

UNIVERSITY COLLEGE OF RHODESIA

Plain Speaking in Law

An Inaugural Lecture
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UNIVERSITY COLLEGE OF RHODESIA

Professor
R. H. Christie

PLAIN SPEAKING IN LAW

*An Inaugural Lecture
given in the University College of Rhodesia
on 21st September, 1967*

by

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When I was learning to fly aeroplanes during the last War they taught me the Morse Code, and the first signals I memorised were those standing for "beginning of message" and "plain language". If I received both I knew I could relax because I had some prospect of being able to understand what was coming next. If I received the first signal only I would grit my teeth and prepare to receive a meaningless jumble of letters and figures in a code that I could only decipher with the aid of a key supplied by the Air Ministry on edible paper.

I give you both signals, so you may relax while I tell you how the memory of my feeling of relief on receiving the plain language signal has stayed with me through twenty-one years' study of the law, and why I wish to spread this feeling of relief among all those who come into contact with the chair which I now occupy. I am going to talk about language. This may seem like trespassing upon the area of the Professors of Modern Languages, Classics, African Languages and English, all of whom I am honoured to number among my colleagues. I know it is an offence to be found by night in or upon any area, but only if I am so found without lawful excuse (the proof of which excuse shall be on me). I foreshadowed this excuse five years ago, when I wrote in the *Rhodesia and Nyasaland Law Journal* "law is an edifice of words, and suffers from every misuse or misunderstanding of its constituent words". Two years before that I wrote in my book *Rhodesian Commercial Law* "The law has suffered much more from the incorrect use of technical terms than it has from circumlocution." I stand by both these statements, but feel that my best excuse for talking about language is to be found in Lord Macmillan's remark, "The lawyer's business is with words. They are the raw material of his craft." What I propose to do is to explain why I have chosen plain speaking not only as the subject of

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this my inaugural lecture but as the hallmark which I hope will be stamped on all the products, both human and literary, of this new law school.

Let me admit at once that my reasons are partly personal. I have set out to make my Department a centre of impersonal, objective thinking, but we are all human, and I do not claim any greater ability than the next man to divorce my objective thinking entirely from my own experience. My experience of law started, I suppose, at birth, for my father was an English Chancery barrister. Like all Chancery barristers he moved in a world of rentcharges, advowsons, indentures and chattels real. He was a wonderful speaker, but no matter how hard he tried he could not talk law and English simultaneously for more than a few minutes. No Chancery man can. Not having a very enquiring mind, instead of becoming fascinated by what I could not understand I rejected it and decided that law was not for me. The musty smell that seemed to hang around Lincoln's Inn and the Law Courts also put me off. Law sounds like a dry subject and smells like a dry subject. For many it is a dry subject. Listen to what was said by the President of the Eastern Districts' Law Society at the Society's first annual general meeting at Port Elizabeth in 1884 :

“We thoroughly, from our own experience, appreciate the severity of the ordeal assumed by one who ventures upon so proverbially a dry study as that of law. There is much force in the story that on one occasion a fond mother asked an old lawyer what his opinion was as to her son entering upon law as a study. ‘Madam,’ said the lawyer, ‘can your son eat sawdust without butter?’”¹

Despite all this [I feel I should have slipped in a “notwithstanding” here, but the big words frighten me] I found myself reading law at my father's old college, Trinity Hall, Cambridge, which was founded in 1350 to foster the study of Canon Law. My supervisors were Dr. Ellis Lewis, J. W. C. Turner, Trevor Thomas and

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R. W. M. Dias. A more stimulating quartet it would be hard to imagine, and they opened my eyes to the simplicity of law. I have kept them open ever since, looking for the practitioners, judges and writers who would agree with the proposition that life should be lived in accordance with law; that the good life is a simple life and therefore good law is simple law. I have found that those who think in this way make a more lasting contribution to the law than any others. That is not to say that all law is simple. Far from it. There is plenty of very complicated law about, but the best lawyers simplify it.

During the sixteen years I practised law in this country I remained almost entirely ignorant of the intricacy of the law, and made a living by sharing my ignorance with numbers of people. With varying success I advised clients, questioned witnesses, addressed judges, magistrates and juries and lectured students. I can even claim to have delivered the first lecture under the auspices of this College, in February, 1953. Yet in all those years the law I put forward never seemed to me complicated. The fact that to the court it often seemed wrong was one of those things I soon learned to accept, but in the end I was in danger of becoming like Tolstoy's Russian, who is self-assured because he knows nothing and does not want to know anything, since he does not believe that anything can be known.

This was more or less my state of mind when, in fairly rapid succession, the College took the decisions to introduce the LL.B. degree, establish a Department of Law and appoint me to the Chair. Of course, all this took place more than two years ago — it must not be thought that in this College an inaugural lecture inaugurates anything. What do two years matter in a country that was colonized by ox-wagon? In 1965, then, I stopped practising and started professing. This was my chance to test the accuracy of Hall J.P.'s remark that "between those who profess and those who practise the law there is psychologically a great gulf

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fixed.”² I had to decide whether to abandon the approach to law that had served me so well and my clients so erratically. Perhaps due to that mental inertia which is graced by the name of “the innate conservatism of lawyers” I decided to abandon nothing, and my answer to the learned Judge of Appeal (as he subsequently became) is that too often there is a psychological gulf between professors and practitioners, but there need not be and there should not be.

I have spent more than enough time on my personal explanation. Having declared my bias I shall now attempt to show why I regard plain speaking as the foundation of good law.

Consider first the place of law in our lives. I have already said that life should be lived in accordance with law. If it is not, retribution can be expected to follow. “The long arm of the law” is a phrase with which we are all familiar, and it is worth remembering the words of Sir Robert Peel, the founder of the English police force :

“Behind the uplifted hand of one of my policemen stands the power of the British nation.”

