Case law for the tyro advocate

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**Abstract**: a collection of legal anecdotes involving bold, insouciant, or impudent behaviour by counsel directed towards the court or the practice of law.

Your opponent has sprung an unanswerable legal point on you and it’s against you? The bench is grilling you without mercy? You feel like a pinned butterfly? No worries? With the following cases in your court book you are more than a match for your well-researched learned friend or the playful judge entertaining him or herself at your expense (*qv* “Junior Silk’s Speech” *per* Crennan QC, 73 Vic Bar News 16 at 24, Winter, 1990).

**NO WAY TO TREAT THE CHIEF**
When Salomons came out of his retirement to argue the question of interference of State laws with Commonwealth instrumentalities, he protested to the High Court that “no lawyer would ever support” the proposition he was opposing. Griffith said somewhat sternly, “You are forgetting that the Judges of this Court have already so held”. Salomons replied, “I did not say no Judge would say so, I said no lawyer would say so.”


**DON’T WAIT TO BE ELEVATED TO CREATE NEW LAW**
… Mr Wakefield, in one of the Chancery Courts, referred to what he described as an anonymous case [not yet reported]; and the matter for the time passed. When Mr Bethell, however, came to reply, he said, “I have to inform your Lordship that the case has been overruled in the House of Lords”. Therewith Mr Wakefield, somewhat losing his temper, retorted, “There never was such a case”.


**CREATIVE LAW II**
One of the greatest equity judges of the last half century was the late Sir George Jessel, the first and so far the only Jew who had been raised to the English Bench. Jessel’s appointment was received with a certain amount of misgiving, not on account
of his attainments, which were unexceptionable, but by reason of an undesirable audacity which had occasionally marked his conduct of cases at the Bar. There is no doubt that at a pinch, in order to score a point, he was not above “improving” the actual text of the report which he purported to be quoting, and I well remember that this practice produced quite a dramatic little scene when, having sprung upon a particularly painstaking opponent some cases which apparently demolished the later’s argument, that learned gentleman, with an almost apoplectic gasp, requested that the volume might be passed to him. The result of his perusal was more satisfactory to himself than it was to Jessel, who, however, treated the matter as a mere trifle not worth fussing about and calmly restarted his argument on a new tack.

In this undesirable habit he resembled an eminent predecessor who, on investing some obsolete case on which he was relying with a complexion favourable to his argument but quite new to the presiding judge, the latter quietly asked him to hand up his volume of reports. After a moment’s critical examination the judge handed the volume back with the scathing rebuke, “As I thought, Mr ⎯⎯⎯, my memory of thirty years is more accurate than your quotation.”

Extract from Personalia (1903) by ‘Sigma’ reprinted in “The Lighter Side”, 17 The Green Bag 499-500 (1905).

Better to talk to a bunch of fools than to listen to them

Sir Richard Bethell was once (so Sir Frederick Darley told me) rebuked in the Court of Appeal for too much speaking. The rebuke took the form of the significantly uttered question, “How long did this case take in the Court below, Sir Richard?” Bethell made a show of whispering to his junior, then said, “I was not in the case below, Your Lordship, and I’m told it lasted two days, but there were no interruptions from the Bench.” Bethell, of course, was famous for an imperturbable hardihood. When he became Lord Chancellor Westbury, his horses bolted, and his coachman called out over his shoulder, “My Lord, I’m afraid the horses are out of hand, what shall I do?” “Drive into something cheap!” was the callous reply.

A B Piddington, Worshipful Masters (1929) 235.
CITE THE JUDGE’S OWN LAW TO HIM

Lord Westbury (formerly Sir Richard Bethell) when delivering judgment against some unfortunate trustees said, “I am profoundly sorry for the embarrassment in which these gentlemen now find themselves placed. Had they taken the most ordinary precautions, had they employed a firm of reputable solicitors, had they taken the opinion of a member of the Bar, they would never have been enmeshed in the snares which now hold them.

