

Start of page 634

## Fussnotes and other Annotational Engines

### Part I

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This article examines the history and nature of footnotes and other annotational devices used in legal and other literature, particularly law reviews. The topic has received considerable attention in United States university law journals, which are heavily drawn on. The article starts by considering the nature of the glossing process and identifying different sorts of 'annotational engine'. Next the function of footnotes and other devices is discussed, the main distinction being between reference notes and notes of substance. There are five main uses: to identify a source, to shorten the text, to make an aside or other comment, to explain what is said in the text, and to indicate revisions of the text. There are also other types of footnote, which are discussed. There are eleven generally-agreed rules about the use of footnotes, which are set out. Finally there is an account of objections to use of footnotes, which have led some academics and judges to eschew them.

#### 1. Introduction

I was tempted, as other writers in the long-running controversy over footnotes have been, to attach these to the key words in the title of this article.<sup>1</sup> However, that can be a nuisance when anybody wants to cite the article, so I won't do it. I am always anxious to retain the goodwill of my readers, so I will put the footnotes in now when I mention the key words, namely fustnotes<sup>2</sup> and engines<sup>3</sup>.

One of the protagonists in the footnote controversy, Professor Fred Rodell of Yale Law School, urged law review writers (and editors) to relax a bit with their style. I am taking his advice, even though it was given as long ago as 1937. What he said was:

There are two things wrong with almost all legal writing.<sup>4</sup> One is its style. The other is its content . . . To go into the question of style then, it seems to be a cardinal principle of law review writing and editing that nothing may be said forcefully and nothing may

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<sup>1</sup> See e.g. nn. 7, 12 and 46 below.

<sup>2</sup> Fussnote is the German for footnote. 'Die fustnote ist (oder gibt vor, es zu sein) Träger wissenschaftlicher Information' ('The footnote is, or pretends to be, the carrier of scholarly information'): P. Reiss, *Vorstudien zu einer Theorie der Fussnote* (Berlin and New York, 1983-84) p. 3.

<sup>3</sup> I use this word in its sense of 'a product of ingenuity; an artifice, contrivance, device' (OED2). The law reports contain a reference to 'replications, traverses, novel assignments, and other engines of pleading': *Yates v Carlile* (1761) 1 Wm Bl. 291.

<sup>4</sup> Inclusion of the words *almost all* is crucial here. *All* the people whom, for professional reasons, Fred Rodell did not wish to offend would have thought those two innocent words let them out.

be said amusingly . . . One of the style quirks that inevitably detracts from the forcefulness and clarity is the taboo on pronouns of the first person. An 'I' or a 'me' is regarded as a rather shocking form of disrobing in print.<sup>5</sup>

Well, things are very different now but I thought I would introduce Fred in that way. We will be hearing further from him.

You will have noticed that at the end of the first of what will I'm afraid be many footnotes in this article a footnote to a footnote was needed. I refrained from inflicting that on the reader, though it has been done. Thomas Frognall Dibdin wrote a lengthy anecdote as a footnote to a footnote.<sup>6</sup> Grafton records an early publication of the Warburg Institute that contained a set of four layers, footnotes to footnotes to footnotes to footnotes.<sup>7</sup>

The impulse to research and write this article originated in an invitation I received to contribute to the 2003 Thematic Issue of the *University of New South Wales Law Journal*.<sup>8</sup> This contains nine articles altogether, with an average of around 100 footnotes each. The average is brought down by Justice Keith Mason's contribution.<sup>9</sup> This has one footnote only, which contains his reason for not including any other footnotes:

I have endeavoured to wrestle with matters of general principle without the distraction of footnotes. To those who may be concerned about a law review article without footnotes, I refer to the body of writing on that topic.<sup>10</sup>

The first sentence of this explanation is problematic. If footnotes distract anybody it is the reader not the author, so providing footnotes would not have impeded the judge himself in his 'wrestling'.<sup>11</sup> The reason why the judge's article has only the one footnote is that, except on the matter of footnotes, he cites no authority for his remarks. They

**Start of page 635**

simply reflect his own views on the matters he discusses; and why not?

## Fusnotes And Glosses

When investigating the topic of footnotes I found a difficulty. There seems to be very little research on their origins in legal writing. As Arthur Austin remarked, footnotes seem to be 'the mark of a scholar but not the object of his study'.<sup>12</sup> Let me say at least that the word *note* derives from the Latin *nota*, a mark or sign, which itself derives from *noscere*, to know. An extension of this meaning is to 'an explanation, comment or addition, added in the margin or at the foot of the page, to a passage in a book, &c.'<sup>13</sup> A work to which detailed notes have

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<sup>5</sup> Fred Rodell, 'Goodbye to Law Reviews' (1937) 23 *Virginia Law Review* p. 38 at 38-39.

