

The Speech of Judges: A Dissenting Opinion*

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It is, or should be, I believe, the inalienable right of any man in a democracy to prefer steak to veal, asparagus to spinach, scotch to rye, Conrad Aiken to Wordsworth, Shaw to Shakespeare, Dewey to Plato, Dashiell Hammett to Galsworthy. The canons of taste are no part of the law of the land or the law of nature. To my mind, taste, whether gustatory or literary, is inherently personal and subjective. It is in taste that individual initiative can and should have freest play. Men, it has been said, may be divided into two classes: those who don't know what is Art but know what they like, and those who don't know what they like but profess to know what is Art. I belong to the first class.

Confessing to such doubts as to the existence of objective literary standards, it may seem ridiculous that I should waste good ink and paper making comments on the literary style of the judiciary. But the subject deserves attention for this reason: The style of one of our greatest American judges, Mr. Justice Cardozo, recently deceased and properly venerated, has been praised without published dissent. It has lately been said, with almost tiring repetition, that he wrote "a singularly facile and lucid English," that he had "a liquid style that sparkles." Already that praise has induced some other judges to attempt to imitate him; and his imitators are beginning to breed their imitators. Unaware that there are many unable to subscribe to that praise but unwilling or too lazy to make public their dissents, the oncoming generation of lawyers may feel constrained to accept that so-called "singularly facile and lucid English" as the ideal pattern, and to esteem lightly the manner in which certain other American judges express themselves. That would be a misfortune, for it would retard the

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effect on legal writing of that healthy development, occurring elsewhere, of an unapologetic American style. And such a style has its importance.

First it makes for clearer understanding by American lawyers and laymen of what American Courts are doing; I shall return to that point later.

Second, it is bad medicine for America that, too long, its literature, legal or other, has been written in English. We Americans are not English. And our speech — what we talk — is not English, but American. Our talk, to be sure, resembles our writing. But the two are importantly different. And the difference hampers, seriously, American written expression and, as a consequence, American thinking.

I remember, more than a decade ago, visiting an English appellate court. A case had just been argued and the three judges huddled together for some ten minutes after which the presiding judge uttered the court's opinion. The utterance was delivered without any preparation or the assistance of a single written note. I was amazed at its literary excellence. I could think of no American judge who could match that performance. "What an inferior lot our judges are," I reflected.

But as I wandered about England I came to doubt the wisdom of that reflection. For, on all sides, I heard men and women speaking what seemed to me like English literature. The most mediocre or commonplace of moderately well educated English men could, without effort, talk in a manner that few Americans of genius equal in their best and most carefully prepared writings. Why? Because *Englishmen both talk and write English. But Americans try to write English, but talk American.*

There is no reason for perpetuating that divorce between our two languages, the spoken and the written. Once upon a time, all Europeans made that error. In those days no cultured Frenchman wrote in French; he spoke French and wrote Latin. The shift to the use of French as a literary medium was revolutionary. To write in French, it was thought, was to write in slang ("patois"). It was asserted that no masterpiece could be written in a modern

language. The literary revolution was in its height when Du Bellay wrote (in French) of “the foolish arrogance and temerity * * * of some learned men who think our vernacular incapable of all good literature, and erudition.” The vestiges of that old tradition are buried in the phrase “romance languages.”

We are, in a sense, to the English what the French were to the Romans. Our speech is, in that sense, like a romance language. It is in large part derived from English. But English itself is a derived language — a composite of French, German, Scandinavian, Greek, Latin and a dozen other tongues.

There’s a key: *a language, at its core, is a tongue*. And the tongue, as we need no physiologist to tell us, is used (some of the time) for speaking. A written language should, therefore, be directly related to the tongue — to speech. And since American speech is not English, no more should American writing be.

