidate the distinction between *ratio decidendi* and *obiter dictum*, account must be taken of an opinion held in some quarters that any attempt of this nature is nothing more than a wild goose chase. This is, in substance, the opinion of a body of American writers, among whom the late Judge Jerome Frank was prominent, and who are often spoken of as realists. By way of contrast with the stress placed by orthodox English judicial theory on the freedom of the judge who decides the case in the matter of its *ratio decidendi*, they emphasize the liberty which a later judge enjoys of disregarding what his predecessors said in the cases cited to him. The realists maintain that it is a mistake to pay too great a regard to the vocal as opposed to the non-vocal behaviour of judges. 'Don't worry so much about what the courts say, consider what they do', is one of the chief cries of this school.<sup>3</sup>

<sup>1</sup> Cross, *Precedent in English Law* (Oxford, The Clarendon Press, 1961) at pp. 45-49.

<sup>2</sup> *Ibid.*, p. 45.

<sup>3</sup> *Ibid.*, p. 45.

The late Judge Jerome Frank wrote a book published in 1930 called *Law and the Modern Mind*.<sup>4</sup> In this book he indicates, among other things, that much of the uncertainty of law is not an unfortunate accident but is of immense social value. His book was reviewed by Henry Rottschaefer of the University of Minnesota Law School in 1931,<sup>5</sup> and, although space does not permit a summary of even the review, let alone the book, it may be briefly stated that Frank in his book says in effect that it is a "basic myth" that law can be, is, or ought to be certain, in the sense of predictable; that an important foundation of this myth is the emotional desire for certainty in a world of chance and uncertainty, a desire which has its psychological origins in early childhood; that the law becomes a father-substitute; that the judging process starts not from premises but from conclusions and works back, within limits, to suitable premises; that the way in which judges get their "hunches" is the key to the judicial process; and that in judicial law-making such factors as the social, political and economic beliefs of judges, and their subconscious biases, are of the utmost importance. Rottschaefer considers that the most glaring instance of overemphasis in the book is Frank's assumption that, because complete predictability is impossible, therefore no practical degree of it is either realizable or desirable, and that here overemphasis has resulted in defective analysis. Professor Llewellyn does not seem to be much impressed with Frank's theories, for he says, obviously referring to them, the following (p. 198):

I am not maundering about 'certainty' and womb-yearning or about law 'the solid' as a father-substitute or similar unnecessary tripe. I am dealing with the sound and right feeling of the American lawyer and the American law-consumer that the work of his appellate tribunals has no business to be hopelessly unreckonable.

Despite his lack of enthusiasm for the views of the American Realists, or some of them, Professor Llewellyn himself, in Appendix B to his book, says (p. 509):

I put this book forward both in its plan and on its descriptive side as a solid and unmistakable product and embodiment of American Legal Realism. I should indeed like to use the book to shame either old critics of the movement or later ones.

and the following (p. 512):

I now put forward, explicitly as a proper product and exhibit of *real* realism this book.  
Here you can meet not the goblin, but the horse.

The author says in Appendix B that the book has been more than thirty years in the making and undertakes to combine solidity and roundedness and balance. It must be prepared to meet the reader or critic on those terms.

A Canadian judge is handicapped in dealing with a book on American Realism, whether in its extreme or modified forms. The

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<sup>4</sup> Frank, *Law and the Modern Mind*. (Stevens & Sons, Ltd.).

<sup>5</sup> 44 Harv. L. Rev. 481.

judicial process with which he is acquainted is obviously very different from that employed in many if not most courts in the United States. Professor Llewellyn's book might appropriately be called "The Nature of the Judicial Process in the Appeal Courts of the United States." *The Nature of the Judicial Process*<sup>6</sup> was the title of a volume of addresses delivered before the Law School of Yale University by Judge Cardozo, as he then was, in 1921, and in these addresses it seems to me that Cardozo comes much closer than Professor Llewellyn to describing the judicial process as we know it in Canada. These addresses will be referred to later but it may be noted at once that Cardozo recognizes that the rule of adherence to precedent is applied with less rigidity in the United States than in England, and, he thought (in 1921), with a rigidity that was diminishing in the United States. In an article published in the July, 1962, issue of the *Law Quarterly Review*,<sup>7</sup> Delmar Karlen compares appeals in England with those in the United States. The author says:

In the United States, an appellate court is free to overrule its own previous decisions. In England, it is not, and corrective action must come through legislation. In this sense, the United States seems to have a far less rigid doctrine of precedent than England.<sup>8</sup>

I think also that it is true to say that the United States seems to have a far less rigid doctrine of precedent than Canada, at least the common law provinces of Canada.