The power of the nation is brought to bear on us not only when we commit a crime. It also compels us to obey the will of the legislature, which embodies the will of the nation. Some people doubt this last proposition, and claim the ability to interpret the will of the nation more accurately than the legislature. I have no doubt that they are sometimes correct, but if their enthusiasm leads them into disobedience they must be prepared to feel the power of the nation, brought to bear on them in accordance with law. I do not wish to embark on a discussion of whether punishment inflicted for disobedience of an unjust law can be regarded as unjust punishment, but in passing I cannot resist quoting from A. J. Kerr’s *Law and Justice*:

“There is normally a proper method which can be adopted in seeking reform and often there are a number of such methods. In considering

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methods by which reform may be brought about, Christians should seek methods which do not interfere with those functions which Christianity lays down as proper to the State. Amongst these functions are the restraint of evil-doers and the maintenance of order and therefore for Christian reasons reformers should not unleash forces of evil or create a state of disorder."

Still in passing, I would like to say that Mr. Kerr cannot and does not expect universal adherence to law. The more unjust the law, the more people come unstuck, but his point is that they should come unstuck in an orderly manner. Law also affects our lives, of course, by regulating our behaviour towards each other. This aspect of law was what Justinian had particularly in mind when he wrote :

"The precepts of the law are these: to live honestly, to hurt no one, to give everyone his due."³

Since law takes such a large part in our lives, it is obviously desirable that we should respect the law, and I use the word "respect" both in the sense of "obey" and "esteem". It is equally desirable that we should respect those who administer the law. When the late Federal Supreme Court was opened in 1955 I remember hearing Chief Justice Centlivres of South Africa quote these words of his predecessor Sir James Rose-Innes (possibly the finest judge the world has known):

"The work of the judge does not catch the eye like the work of the statesman, but it is of supreme importance to the community. For the character, the integrity and the efficiency of its judiciary are a priceless asset to any country, and especially to a young country like ours. The confidence of all races and all sections of the people in the Bench is a sheet anchor, equipped with which the ship of State may safely ride out storms which would otherwise overwhelm it."⁴

I do not think there are many who would quarrel with

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that view, but I am sure there are many who would say, "How can we have confidence in people we can't understand, and how can we respect the law if we can't understand it?"

It would be nice to answer this very reasonable complaint by waving a wand and abolishing all the incomprehensible law that complicates our lives. Of course, this is impossible. Even if we push the clock back 1,500 years we find Justinian's simple precepts followed by hundreds of pages of elaboration — pages which give our first year students headaches enough, without counting the headaches introduced by the increasing complexity of modern life. Many years ago Sir Frederick Pollock admitted in his *First Book of Jurisprudence* that he could no longer keep up with the American law reports, because their annual bulk was too great for him to absorb in addition to the English reports. Only a few months ago Lord Devlin wrote in *The Times*:⁵

"The annual output of statutes, statutory regulations, by-laws, etc., could not be read, let alone understood, by any single individual if he did nothing else for the whole year."

Lord Devlin was talking about England, which is admittedly a big country, but do you think we are much better off here? According to my calculation our own Government Printer puts out annually Bills, Acts, Government Gazettes and Government Notices containing about 2½ million words spread over 5,000 pages. Any individual who tried to read and understand all that would probably take to the bottle and stagger off like Mark Twain's Heidelberg professor "with his vast cargo of learning afloat in his hold". He would be well advised to, because by taking on such a cargo he would have left no room for anything that really mattered. When you think that the law libraries at Oxford and Cambridge each contain more volumes than our entire College Library, and the law library at Harvard more than all three put together, you realise that the words

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which Lord Macmillan described as the raw material of our craft need something like an advanced mining technique to win them before we can even start to dress them.

A technique that naturally springs to mind is the use of computers. Writing in (1965) *Journal of the Society of Public Teachers of Law*, Colin Tapper concludes that a vast amount of experiment and research at vast expense are needed before law can hope to benefit substantially from the computer revolution :

“Unfortunately the computer cannot hope to reproduce the incredibly complex process by which the human brain derives meaning from words. It is, of course, hoped that this will ultimately be achieved.”

If it is achieved, we must be sure that our enthusiasm for the automatic does not allow us to entrust anything more to the computer than searching for authorities—what computer experts call information retrieval. If we allow any part of the process of decision-making to be handled by computers we will have gone too far, because even if justice is done by such a method it will not have been seen to be done. This is why the courts in this country and South Africa have refused to convict motorists of speeding when electronic speed-testing instruments have been used unless the evidence makes clear to the court both how the instrument operates and that it has operated correctly.⁶ The evidence is as necessary to the motorist as it is to the court. A man convicted by a machine will be tempted to smash the machine and the system that relies on it. A couple of years ago we assembled in the High Court in Salisbury on the occasion of the retirement of Hathorn J. The Chief Justice, Sir Hugh Beadle, pointed out that the law is becoming more and more complex and bewildering to the layman, and painted a jocular but frightening picture of courts equipped with computers which would deliver judgment when the judicial officer

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(trained in the operation of the instrument) pulled the lever. He went on :

“In such an age it has been refreshing to work with a judge like Anton Hathorn, who has never lost sight of the fundamental purpose of the law; the purpose of making it easier and not more difficult to find the truth. . . . One of his greatest qualities as a judge has been to strip a case of its technicalities and unnecessary detail, to reveal the essentials on which to base the decision—a quality which is not as common among lawyers as it might be.”⁷

What judge could wish for a better testimonial from his Chief? A good judge is a human judge, in every sense of the word. Travers Humphreys J., one of the oldest and wisest of English criminal judges, summed up his advice to his successors in the two words “Be merciful”.

But we can learn something from the computer. My mathematical friends tell me that the reason school-children are now being taught to calculate on the binary system is because that is the way computers do it. Being operated by electricity (the computers, that is, not the children), there are only two courses open to them at any stage of their operations — either the circuit is closed and the electricity flows, or the circuit is open and the electricity ceases to flow. So every problem must be presented to the computer in terms of the binary system, which counts in twos — one or two, open or closed, right or wrong. Look at it this way and you need not be so frightened of computers. After all, they can only count up to two. But they produce wonderful results, and I think lawyers can produce wonderful results if they will learn from the computer that by breaking every problem down into the simplest possible terms they will be able to tell right from wrong, which after all is what law is all about.