It is no accident that we use almost interchangeably the words “language,” “tongue,” “speech.” For the basic appeal of language is to the ear. “Language,” says Sapir, “is primarily an auditory system of symbols. In normal individuals the impulse to speak, first takes effect in the sphere of auditory imagery. * * * Hence the cycle of speech * * * is a matter of sounds and of movements intended to produce these sounds. Written language is * * * a point to point equivalence to its spoken counterpart. The written forms are secondary symbols of the spoken ones — symbols of symbols.” Although the written symbols may “in the actual practice of certain eye-readers, and possibly in certain types of thinking, be entirely substituted for the spoken ones, yet the auditory-motor associations are probably always latent.”

It would seem clear that good writing is speech heightened in tone and polished in form. But heighten and polish up American speech as you will, it is still not English. Yet, under the lash of tradition, we try to make it so. And we fail signally.

I repeat that it is bad medicine for Americans to speak American and to try to write English. For one thinks in language. Our thought grooves and our language grooves are inseparable. So that Americans should think in American, in their native tongue. To

force ourselves, as we do, to think in an alien tongue, in English, is to clog our thinking.

Mr. Justice Holmes once said, and profoundly, that we need “to think things instead of words, or at least we must constantly translate our words into the things for which they stand.”¹ But we think by means of our words. And we should use those words in a way which will bring them, with least effort, closest to the things about which we are thinking, else there will be loose connecting rods in our thoughts. So that it is unwise for Americans, when thinking of American things, to use words after the manner of Englishmen.

It is possible that it would be easier for us to learn to think in some language which we could not fail to recognize as foreign, such as French or Latin or German. The very fact that English is not obviously alien — that the differences between American and English are subtle, so that we are not aware of the task we impose on ourselves — may make that task the greater. How subtle are the differences and how difficult it is to discern them is easily shown by observing the reverse of the usual process: note how Bernard Shaw falls down when, in *Blanco Posnet*, he tries to write American.

Let me add that nothing I have said is to be taken as expressing distaste for the English or English style. I do not mean for a moment that Americans are better than Englishmen or American

¹ He was, in part, anticipated: Mr. Justice Miller in a letter to a friend, written in 1878, said that he was for the sort of education which sought “the knowledge of things instead of the knowledge of words.” And, still earlier, Mr. Justice Story, in 1835, remarking that an argument of a case had taken too long, said, “But this is the very region of words; and Americans, I fear, have a natural propensity to substitute them for things.” William Hazlitt, in *The Ignorance of the Learned*, said in 1818: “There is a certain kind and degree of intellect in which words take root, but into which things have no power to penetrate.” There are, it would seem, more ancient sources of the antithesis. See e.g., BACON, *NOVUM ORGANUM*, 399f; HOBBS, *LEVIATHAN*, Pt. I, Ch. IV; LOCKE, *AN ESSAY CONCERNING THE CONDUCT OF THE UNDERSTANDING*, Bk. III, Ch. X, § 13; PLATO, *CRATYLUS*; A. E. TAYLOR, *PLATO* (2d ed. 1927) 75ff; ARISTOTLE, *DE INTERPRETATIONE*, especially 16a, 3-7, 19-29. See in general OGDEN & RICHARDS, *THE MEANING OF MEANING* (5th ed. 1938) 33-36.

speech better than English. I do mean that Americans are not Englishmen and that American is not English. Nor am I expressing any disdain for the “classics,” English or Latin or Greek. Of the classics, I say, with Du Bellay, “Devour them not in order to imitate but to turn them into blood and nutriment;” and I recall Hobbes, who said that, “it is an argument of indigestion when Greek and Latin sentences come up again unchanged.”

I have been told of a student at the University of Chicago who, as a native of China, had learned English in Barcelona, Spain. In Chicago he listened to a professor, talking American, and recorded what he heard in English learned from a Spanish teacher. In just what language he thought during that process, I do not know. His job was complicated. That of the American, trying to write and think in English, is but a trifle less so.