<sup>6</sup> *The Bibliographical Decameron*, 3 vols. (London, 1817), 3: 59-60. Cited A. Gillespie, 'Balliol M.S. 354: Some Histories of the Book', *Balliol College Annual Record 2003*, p. 17.

<sup>7</sup> Anthony Grafton, *The Footnote: A Curious History* (Harvard University Press, 1997), p. 234. I draw extensively on this splendid book, hereafter referred to as 'Grafton'. On footnotes to footnotes see also Maher, Charles R, 'The Infernal Footnote' (1984) 70 *American Bar Association Journal* (April 1984) p. 92.

<sup>8</sup> (2003) 26(2) UNSWLJ.

<sup>9</sup> See n. 8 above, pp. 442-446.

<sup>10</sup> See n. 8 above, p. 446. In his solitary footnote the judge then cites a number of sources, all of which are duly given footnotes of their own in the course of the present article.

<sup>11</sup> How anyway do you 'endeavour' to wrestle?

<sup>12</sup> Arthur D. Austin, 'Footnote\* Skulduggery\*\* and Other Bad Habits\*\*\*' (1990) 44 *University of Miami Law Review* p. 1009 at 1009.

<sup>13</sup> *Encyclopedia Britannica*, 11th edn (1910-11), vol. 19, p. 823.

been added (especially in the margin) is said to contain *annotations*, a point to which its title may refer: for example, *The Annotated Dickens*.<sup>14</sup>

I propose, because I think it would be useful, to introduce the term *fussnote* into the English language to embrace not only footnotes proper but also any other appendages, such as endnotes and marginal notes, which involve inserting little reference numbers or other symbols at specific points in the text.<sup>15</sup> Gibbon's footnotes in *Decline and Fall* began (in the first edition) as endnotes. Then David Hume complained to the publisher they both shared, William Strahan:

When a note is announced, you turn to the End of the Volume; and there you often find nothing but the Reference to an Authority: All these Authorities ought only to be printed at the Margin or the Bottom of the Page.<sup>16</sup>

Endnotes placed at the end of chapters rather than at the end of a book are called chapter notes. In judgments there are also headnotes, of which it was said:

Headnotes arranged vertically make a digest. Headnotes arranged horizontally make a textbook. Textbooks arranged alphabetically make an encyclopædia. Every few years some investigator has to disintegrate one of these works into its constituent atoms, add some headnotes from recent decisions, stir well, and give us the latest book on the subject.<sup>17</sup>

My proposed treatment of *fussnote* (mentioned above) departs from the true meaning of the German word, but that does not matter. When we English steal a term from another language we always change its meaning, which absolves us from trying to pronounce it properly. To avoid irritating the reader, which as I say I dislike doing, I shall refrain from using my new term any further in this article. However when I refer to a footnote in what follows, a *fussnote* is what I mean.<sup>18</sup>

Annotational engines other than footnotes include dedications, epigraphs, prolegomena, prefaces, forewords, introductions, annexes, appendices (or appendixes) and even indexes (or indices).<sup>19</sup> Each has its individual function in glossing the text, but gloss it they do – to a greater or lesser extent.<sup>20</sup> A further element, also with its influence on the text, is the heading or subheading, sometimes placed in the margin as a sidenote.<sup>21</sup>

The useful verb or noun *gloss* derives from *glossa*, which in medieval Latin meant *language*.<sup>22</sup> It has several shades of meaning. The main one connotes the idea of a master text later modified by persons other than its creator.<sup>23</sup> The OED2 has the following definition of *gloss*:

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<sup>14</sup> *Orbis*, two volumes, 1986; see *The Oxford Companion to the English Language*, ed. Tom McArthur, (Oxford, 1992), p. 709.

<sup>15</sup> I accept that marginal notes do not necessarily require little numbers or symbols in the text. Gibbon for one managed without them.

<sup>16</sup> David Hume's letter to William Strahan, 8 April 1776; cited Grafton, pp. 102-103.

<sup>17</sup> Zechariah Chafee Jr., 30 *Harvard Law Review* (1917), p. 300.

<sup>18</sup> Except of course where the context otherwise requires.

<sup>19</sup> For extracts from a legal index which contrives to combine (often amusing) glosses with factual information see Annex A to this article.

<sup>20</sup> Usually an index does not gloss the text, but there are exceptions (see Annex A to this article).

<sup>21</sup> This is one of the elements of an Act of Parliament known as unamendable descriptive components: see F.A.R. Bennion, *Statutory Interpretation* (4<sup>th</sup> edn., 2002), s. 251.

<sup>22</sup> I decline to provide a footnote verifying this well-known fact.