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Justinian defined jurisprudence as "the science of the just and unjust", and 500 years earlier Celsus wrote the celebrated words, "Jus est ars boni et aequi", law is the art of the good and fair. These high ideals are always with us. The Book of Common Prayer teaches us to pray for those set in authority throughout Her Majesty's dominions "that they may truly and impartially minister justice to the removing of wickedness and vice, and to the maintenance of order and right living". Again, few would quarrel with these ideals, but many ask, and are entitled to ask, "What is just, what is good, what is fair, what is wickedness and vice, what is order and right living?" The answers to these questions are given by the philosophers, and because the questions are searching, the answers are often difficult to understand and even more difficult to act on. Rabindranath Tagore spoke for all of us when he said, "Your speech is simple, my Master, but not theirs who talk of you." This is not good enough for law, because law is constantly engaged in ruling our lives, while philosophy is seeking to do so. While philosophers work out the best possible answers to the searching questions of good and evil, right and wrong, lawyers give the best answer they can and pass on to the next case. If this seems a slipshod method of operation, remember that the Prayer Book desires our judges to *remove* wickedness and vice and *maintain* order and right living, not merely to define what they are. The most senior archbishop cannot call down a thunderbolt, but the most junior magistrate can call up a policeman with handcuffs. Lawyers are sometimes embarrassed at their inability to meet philosophers on their own ground, and hide their embarrassment with bluff, hearty talk about common sense and practicality. They have no need to be embarrassed, because true philosophy recognises that the purpose of law is to shepherd people more or less in the right direction rather than define an exact goal that they may never reach. The archbishop rightly tells us all to love our

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neighbours as ourselves, but think what would happen if the magistrate set out to lock up all of us who do not.

This difference between philosophy and law crops up on all sorts of occasions, and I think the best statement of the lawyer's position was given by Kotze J.P., when he was called upon to decide the mundane but thorny problem of the time and place of creation of a contract made by correspondence. In *Cape Explosives Works, Ltd., v. South African Oil and Fat Industries, Ltd.*, 1921 C.P.D. 244, 265, he said :

“We should bear in mind that law in its development is apt to proceed on practical in preference to philosophical lines. The practice of law as a living system is based rather on human necessities and experience of the actual affairs of men, than on notions of a purely philosophical kind. Lord Bacon reminds us that the thoughts of the philosophers may be likened to the stars; they are lofty, but give very little light. I speak with every respect, and while I am conscious that we should at all times strive to be logical in our reasoning, and as philosophic and systematic as we can in our laying down of legal principles, I hold it to be a sound notion that it is not a false philosophy to inquire what method serves the best practical purpose.”

If I had a mast I would nail those words to it by way of colours.

The method that serves the best practical purpose is the method that produces the desired result with the minimum of fuss and confusion. How can the law shepherd people in the right direction if its bark is so incomprehensible that its bite comes unexpectedly? If it barks in clear, ringing tones it will not have to bite so often. Most textbooks on jurisprudence recognise this fact, and start with a warning about the dangers of misusing and misunderstanding words. Alas, most of them go on to bog the reader hopelessly in a morass of words used in a specialised sense that is often

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peculiar to the writer. To my mind this method of use is misuse, and is a constant danger faced by lawyers when they allow their feet to leave the ground. The opposite danger, of course, is keeping your feet so firmly on the ground that you can't see the wood for the trees. How can you win? Again, I go back to the Romans, this time to Ulpian. Stein in (1966) 77 *L.Q.R.* 242 points out that Ulpian uses the same word "elegans" to describe three different achievements:

1. The felicitous use of terms current in everyday speech;
2. The correct use of technical terms;
3. Acuteness of thought in transcending traditional legal categories.

An example of the last type of passage is D. 2. 14. 1. 3 in which Ulpian comments that Pedius *eleganter* observed that in every contract, whatever its traditional legal category, there was the common element of *conventio* agreement. This seems trite to us, but in Pedius' time it was what we would now call a breakthrough, and it is significant that Ulpian acknowledges this fact in the same way that he acknowledges simplicity and accuracy of speech. Talk straight and break through, Ulpian might say if he were alive today.

He would probably say so with great vigour, too, because he would be alarmed at the enormous bulk of our modern law, to which I have already referred. As that bulk grows, so it becomes more difficult for lawyers to understand, apply and improve the law. As we struggle with more and more of them, we become acutely aware that words are the raw material of our craft, and a new danger arises — the danger of grasping a verbal formula and using it to produce a verbal answer that we then call the law. Ulpian would call this inelegant, and might even trot out the old joke about there being three sorts of language — plain, legal and bad, and the second induces the third. More recently Philip Elman in (1966) *Col. L. R.* 625 has warned

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against this danger of using words without looking behind them :

“A wise judge or lawyer . . . does not delude himself that legal problems can be solved by the manipulation of verbal formulas. He is mindful that the scope and application of a legal principle depend not on its words but on the policy considerations in which it is rooted. He knows that it is not enough, when confronted with a novel factual situation, to ask whether the language of an existing rule is broad enough to cover it; he asks whether the rationale and policy of the rule also fit. The principles of the law must be understood, not merely intoned.”

Those last words are so apt there is a danger of them being regularly intoned.

A further danger which the law faces if it does not express itself in plain language is that it will isolate itself from constructive criticism, for who can offer any constructive criticism of something he cannot understand, except the criticism that it ought to be easier to understand? It is most important that the law should be constructively criticised, especially by non-lawyers who wish to be its allies rather than its victims. In a celebrated passage in *Ambard v. A.-G. for Trinidad & Tobago* [1936] A.C. 322, 335, Lord Atkin said :

“The path of criticism is a public way: the wrong headed are permitted to err therein. . . . Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.”

How easy and how wrong it is for justice to cloister herself by talking in language that ordinary men cannot understand.

Up to now I have talked about the law and lawyers in general. But every word that finds its way into the law must have been spoken or written by somebody, so I want to take a closer look at the classes of people who produce these words.