Thanks to Mencken,² many Americans have become conscious of that needless difficulty. There were pre-Menckenites who sensed it. Veblen did, as I shall presently point out. And the writings of Thoreau or Mr. Justice Holmes are full of native idioms; are made of the American speech of their day, heightened and polished. Is it not possible that Holmes’ clarity of thought owes much to that fact?

“Cardozo’s style,” writes one of his admirers, “flows with excitement across the printed page,” adding that “here is an essayist rare enough to rank with Lamb.”

I shall doubtless be chided for questioning that judgment. I do so with no deviation from the deepest admiration for his greatness as a judge, a philosopher or a scholar. That he was a great judge, that he advanced the progress of keen thinking about the purposes and workings of the courts, is beyond question. That he was a great person, too, is undeniable. Holmes called him “A beautiful spirit.” And all who knew him have paid him similar tributes: they speak of him as “a unique personality;” of his “spiritual nature;” of his “nobility of character;” of his “simplicity.” He was “reserved,

² Mencken, H. L., *THE AMERICAN LANGUAGE*, N.Y. (1919).

unassuming, retiring, gracious to high and low," and "serene." It is said that "his every thought and action were mellowed by gentleness and humility." Yet "with the simplicity, modesty and gentleness of his character, there was a driving spirit to right the wrongs of the world." Surely here was a wise and good man, entitled to veneration.

But he was neither an immortal nor a mortal god. Being human, he escaped perfection.

The dogma that one should speak nothing but good of the dead surely needs to be discarded. It is plainly absurd as to rascals: there is every reason why, when an Insull dies, we should point out his vices. But it is almost as absurd that there should be silence as to the faults of great men. No man is great in all his aspects. Diderot observed that "everything even among the greatest of all the sons of men is incomplete, mixed, relative; everything is possible in the way of contradictions and limits; every virtue neighbors elements of uncongenial alloy; all heroism may hide points of littleness; all genius has its days of shortened vision." Unmitigated or monolithic praise of the great departed often encourages imitation of their errors and weaknesses.

I do not depart from these views when I venture to reproach Cardozo's style. If it should be said that it is presumptuous for so unaccomplished a person to criticize the style of one so great as Cardozo, my answer will be this: It is a prized democratic maxim that even an alley cat may look at a king; it was an untutored boy who saw the true nature of the emperor's clothes.

Cardozo was a contradictory personality: although he was a recluse, a retiring man, he devoted most of his life to public service and was therefore constantly making a public appearance. Deeply hurt, in his youth, by a certain bitter personal experience, he withdrew from the manner of living followed by most of his fellow men. Yet he did not seek refuge in morbid introspection or in an ivory tower. He did indeed retreat from 20th Century living. But he re-entered it. And — here is the point — he re-entered it disguised as an 18th Century scholar and gentleman. His observations of the contemporary scene were keen, but they were not

quite the observations of a contemporary. He wanted, at one and the same time, to be in and yet out of what was happening in the America of his time.

He achieved a compromise. And that compromise expresses itself in his style. It is neither 20th Century nor American. It is imitative of 18th Century English: he wrote of 20th Century America not in the American idiom of today but in a style that employed the obsolescent "King's English" of two hundred years ago.

The result was by no means ugly. His writings have grace. But it is an alien grace. Significantly, in his essay on *Law and Literature*, Cardozo, in citing instances of literary excellence among judges, passes freely from English to American opinions without noting any need for differentiation.