A striking feature of Professor Llewellyn's book is his submission that for a very long period the appellate courts both of England and of the United States applied a method of deciding appeals which he describes as the Grand Style and which he attributes to what he calls the common law tradition. His use of the word "style" in Grand Style refers "not to literary quality or tone, but to the manner of doing the job, to the way of craftsmanship in office, to a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need". His conception of the Grand Style may be gathered from the following passages. He says (p. 5):

We shall observe, however, that the huge unnoticed or forgotten or ignored correct range for action which our American system has afforded to our appellate courts from the beginnings of the nation in no way produces an undue unreckonability of results. We shall see that the most vital element in reckonability and stability is the courts' constant use, in application of doctrine, and also in choosing among the branching doctrinal possibilities, of the best sense and wisdom it can muster—but always in terms of those same traditions of the work which we have seen as 'steadying factors.' We shall demonstrate that sense is thus used not occasionally but constantly, not in great cases only but in the mine-run of cases as well; and we shall demonstrate also that sense and wisdom are thus used daily not only in application of doctrine or in choice among competing rules but in an area by no means so frequently observed, to wit, in the on-going, careful readjustment of doctrine to needs by way of overt recourse to the sense which ought to control in

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<sup>6</sup> Cardozo, *The Nature of the Judicial Process* (New Haven, Yale University Press, 1921).

<sup>7</sup> *Appeals in England and The United States*, 78 *Law Q. Rev.* 371.

<sup>8</sup> *Ibid.*, at p. 384.

the given type-situation. We shall show that this is not novel, but is old, is not occasional, but is standard, is not unsettling, but is stabilizing.

It is, in fact, the manner of appellate judicial work which prevailed in this country from Jefferson's administration up roughly until Grant's. Pound has called it the manner of 'our classic period': I call it our Grand Style.

and (p. 36):

The *type*-thinking of the time [of the Grand Style] is to view precedents as welcome and *very* persuasive, but it is to test a precedent almost always against three types of reason before it is accepted. The reputation of the opinion-writing judge counts heavily . . . . Secondly, 'principle' is consulted to check up on precedent, and . . . 'principle' means no mere verbal tool for bringing large-scale order into the rules, it means a broad generalization which must yield patent sense as well as order, if it is to be 'principle'. Finally, 'policy', in terms of prospective consequences of the rule under consideration, comes in for explicit examination by reason in a further test of both the rule in question and its application. The tone and mark consist in an as-of-courseness in the constant questing for better and best law to guide the future, but the better and best law is to be built on and out of what the past can offer; the quest consists in a constant re-examination and reworking of a heritage, that the heritage may yield not only solidity but comfort for the new day and for the morrow.

The author says that there was an incursion later (as or after the Grand Style faded out) of "a way of work in which the appellate judges *sought* to do their deciding without reference to much except the rules, *sought* to eliminate the impact of sense, as an intrusion, and *sought* to write their opinions as if wisdom (in contrast to logic) were hardly a decent attribute of a responsible appellate court". The author calls "that way of work the Formal Style; its image is with us still, distorting the common perception both of what our appellate courts are doing and of what they ought to do. The prevalence still of that unhappy image is indeed the major cause of the crisis in confidence" (p. 5).

The author indicates that the Formal Style came into use gradually in or near the '80's and began to subside about 1920 and that there is now, the author hopes and believes, a more or less complete return to something like the Grand Style in many of the appellate courts. He believes, as appears from some of the foregoing quotations, that this return to the Grand Style makes for an increase in the "reckonability" of the results of appeals.