Most prolific are the draftsmen who produce the statutes, regulations and so forth which express the will of the legislature which expresses the will of the nation. Not all of the 2½ million Rhodesian words a year which I mentioned earlier fall into this category, but certainly more than I can hope to read each year. In producing these words draftsmen labour under immense difficulties. For a start, it is only a polite fiction that the legislature has a will at all. The legislature consists of a number of people, each having a will of his own, and these wills usually clash, compromise and clash again several times before any sort of agreement is reached. The draftsman must try to foresee and shorten this process with his original draft, and interpret the whole process in a final draft which will be judged as if it expressed the single will of an all-knowing and clear-thinking individual. Is it surprising that judges have often been severely critical of the draftsmanship of legislation? In England the favourite target of the judges is the series of Acts known as the Rent and Mortgage Restriction Acts, 1920 to 1939. Of these Acts Mackinnon L.J. said, in *Winchester Court, Ltd. v. Miller* [1944] K.B. 734, 744 :

“Having once more groped my way about that chaos of verbal darkness, I have come to the conclusion, with all becoming diffidence, that the county court judge was wrong in this case. My diffidence is increased by finding that my brother Luxmoore has groped his way to the contrary conclusion.”

In South Africa the task of the judge is slightly easier, because all legislation has to be published in English and Afrikaans, and if one version is difficult to understand, the true meaning can often be discovered by reference to the version in the other official language. Even then the court is sometimes baffled, and bilingual draftsmanship gave Holmes J. an opportunity to restate the aim of good draftsmanship in *Taylor v. S.A.R. & H.*, 1958 (1) S.A. 139, 142, a case on the Apportion-

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ment of Damages Act, 1956 :

“It is a little disquieting to find that after all the lawgiver, with two and possibly three official languages at its disposal, has not expressed itself in words so simple and clear that he who runs may read.”

In this country the record of our draftsmen is good. They have produced no really inviting targets for judicial wit, although often enough the courts have puzzled over the meaning of individual words and sections. The reason for our generally high standard is partly, I think, our bright sunny climate which brings the draftsman out of doors into the company of people who are in the habit of expressing simple thoughts in simple language. After a weekend at the sports club the draftsman cannot fail to be aware that he must keep his language simple or isolate himself and his products from the civil servants who administer those products and the businessmen and ordinary people whose affairs are governed by them. More significant, perhaps, is the fact that much of our legislation is copied from that of England and other English-speaking countries. In setting out to take what he needs from such legislation the draftsman has the double advantage of being able to look at it with a fresh mind and to see how it has fared in the courts. If he finds difficulty in understanding it he will not just lift it wholesale, but will redraft it as necessary. If it has been criticised in the courts of its country of origin he will redraft it to avoid the same criticism here. This sounds like perfection, and of course we are far from perfection, but as a user of the product for many years I would like to say that our legislation is technically far better than a country of this size is entitled to expect.

Any draftsman will tell you, however, that no matter how clearly he expresses himself, somebody will stand up and argue that his wording means something quite different. This sort of hair-splitting argument is

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generally regarded as characteristic of lawyers, and no doubt helps to bring the law into disrepute, but in matters of interpretation hair-splitting is sometimes both necessary and desirable. For example, a statute lays down that a person who behaves in a certain way commits an offence. An individual apparently behaves in this way, and is duly charged with the offence. He takes legal advice. Is his legal adviser discharging his duty by telling him he is guilty and wishing him a happy Christmas in gaol? Of course not. It is his duty to examine the wording of the statute carefully, to see whether it is possible to argue that what his client has done does not fall within the wording of the statute. If it is possible to present such an argument, however hair-splitting, it is his duty to present it if his client so instructs him. Aristotle had no doubt about this :

“The employment of rhetoric is not to persuade, but to perceive on every subject what is adapted to procure persuasion, in the same manner as in all other arts. For it is not the business of medicine to produce health, but to do everything as much as possible which may produce it; since the healing art may be well exercised upon those that are incapable of being restored to health.”⁸

In other words the doctor must do his best for his patient and leave the decision to God. The lawyer must do his best for his client and leave the decision to the court. The only difference is that, the court being human, the lawyer must never knowingly mislead it as to the true facts or law. If the wording of the law is not absolutely clear the lawyer is misleading nobody by saying so.

So, although draftsmen complain about hair-splitting arguments, they do so tolerantly because they know them to be a proper method of testing their handiwork. The draftsman's position was well explained by Stephen J., one of the greatest of draftsmen, in *Re Castioni* [1891] 1 Q.B. 149. Switzerland wanted

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Castioni extradited for a murder committed in the course of a political insurrection. In terms of the Extradition Act, 1870, extradition would not be granted if the offence was "of a political character". John Stuart Mill, who was no novice in the English language, had previously expressed the view that an offence such as Castioni's would not fall within these words. In expressing the opposite view Stephen J. gave some indication of the fire which every legal draftsman must go through, and which tempers his use of words :

"I think my late friend Mr. Mill made a mistake upon the subject, probably because he was not accustomed to use language with that degree of precision which is essential to everyone who has ever had, as I have had on many occasions, to draft Acts of Parliament which, although they may be easy to understand, people continually try to misunderstand, and in which therefore it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it."

The parliamentary draftsman's colleague is the public prosecutor, one of whose duties is to draft the indictment or charge which informs an accused person what crime he is accused of having committed. In days gone by an indictment was a fearsome document, and the reading of it in sonorous tones at the beginning of a trial must have gone a long way towards undermining the prisoner's confidence and convincing the jury of the enormity of his crime. Here is an example from Clark and Finnely's Reports :

"The prisoner had been indicted for that he, on the twentieth day of January, 1843, at the parish of St. Martin in the Fields, in the county of Middlesex, and within the jurisdiction of the Central Criminal Court, in and upon one Edward

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Drummond, the said Daniel McNaghten, a certain pistol of the value of 20s., loaded and charged with gunpowder and a leaden bullet (which pistol be in his right hand had and held), to, against and upon the said Edward Drummond, feloniously, wilfully, and of his malice aforethought, did shoot and discharge; and the said Daniel McNaghten, with the leaden bullet aforesaid, out of the pistol aforesaid, by force of the gunpowder, etc., the said Edward Drummond, in and upon the back of him the said Edward Drummond, feloniously, etc., did strike, penetrate and wound, giving to the said Edward Drummond, one mortal wound, etc., of which mortal wound the said Edward Drummond languished until the 25th of April and then died; and that by the means aforesaid, he the prisoner did kill and murder the said Edward Drummond.”

