

MORE ON WHITE RABBITS AND TORTOISES

Alert readers will remember that in our last episode an eminent Oxford scholar played a walk-on role. As that was child's play for some, while a bit confusing for other readers, let me clear things up. Henry George Liddell was father to Alice. Henry is best known for his *Greek-English Lexicon*. Alice is best known for going down a rabbit hole on a summer day. It was at Oxford that the maths scholar Dodgson met Alice and her sisters. And Charles Lutwidge Dodgson played a trick on his first names and, as puzzled about, is now known as Lewis Carroll.

After the publication of *Alice's Adventures* in 1865, Queen Victoria asked Carroll to send her a copy of any other works that he had written. It is said that Carroll sent Her Majesty a copy of his *Condensation of Determinants*, but in his *Introduction to Symbolic Logic* he says that's just a fairy story.

Carroll's *Introduction* is launched in his cheeky fashion. Someone who wishes to learn symbolic logic should read the book with a "genial friend" who will "talk over any difficulties with you." Carroll has underlined this point, which would be of interest to lawyers and judges: "Talking is a wonderful smoother-over of difficulties." Carroll even recommends as a "capital plan" talking through the puzzles in logic or in any other hard subject "aloud"; and this was Carroll's own practice, "even when I am all alone." We'll return to talking-as-problem-solving in moment.

I mentioned Carroll's fable of Achilles and his friend in our last episode; Carroll died in 1898 and is fondly remembered in a variety of Websites; lewiscarroll.org has good links to all of them.

We'll take what we've learned on the road, but deferring, for now, our own send up of *The Tortoise and Achilles*; let's think of a modern problem that frequents state courts. Judges are called to sort out this from that in codelaw; the task is called statutory interpretation. Let us imagine that a statute gives a number of examples. Take "unimproved portion of the land" on which an accident occurs. AS 9.65.200(a). The legislature has helpfully provided instances to chew on. Trail, abandoned aircraft landing area and disused mining road are listed at §200(c).

So what other examples are in the set {unimproved real property}? If the legislature has seen fit (in codelaw A) to give us examples K, L, M, N and O, then is P a member of {A}? The lawyers brief and argue, drink water at the podium and so forth. But set {A} stares back at the judge; apparently a riddle, wrapped in an enigma, if not in paradox.

Readers will remember that (in an earlier episode) I suggested that sorting *this* from *that* requires an apparatus, and it may be that the Latin phrase *sociis noscitur* fits comfortably into this discussion. “Known by its friends” was dignified by Justice Antonin Scalia in his speech to the Bar Association last May. He was speaking Latin, but there are differences in vocalizing even dead languages.

I’m gratified that J. O. Urmson has cleared up this matter for me. Urmson knew both Russell and Wittgenstein when teaching at Oxford. The style of pronunciation (acquired in public school early in the last century) has given way to reformed pronunciation that now dominates Latin studies. Urmson (reformed) says so-Key-ees No-skuh-tur. Scalia has it so-She-ees No-shi-tur.)

Vocalized *this* way or *that* way, the conceit is that the legislature’s examples will, in some way, speak out loud and tell us who their friends are. In this dialogue of the mind, as Carroll might say, we’re able to know whether a ski hill is a friend to trails, abandoned landing sites, old mining roads.

Part of this isn’t too troublesome, which is the part where you think out loud in your head, or you talk out loud about it, or you write it down, which is what lawyers and judges are quite used to doing. But the part that is quite troublesome is the suggestion that L, M, N, etc. are going to talk to you and tell you the answer. Is P saying she’s a friend? Or a not-friend?

Even before we go too much farther, this is how we’re going to get into trouble; what the legislature said were examples are really generalizations, which makes a piece of codelaw a generalization about generalizations. The alert reader will already guess that there’s a wheelbarrow of problems running one generalization/property/set into another *or* nesting one class in another class.

Can you have a generalization of generalizations where former are complete and the latter are incomplete? The class of all classes who are not members of themselves – known as *R*, in honor of its discoverer Bertrand Russell – can only be perfect if it doesn't exist. The year is 1902.

But on the other hand, the perfect generalization must exist because if it didn't exist it wouldn't be perfect. St. Anselm gets the honors here. The year is 1078. (Apparently the real world can be full of imperfect and indubitably *really* existing generalizations.)

One other approach (among many) is to look for the negative analogy, in our case, to look for the un-friends of the legislator's listed examples. Perhaps the un-friends would tell us more than the friends would tell us. So ran the thinking of John Neville Keynes, who taught moral science at Cambridge. His son, John Maynard, is better known but the young J.M. wrote an important work on logic as well. What's interesting about looking for un-friends is that diversity in experience of the searchers may be of value. If you have ten people with ten different life-stories – differing in socio-economic, race, religious backgrounds and so forth – perhaps working together these ten are more likely to come up with some useful un-friends to populate the set in question. On Keynes' account, variety in examples is more useful than similarity. Differences matter but only if the experience is shared in public.

One solution might be to follow Carroll's suggestion. Talk– or at least ask – out loud. You could, for example, ask the legislature. In fact, judges in the first French republic (1792) were instructed to refer matters to the legislature if they found the law was unclear.

Within a few years, however (and the guillotine at work may have played a role here) judges were unwilling to make decisions, and they were referring all legal issues to the legislature. So when the Code Civil was adopted, which we know as the Code Napoleon (1805), judges were told not to ask the legislature for help. No matter how tough the work was, the judge had to do it. So if there's any kind of dialogue about the set of examples, the dialogue would have to be one where the legislature's not on the other end of the phone. On the other hand, perhaps that's the solution to "activist" judges. Simply have the legislature decide all contested issues of statutory interpretation.

It's been done another way: In the Roman Empire a litigant could write the Emperor and get back a "rescript" which answered the legal question posed. The first litigant with a winning rescript won the suit. The Emperor Valens (364-378) complained that there was no point in having a court system if he was going to resolve all these issues himself. In the Eastern Roman Empire these issues were referred to the Attorney General in Constantinople, just as our Governor might dispense rescripts, if the idea catches anyone's fancy these days. If we adopt the terminology of that empire, Gregg Renkes will be known as the Quaestor of the Sacred Palace. Juneau and Constantinople! Narrow bodies of water, silk robes, the raised dias. It's all coming together.

Which brings us back to the question: Are a bunch of generalizations going to be helpful without an apparatus to help us decide how to populate {A}? Or is there a way to generalize about generalizations? Of interest is the fact that many solutions assume live discourse as a way of getting at the friends of L, M, N, etc. Perhaps generalizing about generalizations works if you do it together.

For those interested in the Supreme Court's apparatus read *University v. Shanti*, 835 P. 2d 1225, 1232 (Alaska 1992) which contains the instructions to the trial judge for parting friend from foe. (Along the way, the court did clear up this point: natural bodies of water are unimproved land. At 1228.)

In getting friends for your tea party into {A}, whether associated or dispersed, friendly or unfriendly, you wind up being committed to method and this has more to do with the logic of the law than most lawyers feel comfortable articulating. Since we're an extraordinarily articulate profession, we'll just have to talk out loud, as Lewis Carroll suggests, although we may keep it to ourselves.

MORE ON WHITE RABBITS AND TORTOISES

Apparatus

Author: Peter J. Aschenbrenner
First published: The Alaska Bar Rag
Revisions: Minor.
Copyright Notice: ©2004, 2011 Peter J. Aschenbrenner.
The moral rights of the author are reserved.
Our Server Version: 6 - More on White Rabbits and Tortoises