The book has a chapter on what the author calls the major steadying factors in our appellate courts, namely: "Law-conditioned Officials; Legal Doctrine; Known Doctrinal Techniques; Responsibility for Justice; The Tradition of One Single Right Answer; An Opinion of the Court; A Frozen Record from Below; Issues Limited, Sharpened, Phrased; Adversary Argument by Counsel; Group Decision; Judicial Security and Honesty; A Known Bench; The General Period-Style and Its Promise; and Professional Judicial Office" (p. 19). Another chapter called "The Leeways of Precedent" shows the large number of techniques employed by courts in treating precedents. The author believes that what he calls horse sense and type-situation

should have a large part in the decision of appeals, horse sense being defined, not as the sense of a horse, or ordinary sense, but as "that extraordinary and uncommon kind of experience, sense, and intuition which was characteristic of an old-fashioned skilled horse trader in his dealings either with horses or with other horse traders" (p. 201). The book discusses appellate judging as a "craft of law" and later contains a long, and, to a judge, most interesting, chapter entitled "Conclusions for Courts".

When I read the book the first time, I found much of it hard going; when I read it the second time, I found most of it of absorbing interest. But for a Canadian judge, at least in the common law provinces, I think there are more helpful works, and among works I include contributions to such publications as the Canadian Bar Review on precedent in our courts and *stare decisis*, subjects which are, I think, of special difficulty to Canadian lawyers and judges, and which have a vital bearing on the subject-matter of Professor Llewellyn's book.

Among the American works (by "American" I mean United States') that I class as particularly helpful, I would give prominent place to the brilliant addresses of Cardozo in the series already mentioned, *The Nature of the Judicial Process*.<sup>9</sup> One can hardly resist the temptation to quote extensively from these addresses but space does not permit me to do more than make passing reference.

Allowing for the fact that the rule of adherence to precedent is applied with less rigidity in the United States than in England (or, as I believe, in Canada), the picture that emerges from Cardozo's addresses of the degree of predictability of the results of appeals in American courts is fairly clear.

Among English works that I regard as particularly helpful, I would place high the book *Precedent in English Law*<sup>10</sup> by Cross, to which I have referred. This book, published in 1961, gives a clear, readable and thorough description of the English doctrine of precedent. Cross translates *stare decisis* as meaning "keep to what has been decided previously". He says that while judicial precedent has some persuasive effect almost everywhere because the maxim *stare decisis* is one of universal application, the peculiar feature of the English doctrine of precedent is its strongly coercive nature. He proceeds to say:

English judges are sometimes obliged to follow a previous case although they have what would otherwise be good reasons for not doing so. In other words, a precedent may be binding and not merely persuasive in England because *stare decisis* is, generally speaking, a hard-and-fast rule in this country. It is a great deal more than a mere maxim of judicial conduct to be followed if other things are more or less equal.<sup>11</sup>

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<sup>9</sup> *Supra*, footnote 6.

<sup>10</sup> *Supra*, footnote 1.

<sup>11</sup> *Ibid.*, at p. 4.

The general rule in England is that every court is bound to follow any case decided by a court above it in the hierarchy, and appellate courts are bound by their previous decisions. Cross himself, after considering the rule that the House of Lords is bound by its previous decisions, gives it as his opinion that the House of Lords should have power to overrule its past decisions and that there is an absence of any convincing argument to the contrary. He says, and he is not speaking only of the House of Lords, that it is more difficult to get rid of an awkward decision in England than almost anywhere else in the world.

The result of this rigid system would appear to be that undue ingenuity is sometimes, if not often, used by appellate courts in distinguishing previous decisions. As every lawyer knows, a decision contains either expressly or by implication a *ratio decidendi* (or more than one) and that it may also include *obiter dicta*, which Cross refers to as statements by the way. It is only the *ratio decidendi* that is binding and it is often difficult to determine what was *ratio* and what was merely *dictum*. A very narrow description of the *ratio* may enable the court in the later case to distinguish, somewhat surprisingly, the earlier case. However, I think all would agree that it is not legitimate for a court to choose as a distinction any but a reasonable one, that is, a distinction which a lawyer might reasonably consider to be relevant, having regard to the existing state of the law.

So far as my experience goes, and I have certainly not made a study of the subject, Canadian judges have been conscientious and scrupulous in their determination of true *rationes* and true distinctions. I call attention to what Professor Llewellyn says (p. 287):

So that we come back to the ancient wisdom: 'a distinction without a difference' is a stench, and there is no reason why the difference should not be sweetly blazoned on the page.