After all that it is a relief to read that the prisoner pleaded “not guilty”, thereby putting his case in a much smaller nutshell than the prosecutor had achieved. Perhaps it is not surprising that the McNaghten Rules regulating the defence of insanity, laid down as a result of this case, have puzzled lawyers and psychiatrists ever since. 1843 was obviously not a vintage year for plain speaking.

In England they put things right by the Indictments Act, 1915, but in this country our indictments still allege that everything was done “at or near Salisbury in the District of Salisbury” and “wrongfully, unlawfully and maliciously”. They would give the accused a much clearer idea of what the trial was going to be about if they were cut down to a quarter of their length or less. The same applies to the documents required by our Rules of Court in civil matters. I have often seen defendants appear personally in court, not because they have any intention of defending the case, but because they are under the very reasonable impression that Elizabeth the Second by the Grace of God has commanded them to be present.

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One does not normally regard attorneys as law-makers, but in fact they are directly responsible for large parts of the law of wills and contracts and a fair amount of company law. They take instructions from their clients and transform those instructions into what is usually described as a "legal document", which in due course may come before the court for interpretation; the court's interpretation finds its way into the law reports and new law is made. I have never been quite clear about the difference between a legal and a non-legal document. In the minds of many people the test is probably the quality of paper and the quantity of red tape and sealing wax. Others look for words like "whereas" and "these presents" in Gothic script. Others again look for incomprehensible language and a complete absence of punctuation. Most English legal documents contain all these things, but in Rhodesia, as in South Africa, the profession limits itself to good quality paper and a few harmless linguistic flourishes. Why the difference? I think the reason is largely historical. English solicitors used to be paid a penny a word for producing documents, so there was little incentive to be terse. The documents they had produced, having been interpreted by the courts, were incorporated in books of precedents with the perfectly correct advice that on the authority of the courts the use of a particular form of words would produce a particular result. So a solicitor who departed from the proved form of words would be taking a risk, and would then reflect that his client did not employ him to take risks, so he would tear up his own draft and stick to the precedent after all. In the early days in South Africa, on the other hand, attorneys were faced with the problem of producing documents in the English language under the Roman-Dutch system of law. The English books of precedents were of little assistance, and the Roman-Dutch books like Grotius, Van Leeuwen and van der Linden were written in such delightfully simple language that the habit grew up of

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drafting documents in the same sort of language. I think it is also not unfair to suggest that many of the attorneys who spread the practice of law to new districts in South Africa, and to this country, had fortunately not been educated out of the habit of using plain language. In many cases they knew no other.

It must not be thought that every English legal document is obscure and every Rhodesian one clear. Certainly not, but there are undoubtedly national characteristics in these matters. And this brings me back to the question of what is a legal document. Perhaps one could define it as a document that is intended to give a clear message to any judge who might be called upon to consider the legal position of the people concerned with the document. If this is the intention the best way to frustrate it is to throw in technical terms in order to make the document look more imposing. In the worst days of English draftsmanship Lord Northington L.C. had this to say in *Le Rousseau v. Rede* [1761] 28 E.R. 795, 796 :

“It is the fate of all courts of justice upon wills, it is the peculiar destiny of this court in contracts, wills and trusts, to be the authorised interpreters of nonsense, and to find the meaning of persons that had no meaning at all,

— Ex luce dare lucem,

— Ut speciosa dehinc miracula promat.

A creative power is required to bring light out of darkness, and sound and specious determinations from unintelligible instruments. Civil polity, however, requires that there must be some supreme seer who is finally to arbitrate all disputes with certain justice and unquestionable satisfaction. Thank God, it is not this court!

The rise of all these difficult questions seems to have been from the law, like all other sciences, using technical expressions not understood by the vulgar, and frequently as little by those they employ.”

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Those they employ, namely, the attorneys, might nowadays reply that of course they would never use technical expressions that they personally do not understand, but to convey a clear message to a judge it is sometimes necessary to use technical expressions in a legal document. This is so. Terms like mortgage and usufruct cannot be avoided, and a will or any other document that tried to avoid them would have to incorporate half a textbook on the rights and duties of mortgagees and usufructuaries. But technical expressions should be reduced to the minimum, because to overcome the difficulty so forcefully described by Lord Northington the courts have very wisely adopted what I have heard described as the "idiot boy" approach. The most learned judges have refused to employ their learning in discussing obscure documents in the same sort of language as that in which they are written, but have announced their intention of shedding their own vast learning and interpreting such documents in the way they think a layman would interpret them. Blackburn J. (a supremely learned judge) said in *Fowkes v. Manchester & London Life Assurance & Loan Assn.* [1863] 3 B. & S. 917, 929:

"In all deeds and instruments the language used by one party is to be construed in the sense in which it would be reasonably understood by the other."

Attorneys should remember this and produce documents which can be understood by the lay client and the people with whom he does business. The better they understand the less likely they are to bring the document before the court, with all the attendant expense. If they do bring it before the court it will fulfil my requirement for a good "legal document" by giving a clear message to the judge, so the legal position of the people concerned can be decided with the minimum delay and expense. Rhodesian attorneys are well placed to give this sort of service to their clients because they are not hampered by a tradition of obscurity.

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When they are obscure it is only because they personally have failed to express clear thinking in clear language.

This is one of the few countries in the world in which the legal profession is divided into two branches, on the English pattern. Personally, I hope the division will remain, for a variety of reasons which I will not go into here, but which I can sum up by saying that I believe the profession serves the public more efficiently and more cheaply if attorneys and advocates maintain the division of responsibility between them. But I recognise that the smallness of this country creates special problems for our separate Bar.