He was not wholly indifferent to current American speech. I am told that one evening, when someone described the "principle of polarity" as expounded in Morris Cohen's *Reason and Nature*, Cardozo remarked, "Ah, Professor Cohen dignifies wobbling." But, when Cardozo wrote, such street language disappeared. His wit then took another and more "elegant" form. So in a dissenting opinion he said: "A Commission which is without coercive powers, which cannot arrest or amerce or imprison though a crime has been uncovered, or even punish for contempt, but can only inquire and report, the propriety of every question in the course of the inquiry being subject to the supervision of the ordinary courts of justice, is likened with denunciatory fervor to the Star Chamber of the Stuarts. *Historians may find hyperbole in the sanguinary simile.*" Contrast that pedantic judicial witticism with Holmes who wrote to Pollock on April 26, 1924: "I was amused by a question of taste yesterday. In one of my opinions I give a short account of a statute and say that there are amplifications 'to stop rat holes' that need not be stated as the plaintiffs admit that

they are within the statute.³ The C. J. [Chief Justice Taft] criticized. I said our reports were so dull because we had the notion that judicial dignity required solemn fluffy speech, as, when I grew up, everybody wore black frock coats and black cravats (I didn't say that to them). I didn't care for the phrase but do for the principle."

It would be unfair to suggest that Cardozo usually thought in American and translated into semi-archaic English. One feels that he had used a private time-machine to transport himself back into 18th Century England. *He had, that is, translated himself into a past alien speech environment.* The style became the man. So that those who adulate his style do not compare him with contemporary Americans; they say that he was an "essayist rare enough to rank with Lamb."

All of us have some "guiding fictions," some images of a self or selves which we try to live up to. The word "person" derives from the Greek theatrical word for an actor's mask through which the actor talked. There is buried truth in that word-history: every person is, in a sense, a mask, and we all have a set of masks. It may be surmised that one of Cardozo's selves or persons, one of the masks through which he talked, was that of an educated Englishman engaging in imaginary conversations with Charles Lamb or Dr. Johnson or Goldsmith.

Any translated style is likely to be awkward. As Sapir says, "a great style incorporates the basic form patterns of the language; * * * it builds on them. * * * It does with ease and economy what the language is always trying to do. Carlylese, though individual and vigorous, is yet not style; it is Teutonic mannerism. Nor is the prose of Milton and his contemporaries strictly English; it is semi-Latin done into magnificent English words." So Coleridge said of Milton that his prose style was better in Latin. James Russell Lowell remarked that one might almost learn Latin by reading

³ *Dillingham v. McLaughlin*, 264 U.S. 370, 372 (1924). Holmes did not delete the words which the C. J. criticized.

Milton's prose; it might be said of Cardozo that one can almost learn English (not American) by reading his opinions. But Milton was translating into his native tongue and could therefore produce ruddy English stuff, sometimes too strong for Lowell — as, for instance, in such a phrase as “that queasy temper of lukewarmness that gives a vomit to God himself.”

It was Lowell, by no stretch of the imagination a radical innovator, who, in 1889, explaining the history of the resistance to the use of living languages to produce living literatures, said that, “as the knowledge of Greek and Latin was the exclusive privilege of a class, that class naturally made an obstinate defense of its vested right.” Ten years later, Veblen exploited a somewhat similar thesis. Proficiency in the use of archaisms, he maintained, is a badge of membership in the leisure class, because it is a display of “conspicuous waste.” So, he said, colleges insist that students must spend a number of years in acquiring the ability to use and understand certain of the dead languages of Southern Europe because the possession of such “substantially useless information” signifies a conspicuous waste of time and effort and “hence the pecuniary strength necessary in order to afford this waste.” The “classics,” he maintained, “serve the decorative ends of leisure-class learning better than any other kinds of knowledge, and hence they are an effective means of reputability.” But Latin and Greek are not, he said, the sole means of manifesting reputable “archaism and waste.” The word “classic” also denotes “the obsolete and obsolescent forms of thought and diction in the living language. * * * The archaic idiom of the English language is spoken of as ‘classic English’. * * * The newest form of diction is never used in writing; the sense of that leisure-class propriety which requires archaism in speech is present even in the most illiterate or sensational writers in sufficient force to prevent such a lapse. * * * Elegant diction, whether in writing or speaking, is an effective means of reputability. * * * A discriminating avoidance of neologisms is honorific,⁴