The exceptions to the rule of *stare decisis* are set out as follows by Cross:

Even if a court would be bound by a particular decision in the ordinary way, that decision need not be followed (i) if it conflicts with a previous decision of the same court, (ii) if it has been impliedly overruled by a subsequent decision of a higher court, (iii) if it was decided *per incuriam*, (iv) (perhaps) if it conflicts with a previous decision of a higher court, notwithstanding the fact that that decision was considered by the court which decided the case in question which case accordingly cannot be said to have been decided *per incuriam*, and (v) (perhaps) if the decision turned on grounds of public policy with regard to which there has been a change of view through causes independent of the action of the courts.<sup>12</sup>

However, there are many refinements and qualifications of both the rules relating to *stare decisis* and the exceptions. Cross points out the impropriety, which I take to be the legal impropriety, of too rigid an application of *stare decisis* and that "analogical reasoning may occasionally become too narrow and thus degenerate into conceptualism".

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<sup>12</sup> *Ibid.*, at pp. 144-145.



After all is considered, it seems to me that the English system of close adherence to precedent must result in much more certainty, predictability and "reckonability" in appeals in the English courts than the American system does in the American courts.

I now come to the Canadian material to which I have referred.<sup>13</sup> I think it is generally true to say that the problems that give concern to Canadian judges are somewhat different in character from those dealt with by Professor Llewellyn. The following questions occasionally if not, frequently, arise in a Canadian judge's mind:

(a) Is the Supreme Court of Canada bound to follow its own previous decisions? My impression is that the Supreme Court of Canada has not given any express answer to this question, and that implications from individual appeals to the Supreme Court of Canada are, at least arguably, conflicting.

(b) Are any courts in Canada bound by the decisions of any English courts, including the Judicial Committee of the Privy Council, rendered before the Judicial Committee ceased to have ultimate appellate jurisdiction for Canada? And, if so, what Canadian Courts and what English courts?

(c) Is a provincial court of appeal bound to follow the previous decisions of the court of appeal of the same province? If the English case of *Young v. Bristol Aeroplane Co.*,<sup>14</sup> is to be followed, the answer probably should be in the affirmative (with the exceptions mentioned in that case). But is the provincial court of appeal bound to follow as a precedent *Young v. Bristol*, or, for that matter, any decision of an English court, even though rendered before the Judicial Committee ceased to have ultimate appellate jurisdiction for Canada?

(d) Is a provincial court of appeal bound to follow decisions of the Supreme Court of Canada rendered before it acquired exclusive ultimate appellate jurisdiction for Canada in cases not appealed to the Judicial Committee? And if so, with what, if any, exceptions or qualifications?

I am assuming, perhaps too hastily, that Canadian courts are not bound to follow decisions of any English courts rendered after the Judicial Committee ceased to have ultimate appellate jurisdiction for Canada; that all Canadian courts lower than the Supreme Court of Canada are bound to follow all relevant decisions of the Supreme Court of Canada rendered since it acquired exclusive ultimate appellate jurisdiction for Canada; that no provincial court of appeal is bound by the previous decisions of the appeal courts of other provinces; and that a judge of first instance is not bound by a previous decision of a judge of co-ordinate jurisdiction.

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<sup>13</sup> A list of contributions to the Canadian Bar Review on the subject of *stare decisis* may be found at (1962), 40 Can. Bar Rev. 149.

<sup>14</sup> [1944] K.B. 718, [1946] A.C. 163.

In what I have said relating to the problems of Canadian courts as such I have raised no question as to the *persuasive*, as distinct from the *binding*, authority of the decisions of any courts.

Questions (a), (b), (c) and (d) do not constitute an exhaustive list but this is the class of questions definitive answers to which would go some distance towards increasing in Canada what Professor Llewellyn calls the "reckonability of results" of appeals.

### **3. Arthur Kelly**

The role of judge, the arbiter of controversies between subjects, was from the earliest days of man's association with other men in some form of society an essential factor in maintaining order. In fact, unless man was prepared to subscribe to the right of every individual to impose his will by force on everyone he was able to subdue physically, the power to make and enforce decisions was a necessary ingredient for the survival of society.