This was a little too much for the learned counsel, whose brief contained an opinion dated some years back and signed “R Bethell”, in which his clients were advised to follow the identical course they had pursued with such disastrous consequences. “My Lord,” he said, “there is a paper here which I am unwilling to read in open Court, but which I would beg to submit to your Lordship.”

“It is a mystery to me”, continued the Lord Chancellor, with unabashed countenance, when he had perused the document, “how the gentleman capable of penning such an opinion can have risen to the eminence he now has the honour to enjoy.”


A somewhat milder version found its way into the American reports:

Lord Westbury … it is said, rebuffed a barrister’s reliance upon an earlier opinion of his Lordship, “I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion.”

per Jackson J, McGrath v Kristensen, 340 US 162 at 177-8 (1950)

DEALING WITH UNHELPFUL ADMINISTRATIVE STAFF

However, when they [Porter and Arnold] brought the document to the Supreme Court building, the court’s clerk, a man nicknamed “Mr Justice” Cullidan, said that he could not accept their plea. It had no docket number, he argued. “Well, take any number from one to ten,” responded the whimsical Thurman Arnold, “we don’t care.” But Cullidan insisted that all the formalities must be observed. “Well, now, look, Mr Cullidan,” said Porter, “we will effectuate a lodgment.” As severe as this sounded, Porter didn’t have the slightest idea what a lodgment was, except that he remembered
hearing about this obscure pleading in a law course he had taken years ago at the University of Kentucky.

Murphy, *Fortas: the rise and ruin of a Supreme Court Justice* (1988) 94.

**CREATIVE LAW III**

**DISPUTATION** — Jason Magnus and Barth Socinus, two eminent lawyers of Pisa in the fifteenth century, held frequent disputations on law subjects. One day Jason found himself driven hard by his adversary, and cited a law that he had that moment forged, which turned the dispute on his side. Socinus, not less quick and ingenious than his opponent, served him the same trick. Jason, who had never heard of that law, called upon Socinus to quote the passage. It stands in the same page with that you have just cited,” replied Socinus with great gravity, and without hesitation.

Jacob le Duchat reported in Willock, *Legal Facetiae* (1887) 248.

**FORESTALLING THE BENCH’S FLOODGATES**

Continuing in the style set by his mentor, Frankfurter presented, in addition to the legal argument, the social one — the detrimental effects of long hours and low wages on labourers and the conditions which had led to the passage of the legislation in Oregon and other states. At one point McReynolds turned on him:

“Ten hours! Ten hours! Ten! Why not four?”

Frankfurter paused for a moment, then made his way slowly and dramatically to where McReynolds was sitting.

“Your Honour,” Frankfurter replied, “if by chance I may make such a hypothesis, if your physician should find that you’re eating too much meat, it isn’t necessary for him to urge you to become a vegetarian.”

Holmes was delighted with his young friend. “Good for you!” he exclaimed loudly and “embarrassingly”, as Frankfurter remembered it.

**BREVITY IS THE SOUL OF PERFECTION**

In a case he [Paul Freund] once argued for the government before the Supreme Court, the justices, in questions to the opposing counsel, brought up everything he had planned to say. Freund rose and said, “May it please the Court, there is a typographical error on page ten of our brief.” He corrected the error, and added, “If there are no questions, the government rests.” The justices ruled unanimously for the United States. For years afterwards, Felix Frankfurter told friends about that triumph. “Since I’ve been on the Court, I’ve heard learned arguments, I’ve heard powerful arguments, I’ve heard eloquent arguments,” he used to say. “But I’ve heard only one perfect argument.”


**ADOPTING A WELL-KNOWN QUOTATION**

Responding to a defence submission, the State Prosecutor [in *Commonwealth of Massachusetts v Lizzie Borden* (1893)] William Moody said:

“I say of what my learned friend is pleased to call his argument — it is magnificent but it is not law.”