⁴ Note how guilty Veblen is of the faults which he describes.

not only because it argues that time has been wasted in acquiring the obsolescent habit of speech, but also as showing that the speaker has from infancy habitually associated with persons who have been familiar with the obsolescent idiom. It thereby goes to show his leisure-class antecedents.” And Veblen goes on to describe — in a manner distinctively relevant to a discussion of judicial style — the arguments of those who defend “the conventional usages of archaism and waste.” It is contended, he says, “that a punctilious use of ancient and accredited locutions will serve to convey thought more adequately and precisely than would the straightforward” use of the latest speech forms, although “it is notorious that the ideas of today are effectively expressed in the slang of today.” Classic English locutions “are reputable because they are cumbrous and out-of-date, and therefore argue waste of time and exemption from the use and the need of direct and forcible speech.” In language, as elsewhere, there is a “code of pecuniary beauty” which is “under the dominance of the canon of reputable futility” and frequently results in “expensive discomfort.” And he notes that, in this country, “leisure-class tastes are to some extent shaped on usages and habits which prevail, or are apprehended to prevail, among the leisure class of Great Britain, * * * the English leisure class being, for purposes of reputable usage, the upper leisure class of this country, and so the exemplar for the lower grades.”

I confess that Veblen’s thesis seems to me to be altogether too unqualified. The compulsion of leisure class attitudes is more unconscious than he indicates; and there are, I believe, other reasons for pleasure in archaisms than those he suggests.⁵ But it is difficult to deny that there is a large element of truth in Veblen’s analysis. Making all due allowances, then, it can perhaps be said that Cardozo’s style is highly esteemed, in part, because it shuns

⁵ These views of mine are perhaps biased because I am a creature of those compulsions which he described, and so enslaved by tradition that, as the reader can easily observe, I tend to express myself in pseudo-English rather than in authentic American speech forms.

racy American speech, because it is caviar to the general, because John Q. Citizen finds it difficult to understand what Cardozo is saying, because some of those who admire his mode of writing can flatter themselves that they are sharing in English upper class virtues, and because many of those who do not understand it do enjoy the snobbism of saluting the ways of those who seem to them to compose a superior caste.

I have said that Cardozo translated himself into an alien speech environment. But his translation was not a complete success. Graceful as is his writing at times, it is not always the equal of the best English writing. It is sometimes ornate, baroque, rococo. Emulated by those with lesser gifts, it is likely to produce writing which is reminiscent of the State, War and Navy building in Washington.⁶ For sometimes Cardozo's ornaments are annoyingly functionless. "Eloquence," wrote Pascal, "is a painting of thought; and thus those who, after having painted it, add something more, make a picture instead of a portrait. * * * Nothing makes us understand better the ridiculousness of a false sonnet than * * * to imagine a woman or a house made according to that standard. * * * Whoever imagines a woman made after this model, which consists of *saying little things in big words*, will see a pretty girl adorned with mirrors and chains, at whom he will smile. * * *"

Cardozo delighted in elaborate metaphors. One of his admirers — an Australian be it noted — after saying that "his style was attractive, often picturesque" goes on, somewhat apologetically, to remark that "even the tendency towards metaphor, *seldom promoting lucidity*, was justified in his case as a reasonable means of persuading the less imaginative." Was it? One wonders. Would he have been less persuasive if less indirect?