The first is that the volume of work does not permit any member of the Bar here to specialise in the manner that is traditional in England and even possible to some extent in Johannesburg. It is often said that one of the main justifications for the separate English Bar is that its members are able to specialise, so that anyone may obtain the services of an expert in any branch of the law by briefing him through his own family solicitor. If our Bar cannot specialise, it may be asked, how can it justify its existence? There are several answers to this question, but I only wish to go into the one that concerns my present subject. It would be a poor profession that could not turn a disadvantage into an advantage, and this is exactly what our Bar can do. Instead of specialising in any particular branch of the law, advocates should specialise in plain speaking. Let me explain what I mean. The advocate's work consists mainly of writing opinions, drawing pleadings and appearing in court. By concentrating on simplicity and accuracy of language in all three fields he can not only justify himself but make himself indispensable.

Opinions are written because they are asked for, and they are asked for because the lay client and the attorney between them are not sure what the law is and what they should do next. When the advocate receives

his instructions, not being a specialist in the particular branch of the law, he is not sure either, so he knows exactly how they feel. Knowing how they feel he knows what they want, which is straight advice with supporting reasons which they can understand. If they were in England and he were the acknowledged expert on his subject it might be sufficient for him merely to express his "opinion", because his mere name would lend it sufficient weight. I do not think any member of the Bar in this country has reached such heights that he can afford to give this type of opinion. Much more frequently our advocates go off into the library, find out what the law is and cover ten pages with the fruits of their research. The result looks like an extract from a Ph.D. thesis, with a concluding paragraph of advice thrown in as an afterthought. This is not what the attorney wants, nor the lay client. The attorney is likely to be embarrassed when the client comes in to ask whether counsel's opinion has been received. It has, but the attorney has not read it yet. So in the presence of the client he has to wade through ten pages of learned dissertation before coming to the punch line at the end, which probably reads "the law is obscure on this point". The client asks whether the attorney agrees with counsel, and how can the poor fellow answer? Short of going through the ten pages line by line he cannot honestly express his own opinion. The client is no better off. He has to decide whether to defend the action, sack the manager, publish the statement or whatever it is that is worrying him, and all he has is a lot of extracts from Grotius, Voet and the House of Lords. The good advocate, taking advantage of his ability to put himself in the shoes of the lay client, will advise him what to do and follow his advice with a few paragraphs explaining in plain English what the conflicting authorities say on the point, which ones he thinks our courts will follow, and why.

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The drawing of pleadings is the best method I know of proving to your own satisfaction what a muddle-headed fool you are. The object of the exercise is to put your client's case down on paper for the information of the other side and the court. You must not plead law, only facts, and only material facts, but not the evidence by which you propose to prove those facts. If pleadings are properly drawn on both sides they reduce the case to one or more issues which the court has to decide one way or the other. In fact, they do the work of the computer, by breaking the problem down into the simplest possible terms, so that the court will be able to tell right from wrong and give the right judgment. Did I say "they" do this work? Of course pleadings do no work at all; it is the advocates who draw the pleadings who do the work, and the raw material they use in this work is words. If too few words are used the other side will except to the pleading on the ground that it does not disclose a cause of action or defence; if too many, or they are used ambiguously, the other side will have them struck out as vague and embarrassing. It sometimes takes many hours of very hard work to produce a statement of the facts material to the case in words that cannot be attacked in either of these ways and which will be supported by the evidence that is available. Every minute of time spent in this way is well spent, because it is putting the pleader's thoughts in order so that he can best help the court to arrive at the truth. In the whole process there is no place for woolly or emotional thinking, so the words finally chosen must be unambiguous, without emotional overtones and supported only by necessary adjectives. The best pleading (because it conveys the clearest message) is one in which no word can be removed without making it excipiable, and no word can be changed except for one of identical meaning. It can be seen that there is a world of difference between writing literature and writing pleadings,

but Ruskin's advice to literary men is worth remembering :

“Let the accent of words be watched, by all means, but let their meaning be watched more closely still, and fewer will do the work.”

Of the advocate's work in court I do not want to say much, because nothing I can say will eradicate the false impression regularly given on television. Cross-examination in fact makes up a small part of an advocate's practice, and he soon learns that unless he sticks to the point and makes himself understood he will never make a name as a cross-examiner. He also learns that a short cross-examination is usually better than a long one. What occupies much more of his time and attention is the art of argument, and it is here that the smallness of our country is again important. In a large, sophisticated country argument at the end of a case tends to become a brief exchange between judge and counsel, who alone know exactly what they are talking about. It goes something like this :

“Another *Winterbottom* case, Mr. Snodgrass?”

“Not quite, my Lord, because of the equity of redemption.”

“So section 42 would apply?”

“Unless your Lordship disbelieves the defendant.”

“Quite. Shorthand writer, take a judgment.”

This sort of conversation saves time and boosts the morale of both participants, but makes the lay client wonder what all his guineas were spent on, which no client ought to wonder. Rhodesian counsel and judges seldom have the opportunity to indulge in exchanges like this, because they are constantly flitting from income tax to crime to wills to divorce to trade marks and back again, and cannot for the life of them remember what *Winterbottom's* case was all about, or even which Act they are dealing with, let alone what section 42 says. So they have to explain everything to

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each other, which has the desirable side-effect of requiring them to be sure what they are trying to say. But it is too easy to slip into the habit of presenting an argument to a judge or magistrate as if he were a machine, adjusted and tuned to receive a series of propositions, each supported by authority or an extract from the evidence, and in due course to transmit a judgment. Any judge will tell you that an argument presented in this way at 3 o'clock on a hot October afternoon has a poor chance of finding its way into a judgment that will be remembered. The English tradition of jury trials gives them the advantage over us, because English common law practitioners spend much of their time addressing juries, and soon discover that juries have a tendency to find in favour of the side they understand. English Chancery practitioners never address juries, so the rules of English equity have come to be expressed in language which means nothing to the uninitiated.