Originally the power of judging reposed in the chief, the leader or the sovereign; the notion of the office of judge, divorced from the person of the sovereign, that of a professional decider dispensing the justice of the sovereign, is recent compared with the span of man's social development: but since its emergence there has grown up around the office and its performance, customs and traditions which have taken away from the exercise of the office the arbitrary nature of the results which characterized its exercise by the sovereign.

As society became more complex, the need for stability in the rulings of judges increased and the formulation of guide lines became more desirable to those affected by judicial decisions and more acceptable to those making them. The extent of the movement is indicated by the fact that the sovereign in whose person nominally reposed the power of making, interpreting and applying law, finally recognized that his power was no longer a despotic one but was exercisable by virtue of, and in accordance with, the prevailing concept of law.

It is axiomatic to say that, for the proper ordering of human relationships, man must have assurance that the laws according to which his conduct will be judged tomorrow will be the same as the law according to which he decided upon his course of conduct yesterday. Under the common law this stability has been achieved by the adherence by judges to the principle that the interpretation of the law and its application to the facts to be pronounced in any given cause will not depart from the previous interpretation and application by a court of co-ordinate or superior jurisdiction.

The manner of the application of this principle, as well as achieving stability, has led to the continuous adjustment of the law to the developing social, economic and political conditions prevailing at any given time.

It may seem paradoxical to attribute both stability and flexibility to the fruits of the application of the doctrine of *stare decisis*, but it is the great genius of the common law that this two-fold result has been accomplished. The outcome of cases which have come before the courts for decision shows how from day to day and year to year the judges have gone about their work so that it can be faithfully said that both these principles have been adhered to, with an overall satisfaction with the decisions resulting. That this result has been accomplished is a tribute to the everyday work of the judges in deciding the cases brought before them.

When any exhaustive examination is made of the process of deciding under the common law and of the persons by whom it is done, one of the first things to strike the observer is that, unlike civil law countries, the common law systems have not developed a separate profession of judges, persons who select a judicial career rather than a career in the private practice of the profession of law and who are by a deliberate process of advancement in responsibility, trained specifically for the offices they will be called upon to fill. Both here and in the United States, as in other common law jurisdictions, the members of the judiciary are drawn from the ranks of practising barristers, the only specified qualification generally being a minimum number of years of practice as a barrister. This process assumes that no special training is a prerequisite and that the possession of certain qualities assures that the appointee brings to the Bench an adequately developed capacity for the craft of judging.

It is not surprising, therefore, that there is a paucity of texts touching upon the performance of the judicial function. In fact, even among judges, there is a dearth of authorship dealing with the nature of the office and the manner in which it is performed.

Judicial reference to the skill and ability of other judges is to be found in judgments, but from them it would be hard for an eager neophyte to piece together any comprehensive treatise for his own guidance.

There are to be found some writings which are the exposition of a personal philosophy: among these the best known is Cardozo's *Nature of the Judicial Process*. This has a subjective approach and must be looked upon as a personal credo—albeit that of one of the great masters of his profession. The unique position it holds is attested by the fact that for many years it has been read, perhaps surreptitiously, but at least once following his appointment, by every English speaking judge on this continent.

The need of one occupying the office of judge for the attainment of special techniques seems to speak for itself. Yet one looking for the means by which consciously the desirable qualities and skills may be developed will find an almost complete absence of facilities. Apart from "The Appellate Judges Seminar" conducted annually at the Law School of New York University under the joint sponsorship of the Institute for Judicial Administration and West Publishing Company, it is difficult to find any group with the temerity to suggest that judges can be taught anything about their craft.

Those who have found merit in Cardozo's essay, and who seek some exposition from a source external to the Bench, will find much of assistance in Karl Llewellyn's *The Common Law Tradition—Deciding Appeals*.

The reason given by the author for the writing of this book perhaps best indicates its nature. Llewellyn, a professor of law at the University of Chicago, became concerned over the persisting attitude of successive classes of students that the outcome of cases heard by the appellate courts in the United States lacked any reasonable degree of predictability and that this lack indicated that the results were purely arbitrary.