Being a lawyer, I turn to citations. And so I must cite illustrative instances of Cardozo's style. Here are a few: "A trustee is held to something stricter than the morals of the market place. Not

⁶ Here I catch myself (such is the power of tradition) traducing my own principles, asserting, impliedly, that one style of architecture is, objectively, more beautiful than another.

honesty alone, but a *punctilio of honor* the most sensitive, is then the standard of behavior.” [Why not “a punctilio of the most sensitive honor?” And why, after all, use “punctilio?”] “To foil the plans of knaves intent upon obscuring or suppressing a knowledge of their knavery. * * *” “The sport of clever knaves * * *” [Would it not have been refreshing to speak of “crooks” and “crookedness?”] “Delicate enough and subtle is the inquiry. * * *” “Room for doubt is there none. * * *” “Fundamental hitherto has been the rule. * * *” “Different, also would be the question of * * *.” “No answer is it to say that * * *.” “Contract in the true sense there is none * * *.” “At the threshold is met the evidence * * *.” “Error of judgment there may have been * * *.” “For answer to all this the thrust will not avail * * *.” “One may take leave to deny * * *.” “So the concept be not abjuring * * *.” “The subject the most lowly * * *.” “An officer must not pause to parley.” “The risk of rescue, if it be not wanton, is born of the occasion. The emergency begets the man.” “Writ large in this style or title was the name of a living man who had done nothing by word or act to give the name a reality or a significance external to himself.” “The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used.” “There is here no seismic innovation.” “Due process is a growth too sturdy to succumb to the infection of the least ingredient of error.” “No doubt the income thus accrued derived sustenance and value from the soil of past events. We do not identify the seed with the fruit that it will yield. Income within the meaning of the Sixteenth Amendment is the fruit that is born of capital, not the potency of fruition.”

In his essay on the style of judges, Cardozo remarks, “Form is not something added to substance as a mere protuberant adornment.” Consider the form of that very sentence. Would it have been less effective if less decorative? One is reminded of Barney McGee who was “full of phrases of length and latinity such as honorificibilitudinity.” Was Cardozo’s style indeed intended to persuade? Was it not, sometimes, perhaps designed rather — no

matter how unconsciously — to arouse that admiration for English leisure-class virtues which Veblen describes?⁷

Cardozo was opposing the natural genius of the language. For, as Toynbee says, in the history of costume, as in the history of writing, simplification is, generally, the path of progress. The trend is apparent in the development of costume in any civilization: in the dress of Queen Elizabeth there was “a profusion and extravagance of ornament * * *. There has been a tendency to the use of plainer materials — and even more markedly — towards a simpler cut, which aims at following and setting off the natural lines of the human body instead of contradicting or correcting them.” And so with the American style of speaking: it, too, tends to the use of plainer materials and towards a simpler cut; it aims at following lines of the body of American thought instead of contradicting or correcting them.

That Englishmen may praise Cardozo’s style is no answer to any part of my comments. For it flatters them that he tried to ape the English. And his use of obsolescent English locutions might well make it welcome to them: they may find in it the pleasure of visiting what Toynbee calls a “living museum” — a living museum of departed English usages. (As Toynbee notes, the top-hat originated in England, was imported into America by the Puritans and Quakers, and was then reimported into and adopted in England where it had long been discarded.)

Cardozo’s style is of the type which he himself classified “as the refined or artificial, smelling a little of the lamp,” a style which “has its dangers, for unless kept well in hand, it verges at times on preciosity and euphuism.” There is often a feeling of strain when one reads Cardozo. Heaven knows, there should be no criticism of a writer because he has worked hard, has written and re-written. Anatole France, it is said, sometimes worked over a passage for weeks. But the reader ought not have to share in the writer’s

⁷ I do not mean to suggest that there is not a virtue in leisure. If we are intelligent in our uses of modern science, every American will have a good share of leisure in the days of peace.

effort: Anatole France's patient efforts yielded a simplicity that made his prose seem effortless. But Cardozo's prose is all too patently worked-over. One thinks of Ransom's comment on Lycidas: "It was written smooth and rewritten rough; which was treason."

Cardozo attained eminence as a thinker not because but in spite of his style. To force himself to think in a foreign tongue must have cost him much effort. That with such a handicap he thought clearly is a tribute to his genius.