Our advocates must turn adversity to advantage. They must accept that in such a small country they cannot achieve the degree of specialised knowledge that will enable them to talk to judges in a language no one else can understand. In accepting this fact they should rejoice, because the history of the law has shown that the most intractable legal problems come closer to solution as the arguments on them are expressed in simpler terms. One of the more difficult problems in the law of delict is the problem of causation in negligence—whose negligence caused the accident, or did the accident cause the loss? The longer one sits at a desk worrying about a problem like this the more difficult it becomes, and the written products of this sort of worrying are bulky and contradictory enough to overwhelm any judge. In *Smith v. Harris* [1939] 3 All E.R. 960, 967 du Parcq L.J. took the opportunity of an argument on causation to remind us how a good argument on a difficult question ought to be presented :

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“I do feel that in cases of this kind, it is no bad test to consider how an argument would appear when put in the kind of language which it is necessary to use in addressing a jury. The common law of this country has been built up, not by the writings of logicians or learned jurists, but by the summings-up of judges of experience to juries consisting of plain men, not usually students of logic, not accustomed to subtle reasoning, but endowed, so far as my experience goes, as a general rule, with great common sense, and if an argument has to be put in terms which only a schoolman would understand, then I am always doubtful whether it can possibly be expressing the common law.”

We have few jury trials in this country, but enough to make most advocates realise that success in the conduct of a jury trial depends upon treating the jurymen as people. Are judges and magistrates not people too?

Indeed they are, and that leads me on to say something about their contribution to the law, which is vast. Students of the law, enquiring into the extent to which judges make new law, sometimes forget that judges spend very little of their time speaking to posterity, but quite a lot of time speaking, directly or indirectly, to the ordinary people who appear before them. A few months ago we organised a short refresher course for magistrates here in the Department. Amongst those who spoke was Quénet J.P., on the judicial function. In the course of the discussion which followed his address a question was asked about the form that a judgment should take. He replied in words that made a great impression on me :

“The best judgment is one which is completely clear and understandable, because, after all, judgments are not simply for the esoteric few. By that I mean not just for the profession which has a knowledge of the law. A judgment ought to be understandable by the public because it is the

public, in the end, with which we are concerned.” I have quoted those words as they were spoken. A regard for the truth compels me to disclose that in editing them for publication Sir Vincent deleted the words “esoteric few” and substituted the word “initiated”. No doubt he felt that “esoteric” was the sort of word that would only be understood by the esoteric few. Whichever version you prefer, the meaning is the same. Magistrates always and judges most of the time address their judgments not to posterity but to the public — the public that sits in court or reads next morning’s newspaper. If the public cannot understand what these judgments are all about, the effort put into composing them has been wasted. It only needs a slightly increased effort to reduce the length and complexity of any judgment so that the message it conveys is clear to all. I can even produce an example where the judgment was reduced to nothing at all, and the message was not only clear but devastating. In *Refuge Insurance Co., Ltd. v. Kettlewell* [1909] A.C. 243 the appellants employed no less than four counsel to try and persuade the House of Lords that an insurance company is entitled to retain premiums paid to it as a result of fraudulent statements made by its agents. What happened at the end of the argument is reported thus :

“Lord Loreburn L.C., without giving any reasons, moved that the appeal be dismissed.

The Earl of Halsbury and Lords Ashbourne, Macnaughten and James of Hereford silently concurred.”

Since this judgment the law on the subject has never been seriously doubted.

When a judge sets out to speak to posterity he is consciously embarking on a law-making process which was well described by Innes C.J. in *Blower v. van Noorden*, 1909 T.S. 890, 905 :

“There comes a time in the growth of every living system of law when old practice and ancient

formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important or so radical that they should be left to the legislature."

This is an enormous responsibility which the judges undertake — the responsibility of deciding whether to modify the law themselves or to leave it to the representatives of the electorate in Parliament. If the electorate do not approve of what their representatives do to change the law, they do not re-elect them, but they cannot remove the judges, and rightly not. If the judges add incomprehensibility to irremovability they put themselves, as I have previously said, beyond the reach of any criticism except the criticism that they are incomprehensible. By isolating themselves to such an extent from the public (with which, as Quénet J.P. pointed out, they are in the end concerned), how can they hope that the changes they make in the law will achieve Innes C.J.'s object of making the law "a living and effective instrument for the administration of justice"?

In pursuing this object judges may at times be illogical. Stephen J., who was such a careful draftsman, must have had a mild shock when he found his judgment in *R. v. Riley* (1887) reported in 56 L.J.M.C. 52, 53 as including the words :

"I think the weight of authority is decidedly in the direction in which this decision will place it."

No doubt he hastened to amend the reporter's note before the case appeared in 18 Q.B.D. 481, but I have no quarrel with the original version, which tells me exactly what he meant. At one end of the line a careless but revealing remark like that in a judgment often makes good law. At the other end of the line a meticu-

lously worded definition that falls on the reader like a ton of bricks is equally useful when the bricks are taken one at a time and built into a complete statement of the law. Hawkins J.'s celebrated definition of reasonable and probable cause in *Hicks v. Faulkner* [1878] 8 Q.B.D. 167, 171 falls into this class :

“I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”

Read in a single breath that definition sounds like nonsense, but when examined in stages, as Hawkins J. went on to examine it, it gives a very good idea of exactly when a person can be sued for malicious prosecution.

Judges make plenty of good law in illogical or ungrammatical phrases. They make plenty of good law in meticulously constructed phrases. Most of their bad law is made when they forget that the function of law is to control people's lives rather than to satisfy theorists. I have already referred to the vexed problem of causation in the law of negligence. One reason why it is so vexed was well expressed by Viscount Simonds in *The Wagon Mound* [1961] A.C. 388, 419 :

“The impression that may well be left on the reader of the scores of cases in which liability for negligence has been discussed is that the courts were feeling their way to a coherent body of doctrine and were at times in grave danger of being led astray by scholastic theories of causation and their ugly and barely intelligible jargon.”