In an effort to determine to what extent the decision of an appellate court in any given case could be forecast, Llewellyn embarked on a critical study of reported decisions selected at random. A clinical examination of the written reasons for judgment delivered in different parts of the United States proceeded as an intellectual post-mortem on the workings of appellate courts: the conclusions set out, from an objective point of vantage, a searching analysis of how courts work in deciding the litigants' causes brought before them. The book does not attempt to set forth the personal views of any one or more judges, but it gives the results of an extra-judicial study of the workings of the courts arrived at from a consideration of the reasons, embodied in written opinions, attributed by the courts as the compelling factors leading to the recorded results.

To any counsel advising a client upon the desirability of an appeal or preparing for an appellate court the argument of his client's case, this volume is pure gold: to this writer, at least, it provided an occasion to re-assess his views as to the purpose of the appellate courts and to sharpen his focus of many of the areas of their work.

It is not the purpose of this article to review Llewellyn's book, but only to set down some of the ideas which the reading of it has served to crystallize, ideas which condition the writer's approach to the business of setting down in written form the reasons which in his mind justify the decision arrived at.

It has long been recognized that the work of an appellate judge is subject to certain environmental influences which are not subjective and of which he may not be aware. It is not proposed to dwell

upon these beyond mentioning some of the more readily recognized ones—the legal professional training of judges, their independence and security of tenure, the multiple-judge court, written or pronounced reasons for judgment, pre-determined facts, adversary argument by professional counsel—these and other factors go to make up the atmosphere in which the work is carried on. These conditions are, of course, not as casual as may appear; they have been, in the years of development, brought about as part of the milieu experience has shown to be conducive to the results the courts are designed to achieve.

But what of the subjective factors? What do the members of these courts conceive to be their function in the administration of justice? The answer of any single person must be drawn from his experience and observations: the views here expressed must be taken with full recognition of the possibility, yea, the probability that the experience and observation of others will lead them to conclusions differing in many respects.

The aim of an appellate judge in approaching the decision of any given case, is to do justice between the litigants, according to law, at all times realizing that the decision will become part of the body of law by which future causes will be decided. Each of these three considerations has a compelling influence on the decision and the reasons given as supporting the decision.

It is elementary, from the nature of the judicial office, that justice as between the parties who have had recourse to the courts must at all times be the aim of the court. It is the only purpose for their existence and it is inconceivable that, where the rule of law prevails, a judge would wittingly act unjustly.

But the justice to be dispensed is not moral justice according to the personal philosophy of the judge: it must be legal justice according to the laws which are binding on all citizens and *a fortiori*, on all judges. Under the democratic system it falls to the legislature to enact just laws and to the courts to interpret and apply the laws as enacted: as of alternative interpretations of which the written law is capable, a judge may apply his views of justice in selecting which interpretation is to be applied—but a judge is not free, in seeking to achieve his views as to justice, to apply an interpretation of which the written text is not capable of meaning. Justice in the eyes of the law must be the fulfillment of the law, not its circumvention. Stability in the law which permits a citizen to shape his course so as to be within the law demands that he be not arbitrarily deprived of his rights by the failure of the court to follow the law. Hence, in seeking the just result, it must be justice as that is conceived to be in the law prevailing.

The fact that an appellate court is expected to give reasons for its decision and that the reasons are from then on available to be

cited as authority to be followed in later cases, points up the most onerous responsibility that impresses itself on the members of the court. The realization that the views expressed in the case under review will be projected into the future as part of the body of the law brings home an appreciation of the obligation not only to the litigants before the court but to all whose rights will be governed by the law thereby laid down.

The awareness of the future impact of the present work leads to a consciousness of two important principles:

- (a) Stability in the application of the law demands adherence to the settled law.
- (b) The fulfilment of the common law requires that the immutable principles of the law be adapted to the requirements of the evolving social, economic and political conditions of the country.

The reconciliation of these two apparently irreconcilable precepts, while remaining a problem of magnitude, at the same time serves to mark out the limits of variations within which the essential work of the court must be done.

A further series of problems arises from the fact that not all of the possible variations of fact have been the subject matter of prior decisions, leaving, as it were, gaps presenting to the judge an area of movement and requiring that the instant case be related to one side or the other of the gap.

It is obvious that mere case-matching will not serve the purposes of an appellate judge—if this were his highest function electronic memories and computers would rapidly supersede the human element and decisions would be produced with an assurance as to the identity of the result with some earlier decision far greater than could be expected of any human agency.