Yet the indirection of his style may sometimes have served a deliberate purpose. "Those of us whose lives have been spent on the bench," he admitted, "have learned caution and reticence, perhaps even in excess. *We know the value of the veiled phrase, the blurred edge, the uncertain line.*" One of the most adulatory biographers says of him that he preferred "to make changes [in the law] *not openly but through a skilful manipulation of precedents.*" Cardozo tells us that, as a young lawyer, he had a "blind faith" that the courts would follow precedents "inexorably to the limit of its logic." He confesses that, as he grew older, he learned the vast amount of legal uncertainty. But he could never bring himself, emotionally, to accept that uncertainty as an unavoidable fact. He indulged in what he called "laments" that the law is not an exact science. He acknowledged its inescapable lack of mathematical exactness but looked upon that inexactness as an "evil against which the intellect rebels." He wrote of "the curse of this fluidity," of "an ever shifting approximation" as a curse "that the law must bear." Reluctantly he was "content with many a makeshift compromise, with many a truth that is approximate and relative;" but, he conceded, he was "yearning for the absolute." That struggle between a yearning for the absolute in law and a recognition that it was unattainable, was doubtless an important cause of his fondness for inverted expressions, negative constructions, sinuous turns of phrases, elaborated metaphors. They signify reluctant doubt.

Cardozo's mannerisms are sometimes an unmitigated nuisance to the lawyer who must, in a work-a-day world, make use of his

judicial opinions.⁸ They sometimes obscure where there is need for clarity. Cardozo's ideas were unusually clear. He was a nice analyst with a zest, not always exercised,⁹ for following up all the implications of his ideas. But the clarity was in this thinking. His was not a lucid style.

And lucidity is the basic quality of good judicial opinions. As Cardozo himself put it, "there can be little doubt that the sovereign virtue for the judge is clearness." That lawyers, at least, should be able quickly to understand what a judge is saying is so obviously desirable as to need no argument. It is wise, too, that laymen should as far as possible comprehend what the judiciary means.

Cardozo once voiced that attitude in a case in which he reversed a judgment of a lower court because of remarks by a trial judge which confused the jury: "It is not enough to show that by the test of error of law there is no flaw in the instructions. What concerns us more profoundly is whether there is justice in the verdict. *Justice is not there unless there is also understanding.*"

To be sure, as Cardozo noted in one of his essays, lucidity need not be the exclusive attribute of judges' language. Clarity is not enough; if it were, then judges should be urged to reduce their opinions to algebraic equations or to employ the chill emotionless symbols of logistics which make so forbidding many of the pages of Michael and Adler's interesting treatise on evidence. Hogben, in an essay in his volume, *Dangerous Thoughts*, shows that the teaching of mathematics has been needlessly difficult because of the prosaic verbiage of most mathematical writers. He refers to Leacock's suggestion that journalism should enliven Euclid, so that for the statement that "a perpendicular is made to fall on a line, bisecting it at a point C" there would be substituted this:

⁸ He thinks of Gilbert's lines about a motto:

"'Though fools may tread upon a twig,

Wise men fear a bandit.'

All of which was very clever, but I did not understand it."

⁹ As noted earlier, sometimes as judge, he deliberately refrained from disclosing his full intentions.

“AWFUL CATASTROPHE
Perpendicular Falls Headlong on a Line
Line at Cincinnati Completely Cut
President of the Line makes Statement.”

Literary skill, if it promotes clarity, is a blessing in a judge. Lively, provocative and graceful writing is not only not improper but is welcome in judicial opinions. As Cardozo asserted, “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.” But although clarity is not enough, although it is not a sufficient condition, it is necessary, indispensable, in the utterances of judges. “Those who make antitheses by forcing words are like those who make false windows for symmetry,” says Pascal. “Their rule is not to speak accurately, but to make apt figures of speech.” Sheer amusement or sheer beauty has its place — as in *Jabberwocky* or in much of Swinburne’s poetry — but not in the opinions of judges. An obscurely worded pronouncement by a court, no matter how “literary,” is, to use the American language, a pain in the neck. To avoid obscurity, to achieve a clarity which is essential, American judges should write good American.

