

A few favorite opinions and a famous footnote

"If I were to remain silent, I'd be guilty of complicity." – Albert Einstein

By Dan J. Kelly

Justice Michael Musmanno served on the Pennsylvania Supreme Court from 1951 until his death in 1968 and was known for his literate and often hilarious opinions and dissents. One of the latter he penned in *Bosley v. Andrews* (1958), 393 Pa. 161, 142 A.2d 263. There, a woman sued her neighbor whose cows trespassed on her farmland one morning and ate her crops until they were chased back to their home. But the "bovine buccaneers," per Musmanno, returned in the afternoon. "This time they came, eight of them, with reinforcements. They brought along their boyfriend, a 1,500-pound Hereford white-faced bull." The bull charged at plaintiff and, in the ensuing chase, she suffered a heart attack.

The majority opinion denied plaintiff's claim for negligent infliction of emotional distress because the bull never touched her and thus, there was no requisite "physical contact."

Perhaps Justice Musmanno's most famous line was in his conclusion in his dissent in this trespassing cows and charging bull case:

> I wish to go on record that the policy of non-liability announced by the Majority in this type of case is insupportable in law, logic, and elementary justice – and I shall continue to dissent from it until the cows come home.

Another great judicial wordsmith was Presiding Justice Robert Gardner of California's Fourth District Court of Appeal. In addition to his colorful writing, his other true love was body surfing. (See Gardener, "The Art of Body Surfing" (1972).)

Gardner was a staunch believer in the jury system and had deep respect for the intelligence of the jury as evidenced by the following quote:

> The mere possession of an LL.B. or J.D. does not anoint the holder with powers of discernment not vested in ordinary mortals. Today it takes a certain effrontery, a certain intellectual arrogance, a certain intellectual snobbery to say to a juror: 'You cannot hear this evidence because you are not capable of effectively evaluating it.' Because of a lack of appreciation of the stability and integrity of the jury system, too much emphasis is still being put on the danger of prejudicing the jury by the admission of allegedly improper evidence.
>
> (*People v. Johnson* (1973), 32 Cal.App.3d 988, 1003.)

He revisited this theme in *People v. Long* (1974), 38 Cal.App.3d 680, 689 where he wrote:

> A juror is not some kind of dithering nincompoop, brought in from never-never land and exposed to the hard realities of life for the first time in the jury box. There is nothing magical about being a member of the bench or bar which makes these individuals capable of dispassionately evaluating gruesome testimony which, it is often contended, will throw jurors into a paroxysm of hysteria. Jurors are our peers, often as well educated, as well balanced, as stable, as experienced in the realities of life as the holders of law degrees.

Long before the current controversy surrounding Pacaso and fractionalized home and condominium ownership, Justice Gardner bluntly dissented from a holding that the owner of a condominium could convert his single unit into a time-share venture, noting that a greedy owner could bring in 52 or even 365 renters. "If as an occupant of a condominium I must anticipate that my neighbors are going to change with clocklike regularity I might as well move into a hotel – and get room service."

(*Laguna Royale Owners Assn. v. Darger* (1981), 119 Cal.App.3d 670, 689.)

Those readers desiring to read more from Justices Musmanno and Gardner can do so at "Justice Musmanno Dissents," Bobbs-Merrill, 1956, and "A Gallery of Gardner" and "Gardner: A Second Gallery" at Santa Clara Law Review, Vols. 19 and 24.

One other piece of judicial writing deserves mention. In *People v. Arno* (1979), 90 Cal.App.3d 505, Justice Robert Thompson (joined by Justice Mildred Lillie) wrote the majority opinion. Their colleague, Justice L. Thaxton Hanson, penned a lengthy dissent in which he stated the majority opinion was "unclear," contained "contradictory statements," "misapplied the law," "ignored judicial precedent," and "unduly restricts" the police. Not taking kindly to this dissent, the majority responded to it with its footnote 2:

> We feel compelled by the nature of the attack in the dissenting opinion to spell out a response:
> 1) Some answer is required to the dissent's charge
> 2) Certainly we do not endorse 'victimless crime'

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3) How that question is involved escapes us
4) Moreover, the constitutional issue is significant
5) Ultimately, it must be addressed in light of precedent
6) Certainly the course of precedent is clear
7) Knowing that, our result is compelled.

What made this footnote so noteworthy is the fact that the first letter of each response spells out "SCHMUCK."

In an interview in 2002, Justice Thompson said he had "no serious regrets" about footnote 2 other than "it was misunderstood."

Justices Musmanno, Gardner, and Thompson wrote with flashes of wit and with unbridled candor of emotion, thus creating vibrant, readable and memorable opinions.

Perhaps it is fitting to close with Justice Gardner's description of a truly effective trial attorney:

> He has the capacity for reducing issues to simple terms. He is as miserly with motions, objections and issues as an Ernest Hemmingway with words or a Louis Armstrong with musical notes. He has an instinct for the jugular, an ability to explore the meritorious and to ignore the trivial, a capacity for keeping issues understandable [and] a high respect for the intelligence of the jury…

(*People v. Eckstrom* (1974), 43 Cal.App.3d 996, 1001-02.)


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