<sup>23</sup> The creator may and often does gloss his own text; but when this occurs subsequently to the original production it is called revision. In middle age the scientist Kepler wrote a commentary on his own early

[T]o introduce a . . . comment, or explanation upon a word or passage in a text. Also in wider sense, to make comments or remarks (esp. unfavourable ones) upon a person's words or actions. Often used in a sinister sense: a sophisticated or disingenuous interpretation.<sup>24</sup>

Glosses have played an important part in the history of lexicography. Old English marginal or interlinear glosses of Latin words were collected in more or less alphabetical lists, known as *glossae collectae* (collected glosses), then *glossaria* (glossaries). These were the ancestors of the first Latin-English dictionaries and ultimately of all English dictionaries.<sup>25</sup>

Glosses may be controversial. Thus of biblical glossators (writers of glosses), the Lollard Wyclif said 'þe wordis of þes glosatouris passiþ Goddis lawe'.<sup>26</sup> Perhaps the most celebrated legal glossators were those who transformed Justinian's *Digest* in the period of scholasticism. Henry Goudy, Regius Professor of Civil Law at Oxford 1893-1919, said that when in the 12<sup>th</sup> century the attention of European scholars began to be turned once more on the *Digest* it came as a revelation to them. He went on:

Dogmatic and exegetic teaching of the *Corpus Juris* in all its parts was actively begun, and a new school arose called the glossarists (*glossatores*), of whom Irnerius has

**Start of page 636**

always been rightly regarded as the founder. This great man . . . was more than a glossator. He was also the first of the medievalists to treat the law in a scientific way.<sup>27</sup>

The commentaries of glossators like Irnerius and Accursius eventually came to be seen as integral parts of the texts they explicated.<sup>28</sup> A verse by Goethe has been freely translated as:

The reader who on dear old ancients dotes  
knows that he needs good glosses, and wants notes.  
The moderns seem far easier, far straighter.  
Yet they too need a talented translator.<sup>29</sup>

Grafton remarks that the margins of manuscripts and early printed texts in theology, law and medicine swarm with glosses which enable the scholar to work backwards from the finished argument to the texts it rests on. They are, as Malcolm Parkes said, the ancestors of the modern scholarly apparatus of footnotes.<sup>30</sup> The term gloss was also used of oral argument. 'Ne glosez point le Statut', said Hengham C.J. to counsel in 1303, adding 'nous le savoms meuz de vous, car nous les feims'.<sup>31</sup>

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work *Mysterium Cosmographicum* 'in order to explain to readers in the distant future the personal circumstances and particular experiences that had given that book its shape and content': Grafton, p. 27. As regards my own work I do not have that much confidence in readers in the distant (or even the near) future.

<sup>24</sup> *Oxford English Dictionary* (2<sup>nd</sup> edn, 1992). The ellipsis hides an error by the OED2 compilers in using the term being defined as part of its definition.

<sup>25</sup> *The Oxford Companion to the English Language*, ed. Tom McArthur, (Oxford, 1992), p. 443.

<sup>26</sup> Wyclif, *Select Works* (1380), III. 258.

<sup>27</sup> *Encyclopedia Britannica*, 11th edn (1910-11), vol. 23, p. 576.

<sup>28</sup> Grafton, p. 27.

<sup>29</sup> Grafton, p. 28 n. 54. The last line reminds us that translation of a text into another language inevitably involves glossing.

<sup>30</sup> Grafton, p. 30.

<sup>31</sup> 'Do not gloss the statute; we know it better than you do for we made them': Y.B. 33-35 Edw. I (R.S.), p. 82 at 83.

There must of course be a text to hang the footnotes on.<sup>32</sup> This may be straightforward or complex. An example of a complex text is one consisting of primary propositions each followed by a commentary containing footnotes.<sup>33</sup> Footnotes have a variety of functions, which will now be explained. Before that I should note that some would say their main function is to attract attention to the author. This aspect has attracted the attention of what Herma Hill Kay has called ‘the hottest new school of legal scholarship, the citation analysts’.<sup>34</sup>

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<sup>32</sup> Every rule has its exceptions, and there are examples of works consisting entirely of footnotes: see Grafton, p. 120. Another variant is to place all the footnotes first, then follow with the text (see *e.g.* Herma Hill Kay, ‘In Defense of Footnotes’ 32 *Arizona Law Review* (1990), p. 419).

<sup>33</sup> See Grafton, pp. 213-4. My own book *Statutory Interpretation* (4<sup>th</sup> edn 2002) takes this form.

<sup>34</sup> See Herma Hill Kay, ‘In Defense of Footnotes’ (1990) 32 *Arizona Law Review* p. 419 at 426. On citation analysts she cites (n. 25 on p. 424) Shapiro, *The Most Gifted Law Review Articles*, (1985) 73 *California Law Review* p. 1540.