When, in certain situations, the defendant’s lawyer contends that the plaintiff’s lawyer has brought the wrong kind of suit, the courts say that the defendant must give the plaintiff “a better writ,” point out a proper way to bring the suit. And, here, I shall try to do the equivalent — to point to some judges whose style should serve as a better model than Cardozo’s.

I nominate three — Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Jackson. They write much as they talk, as their fellow

Americans talk.¹⁰ Unlike Cardozo, they express the ideas of today in the American idiom of today. They employ direct and forcible American speech. They do not shun the straightforward use of the current forms of spoken American. There is a racy and contemporary timbre in the way they write. They achieve simplicity and clarity. The American reader knows exactly what they mean. He has no sense of strain. He sees through their words as through a well-polished pane of glass. One recalls a line of Lowell's: "If this be not style, there is something better than style." The style of Black or Douglas or Jackson is of the earth, earthy. And it is of the American earth.

I may be told that Cardozo (although he sounds as if he were striving to talk in the past) was writing for posterity,¹¹ and that Black, Douglas and Jackson are writing ephemerally, for men of their own time and place. I count that in their favor. It is, indeed, a paradox that most of the writers whose posterity has cherished them are men who, like Shakespeare and Montaigne, gave little heed to what men in future times or in other lands would think of them; they wrote for their contemporaries. The "greatest — or shall we say the most satisfying — literary artists," says Sapir, "are those who have known subconsciously to fit or trim the deeper

¹⁰ Mr. Justice Jackson: "I do not suppose the skies will fall if the court does allow Arkansas to rig up this handy device for policing liquor on the ground * * *, etc."; concurring opinion in *Duckworth v. Arkansas*, 314 U.S. 390 at 402. "The world is even more upside down than I had supposed it to be, if California must accept aliens * * *, etc."; concurring opinion in *Edwards v. California*, 314 U.S. 160, at 184.

Mr. Justice Douglas: "Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business. Thus primary utility is in litigating, not in railroading"; *Palmer v. Hoffman*, 63 S. Ct. 477 (decided Feb. 1, 1943). "Nor are we justified in rewriting the statute to iron out possible logical inconsistencies * * * etc."; dissenting opinion in *Scripps-Howard Radio Inc. v. F.C.C.*, 316 U.S. 4 at 19.

Mr. Justice Black: "But the trouble with these arguments is that they are addressed to the wrong forum. Conditions may have changed, but the statute has not"; *United States ex rel. Marcus v. Hess*, 63 S. Ct. 379 (decided January 18, 1943).

¹¹ "What," someone once asked, "has posterity done for me, that I should think of posterity?"

intuition to *the provincial accents of their daily speech*,” for “style is not an absolute, a something to be imposed on the language * * * but merely the language itself, running in its natural grooves, and with enough of an individual accent to *allow the artist’s personality to be felt as a presence, not as an acrobat.*” Black, Douglas and Jackson use the provincial accents of their daily speech; one feels, in the writings of each of them, the personality of the writer as a presence, not as an acrobat. Their now-ness is not a blemish but its outstanding virtue.

Hobbes, smarting under criticism of his own pre-occupation with problems of his own time, said wisely: “Though I reverence these men of ancient time, that either have written truth perspicuously, or set us in a better way to find it out ourselves; yet to the antiquity itself I think nothing due. For if we reverence the age, the present is the oldest. If the antiquity of the writer, I am not sure that generally they to whom such honor is given were more ancient when they wrote than I am that am writing. But if it be well considered, the praise of ancient authors proceeds not from reverence of the dead, but from the competition and mutual envy of the living.”

Black, Douglas and Jackson write in their native tongue. Of Cardozo one might say this: He admitted that, at times, he wrote with his tongue in his cheek. And, frequently, it was not even his native tongue.