In South Africa the same problem of causation has been tackled by Hiemstra J. in a delightful judgment opening with the words “Eating cheese can be dangerous to life”. The case of *Alston v. Marine & Trade Insurance*

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Co., Ltd., 1964 (4) S.A. 112. At 114 this passage appears :

“For a review of the Continental learning on the subject I am indebted to Prof. L. C. de Wet in *Tydskrif* V, 126. The authorities referred to are German and Dutch. Their treatment of the subject is groping, unhelpful and couched in ugly terminology.”

The use of the word “ugly” by both Viscount Simonds and Hiemstra J. to describe what is least helpful is a reminder that Ulpian used the word “elegant” to describe what is most helpful — a combination of the felicitous use of terms current in everyday speech and correct technical terms to express acuteness of thought in order to improve the law. Judges who work in this way make the law live in their judgments long after they themselves are dead.

Living law is effective, elegant, interesting. Call it what you will, it is the sort of law we try to teach here. It follows that the least important class of lawmakers—the academic lawyers—deserve a few words. Academic lawyers contribute to the making of law by their writings. The contribution would be larger if practising lawyers took more notice of these writings. They would take more notice if they could understand more of them. This is what I had in mind when eight years ago I started what is now the *Rhodesian Law Journal*. I sent a circular to prospective contributors in which I said “the journal must be useful, not merely learned”. Large portions of the journal, including my own contributions, have been neither, but the ideal remains not only for the journal but for all publications emanating from the staff of the Department. If our written work is to be useful it must be written in a way that will bridge the gulf between academics and practitioners, and so help to bridge the gulf between practitioners and the public. English is the official language of this country: why can't we all use it in the same way?

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Of greater importance than the making of law is the making of lawyers. That is why I am here instead of in the chambers I used to occupy. The raw material out of which you make lawyers is people, and as they say in Yorkshire "There's nowt so daft as folk". So before we start making them into lawyers we must be understood by them, daft and all. This is merely another way of saying that I look for the same quality in academic lawyers as in any other lawyers — the ability to be understood. Law is not transmitted by any other means than words. On the other hand an attitude to law is transmitted by example, and by concentrating on plain speaking we hope to transmit the attitude that plain speaking is the foundation of good law.

I have tried to show how this attitude helps draftsmen, attorneys, advocates, magistrates and judges to contribute more effectively towards the making of more effective law. I need hardly add that those of our graduates (and I anticipate there will be many) who decide not to make law their profession will be well equipped for the business world if they enter it with the conviction that law ought to be understandable and the determination to demand that it be made understandable. To spread this conviction and this determination is the object of my Department. We pursue this object in order to maintain the rule of law in the purest sense — the sense in which the phrase was used by Aristotle when he wrote that the rule of law is preferable to the rule of any individual. How can those who are ruled tell whether it is indeed the law that is ruling them unless they can recognise the law when they see it?

Sitting as we are in the midst of a revolution (albeit a most gentlemanly one) it is more important than ever that the law should speak with a clear voice, and not take cover behind a screen of its own verbiage. Lawyers have been criticised for not taking a more active part in the revolution, on one side or the other. It is not their business to do so, lest, in Lord Greene's

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classic phrase, by descending into the arena they have their vision clouded by the dust of the conflict. In this conflict, as in most conflicts, respect for the law has reached a low ebb, although all sides honestly regard themselves as fighting to maintain the rule of law. Not everybody who knowingly swears a false affidavit to beat sanctions would agree with me that he is a perjurer. Not everybody who kills a political opponent in cold blood would agree with me that he is a murderer. Few supporters of the United Nations would agree with me that the Security Council's decision that Rhodesia constitutes a threat to the peace was a finding of fact at which no honest person could arrive. Few supporters of the Rhodesian Government would agree with me that the Emergency Regulations give the Minister arbitrary powers that no minister ought to possess. Perjury, murder, dishonesty and arbitrary rule are nasty words, but these words must be used, and used often, if we are to remove wickedness and vice and maintain order and right living. I do not admire Machiavelli, who says that what looks like vice may be followed if it brings security and prosperity. Still less do I admire those who delude themselves that what they are following is not vice. Plain speaking by lawyers can cure these delusions, and give us some hope that the rule of law will survive the present constitutional conflict.

There are four million people in this country, and however our constitutional difficulties are resolved there will still be four million people to be ruled by law. To enable it to rule, the law presently employs almost exactly 400 people in the country at a professional level, from the judges to the articulated clerks. This is 1 in 10,000 of the population, and it would do no professional lawyer any harm to reflect that if the rule of law is to be maintained, he personally must be prepared to explain whatever part of the law is his responsibility in a way that can be understood by 10,000 people, of all races and political beliefs.

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So that our students may be fit to take their places among these 400 lawyers we not only teach them law, but we teach them to explain it. In the three years of the LL.B. course each student writes 26 examination papers and 105 essays. He also has to explain the law verbally in 299 tutorials, at each of which no more than six students are present, and they are encouraged to insist that the lecturer reciprocates and talks in language that every student can understand. By adopting these methods we are able to keep the course down to three years and yet feel confident that our graduates will be a credit to us. It is important that they should be, because in future years they may be called upon to judge us.

Since I have been talking about words, it would be as well to remind you that this is an inaugural lecture, and the word "inaugural" comes from the Latin *inaugurare*, to take omens from the flight of birds. Our first flock of graduates will take flight at the end of this term, and I am happy to report that, having studied them and their successors for three years, the omens appear to me favourable.

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NOTES

- ¹ (1884) 1 *Cape L. J.* 6.
- ² Introduction to *Maasdorp's Institutes of South African Law* (7th ed.), vol. III.
- ³ Inst. 1.1.3.
- ⁴ See 1956 R. & N. v.
- ⁵ 19th April 1967.
- ⁶ See *Peche v. R.* (Judgment No. A.D. 108/67, not yet reported); *S. v. Currin*, 1961 (4) S.A. 393; *S. v. Margolis*, 1964 (4) S.A. 579.
- ⁷ 1965 R. L. J. 40.
- ⁸ *Rhetoric* (tr. Taylor, 1808) p.6.
- ⁹ *R. v. McNaghten* (1843) 10 Cl. & F. 200.