**CITE THE JUDGE’S OWN REVERSALS TO HIM**

Judge Hanecy was impatient as Darrow argued. The judge tried to stop him: “You might as well know, Mr Darrow, what you are saying is going into one ear and out the other.”

Darrow’s unorthodox retort was in keeping with the irritation he felt towards the judge: “I’m not surprised, Your Honour. Maybe it’s because there’s nothing to interfere with the passage, Your Honour.” Surprisingly enough, he was not charged with contempt.

In the same case Darrow cited authorities who had, in earlier proceedings, acted in opposition to Judge Hanecy’s decision. He produced a law book with a flourish to give it added importance. Then he said, “Now, Your Honour, I want to cite this specific case which resembles the one at bar in four important respects: one, it is a
contempt case; two, it’s a constructive contempt case; three, it was an appeal from the
Honourable Elbridge Hanecy; and four, it was reversed by the Supreme Court as I
expect this case to be.”


**Appealing to Twelve Good Men and True**

Charles P Thompson who served on the US Supreme Court (1823-43) at one time in
his practice had a client named Michael Dougherty, who had been arrested for the
illegal sale of liquor. The police had no evidence except one pint of whisky, which
their search of his alleged kitchen bar-room revealed.

In the superior Court this evidence was produced and a somewhat vivid claim made
of *prima facie* evidence of guilt by the prosecuting attorney. During all this Mr
Thompson was silent. When his turn came for the defence he arose and said,
“Michael Dougherty, take the stand”. And Mike with his big red nose, unshaven face,
bleared eyes and a general appearance of dilapidation and dejection, took the stand.
“Michael Dougherty, look upon the jury. Gentlemen of the jury, look on Michael
Dougherty,” said Mr Thompson. All complied. Mr Thompson himself, silently and
steadily gazing at Mike for a moment, slowly and with solemnity turned to the jury
and sad, “Gentlemen of the jury, do you mean to say to this court and to me that you
honestly believe that Michael Dougherty, if he had a pint of whisky, would sell it?”

It is needless to say Mike was acquitted.

From *The Green Bag* magazine.

**No Way to Treat the Chief II**

Mr Paris Nesbitt KC, who was in the habit of living and talking dangerously, caused a
flutter in the High Court on the hearing of an appeal in which he acted as counsel. In
the course of his argument, he made some statement relating to the law of trusts.

“That sounds rather startling,” said Sir Samuel Griffith; “what is your authority for
that proposition?”
“I should have thought,” Nesbitt replied, “that it was unnecessary to require authority for anything so obvious.” Turning to the solicitor instructing him, he said, “Get me a textbook on the Law of Trusts from the Supreme Court library.” As the solicitor was approaching the door leading out of Court, Nesbitt called out, in the hearing of everyone, “Any elementary book will do!”


As Jacobs says, it takes courage to do a thing like that. Good luck and, by the way, make sure you’ve boned up on *Lloyd v Biggin* [1962] VR 593 relating to contempt of court by counsel.

**SET FIRE TO THE JUDGE**

The narrator is Sir Hubert Ostler, retired Justice of the NZ Supreme Court:

“… as I read I lit my pipe, shook the match and, thinking it was out, dropped it into the wastepaper basket, which happened to be fairly full. But the match had not been extinguished, and presently I heard a noise and on looking round found a merry fire, the paper being well alight. I promptly picked up the basket and dropped it out the window, and on looking out to watch the result I saw it descend on to the head of Mr Justice Cooper, who had just emerged from the door. There was no time to warn him. It landed on his hat, and blazing papers were shot out and showered around him like Greek fire. He let out a yell and jumped like a frightened horse. He must have thought it was the fiery chariot of Elisha. I never saw such a mingled look of fear and anger as was on his face when he gazed up and found that I was responsible, and it took quite a lot of tact and humility to persuade him that it was not an intentional prank.” [Ostler had not yet been appointed to the Bench and was a practitioner at the time.]

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