When one gets into the "gray" areas where, from lack of an earlier decision exactly in point, or where the nature of the change in human relationships makes inappropriate the authority to which the situation is most nearly related, there are several steps by which a solution can be reached or a proposed solution tested: these are not necessarily successive steps but all of them at one time or another direct the conclusion embodied in the reasons for judgment.

Just as a physician, after considering all the patient's symptoms (subjective and objective) arrives at a diagnosis of the ailment by the rejection of the non-relevant and the determination of the appropriate weight to be given each significant factor, the judge's quest must be to reduce the established facts to a recognizable situation to which the applicable law can be related. Since the situation thus resolved is associated with the social and economic atmosphere in which it arose, it is necessary that in examining the available precedents attention be

directed to see that the precedent relied on was decided in the same social and economic milieu or at least that the change which has occurred in the background is of such little consequence that the precedent has not become unsuitable.

This perhaps is but another phase of the procedure to be applied in dealing with precedents. What is sought is not the near image of the exact features: what is to be looked for and what is binding is the underlying principle which the earlier court has applied to the situation presented to it; the extension of the principle to a similar but not alike situation, is the essential skill in the handling of precedent. And only when it is done in the true tradition of the common law is there faithful demonstration of the belief that the common law can afford stability and at the same time adequately provide for the cases for which there is no earlier exact parallel.

The process of extracting the principle upon which any decision rests and the selection of the principles to be applied requires again two separate considerations. A comparative examination of the relevant cases should disclose not only the principle sought to be isolated but the trend of judicial opinion which will give important information as to the direction in which courts in the like matters have been and are now facing and moving in the application of the principle. When the direction of the trend has been discovered, the judge must apply his personal judgment to the requirements of the present social, economic and political atmosphere so that his conclusion will make sound sense, particularly with respect to the exact distance he is prepared to go as of today in the direction which future decisions will foreseeably go.

It is apparent that the judge will not be unaware of the element of policy—that is both the desirable direction in which the law should be moving and the extent to which the movement will be properly carried by the case under review.<sup>1</sup> The application of the decision to hypothetical situations envisaged as occurring in the future will serve as a test for the soundness of the rule applied and the usefulness of its application.

Before concluding, a word as to draftmanship and its importance. A well reasoned decision when made should provide for all time a helpful exposition of some phase of law: by lack of care in its composition its value may be obscured and it may become a legacy of difficulties.

The written reasons should be in tone authoritative but not argumentive—they should be organized so as to present a logical progression from the situation disclosed by the facts to the result

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<sup>1</sup> Canadian lawyers who survive the shock will find material for speculation in the doctrine of prospective over-ruling adopted by the U.S. Supreme Court in *Great Northern Ry. v. Sunburst Oil*, 287 U.S. 385, 85 A.L.R. 254.

following irresistibly from the application of the appropriate law. In other words, if they represent the process by which the author has himself become convinced of the correctness of his decision, they should lead the reader to the same conclusion. They should attempt to resolve any apparent inconsistencies in the law as it stands and provide a new starting point back of which it should not be necessary to go in the future.

As a general rule, in scope they should not be more general than is necessary for the decision of the actual point before the court. It is the unnecessary comment and the *obiter* remarks that rise up to haunt the writer and to confound courts called upon to deal with similar but not like situations in the future.

Finally, the draft should be subjected to a two-fold scrutiny—the first to examine the words used to discover whether they will convey to the sophisticated reader the meaning intended—the second, and by far the most important, to re-examine the same words to determine if the text even in the hands of an ingenious counsel can be read to mean anything other than that which it is intended to mean.

It would be unfitting if this article had essayed at more than expressing the writer's personal views—views which are open to the criticism of being based on a limited experience in the production of reasons for judgment. Other judges bring to the discharge of their duties, experience more varied and more extensive. From the reading of their judgments in the reports can be gathered the manner in which they go about their work.

But for the readers who have not the time to make a study of the reports, as well as to those engaged in writing the judgments on them, it is heartening to know Llewellyn's conclusion after his extensive and intensive studies:

"Nor do I think any other craft of our law, taken as a whole and taken in the light of what is offered the craftsmen to work with, is coming as close to turning out a proper job as is our appellate bench."